



CASE WESTERN RESERVE  
UNIVERSITY  
SCHOOL OF LAW

# **INTRODUCTION TO INTERNATIONAL CRIMINAL LAW**

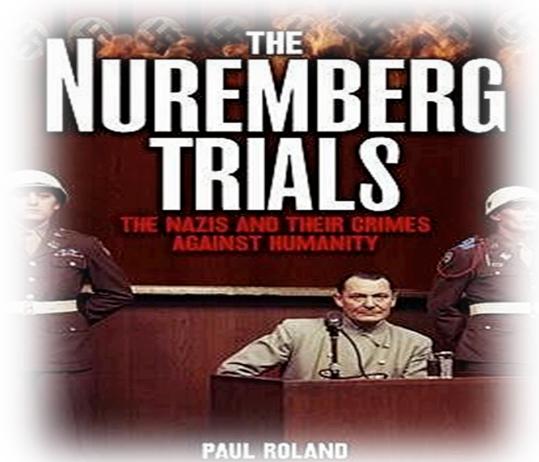
**MOOC taught by Professor  
Michael P. Scharf**

**Module #1:**

**From Nuremberg to The Hague**

## **International Criminal Law Professor Michael Scharf**

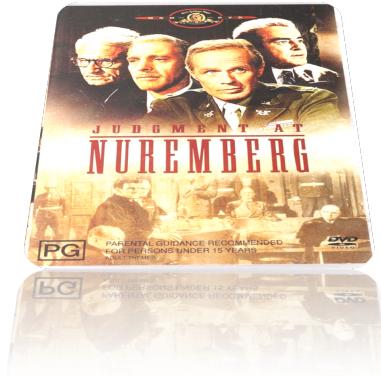
### **Readings for Module #1: “From Nuremberg to the Hague”**



## **I. Introduction**

The first class session focuses on the post World War II Nuremberg Trials, which launched the field of International Criminal Law. It then examines the creation of the International Criminal Court.

After the end of World War II, the world gradually became aware of the full extent of the atrocities perpetrated by Nazi Germany. After the conclusion of the Nuremberg trial, a series of trials were held in Nuremberg, Germany, by an international tribunal, headed by American legal and military officials, with the intent of bringing to justice those guilty of crimes against humanity. Director Stanley Kramer's Academy Award winning movie, "Judgment at Nuremberg," was based on one of those trials, the real-life case of *U.S. v. Joseph Alstoetter*. Clips from the movie will be shown during the first on-line class session. The entire movie is available on YouTube at: <http://m.youtube.com/watch?hl=en&gl=US&client=mv-google&v=J62XvzlHelk>



In the movie, Judge Dan Haywood (Spencer Tracy) is overseeing the trial of Dr. Ernst Yannig (Burt Lancaster) and Emil Hahn (Werner Klemperer) — Nazi judges accused of participating in a court system which disregarded human rights and due process and made possible sterilizations and executions on racial, religious and political grounds. Maximilian Schell (winner of the Best Actor Oscar) plays the defense counsel who argues that his client was no more responsible than the German people and the leaders of the rest of the world for standing by while Hitler committed atrocities. “The judges do not make the law, they merely carry them out.” Richard Widmark plays the Prosecutor, U.S. Col. Tad Lawson. The move also features notable supporting performances by Judy Garland and Montgomery Clift, both of whom play witnesses at the trial. William Shatner plays the Clerk of Court.

### **ONLINE SIMULATIONS**

In order to complete the optional on-line simulations for this course, students must go to the Navigation Bar on the left panel. Under the Exercises section, you will find a button for “on-line simulations.” The simulations for each session are available under this button. Written work can be submitted directly or through file upload. Students who post five or more on-line submissions of over 200 words in length during the course (simulations and discussions) will be awarded a Statement of Accomplishment with Distinction for the course.

#### **On-line Simulation #1:**

Your participation in the on-line simulations and debates is optional but highly encouraged as it will help bring the course to life! For this (and subsequent simulations), those enrolled in this course will be divided up into two groups, by first letter of your last name. Last names beginning with the letters A through H will be in **Group A**; letters I through Z will be in **Group B**. This will ensure that a roughly equal number of students participate on each side of an issue throughout the course.

Based on the reading materials herein, members of Group A are invited to submit a short written opening argument on behalf of the Prosecution of Nazi Minister of Justice Schlegelberger (the defendant upon which Spencer Tracy's character was modeled) in the Alstoetter Case, which is described in the readings below. Your argument should cover the justification for prosecuting the German judges, the law that applies to their crimes, and responses to the defense argument that prosecuting them would be unfair.

Members in Group B will represent the Defense. You are invited to submit a short written opening argument that argues that the judges on trial committed no crime, they just applied the law; and that prosecution of them before the military tribunal is unfair.

**On-line simulation #2:**

In addition or in the alternative to submitting a closing argument in the *Alstoetter Case*, members of **Group B** are invited to submit written argument in favor of prosecuting former DOJ attorney, John Yoo, who wrote the "White House Torture Memo" under the precedent of the *Alstoetter Case*. Members of **Group A** are invited to submit a written argument on behalf of John Yoo.

**On-line simulation #3:**

In addition or in the alternative to the above simulations, members of **Group A** are invited to submit a written argument in favor of the United States becoming a party to the International Criminal Court. **Members of Group B** are invited to submit a written argument against the United States doing so.

## **II. READINGS**

### **A. *Establishment of the Nuremberg Tribunal***

**Virginia Morris and Michael P. Scharf, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, 2-7 (Transnational Publishers, Inc. 1998) (footnotes omitted).**



The possibility of establishing an international criminal court with jurisdiction over war crimes and crimes against humanity was seriously considered for the first time in relation to the atrocities committed during the First World War. At the end of the war, the Allied Powers established the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties to investigate and recommend action on war crimes committed by the personnel of the defeated Central Powers. The Commission documented thirty categories of offenses against the laws and customs of war ranging from the deliberate bombardment of undefended places and attacks against hospital ships by the Germans to the massacre of over a million Armenians by Turkish authorities and by the Turkish populace supported by the public policy of the State.

After the war, the Treaty of Sevres and the Treaty of Versailles, respectively, provided for the prosecution of Turkish and German war criminals (including Kaiser Wilhelm II) before international tribunals. However, no international tribunals were ever established for this purpose. Instead, Kaiser Wilhelm was given sanctuary in the Netherlands and the Allied Powers consented to the trial of accused Germans before the German Supreme Court sitting at Leipzig. Of the 896 Germans accused of war crimes by the Allied Powers, only twelve were tried and of those only six were convicted (and given token sentences). The Turks fared even better by receiving amnesty for their crimes in the Treaty of Lausanne, which replaced the Treaty of Sevres.

Despite the unsatisfactory experience with the attempt to conduct international war crimes trials after the First World War, the Allies were determined to conduct such trials at the end of the Second World War. In the midst of this worldwide conflagration, the Allies took a number of decisive measures in order to ensure that the persons who were responsible for the outbreak of the war and the atrocities that followed would be brought to justice. In 1943, the Allies set up the United Nations War Crimes Commission to collect evidence with a view to conducting trials at the end of the war. Furthermore, the Allies solemnly declared and gave full warning of their unequivocal intention to bring to justice the German political and military leaders who were responsible for the atrocities committed during the war. In 1945, the victorious Allied Governments of the United States, France, the United Kingdom and the Soviet Union concluded the London Agreement providing for the establishment of the International Military Tribunal at Nuremberg (Nuremberg Tribunal) to try the most notorious of the

Germans accused of crimes against peace, war crimes and crimes against humanity. The Charter of the International Military Tribunal (Nuremberg Charter) was annexed to the London Agreement.

The Nuremberg Charter was the constitutive instrument of the Nuremberg Tribunal. Thus, the Nuremberg Charter established the structure and governed the functions of the Nuremberg Tribunal. Each State Party to the Nuremberg Charter was to appoint one of the four judges and one of their alternates. The members of the Nuremberg Tribunal were to select from among themselves a President for the first trial, with the presidency rotating among the members in successive trials. A conviction and a sentence could be imposed only by an affirmative vote of at least three members of the Nuremberg Tribunal. All other questions would be decided by majority vote, with the President having the decisive vote in the event of a tie. Each State Party was also to appoint one of the four Chief Prosecutors. The Chief Prosecutors were to act as a committee in designating the major war criminals to be tried by the Nuremberg Tribunal and in preparing the indictments. The Chief Prosecutors were also responsible for drafting the rules of procedure for the Nuremberg Tribunal, which were subject to the approval of the judges. The Nuremberg Tribunal was not bound by technical rules of evidence and was at liberty to admit any evidence which it deemed to have probative value. Moreover, the Nuremberg Tribunal was given the power to compel the presence of witnesses, to interrogate defendants, to compel the production of documents and other evidence, to administer oaths, and to appoint officers to take evidence on commission. The Nuremberg Tribunal was also authorized, upon conviction of a defendant, to impose any punishment it considered just, including the death penalty. The Nuremberg Tribunal judgments were not subject to review.

As regards jurisdiction and applicable law, the Nuremberg Charter determined the subject matter jurisdiction of the Nuremberg Tribunal and provided the definitions of the three categories of crimes with which the defendants were charged:

*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;

*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 necessity;

*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 domestic law of the country where perpetrated.

.... As regards due process, the Nuremberg Charter guaranteed certain fundamental rights of the accused in order to ensure that every accused received a fair trial, namely: (1) the right to be furnished with the indictment in a language which the accused understands at a reasonable time before trial; (2) the right to give any explanation relevant to the charges against the accused; (3) the right to translation of proceedings before the Nuremberg Tribunal in a language which the accused understands; (4) the right to have the assistance of counsel; and (5) the right to present evidence and to cross-examine any witness called by the prosecution. At the same time, the Nuremberg Charter provided for trials *in absentia*, authorized the Nuremberg Tribunal to interrogate the accused, limited the defenses available to the accused by excluding the act of State defense and the defense of superior orders; and precluded any challenges to the jurisdiction or the composition of the Nuremberg Tribunal.

.... In terms of procedure, the Nuremberg Charter and Rules of Procedure provided an innovative blend and balance of various elements of the Continental European inquisitorial system and the Anglo-American adversarial system in order to create a tailor-made international criminal procedure which would be generally acceptable to the States Parties representing both systems. ... The Nuremberg Tribunal was governed by simplified evidentiary rules which constituted another unique feature of the Nuremberg Charter. The technical rules of evidence developed under the common law system of jury trials to prevent the jury from being influenced by improper evidence were considered to be unnecessary for trials conducted in the absence of a jury. Accordingly, the Nuremberg Charter provided that the Nuremberg Tribunal was not bound by technical rules of evidence and could admit any evidence which it deemed to have probative value. Consequently, the Nuremberg Tribunal allowed the prosecutors to introduce *ex parte* affidavits against the accused over the objections of their attorneys.

## ***B. The Rationale for Creating the Nuremberg Tribunal***

**Michael P. Scharf and William A. Schabas, Slobodan Milosevic on Trial: A Companion, 39-43 (Continuum, 2002).**

The events that prompted the formation of the Nuremberg Tribunal in 1945 are probably more familiar to most than those which led to the creation of the Yugoslavia War Crimes Tribunal a half century later. Between 1933 and 1940, the Nazi regime established concentration camps where Jews, Communists and opponents of the regime were incarcerated without trial; it progressively prohibited Jews from engaging in employment and participating in various areas of public life, stripped them of citizenship, and made marriage or sexual intimacy between Jews and German citizens a criminal offense; it forcibly annexed Austria and Czechoslovakia; invaded and occupied Poland, Denmark, Norway, Luxembourg, Holland, Belgium, and France; and then it set in motion "the final solution to the Jewish problem" by establishing death camps such as Auschwitz and Treblinka, where six million Jews were exterminated.

As Allied forces pressed into Germany and an end to the fighting in Europe came into sight, the Allied powers faced the challenge of deciding what to do with the

surviving Nazi leaders who were responsible for these atrocities. Holding an international trial, however, was not their first preference. The British Government opposed trying the Nazi leaders on the ground that their "guilt was so black" that it was "beyond the scope of judicial process." British Prime Minister Winston Churchill, therefore, proposed the summary execution of the Nazi leaders. Soviet leader Joseph Stalin, however, urged that Nazi leaders be tried, much as he had done with dissidents in his own country during the purges of the 1930s. United States President Franklin D. Roosevelt initially appeared willing to go along with Churchill's proposal. But upon Roosevelt's death in April 1945, President Harry Truman made it clear that he opposed summary execution. Instead, at the urging of U.S. Secretary of War, Henry Stimson, Truman pushed for the establishment of an international tribunal to try the Nazi leaders.



The arguments for a judicial approach were compelling, and soon won the day. First, judicial proceedings would avert future hostilities which would likely result from the execution, absent a trial, of German leaders. Legal proceedings, moreover, would bring German atrocities to the attention of all the world, thereby legitimizing Allied conduct during and after the war. They would individualize guilt by identifying specific perpetrators instead of leaving Germany with a sense of collective guilt. Finally, such a trial would permit the Allied powers, and the world, to exact a penalty from the Nazi leadership rather than from Germany's civilian population.

### ***C. The Legacy of the Nuremberg Tribunal***

#### **1. Virginia Morris and Michael P. Scharf, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, 7-17 (Transnational Publishers, Inc. 1998) (footnotes omitted).**

After a trial that lasted 284 days, the Nuremberg Tribunal convicted nineteen of the twenty-two German officials and sentenced twelve of the major war criminals to death by hanging. In the course of the lengthy trial, the Nuremberg Tribunal documented the Nazi atrocities "with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people." The judgment of the Nuremberg Tribunal

also paved the way for the trial of over a thousand other German political and military officers, businessmen, doctors, and jurists under Control Council Law No. 10 by military tribunals in occupied zones in Germany and in the liberated or Allied Nations. Moreover, the Charter and the Judgment of the Nuremberg Tribunal established the fundamental principles of individual responsibility for crimes under international law which provide the cornerstones of the legal foundation for all subsequent international criminal proceedings.

A year after the Nuremberg trial, the major Japanese war criminals were tried before the International Military Tribunal for the Far East (Tokyo Tribunal). The Charter of the International Military Tribunal for the Far East (Tokyo Charter) was based largely on the Nuremberg Charter. Nonetheless, the Charter and the Judgment of the Tokyo Tribunal are generally considered to be less authoritative than those of the Nuremberg Tribunal. Whereas the Nuremberg Charter was adopted as part of an international agreement after extensive multilateral negotiations, the Tokyo Charter was promulgated as an executive order by the Supreme Allied Commander for Japan following the war, General Douglas MacArthur, without the prior approval of the other Allied Powers.

Furthermore, in contrast to the Nuremberg Tribunal whose judges and prosecutors were selected by four different countries, the prosecutor and the judges of the Tokyo Tribunal were personally selected by General MacArthur. In his dissenting opinion, the French judge of the Tokyo Tribunal, Henri Bernard, expressed the view that "so many principles of justice were violated during the trial that the Court's judgment certainly would be nullified on legal grounds in most civilized countries." Thus, the United Nations General Assembly expressly affirmed the principles of international law recognized in the Charter and the Judgment of the Nuremberg Tribunal and merely took note of the Charter and the Judgment of the Tokyo Tribunal.

Although the Nuremberg Tribunal has been hailed as one of the most important developments in international law in this century, it has also been subject to three major criticisms. While these criticisms are not entirely justified, they deserve consideration because they are also not entirely without some foundation. It is important to consider the shortcomings of the Nuremberg precedent in order to avoid them in the future. At the same time, it is important to judge the Nuremberg precedent--not by contemporary standards--but by the standards of its time.

First, the Nuremberg Tribunal has been criticized as a victor's tribunal before which only the vanquished were called to account for violations of international humanitarian law committed during the war. The victorious States created the Nuremberg Tribunal and appointed their nationals to serve as its judges. The ability of the judges to objectively perform their judicial functions was questioned due to their nationality and the various roles which they performed. In particular, two of the Nuremberg judges had earlier served on the committee of prosecutors that negotiated the Nuremberg Charter, selected the defendants for trial, and drafted the indictments against these defendants. In addition, during the Nuremberg trial the defense counsel argued that the judges were not qualified to pass judgment on the accused because the States which tried the Nuremberg defendants were guilty of many of the same crimes for which their representatives on the bench would judge their former adversaries.

The first criticism of the Nuremberg Tribunal as victor's justice is without any foundation in terms of the existing international law at the time and ignores the fact that

the only other alternative that was seriously considered was far less desirable, namely, victor's vengeance. At the conclusion of the Second World War, the victorious parties to the armed conflict were fully competent as a matter of international law to try the members of the vanquished armed forces for violations of the laws and customs of war. The history of war has sadly demonstrated that vengeance often prevails on the battlefield during the war and impunity often prevails at the negotiating table after the war. It was an extraordinary triumph of justice and the rule of law that the major German war criminals were brought to trial before a court of law, rather than being summarily executed (as proposed by Winston Churchill and Joseph Stalin at the Yalta Conference in 1945) or being allowed to go unpunished (as after the First World War).

As the Chief Prosecutor for the United States at Nuremberg, Supreme Court Justice Robert H. Jackson, observed in his opening remarks for the prosecution: "That four great nations, flushed with victory and stung with injury, stay the hands of vengeance and voluntarily submit their captive enemies to the judgment of the law, is one of the most significant tributes that Power has ever paid to Reason." Clearly, it would have been preferable to bring the major German war criminals before a permanent international criminal court which had been established previously by the international community and whose judiciary excluded nationals of the parties to the armed conflict. This ideal solution was quite simply not an option at the end of the Second World War. Yet few, if any, have suggested that the characteristics of the Nuremberg Tribunal as a "victor's tribunal" resulted in the conviction of a single innocent man. The documentary evidence alone was overwhelming.

The second criticism of the Nuremberg Tribunal was that the defendants were prosecuted and punished for crimes expressly defined as such for the first time in an instrument adopted by the victors at the conclusion of the war. In particular, the Nuremberg Tribunal was perceived by some as applying *ex post facto* law because it held individuals responsible for waging a war of aggression for the first time in history. Senator Robert Taft of Ohio was one of the first to voice this criticism in 1946. His views became part of the public legacy of Nuremberg when his speech was included by John F. Kennedy in his 1956 Pulitzer Prize winning book *Profiles in Courage*. To this day, articles appear in the popular press deriding Nuremberg as "a retroactive jurisprudence that would surely be unconstitutional in an American court."

This second criticism of the Nuremberg Tribunal minimizes the existing law at the time. The war crimes for which the defendants were tried and punished were violations of well established rules of law governing the conduct of war. The crimes against humanity for which the defendants were tried and punished were contrary to the national law of every civilized nation. No reasonable individual could possibly doubt the serious criminal nature of such crimes which were clearly *malum in se*. The crimes against peace for which the defendants were tried and punished were contrary to a panoply of legal instruments that prohibited aggressive warfare at the time. Nazi Germany initiated an aggressive war--not because it believed that this was permitted under international law--but because it believed that it could do so with impunity. The fact that a law has not been enforced in the past is no guarantee that it will not be enforced in the future. In this regard, there were specific warnings of individual responsibility for violations of international law at the end of the First World War and during the Second World War, as discussed previously. Furthermore, the defendants had

the opportunity to raise this legal challenge which was considered and rejected by the Nuremberg Tribunal.

The third criticism of the Nuremberg Tribunal was that it functioned on the basis of limited procedural rules which did not provide sufficient protection of the rights of the accused. More specifically, the Nuremberg Charter is criticized for providing insufficient due process guarantees for the accused which were circumscribed by several rulings of the Nuremberg Tribunal in favor of the prosecution. In particular, the Nuremberg Tribunal allowed the prosecutors to introduce the *ex parte* affidavits of persons who were available to testify at trial as evidence against the defendants. As one of the Nuremberg prosecutors, Telford Taylor, wrote: "Total reliance on...untested depositions by unseen witnesses is certainly not the most reliable road to factual accuracy....Considering the number of deponents and the play of emotional factors, not only faulty observation but deliberate exaggeration must have warped many of the reports." The procedural rulings in favor of the prosecution were considered to be particularly troubling since the Nuremberg Charter did not provide for a right of appeal. It has further been argued that the defendants who were acquitted by the Nuremberg Tribunal did not fare much better than those who were convicted since the Nuremberg Charter failed to provide any guarantee of the *non bis in idem* principle (known in the United States as the prohibition of double jeopardy). Consequently, the defendants Schacht, von Papen and Fritzsche were acquitted by the Nuremberg Tribunal only to be subsequently tried and convicted by German national courts for similar crimes.

The third criticism of the limited procedural guarantees provided by the Nuremberg Charter ignores the fact that this was the first attempt to establish an international standard of due process and fair trial. Notwithstanding the absence of any internationally recognized standard of fair trial, the Nuremberg Charter endeavored to guarantee the minimum rights of the accused which were considered to be essential for a fair trial based on general principles of procedural fairness and due process recognized in various national criminal justice systems at the time. It is generally recognized that the defendants who were tried by the Nuremberg Tribunal were entitled to the essential procedural guarantees required for a fair trial even if there were some procedural imperfections.

The Nuremberg Tribunal was unquestionably a significant achievement for its time notwithstanding its shortcomings. Telford Taylor recognized that the Nuremberg Tribunal was not free from what he referred to as its "political warts." Even Justice Jackson acknowledged at the conclusion of the Nuremberg trial that "many mistakes have been made and many inadequacies must be confessed." But he went on to say that he was "consoled by the fact that in proceedings of this novelty, errors and missteps may also be instructive to the future." In this regard, the Nuremberg precedent provides an important benchmark for evaluating the subsequent international criminal tribunals.

Despite its shortcomings, the Nuremberg precedent has had an enduring impact on the development of international criminal law and jurisdiction. The principles of international law recognized in the Charter and the Judgment of the Nuremberg Tribunal constitute the fundamental principles of international criminal law today.

The Nuremberg precedent also contributed to the further development of international criminal law after the Second World War. In 1948, the Nuremberg precedent with respect to persecution as a crime against humanity led to the adoption of

the Convention on the Prevention and Punishment of the Crime of Genocide. In 1949, the Nuremberg precedent with respect to war crimes was codified and further developed in the Geneva Conventions for the protection of war victims. In terms of international criminal jurisdiction, the Nuremberg Tribunal demonstrated for the first time the feasibility of establishing an international criminal tribunal to replace the historical tradition of impunity and vengeance by a new world order based on justice and the rule of law. In doing so, the Nuremberg Tribunal laid the foundation for all subsequent international criminal jurisdictions.

**2. Principles of the Nuremberg Charter and Judgment Formulated by the International Law Commission pursuant to G.A. Res. 177(11)(a), 5 U.N. GAOR, Supp. No. 12, at 11-14, para. 99, U.N. Doc. A/1316 (1946).**

- I. Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.
- II. The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.
- III. The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.
- IV. The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.
- V. Any person charged with a crime under international law has the right to a fair trial on the facts and law.
- VI. The crimes hereinafter set out are punishable as crimes under international law: (a) Crimes against peace, (b) War crimes, (c) Crimes against humanity....
- VII. Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

**D. Judgment at Nuremberg: The Real Story Behind the Movie**

**1. A Commentary on the Justice Case by Doug Linder, 2000**



No one contends, of course, that German judges and prosecutors destroyed as many lives as did the SS, Gestapo, or other agencies of the Nazi machine. Their victims number in the thousands, not the millions. A judge who knowingly sentenced even one innocent Jew or Pole to death was, however, guilty in the eyes of the prosecutors and judges at the Justice Trial in Nuremberg. There would be no "only a couple of atrocities" defense.

Ingo Muller, in Hitler's Justice: The Courts of the Third Reich, provides a penetrating picture of the workings of the criminal justice system in Nazi Germany. Muller's analysis of the evidence suggests that most German judges--contrary to common opinion--were ultraconservative nationalists who were largely sympathetic to Nazi goals. The "Nazification" of German law occurred with the willing and enthusiastic help of judges, rather than over their principled objections.

Many judges appointed before the Nazi rise to power--because of the economic and social circles that judges were drawn from--had views that were quite compatible with the Nazi party. A few Jewish judges sat on the bench when the Nazis assumed power--but only a very few. A 1933 law removed those few Jewish judges from office.

Only a handful of the non-Jewish judges demonstrated real courage in the face of Nazi persecution and violations of civil liberties. One who did was Lothar Kressig, a county court judge who issued injunctions against sending hospital patients to extermination camps. When ordered to withdraw his injunctions, Kreyssig refused. He also attempted to initiate a prosecution of Nazis for their role in the program. Kreyssig, under pressure, eventually resigned.

In the Justice trial, American prosecutors sought to demonstrate a pattern of judicial and prosecutorial support for Nazi programs of persecution, sterilization, extermination, and other gross violations of human rights. In order to prove an individual defendant guilty, prosecutors had to show that the defendant consciously furthered these human rights abuses.

The violations of human rights progressively worsened as the Nazis solidified power and began their wars of aggression. In 1938, laws were adopted that imposed different levels of punishment for the same crime--a tougher punishment for Jews, a lighter one for other Germans. By 1940, sterilization programs were underway. By 1942, the "Final Solution," the wholesale extermination of Jews and other persons deemed undesirable, was in full swing.

Two features of German law combined to facilitate the Nazi's evil schemes. The first was that German law, unlike the law of the United States and many other nations, lacked "higher law" (constitutional or ethical standards) that might be resorted to by judges to avoid the harsh effects of discriminatory laws adopted by the Nazi regime. The second difficulty was that there was no separation of powers between the executive and judicial branches of government. Hitler declared, and the Reichstag agreed, had the power "to intervene in any case." This was done, legally, through what was called "an extraordinary appeal for nullification of sentence." The nullification invariably resulted in a sentence the Nazis thought was too light being replaced by a more severe sentence, often death. If these features of German law weren't enough, the Nazis also assigned a member of the Security Service to each judge to funnel secret information about the judges back to Hitler and his henchmen.

The excerpt from the decision of the tribunal (omitted) includes the judgments for two of the Justice trial defendants, Franz Schlegelberger and Oswald Rothaug. In the movie Judgment at Nuremberg, Burt Lancaster played the role of a German judge (Ernst Janning) that was based loosely on the prosecution of Schlegelberger.

Schlegelberger is the more sympathetic of the two defendants. He served in the Ministry of Justice from 1931-1942. For the last seventeen months of his service, Schlegelberger was Director of the Ministry of Justice. He wrote several books on the law and was called at the time of his retirement, "the last of the German jurists." Schlegelberger argued in his defense that he was bound to follow the orders of Hitler, the "Supreme Judge" of Germany, but that he did so only reluctantly. Schlegelberger pointed out that he did not join the Nazis until 1938, and then only because he was ordered to do so by Hitler. Schlegelberger claimed to have harbored no ill-will toward the Jews. His personal physician, in fact, was Jewish. In his defense, he also stresses that he resisted the proposal that sent "half Jews" to concentration camps. Schlegelberger suggested giving "half Jews" a choice between sterilization and evacuation. He also argued that he continued to serve as long as he did because "if I had resigned, a worse man would have taken my place." Indeed, once Schlegelberger did resign, brutality increased.

In its decision, the Justice Trial tribunal considered what it called Schlegelberger's "hesitant injustices." The tribunal concluded that Schlegelberger "loathed the evil that he did" and that his real love was for the "life of the intellect, the work of the scholar." In the end he resigned because "the cruelties of the system were too much for him." Despite its obvious sympathy with Schlegelberger's plight, the tribunal finds him guilty. It pointed out that the decision of a man of his stature to remain in office lent credibility to the Nazi regime. Moreover, Schegelberger did sign his name to orders that, in the tribunal's judgment, constituted crimes. One case described in the decision involved the prosecution in 1941 of a Jew (Luftgas) accused of "hoarding eggs." Schlegelberger gave Luftgas a two-and-a-half-year sentence, but then Hitler indicated that he wanted the convicted man executed. Although Schlegelberger may well have protested, he signed his name to the order that led to the execution of Luftgas. Another case cited by the tribunal concerned a remission-of-sentence order signed by Schlegelberger. Scheleberger explained in his decision that the sentence imposed against a police officer who was convicted of beating a Jewish milking hand would have been bad for the morale of officers. Although Sclegelberger received a life sentence in Nuremberg, he was released from prison in 1951 and received a generous monthly pension until his death.

The tribunal found "no mitigating circumstances" in the case of Oswald Rothaug. In its decision, the tribunal calls Rothaug "a sadistic and evil man." Rothaug, unlike Schlegelberger, had no reservations about enthusiastically supporting the Nazi pattern of human rights abuses. One case used by the tribunal to illustrate Rothaug's guilt involved a sixty-eight-year-old Leo Katzenberger, head of the Nuremberg Jewish community. Katzenberger stood accused of violating Article 2 of the Law for the Protection of German Blood. The law forbid sexual intercourse between Jews and other German nationals. Katzenberger was accused of having sexual intercourse with a nineteen-year-old German photographer, Seillor.

Both Katzenberger and Seillor denied the charge. Katzenberger described the relationship between the two of them as "fatherly." The most incriminating evidence the

prosecution produced was that Seiler was seen sitting on Katzenberger's lap. That, in Rothaug's view, was enough: "It is sufficient for me that the swine said that a German girl sat upon his lap!" Rothaug arranged to have Katzenberger's trial transferred to a special court. In the special court, high-ranking Nazi officials--in uniform--took the stand to express their opinions that Katzenberger was guilty. Rothaug's real trick, however, was getting Katzenberger's punishment increased from life in prison (the normal punishment for violations of Article 2) to death. This he did by a creative construction of a law that prescribed death for breaking certain laws "to take advantage of the war effort." Rothaug argued that death was the appropriate punishment for Katzenberger because he exploited the lights-out situation provided by air raid precautions to develop his "romance" with Seiler.

**2. Michael P. Scharf, "Judgment at Nuremberg Revisited," from "Grotian Moment: Saddam Hussein Trial Blog" (2006), available at: <http://law.case.edu/grotian-moment-blog/>**



The defendant who sits immediately to the right of Saddam Hussein in the Iraqi High Tribunal courtroom every day is Awwad Al-Bandar, the former Chief Judge of Saddam's Revolutionary Court. The placement is no coincidence, as next to Saddam, Al-Bandar is the most important man on trial. He is charged with crimes against humanity in connection with ordering the execution of 148 Dujail townspeople after an unfair trial. He is the first judge since the Nuremberg-era Alstoetter case, which was made into the Academy Award-winning Movie "Judgment at Nuremberg," to be tried for using his court as a political weapon.

On March 13, 2006, Al-Bandar took the stand to testify on his own behalf. Al-Bandar acknowledged that he presided over the 1984 Dujail trial, and that he sentenced all 148 defendants in that case to death after a trial that lasted only two weeks. "They attacked the president of the Republic and they confessed," he told the IHT. He said that their confessions were verified by the intelligence department's investigative judge, and added that the Dujail defendants also admitted their responsibility on radio and television. Moreover, Al-Bandar said that the case file had established that weapons and incriminating documents, proving the Dujail defendants' affiliation with the Iran-allied Al-Da'wah Party, were found in their hideouts in the Dujail orchards. He said that the Dujail defendants were represented by court-appointed counsel, and that his court issued the ruling in accordance with the law and without the interference or influence of any side. He admitted that the trial was a short one given the number of defendants, but said

that due to the war with Iran and the defendants' confessions the trial could not be delayed, stressing that "these were extraordinary events, as the president was targeted."

When confronted with documents showing that 46 of the 148 Dujail defendants had actually died during interrogation before the 1984 trial, Al-Bandar replied: "Is it so strange for someone to die during interrogation," asserting that five of his fellow former Ba'ath party leaders have died in U.S. custody since 2003. Al-Bandar then read from a prepared statement, saying "according to the law, a judge cannot be arrested or tried unless he carries out a proven crime." He added that at the time of the Dujail trial, Iraqi law stated that any member of the Al-Da'wah Party was to be executed, and also required the death sentence for any person who attempts to kill the head of state. "Therefore, the court had no choice but to sentence the Dujail defendants to death."

Al-Bandar's testimony raises difficult moral and legal questions: should a judge be held criminally liable for presiding over an unfair trial if it comported with the domestic law then in effect? And should departures from normal fair trial norms be permissible with respect to alleged insurgents or terrorists in times of war? In considering these questions, it may be helpful to consider a few of the most memorable passages from the movie "Judgment at Nuremberg."

Prosecutor's Opening Statement: "Your Honor, the case is unusual in that the defendants are charged with crimes committed in the name of the law. These men are the embodiment of what passed for justice in the Third Reich. As judges on the bench you will be sitting in judgment of judges in the dock. This is how it should be. For only a judge knows how much more a court is than a courtroom. It is a process and a spirit. It is the House of Law. The defendants knew this too. They knew courtrooms well. They sat in their black robes. And they distorted and they perverted and they destroyed justice in Germany. They are, perhaps more than others, guilty of complicity in murders, tortures, atrocities—the most cruel and devastating this world has ever seen. Here they will receive the justice they denied others."

Defense's Opening Statement: "If the defendant is to be found guilty, certain implications must arise. A judge does not make the law. He carries out the laws of his country, be it a democracy or a dictatorship. The statement, 'My country right or wrong,' was expressed by a great American patriot. It is no less true for a German patriot. Should the defendant have carried out the laws of his country? Or should he have refused to carry them out and become a traitor?"

Judgment: "This trial has shown that under a national crisis, ordinary, even able and extraordinary men can delude themselves into the commission of crimes against humanity. How easily it can happen. There are those in our own country too that today speak of the protection of country, of survival. A decision must be made in the life of every nation, at the very moment when the grasp of the enemy is at its throat; then it seems that the only way to survive is to use the means of the enemy, to wrest survival on what is expedient, to look the other way. Only the answer to that is... survival as what? A country isn't a rock; it's not an extension of one's self. It's what it stands for. It's what it stands for when standing for something is the most difficult. Before the people of the world, here in our decision, this is what we stand for – justice, truth, and the value of a single human being."

Like its Hollywood counterpart, the real-life Nuremberg Tribunal found the Nazi judges guilty of crimes against humanity, concluding that "the dagger of the assassin was

concealed beneath the robe of the jurist.” The Tribunal rejected both the necessity defense and the notion that the judges should be absolved because they did not make the law, they only carried it out – the very arguments Al-Abandar has made before the IHT. For sixty years, the Alstoetter judgment has served as a warning to judges and other government officials. A conviction in the Al-Abandar case would reaffirm the continuing vitality of this precedent, and send an important message not just to those in the new Iraqi government, but also to those in governments around the world (including the United States) who might be tempted to argue that in time of war the law must be silent.

**3. ASIL Insight, Scott Lyons, “German Criminal Complaint Against Donald Rumsfeld and Others,” Dec. 14, 2006, available at:  
<http://www.asil.org/insights/2006/12/insights061214.html>**



On November 14, 2006, a criminal complaint was filed in a German court against senior U.S. officials, including former Secretary of Defense Donald Rumsfeld, former CIA Director George Tenet, high ranking military officers, and several former government lawyers alleging torture and war crimes at Abu Ghraib prison in Iraq and the Guantanamo Bay Prison Camp. The new complaint renews debates surrounding the international law of universal jurisdiction, which contemplates that certain heinous offenses may be prosecuted wherever the alleged offender is found, even if he or she is not a national of the prosecuting country. Further, the new complaint raises questions concerning the impact of the Military Commissions Act of 2006 (MCA) on Germany’s interest in respecting principles of comity and “complementarity” and the culpability of lawyers for the actions of a government.

### **The Complaint**

The complaint is an updated attempt to indict U.S. officials in a German court after a previous German Federal Prosecutor failed to prosecute many of the same defendants two years ago. Under German criminal procedure, prosecutors have discretion whether to pursue universal jurisdiction cases, and the 2004 complaint was dismissed with the prosecutor stating: “there are no indications that the authorities and courts of the United States of America are refraining, or would refrain, from penal measures as regards

the violations described in the complaint.” At the time, the prosecutor cited investigations and proceedings in the U.S. that indicated that the judicial process should best be reserved for U.S. jurisdiction. The dismissal also followed political pressure from the U.S. government.

The new complaint is filed on behalf of eleven Iraqi citizens held at Abu Ghraib and a Saudi held at Guatanamo Bay. The complaint is filed under Germany’s Code of Crimes Against International Law (CCAIL), which has been in effect since July 2002. The law was enacted in response to the formation of the International Criminal Court, to which Germany is a party. CCAIL enables German courts to exercise jurisdiction over specified crimes against international law and is applicable to acts committed regardless of location of the alleged crimes or the nationality of the persons involved in those actions.

The new complaint differs from the 2004 complaint because it follows Mr. Rumsfeld’s resignation, thus removing possible immunities from universal jurisdiction attached to certain government offices, and the passage of the MCA. The new complaint also names U.S. Attorney General Alberto Gonzales, former Assistant Attorney General Jay Bybee, former Deputy Assistant Attorney General John Yoo, former Counsel to the Vice-President and current chief of staff David S. Addington, and General Counsel of the Department of Defense William J. Haynes, II. The complaint alleges that the government lawyers facilitated, aided and abetted torture by drafting legal opinions, which were clearly erroneous, but enabled the torture to occur under the guise of legal justification. Torture is one of the offenses generally recognized as being subject to universal jurisdiction.

### **Issues of Immunity**

Personal immunity offers protection to heads of State and certain high-ranking State officers from foreign prosecution while that person is in office. This immunity prevents States from prosecuting officials of another sovereign State without consent and ensures that high-ranking government officials can travel freely to represent their State in order to carry out foreign relations without threat of criminal action. Personal immunity has been found to attach to the offices of head of State and minister for foreign affairs, in addition to foreign diplomats. Whether personal immunity would attach to the equivalent offices of Minister of Defense or Director of Intelligence or their high-ranking employees is uncertain, but viable arguments have been made that high-level defense and intelligence officers must similarly travel abroad so that they can represent their State and carry out the necessary functions related to international alliances and defense pacts. Donald Rumsfeld’s and George Tenet’s resignations remove this possible limitation to the exercise of universal jurisdiction. However, the question still remains whether some of the named U.S. officials still in office (e.g. Under-Secretary of Defense for Intelligence Stephen A. Cambone) are accorded personal immunity.

### **Impact of the MCA**

As noted in the first complaint dismissal, the purpose of universal jurisdiction prosecution is to “close gaps in punishability” and ensure criminal accountability. However, a State’s interest in combating impunity must be balanced against the fundamental principle of non-interference in the affairs of foreign States. Germany’s universal jurisdiction provisions are derived from the Statute creating the International

Criminal Court, and the German prosecutor cited complementarity for the deferral to U.S. jurisdiction. Complementarity denotes that States with direct nexus to the perpetrators, perpetrated acts, or victims have the first right and obligation to prosecute international crimes, and because third-state universal jurisdiction is complementary to these courts, German jurisdiction can only be invoked if those States, or a competent international tribunal, are unwilling or unable to prosecute.

The first case was dismissed when the U.S., the State with primary jurisdiction, was shown to be conducting investigations and U.S. authorities had no actual or legal obstacles to prosecution. The new complaint alleges that the recent passage of the MCA immunizes U.S. officials from criminal liability for events at Abu Ghraib and Guantanamo Bay. The MCA protects certain U.S. government personnel by retroactively narrowing the grounds for criminal liability under the War Crimes Act and creating a defense that the detention and interrogation techniques were either lawful or the person responsible, acting with ordinary sense and understanding, did not know the practices were unlawful. The complaint argues that these provisions effectively grant immunity from prosecution in the United States, leaving only foreign venues as avenues for redress. (Lawyers representing Mr. Rumsfeld, Lt. Gen. Ricardo Sanchez and Col. Thomas M. Pappas have already cited the MCA for purposes of immunity from an unrelated civil claim filed in a U.S. District Court on behalf of detainees in Iraq and Afghanistan. With the newly created immunity, the U.S. not being a party to the International Criminal Court, and Iraqi courts having no jurisdiction to prosecute Americans, the complaint contends that foreign courts are the last resort. The U.S. government is likely to argue that the MCA does not prevent legal accountability, but instead clarifies criminal conduct that would constitute torture and prevents *ex post facto* prosecution. Further, the U.S. likely will contend that the State did not abdicate responsibility because the Department of Defense conducted twelve substantial reviews of the events and detention operations and prosecuted those most directly responsible for criminal activity at Abu Ghraib.

The MCA may also impact named military officers stationed in Germany. The NATO Status of Forces Agreement says that the authorities of the receiving State (in this case, Germany) have exclusive jurisdiction over members of the sending State's military forces with respect to offences punishable by its law, but not by the law of the sending State. The Agreement also specifies that, in cases of concurrent jurisdiction, the U.S. military authorities shall have the primary (but not exclusive) right to exercise jurisdiction over its officers in relation to offences committed in the performance of official duty. The right to exercise primary jurisdiction can be waived. Consequently, in situations where the MCA provides military officers stationed in Germany with a defense to prosecution in the United States, an obstacle may be cleared for the exercise of German jurisdiction either because the offence is not punishable by U.S. law or because the MCA might be regarded as a waiver of U.S. jurisdiction.

### **Culpability of Lawyers**

The new complaint includes the lawyers who advised on, and possibly enabled, the legal framework governing prisoner policies in Iraq and Guantanamo Bay. While it is very rare for war crimes allegations to be issued against legal advisors, it is not without precedent. Twelve trials were held in Nuremberg, Germany under the provisions of the Control Council Law No. 10, following the U.S. defeat of Nazi Germany. One of these

trials, the United States versus Joseph Altstoetter, et. al (also known as “the Justice Case”) indicted nine officials of the Reich Ministry of Justice for participating in the drafting and enacting of unlawful orders and facilitating the violation of the laws of war and of humanity, by allowing war crimes to be perpetrated under the impression of law authorized by the Ministry of Justice. The Ministry of Justice lawyers had decreed that the relevant Hague Law and Geneva Convention on the Prisoners of War of 1929 did not apply to German actions because of the legal status of the occupied territories and that the insurgencies did not subscribe to the treaties. While the allegations stemming from Iraq and Guantanamo Bay are in no way comparable to those relating to events in World War II, the Justice Case forms an instructive nonbinding precedent in U.S. and German-related jurisprudence for criminal responsibility for lawyers who provide legal justification for the commission of war crimes.

### **Conclusion**

While it is uncertain whether the German prosecutor will initiate an investigation due to political considerations and the barriers that make extradition for purposes of trial unlikely, the new claim raises legal questions that were absent during the dismissal of the first claim.

## **II. THE INTERNATIONAL CRIMINAL COURT**



The ICC Statute is available at: <http://untreaty.un.org/cod/icc/statute/romefra.htm>

- A. Michael P. Scharf, *The Case for Supporting the International Criminal Court*, Washington University School of Law, Whitney R. Harris Institute for Global Legal Studies, Washington University in St. Louis, International Debate Series, No. 1 (2002).

### **Background: The Road to Rome**

With the creation of the Yugoslavia and Rwanda Tribunals in the early 1990s, there was hope among U.S. policy makers that Security Council-controlled ad hoc tribunals

would be set up for crimes against humanity elsewhere in the world. Even America's most ardent opponents of a permanent international criminal court had come to see the ad hoc tribunals as a useful foreign policy tool. The experience with the former Yugoslavia and Rwanda Tribunals proved that an international indictment and arrest warrant could serve to isolate offending leaders diplomatically, strengthen the hand of domestic rivals, and fortify international political will to impose economic sanctions and take more aggressive actions if necessary. Unlike a permanent international criminal court, there was no perceived risk of American personnel being prosecuted before the ad hoc tribunals since their subject matter, territorial and temporal jurisdiction were determined by the Security Council, which the United States could control with its veto.

But then something known in government circles as "Tribunal Fatigue" set in. The process of reaching agreement on the tribunal's statute; electing judges; selecting a prosecutor; hiring staff; negotiating headquarters agreements and judicial assistance pacts; erecting courtrooms, offices, and prisons; and appropriating funds turned out to be too time consuming and exhausting for the members of the Security Council to undertake on a repeated basis. China and other Permanent Members of the Security Council let it be known that Rwanda would be the last of the Security Council-established ad hoc tribunals.

Consequently, the establishment of a permanent international criminal court began to be seen by many members of the United Nations (as well as some within the U.S. government) as the solution to the impediments preventing a continuation of the ad hoc approach. Having successfully tackled most of the same complex legal and practical issues that U.S. diplomats had earlier identified as obstacles to a permanent international criminal court, the United States Government was left with little basis to justify continued foot-dragging with regard to the ICC. In 1994, the U.N. International Law Commission produced a draft Statute for an ICC which was largely based on the Statutes and Rules of the popular ad hoc tribunals. The International Law Commission's draft was subsequently refined through a series of Preparatory Conferences in which the United States played an active role. During this time, the establishment of a permanent international criminal court began to receive near unanimous support in the United Nations. The only countries that were willing to go on record as opposing the establishment of an ICC were the few states that the United States had labeled "persistent human rights violators" or "terrorist supporting states."

Thus, on the eve of the Rome Diplomatic Conference in the summer of 1998, both the U.S. Congress and the Clinton Administration indicated that they were in favor of an ICC if the right protections were built into its statute. As David Scheffer, then U.S. Ambassador-at-Large for War Crimes Issues, reminded the Senate Foreign Relations Committee on July 23, 1998: "Our experience with the establishment and operation of the International Criminal Tribunals for the former Yugoslavia and Rwanda had convinced us of the merit of creating a permanent court that could be more quickly available for investigations and prosecutions and more cost-efficient in its operation."

## **The Politics of Rome**

The Rome Diplomatic Conference represented a tension between the United States, which sought a Security Council-controlled Court, and most of the other countries of the

world which felt no country's citizens who are accused of serious war crimes or genocide should be exempt from the jurisdiction of a permanent international criminal court. These countries were concerned, moreover, about the possibility that the Security Council would once again slide into the state of paralysis that characterized the Cold War years, rendering a Security-Council controlled court a nullity. The justification for the American position was that, as the world's greatest military and economic power, more than any other country the United States is expected to intervene to halt humanitarian catastrophes around the world. The United States' unique position renders U.S. personnel uniquely vulnerable to the potential jurisdiction of an international criminal court. In sum, the U.S. Administration feared that an independent ICC Prosecutor would turn out to be (in the words of one U.S. official) an "international Ken Starr" who would bedevil U.S. military personnel and officials, and frustrate U.S. foreign policy.

Many of the countries at Rome were in fact sympathetic to the United States' concerns. Thus, what emerged from Rome was a Court with a two-track system of jurisdiction. Track one would constitute situations referred to the Court by the Security Council. This track would create binding obligations on all states to comply with orders for evidence or the surrender of indicted persons under Chapter VII of the U.N. Charter. This track would be enforced by Security Council imposed embargoes, the freezing of assets of leaders and their supporters, and/or by authorizing the use of force. It is this track that the United States favored, and would be likely to utilize in the event of a future Bosnia or Rwanda. The second track would constitute situations referred to the Court by individual countries or the ICC Prosecutor. This track would have no built in process for enforcement, but rather would rely on the good-faith cooperation of the Parties to the Court's statute. Most of the delegates in Rome recognized that the real power was in the first track. But the United States still demanded protection from the second track of the Court's jurisdiction. In order to mollify U.S. concerns, the following protective mechanisms were incorporated into the Court's Statute at the urging of the United States:

First, the Court's jurisdiction under the second track would be based on a concept known as "complementarity" which was defined as meaning the court would be a last resort which comes into play only when domestic authorities are unable or unwilling to prosecute. At the insistence of the United States, the delegates at Rome added teeth to the concept of complementarity by providing in Article 18 of the Court's Statute that the Prosecutor has to notify states with a prosecutive interest in a case of his/her intention to commence an investigation. If, within one month of notification, such a state informs the Court that it is investigating the matter, the Prosecutor must defer to the State's investigation, unless it can convince the Pre-Trial Chamber that the investigation is a sham. The decision of the Pre-Trial Chamber is subject to interlocutory appeal to the Appeals Chamber.

Second, Article 8 of the Court's Statute specifies that the Court would have jurisdiction only over "serious" war crimes that represent a "policy or plan." Thus, random acts of U.S. personnel involved in a foreign peacekeeping operation would not be subject to the Court's jurisdiction. Neither would one-time incidents such as the July 3, 1988 accidental downing of the Iran airbus by the *USS Vincennes* or the August 20, 1998 U.S. attack on the Al Shiffa suspected chemical weapons facility in Sudan that turned out to be a pharmaceutical plant.

Third, Article 15 of the Court's Statute guards against spurious complaints by the ICC prosecutor by requiring the approval of a three-judge pre-trial chamber before the prosecution can launch an investigation. Further, the decision of the chamber is subject to interlocutory appeal to the Appeals Chamber.

Fourth, Article 16 of the Statute allows the Security Council to affirmatively vote to postpone an investigation or case for up to twelve months, on a renewable basis. While this does not amount to the individual veto the United States had sought, this does give the United States and the other members of the Security Council a collective veto over the Court.

The United States Delegation played hard ball in Rome and got just about everything it wanted, substantially weakening the ICC in the process. As Ambassador Scheffer told the Senate Foreign Relations Committee: "The U.S. delegation certainly reduced exposure to unwarranted prosecutions by the international court through our successful efforts to build into the treaty a range of safeguards that will benefit not only us but also our friends and allies." These protections proved sufficient for other major powers including the United Kingdom, France and Russia, which joined 117 other countries in voting in favor of the Rome Treaty. But without what would amount to an iron-clad veto of jurisdiction over U.S. personnel and officials, the United States felt compelled to join China, Libya, Iraq, Israel, Qatar and Yemen as the only seven countries voting in opposition to the Rome Treaty.

It is an open secret that there was substantial dissension within the U.S. Delegation (especially among Department of State and Department of Justice representatives) about whether to oppose the ICC and that the position of the Secretary of Defense ultimately carried the day. As a former Republican member of Congress, there has been conjecture that Secretary of Defense William Cohen was influenced by Senator Jesse Helms (R-NC), a vocal opponent of the ICC. President Clinton, for his part, had proven to be uniquely vulnerable on issues affecting the military due to his record as a Vietnam "draft dodger" and his unpopular stand on gays in the military. Thus, rather than focus his attention on the negotiations in Rome as they came to a head, Clinton immersed himself in a historic trip to China during the Rome Conference. And in the midst of several breaking White House scandals in the summer of 1998, there was to be no last minute rescue of the Rome Treaty by Vice President Al Gore as had been the case with the Kyoto Climate Accord a year earlier.

### **The Question of ICC Jurisdiction over the Nationals of Non-Party States**

Once it decided that it would not sign the Court's Statute, the primary goal of the United States government (still bowing to the concerns of the Pentagon) was to prevent the ICC from being able to exercise jurisdiction over U.S. personnel and officials. As Ambassador Scheffer explained to the Senate Foreign Relations Committee: "We sought an amendment to the text that would have required ... the consent of the state of nationality of the perpetrator be obtained before the court could exercise jurisdiction. We asked for a vote on our proposal, but a motion to take no action was overwhelmingly carried by the vote of participating governments in the conference." Had the U.S. amendment been adopted, the United States could have declined to sign the Rome Statute, thereby ensuring its immunity from the second track of the court's jurisdiction,

but at the same time permitting the United States to take advantage of the first track of the Court's jurisdiction (Security Council referrals) when it was in America's interest to do so.

Having lost that vote, the U.S. Administration began to argue that international law prohibits an ICC from exercising jurisdiction over the nationals of non-parties. Thus, Ambassador Scheffer told the Senate Foreign Relations Committee that "the treaty purports to establish an arrangement whereby U.S. armed forces operating overseas could be conceivably prosecuted by the international court even if the United States has not agreed to be bound by the treaty. ... This is contrary to the most fundamental principles of treaty law" as set forth in the Vienna Convention on the Law of Treaties. Based on the U.S. objection to the ICC's exercise of jurisdiction over nationals of non-party states, Ambassador Scheffer expressed the "hope that on reflection governments that have signed, or are planning to sign, the Rome treaty will begin to recognize the proper limits to Article 12 and how its misuse would do great damage to international law and be very disruptive to the international political system." Senator Helms later quoted this "Vienna Convention" argument in the preamble of his anti-ICC legislation, which is discussed below.

Diplomats and scholars have been quick to point out the flaws in Scheffer's argument. First, it is a distortion to say that the Rome Statute purports to impose obligations on non-party States. Under the terms of the Rome Treaty, the Parties are obligated to provide funding to the ICC, to extradite indicted persons to the ICC, to provide evidence to the ICC, and to provide other forms of cooperation to the Court. Those are the only obligations the Rome Treaty establishes on States, and they apply only to State Parties. Thus, Ambassador Scheffer's objection is not really that the Rome Treaty imposes obligations on the United States as a non-party, but that it affects the sovereignty interests of the United States -- an altogether different matter which does not come within the Vienna Convention's proscription. Moreover, although States have a sovereignty interest in their nationals, especially state officials and employees, sovereignty does not provide a basis for exclusive jurisdiction over crimes committed by a State's nationals in a foreign country. Nor does a foreign indictment of a State's nationals for acts committed in the foreign country constitute an impermissible intervention in the State's internal affairs.

Second, the exercise of the ICC's jurisdiction over nationals of non-party states who commit crimes in the territory of a State parties is well grounded in both the universality principle and the territoriality principle of jurisdiction under international law. The core crimes within the ICC's jurisdiction -- genocide, crimes against humanity, and war crimes -- are crimes of universal jurisdiction. The negotiating record of the Rome Treaty indicates that the consent regime was layered upon the ICC's inherent universal jurisdiction over these crimes, such that with the consent of the State in whose territory the offense was committed, the Court has the authority to issue indictments over the nationals of non-party States. The Nuremberg Tribunal and the ad hoc Tribunal for the former Yugoslavia provide precedent for the collective delegation of universal jurisdiction to an international criminal court without the consent of the State of the nationality of the accused.

In addition, international law recognizes the authority of the state where a crime occurs to delegate its territorial-based jurisdiction to a third State or international Tribunal. Careful analysis of the European Convention on the Transfer of Proceedings

indicates that the consent of the State of the nationality of the accused is not a prerequisite for the delegation of territorial jurisdiction under the Convention, and therefore that it provides a precedent for the ICC's jurisdictional regime. There are no compelling policy reasons why territorial jurisdiction cannot be delegated to an international court and the Nuremberg Tribunal provides the precedent for the collective exercise of territorial as well as universal jurisdiction.

Third, Scheffer's argument is inconsistent with past U.S. exercise of universal jurisdiction granted by anti-terrorism, anti-narcotic trafficking, torture, and war crimes treaties over the nationals of states which are not party to these treaties. In light of the past U.S. practice, the claim that a treaty cannot lawfully provide the basis of criminal jurisdiction over the nationals of non-party states, while directed against the ICC, has the potential of negatively effecting existing U.S. law enforcement authority with respect to terrorists, narco-traffickers, torturers, and war criminals.

### **An Effort to Modify the Rome Treaty**

During hearings before the Senate Foreign Relations Committee on June 23, 1998, Senator Jesse Helms (R-N.C.) urged the Administration to take the following steps in opposition to the establishment of an international criminal court: First, that it announce that it would withdraw U.S. troops from any country that ratified the International Criminal Court Treaty. Second, that it veto any attempt by the Security Council to refer a matter to the Court's jurisdiction. Third, that it block any international organization in which it is a member from providing any funding to the International Criminal Court. Fourth, that it renegotiate its Status of Forces Agreements and Extradition Treaties to prohibit its treaty partners from surrendering U.S. nationals to the International Criminal Court. Finally, that it provide no U.S. soldiers to any regional or international peacekeeping operation where there is any possibility that they will come under the jurisdiction of the International Criminal Court. According to Senator Helms, these measures would ensure that the Rome Treaty will be "dead on arrival."

Ambassador Scheffer was non-committal as to the adoption of Senator Helms' proposals, saying only that "the Administration hopes that in the years ahead other governments will recognize the benefits of potential American participation in the Rome treaty and correct the flawed provisions in the treaty." In the meantime, he added, "more ad hoc judicial mechanisms will need to be considered." Ambassador Scheffer's testimony suggested that the U.S. response to the International Criminal Court might parallel its efforts to reform the 1982 Law of the Sea Convention. The United States refused to sign that treaty until amendments were adopted concerning its seabed mining regime. In 1994, the signatories to the Law of the Sea Convention adopted an Agreement containing the revisions sought by the United States and the United States signed the treaty, which still awaits Senate advice and consent to ratification.

In the following months, the United States tried to secure international backing for a clause to be included in the agreement that was being prepared to govern the relations between the United Nations and the ICC. Without actually amending the ICC Statute, the U.S. proposal would prevent the ICC from taking custody of official personnel of non-party states where the state has acknowledged responsibility for the act in question. This was a major walk back from its earlier position, as this proposal would not prevent the

ICC from indicting nationals of non-party states, only prosecuting them. That the Clinton Administration was willing to float this proposal indicated that it was no longer promoting Ambassador Scheffer's questionable reading of the Vienna Convention.

Prior to the Rome Diplomatic Conference, many countries felt that the success of a permanent international criminal court would be in question without U.S. support. But as it became increasingly obvious that the United States was not going to sign the Rome Treaty, the willingness to compromise began to evaporate, culminating in the overwhelming vote against the U.S. amendment requiring the consent of the state of nationality at the Rome Diplomatic Conference. The United States soon discovered that it would have no more luck with the issue through a series of bilateral negotiations than it did in the frenzied atmosphere that characterized the final days of the Rome Conference.

### **"If You Can't Beat 'em, Join 'em"**

By late 2000, the Clinton Administration had come to realize that the ICC would ultimately enter into force with or without U.S. support. By December 2000, a growing number of countries had ratified the Rome Treaty, and over 120 countries had signed it, indicating their intention to ratify. Sixty ratifications are necessary to bring it into force. The Signatories included every other NATO State except for Turkey, three of the Permanent Members of the Security Council (France, Russia, and the United Kingdom), and both of the United States' closest neighbors (Mexico and Canada). Even Israel, which had been the only Western country to join the United States in voting against the ICC Treaty in Rome in 1998, later changed its position and announced that it would sign the treaty. Israel's change of position was made possible when the ICC Prep Con promulgated definitions of the crimes over which the ICC has jurisdiction, which clarified that the provision in the ICC Statute making altering the demographics of an occupied territory a war crime would be interpreted no more expansively than the existing law contained in the Geneva Conventions.

In the waning days of his presidency, William J. Clinton authorized the U.S. signature of the Rome Treaty, making the United States the 138th country to sign the treaty by the December 31st deadline. According to the ICC Statute, after December 31, 2000, States must accede to the Treaty, which requires full ratification -- something that was not likely for the United States in the near term given the current level of Senate opposition to the Treaty. While signature is not the equivalent of ratification, it set the stage for U.S. support of Security Council referrals to the International Criminal Court, as well as other forms of U.S. cooperation with the Court. In addition, it put the United States in a better position to continue to seek additional provisions to protect American personnel from the court's jurisdiction.

### **Hostile Outsider or Influential Insider?**

Clinton's last minute action drew immediate ire from Senator Jesse Helms, then Chairman of the U.S. Senate Foreign Relations Committee, who has been one of the treaty's greatest opponents. In a Press Release, Helms stated: "Today's action is a blatant attempt by a lame-duck President to tie the hands of his successor. Well, I have a message for the outgoing President. This decision will not stand. I will make reversing

this decision, and protecting America's fighting men and women from the jurisdiction of this international kangaroo court, one of my highest priorities in the new Congress."

Helms responded by pushing for passage of the "Servicemembers Protection Act," Senate Bill 2726, which would prohibit any U.S. Government cooperation with the ICC, and cut off U.S. military assistance to any country that has ratified the ICC Treaty (with the exception of major U.S. allies), as long as the United States has not ratified the Rome Treaty. Further, the proposed legislation provides that U.S. military personnel must be immunized from ICC jurisdiction before the U.S. participates in any U.N. peacekeeping operation. The proposed legislation also authorizes the President to use all means necessary to release any U.S. or allied personnel detained on behalf of the Court.

The essence of this debate, then, is whether the national security and foreign policy interests of the United States are better served by playing the role of a hostile outsider (as embodied in Senator Helms' and Lee Casey's "American Servicemembers Protection Act"), or by playing the role of an influential insider (as it has done, for example, with the Yugoslavia Tribunal). In deciding this issue, one must carefully and objectively examine the consequences that would flow from the hostile approach.

First, the hostile approach would transform American exceptionalism into unilateralism and/or isolationism by preventing the United States from participating in U.N. peacekeeping operations and cutting off aid to many countries vital to U.S. national security. This would be especially foolhardy at this moment in history when the United States is working hard to expand and hold together an international coalition against the terrorist organizations and their state supporters that were involved in the terrorist attacks of September 11, 2001.

Further, overt opposition to the ICC would erode the moral legitimacy of the United States, which has historically been as important to achieving U.S. foreign policy goals as military and economic might. A concrete example of this was the recent U.S. loss of its seat in the U.N. Commission of Human Rights, where several western countries cited current U.S. opposition to the ICC as warranting their vote against the United States.

Perversely, the approach embodied in Senator Helms' legislation could even turn the United States into a safe haven for international war criminals, since the U.S. would be prevented from surrendering them directly to the ICC or indirectly to another country which would surrender them to the ICC. And the idea that the President should use all means necessary to release any U.S. or allied personnel detained on behalf of the Court is the height of folly, as reflected in headlines describing the legislation as the "Hague Invasion Act."

Second, under the hostile approach, the United States would be prevented from being able to take advantage of the very real benefits of an ICC. The experience with the Yugoslavia Tribunal has shown that, even absent arrests, an international indictment has the effect of isolating rogue leaders, strengthening domestic opposition, and increasing international support for sanctions and even use of force. The United States has recognized these benefits in pushing for the subsequent creation of the ad hoc tribunals for the Rwanda, Sierra Leone, and Cambodia, as well as proposing the establishment of a tribunal for Iraq. But the establishment of the ICC will signal the end of the era of Security Council-created tribunals, since even our friends and allies at the U.N. will insist that situations involving genocide, crimes against humanity, and war crimes be referred to the existing ICC rather than additional ad hoc tribunals. Thus, when the next Rwanda

occurs, the United States will not be able to employ the very useful tool of international criminal justice unless it works through the ICC.

To bring home this point, consider that if the ICC had been in existence on September 11, 2001, the United States and the other members of the Security Council could have referred the case of Osama bin Laden and the other masterminds of the attacks on the World Trade Center and Pentagon to the ICC, rather than creating U.S.-led military tribunals which have been subject to harsh criticism in the United States and abroad. An ICC indictment of these terrorists for their "crimes against humanity" would have strengthened foreign support for the American intervention into Afghanistan and would have deflected bin Laden's attempt to characterize the military action as an American attack against Islam. And if any of the perpetrators fell into any country's custody, an ICC would present a neutral fora for their prosecution that would have enjoyed the support of the Islamic world.

Opponents of the ICC have suggested that without U.S. support, the ICC is destined to be impotent and irrelevant because it will lack the power of the Security Council to enforce its arrest orders. But as the experience of the ad hoc Tribunals for Rwanda, Sierra Leone, and most recently Yugoslavia (with the surrender of Milosevic) has proven, in most cases where an ICC is needed, the perpetrators are no longer in power and are in the custody of a new government or of nearby states which are perfectly willing to hand them over to an international tribunal absent Security Council action. Moreover, the Security Council has been prevented (largely by Russian veto threats) from taking any action to impose sanctions on States that have not cooperated with the Yugoslavia Tribunal despite repeated pleas from the Tribunal's Prosecutor and Judges that it do so. Indeed, in the Yugoslavia context, where the perpetrators were still in power when the Tribunal was established, it was not action by the Security Council, but rather the threatened withholding of foreign aid and IMF loans that have induced Croatia and Serbia to hand over indictees. This indicates that, unlike the League of Nations (which United States officials have frequently referred to in this context), the ICC is likely to be a thriving institution even without United States participation. In other words, the United States may actually need the ICC more than the ICC needs the United States.

Third, the United States achieves no real protection from the ICC by remaining outside the ICC regime. This is because, as explained above, Article 12 of the Rome Statute empowers the ICC to exercise jurisdiction over nationals of non-party States who commit crimes in the territory of State Parties. Further, in its Pollyanna-ish refusal to recognize the legitimacy of the ICC's exercise of jurisdiction over the nationals of non-party states, opponents of the ICC have resorted to a questionable legal interpretation which is not only unlikely to sway the ICC or its founding members, but also has the potential of undermining important U.S. law enforcement interests.

If U.S. officials can be indicted by the ICC whether or not the U.S. is a party to the Rome Treaty, than the United States preserves very little by remaining outside the treaty regime, and could protect itself better by signing the treaty. This has been proven to be the case with the Yugoslavia Tribunal, which the U.S. has supported with contributions exceeding \$15 million annually, the loan of top-ranking investigators and lawyers from the federal government, the support of troops to permit the safe exhumation of mass graves, and even the provision of U-2 surveillance photographs to locate the places where Serb authorities had tried to hide the evidence of its wrongdoing. This policy bore fruit

when the International Prosecutor opened an investigation into allegations of war crimes committed by NATO during the 1999 Kosovo intervention. Despite the briefs and reports of reputable human rights organizations arguing that NATO had committed breaches of international humanitarian law, on June 8, 2000, the International Prosecutor issued a report concluding that charges against NATO personnel were not warranted. This is not to suggest that the United States coopted the Yugoslavia Tribunal; but when dealing with close calls regarding application of international humanitarian law it is obviously better to have a sympathetic Prosecutor and Court than a hostile one.

Opponents of the ICC like to raise the specter of politicized indictments against American or Israeli officials drafted by prosecutors and confirmed by judges from countries that oppose our policies. A close examination of the list of the countries that have so far ratified the ICC, however, reveals that the ICC will be dominated not by our diplomatic opponents, but instead by our closest friends and allies. Of these 46 ratifying countries, nineteen are NATO or Western European allies, nine are Latin American and Caribbean countries with which the U.S. enjoys close relations, and four are U.S.-friendly Pacific island countries such as New Zealand and the Marshall Islands. With the possible exception of the Central African Republic, no country on the list would give a U.S. foreign policy-maker any cause for concern. On the other hand, the countries that most frequently oppose the United States in the United Nations (Asian and middle-eastern countries such as China, Cuba, Iraq, Libya, North Korea, Syria, and the Sudan) are the countries least likely to ratify the ICC Statute, so they will not be able to participate in the ICC Assembly of Parties or nominate judges for the ICC's bench or select the Court's Prosecutor. Consequently, even if the U.S. does not ratify the Rome Treaty, the reality is that the ICC is going to be a very U.S.-friendly tribunal, unless, that is, the United States figuratively (and literally) wages war against the institution as suggested in Senator Helms' legislation.

### **Rebutting the Constitutional Arguments Against the ICC**

Much of argument against the ICC concerns the constitutionality of U.S. participation in the Court. But, as Yale Law School constitutional Law professor Ruth Wedgwood has written, there are three reasons why we must conclude there "is no forbidding constitutional obstacle to U.S. participation in the Rome Treaty."

First, the ICC includes procedural protections negotiated by the U.S. Department of Justice representatives at Rome that closely follow the guarantees and safeguards of the American Bill of Rights. These including a Miranda-type warning, the right to defense counsel, reciprocal discovery, the right to exculpatory evidence, the right to speedy and public trial, the right to confront witnesses, and a prohibition on double jeopardy.

The only significant departures from U.S. law are that the ICC employs a bench trial before three judges rather than a jury, and it permits the Prosecutor to appeal an acquittal (but not to retry a defendant after the appeals have been decided). There were good reasons for these departures: For grave international crimes, qualified judges who issue detailed written opinions should be preferred over lay persons who issue unwritten verdicts. And if the trial judges misinterpret the applicable international law, whether in favor or to the detriment of the accused, an appeal is important to foster uniform interpretation of international criminal law.

Second, the United States has used its treaty power in the past to participate in other international tribunals that have had jurisdiction over U.S. nationals, such as the Yugoslavia Tribunal which was established by the Security Council pursuant to a treaty - - the U.N. Charter. Like the ICC, the Yugoslavia Tribunal employs judges rather than a jury, and permits the Prosecutor to appeal acquittals. Moreover, the U.S. Congress has approved legislation authorizing U.S. courts to extradite indicted persons (including those of U.S. nationality) to the Yugoslavia Tribunal where there exists an order for their arrest and surrender. And this legislation has been upheld in a recent federal court case.

Third, the offenses within the ICC's jurisdiction would ordinarily be handled through military courts-martial, which do not permit jury trial, or through extradition of offenders to foreign nations, which often utilize bench trials and do not employ American notions of due process. It should be noted that U.S. federal courts have upheld the extradition of Americans to such foreign jurisdictions for actions that took place on U.S. soil but had an effect abroad.

At the conclusion of the Senate Foreign Relations Committee's hearings on the ICC in July 1998, the Committee submitted several questions about the Constitutionality of U.S. participation in the ICC for the Department of Justice to answer for the record. The answers were prepared by Lee Casey's former colleagues in the Department's Office of Legal Counsel. This part of the Committee's published report should be required reading for anyone who has serious concerns about the Constitutionality of the ICC. The Department of Justice specifically found that U.S. ratification of the Rome Treaty and surrender of persons including U.S. nationals to the ICC would not violate Article III, section 2 of the Constitution nor any of the provisions of the Bill of Rights.

## **Conclusion**

Opponents of the ICC base their arguments on the assumption that it is not too late for America to prevent the ICC from coming into existence or to marginalize the Court so that it exists as a non-entity. But the spate of ratifications and the numerous powerful countries that are supporting the ICC (including virtually every other member of NATO) indicate that the ICC is a serious international institution that the United States is very soon going to have to learn to live with.

The risks to U.S. service members as well as the potential constitutional problems presented by the ICC have been greatly exaggerated by American opponents of the ICC, while both the practical usefulness of the ICC and the safeguards contained in the ICC Statute have been significantly undervalued. To the extent that American fears of politicized prosecutions are valid, U.S. opposition to the ICC will only increase the likelihood that the ICC will be more hostile than sympathetic to U.S. positions. And, by opposing the Court, the United States may actually engender more international hostility toward U.S. foreign policy than would have resulted from an indictment by the Court. Thus, whether or not the U.S. is able to achieve additional safeguards to prevent the ICC from exercising jurisdiction over U.S. personnel, it will be in the interests of U.S. national security and foreign policy to support, rather than oppose, the ICC.

It is important to recognize that supporting the ICC does not require immediate U.S. ratification of the Rome Treaty. Perhaps it would be prudent for the United States to let the Court prove itself over a period of years before sending the treaty to the Senate. But

in the meantime, when the next Rwanda-like situation comes along, the United States will find value in having the option of Security Council referral to the ICC in its arsenal of foreign policy responses -- something the United States can do even if it does not ratify the Rome Treaty so long as it does not enact a version of Senator Helms' and Lee Casey's anti-ICC legislation.

**B. Lee A. Casey, *The Case Against Supporting the International Criminal Court*, Washington University School of Law, Whitney R. Harris Institute for Global Legal Studies, Washington University in St. Louis, International Debate Series, No. 1 (2002).**

The United States should not ratify the ICC Treaty. There are two fundamental objections to American participation in the ICC regime. First, U.S. participation would violate our Constitution by subjecting Americans to trial in an international court for offenses otherwise within the judicial power of the United States, and without the guarantees of the Bill of Rights. Second, our ratification of the Rome Treaty would constitute a profound surrender of American sovereignty, undercutting our right of self-government - the first human right, without which all others are simply words on paper, held by grace and favor, and no rights at all.

With respect to the Constitutional objections, by joining the ICC Treaty, the United States would subject American citizens to prosecution and trial in a court that was not established under Article III of the Constitution for criminal offenses otherwise subject to the judicial power of the United States. This, it cannot do. As the Supreme Court explained in the landmark Civil War case of *Ex parte Milligan* (1866), reversing a civilian's conviction by a military tribunal, "[e]very trial involves the exercise of judicial power," and courts not properly established under Article III can exercise "no part of the judicial power of the country."

This rationale is equally, and emphatically, applicable to the ICC, a court where neither the prosecutors nor the judges would have been appointed by the President, by and with the advice and consent of the Senate, and which would not be bound by the fundamental guarantees of the Bill of Rights. In fact, individuals brought before the ICC would only nominally enjoy the rights we in the United States take for granted.

For example, the ICC Treaty guarantees defendants the right "to be tried without undue delay." In the International Criminal Tribunal for the Former Yugoslavia (an institution widely understood to be a model for the permanent ICC), and which also guarantees this "right," defendants often wait more than a year in prison before their trial begins, and many years before a judgment actually is rendered. The Hague prosecutors actually have argued that up to five years would not be too long to wait IN PRISON for a trial, citing case law from the European Court of Human Rights supporting their position.

Such practices, admittedly, have a long pedigree, but they mock the presumption of innocence. Under U.S. law, the federal government must bring a criminal defendant to trial within three months, or let him go.

By the same token, the right of confrontation, guaranteed by the Sixth Amendment, includes the right to know the identity of hostile witnesses, and to exclude most "hearsay" evidence. In the Yugoslavia Tribunal, both anonymous witnesses and

virtually unlimited hearsay evidence have been allowed at criminal trials, *large portions of which are conducted in secret*. Again, this is the model for the ICC.

Similarly, under the Constitution's guarantee against double jeopardy a judgment of acquittal cannot be appealed. Under the ICC statute, acquittals are freely appealable by the prosecution, as in the Yugoslav Tribunal, where the Prosecutor has appealed every judgment of acquittal.

In addition, the ICC would not preserve the right to a jury trial. The importance of this right cannot be overstated. Alone among the Constitution's guarantees, the right to a jury trial was stated twice, in Article III (sec. 2) and in the Sixth Amendment. It is not merely a means of determining facts in a judicial proceeding. It is a fundamental check on the abuse of power. As Justice Joseph Story explained: "The great object of a trial by jury in criminal cases is to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people.<sup>6</sup> It is "part of that admirable common law, which had fenced round, and interposed barriers on every side against the approaches of arbitrary power." That said, the exclusion of jury trials from the ICC is not surprising, for that Court invites the exercise of arbitrary power by its very design.

The ICC will act as policeman, prosecutor, judge, jury, and jailor - all of these functions will be performed by its personnel, with nothing but bureaucratic divisions of authority, and no division of interest. There would be no appeal from its judgments. If the ICC abuses its power, there will be no recourse. From first to last, the ICC will be the judge in its own case. It will be more absolute than any dictator. As an institution, the ICC is fundamentally inconsistent with the political, philosophical, and legal traditions of the United States.

ICC supporters suggest that U.S. participation in this Court would not violate the Constitution because it would not be "a court of the United States," to which Article III and the Bill of Rights apply. They often point to cases in which the Supreme Court has allowed the extradition of citizens to face charges overseas. There are, however, fundamental differences between United States participation in the ICC Treaty Regime and extradition cases, where Americans are sought for crimes committed abroad. If the U.S. joined the ICC Treaty, the Court could try Americans who never have left the United States, for actions taken entirely within our borders.

A hypothetical, stripped of the emotional overlay inherent in "war crimes" issues, can best illustrate the constitutional point here: The Bill of Rights undoubtedly impedes efficient enforcement of the drug laws - also a subject of international concern. Could the federal government enter a treaty with Mexico and Canada, establishing an offshore "Special Drug Control Court," which would prosecute and try all drug offenses committed anywhere in North America, without the Bill of Rights guarantees? Could the federal government, through the device of a treaty, establish a special overseas court to try sedition cases - thus circumventing the guarantees of the First Amendment.

Fortunately, the Supreme Court has never faced such a case. However, in the 1998 case of *United States v. Balsys*, the Court suggested that, where a prosecution by a foreign court is, at least in part, undertaken on behalf of the United States, for example, where "the United States and its allies had enacted substantially similar criminal codes aimed at prosecuting offenses of international character . . ." then an argument can be made that the Bill of Rights would apply "*simply because that prosecution [would not*

*be] fairly characterized as distinctly >foreign' The point would be that the prosecution was as much on behalf of the United States as of the prosecuting nation... "*

This would, of course, be exactly the case with the ICC. If the United States became a "State Party" to the ICC Treaty, any prosecutions undertaken by the Court would be "as much on behalf of the United States as of any other State party. Since the full and undiluted guarantees of the Bill of Rights would not be available in the ICC, the United States cannot, constitutionally, sign and ratify the ICC treaty.

ICC supporters also have argued that the U.S. should sign and ratify the Rome Treaty because the Court would be directed against people like Saddam Hussein and Slobodan Milosevic, and not against the United States. Here, as pretty much everywhere, the past is the best predictor of the future. We already have seen this particular drama staged at the Yugoslav Tribunal. Even though that Tribunal was established to investigate crimes committed during 1991-1995 Yugoslav conflict, and even though NATO's air war against Serbia was fought on entirely humanitarian grounds, and even though it was conducted with the highest level of technical proficiency in history, the Hague prosecutors nevertheless undertook a *politically motivated investigation - motivated by international humanitarian rights activists along with Russia and China - of NATO's actions based upon the civilian deaths that resulted.*

At the end of this investigation, the prosecutors gave NATO a pass not because, in their view, there were no violations, but because "[i]n all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offenses."

Significantly, in their report the prosecutors openly acknowledged the very elastic nature of the legal standards in this area, further highlighting the danger that the United States will be the subject of such politically motivated prosecutions in the future: "[t]he answers to these question [regarding allegedly excessive civilian casualties] are not simple. It may be necessary to resolve them on a case-by-case basis, *and the answers may differ depending on the background and values of the decision-maker.* It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases."

These are, in fact, "will-build-to-suit" crimes. Whether prosecutions are brought against American officials will depend entirely upon the motivations and political agenda of the ICC.

In response, ICC supporters claim that we can depend upon the professionalism and good will of the Court's personnel. One of the ICC=s strongest advocates, former Yugoslav Tribunal Prosecutor Louise Arbour has argued for a powerful Prosecutor and Court, suggesting that "an institution should not be constructed on the assumption that it will be run by incompetent people, acting in bad faith from improper purposes."

The Framers of our Constitution understood the fallacy of this argument probably better than any other group in history. If there is one particular American contribution to the art of statecraft, it is the principle - incorporated into the very fabric of our Constitution - that *the security of our rights cannot be trusted to the good intentions of*

*our leaders.* By its nature, power is capable of abuse and people are, by nature, flawed. As James Madison wrote "the great difficulty lies in this: you must first enable the government to control the governed; and in the next place *oblige it to control itself.* A The ICC would not be obliged to control itself.

It is also often asserted that the principle of "complementarity," found in Article 17 of the Rome Treaty, will check the Court's ability to undertake prosecution of Americans. This is the principle that prohibits the ICC from taking up a case if the appropriate national authorities investigate and prosecute the matter. In fact, this limit on the ICC=s power is, in the case of the United States, entirely illusory.

First, as with all other matters under the Rome Treaty, it will be solely within the discretion of the ICC to interpret and apply this provision. Second, under Article 17, the Court can pursue a case wherever it determines that the responsible State was "unwilling or unable to carry out the investigation or prosecution." In determining whether a State was "unwilling" the Court will consider whether the national proceedings were conducted "independently or impartially." The United States can never meet that test as an institutional matter. Under the Constitution, the President is both the Chief Executive, i.e., the chief law enforcement officer, and the Commander-in-Chief of the armed forces. In any particular case, both the individuals investigating and prosecuting, and the individuals being investigated and prosecuted, work for the same man. Moreover, under command responsibility theories, the President is always a potential - indeed, a likely, target of any investigation. The ICC will simply note that an individual cannot "impartially" investigate himself, and it will be full steam ahead. As a check on the ICC, complementarity is meaningless.

Finally, it's important to understand exactly what is at stake here. Today, the officials of the United States are ultimately accountable for their actions to the American electorate. If the United States were to ratify the ICC Treaty this ultimate accountability would be transferred from the American people to the ICC in a very real and immediate way - through the threat of criminal prosecution and punishment. The policies implemented and actions taken by our national leaders, whether at home or abroad, could be scrutinized by the ICC and punished if, *in its opinion*, criminal violations had occurred. As Alexis de Tocqueville wrote, "[h]e who punishes the criminal is . . . the real master of society." Ratification of the ICC Treaty would, in short, constitute a profound surrender of American sovereignty - our right of self-government -the first human right. Without self-government, the rest are words on paper, held by grace and favor, and not rights at all.

That surrender would be to an institution that does not share our interests or values. There is no universally recognized and accepted legal system on the international level, particularly in the area of due process, as the Rome Treaty itself recognizes in requiring that, in the selection of judges, "the principal legal systems of the world," should be represented. Moreover, although a number of Western states have signed this treaty, so have states such as Algeria, Iran, Nigeria, Sudan, Syria and Yemen. According to the U.S. State Department, each of these states has been implicated in the use of torture or extra judicial killings, or both. Yet, each of them would have as great a voice as the United States in selecting the ICC=s Prosecutor and Judges and in the Assembly of State Parties.

This is especially troubling because, as the ICTY Prosecutor conceded, who is and who is not a war criminal is very much a matter of your point of view. And I'd like to give you a fairly poignant example that I learned of, actually, while practicing before the ICTY.

In this case there was a young officer, 20 or 21 years old, who commanded a detachment of regular soldiers, along with a group of irregulars. Irregulars are, of course, always a problem. I think everyone pretty much agrees that, for example, the worst atrocities in Bosnia were committed by irregulars. At any rate, these irregulars were clearly under the officer=s command when they all ran into a body of enemy troops.

There was a short, sharp firefight. A number of the enemy were killed or wounded, and the rest threw down their arms and surrendered. At that point, the officer entirely lost control of the situation. His irregulars began to kill the wounded and then the rest of the prisoners -- with knives and axes actually.

After a good deal of confusion, the officer managed to form up his regulars around the remaining prisoners, but about a dozen were killed. Now, under our system of military justice, the perpetrators would be prosecuted, but the officer would very likely not be. He gave no order for the killings, and took some action to stop it.

However, under the command responsibility and "knowing presence" theories now current at the ICTY, the ICC's model, this officer is guilty of a war crime. The fact that he did make some attempt to prevent the killing would certainly be taken into account, but very likely as a matter of mitigation at sentencing.

At any rate, this is a real case. It didn't, however, happen in Central Bosnia, or Kosovo, or Eastern Slavonia, and the individuals involved were not Serbs, Croats, or Muslims. As a matter of fact, it happened in Western Pennsylvania. The soldiers were English subjects, at the time, and the irregulars were Iroquois Indians; their victims were French. The young officer was, as a matter of fact, from the county in which I live -- Fairfax, Virginia. And, for those of you who are students here at the University, his name -- Washington -- will grace each of your diplomas.

War is, inherently, a violent affair and the discretion whether to prosecute any particular case in which Americans are involved should be kept firmly in the hands of our institutions, to be made by individuals who are accountable to us for their actions. The ICC is inconsistent with our Constitution and inimical to our national interests. It is an institution of which we should have no part.

### C. Fatou Bensouda: the woman who could redeem the international criminal court, *The Guardian*, June 14, 2012.



Times are hard for the International Criminal Court. It is nine years since it was established with notions of ending impunity for "unimaginable atrocities that deeply shock the conscience of humanity". The arrest in Libya last week of four members of the court's defence team, who were visiting Muammar Gaddafi's son, Saif al-Islam, marked a new low in the court's history.

But with only one conviction in its history, an exclusively African caseload, and relations with other African states also at breaking point, the court's reputation leaves much to be desired.

Into the fray steps Fatou Bensouda, the Gambian who on Friday becomes chief prosecutor – the second in the court's history and the first African woman.

Her most immediate task will be to resolve the standoff with Libya, amid concern for the welfare of the ICC envoys after the Libyan government said they had been placed in "preventive detention" in prison for 45 days during investigations into alleged threats to Libya's national security.

Alexander Khodakov, of Russia, Esteban Peralta Losilla, of Spain, Lebanese Helene Assaf and Australian Melinda Taylor were arrested after meeting Gaddafi, who is in detention and has been indicted by the ICC. They were held at an unknown location before being moved to a prison.

Human rights groups have strongly condemned the move by Libya, which they say violates international law and the immunity given to ICC staff, and claim that they have not had access to legal advice. "The detention of the four staff members of the international criminal court is unacceptable," said Mark Ellis, executive director of the International Bar Association. "Defence rights are essential for any meaningful judicial proceedings at the national and international levels and should be adhered to in the proceedings of Saif al-Islam Gaddafi's trial."

The detention comes after months of tension between the court and the Libyan government over where the toppled dictator's son and former spy chief, Abdullah al-Senussi should stand trial.

On the surface, it is hard to see how Bensouda, a public prosecutor and former attorney general of the Gambia, could be equipped to turn around the fortunes of the ICC, which is based in The Hague. Her country – with a population of only 1.7 million – is notorious as one of west Africa's last dictatorships, with opposition to President Yahya Jammeh's 18-year regime suppressed.

Yet among those who follow – and frequently criticise – the ICC, there is a surprising degree of faith in Bensouda's leadership, and a view that she has remained unscathed despite her professional relationships with Jammeh and the deeply unpopular outgoing chief prosecutor, the Argentinian Luis Moreno-Ocampo.

"I feel positive about Fatou's tenure as chief prosecutor," said Chidi Odinkalu, chairman of the Nigerian National Human Rights Commission. "Will she wave a magic wand and cure all the difficulties that exist at the ICC at the moment? No. Can she bring positive disposition over time to transforming the polluted atmosphere in which the institution has been operating in Africa? Absolutely."

Controversy surrounding the ICC has centred on its relationship with Africa. It is currently prosecuting suspects in seven "situations" – the Democratic Republic of the Congo, the Central African Republic, Uganda, Sudan, Kenya, Ivory Coast, and Libya.

The first three of these countries self-referred to the court. Even that was controversial: Moreno-Ocampo was accused of going soft on co-operative rulers by not prosecuting government forces.

But it is the remaining cases that have drawn the most withering criticism of "LMO", as he is affectionately known in the African legal community.

Moreno-Ocampo's exclusive focus on Africa – at a time when two other international courts, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone, were also prosecuting Africans for crimes against humanity – has drawn extensive criticism. Opportunities to investigate abuses in Afghanistan, Colombia, Georgia, and Iraq have largely been passed up, prompting a widespread belief within Africa that the court is an imperialist organ of western governments.

A full-blown crisis in relations between the courts and the African Union was triggered by the decision to issue an arrest warrant for the Sudanese president Omar al-Bashir in 2009 for genocide, crimes against humanity and war crimes for his role in the situation in Darfur. After Moreno-Ocampo ignored an AU warning that attempting to arrest al-Bashir could undermine peace talks in Sudan, African member states retaliated by flouting the warrant, and welcoming al-Bashir into their jurisdictions.

Bensouda's popularity stems in no small part from the fact that she is not Moreno-Ocampo. "Fatou brings a different set of skills and temperament from her predecessor, and that is a positive thing" said Odinkalu. "She has a pretty difficult job given the state of relations between the ICC and African states – things are quite honestly abysmal."

Despite her close professional relationship with Moreno-Ocampo, she remains a popular choice. "A lot of people have said that Fatou has been a yes man – someone that just followed or went along with LMO's policies, but she has made it clear that while it is important to consolidate the gains made over the past nine years, there are things that could be improved," said Alpha Sesay, a Sierra Leonean lawyer based in The Hague for

the Open Society Justice Initiative. "I do really accept that things will be different under her."

"Fatou is someone who is ready to listen and provide answers. You can sense that this is a different regime from the past, that she wants to listen, and to have a dialogue," Sesay added.

Bensouda is also – crucially – African. "She qualified here in Nigeria but really made her name in the Gambia," said Odinkalu. "She did have a reputation as a principled but also sensitive and sensible leader of the bar and chief law officer of the country. She even came out of serving her stint at the justice ministry with her reputation intact ... in fact she is one of the very few who has."

"There is no question that the AU [African Union] is warming up to Fatou. How much further things go is going to depend a lot on her diplomatic skills," said Sesay. "And in that, she is going to be completely different from Moreno-Ocampo."

Many challenges remain. The first is to get Arab countries to sign up to the Rome Statute, which established the ICC – Tunisia stands alone as the only Arab nation to belong to the court. Libya, where acts committed by pro-Gaddafi forces during last year's uprising are before the court, has acted with aggressive defiance of its investigations, refusing to surrender Gaddafi.

Fatou inherits two cases instigated by Moreno-Ocampo at his own discretion – violations by forces loyal to former president Laurent Gbagbo in Ivory Coast, and the prosecution of six prominent figures for post-election violence in Kenya in 2007-9. Both are proceeding slowly and continue to attract controversy for their political ramifications.

Perhaps the most important task for Bensouda, international lawyers say, will be to change the court's approach towards victims. "People have the mistaken impression that it is just heads of state, motivated by their own self interest, who have criticised the ICC – it's not," said Odinkalu. "The first alarm bells were sounded by victims' communities – they have a sense of being used, abused, dumped and not cared for."

"Fatou's accession gives ICC an opportunity to redeem relationships with victims' communities, show them that it is capable of caring – she inherits a situation in which the ability to be deeply nuanced is needed and if she has those skills, which she seems to, that will be an asset," said Odinkalu.

Bensouda insists that for her, helping victims is at the centre of what international criminal justice is really about. "That's where I get my inspiration and my pride," she said.



CASE WESTERN RESERVE  
UNIVERSITY  
SCHOOL OF LAW

# **INTRODUCTION TO INTERNATIONAL CRIMINAL LAW**

**MOOC taught by Professor  
Michael P. Scharf**

**Module #2:**

**Peace verses Justice**

**War Crimes, Crimes Against Humanity and  
Genocide**

**International Criminal Law  
Module #2  
Peace verses Justice**

**Read the article below, and then consider the following fictional case:**

**The Case of Togoland**

1. The African country of Togoland has a population of four million people, comprised of two main ethnic groups, the Tumani (45 percent of the population) and the Hottami (55 percent of the population). Its main export is the rare mineral cobalt, which is mined throughout the country. From March 2008 through May 2013, Togoland was ruled by a democratically elected President, George Humbarty, who was a member of the minority Tumani tribe.
2. During his last few months in office, Humbarty was under investigation on charges of embezzlement of government funds by the Togoland Peoples' Congress. On May 1, 2013, President Humbarty died of a heart attack while in bed with his mistress. Humbarty's Vice President, Jean Erickson (also a member of the Tumani tribe), was attending a meeting of the UN Human Rights Commission in Geneva at the time. Under the Togoland Constitution, the Vice President is to automatically assume the Presidency upon the death of the President.
3. A few hours after Humbarty died, a military faction seized power in a bloodless coup. The military regime is led by General Thomas Cederick (a member of the majority Hottami tribe), who was the former Chief of Staff of the army in the Humbarty Administration. General Cederick has vowed to turn the government back over to a democratically elected President after he has cleansed the Executive Branch of corrupt officials.
4. General Cederick's subordinates immediately rounded up the members of the Humbarty Administration and subjected them to extraordinary interrogation methods, including "water boarding," in order to induce them to confess to their acts of corruption. General Cederick then convened a special emergency tribunal to rapidly try such officials. To date, two thirds of the former officials of the Humbarty Executive Branch have been summarily tried and executed for corruption by the Special Tribunal, which Human Rights Watch has characterized as "a political weapon, not a real court." The day after he seized power, General Cederick publicly warned Madame Erickson that if she returned to Togoland she would be charged, convicted, and executed for being an accomplice to Humbarty's illegal schemes.

5. In the days after the coup, Madame Erickson appeared on CNN and the BBC, and met with numerous United Nations and foreign government representatives in an effort to gain support for international action to depose the military regime and install her as rightful President of Togoland. In her media appearances, she urged her followers in Togoland to go on strike and demonstrate for democracy.
6. By May 15, 2013, supporters of Madame Erickson launched a series of employment strikes in the Cobalt mines and street demonstrations in the cities of Togoland. On June 17, 2013, ten thousand people, mostly members of the Tumani tribe, gathered in front of the Capital building at Togoland Square, chanting “Bring back democracy, turn government over to Madame Erickson.” Several hundred of the protesters were armed with rifles, which they periodically fired into the air.
7. General Cederick ordered the Togoland army to “wipe out” the protesters at Togoland Square. Without warning, the Fourth Armored Division of the Togoland army circled the protesters and mowed them down with machine gun and mortar fire. Some shots were fired by the armed protestors in a futile effort to combat the army. Seven thousand civilians were killed in fifteen minutes. There were no army casualties. After that overwhelming show of force, there were no more protests and the Cobalt miners went back to work.
8. In response to the massacre at Togoland Square, on May 20, 2013, the United Nations Security Council adopted a Chapter VII Resolution imposing a world-wide embargo on imports of cobalt from Togoland and the freezing of General Cederick’s assets in offshore banks. In addition, the Security Council threatened the military regime that it would authorize use of force by a coalition of African States to topple the regime unless the regime turned power over to Madame Erickson by the end of June.
9. On May 25, 2013, General Cederick agreed to participate in peace negotiations with Madame Erickson at Kinvara, the capital of the neighboring African Country of Maulitania. The negotiations are being mediated by Larry Johnson, the UN Under-Secretary General for Legal Affairs. According to press reports, General Cederick may be willing to relinquish power to Madame Erickson if the UN revokes its sanctions, unfreezes his assets, and promises not to authorize an invasion, and if he and the other military leaders are given asylum in Maulitania and/or a complete amnesty in Togoland. The negotiations were scheduled for July 7, 2013.
10. Maulitania and Togoland are both parties to the United Nations Charter, the Genocide Convention, the 1949 Geneva Conventions, and the International Covenant on Civil and Political Rights. Maulitania, but not Togoland, is a party to the Torture Convention. Maulitania, but not Togoland, is a party to the International Criminal Court.



Map of Togoland



Photo of the Togoland Square Massacre

### **On-line simulation of the Maulitania Peace Negotiations.**

Last names beginning with the letters A through H will be in **Group A**; letters I through Z will be in **Group B**.

General Cederick and his staff are to be role-played by members of **Group A**.



Based on the simulated facts and article below, members of **Group A** are invited to submit a short position paper for General Cederick, setting forth a proposed opening and fall-back position for the General in the peace negotiations, and responding to the argument that trading justice for peace in these circumstances would violate international law.

Madame Erickson and her staff are to be role-played by members of **Group B**.



Based on the simulated facts and article below, members of **Group B** are invited to submit a short position paper for Vice President Erickson, setting forth a proposed opening and fall-back position for the Vice President in the peace negotiations, and making the argument that trading justice for peace in these circumstances would violate international law.

In order to complete the optional on-line simulations for this course, students must go to the Navigation Bar on the left panel. Under the Exercises section, you will find a button for “on-line simulations.” The simulations for each session are available under this button. Written work can be submitted directly or through file upload. Students who post five or more on-line submissions of over 200 words in length during the course (simulations and discussions) will be awarded a Statement of Accomplishment with Distinction for the course.

# From the eXile Files: An Essay on Trading Justice for Peace

By Michael P. Scharf

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**[Footnotes deleted for MOOC version]**

## *I. Introduction*

Since 1990, three different U.S. Presidents have accused Iraqi leader Saddam Hussein of committing grave breaches of the 1949 Geneva Conventions and acts of genocide. Although the Geneva Conventions and the Genocide Convention require state parties to bring offenders to justice, on the eve of the 2003 invasion of Iraq, President George W. Bush offered to call off the attack if Saddam Hussein and his top lieutenants would agree to relinquish power and go into exile. This was no publicity stunt, as some have characterized it. Working through President Hosni Mubarak of Egypt, the United States actively pursued the matter with several Mideast countries, ultimately persuading Bahrain to agree to provide sanctuary to Hussein if he accepted the deal. When Hussein rejected the proposal, Bush promised that the Iraqi leader would be forced from power and prosecuted as a war criminal.

Admittedly, thousands of lives could have been spared if Hussein had accepted the deal. But at the risk of being accused of blindly embracing Kant's prescription that "justice must be done even should the heavens fall," this Article argues that it was inappropriate for the Bush Administration even to make the offer, and that if implemented the exile-for-peace deal would have seriously undermined the Geneva Conventions and the Genocide Convention, which require prosecution of alleged offenders without exception.

A few months after the invasion of Iraq, U.S. officials helped broker a deal whereby Liberian President Charles Taylor, who had been indicted for crimes against humanity by the Special Court for Sierra Leone, agreed to give up power and was allowed to flee to Nigeria, where he received asylum. At the time, forces opposed to Taylor, which had taken over most of the country, were on the verge of attacking the capital city Monrovia, and tens of thousands of civilian casualties were forecast. The exile deal averted the crisis and set the stage for insertion of a U.N. peacekeeping mission that stabilized the country and set it on a path to peace and democracy. In contrast to the Hussein case, the Taylor arrangement did not in any way violate international law. This Article explains why international law should treat the two situations differently, prohibiting exile and asylum for Saddam Hussein while permitting such a justice-for-peace exchange in the case of Charles Taylor.

This is the first scholarly article in recent years to focus on the significant issue of exile. Scholarship on the analogous issue of amnesty has been written largely from the point of view of aggressive advocates of international justice, whose writing is based on the assumption that the widespread state practice favoring amnesties constitutes a violation of, rather than a reflection

of, international law in this area. Before analyzing the relevant legal principles, the Article begins with an examination of the practical considerations that counsel for and against the practice of "trading justice for peace." Next, using the Saddam Hussein and Charles Taylor cases as a focal point, the Article analyzes the relevant international instruments which require prosecution under limited circumstances. This is followed by a critique of the popular view that customary international law and the principle of *jus cogens* broadly prohibit actions that prevent prosecution of crimes under international law. The Article establishes that there does not yet exist a customary international law rule requiring prosecution of war crimes in internal armed conflict or crimes against humanity, but that there is a duty to prosecute in the case of grave breaches of the Geneva Conventions, the crime of genocide, and torture. Where the duty to prosecute does apply, it is important that states and international organizations honor it, lest they signal disrespect for the important treaties from which the duty arises, potentially putting their own citizens at risk and generally undermining the rule of law.

## *II. Practical Considerations*

### *A. Interests Favoring Exile, Asylum, and Amnesty*

Notwithstanding the popular catch phrase of the 1990s—"no peace without justice"—achieving peace and obtaining justice are sometimes incompatible goals—at least in the short term. In order to end an international or internal conflict, negotiations often must be held with the very leaders who are responsible for war crimes and crimes against humanity. When this is the case, insisting on criminal prosecutions can prolong the conflict, resulting in more deaths, destruction, and human suffering.

Reflecting this reality, during the past thirty years, Angola, Argentina, Brazil, Cambodia, Chile, El Salvador, Guatemala, Haiti, Honduras, Ivory Coast, Nicaragua, Peru, Sierra Leone, South Africa, Togo, and Uruguay have each, as part of a peace arrangement, granted amnesty to members of the former regime that committed international crimes within their respective borders. With respect to five of these countries—Cambodia, El Salvador, Haiti, Sierra Leone, and South Africa—"the United Nations itself pushed for, helped negotiate, or endorsed the granting of amnesty as a means of restoring peace and democratic government."

In addition to amnesty (which immunizes the perpetrator from domestic prosecution), exile and asylum in a foreign country (which puts the perpetrator out of the jurisdictional reach of domestic prosecution) is often used to induce regime change, with the blessing and involvement of significant states and the United Nations. Peace negotiators call this the "Napoleonic Option," in reference to the treatment of French emperor Napoleon Bonaparte who, after his defeat at Waterloo in 1815, was exiled to St. Helena rather than face trial or execution. More recently, a number of dictators have been granted sanctuary abroad in return for relinquishing power. Thus, for example, Ferdinand Marcos fled the Philippines for Hawaii; Baby Doc Duvalier fled Haiti for France; Mengistu Haile Miriam fled Ethiopia for Zimbabwe; Idi Amin fled Uganda for Saudi Arabia; General Raoul Cedras fled Haiti for Panama; and Charles Taylor fled Liberia for exile in Nigeria—a deal negotiated by the United States and U.N. envoy Jacques Klein.

As Payam Akhavan, then Legal Adviser to the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, observed a decade ago: "[I]t is not

unusual in the political stage to see the metamorphosis of yesterday's war monger into today's peace broker." This is because, unless the international community is willing to use force to topple a rogue regime, cooperation of the leaders is needed to bring about peaceful regime change and put an end to violations of international humanitarian law. Yet, it is not realistic to expect them to agree to a peace settlement if, directly following the agreement, they would find themselves or their close associates facing potential life imprisonment.

This conclusion finds support in the observations of the 2004 Report of the International Truth and Reconciliation Commission for Sierra Leone:

The Commission is unable to condemn the resort to amnesty by those who negotiated the Lomé Peace Agreement [which provides amnesty to persons who committed crimes against humanity in Sierra Leone]. The explanations given by the Government negotiators, including in their testimonies before the Truth and Reconciliation Commission, are compelling in this respect. In all good faith, they believed that the RUF [insurgents] would not agree to end hostilities if the Agreement were not accompanied by a form of pardon or amnesty. . . . The Commission is unable to declare that it considers amnesty too high a price to pay for the delivery of peace to Sierra Leone, under the circumstances that prevailed in July 1999. It is true that the Lomé Agreement did not immediately return the country to peacetime. Yet it provided the framework for a process that pacified the combatants and, five years later, has returned Sierra Leoneans to a context in which they need not fear daily violence and atrocity.

In brokering the Charles Taylor exile deal, the United States and United Nations were particularly encouraged by the success of similar amnesty/exile for peace arrangements relating to Haiti and South Africa in the 1990s. From 1990–1994, Haiti was ruled by a military regime headed by General Raoul Cedras and Brigadier General Philippe Biamby, which executed over 3000 civilian political opponents and tortured scores of others. The United Nations mediated negotiations at Governors Island in New York Harbor, in which the military leaders agreed to relinquish power and permit the return of the democratically elected President (Jean-Bertrand Aristide) in return for a full amnesty for the members of the regime and a lifting of the economic sanctions imposed by the U.N. Security Council. Under pressure from the United Nations mediators, Aristide agreed to the amnesty clause of the Governors Island Agreement. The Security Council immediately "declared [its] readiness to give the fullest possible support to the Agreement signed on Governors Island," which it later said constitutes "the only valid framework for the resolution of the crisis in Haiti." When the military leaders initially failed to comply with the Governors Island Agreement, on July 31, 1994, the Security Council took the extreme step of authorizing an invasion of Haiti by a multinational force. On the eve of the invasion on September 18, 1994, a deal was struck, whereby General Cedras agreed to retire his command and accept exile in response to a general amnesty voted into law by the Haitian parliament and an offer by Panama to provide him asylum.

The amnesty deal had its desired effect: The democratically elected Aristide was permitted to return to Haiti and reinstate a civilian government, the military leaders left the country for sanctuary in Panama, much of the military surrendered their arms, and most of the human rights abuses promptly ended—all with practically no bloodshed or resistance. Although the situation in Haiti has once again deteriorated, with a wave of violent protests and strikes erupting in 2004, the more recent problems were due largely to President Aristide's mismanagement and corruption, not the fact that the military leaders escaped punishment ten years earlier.

South Africa stands as another success story, indicating the potential value of trading justice for peace. From 1960 to 1994, thousands of black South Africans were persecuted and

mistreated under that country's apartheid system. With the prospect of a bloody civil war looming over negotiations, "[t]he outgoing leaders made some form of amnesty for those responsible for the regime a condition for the peaceful transfer to a fully democratic society." The leaders of the majority black population decided that the commitment to afford amnesty was a fair price for a relatively peaceful transition to full democracy. In accordance with the negotiated settlement between the major parties, on July 19, 1995, the South African Parliament created a Truth and Reconciliation Commission, consisting of a Committee on Human Rights Violations, a Committee on Amnesty, and a Committee on Reparation and Rehabilitation. Under this process, amnesty would be available only to individuals who personally applied for it and who disclosed fully the facts of their apartheid crimes. After conducting 140 public hearings and considering 20,000 written and oral submissions, the South African Truth Commission published a 2739-page report of its findings on October 29, 1998. Most observers believe the amnesty in South Africa headed off increasing tensions and a potential civil war.

It is a common misconception that trading amnesty or exile for peace is equivalent to the absence of accountability and redress. As in the Haitian and South African situations described above, amnesties can be tied to accountability mechanisms that are less invasive than domestic or international prosecution. Ever more frequently in the aftermath of an amnesty- or exile-for-peace deal, the concerned governments have made monetary reparations to the victims and their families, established truth commissions to document the abuses (and sometimes identify perpetrators by name), and have instituted employment bans and purges (referred to as "lustration") that keep such perpetrators from positions of public trust. While not the same as criminal prosecution, these mechanisms do encompass much of what justice is intended to accomplish: prevention, deterrence, punishment, and rehabilitation. Indeed, some experts believe that these mechanisms do not just constitute "a second best approach" when prosecution is impracticable, but that in many situations they may be better suited to achieving the aims of justice.



#### *B. Factors Favoring Prosecution*

Although providing amnesty and exile to perpetrators may be an effective way to induce regime change without having to resort to force, there are several important countervailing considerations favoring prosecution that suggest amnesty/exile should be a bargaining tool of last resort reserved only for extreme situations. In particular, prosecuting leaders responsible for violations of international humanitarian law is necessary to discourage future human rights abuses, deter vigilante justice, and reinforce respect for law and the new democratic government.

While prosecutions might initially provoke resistance, many analysts believe that national reconciliation cannot take place as long as justice is foreclosed. As Professor Cherif Bassiouni, then Chairman of the U.N. Investigative Commission for Yugoslavia, stated in 1996, "[i]f peace is not intended to be a brief interlude between conflicts," then it must be accompanied by justice.

Failure to prosecute leaders responsible for human rights abuses breeds contempt for the law and encourages future violations. The U.N. Commission on Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities have concluded that impunity is one of the main reasons for the continuation of grave violations of human rights throughout the world. Fact finding reports on Chile and El Salvador indicate that the granting of amnesty or de facto impunity has led to an increase in abuses in those countries.

Further, history teaches that former leaders given amnesty or exile are prone to recidivism, resorting to corruption and violence and becoming a disruptive influence on the peace process. From his seaside villa in Calabar, Nigeria, for example, Charles Taylor orchestrated a failed assassination plot in 2005 against President Lansana Conte of Guinea, a neighboring country that had backed the rebel movement that forced Taylor from power.

What a new or reinstated democracy needs most is legitimacy, which requires a fair, credible, and transparent account of what took place and who was responsible. Criminal trials (especially those involving proof of widespread and systematic abuses) can generate a comprehensive record of the nature and extent of violations, how they were planned and executed, the fate of individual victims, who gave the orders, and who carried them out. While there are various means to develop the historic record of such abuses, the most authoritative rendering of the truth is possible only through the crucible of a trial that accords full due process. Supreme Court Justice Robert Jackson, the Chief Prosecutor at Nuremberg, underscored the logic of this proposition when he reported that the most important legacy of the Nuremberg trials was the documentation of Nazi atrocities "with such authenticity and in such detail that there can be no responsible denial of these crimes in the future." According to Jackson, the establishment of an authoritative record of abuses that would endure the test of time and withstand the challenge of revisionism required proof of "incredible events by credible evidence."

In addition to truth, there is a responsibility to provide justice. While a state may appropriately forgive crimes against itself, such as treason or sedition, serious crimes against persons, such as rape and murder, are an altogether different matter. Holding the violators accountable for their acts is a moral duty owed to the victims and their families. Prosecuting and punishing the violators would give significance to the victims' suffering and serve as a partial remedy for their injuries. Moreover, prosecutions help restore victims' dignity and prevent private acts of revenge by those who, in the absence of justice, would take it into their own hands.

While prosecution and punishment can reinforce the value of law by displacing personal revenge, failure to punish former leaders responsible for widespread human rights abuses encourages cynicism about the rule of law and distrust toward the political system. To the victims of human rights crimes, amnesty or exile represents the ultimate in hypocrisy: While they struggle to put their suffering behind them, those responsible are allowed to enjoy a comfortable retirement. When those with power are seen to be above the law, the ordinary citizen will never come to believe in the principle of the rule of law as a fundamental necessity in a society transitioning to democracy.

Finally, where the United Nations or major countries give their imprimatur to an amnesty or exile deal, there is a risk that leaders in other parts of the world will be encouraged to engage in gross abuses. For example, history records that the international amnesty given to the Turkish officials responsible for the massacre of over one million Armenians during World War I encouraged Adolf Hitler some twenty years later to conclude that Germany could

pursue his genocidal policies with impunity. In a 1939 speech to his reluctant General Staff, Hitler remarked, "Who after all is today speaking about the destruction of the Armenians?" Richard Goldstone, the former Prosecutor of the International Criminal Tribunal for the former Yugoslavia, has concluded that "the failure of the international community to prosecute Pol Pot, Idi Amin, Saddam Hussein and Mohammed Aidid, among others, encouraged the Serbs to launch their policy of ethnic cleansing in the former Yugoslavia with the expectation that they would not be held accountable for their international crimes." When the international community encourages or endorses an amnesty or exile deal, it sends a signal to other rogue regimes that they have nothing to lose by instituting repressive measures; if things start going badly, they can always bargain away their responsibility for crimes by agreeing to peace.

### *III. The Limited International Legal Obligation to Prosecute*

In a few narrowly defined situations (described below) there is an international legal obligation to prosecute regardless of the underlying practical considerations. Where this is the case, failure to prosecute can amount to an international breach. An amnesty or asylum given to the members of the former regime could be invalidated in a proceeding before either the state's domestic courts or an international forum. International support for such an amnesty or asylum deal would undermine international respect for and adherence to the treaties that require prosecution. Finally, it would be inappropriate for an international criminal court to defer to a national amnesty or asylum in a situation where the amnesty or asylum violates obligations contained in the very international conventions that make up the court's subject matter jurisdiction.

#### *A. Crimes Defined in International Conventions*

The prerogative of states to issue an amnesty or grant asylum for an offense can be circumscribed by treaties to which the states are party. There are several international conventions that clearly provide for a duty to prosecute the humanitarian or human rights crimes defined therein, including in particular the grave breaches provisions of the 1949 Geneva Conventions, the Genocide Convention, and the Torture Convention. When these Conventions are applicable, the granting of amnesty or asylum to persons responsible for committing the crimes defined therein would constitute a breach of a treaty obligation for which there can be no excuse or exception. It is noteworthy, however, that these Conventions were negotiated in the context of the Cold War and by design apply only to a narrow range of situations, as such limitations were necessary to ensure widespread adoption.

##### *1. The 1949 Geneva Conventions*

The four Geneva Conventions were negotiated in 1949 to codify, *inter alia*, the international rules relating to the treatment of prisoners of war and civilians during armed conflict and in occupied territory after a war. Almost every country of the world is party to these conventions. Each of the Geneva Conventions contains a specific enumeration of "grave

breaches," which are war crimes under international law for which there is individual criminal liability and for which states have a corresponding duty to prosecute or extradite. Grave breaches include willful killing, torture or inhuman treatment, willfully causing great suffering or serious injury to body or health, extensive destruction of property not justified by military necessity, willfully depriving a civilian of the rights of fair and regular trial, and unlawful confinement of a civilian.

Parties to the Geneva Conventions have an obligation to search for, prosecute, and punish perpetrators of grave breaches of the Geneva Conventions, or to hand over such persons for trial by another state party. The Commentary to the Geneva Conventions, which is the official history of the negotiations leading to the adoption of these treaties, confirms that the obligation to prosecute grave breaches is "absolute," meaning, *inter alia*, that state parties can under no circumstances grant perpetrators immunity or amnesty from prosecution for grave breaches of the Conventions.

It is important to recognize that while states or international tribunals may prosecute persons who commit war crimes in internal armed conflicts, the duty to prosecute grave breaches under the Geneva Conventions is limited to the context of international armed conflict. Further, there is a high threshold of violence necessary to constitute a genuine armed conflict, as distinct from lower level disturbances such as riots, isolated and sporadic acts of fighting, or unilateral abuses committed by a government in the absence of widespread armed resistance by the target population. Moreover, to be an international armed conflict, the situation must constitute an armed conflict involving two or more states, or a partial or total occupation of the territory of one state by another.

In contrast to the duty to prosecute grave breaches occurring in an international armed conflict, with respect to internal armed conflict amnesties are not only permitted, but are encouraged by Article 6(5) of Additional Protocol II—a point the South African Constitutional Court stressed in finding that the amnesties granted by the Truth and Reconciliation Commission did not violate international law. The rationale for this provision is to encourage reconciliation, which is of greater importance in noninternational armed conflicts where patrolable international borders do not exist between former enemies. Thus, the Commentary on the Protocol, prepared by the International Committee of the Red Cross, states: "The object of this sub-paragraph is to encourage gestures of reconciliation which can contribute to reestablishing normal relations in the life of a nation which has been divided."

The Geneva Conventions, then, would require prosecution of Saddam Hussein for acts committed during the international armed conflicts involving Iran, Kuwait, and the 1991 Persian Gulf War. They would not, however, require prosecution of Charles Taylor, who is accused only of complicity in war crimes during the internal armed conflict in Sierra Leone.

## *2. The Genocide Convention*

Most of the countries of the world are party to the Genocide Convention, which entered into force on January 12, 1952, and the International Court of Justice has determined that the substantive provisions of the Convention constitute customary international law binding on all states. Like the Geneva Conventions, the Genocide Convention provides an absolute obligation to prosecute persons responsible for genocide as defined in the Convention.

The Genocide Convention defines genocide as one of the following acts when 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.

There are several important limitations inherent in this definition. First, to constitute genocide, there must be proof that abuses were committed with the specific intent required by the Genocide Convention. It is not enough that abuses were intended to repress opposition; the intent must be literally to destroy a group of people. Second, and even more importantly, the victims of such abuses must constitute a group of one of the four specific types enumerated in the Genocide Convention, namely, national, ethnic, racial, or religious. In this respect, it is noteworthy that the drafters of the Genocide Convention deliberately excluded acts directed against "political groups" from the Convention's definition of genocide.

The Genocide Convention would require prosecution of Saddam Hussein, who has been accused of ordering attacks aimed at destroying the Northern Iraqi Kurds and the Southern Iraqi Marsh Arabs as a people, resulting in hundreds of thousands of casualties. Charles Taylor, in contrast, has not been accused of acts of genocide.

#### *B. The Torture Convention*

The Torture Convention entered into force on June 26, 1987, and currently has 138 parties. The Convention defines "torture" as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The Torture Convention requires each state party to ensure that all acts of torture are offenses under its internal law and to establish its jurisdiction over such offenses in cases where the accused is found in its territory, and if such a state does not extradite the alleged offender, the Convention requires it to submit the case to its competent authorities for the purpose of prosecution. Persons convicted of torture are to be subjected to harsh sentences proportionate to the grave nature of the offense.

The Special Court for Sierra Leone charged Charles Taylor with committing crimes against humanity in Sierra Leone, including complicity in widespread and systematic acts of torture, from 1991–1999. Notably, however, neither Sierra Leone (the state where the acts of torture occurred), Liberia (the state of nationality of the accused), nor Nigeria (the state where

Charles Taylor was given asylum) were parties to the Torture Convention when the acts of torture in Sierra Leone were committed. And although the United States, which helped broker the exile-for-peace deal, was a party to the Torture Convention during that time, the requirements of the convention are not applicable to the United States in this case because the acts of torture did not occur in U.S. territory, the offender was not a national of the United States, and the offender was not present in U.S. territory. Under the Vienna Convention on the Law of Treaties, the provisions of a treaty "do not bind a party in relation to any act or fact which took place . . . before the date of the entry into force of the treaty with respect to that party." Consistent with the Vienna Convention as well as the reasoning of the British High Court in the *Pinochet* case, the obligations to prosecute and to refrain from taking actions which would frustrate prosecution contained in the Torture Convention were not applicable to the case of Charles Taylor because his alleged involvement in acts of torture pre-dated the ratification of the Convention by the relevant states.

Still, some might argue that the Torture Convention is relevant to the situation involving Charles Taylor based on the Committee Against Torture's 1990 decision concerning the Argentinean amnesty laws. In that case, the Committee Against Torture, which is the treaty body created by the Torture Convention to facilitate its implementation, decided that communications submitted by Argentinean citizens on behalf of their relatives who had been tortured by Argentinean military authorities were inadmissible since Argentina had ratified the Convention only after the amnesty laws had been enacted. However, in dictum, the Committee stated "even before the entry into force of the Convention against Torture, there existed a general rule of international law which should oblige all states to take effective measures to prevent torture and to punish acts of torture."

The Committee's statement should not be mistakenly construed as suggesting that amnesties/asylum for persons who commit torture is invalid under customary international law. By using the word "should," the Committee indicated that its statement was aspirational rather than a declaration of binding law. On the basis of its decision, the Committee urged Argentina to provide remedies for the victims of torture and their surviving relatives; it did not suggest that international law *required* that Argentina do so. Nor did it specify that the remedy should be prosecution of those responsible, rather than some other appropriate remedy such as compensation. The Committee's decision, therefore, should not be read as indicating that the Torture Convention required Nigeria, Liberia, or Sierra Leone to prosecute those whose acts of torture pre-dated their ratification of the Convention.

#### *4. General Human Rights Conventions*

General human rights conventions include the International Covenant on Civil and Political Rights, and the similarly worded European Convention for the Protection of Human Rights and Fundamental Freedoms, and American Convention on Human Rights. Although these treaties do not expressly require states to prosecute violators, they do obligate states to "ensure" the rights enumerated therein. There is growing recognition in the jurisprudence of the treaty bodies responsible for monitoring enforcement of these conventions and the writings of respected commentators that the duty to ensure rights implies a duty to hold specific violators accountable.

Yet, a careful examination of the jurisprudence of these bodies suggests that methods of obtaining specific accountability other than criminal prosecutions would meet the requirement of "ensuring rights." This jurisprudence indicates that a state must fulfill five obligations in confronting gross violations of human rights committed by a previous regime: (1) investigate the identity, fate, and whereabouts of victims; (2) investigate the identity of major perpetrators; (3) provide reparation or compensation to victims; (4) take affirmative steps to ensure that human rights abuse does not recur; and (5) punish those guilty of human rights abuse. Punishment can take many noncriminal forms, including imposition of fines, removal from office, reduction of rank, forfeiture of government or military pensions, and exile.

## *B. Crimes Against Humanity*

### *1. Definition*

As developed in the jurisprudence of the Nuremberg Tribunal and codified in the Statutes of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the Rome Statute for the International Criminal Court, crimes against humanity are defined as:

any of the following acts when committed as part of a widespread or systematic attack 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) Persecutions against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, 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.

States are required to prosecute grave breaches of the Geneva Conventions and the crime of genocide, but there exists no treaty requiring prosecution of crimes against humanity (except for torture where the state is party to the Torture Convention at the time the crime is

committed); crimes against humanity are purely a creature of customary international law. Traditionally, those who committed crimes against humanity were treated like pirates, as *hostis humani generis* (an enemy of all humankind), and any state, including their own, could punish them through its domestic courts. In the absence of a treaty containing the *aut dedere aut judicare* (extradite or prosecute) principle, this so called "universal jurisdiction" is generally thought to be permissive, not mandatory. Yet several commentators and human rights groups have recently taken the position that customary international law (and the notion of *jus cogens*—meaning peremptory norms) not only establishes permissive jurisdiction over perpetrators of crimes against humanity, but also requires their prosecution and conversely prohibits the granting of amnesty or asylum to such persons.

## 2. Customary International Law

Notwithstanding the chimerical conclusions of some scholars, there is scant evidence that a rule prohibiting amnesty or asylum in cases of crimes against humanity has ripened into a compulsory norm of customary international law. Customary international law, which is just as binding upon states as treaty law, arises from "a general and consistent practice of states followed by them from a sense of legal obligation" referred to as *opinio juris*. Under traditional notions of customary international law, "deeds were what counted, not just words." Yet those who argue that customary international law precludes amnesty/exile for crimes against humanity base their position on nonbinding General Assembly resolutions, hortative declarations of international conferences, and international conventions that are not widely ratified, rather than on any extensive state practice consistent with such a rule.

Commentators often cite the 1967 U.N. Declaration on Territorial Asylum as the earliest international recognition of a legal obligation to prosecute perpetrators of crimes against humanity. The Declaration provides that "the right to seek and enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a . . . crime against humanity." Yet according to the historic record of this resolution, "[t]he majority of members stressed that the draft declaration under consideration was not intended to propound legal norms or to change existing rules of international law, but to lay down broad humanitarian and moral principles upon which States might rely in seeking to unify their practices relating to asylum." This evidences that, from the outset, the General Assembly resolutions concerning the prosecution of crimes against humanity were aspirational only, and not intended to create any binding duties.

In addition to this contrary legislative history, the trouble with an approach to proving the existence of customary international law that focuses so heavily on words is "that it is grown like a flower in a hot-house and that it is anything but sure that such creatures will survive in the much rougher climate of actual state practice." Indeed, to the extent any state practice in this area is widespread, it is the practice of granting amnesties or asylum to those who commit crimes against humanity. That the United Nations itself has felt free of legal constraints in endorsing recent amnesty and exile-for-peace deals in situations involving crimes against humanity suggests that customary international law has not yet crystallized in this area. The Special Court for Sierra Leone confirmed this when it recently held that domestic amnesties for crimes against humanity and war crimes committed in an internal armed conflict were not unlawful under international law.

Commentators may point to the Secretary General's August 2004 Report to the Security Council on the Rule of Law and Transitional Justice as an indication that the United Nations has recently altered its position on the acceptability of amnesty/exile for peace deals. In that report, the Secretary-General of the United Nations said that peace agreements and Security Council resolutions and mandates should "[r]eject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, including those relating to ethnic, gender and sexually based international crimes, [and] ensure that no such amnesty previously granted is a bar to prosecution before any United Nations-created or -assisted court." It is more significant, however, that in the Security Council's debate on the Secretary-General's Report, there was no consensus on this particularly controversial recommendation (only two of the fifteen members of the Council—Brazil and Costa Rica—spoke in favor of it while several opposed it), and the statement approved by the Council at the end of the debate made no reference to the issue of amnesty.

### 3. Jus Cogens

The concept of *jus cogens*—meaning "peremptory norms"—is said to be among the "most ambiguous and theoretically problematic of the doctrines of international law." Since the inception of the modern state system three and a half centuries ago, international law has been based on notions of consent. Under this concept of *jus dispositivum* (positive law), states were bound only to treaties to which they had acceded and to those rules of customary international law to which they had acquiesced. The concept of *jus cogens*, in contrast, is based in part on natural law principles that "prevail over and invalidate international agreements and other rules of international law in conflict with them."

Though the term itself was not employed, the *jus cogens* concept was first applied by the U.S. Military Tribunal at Nuremberg, which declared that the treaty between Germany and Vichy France approving the use of French prisoners of war in the German armaments industry was void under international law as *contra bonus mores* (contrary to fundamental morals). The debates within the U.N. International Law Commission, which codified the *jus cogens* concept in the 1969 Vienna Convention on the Law of Treaties, reflect the view that the phenomenon of Nazi Germany rendered the purely contractual conception of international law insufficient for the modern era. Consequently, the International Law Commission opined that a treaty designed to promote slavery or genocide, or to prepare for aggression, ought to be declared void.

Thus, pursuant to the *jus cogens* concept, states are prohibited from committing crimes against humanity and an international agreement between states to facilitate commission of such crimes would be void *ab initio*. Moreover, there is growing recognition that universal jurisdiction exists such that all states have a right to prosecute or entertain civil suits against the perpetrators of *jus cogens* crimes. From this, some commentators take what they view as the next logical step and argue that the concept also prohibits states from undertaking any action that would frustrate prosecution, such as granting amnesty or asylum to those who have committed crimes against humanity.

Such scholars fail, however, to take into consideration the fact that although *jus cogens* has natural law underpinnings, the concept is also related to customary law. A rule will qualify as *jus cogens* only if it is "accepted by the international community of States as a whole as a norm from which no derogation is permitted." Thus, *jus cogens* norms have been described by

one court as "a select and narrow subset of the norms recognized as customary international law." As with ordinary customary international law, *jus cogens* norms are formed through widespread state practice and recognition, but unlike ordinary customary international law, a state cannot avoid application of a *jus cogens* norm by being a persistent objector during its formation.

Though there is no question that the international community has accepted that the prohibition against committing crimes against humanity qualifies as a *jus cogens* norm, this does not mean that the associated duty to prosecute has simultaneously attained an equivalent status. In fact, all evidence is to the contrary. Not only have there been numerous instances of states providing amnesty and asylum to leaders accused of crimes against humanity, but, even more telling, there have been no protests from states when such amnesty or asylum has been offered. Moreover, there has been widespread judicial recognition that the *jus cogens* nature of crimes against humanity does not prevent accused perpetrators from successfully asserting head of state immunity or sovereign immunity to avoid criminal or civil liability in foreign courts. Because *jus cogens*, as a peremptory norm, would by definition supersede the customary international law doctrine of head of state immunity where the two come into conflict, the only way to reconcile these rulings is to conclude that the duty to prosecute has not attained *jus cogens* status.

As compared to the substantive rule of law prohibiting states from entering into international agreements that facilitate the commission of crimes against humanity, the procedural obligation of third parties to prosecute such crimes after their commission constitutes a far greater intrusion into a state's internal sovereignty, with far less justification. Thus, it is sensible that such an encroachment would require the state's consent through the carefully negotiated provisions of a treaty—such as the Geneva Conventions, Genocide Convention, or Torture Convention—which would narrowly define the applicable circumstances and perhaps—like the Rome Statute—provide escape clauses permitting states to disregard the obligation to prosecute when strict enforcement would frustrate greater interests of international peace and justice.

### *C. Amnesty/Exile and the International Criminal Court*

The above discussion indicates that there are frequently no international legal constraints on the negotiation of an amnesty/exile-for-peace deal, and that in certain circumstances swapping amnesty/exile for peace can serve the interests of both peace and justice. However, an international criminal tribunal is not bound to defer to a domestic amnesty/exile arrangement. During the negotiations for the Rome Statute creating the International Criminal Court (ICC), the United States and a few other delegations expressed concern that the ICC would hamper efforts to halt human rights violations and restore peace and democracy in places like Haiti and South Africa.

According to the Chairman of the Rome Diplomatic Conference, Philippe Kirsch of Canada, the issue was not definitively resolved during the Diplomatic Conference. Rather, the provisions that were adopted reflect "creative ambiguity" that could potentially allow the prosecutor and judges of the ICC to interpret the Rome Statute as permitting recognition of an amnesty or asylum exception to the jurisdiction of the court.

### *1. The Preamble*

The preamble to the Rome Statute suggests that deferring a prosecution because of the existence of a national amnesty or asylum deal would be incompatible with the purpose of the court, namely to ensure criminal prosecution of persons who commit serious international crimes. In particular, the Preamble:

Affirm[s] that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured . . .

Recall[s] that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes . . .

[And] Emphasiz[es] that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.

Preambular language is important because international law provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Thus, the Rome Statute's preamble constitutes a critical source of interpretation because it indicates both the treaty's context and its object and purpose. Yet, notwithstanding this preambular language, there are several articles of the Rome Statute (discussed below) that might be read as permitting the court under certain circumstances to recognize an amnesty exception to its jurisdiction. The apparent conflict between these articles and the preamble reflects the schizophrenic nature of the negotiations at Rome: The preambular language and the procedural provisions were negotiated by entirely different drafting groups, and in the rush of the closing days of the Rome Conference, the drafting committee never fully integrated and reconciled the separate portions of the Statute.

### *2. Article 16: Action by the Security Council*

With respect to a potential amnesty/asylum exception, the most important provision of the Rome Statute is Article 16. Under that article, the ICC would be required to defer to a national amnesty if the Security Council adopts a resolution under Chapter VII of the United Nations Charter requesting the court not to commence an investigation or prosecution, or to defer any proceedings already in progress. The Security Council recently invoked its right under Article 16 of the Rome Statute in adopting Resolution 1593, referring the Darfur atrocities to the ICC for prosecution but at the same time providing that the ICC could not exercise jurisdiction over foreign military personnel in Darfur who are from states (other than Sudan) that are not parties to the Rome Statute.

The Security Council has the legal authority to require the court to respect an amnesty or asylum if two requirements are met, namely: (1) the Security Council has determined the existence of a threat to the peace, a breach of the peace, or an act of aggression under Article 39 of the U.N. Charter; and (2) the resolution requesting the court's deferral is consistent with the purposes and principles of the United Nations with respect to maintaining international peace and security, resolving threatening situations in conformity with principles of justice and international law, and promoting respect for human rights and fundamental freedoms under Article 24 of the U.N. Charter.

The decision of the Appeals Chamber of the Yugoslavia Tribunal in the *Tadic* case suggests that the ICC could assert that it has the authority to independently assess whether these two requirements were met as part of its incidental power to determine the propriety of its own jurisdiction (competence de la compétence). One commentator has characterized this aspect of the Appeals Chamber decision as "strongly support[ing] those who see the U.N. Charter not as unblinkered license for police action but as an emerging constitution of enumerated, limited powers subject to the rule of law." It is possible, then, that the ICC would not necessarily be compelled by the existence of a Security Council resolution to terminate an investigation or prosecution were it to find that an amnesty contravenes international law.

While an amnesty or exile arrangement accompanied by the establishment of a truth commission, victim compensation, and lustration might be in the interests of justice in the broad sense, it would nonetheless be in contravention of international law where the grave breaches provisions of the 1949 Geneva Conventions, the Genocide Convention, or the Torture Convention are applicable. It is especially noteworthy that the Geneva Conventions require parties "to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention," that the Genocide Convention requires parties "to provide effective penalties for persons guilty of genocide," and that the Torture Convention requires parties to make torture "punishable by appropriate penalties which take into account their grave nature."

This would suggest that the ICC might not defer to the Security Council under Article 16 of the Rome Statute where the accused is charged with grave breaches of the 1949 Geneva Conventions, the crime of genocide, or torture. Yet, a strong counterargument can be made that the Rome Statute codifies only the substantive provisions of the 1949 Geneva Conventions, the Genocide Convention, and the Torture Convention, and does not incorporate those procedural aspects of the Conventions that require prosecution (which apply to the state parties but not to the ICC, which has its own international legal personality). Accordingly, the nature of the charges might constitute a factor to be considered but would not necessarily be a bar to deferring to an amnesty or exile arrangement.

### *3. Article 53: Prosecutorial Discretion*

Where the Security Council has not requested the ICC to respect an amnesty or exile-for-peace deal and thereby to terminate a prosecution, the court's prosecutor may choose to do so under Article 53 of the Rome Statute. That article permits the prosecutor to decline to initiate an investigation (even when a state party has filed a complaint) where the prosecutor concludes there are "substantial reasons to believe that an investigation would not serve the interests of justice." However, the decision of the prosecutor under Article 53 is subject to review by the pretrial chamber of the court. In reviewing whether respecting an amnesty or exile deal and not prosecuting would better serve "the interests of justice," the pretrial chamber would have to evaluate the benefits of a particular amnesty or exile arrangement and consider whether there is an international legal obligation to prosecute the offense (as discussed above).

### *4. Article 17: Complementarity*

Where neither the Security Council nor the prosecutor has requested the ICC to defer to a national amnesty, the concerned state can attempt to raise the issue under Article 17(1)(a) of the Rome Statute. That article requires the court to dismiss a case where "[t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution." It is significant that the article requires an investigation but does not specify that it be a criminal investigation. The concerned state could argue that a truth commission (especially one modeled on that of South Africa) constitutes a genuine investigation. On the other hand, subsection (2) of Article 17 suggests that the standard for determining that an investigation is not genuine is whether the proceedings are "inconsistent with an intent to bring the person concerned to justice"—a phrase that might be interpreted as requiring criminal proceedings.

\* \* \*

In sum, the Rome Statute is purposely ambiguous on the question of whether the ICC should defer to an amnesty/exile-for-peace arrangement in deciding whether to exercise its jurisdiction. While amnesties and exiles are sometimes a necessary bargaining chip in negotiations for the peaceful transfer of political power, it must be recognized that such arrangements can vary greatly. Some, as in South Africa and Haiti, are closely linked to mechanisms for providing accountability and redress; others, as in the case of the exile of Charles Taylor, are simply a mindful forgetting. The ICC should take only the former types of amnesties/exiles into account in prosecutorial decisions. Moreover, the ICC should be particularly reluctant to defer to an amnesty/exile in situations involving violations of international conventions that create obligations to prosecute, such as the Genocide Convention and the grave breaches provisions of the Geneva Conventions. The other international agreements and customary international law crimes that make up the ICC's subject matter jurisdiction make prosecution for related crimes possible, but not mandatory, and should be treated as such by the court in the broader interests of peace and international security.

#### *IV. Conclusion*

This Article has described how, under the present state of international law, the international procedural law imposing a duty to prosecute is far more limited than the substantive law establishing international offenses. The reason for this is historical: With respect to all but the most notorious of international crimes, it was easier for states to agree to recognize permissive jurisdiction than to undertake a duty to prosecute. But where the duty to prosecute does apply, it is critical that states and international organizations honor it, lest they express contempt for the important treaties from which the duty arises, potentially putting their own citizens at risk pursuant to the international law principle of reciprocity.

This is not to suggest, however, that states must rush to prosecute all persons involved in offenses under these treaties. Selective prosecution and use of "exemplary trials" is acceptable as long as the criteria used reflect appropriate distinctions based upon degrees of culpability and sufficiency of evidence. Moreover, while the provisions of the treaties requiring prosecution are nonderogable even in time of public emergency that threatens the life of the nation, the doctrine of *force majeure* can warrant temporary postponement of prosecutions for a reasonable amount of time until a new government is secure enough to take such action against members of the

former regime or until a new government has the judicial resources to undertake fair and effective prosecutions.

In the case of Saddam Hussein, the United States had accused the Iraqi leader of grave breaches of the Geneva Conventions and violations of the Genocide Convention. Both the United States and Iraq were parties to these treaties, which contain an absolute obligation to prosecute offenders. By offering to permit exile and perpetual sanctuary in Bahrain in lieu of invasion and prosecution, the Bush administration signaled that the provisions of these treaties are inconsequential, thereby undermining the rule of law in a critical area of global affairs. This must be viewed also in light of other U.S. actions involving application of the Geneva Conventions to the conflict in Iraq, most notably the infamous White House memos authored by now Attorney General Alberto Gonzales. The memos refer to the Geneva Conventions as "obsolete" and "quaint," and wrongly opine that the Torture Convention permits mild forms of torture, thereby creating a climate of disdain toward international humanitarian law and opening the door to the abuses committed at Abu Ghraib prison in Iraq. In a statement before the Senate Judiciary Committee, Admiral John Hutson, Judge Advocate General of the U.S. Navy from 1997–2000, urged the Bush administration to officially and unequivocally repudiate Gonzales's erroneous position. In doing so, Hutson stressed that:

Since World War II and looking into the foreseeable future, United States armed forces are more forward-deployed both in terms of numbers of deployments and numbers of troops than all other nations combined. What this means in practical terms is that adherence to the Geneva Conventions is more important to us than to any other nation. We should be the nation demanding adherence under any and all circumstances because we will benefit the most.

Because Hussein did not accept the exile-for-peace offer, the damage to the rule of law in this instance was negligible. Would greater damage to the rule of law have nevertheless been acceptable if it succeeded in averting a war which has resulted in tens of thousands of casualties on both sides since 2003? This Article has described the policy reasons generally favoring prosecution, including the fact that former leaders who have resorted to war crimes and crimes against humanity tend to be recidivists. Saddam Hussein himself launched a coup and initiated his policy of terror after he was released from prison through a domestic amnesty in 1968. It is not hard to imagine the dangers Hussein could present to the Iraqi democratic transition from exile in nearby Bahrain. Moreover, the people of Iraq have insisted on Hussein's trial before the Iraqi Special Tribunal. Morally, what right would American negotiators have to trade away the ability of thousands of Hussein's victims to see the dictator brought to justice? Finally, it is worth stressing that the duty to prosecute Hussein arising from these treaties did not require or even justify the invasion of Iraq. Rather, it merely prohibited actions that are manifestly incompatible with the prosecution of Hussein, such as arranging for exile and sanctuary in Bahrain.

The situation involving Charles Taylor is distinguishable. Taylor has been charged by the Special Court for Sierra Leone with complicity in crimes against humanity and war crimes in an internal armed conflict. As the Special Court itself has recognized, since there is no treaty-based nor customary international law duty to prosecute crimes against humanity or war crimes in an internal conflict, an amnesty or exile-for-peace deal would not constitute a violation of international law.

The distinction reflects the fact that, notwithstanding the natural law rhetoric of *jus cogens* employed by proponents of a broad duty to prosecute, the international legal order is still

governed by principles of positive law under the 357-year-old Westphalian concept of sovereignty. State practice belies the existence of a customary international law duty (based on the positive law notion of state acquiescence to rules over time) to prosecute outside of the treaty framework. Consequently, the obligation to prosecute and the corresponding duty to refrain from frustrating prosecution through amnesty or exile applies only to certain treaty-based crimes where the treaty sets forth such an obligation and the affected states are party to the treaty at the time of the acts in question. This conclusion is analogous to that of the House of Lords in the *Pinochet* case, in which the British High Court held that the head of state immunity doctrine prevented the United Kingdom from extraditing to Spain former Chilean President Augusto Pinochet for crimes against humanity, with the exception of crimes of torture committed after the U.K., Chile, and Spain had all ratified the Torture Convention. Thus, while there was a treaty-based duty to prosecute Saddam Hussein under the Geneva Conventions and Genocide Convention, no such duty existed in the case of Charles Taylor, who was accused of crimes against humanity.

This does not mean that the Special Court for Sierra Leone has to honor the Charles Taylor exile-for-peace deal. The Special Court made clear that amnesty and exile arrangements are only binding within the state(s) granting them. They do not apply to other states or to international tribunals such as the Special Court. Moreover, it is important to recognize that amnesty, exile, and sanctuary arrangements are often temporary in nature. They are not a permanent right of the recipient, but a privilege bestowed by the territorial state, which can be revoked by a subsequent government or administration. The trend in recent years is to use amnesty and exile as a transitional step toward eventual justice, not as an enduring bar to justice. As a U.S. Department of State official explained with respect to Charles Taylor, "First we'll get him out of Liberia, then we'll get him to the Court."

	Grave Breaches	Other War Crimes	Genocide	Crimes Against Humanity	Torture
Haiti in 1994					
S. Africa - Apartheid					
Cambodia - Killing Fields					
Bosnia/Serbia in 1995 (Srebrenica)					
Iraq in 1988 (Anfal)					
Syria in 2013					








This chart is designed to summarize the materials in this Module. Which of the international crimes listed above on the top line were applicable to each of the six situations listed on the left column? Crimes in red indicate a duty to prosecute.



CASE WESTERN RESERVE  
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# **INTRODUCTION TO INTERNATIONAL CRIMINAL LAW**

**MOOC taught by Professor  
Michael P. Scharf**

**Module #3:**

**Terrorism and Piracy**

## **International Criminal Law Module #3 Terrorism and Piracy**

Before watching the video for this session, please read through the simulation and the material below:

### **Simulation:**

For three decades, the United Nations has been trying to negotiate a consensus definition of terrorism. Assume that the United Nations has convened a Diplomatic Conference to adopt a universal definition of terrorism, and you are a delegate to the Diplomatic Conference. The working draft provides:

**“Terrorism is the intentional use of, or threat to use violence against civilians or against civilian targets, in order to attain political aims.”**

You are invited to provide a short on-line submission that critique this definition and proposes alternative language to improve it from the perspective of your assigned country as set forth below.

**Group A** will represent States that have been the target of international terrorism: The United States, the United Kingdom, France, Russia, India, Japan, and Israel. Pick any state from this list.

**Group B** will represent States that are known to have terrorist groups active within their territory, or which have been accused of supporting terrorists: Afghanistan (al Qaeda), Pakistan (al Qaeda), Yemen (al Qaeda), Lebanon (Hizballah) Somalia (al Shabab), Spain (ETA), Columbia (FARC), Turkey (PKK), Iran (State sponsor of Islamic terrorist groups), Syria (State sponsor of Islamic terrorist groups). Pick any state from this list.

In order to complete the optional on-line simulations for this course, students must go to the Navigation Bar on the left panel. Under the Exercises section, you will find a button for “on-line simulations.” The simulations for each session are available under this button. Written work can be submitted directly or through file upload. Students who post five or more on-line submissions of over 200 words in length during the course (simulations and discussions) will be awarded a Statement of Accomplishment with Distinction for the course.



## Readings

### (1) Making sense of the U.N. Terrorism Resolutions

In a landmark resolution adopted in 1991 (whose language has been repeated in several subsequent resolutions), the United Nations General Assembly stated that it “unequivocally condemns, as criminal and unjustifiable, all acts, methods and practices of terrorism wherever and by whoever committed.” Rather than attempt to define terrorism, the resolution simply listed in its preamble the “existing international conventions relating to various aspects of the problem of international terrorism.” The referenced international conventions require States Parties to criminalize specified conduct, to either initiate prosecution of or to extradite the transgressors, and to cooperate with other States for effective implementation. The conventions prohibit the following: aircraft hijacking, aircraft sabotage, attacks against ships and fixed platforms in the ocean, attacks at airports, violence against officials and diplomats, hostage-taking, theft of nuclear material, use of unmarked plastic explosives, bombings against civilian targets, and attacks against UN Peacekeepers. Would resort to other forms of terror-violence not covered by those conventions such as attacking a school bus with a machine gun for political purposes and with an intent to produce a terror outcome fit within the resolution’s unequivocal condemnation of terrorism?

The last paragraph of the U.N. resolution provides that “noting in the present resolution could in any way prejudice the right to self-determination ..., particularly peoples under colonial and racist regimes or other forms of alien domination, or the right of these peoples to struggle legitimately to this end.” Some have argued that this language preserves the right of peoples struggling against alien or colonial domination to resort to acts of “terrorism”? Others believe the phrase “the right of these peoples to struggle *legitimately* to this end” means that resort to terrorism can never be justified since “terrorism” is not a legitimate means? Read together with the preamble, this would mean that acts specifically prohibited by the anti-terrorism conventions

are unacceptable under any circumstances, but that other acts of terrorism may sometimes be permissible.

Paragraph 3 of the 1991 resolution states that it is a violation of international law for states to organize, instigate, assist or participate in terrorist acts in other States, or acquiesce in or encourage activities within their territory directed towards the commission of such acts. Under this paragraph, which of the following acts do you think would violate international law: (1) Provision of financial assistance to a terrorist organization? (2) Provision of logistical support such as passports and weapons? (3) Permitting a terrorist organization to maintain a headquarters or training facility in a State's territory? In answering these questions, consider the International Court of Justice's opinion in *the Case of Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*. In that case, the ICJ held that, by arming, training, and directing the Contras, the United States violated the customary international law principle of the non use of force by "organizing or encouraging the organization of irregular forces or armed bands...for incursion into the territory of another State." The Court stressed, however, that neither Nicaragua's provision of arms to the opposition in El Salvador nor the United States' provision of funds to the Contras in Nicaragua, by themselves, amounted to a prohibited use of force, justifying force in self-defense.

The day after the September 11, 2001 terrorist attacks, the United States informed the U.N. Security Council that it had been the victim of an armed attack and declared its intent to respond under Article 51 of the U.N. Charter. The Security Council then adopted Resolution 1368, which condemned the 9/11 attacks and "recognized the inherent right of individual or collective self-defense in accordance with the Charter." This action was not a Chapter VII authorization to use force, but rather a confirmation that the United States could invoke its right to respond with force under Article 51 of the U.N. Charter, despite the fact that al Qaeda was a non-state actor. Consistent with that right, on October 7, 2001, the United States informed the Council that it had launched Operation Enduring Freedom. Air strikes were directed at camps allegedly belonging to al Qaeda and other Taliban military targets throughout Afghanistan. There was no international protest or condemnation of the operation; rather through word and actions, a long list of States expressed support for the operation.

The Obama Administration's State Department Legal Adviser, Harold Koh, delivered a major policy speech at the Annual Meeting of the American Society of International Law on March 25, 2010, in which he provided the legal justification for the Administration's use of drones to fight terrorist groups around the world. Koh began by stressing that the attacks of 9/11 triggered the U.S. right of self-defense against al-Qaeda and other terrorist organizations. Koh asserted "as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law."

## 2. The quest for a general definition of terrorism



**Michael P. Scharf, Symposium: “Terrorism on Trial”: Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects, 36 Case W. Res. J. Int'l L. 359 (2004)(footnotes omitted).**

In 1987, the United Nations General Assembly adopted Resolution 42/159, recognizing that the effectiveness of the struggle against terrorism could be enhanced by the establishment of a generally agreed definition of international terrorism. The issue was initially assigned to the U.N. Sixth (Legal) Committee, which had over the years drafted a number of conventions addressing specific crimes committed by terrorists, although none of these conventions ever used the word "terrorism" let alone provided a definition of the term. When the Sixth Committee failed to make progress in reaching a consensus definition of terrorism, the General Assembly in 1996 established an ad hoc committee to develop a comprehensive framework for dealing with international terrorism.

Foremost among its accomplishments, the ad hoc committee developed the International Convention for the Suppression of the Financing of Terrorism, which defined terrorism as (1) any activity covered by the twelve anti-terrorism treaties; and (2) "any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act." 129 States have so far ratified this multilateral treaty. This was as close as the international community has ever come to adopting a widely accepted general definition of terrorism.

Immediately after the events of September 11, 2001, the General Assembly established a working group to develop a comprehensive convention on international terrorism. In the spirit of cooperation that marked the early days after the September 11 attacks, the members of the working group nearly reached consensus on the following definition of terrorism:

[Terrorism is an act] intended to cause death or serious bodily injury to any person; or serious damage to a State or government facility, a public transportation system, communication system or infrastructure facility . . . when the purpose of such act, by its

nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing an act.

The effort hit a snag, however, when Malaysia, on behalf of the 56-member Organization of the Islamic Conference (OIC), proposed the addition of the following language:

Peoples' struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime.

According to Nicholas Rostow, General Counsel to the U.S. Mission to the United Nations, the OIC's proposal intended to exempt acts against Israel over the occupied territories and acts against India over Kashmir from the definition of terrorism, and to brand violations of the laws of war by State military forces such as the Israel Defense Forces as terrorist acts. When neither side was willing to compromise on this issue, the project was shelved indefinitely. With work on a general definition of terrorism once again stalled in the General Assembly, the U.N. Security Council stepped in to the fray. Acting under Chapter VII of the U.N. Charter, the Council adopted Resolution 1373, which in essence transformed the Terrorism Financing Convention into an obligation of all U.N. member States, requiring them to prohibit financial support for persons and organizations engaged in terrorism. The Council missed an opportunity, however, to adopt a universal definition of terrorism when it decided not to include the Terrorism Financing Convention's definition of terrorism in Resolution 1373, but rather to leave the term undefined and to allow each State to ascertain its own definition of terrorism. Further, the Council created a committee (The Counter-Terrorism Committee) to oversee the implementation of the resolution, but it did not give the Committee the mandate to promulgate a list of terrorists or terrorist organizations to whom financial assistance would be prohibited under the resolution.

The Security Council's most recent statement on terrorism came in response to a bloody terrorist attack at an elementary school in Russia in October 2004. Upon Russia's insistence, the Security Council adopted Resolution 1566, which provides:

criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, *which constitute offenses within the scope of and as defined in the international conventions and protocols relating to terrorism*, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious, or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature (emphasis added).

At first blush this clause seems to be a general definition of terrorism, similar to that contained in the Terrorist Financing Convention. But due to the inclusion of the italicized language (which was required to gain consensus), this clause actually does no more than reaffirm that there can be no justification for committing any of the acts prohibited in the twelve counter-

terrorism conventions; a sentiment that was expressed in numerous past General Assembly and Security Council resolutions.

**Michael P. Scharf, Symposium: “Terrorism on Trial”: Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects, 36 Case W. Res. J. Int'l L. 359 (2004).**

There are significant gaps in the regime of the anti-terrorism conventions. For example, assassinations of businessmen, engineers, journalists and educators are not covered, while similar attacks against diplomats and public officials are prohibited. Attacks or acts of sabotage by means other than explosives against a passenger train or bus, or a water supply or electric power plant, are not covered; while similar attacks against an airplane or an ocean liner would be included. Placing anthrax into an envelope would not be covered; nor would most forms of cyber-terrorism. Additionally, acts of psychological terror that do not involve physical injury are not covered, even though placing a fake bomb in a public place or sending fake anthrax through the mails can be every bit as traumatizing to a population as an actual attack.

**Alex Schmid, Symposium: “Terrorism on Trial”: Terrorism – The Definitional Problem, 36 Case W. Res. J. Int'l L. 375 (2004).**

Alex Schmid, the Senior Crime Prevention and Criminal Justice Officer at the U.N.'s Terrorism Prevention Branch in Vienna, has suggested eight reasons why it is important to have an internationally accepted general definition of terrorism:

- Developing an effective international strategy requires agreement on what it is we are dealing with, in other words, we need a definition of terrorism.
- International mobilization against terrorism . . . cannot lead to operational results as long as the participants cannot agree on a definition.
- Without a definition, it is impossible to formulate or enforce international agreements against terrorism.
- Although many countries have signed bilateral and multilateral agreements concerning a variety of crimes, extradition for political offences is often explicitly excluded, and the background of terrorism is always political.
- The definition of terrorism will be the basis and the operational tool for expanding the international community's ability to combat terrorism.
- It will enable legislation and specific punishments against those perpetrating, involved in, or supporting terrorism, and will allow the formulation of a codex of laws and international conventions against terrorism, terrorist organizations, states sponsoring terrorism, and economic firms trading with them.
- At the same time, the definition of terrorism will hamper the attempts of terrorist organizations to obtain public legitimacy, and will erode support among those segments of the population willing to assist them (as opposed to guerrilla activities).
- Finally, the operational use of the definition of terrorism could motivate terrorist organizations, due to moral and utilitarian considerations, to shift from terrorist activities to alternate courses (such as guerrilla warfare) in order to attain their aims, thus reducing the scope of international terrorism.

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An additional reason is that the absence of an internationally accepted definition of terrorism has led several U.S. courts to dismiss civil claims and criminal charges in terrorist-related cases. In the concurring opinion dismissing plaintiffs' tort actions against certain alleged terrorists responsible for an attack on a bus in Israel in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 795 (D.C. Cir. 1984), Judge Harry Edwards stated:

While this nation unequivocally condemns all terrorist attacks, that sentiment is not universal. Indeed, the nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus. Unlike the issue of individual responsibility, which much of the world has never even reached, terrorism has evoked strident reactions and sparked strong alliances among numerous nations. Given this division, I do not believe that under current law terrorist attacks [outside of those prohibited by international conventions] amount to law of nations violations.

More recently, in the case of *United States v. Yousef*, 327 F.3d 56 (2003), the U.S. Court of Appeals for the Second Circuit, in dismissing extraterritorial terrorism charges based on "universal jurisdiction," concluded:

We regrettably are no closer now than eighteen years ago to an international consensus on the definition of terrorism or even its proscription; the mere existence of the phrase "state-sponsored terrorism" proves the absence of agreement on basic terms among a large number of States that terrorism violates public international law. Moreover, there continues to be strenuous disagreement among States about what actions do or do not constitute terrorism, nor have we shaken ourselves free of the cliche that "one man's terrorist is another man's freedom fighter." We thus conclude that the statements of Judges Edwards, Bork, and Robb remain true today, and that terrorism--unlike piracy, war crimes, and crimes against humanity--does not provide a basis for universal jurisdiction.

### **3. Some Questions to consider about developing a general definition of terrorism**

#1. Should the definition of terrorism exclude acts committed by government or military personnel undertaken "in the exercise of their official duties," even if they are terroristic in purpose and effect?

#2. Should the definition of terrorism apply only to acts against civilians and non-combatants, and exclude attacks on military personnel? What about military personnel who are outside of the area of armed conflict? What about military personnel who are unarmed and off duty? What about police forces? What about Government officials? What about military installations, headquarters, vessels, aircraft, or vehicles during an armed conflict? Were the attacks on the USS Cole in 2000 in Yemen and the Pentagon in 2001 by members of al Qaeda acts of terrorism?

#3. If peacetime attacks against military personnel and installations are not considered terrorist, should the international humanitarian law “collateral damage doctrine” apply, such that loss of innocent civilian life is not considered a crime so long as the target was legitimate and reasonable steps were taken to avoid unnecessary civilian casualties? Should the international humanitarian law “obedience to superior orders defense” apply to such acts?

#4. For some, the major problem in defining terrorism has been distinguishing “terrorists” from “freedom fighters” or “revolutionaries.” During the 1980s, the U.S. Government labeled the rebels in El Salvador “agents of subversion,” while referring to the Afghan guerrillas as “resisters” and the Contras in Nicaragua as “freedom fighters” who in President Reagan’s words were “the moral equivalent of the Founding Fathers.” *Newsweek*, January 6, 1986, at 39. Do these labels reflect a double standard or are the distinctions justified?



#5. Is the word “violence,” or even the phrase “politically motivated violence,” too broad? Is such necessary or too limiting? Consider the case where alleged terrorists release nerve gas, a deadly chemical, or a biologic agent in a subway in order to induce terror within a sector of a city? Would the phrase “use of violence or a weapon” cover such conduct? Should the definition of terrorism include computer crimes (“cyber-terrorism”) and attacks against the environment (“eco-terrorism”) committed with the intention to intimidate a population or compel a government to act or refrain from acting, or to produce “terror”?

#6. Another alternative is to include with the definition of terrorism a list of exclusions, defining what “terrorism” is not. Which, if any, of the exceptions do you think make the most sense?

- Excluding mere acts of property damage as well as acts of sabotage like interrupting the flow of an oil pipeline even when the saboteurs are engaging in acts of terrorism on other occasions.
- Excluding attacks on military installations, aircraft, navy vessels, barracks which are guarded even when those who attack military installations or personnel are otherwise also engaging in acts of terrorism.
- Excluding attacks on police stations and armed police on patrol in situations of armed conflict;

- Excluding cases of collateral damage where the targeting of civilians was not deliberate (e.g. when an attack on a police station misfires and civilians are (also) victims).
- Excluding cases of attacks on secular or religious symbols unless it is combined with the victimization of people (an attack on a knowingly empty church would not qualify, an attack on a full church would).
- Excluding certain types of assassinations, e.g. when the direct victim is the only target, as opposed to de-individuated murder where the victim serves only as message generator to reach a wider audience.
- Excluding acts of war which do not qualify as war crimes.
- Excluding guerrilla warfare activities which are not war crimes.
- Excluding acts of legal use of force by legitimate authorities to impose public order when acting within the boundaries of the rule of law.
- Excluding acts of (collective) political violence which are spontaneous, as in riots, demonstrations, revolts.

#7. If it is not possible to ever reach international consensus on a general definition of terrorism, would it make sense instead to agree on an international process for identifying “terrorist organizations”? At the Club of Madrid International Summit on Democracy, Terrorism and Security, 8-11 March 2005, the Working Group on Legal Responses to Terrorism made the following proposal in paragraph 2.6 of its report: "In order to help States identify terrorist organizations to whom financial support is prohibited by the Convention on the Suppression of Terrorist Financing and Security Council Resolution 1373 (2001), the Counter Terrorism Committee (CTC) established by the Security Council should develop a core list of organizations that the CTC determines to be involved, directly or indirectly, with acts of financing of terrorism. In developing this list, the CTC should employ procedural safeguards to ensure that organizations and individuals associated with them which are not so involved are not erroneously included. States would thereafter be bound to subject organizations included in the list to the sanctions enumerated in resolution 1373 (2001). States would also remain free to impose sanctions on non-listed organizations that the State determines to be involved in terrorism.

#### **4. The Special Tribunal for Lebanon's recent decision on the definition of terrorism.**



#### **INTRODUCTORY NOTE TO THE DECISION OF THE APPEALS CHAMBER OF THE SPECIAL TRIBUNAL FOR LEBANON ON THE DEFINITION OF TERRORISM AND**

**MODES OF PARTICIPATION, BY MICHAEL P. SCHARF, Published in International Legal Materials (2011) [Footnotes omitted for this MOOC].**

The Special Tribunal for Lebanon (STL), established in 2007 by the UN Security Council to prosecute those responsible for the 2005 bombings that killed former Lebanese Prime Minister Rafiq Hariri and 22 others, is the world's first international court with jurisdiction over the crime of terrorism. On January 17, 2011, the Tribunal's Prosecutor, Daniel Bellemare, submitted a sealed indictment for the pre-trial judge to confirm. The pre-trial judge, in turn, requested that the Appeals Chamber resolve fifteen questions relating to the substantive criminal law to be applied by the STL, the modes of criminal responsibility to be applied by the STL, and whether the STL should charge crimes cumulatively or in the alternative. In response, the STL Appeals Chamber handed down a landmark ruling on February 16, 2011.

The unanimous ruling of the five Appeals Chambers judges was signed by Presiding Judge Antonio Cassese, who holds the title "Judge Rapporteur" of the STL Appeals Chamber. Judge Cassese was formerly Professor of International Law at the University of Florence and served as President of the International Criminal Tribunal for the former Yugoslavia (ICTY) during the early days of that court. The opinions he wrote for the ICTY Appeals Chamber constituted some of the most important legal developments in international humanitarian law since the adoption of the 1949 Geneva Conventions. For example, during Judge Cassese's tenure as President of the ICTY, the tribunal's Appeals Chamber held for the first time in history that individual criminal responsibility applied not just during international armed conflicts, but to war crimes committed in internal armed conflicts as well; and it developed the novel concept of joint criminal enterprise liability which has since been applied by the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia. As the STL Appeals Chamber's Presiding Judge, Cassese once again took advantage of a historic opportunity to boldly push forward the development of international criminal law.

Of the several issues on which the Appeals Chamber issued guidance, by far the most important concerned the definition of terrorism to be applied by the STL. Although the STL's Statute stipulates that the court is to apply the crime of terrorism as defined by Lebanese law, the Appeals Chamber held that the STL is authorized to construe Lebanese law defining terrorism with the assistance of international treaty and customary law. This was a departure from the traditional approach of treaty interpretation, as reflected in Article 32 of the Vienna Convention on the Law of Treaties, in which the Tribunal would apply the "ordinary meaning" of the terms of the Statute unless the text was found to be either ambiguous or obscure or would lead to an interpretation which is manifestly absurd or unreasonable. Since the Statute of the STL clearly stated that the Court was to apply the Lebanese domestic law on terrorism, under the traditional approach resort to supplementary means of interpretation would be appropriate only if the Court had found that there was an inconsistency or gap in the applicable Lebanese law.

In diverging from the traditional approach, the Appeals Chamber stated that "the old maxim *in claris non fit interpretation* (when a text is clear there is no need for interpretation) is in truth fallacious," explaining that "it overlooks the spectrum of meanings that words, and especially a collection of words, may have and misses the truth that context can determine

meaning.” Instead, the Appeals Chamber adopted a “semiotic” approach to interpretation. Semiotics begins with the assumption that terms such as “terrorism” are not historic artifacts whose meaning remains static over time. Rather, the meaning of such terms changes along with the interpretative community or communities. As the STL Appeals Chamber explained, this interpretative approach “recognizes the reality that society alters over time and interpretation of a law may evolve to keep pace.”

The Appeals Chamber thus held that it was appropriate to read the Lebanese law in the context of “international obligations undertaken by Lebanon with which, in the absence of very clear language, it is presumed any legislation complies.” This interpretive approach opened the door for the Appeals Chamber to then opine on the question of whether a defined offense of terrorism exists under customary international law. To that end, the Appeals Chamber found “although it is held by many scholars and other legal experts that no widely accepted definition of terrorism has evolved in the world society because of the marked difference of views on some issues, closer scrutiny reveals that in fact such a definition has gradually emerged.”

Based on its review of state practice and indicators of *opinio juris*, the Appeals Chamber declared that the customary international law definition of terrorism consists of “the following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.”

Reading the Lebanese law on terrorism together with the definition of terrorism under customary international law, the Appeals Chamber concluded that the particular means used in an attack were not dispositive in determining whether an attack was terrorism or simply murder. In other words, contrary to Lebanese case law, the Appeals Chamber opined that attacks committed by rifles or handguns, which are not likely *per se* to cause a danger to the general population, are nevertheless within the jurisdiction of the STL.

Yet, the significance of this aspect of the Appeals Chamber opinion is far broader than its application to the case before the STL. This is the first time in history that an international tribunal has authoritatively confirmed the crystallization of a general definition of terrorism under customary international law. The decision will almost certainly spark a debate about whether the STL’s conclusion is correct in light of the conventional view that the international community has not yet reached consensus on a general definition of terrorism. Since the decision has been issued by an international tribunal, and penned by a highly respected jurist, it is possible that the decision itself will be seen as “a Grotian moment,” crystallizing a customary international law definition of terrorism. If so, the decision will have a momentous effect on the decades-long effort of the international community to develop a broadly acceptable definition of terrorism.

Unable to reach consensus on a general definition, the international community has instead proceeded over the past thirty years to adopt a dozen separate counter-terrorism conventions that impose an obligation to prosecute or extradite in cases of hostage-taking,

hijacking, aircraft and maritime sabotage, attacks at airports, attacks against diplomats and government officials, attacks against U.N. peacekeepers, use of bombs or biological, chemical or nuclear materials, and providing financial support to terrorist organizations. By listing the dozen counter-terrorism conventions in the preambular clauses of numerous U.N. General Assembly and Security Council counter-terrorism resolutions, which confirm that acts of terrorism are criminal and unjustifiable, the United Nations has arguably crystallized the acts prohibited by those Conventions into customary international law crimes. Yet, there are significant gaps in the coverage of these anti-terrorism conventions. For example, assassinations of businessmen, engineers, journalists and educators are not included, while similar attacks against diplomats and public officials would be covered by the treaties. Attacks or acts of sabotage by means other than explosives against a passenger train or bus, or a water supply or electric power plant, are not dealt with, while similar attacks against an airplane or an ocean liner would be covered. Moreover, most forms of cyber-terrorism are not encompassed by the treaties. Additionally, acts of psychological terror that do not involve physical injury are not covered, even though placing a fake bomb in a public place or sending fake anthrax through the mails can be every bit as traumatizing to a population as an actual attack.

Notably, the STL Appeals Chamber stated that the customary rule can be held to impose a duty on States to prosecute those who commit acts of terrorism as defined under customary international law. This would include cases falling within the gaps of the dozen counter-terrorism conventions. Moreover, the U.N. Security Council in Resolution 1373 prohibited the financing of terrorism without defining the term or listing proscribed groups. The Appeals Chamber's general definition of terrorism could potentially facilitate more effective implementation of that important resolution.

## 5. PIRACY

**ASIL Insights, International Legal Responses to Piracy off the Coast of Somalia, February 6, 2009, By Eugene Kontorovich**

### Introduction



The extraordinary growth in piracy off the coast of Somalia in recent months has led to a multipronged international response. Several nations have sent naval assets to patrol the Gulf of Aden in an effort to protect international commercial shipping. The United Nations Security Council has, under its Chapter VII powers to address threats to international peace and security, passed a series of resolutions that give these forces unprecedented legal authority to pursue pirates.

While the traditional definition of piracy under international law restricts military responses by outside powers to those carried out on the high seas, the 2008 Security Council resolutions authorize the use of military force within sovereign Somali waters and territory. Despite this authorization of expanded powers to interdict and detain pirates at sea, states have expressed frustration at the limited available options for prosecuting captured pirates. Thus Britain has entered into an agreement with Kenya to permit sea robbers captured by the Royal Navy to be

tried in Kenyan courts. All these developments are innovative legal responses to a modern epidemic of the oldest recognized international crime.

## **Background**

The international crime of piracy, like the slave trade, was believed to have largely disappeared in modern times, or at least to have fallen to levels that would not demand international attention. Contrary to that belief, for the past several years, piracy has become endemic off the coast of Somalia, which has not had a government capable of broadly asserting its authority over the country since 1991. In the past year alone, attacks on international shipping in the Gulf of Aden increased by 200% over 2007. But the surge in sea robbery over the past six months is unprecedented, and perhaps the most significant eruption of such criminal activity in nearly two hundred years.

The problem is exacerbated by geography. All vessels transiting the Suez Canal must pass through the narrow strait between the Horn of Africa and the Arabian Peninsula, where cargo vessels with unarmed crews become easy prey. Pirates typically hijack a vessel with the goal to ransom it and its crew back to the owners, though sometimes pirates take the vessel to shore to sell the cargo. A single seizure can earn each pirate \$150,000. (In Somalia, per capita GDP is \$600 and male life expectancy is around 47 years.) Currently hundreds of crewmembers from many different countries remain in captivity pending ransom negotiations. In the past year, the pirates have become busier and bolder. Pirates have attacked a vessel even further from the coast, and made some spectacular seizures, including a freighter loaded with Saudi oil, a ship carrying Ukrainian tanks bound for Kenya, and most tragically, several ships laden with United Nations relief supplies for Somalia. The pirates make no discrimination among vessels. Anything is fair game. Experts predict to see even more attacks in 2009 as the recent successes inspire others.

## **International Patrols**

The unprecedented upsurge in piracy has prompted unprecedented international naval cooperation. A still-expanding coalition has been patrolling the Gulf of Aden with the navies of the United States, Great Britain, France and India playing leading roles. This coalition now includes the first-ever European Union naval force and China's first naval deployment outside of the South China Sea region. As of mid-January, this flotilla of ships from more than twenty countries is being coordinated by the United States. The increased military presence has successfully prevented or interrupted numerous attempted piracies, and members of the coalition have on several occasions exchanged fire with the Somalis. Yet thus far the role of the naval force has been to ward off pirates, rather than to pursue or apprehend them, which may not be sufficient to deter piracy motivated by outsized financial gains. Moreover, the deployment of a naval contingent is an expensive undertaking, particularly relative to the costs of ransom.

## **Security Council Enforcement Action under Chapter VII**

In 2008, the United Nations Security Council passed five separate resolutions dealing with Somali piracy -- more resolutions than on any other subject last year. Each of these was passed pursuant to Chapter VII of the UN Charter, under which the Council may authorize the use of military force against threats to international security. These resolutions have bolstered the

authority of the multinational armada by expanding the authority of the navies beyond acts permitted under the customary international law of piracy. Absent Security Council authority to use force, international law permits nations to act against foreign piracy only on the high seas. In the Gulf of Aden, where international shipping must pass through a narrow corridor, pirates are able to launch attacks in international waters and then quickly return to Somali territorial waters. The Council responded to this problem on June 2 by passing Resolution 1816, which authorizes nations to take action against pirates even in sovereign Somali waters. That resolution noted that it was passed with the consent of the government of Somalia “which lacks the capacity to interdict pirates or patrol and secure its territorial waters.”

On December 16, 2008, the Council passed an even broader resolution, drafted and promoted by the United States (in the last weeks of the Bush administration) extending the authorization of military force to land-based operations in Somalia mainland. For a one-year period, Resolution 1851 authorizes nations to “undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea.” Concerns raised by other Council members led the U.S. to withdraw draft language referring to operations in Somali “airspace,” though the U.S. argues that the effect of the resolution remains the same, and that use of Somali airspace is permitted.

Authorizing armed action against pirates in sovereign territory is an unprecedented measure by the Security Council. Because the resolutions permit responses beyond those permitted under customary international law they caused some apprehension on the part of states with a history of piracy problems, fearing the resolutions may set a precedent eroding national territorial sovereignty. The text accompanying the resolutions and statements made by Council members stressed that the resolutions applied solely to the Somali situation, and would not establish any precedent of customary international law. Indeed, the measures were sought and welcomed by the transitional Somali government, which is too weak to deal with the piracy problem itself.

Moreover, the resolutions require that any action in Somali territory be approved by that nation's provisional government and comport with international humanitarian law. The latter condition may greatly limit the scope of possible operations under the resolution. Pirates are not combatants, but rather civilians. Under international humanitarian law civilians may not be specifically targeted except in immediate self-defense. United States military officials have already warned that any action against the pirates on land will likely result in civilian deaths. Still, Resolution 1851 clearly broadens the scope of permissible “hot pursuit,” allowing pirates to be chased from the high seas into Somali waters and farther onto dry land.

Thus it is not surprising that the authority given by these resolutions has apparently gone largely if not entirely unutilized, with military action against pirates taking place in international waters and confined to small, reportedly defensive incidents. Indeed, the most significant exception, an April 2008 raid by French commandos on pirates holding hostages on the mainland, preceded the first Chapter VII authorization. It also appears to have been a one-off mission, in response to the capture of a French luxury yacht and its passengers.

### **Jurisdiction to Try Captured Pirates**

Another question raised by the resolutions is whether pirates captured in Somali territory would be amenable to universal jurisdiction. Piracy is the original universal jurisdiction crime. The doctrine of universal jurisdiction allows any nation to try certain offenders who have committed international crimes, even if the crime, the defendant and the victims have no nexus with the state carrying out the prosecution. For hundreds of years the doctrine applied exclusively to piracy. In recent decades, universal jurisdiction has been applied by national courts to prosecute cases of war crimes, crimes against humanity and torture. While its original application to cases of piracy appeared to have fallen into disuse, now universal jurisdiction has the potential to come full circle to help address the modern piracy epidemic.

However, in practice, the nations patrolling the Gulf of Aden have chosen not to prosecute pirates because of the anticipated difficulty and expense. What to do with apprehended pirates has become the central legal question of the current anti-piracy campaign. The dominant approach has been to avoid capturing pirates in the first place, or, if captured, releasing the pirates without charging them with a crime. Returning pirates to Somalia for trial has generally not been considered an option both because of the lack of a functioning government and the probability that the accused would be subject to unfair trials and cruel treatment. Some European governments have expressed concern that the latter problem presents a conflict with a sending state's obligation of *non-refoulement* under various international treaties, which prohibit sending people to countries where they will likely be abused. France, one of the more active nations in the piracy campaign, regularly resorts to repatriation of pirates to Somalia.

Nations have called for new venues or possibilities for prosecuting the pirates, including an international tribunal or domestic courts in other countries in the region. Britain is pioneering the latter solution. In December 2008, Britain signed a memorandum of understanding with Kenya formalizing the arrangement whereby captured pirates will be turned over for trial, and handed over the first group of captured pirates for prosecution. The United States was the first to experiment with this arrangement, rendering a group of pirates to the Kenyan government in a carefully controlled test case in 2006. While those pirates were convicted and the trial went off without major complications, it did not turn into a regular procedure. Great Britain and other patrolling nations are also discussing the possibility of other nearby states hosting piracy prosecutions.

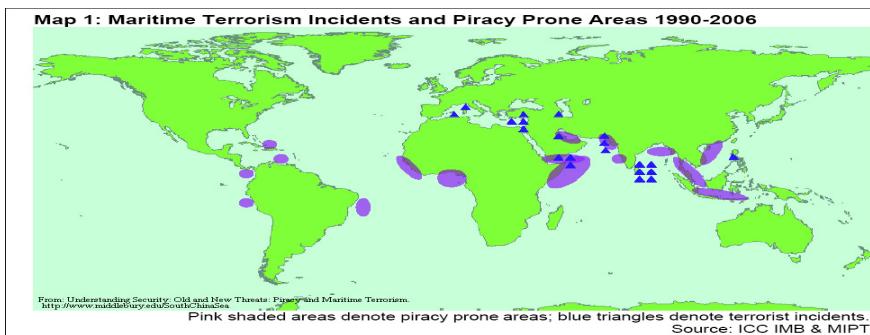
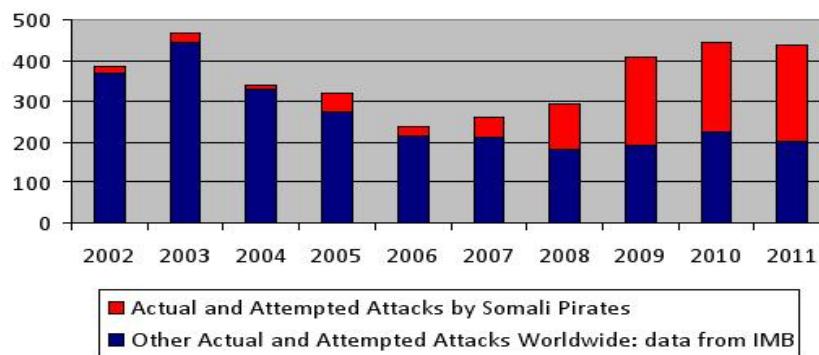
The legality of such transfers from outside capturing states to third states is thrown into doubt by the piracy provisions of the Third United Nations Convention on the Law of the Sea (UNCLOS), a comprehensive multilateral treaty often described as the "constitution of the oceans." The treaty codifies the long-standing customary prohibition on piracy. UNCLOS article 105, codifying universal jurisdiction in cases of piracy, provides that "every State may seize a pirate ship" on the high seas, but that the prosecution should be by "the courts of the state which carried out the seizure." The drafting history reveals that this provision was intended to preclude transfers to third-party states. No court or tribunal has yet ruled on the effect of UNCLOS Article 105, but it may emerge as an issue in the case of those British-captured pirates on trial in Kenya.

Because international law defines piracy as an act taking place on the high seas, the increased authority conferred on outside states to take military action may not translate into a coextensive authority to prosecute. However, attacks on vessels are also punishable under the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation

(SUA). The SUA Convention is not limited to acts on the high seas, and arguably extends jurisdiction to any nation capturing the offenders. However, invoking SUA would also raise many questions, as it has only been used as a basis for jurisdiction in one reported case. Somalia has not ratified the treaty, which might create additional difficulties. However, the recent piracy problems have renewed international interest in using the dormant treaty.

### Piracy Law Enforcement Going Forward

The international cooperation that Somali piracy has spawned is unusual and impressive. Yet while nations have been willing to shoulder serious enforcement costs, they have shied away from accepting judicial burdens. It is unlikely that piracy can be stopped if pirates are not prosecuted and punished. In the absence of a comprehensive international response that includes incapacitation of pirates, shippers are increasingly likely to turn to private security companies and other do-it-yourself solutions. Because the legal remedies under discussion -- whether through the SUA or third-party courts such as in Kenya -- raise numerous novel questions of international law. The most straightforward answer -- trial in the courts of the capturing nation -- is firmly rooted in customary and conventional international law. To date, however, this approach has not been treated as a serious option.





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# **INTRODUCTION TO INTERNATIONAL CRIMINAL LAW**

**MOOC taught by Professor  
Michael P. Scharf**

**Module #4:**

**Unique Modes of Liability**

**International Criminal Law  
Module #4  
Special Modes of Criminal Liability**



### **On-Line Simulation**

This simulation is based on the underlying facts regarding the fictional Togoland Square massacre from Module #2.

1. Recall that Togoland has a population of four million people, comprised of two main ethnic groups, the Tumani (45 percent of the population) and the Hottami (55 percent of the population). After the death of Togoland's President on May 1, 2013, a military faction seized power in a bloodless coup. The military regime was led in partnership by General Thomas Cederick (a member of the majority Hottami tribe who was the former Chief of Staff of the army in the prior Administration), and General Rafiki Biambi (a member of the majority Hottami tribe who was the former head of the Togoland National Guard).
2. In the days following the coup, opponents of the military regime launched a series of employment strikes in the Cobalt mines and street demonstrations in the cities of Togoland. On June 17, 2013, ten thousand people, mostly members of the Tumani tribe, gathered in front of the Capital building at Togoland Square, chanting "Bring back democracy, bring back democracy." Several hundred of the protesters were armed with rifles, which they periodically fired into the air.
3. At a meeting at noon on June 17, General Cederick told General Biambi, "You should do something about the growing protests before things really get out of hand." An hour later, General Biambi ordered the National Guard to "wipe out" the protesters at

Togoland Square. Without warning, the National Guard's Armored Division circled the protesters and mowed them down with machine gun and mortar fire. Seven thousand civilians were killed in fifteen minutes. After that overwhelming show of force, there were no more protests and the Cobalt miners went back to work. Neither General Cederick nor General Biambi took disciplinary action related to the perpetrators of the massacre.

4. The U.N. Security Council referred the situation of Togoland to the International Criminal Court. The Court ended up trying General Cederick for crimes against humanity related to the Togoland Square massacre.
5. The Trial Chamber's Judgment concludes: "Although General Biambi was not technically General Cederick's subordinate, and although we found no evidence that General Cederick knew that General Biambi would order the massacre at Togoland Square, we nonetheless find Cederick criminally liable under both command responsibility and joint criminal enterprise liability, and sentence him to 20 years in prison."

Assume that the Defense has appealed the Trial Chamber's judgment, and that you are the Judge of the Appeals Chamber assigned to draft the opinion. Based on these facts and the readings below, you are invited to upload a submission in the form of a brief Appeals Chamber Opinion concerning whether the Trial Chamber should be affirmed or reversed.

In order to complete the optional on-line simulations for this course, students must go to the Navigation Bar on the left panel. Under the Exercises section, you will find a button for "on-line simulations." The simulations for each session are available under this button. Written work can be submitted directly or through file upload. Students who post five or more on-line submissions of over 200 words in length during the course (simulations and discussions) will be awarded a Statement of Accomplishment with Distinction for the course.

## I. Command Responsibility



**Anne E. Mahle, The Yamashita Standard, PBS Justice and the Generals, available at: [http://www.pbs.org/wnet/justice/world\\_issues\\_yam.html](http://www.pbs.org/wnet/justice/world_issues_yam.html)**

The modern legal standard governing the doctrine of command responsibility in the United States rests upon the precedent established by the United States Supreme Court in the case of General Tomoyuki Yamashita. The Court's holding has become known as the "Yamashita Standard."

General Tomoyuki Yamashita was the Commanding General of the Fourteenth Army Group of the Japanese Imperial Army and the Military Governor on the Philippine Islands from October 1944 until full control of the Islands was assumed by United States forces in September 1945. In the waning days of World War II, numerous atrocities were committed by troops under General Yamashita's control against the civilian population of the Philippines. Pursuant to Japan's unconditional surrender to the United States at the end of the war, General Yamashita also surrendered to United States troops present in the Philippines and immediately became a prisoner of war. He was detained by the United States Army in the Commonwealth of the Philippines.

Upon his arrest as a prisoner of war, General Yamashita was charged by the Army's Judge Advocate General's Department with violations of the law of war. Included in this charge were allegations that forces under his command engaged in a "deliberate plan to massacre and exterminate a large part of the civilian population of Batangas Province as a result of which more than 25,000 men, women, and children all unarmed noncombatant civilians, were brutally

mistreated and killed." General Yamashita was appointed six lawyers from within the JAG corps to serve as defense counsel, and was tried before a United States military commission of five United States Army Officers. General Yamashita pled not guilty to all charges. He asserted that he did not personally engage in the criminal acts committed by the Japanese troops, that he did not order these acts to be committed, and that he did not have control over the troops under his command. He was found guilty by the commission after it heard testimony from two hundred and eighty-six witnesses. Upon his conviction, General Yamashita filed a writ of habeas corpus with the Supreme Court of the Commonwealth of the Philippines. In his writ, General Yamashita challenged the jurisdiction of the military commission, asserted that he did not commit a violation of the law of war, and claimed that he was denied a fair trial under the United States Articles of War, the Geneva Convention, and the United States Constitution. The Supreme Court of the Commonwealth of the Philippines denied his writ in total. The General then appealed to the United States Supreme Court.

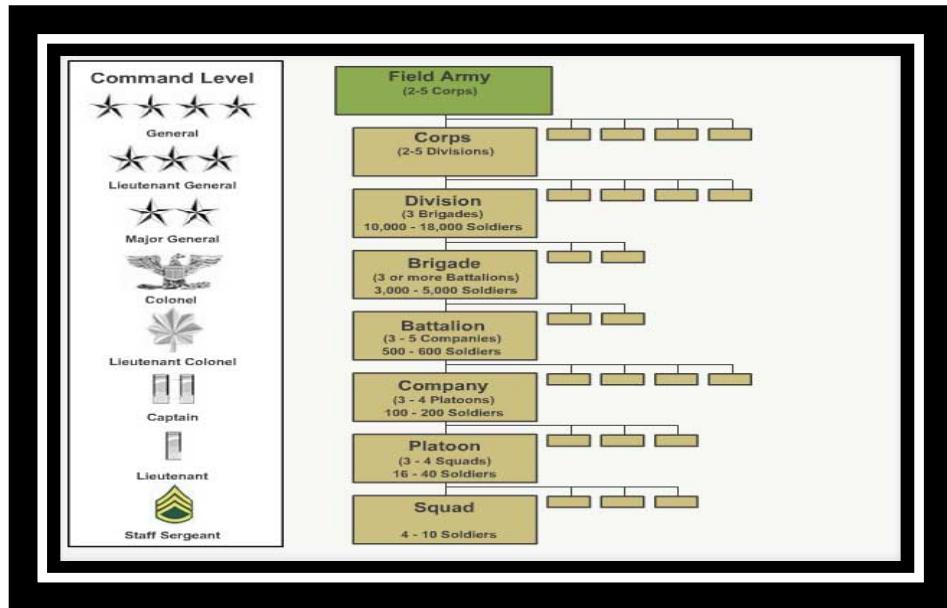
In the Supreme Court's decision, rendered in February 1946, the Court articulated a clear standard for military commanders with respect to the actions of their subordinates. In responding to General Yamashita's assertion that he did not personally participate in or order the commission of these offenses, the Court described the heart of the charge as being "an unlawful breach of duty by [General Yamashita] as an army commander to control the operations of members of his command by 'permitting them to commit' the extensive and widespread atrocities." The Court recognized that international law, through the law of war, "presupposes that [violations of the law of war] are to be avoided through the control of the operations of war by commanders who to some extent are responsible for their subordinates." The Court believed that absent such a duty upon commanders, nothing would prevent occupying forces from committing atrocities upon the civilian population. The Court held that General Yamashita was, by virtue of his position as commander of the Japanese forces in the Philippines, under an "affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population." General Yamashita's writ was denied, and he was executed by hanging by the United States military.

Since the Supreme Court's decision in 1946, the United States Congress and federal courts throughout the country have relied on the Yamashita standard. Many important human rights cases cite directly from the Supreme Court decision, as does the legislative history of the Torture Victims Protection Act ("TVPA"). In citing to the Yamashita Standard for support in the interpretation of the TVPA, the United States Senate Committee stated, "under international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts -- anyone with higher authority who authorized, tolerated, or knowingly ignored those acts is liable for them." The Second and Ninth Circuits of the United States Court of Appeals affirmed this standard in their decisions *Kadic v. Karadzic*, 70 F.3d 232 (1995) and *Hilao v. Estate of Marcos*, 103 F.3d 767 (1996), and it has been repeatedly recognized as the standard in numerous human rights cases litigated under the TVPA and the Alien Tort Claims Act ("ACTA") in federal courts across the country.

Wide acceptance of the Yamashita Standard does not render it immune from critique. There have been a number of legal questions raised as to the reach of the Standard and the degree to which it imposes strict liability on a military commander for the actions of his or her

subordinates. For example, the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") has rejected a strict liability standard for military commanders, in part as a response to the reality it faces: many of those charged under the doctrine of command responsibility under the jurisdiction of the ICTY were not commanders of armies of recognized states, as was Yamashita, instead they exerted military command over militarized troops of non-recognized entities such as the Republika Srpska and the Republic of Herzeg-Bosna. The Yamashita Standard, however, no doubt will arise in the trial of Slobodan Milošević, and others who were in command positions in recognized nation states and will play a role in the jurisprudence of the International Criminal Court.

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### **The Doctrine of Command/Superior Responsibility, by Guenael Mettraux, PJI, available at: <http://www.peaceandjusticeinitiative.org/>**

“Command or superior responsibility” is often misunderstood. First, it is not a form of objective liability whereby a superior could be held criminally responsible for crimes committed by subordinates of the accused regardless of his conduct and regardless of what his knowledge of these crimes. Nor is it a form of complicity whereby the superior is held criminally responsible for some sort of assistance that he has given to the principal perpetrators. Instead, superior responsibility is a form of responsibility for omission to act: a superior may be held criminally responsible under that doctrine where, despite his awareness of the crimes of subordinates, he culpably fails to fulfill his duties to prevent and punish these crimes.

The commission of one or more crimes attributable to a subordinate is a pre-requisite for the application of that doctrine. In addition, the following requirements have been identified as forming part of the doctrine of superior responsibility under customary international law:

- (i) A relationship of superior-subordinate linking the accused and those who committed the underlying offences at the time of the commission of the crime;
- (ii) The knowledge on the part of the superior that his subordinates have committed or taken a culpable part in the commission of a crime or are about to do so; and
- (iii) A failure on the part of the superior to take necessary and reasonable measures to prevent or to punish those crimes.

This doctrine might apply, in principle, to military commander (at whatever level in the military structure), civilian officials (regardless of the nature of their function, including heads of state or ministers) or paramilitary leaders. Whilst, under customary international law, the elements of the doctrine are the same as a matter of law (though not necessarily at the evidential level) regardless of the nature of the authority which the superior exercised, the ICC Statute is drawing certain differences between military and non-military superiors.

The person to whom the doctrine is relevant must be superior, hierarchically, to those who have committed the crimes in the sense that there must have existed between them a hierarchical relationship within a common chain of authority or command. That relationship may be *de jure* (i.e., it is recognised and sanctioned in the relevant – internal or domestic – legal regime) or *de facto* (where the relationship of authority is one based, not on legal regulations, but on a state of affair). There is contradictory jurisprudence as to the time that is relevant to establishing the existence of such a link (the time when the crimes were committed or the time when the superior is said to have failed in his duty).

“Superior responsibility” could apply, in theory, to any person who is able to exercise “effective control” over one or more people. The requirement of “effective control”, which must be met in relation to all and any sort of superior means that he must have had the material ability, at the time relevant to the charges, to prevent or punish the crimes of subordinates. Mere influence or charisma, even if significant, would not meet that standard. In all cases, there must be an expectation of obedience to orders on the part of the superior and a parallel expectation of subjection to his authority on the part of those who are under his authority.

The superior must also have been sufficiently aware of the commission of a crime by subordinates and/or of the real and concrete likelihood that a crime was about to be committed. Under customary law, the superior must be shown to have “known” (i.e., he actually knew) or “had reason to know” (i.e. the superior possessed some general information putting him on notice of the commission of crimes of his subordinates or that such information as was available to him put him on notice of the strong likelihood that they were about to be committed) of the underlying crimes. The ICC Statute has added one form of culpable *mens rea* (“owing to the circumstances at the time, should have known”) for military or military-like superiors, whereby a superior might be liable where he might not have known of the crimes (whether in actual or “had reason to know” form) but should have known of those. The exact scope of this new form of *mens rea* is uncertain and has been subject to serious criticism, although it could be constructed in such a way as to reduce the risks involved with this form of *mens rea*.

To be liable under that doctrine, the superior must also have failed to prevent or punish crimes committed by subordinates. A failure to fulfill either or both of these separate obligations

(“duty to prevent” and “duty to punish”) could render a superior liable. Not every sort of failure would trigger his superior liability. To meet his obligations, a superior is required to adopt “necessary and reasonable” measures. The dereliction of duty attributable to the superior must be gross so that not any kind of failure to fulfill his duty would automatically render a superior responsible under that doctrine. There is some doubt in the literature and jurisprudence as to whether the dereliction must be causally linked in some ways with the crimes of the subordinates. The text of the ICC Statute makes it clear, however, that liability would be engaged where the crimes have been committed “as a result” of the superior’s failure.

In sum, the doctrine of superior or command responsibility could be defined as follows: A superior, whether *de jure* or *de facto*, may be held criminally responsible under that doctrine in relation to crimes committed by subordinates where, at the time relevant to the charges, he was in a relationship of superior-subordinate with the perpetrators, knew or had reason to know (or, in the case of military superiors at the ICC, “should have known”) that these crimes had been committed or were about to be committed and, with and despite that knowledge, wilfully and culpably failed to prevent or punish these crimes.

**The Celebici Case**

**Mucic**, the Celebici camp commander: guilty on basis of command responsibility (sentenced to 7 years).

**Delic**, the deputy Camp commander: not guilty of command responsibility charge because the guards reported directly to Mucic; but guilty of his own acts of rape and abuse.

**Delalic**, a sector commander: Not guilty because he did not have direct authority or effective control over the camp guards.

**Maria Nybondas, The Relationship Between Individual Criminal and Command Responsibility, January 2004, available at:**  
[http://www.asser.nl/default.aspx?site\\_id=9&level1=13337&level2=13383](http://www.asser.nl/default.aspx?site_id=9&level1=13337&level2=13383)

The *Celebici* case was the first case in which the ICTY Trial Chamber held that not only military commanders but also non-military superiors may incur responsibility under the doctrine of superior responsibility. In that case, the accused were camp commanders, and as such not

directly in the military chain of command. The decisive question was whether a superior-subordinate relationship could be established.

This is also where the difference between superior responsibility for military and non-military (hereinafter, civilian) leaders starts. When it comes to military commanders, there usually exists a formal command structure, in which the duties of the commander are laid down. Accordingly, the possibility to prove the existence of a superior-subordinate relationship can be based on the fact that the position of the superior obligated him to exercise command and control over his subordinates.

For civilian superiors the establishment of a superior-subordinate relationship usually cannot be drawn from the official position of the person. The Trial Chamber in *Ćelebići* recognised that the Statute of the ICTY does not contain guidance as to how the Tribunal should establish responsibility in such cases. However, it found that the term ‘superior’ is broad enough to include other superiors than those in a *de jure* position of authority. The Chamber was of the view that ‘individuals in positions of authority, whether civilian or within military structures, may incur criminal responsibility under the doctrine of command responsibility on the basis of their *de facto* as well as *de jure* positions as superiors’.

The Chamber explained what should be understood by a position as a *de facto* superior by mentioning ‘persons effectively in command of more informal structures, with power to prevent and punish the crimes of persons who are in fact under their control’.

The ‘effective authority’ argument was upheld in the *Aleksovski* case. The Trial Chamber in *Kordić* also confirmed the view stated in the *Ćelebići* case. Consequently, there seems to be an established view, articulated in the cases of the ICTY, that a leader can incur superior responsibility also where, as in the case of the conflicts in the former Yugoslavia, the formal command structures have ceased to exist or are no longer clearly discernible.

Importantly, the *Ćelebići* Trial Chamber stressed that whether *de facto* or *de jure* authority is being considered, a superior is someone who has the power to prevent and repress the violations of his subordinates.

It is when he fails to fulfill this duty that he can be held individually responsible under the doctrine of superior responsible. On the other hand, where a person does not have this power, the doctrine cannot be applied. In the reasoning of the Chamber, this was of great importance, as the basic idea is that persons are held responsible for their own acts, and as there is a danger of injustice being done if the responsibility of superiors is not considered with care.

Compared to the Statutes of the *ad hoc* Tribunals, the ICC Statute, which entered into force on 1 July 2002, contains more elaborate provisions on what in its Article 28 is called ‘Responsibility of commanders and other superiors’. Contrary to the Statutes of the *ad hoc* International Criminal Tribunals, the ICC Statute makes an explicit differentiation between the responsibility of military commanders and that of ‘other superiors’. While responsibility arises for both military commanders and other superiors ‘as a result of his or her failure to exercise proper control’, a significant difference in the formulation of the responsibility for the two

categories of superiors is the explicit mention that responsibility for ‘other superiors’ only arises where ‘[t]he crimes concerned activities that were within the effective responsibility and control of the superior’, in Article 28 (b)(2).

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The Statute of the International Criminal Court contains the following provision on the responsibility of superiors for the acts of their subordinates:

Article 28  
Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
    - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
    - (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
  - (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
    - (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
    - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
    - (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution
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## Should command responsibility apply to civilian superiors?



At the time of the Rwandan genocide, Alfred Musema was the Director of the Gisovu Tea Factory in Kibuye Prefecture. His employees were repeatedly involved in attacks on Tutsis and he did not attempt to stop them or discipline them.



### THE PROSECUTOR

v.

**ALFRED MUSEMA**

*Case No. ICTR-96-13-A*

*January 27, 2000*

### ***JUDGMENT***

#### **5.4 Musema's Authority**

- 863. In relation to Article 6(3) of the Statute, the nature of the authority exercised by an individual is crucial to an assessment of whether that individual exercised a superior responsibility over perpetrators of acts detailed in Articles 2 to 4 of the Statute, and whether, as a result, that individual attracts individual criminal responsibility for those acts.
- 864. It is, therefore, necessary for the Chamber to assess the nature and extent of the authority, whether *de facto* or *de jure*, and the effective control exercised by Musema in the context of the events alleged in the Indictment. The Chamber will make that assessment of Musema's authority, firstly by examining the testimonies of witnesses before the Chamber and the documents tendered to it, and secondly by presenting its factual findings on the matter.

#### **Factual findings**

879. The Chamber finds that it has been established beyond reasonable doubt that Musema exercised *de jure* authority over employees of the Gisovu Tea Factory while they were on Tea Factory premises and while they were engaged in their professional duties as employees of the Tea Factory, even if those duties were performed outside factory premises. The Chamber notes that Musema exercised legal and financial control over these employees, particularly through his power to appoint and remove these employees from their positions at the Tea Factory. The Chamber notes that Musema was in a position, by virtue of these powers, to take reasonable measures, such as removing, or threatening to remove, an individual from his or her position at the Tea Factory if he or she was identified as a perpetrator of crimes punishable under the Statute. The Chamber also finds that, by virtue of these powers, Musema was in a position to take reasonable measures to attempt to prevent or to punish the use of Tea Factory vehicles, uniforms or other Tea Factory property in the commission of such crimes. The Chamber finds that Musema exercised *de jure* power and *de facto* control over Tea Factory employees and the resources of the Tea Factory.
880. In relation to other members of the population of Kibuye *Préfecture*, including *thé villageois* plantation workers, while the Chamber is satisfied that such individuals perceived Musema as a figure of authority and as someone who wielded considerable power in the region, it is not satisfied beyond reasonable doubt on the basis of the evidence presented to it that Musema did, in fact, exercise *de jure* power and *de facto* control over these individuals.
881. The Chamber finds, therefore, that it has been established beyond reasonable doubt that there existed at the time of the events alleged in the Indictment a *de jure* superior-subordinate relationship between Musema and the employees of the Gisovu Tea Factory.



## II. Joint Criminal Enterprise Liability

**Michael P. Scharf, *Joint Criminal Enterprise, The Nuremberg Precedent, and the Concept of “Grotian Moment,”* in ACCOUNTABILITY FOR COLLECTIVE WRONGDOING (Cambridge University Press, 2012).**

### I. INTRODUCTION

During a sabbatical in the fall of 2008, I had the unique privilege of being invited to serve as Special Assistant to the International Prosecutor of the Extraordinary Chambers in the Courts of Cambodia (ECCC). During the time I spent in Phnom Penh, my most important assignment was to draft the Prosecutor's brief in reply to the Defense Motion to Exclude "Joint Criminal Enterprise" (JCE), and in particular the extended form of JCE known as JCE III, as a mode of liability from the trial of the five surviving leaders of the Khmer Rouge.



JCE III is a form of liability somewhat similar to the American "felony murder rule," in which a person who willingly participates in a criminal enterprise can be held criminally responsible for the reasonably foreseeable acts of other members of the criminal enterprise. Since the decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the 1998 *Tadic* case, it has been accepted that JCE is a mode of liability applicable to international criminal trials. Dozens of cases before the ICTY, the International Criminal Tribunal for Rwanda ("ICTR"), the Special Court for Sierra Leone ("SCSL") and the Special Panels for the Trial of Serious Crimes in East Timor have recognized and applied the three forms of JCE liability.

Under the international law principle of *nullem crimin sine lege* (no crime without law), the Cambodia Tribunal, however, can only apply the substantive law and associated modes of liability that existed as part of customary international law in 1975-1979 -- the time of the atrocities committed by the Khmer Rouge regime. Therefore the question at the heart of the brief I drafted was whether Nuremberg and its progeny had established JCE as part of customary international law following World War II.

The Khmer Rouge Defendants argued that Nuremberg and its progeny provided too scant a sampling to constitute the widespread state practice and *opinio juris* required to establish JCE as a customary norm as of 1975. In response, the Prosecution brief argues that Nuremberg constituted what some commentators call "a Grotian Moment" – an instance in which there is such a fundamental change to the international system that a new principle of customary international law can arise with unusual rapidity.

This chapter explores the concept of “Grotian Moment” in the context of the validity of applying JCE to the Cambodia Tribunal’s cases. It begins with an analysis of whether the “joint plan” mode of liability applied by the Nuremberg Tribunal and its progeny was equivalent to the modern JCE concept. Next it examines whether the Nuremberg precedent fits within the profile of a legitimate “Grotian Moment.” The Chapter then considers whether, as a “Grotian Moment,” both the substantive crimes and modes of liability can be deemed to have crystallized into customary international law by 1975.

Very little has previously been written about the concept of “the Grotian Moment.” Indeed, an electronic search of law review databases revealed only sixty-one previous references to the term, and few that use the term in the way it is being considered here. While this chapter focuses on the concept in the context of the trial of the Khmer Rouge leaders before the Cambodia Tribunal, this analysis has implications far beyond the sub-field of international criminal law.

## **II. DID THE NUREMBERG PRECEDENT ESTABLISH JCE AS CUSTOMARY INTERNATIONAL LAW?**

### **A. APPLICATION OF JCE AT NUREMBERG**



The Nuremberg Charter and Judgment never specifically mention the term “Joint Criminal Enterprise.” Yet, a close analysis of the Nuremberg Judgment and the holdings of several Control Council Law #10 cases reveal that the Nuremberg tribunal and its progeny applied a concept analogous to JCE, which they called the “common plan” mode of liability.

Prior to Nuremberg, liability for participation in a common plan had existed in some form in the national legislation or jurisprudence of numerous common law and civil law countries since at least the nineteenth century. Indeed, many advanced jurisdictions recognized modes of co-perpetration similar to JCE III; these included conspiracy, the felony murder doctrine, the concept of *association de malfaiteurs* and numerous other doctrines of co-perpetration.

The drafters of the Nuremberg Charter, like the drafters of the ICTY Statute 48 years later, recognized that the unique nature of atrocity crimes justifies and requires a unique mode of liability. This was explained in *Tadic*:

Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.

This passage has been quoted in a number of subsequent judgments of the ICTY, and in *Karemera* the ICTR Trial Chamber articulated a similar rationale for the JCE doctrine:

To hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might underestimate the degree of their criminal responsibility.

Similarly, Antonio Cassese, the former President of the ICTY, has opined:

International crimes such as war crimes, crimes against humanity, genocide, torture, and terrorism share a common feature: they tend to be expression of collective criminality, in that they are perpetrated by a multitude of persons, military details, paramilitary units or government officials acting in unison or, in most cases, in pursuance of a policy. When such crimes are committed, it is extremely difficult to pinpoint the specific contribution made by each individual participant in the criminal enterprise or collective crime. [...] The notion of joint criminal enterprise denotes a mode of criminal liability that appears particularly fit to cover the criminal liability of all participants in a common criminal plan.

Consistent with the doctrine's historic origins in an international agreement (the 1945 London Charter establishing the Nuremberg Tribunal) and the jurisprudence of international judicial bodies (the Nuremberg and Control Council Law #10 Tribunals), Professor van Sliedregt concludes that "JCE is a merger of common law and civil law. JCE in international law is a unique (*sui generis*) concept in that it combines and mixes two legal cultures and systems." Specifically, the Major Powers sought to create an approach in the Nuremberg Charter that would combine the Anglo-American conspiracy doctrine with the approach in France and the Soviet Union where conspiracy was not recognized as a crime. Thus, Article 6 of the London Charter implemented a modified form of the initial American proposal to include conspiracy, providing that "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."

During the Nuremberg Trial, Justice Robert Jackson, the Chief U.S. Negotiator of the Nuremberg Charter and Chief U.S. Prosecutor at Nuremberg explained to the Tribunal the meaning of “common plan,” as distinct from the U.S. concept of conspiracy:

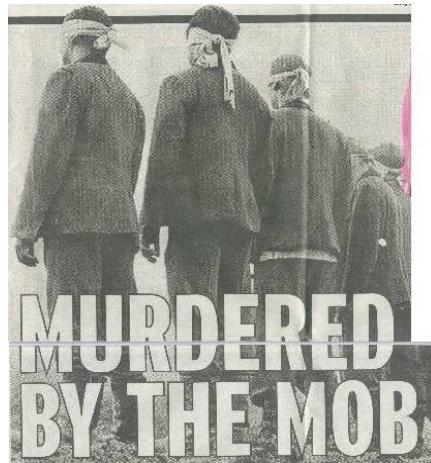
The Charter did not define responsibility for the acts of others in terms of “conspiracy” alone. The crimes were defined in non-technical but inclusive terms, and embraced formulating and executing a “common plan” as well as participating in a “conspiracy.” It was feared that to do otherwise might import into the proceedings technical requirements and limitations which have grown up around the term “conspiracy.” There are some divergences between the Anglo-American concept of conspiracy and that of either Soviet, French, or German jurisprudence. It was desired that concrete cases be guided by the broader considerations inherent in the nature of the social problem, rather than controlled by refinements of any local law.

In harmony with this statement, the Nuremberg Tribunal and the Control Council Law Number 10 Tribunals accepted their own version of the “common plan” concept, thereby transforming it into what has now become known as the doctrine of JCE. These tribunals found that “the difference between a charge of conspiracy and one of acting in pursuance of a common design is that the first would claim that an agreement to commit offences had been made while the second would allege not only the making of an agreement but the performance of acts pursuant to it.” In other words, conspiracy is a crime in its own right, while acting in pursuance of a common design or plan, like JCE, was a mode of liability that attaches to substantive offences. In developing JCE liability from pre-existing approaches in domestic jurisdictions, the Nuremberg Tribunal declared that its conclusions were made “in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal and that mass punishments should be avoided”.

While the Nuremberg Tribunal tried the 22 highest ranking surviving members of the Nazi regime, Control Council Law Number 10 was jointly promulgated by the Allied Powers to govern subsequent trials of the next level of suspected German war criminals by U.S., British, Canadian, and Australian military tribunals, as well as German courts, in occupied Germany. Under the authority of Control Council Law Number 10, the tribunals were to follow the Charter and jurisprudence of the Nuremberg Tribunal. As such, the case law from those tribunals is viewed as an authoritative interpretation of the Nuremberg Charter and Judgment and a reflection of customary international law.

An analysis of several of the Control Council Law Number 10 cases supports the conclusion that the JCE doctrine was in fact employed by those tribunals in 1946–7. In reaching its conclusion about the existence of JCE, the Appeals Chamber of the Yugoslavia Tribunal in *Tadic* relied partly on ten different post-World War II cases—six regarding JCE I, two regarding JCE II, and two regarding JCE III. Most of these cases were published in summary form in the 1949 Report of the UN War Crimes Commission. In addition to these ten, we included in the Prosecution’s Brief another sixteen cases published in the 1949 UN War Crimes Commission Report and the U.S. Nuremberg War Crimes Tribunal Report in which the Control Council Law Number 10 tribunals also applied the common plan or design/JCE concept. All of these cases clarified the meaning of Nuremberg’s common plan liability – the forerunner of JCE. Summing

up this extensive case law and explaining the difference between common design and simple co-perpetration, the UN War Crimes Commission Report states: “the prosecution has the additional task of providing the existence of a common design, [and] once that is proved the prosecution can rely upon the rule which exists in many systems of law that those who take part in a common design to commit an offence which is carried out by one of them are all fully responsible for that offence in the eyes of the criminal law.” Consistent with this explanation, the Appeals Chamber of the Yugoslavia Tribunal in the *Milutinovic* case, after considering extensive filings by the parties on whether JCE is part of customary international law, found that JCE and common plan liability are one and the same.



Given that JCE III is the most controversial type of JCE liability, the three Control Council Law Number 10 cases dealing with that mode of JCE liability are worth examining in some detail. The first is the trial of Erich Heyer and six others -- known as the *Essen Lynching Case*. According to the official summary of the trial published in the UN War Crimes Commission Report, this case concerned the lynching of three British prisoners of war by a mob of Germans. Though the case was tried by a British military court, it did so under the authority of Control Council Law Number 10, and it was therefore “not a trial under English law.” One of the accused, Captain Heyer, had placed three prisoners under the escort of a German soldier, Koenen, who was to take them for interrogation. As Koenen left, Heyer, within earshot of a waiting crowd, ordered Koenen not to intervene if German civilians molested the prisoners and stated that the prisoners deserved to be and probably would be shot. The prisoners were beaten by the crowd and one German corporal fired a revolver at a prisoner, wounding him in the head. One died instantly when they were thrown over a bridge and the remaining two were killed by shots from the bridge and by members of the crowd who beat them to death. The defence argument that the prosecution needed to prove that each of the accused—Heyer, Koenen and five civilians—had intended to kill the prisoners was not accepted by the court. The prosecution argued that in order to be convicted the accused had to have been “concerned in the killing” of the prisoner. Both Heyer and Koenen were convicted of committing a war crime in that they were concerned in the killing of the three prisoners, as were three of the five accused civilians. Even though it was not proven which of the civilians delivered the fatal shots or blows, they were convicted because “[f]rom the moment they left those barracks, the men were doomed and the crowd knew they were doomed and every person in that crowd who struck a blow was both morally and criminally responsible for the deaths of the three men.”

A second example (surprisingly not cited in *Tadic*), which the UN War Crimes Commission specifically found analogous to the *Essen Lynching Case*, is the *Trial of Hans Renoth and Three Others*. In that case, two policemen (Hans Ronoth and Hans Pelgrim) and two customs officials (Friedrich Grabowski and Paul Nieke) were accused of committing a war crime in that they “were concerned in the killing of an unknown Allied airman, a prisoner of war.” According to the allegations, the pilot crashed on German soil unhurt, and was arrested by Renoth, then attacked and beaten with fists and rifles by a number of people while the three other defendants witnessed the beating but took no active part to stop it or to help the pilot. Renoth also stood by for a while, and then shot and killed the pilot. “The case for the prosecution was that there was a common design in which all four accused shared to commit a war crime, [and] that all four accused were aware of this common design and that all four accused acted in furtherance of it.” All the accused were found guilty, presumably based on the foreseeability that the pilot would eventually be killed during the beating at the hands of the crowd or by one of them.

A third example is the case of *Kurt Goebell et. al* (the *Borkum Island Case*). Although not published in the Report of the UN War Crimes Commission, a detailed record of this case is publicly available through the U.S. National Archives Microfilm Publications. Moreover, a detailed report of the trial (based on trial transcripts) was published in the *Journal of Criminal Law* in 1956. According to that report, the mayor of Borkum and several German military officers and soldiers were convicted of the assault and killing of seven American airmen who had crashed-landed. The prosecution argued that the accused were “cogs in the wheel of common design, all equally important, each cog doing the part assigned to it.” It further argued that “it is proved beyond a reasonable doubt that each one of the accused played his part in mob violence which led to the unlawful killings” and “therefore, under the law each and every one of the accused is guilty of murder.” After deliberating in closed session, the judges rendered an oral verdict in which they convicted the mayor and several officers of the killings and assaults. From the arguments and evidence submitted, it is apparent that the accused were convicted pursuant to a form of common design liability equivalent to JCE III. Essentially, the court decided that though certain defendants had not participated in the murder nor intended for it to be committed, they were nonetheless liable because it was a natural and foreseeable consequence of their treatment of the prisoners.

International judicial decisions, like domestic court cases, can evince state practice and *opinio juris*, establishing customary international law. The Khmer Rouge Defendants objected that these Control Council Law Number 10 cases are “unpublished cases” or, in some instances, mere summaries of unwritten verdicts. The suggestion being that the Court could not validly rely on them to glean the substance of customary international law because defendants could not be deemed to have constructive knowledge of unpublished works with respect to the doctrine that ignorance of law is no excuse (*ignorantia juris non excusat*). It is significant, however, that two of the three Control Council Law #10 JCE III cases described above were published in summary form in the official UN War Crimes Commission Report in 1949. According to those Reports’ foreword, the “main object of these Reports [was] to help to elucidate the law, i.e., that part of International Law which has been called the law of war”. This authoritative and widely disseminated multi-volume account of the trials, in which the war crimes tribunals recognized

and applied JCE liability, supports the argument that the Khmer Rouge leaders had sufficient constructive notice in 1975–79 that their mass atrocity crimes would attract criminal responsibility under the JCE doctrine.

While the *Borkum Island Case* was not included in the Report of the UN War Crimes Commission, it is significant that the charging instrument, transcript (including oral bench judgment), and other documents of the case have been publicly available from The United States Archives. In addition, as mentioned above a detailed account and analysis of the *Borkum Island Case* was published in 1956 in the *Journal of Criminal Law*. It may be an open question whether a judgment that was the subject of a scholarly article in a widely read prestigious publication and which was available in public archives years before the Khmer Rouge launched their genocidal campaign can be viewed as a published judicial decision for this purpose.



Given the nature of international crimes and mass atrocities, the rationale behind the existence of JCE and the relative infrequency with which trials for such crimes arise, it is unsurprising that there are few examples of national jurisprudence applying forms of JCE liability in the years after Nuremberg. The most notable example is the Jerusalem District Court and Israeli Supreme Court’s decisions in the *Eichmann case*. Those decisions demonstrate that, as of 1961, domestic courts recognized JCE as developed by the immediate post-World War II laws and jurisprudence. The Jerusalem District Court’s approach to determining Adolf Eichmann’s individual responsibility for participating in a common criminal plan to extinguish the Jews in Europe closely resembled that applied by the Control Council Law Number 10 cases cited above (several of which were cited by the Jerusalem District Court). This can be seen clearly in its statement:

Hence, everyone who acted in the extermination of Jews, knew about the plan for the Final Solution and its advancement, is to be regarded as an accomplice in the annihilation of the millions who were exterminated during the years 1941–1945, irrespective of the fact of whether his actions spread over the entire front of the extermination, or over only one or more sectors of that front. His responsibility is that of a ‘principal offender’ who perpetrated the entire crime in co-operation with the others.

The District Court found that Eichmann was made aware of the criminal plan to exterminate the Jews in June of 1941; he actively furthered this plan via his central role as Referent for Jewish Affairs in the Office for Reich Security as early as August of 1941; and he possessed the requisite intent (specific intent here, because the goal was genocide) to further the plan as evidenced by “the very breadth of the scope of his activities” undertaken to achieve the biological extermination of the Jewish people. On the basis of these findings, Eichmann was held criminally liable for the “general crime” of the Final Solution, which encompassed acts constituting the crime “in which he took an active part in his own sector *and the acts committed by his accomplices to the crime in other sectors* on the same front”. In so holding, the District Court ruled that full awareness of the scope of the plan’s operations was not necessary noting that many of the principal perpetrators, including the defendant, may have possessed only compartmentalized knowledge. The Israeli Supreme Court also cited the 1946 General Assembly Resolution affirming the Nuremberg principles, stating: “if fifty-eight nations unanimously agree on a statement of existing law, it would seem that such a declaration would be all but conclusive evidence of such a rule, and agreement by a large majority would have great value in determining what is existing law.”

## **B. NUREMBERG AS A “GROTIAN MOMENT.”**

The United Nations’ International Law Commission (ILC) has recognized that the Nuremberg Charter, Control Council Law Number 10, and the post-World War II war crimes trials gave birth to the entire international paradigm of individual criminal responsibility. The ILC has described the principle of individual responsibility and punishment for crimes under international law recognized at Nuremberg as the “cornerstone of international criminal law” and the “enduring legacy of the Charter and Judgment of the Nuremberg Tribunal.”

Importantly, on 11 December 1946, in one of the first actions of the newly formed United Nations, its General Assembly unanimously affirmed the principles from the Nuremberg Charter and judgments. This action arguably affirmed as customary international law both the substantive law and the theory of individual criminal liability (including “common plan” liability) codified in the Nuremberg Charter and applied by the Nuremberg Tribunal. As a consequence, a compelling case can be made that common plan (now known as JCE) liability was rendered just as much a part of customary international law as the other fundamental concepts of international criminal liability reflected in the Nuremberg Principles which the ECCC applies. These concepts include: command responsibility, the principle that obeying superior orders is not a defence, the idea that leaders can be held liable for international crimes despite their official position and the notion that a perpetrator is responsible for an act that constitutes a crime under international law notwithstanding the fact that domestic law does not impose a penalty for this act. Although General Assembly resolutions are by their nature “non binding,” domestic and international courts have long recognized that they are official expressions of the governments concerned and consequently are relevant and entitled to be given weight as evidence of state practice and *opinio juris*—the two components of customary international law.

Subsequently, the International Law Commission (ILC) was directed by the UN General Assembly to formulate the Principles of International Law Recognized in the Charter of the

Nuremberg Tribunal and in the Judgment of the Tribunal. In 1950, the ILC submitted the following seven principles to the United Nations:

Principle I: Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

Principle II: The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

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

Principle IV: The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle V: Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI: The crimes hereinafter set out are punishable as crimes under international law:

(a) Crimes against peace: Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances; (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

(b) War crimes: Violations of the laws or customs of war include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of 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.

(c) Crimes against humanity: Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

Principle VII: Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

Although the ILC's 1950 formulation neither specifically references nor specifically excludes JCE, it does make clear that anyone who "commits" a crime against peace, a war crime,

or crime against humanity, is criminally liable. It is of note in this regard that the ICTY, the ICTR and the SCSL have all read the word “committed” in their Statutes as including participation in the realization of a common design or purpose.

The UN General Assembly did not pass a resolution endorsing the ILC’s 1950 formulation of the Nuremberg Principles, presumably because the General Assembly had four years earlier already confirmed the status of the Nuremberg Principles as international law. Instead, it directed the International Law Commission to codify them in an “International Code of Offences against the Peace and Security of Mankind.” It is noteworthy that the ILC’s first draft of the Code in 1956 specifically included “the principle of individual criminal responsibility for formulating a plan or participating in a common plan or conspiracy to commit a crime” – thus indicating that the ILC in fact perceived the common plan concept to be part of the Nuremberg Principles.

In submitting the draft statute for the ICTY to the Security Council in 1993, the United Nations Secretary-General emphasized the customary international law status of the principles and rules emanating from the Nuremberg Trial and other post-World War II jurisprudence. Specifically, he stated that the Statute had been drafted to apply only the “rules of international humanitarian law which are beyond any doubt part of customary international law,” which included the substantive law and modes of liability embodied in “the Charter of the International Military Tribunal of 8 August 1945.” Logic dictates that this 1993 statement about the content of customary international law also holds true for the time of the crimes in question before the ECCC (1975–9), as there were no relevant major developments in international humanitarian law between 1975 and the establishment of the ICTY in 1993. As Ciara Damgaard documents, “the origins of the JCE Doctrine can be found in the events surrounding the end of World War II.”

The Khmer Rouge Defendants argued in their brief that even if Nuremberg and a few Control Council Law #10 cases recognized the JCE concept, the number of cases was too limited to constitute customary international law. In response the Prosecutor’s brief submitted that Nuremberg and its progeny created a so-called “Grotian Moment.” Notably, this was the first time in history an organ of an international tribunal used the term.

### **C. THE CONCEPT OF “GROTIAN MOMENT”**

Hugo Grotius is widely considered to be the “father” of modern international law as the law of nations, and has been recognised for having “recorded the creation of order out of chaos in the great sphere of international relations.” In the mid-1600s, at the time that the nation-state was formally recognized as having crystallized into the fundamental political unit of Europe, Grotius “offered a new concept of international law designed to reflect that new reality.” In his masterpiece, *De Jure Belli ac Pacis* (The Law of War and Peace), Grotius addresses questions bearing on just war: who may be a belligerent; what causes of war are just, doubtful or unjust; and what procedures must be followed in the inception, conduct, and conclusion of war.

Although NYU Professor Benedict Kingsbury has convincingly argued that Grotius’ actual contribution has been distorted through the ages, the prevailing view today is that his treatise had an extraordinary impact as the first formulation of a comprehensive legal order of

interstate relations based on mutual respect and equality of sovereign states. In “semiotic” terms, the “Grotian tradition” has come to symbolize the advent of the modern international legal regime, characterized by positive law and state consent, which arose from the Peace of Westphalia.

The term “Grotian Moment,” on the other hand, is a relatively recent creation, apparently coined by Princeton Professor Richard Falk in 1985. Such a moment is said to occur when there is a transformative development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance. Usually this happens during “a period in world history that seems analogous at least to the end of European feudalism … when new norms, procedures, and institutions had to be devised to cope with the then decline of the Church and the emergence of the secular state.” Commentators have opined that the creation of the Nuremberg Tribunal at the end of World War II constituted a classic “Grotian Moment,” on par with the negotiation of the Peace of Westphalia and the establishment of the UN Charter.

Normally, customary international law crystallizes out of the slow accretion of widespread state practice evincing a sense of legal obligation (*opinio juris*). The process can take decades or even centuries. The International Court of Justice, however, has made clear that customary norms can sometimes ripen quite rapidly, and that a short period of time is not a bar to finding the existence of a new rule of customary international law, binding on all the countries of the world, save those that persistently objected during its formation. Often this will occur during a so-called “Grotian Moment.”

It was thus the paradigm-shifting nature of the Nuremberg precedent, and the universal and unqualified endorsement of the Nuremberg Principles by the nations of the world in 1946, rather than the number of cases applying JCE liability at the time, which crystallized this doctrine into a mode of individual criminal liability under customary international law. As such, in accordance with Article 15(2) of the International Covenant on Civil and Political Rights, the ECCC may try international crimes using internationally recognized modes of liability whether or not such crimes or forms of liability were recognized in the domestic law at the time of their commission.

It follows from the above that, in addition to international and hybrid tribunals, domestic courts may legitimately apply the JCE doctrine in criminal prosecutions of war crimes, genocide, and crimes against humanity.

### **III. CONCLUSION**

This Chapter has demonstrated that JCE III does in fact have a venerable lineage, anchored securely in the customary international law established during the Grotian Moment of Nuremberg. Nevertheless, JCE III has been widely criticized by commentators and defense counsel as tilting the playing field too far toward the prosecution. In particular, defense counsel decry that the “foresight standard” on which JCE III is based introduces a form of guilt by association or strict liability for membership in a criminal organization. By way of concluding observations, I offer a four-part rejoinder to this argument.

First, liability in a JCE is distinguishable from the crime of membership in a criminal organization. The latter was criminalized as a separate offence in Nuremberg and in subsequent trials held under Control Council Law Number 10, where knowing and voluntary membership in an entity deemed to be a criminal organization was sufficient to entail individual criminal responsibility. At Nuremberg, the discrete offence of membership in a criminal organization was adopted to facilitate the later prosecutions of minor offenders. In contrast, criminal liability pursuant to a JCE is not liability for mere membership, but “a form of liability concerned with the participation in the commission of a crime as part of a joint criminal enterprise, a different matter.”

Second, the underpinning of the JCE liability is to be found in considerations of public policy. That is, the need to protect society against persons who (1) join together to take part in criminal enterprises, (2) while not sharing the criminal intent of those participants who intend to commit serious crimes outside the common enterprise, nevertheless are aware that such crimes may be committed, and (3) do not oppose or prevent their commission. As the High Court of England and Wales has noted, “[e]xperience has shown that criminal enterprises only too readily escalate into the commission of greater offences”. Thus, JCE liability is justified by both the unique threats posed by organized criminality and the unique challenge of prosecuting such perpetrators.

Third, incidental criminal liability based on foresight and risk is a mode of liability that is dependent on, and incidental to, a common criminal plan. The “incidental crime” is the outgrowth of, rendered possible by, and premised on the existence of prior joint planning to commit the concerted crime or primary criminal acts of the JCE. In other words, there is a causal link between the concerted crime and the incidental crime. Although, the secondary offender did not share the intent of the participant that engaged in the incidental crime, his culpability lies in the fact that he could anticipate such conduct, but willingly took the risk that it might occur. He could have prevented the further crime or disassociated himself from its likely commission and his failure to do so entails that he too must be held responsible for its commission. This is to be distinguished from situations where a crime is committed as an outgrowth of a plan that is, in the first place, legal. Under those circumstances, for example, when a military unit carries out a legitimate military action, and a member commits a subsequent and unanticipated illegal act, the culpability for that act is considered that of the perpetrator alone. Moreover, the Court can take into account the different degrees of culpability of the participants in the JCE at sentencing.

Finally and most importantly, national and international judges have historically applied a “foreseeability” standard with rigor and fairness in numerous contexts in criminal law. Indeed, an objective “foreseeability” standard is also applicable in the contexts of proving “aiding and abetting” or “command responsibility.” Like JCE III, proof of aiding and abetting is based on an objective test, namely whether the defendant was aware that a crime “will probably be committed.” And, like JCE III, liability for command responsibility utilizes a “foreseeability” test, namely whether (1) an act or omission incurring criminal responsibility has been committed by other persons than the accused, (2) there existed a superior-subordinate-relationship between the accused and the principle perpetrator, (3) the accused as a superior knew or had reason to know that the subordinate was about to commit such crimes or had done so and (4) the accused as a superior failed to take the necessary and reasonable measures to prevent such crimes or

punish the perpetrator thereof. In fact, the command responsibility “had reason to know” standard is an objective test with an even lower *mens rea* requirement than JCE III.

What remains contentious is not that JCE liability exists for crimes under international law, but under what conditions such liability should be applied. The jurisprudence of the ICTY, ICTR, and SCSL have gone a long way toward defining the contours of the JCE III doctrine to the point where it is sufficiently precise. Specifically, this is achieved by requiring that in addition to a defendant’s significant contribution to the execution of the criminal plan, he or she also: (a) shares the criminal intent or, at a minimum, (b) is aware of the possibility that a crime might be committed as a consequence of the execution of the criminal act and willingly takes the risk. Accordingly, the crime must not only have been a natural and foreseeable consequence of the requisite participation in the plan (which involves an objective test requiring *dolus eventualis*/advertent recklessness), the accused must also have “willingly” taken the risk despite knowing of the foreseeable consequences. Moreover, the ICTY Appeals Chamber has deliberately sought to prevent the JCE doctrine from expanding and becoming amorphous. For example, in *Krnojelac*, it held that using JCE as a mode of liability “requires a strict definition of common purpose,” and that the principal perpetrators who physically commit the crime “should be defined as precisely as possible.”



**Michael P. Scharf, Special Tribunal Issues Landmark Ruling on Definition of Terrorism and Modes of Participation, ASIL Insight, March 4, 2011.**

## Introduction

In 2007, the UN Security Council established the Special Tribunal for Lebanon (“STL”), the world’s first international court with jurisdiction over the crime of terrorism, to prosecute those responsible for the 2005 assassination of Lebanese Prime Minister Rafiq Hariri and twenty-two others. On January 17, 2011, the Tribunal’s Prosecutor, Daniel Bellemare, submitted a sealed indictment for the pre-trial judge to confirm. The pre-trial judge, in turn, requested that the Appeals Chamber resolve fifteen questions relating to the substantive criminal law and modes of criminal responsibility to be applied by the STL and to determine whether the STL should charge crimes cumulatively or in the alternative. In response, on February 16, 2011, the STL Appeals Chamber handed down a landmark ruling.

## **Modes of Participation**

The Appeals Chamber opined that the STL was “an international tribunal in provenance, composition, and regulation.” The Appeals Chamber further noted that since Article 3 of the STL Statute (setting forth principles of liability) draws verbatim from the Statutes of the *ad hoc* international criminal tribunals, “it reflects the status of customary international law as articulated in the case law of the *ad hoc* tribunals.” Consequently, the Appeals Chamber held that the STL may apply the international modes of responsibility, including joint criminal enterprise (“JCE”) liability, which the other international tribunals have employed. In so holding, the Appeals Chamber took a swipe at the International Criminal Court’s alternative approach to co-perpetrator liability (known as “perpetration by means”), stating that unlike JCE, “the doctrine of perpetration by means … is not recognised in customary international law.”

There are three forms of JCE. JCE I (basic form) attributes individual criminal liability when all co-defendants act pursuant to a common design and possess the same criminal intent, even if each co-perpetrator carries out a different role within the JCE. The *mens rea* required for this form of JCE is the shared intent of all members to commit a certain crime. JCE II (systemic form) is characterized by the existence of an organized criminal system, particularly in the case of concentration or detention camps. The *mens rea* required for this form of JCE is the personal knowledge of the system of ill-treatment and the intent to further this concerted system of ill-treatment. JCE III (extended form) ascribes individual criminal liability in situations “involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common plan, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose.” The *mens rea* for this form is either the shared criminal intent of the perpetrators or, at a minimum, the fact that the defendant is “aware of the possibility that a crime might be committed as a consequence of the execution of the criminal act and [she or he] willingly takes the risk.”

Of the three forms of JCE, JCE III has engendered the most controversy, as it is seen by defense counsel and some commentators as a form of guilt by association. Perhaps for this reason, the Appeals Chamber sought to limit the use of JCE III before the STL. While noting that Lebanese law recognizes a principle of liability similar to JCE III, the Appeals Chamber concluded that the application of JCE III would not be appropriate for the STL to apply to the crime of terrorism because JCE III utilizes an advertent recklessness (*dolus eventualis*) standard, whereas terrorism is a specific intent crime. In so concluding, the Appeals Chamber recognized that this is a departure from the approach of the ICTY and ICTR, which allow for convictions

under JCE III for the specific intent crimes of genocide and persecution as a crime against humanity. The *ad hoc* tribunals also allow for convictions under the principle of command responsibility for specific intent crimes, even though command responsibility employs a negligent standard (the commander is responsible for the acts of subordinates if he knew or should have known about their crimes and failed to take action to prevent or punish). For the crime of terrorism, the Appeals Chamber asserts, “the better approach” is to treat the secondary offender as an aider and abetter rather than “pin on him the stigma of full perpetratorship.”

As a final observation, prior to the STL Appeals Chamber’s decision, the doctrine of joint criminal enterprise liability had been applied only to war crimes, crimes against humanity, and genocide, though Judge Cassese presaged application of JCE to the offense of terrorism in a book he authored three years before the issuance of the STL Appeals Chamber opinion. Cassese wrote:

International crimes such as war crimes, crimes against humanity, genocide, torture, and terrorism share a common feature: they tend to be expression of collective criminality, in that they are perpetrated by a multitude of persons, military details, paramilitary units or government officials acting in unison or, in most cases, in pursuance of a policy. When such crimes are committed, it is extremely difficult to pinpoint the specific contribution made by each individual participant in the criminal enterprise or collective crime. . . . The notion of joint criminal enterprise denotes a mode of criminal liability that appears particularly fit to cover the criminal liability of all participants in a common criminal plan.

Based on the policies articulated in the quote above, it may well be that the STL Appeals Chamber’s confirmation that JCE I and JCE II could apply to the crime of terrorism will be taken as a license for domestic application of the doctrine to terrorism cases worldwide.

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The Statute of the International Criminal Court contains the following provisions on the liability of co-perpetrators:

Article 25  
Individual criminal responsibility

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

- (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
  - (ii) Be made in the knowledge of the intention of the group to commit the crime;
- (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
- 

### **III. Incitement to Commit Genocide**

**Incitement to Genocide in International Law, US Holocaust Museum, Holocaust Encyclopedia, available at: <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007839>**

In the immediate aftermath of World War II, the world was faced with a challenge—how to seek justice for an almost unimaginable scale of criminal behaviour, including the annihilation of European Jewry. Even as a vocabulary emerged to describe the atrocities that would come to be known as the Holocaust, legal experts sought to establish a new body of law to address the unprecedented crimes perpetrated by the Axis powers. A series of war crimes trials convened by the Allied powers and European governments sought to answer tangled questions of guilt, punish the perpetrators, and deter future crimes on this scale.



The trial of leading German officials before the International Military Tribunal (IMT), the best known of the postwar war crimes trials, formally opened in Nuremberg on November 20, 1945, only six and a half months after Germany surrendered. Among the 24 defendants was Julius Streicher, publisher of the antisemitic German weekly *Der Stürmer*. On October 1, 1946, the IMT convicted Streicher of crimes against humanity in connection with his incitement to the mass murder of Europe's Jewish population. Streicher was executed for his crimes. At the time of the IMT, incitement to murder and extermination was considered a form of persecution on political and racial grounds, punishable as a crime against humanity. By holding one of Nazi

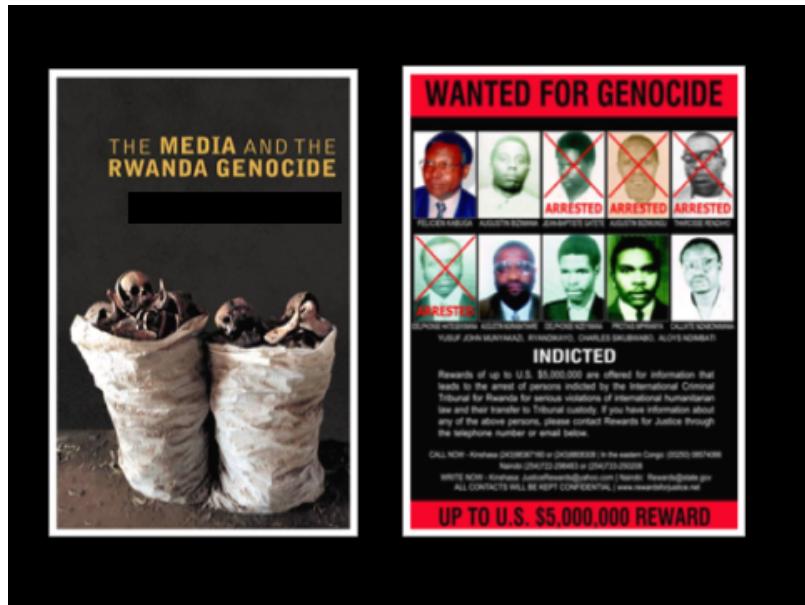
Germany's chief propagandists responsible as an accomplice for the destruction of the European Jews, Streicher's conviction established a precedent-setting link between inflammatory speech and criminal action in international law. Soon after the IMT had completed its mission, direct and public incitement to commit genocide became a crime under international law.

## **DEFINING A CRIME**

The term "genocide" had been coined in 1944 by Raphael Lemkin, a Polish-Jewish lawyer who had fled to the United States. After the war, Lemkin and others lobbied at early sessions of the United Nations for the crime of genocide to become part of the emerging field of international law. On December 9, 1948, the United Nations General Assembly adopted the "Convention on the Prevention and Punishment of the Crime of Genocide" (commonly referred to as the Genocide Convention). Building on the intellectual and legal foundation laid by the IMT in the Streicher decision, Article III (c) of the Genocide Convention declares that "direct and public incitement to commit genocide" is a crime.

Generally speaking, "incitement" means encouraging or persuading another to commit an offense by way of communication, for example by employing broadcasts, publications, drawings, images, or speeches. It is "public" under international law if it is communicated to a number of individuals in a public place or to members of a population at large by such means as the mass media. Among other things, its "public" nature distinguishes it from an act of private incitement (which could be punishable under the Genocide Convention as "complicity in genocide" or possibly not punishable at all). Incitement to genocide must also be proven to be "direct," meaning that both the speaker and the listener understand the speech to be a call to action. Prosecutors have found it challenging to prove what "direct" may mean in different cultures, as well as its meaning to a given speaker. Moreover, public incitement to genocide can be prosecuted *even* if genocide is never perpetrated. Lawyers therefore classify the infraction an "inchoate crime": a proof of result is not necessary for the crime to have been committed, only that it had the potential to spur genocidal violence. It is intent of the speaker that matters, not the effectiveness of the speech in causing criminal action. This distinction helps to make the law preventative, rather than reactive.

## **INCITEMENT TO GENOCIDE IN RWANDA**



The incitement provision of the Genocide Convention took on new importance in the wake of genocide in the Central African nation of Rwanda. Between April and July 1994, members of the Hutu majority, wielding machetes, firearms, and other weapons, killed at least 500,000 people. The vast majority of the victims were members of the Tutsi minority. In 1997, the United Nations International Criminal Tribunal for Rwanda (ICTR) indicted three Rwandans for “incitement to genocide”: Hassan Ngeze who founded, published, and edited *Kangura* (Wake Others Up!), a Hutu-owned tabloid that in the months preceding the genocide published vitriolic articles dehumanizing the Tutsi as *inyenzi* (cockroaches) though never called directly for killing them; and Ferdinand Nahimana and Jean-Bosco Barayagwiza, founders of a radio station called *Radio Télévision Libre des Milles Collines* (RTLM) that indirectly and directly called for murder, even at times to the point of providing the names and locations of people to be killed. In the days leading to and during the massacres, RTLM received help from Radio Rwanda, the government-owned station, and programs were relayed to villages and towns throughout the country by a network of transmitters operated by Radio Rwanda. At the heart of the Rwanda “Media Trial” that opened on October 23, 2000, was the issue of free speech rights. “A key question is what kind of speech is protected and where the limits lie,” said American lawyer Stephen Rapp, the case’s senior prosecutor for the Tribunal. “It is important to draw that line. We hope the judgment will give the world some guidance.”

In December 2003, the ICTR handed down its verdict. The three judges (a South African, a Sri Lankan, and a Norwegian) convicted Ngeze, Nahimana, and Barayagwiza for direct and public incitement to genocide. The judges declared: “Without a firearm, machete or any physical weapon, you caused the deaths of thousands of innocent civilians.” In framing their verdict, the judges noted: “This case raises important principles concerning the role of the media, which have not been addressed at the level of international criminal justice since Nuremberg. The power of the media to create and destroy fundamental human values comes with great responsibility. Those who control the media are accountable for its consequences.” The prosecutors’ burden involved the interpretation of euphemisms (in order to prove the “direct” nature of the incitement), such as the phrase “go to work” as a call to kill the Tutsi and the Hutu who opposed

the Rwandan regime. That an individual or group killed someone in response to the radio broadcasts or newspaper articles was not required to prove the incitement to genocide charge.

In January 2007, the lawyers for the defendants in the Rwanda “Media Trial” appealed the tribunal’s decisions on numerous grounds. Issuing a decision on November 28, 2007, the Tribunal affirmed the charge of “direct and public incitement to commit genocide” for Ngeze and Nahimana. The judges reversed the finding of guilt on this charge against Barayagwiza, ruling that only RTLM broadcasts made after April 6, 1994 (when the genocide began), constituted “direct and public incitement to commit genocide,” and that Barayagwiza no longer exercised control over the employees of the radio station at that time. (The Tribunal did affirm the findings of guilt against Barayagwiza on different grounds, for instigating the perpetration of acts of genocide and crimes against humanity.) Because of the reversal of some charges against the three defendants, the judges lowered the defendants’ sentences: Nahimana’s from life to 30 years, Negeze’s from life to 35 years, and Barayagwiza’s from 35 to 32 years.

## **HATE SPEECH VS. INCITEMENT TO GENOCIDE**

What is the difference between hate speech and direct and public incitement to commit genocide? The Rwanda Media Case emphasized that incitement to commit genocide required a calling on the audience (be they listeners or readers) to take action of some kind. Absent such a call, inflammatory language may qualify as hate speech but does not constitute incitement. In many jurisdictions hate speech itself has been criminalized.

Demonstrating that speech meets the legal threshold for the “direct” element of the incitement charge can be extremely complex. Proving such directness often involves a careful parsing of metaphors, allusions, double entendres, and other linguistic nuances: a mode of speech may be perceived as direct in one culture, but not in another. Consider, for example, the Trial Judgment in the case of *Prosecutor v. Simon Bikindi*, handed down by the ICTR on December 2, 2008. Simon Bikindi was a famous composer and singer from Rwanda who distinguished himself in the run-up to the 1994 genocide by using his music and fame to drum up support for the Hutu-led regime, and by fostering ethnic hatred throughout the carnage. He was also held accused of incitement for composing and performing songs like *Nanga Abahutu* (“I Hate These Hutu,” an anti-Tutsi song). According to prosecution witnesses who appeared before the ICTR, Bikindi’s song was not only an invitation to hate Tutsi, but given the context of the ongoing civil war, to be ready to kill them as well. The ICTR Trial Chamber was not in the end persuaded that Bikindi’s songs amounted to incitement to commit genocide. Instead, the judges convicted Bikindi for statements that he made—via loudspeaker—in the Rwandan countryside *during* the genocide (where he asked his audiences, among other things, “Have you killed the Tutsi here?” and referred to Tutsis as “snakes.”). The Bikindi case illustrates that a sophisticated understanding of cultural context—notably linguistic usage and subtlety—is critical for the legal determination of the directness of any alleged incitement to genocide.

In contrast to the Rwanda Tribunal, the international crime of direct and public incitement to commit genocide has played virtually no role in the prosecution of genocide at the International Criminal Tribunal for the Former Yugoslavia in The Hague. There the prosecution of atrocities other than genocide has predominated the proceedings. Most experts believe that

mass communication in the former Yugoslavia was employed chiefly for spewing hate propaganda, rather than incitement to commit genocide as defined in strictly legal terms.

## **INCITEMENT TO GENOCIDE IN CURRENT LEGAL DEBATE**



The crime of incitement remains firmly in place on the international legal stage. In 1998, an incitement provision was included in Article 25(3)(e) of the Rome Statute of the International Criminal Court (in conjunction with Article 6—Genocide). And on November 28, 2008, after seven years of negotiations, the European Union (EU) adopted a Framework Decision on combating racism and xenophobia. The document's principal contribution is the EU-wide prohibition of public incitement and hatred against persons of a different race, color, religion, or national or ethnic origin, punishable by a prison sentence of one to three years. This document also prohibits public approval, denial, or gross trivialization of international crimes, notably genocide, and is an outgrowth of pre-existing European laws prohibiting Holocaust denial.

The Genocide Convention's Article III (c) has recently been invoked in the spirit of genocide prevention. On October 26, 2005, Iranian president Mahmoud Ahmadinejad at the "World Without Zionism" conference in Tehran, called for the State of Israel to be "wiped off the map." Ahmadinejad has continued to make public speeches either directly or indirectly calling for Israel's destruction. In 2006, Israeli diplomats proposed to charge Ahmadinejad with direct and public incitement to genocide before the International Criminal Court. Irwin Cotler, the former Canadian Minister of Justice and currently Member of the Canadian Parliament, has also argued that the Iranian president is guilty of state-sanctioned incitement to genocide, incitement that is both "direct and public" as defined in the Genocide Convention. Additionally, in June 2007, the US House of Representatives passed a resolution calling upon the United Nations Security Council to charge Ahmadinejad with violating the Genocide Convention by his repeated calls for Israel to be annihilated. Government officials in the United Kingdom and Australia have adopted similar stances to that of the Americans. To date, no international legal proceedings for incitement to genocide have moved forward against Ahmadinejad.



CASE WESTERN RESERVE  
UNIVERSITY  
SCHOOL OF LAW

# **INTRODUCTION TO INTERNATIONAL CRIMINAL LAW**

**MOOC taught by Professor  
Michael P. Scharf**

**Module #5:**

**Specialized Defenses**

# OCTOBER 10

## **International Criminal Law Module #5 Defenses under International Criminal Law**

### **On-Line Simulation**

For this week's on-line simulation, assume the following facts, based on the real-life case of Drazen Erdomovic before the International Criminal Tribunal for the former Yugoslavia. Erdomovic is a 20 year old ethnic Serb, who had voluntarily enlisted in 1994 in the Bosnian Serb army as an auto mechanic. In May 1995, he was transferred to serve as an infantry soldier in the 10<sup>th</sup> Sabotage Detachment of the Bosnian Serb army. On 6 July 1995, the Bosnian Serb army commenced an attack on the UN "safe area" of Srebrenica. This attack continued through 11 July 1995, when the first units of the Bosnian Serb army entered Srebrenica. On 16 July 1995, busses containing Bosnian Muslim men arrived at the collective farm in Pilica, near Srebrenica. Each bus was full of about 70 Bosnian Muslim men, ranging from 17-60 years of age. After each bus arrived at the farm, the Bosnian Muslim men were removed in groups of about 10, escorted by members of the 10<sup>th</sup> Sabotage Detachment to a field adjacent to farm buildings and lined up in a row with their backs facing Erdemovic and members of his unit.

At first Erdemovic refused to carry out his commander's order to shoot and kill the Muslim men with his machine gun. But then the commander told him that the alternative was to line up next to the Muslims and be killed. Erdemovic then pulled the trigger, and killed approximately 70 men. When Erdemovic was prosecuted for these killings before the Yugoslavia Tribunal he raised the defense of having acted under duress. Based on the reading materials below:

**Members of Group A** are invited to upload a submission, playing the role of the Prosecutor, arguing why Erdomovic cannot rely on the defense of duress.

**Members of Group B** are invited to upload a submission, playing the role of the Defense, arguing why Erdomovic can rely on the defense of duress.

In order to complete the optional on-line simulations for this course, students must go to the Navigation Bar on the left panel. Under the Exercises section, you will find a button for "on-line simulations." The simulations for each session are available under this button. Written work can be submitted directly or through file upload. Students who post five or more on-line submissions of over 200 words in length during the course (simulations and discussions) will be awarded a Statement of Accomplishment with Distinction for the course.

## Problem for On-Line Discussion

Based on the *New York Times* article about the court martial of Captain Lawrence Rockwood, and the background materials below, you are invited to upload a submission that argues why you think Captain Rockwood should or should not be able to prevail on the defense of refusing to obey an unlawful order.

In order to complete the optional on-line simulations for this course, students must go to the Navigation Bar on the left panel. Under the Exercises section, you will find a button for "on-line simulations." The simulations for each session are available under this button. Written work can be submitted directly or through file upload. Students who post five or more on-line submissions of over 200 words in length during the course (simulations and discussions) will be awarded a Statement of Accomplishment with Distinction for the course.

### **Francis X. Clines, "American Officer's Mission for Haitian Rights Backfires," New York Times, May 12, 1995.**

An Army officer who took the words of the nation's Commander in Chief to heart and went off on his own in search of human-rights violations against Haitian penitentiary inmates faced a court-martial today with his career and his conscience on the line.

A panel of five fellow officers sat in judgment of the odd, passionate case of Capt. Lawrence P. Rockwood, a fourth-generation military man who talked his way alone into the National Penitentiary in Port-au-Prince last year during the multinational Haitian incursion in a zealous and unauthorized search for abused political prisoners.

His one-man mission, intercepted before he could complete it, has ruined his 15-year career and left him facing a possible dishonorable discharge and 10 years in prison. But as he took the stand this morning, the captain defended his belief in conscience, a belief that was bolstered, he emphasized, by his soldier-father, who took him as a boy to the Dachau concentration camp in Germany and taught him about the individual soldier's duty to human rights over rote obedience.

"He explained why these things exist in the world," Captain Rockwood told the tribunal here in a simple barracks courthouse. "What happened there was the result of cynicism and blind obedience," he said, speaking of Dachau. He justified his prison adventure by invoking international law and President Clinton's stated concern for "stopping brutal atrocities" as a main motive for the military intervention in Haiti that began Sept. 19.

Platoons of soldiers jogged past in orderly cadence this morning as the captain faced charges of leaving his assigned post and disobeying orders. In the view of the Army, Captain Rockwood was a military intelligence specialist on the loose in Haiti with a separate agenda and a loaded

rifle when he scaled the fence of his base on the night of Sept. 30 and found his way to the national prison, announcing that he was there to inspect it for prisoner abuses.

Captain Rockwood's defense is that he heeded too well the words of President Clinton. The 36-year-old officer said he acted on his own only after he was rebuffed in various attempts at going through the chain of command and found the military too preoccupied with protecting its own invasion force to attend properly to the human-rights abuses in Haiti. "The chain of command had cowardly failed to carry out the primary objective of the Commander in Chief," the captain firmly insisted, saying he had to act. "I felt it was my duty."

Rockwood testified that he had carefully gathered intelligence information from a number of sources and was convinced that political prisoners faced torture and murder in the Port-au-Prince prison, long a target of criticism by human-rights monitors. "I felt human life would be lost," he said, arguing that the Army was required to take action under international law like the Geneva conventions. Hours before his prison adventure, the captain had accused his own command of dereliction in a written complaint to the Inspector General of the Army. It was "a career-terminating move," Captain Rockwood said.

The captain edged toward sarcasm in denouncing military officials and he bristled when Captain Pede asked whether he claimed broad authority to selectively reject or reinterpret orders.

"I am personally responsible for carrying out international law," Capt. Rockwood replied. "That is the Nuremberg principle."

Under the Nuremberg Principles, established by the Allies after World War II, an international crime can be subject to punishment, heads of state can be held responsible, and obeying orders does not exempt subordinates when there is the possibility of a moral choice.

The prosecution objected repeatedly to the attempts by the captain's lawyer, former Attorney General Ramsey Clark, to focus on reports from international monitoring groups that the Port-au-Prince prison was notorious, with up to 85 percent of the inmates incarcerated for political opposition, not crimes.

Captain Rockwood, who was also supported by the Lawyers Committee for Human Rights, a private advocacy group, insisted that throngs of political prisoners in Port-au-Prince were at heightened risk as Haiti's despotic de facto regime was on the verge of collapse. To superiors' claims that no intelligence reports of prison abuse in Port-au-Prince were ever received, Captain Rockwood insisted that the Army never sought them out in the first place.

"I was aware that you are not allowed to walk on the grass to stop a rape," he said in an interview before he took the stand, referring to the Army's rules regarding actions that soldiers could take against Haitians. He said at the time he rated the court-martial risk as negligible in the face of the obligation he sensed by law and family tradition.

The ghosts of old and new armies seemed on trial, too. Prosecution witnesses hailed Operation Uphold Democracy, the military name for the Haitian incursion, as a great success under difficult

post-cold-war circumstances. But the defense invoked the history of World War II atrocities and the My Lai massacre in Vietnam as agonizing milestones pointing to the primacy of Captain Rockwood's conscience under the conditions he sensed in Haiti.

Once he was inside the prison, the Haitian authorities summoned help from the United States Embassy. A military attache, Maj. Roland S. Lane, told the court that he arrived to find a self-righteous and antagonistic captain holding a loaded weapon and "trying to take action into his own hands" during a "fragile" period of transition in Haiti.

"I thought, 'This could really turn out nasty,' " the major testified, adding that Captain Rockwood was "unstable" in fluctuating from calmness to shouting rages and demanding the right to check on prisoners' conditions. The captain was eventually talked into unloading the weapon and obeying an order to leave the prison. He was taken to an Army hospital for a psychiatric examination and was cleared as healthy.

"He's a soft person, a gentle person," Mr. Clark said in discussing the captain's excited state when confronting superiors. "He became upset because he knew if he was sent home his work would be severely damaged." His commander, Lieut. Col. Frank Bragg, testified that Captain Rockwood was shouting and had a contemptuous attitude after he returned from the prison. Colonel Bragg said he repeatedly ordered the officer to be silent and "shut up," but the captain shouted: "I'm an American officer. I'm not a Nazi officer and I want a full accounting of human-rights abuses." Captain Rockwood told the court what he meant was that, under international law, "there are limitations to military authority and I thought any educated officer realized that."

Contradicting the defense, Colonel Bragg said Army regulations specifically barred counterintelligence specialists like Captain Rockwood and himself from investigating possible prison atrocities. Major Lane said officials from the State Department and the Justice Department, not from the Army, had prison responsibilities in the Haiti operation. Rather than worrying about human-rights abuses in prison, Colonel Bragg said, the defendant should have been worrying about protecting his fellow soldiers by tracing arms caches and "getting the bad guys off the streets."

[Rockwood was convicted and dishonorably discharged from the army. He went on to get his Ph.D. at the University of Florida, wrote a best-selling book about his case, titled "Walking Away from Nuremberg" (University of Massachusetts Press, 2007), and the production company owned by Steven Spielberg ("Saving Private Ryan") recently paid Rockwood \$475,000 for the rights to his story.]

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## **READINGS**

### **I. The Defense of Superior Orders**

**The following excerpt draws upon "Superior Orders and Duress as Defenses in**

**International Law” available at:**  
[http://www.unt.edu/honors/eaglefeather/2004\\_Issue/HensonC2.shtml](http://www.unt.edu/honors/eaglefeather/2004_Issue/HensonC2.shtml)

There are several important defenses that have raised in international criminal trials. The first, and probably the most well-known, of these defenses in international and military law is the defense of superior orders. This defense argues that an individual is not responsible for any act he or she commits if he or she was ordered to perform that act by a higher-ranking officer. According to one author:

Military discipline is founded on complete obedience to superior orders, and it was considered impractical to expect a member of the armed services in conditions of war “to weigh scrupulously the legal merits of the orders received.” (Mitchell, 2000, p. 5)

Essentially, since militaries are built on a hierarchical structure that is to be rigidly adhered to, lower-ranking members of the armed services do not have the necessary intent or motive required for most crimes.

### **Historic Development**

While some defenses are relatively new, others have existed for several centuries. “Superior orders” is probably the oldest defense used in military trials. Dating back to the 15th century, Peter von Hagenbach was tried and convicted for mistreating, and permitting those under his command to mistreat, the people of Breisach (Levie, 1991, p.187). His defense was that he was adhering to the orders of his superior, the Duke of Burgundy. Henry Wirz, a captain for the Confederate Army in the American Civil War, made a similar defense against allegations of his mistreatment of prisoners of war (Levie, 186). Wirz stated:

I think I may also claim as a self-evident proposition that if I, a subaltern officer, merely obeyed the legal orders of my superiors in the discharge of my official duties, I cannot be held responsible for the motives that dictated such orders. (Levie, 1991, p. 186)

Wirz’s claim was not given much credence and he was sentenced to death.

Lassa Oppenheim, a well-known authority on international law in the first half of the 20th century, produced nine editions of his comprehensive works. His views, however, changed considerably over time. In his first edition, published in 1906, Oppenheim wrote that “If members of the armed forces commit violations by order of their Government, they are no war criminals and cannot be punished by the enemy....” (Levie, 1991, p. 186) However, by the sixth edition written in 1935, Oppenheim writes:

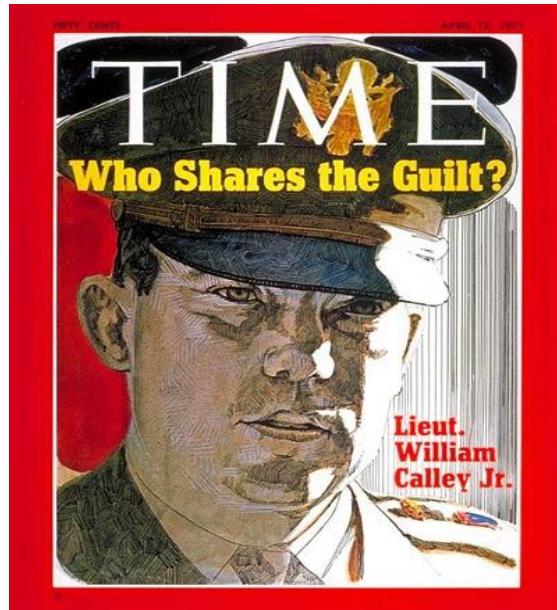
The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander does

not deprive the act in question of its character as a war crime...[M]embers of the armed forces are bound to obey lawful orders only.... (Levie, 1991, p. 187)

It is certainly probable that Oppenheim and his editors revised his views after witnessing World War I and the trials following it.

The *Dover Castle* case following World War I provided one of the first cases involving the defense of superior orders in the period of modern warfare (Scaliotti, 2001, p. 133). The Dover Castle was a hospital ship carrying the sick and wounded from Malta to Gibraltar. In spite of the fact that this was known as a peaceful ship, it was torpedoed, resulting in the death of everyone on board. The National German court found the sailor who actually launched the torpedo not guilty because, according to German law, subordinates were required to follow all orders from their superiors (Scaliotti, 2001, p. 133). The *Llandoverry Castle* case involved a similar situation where, subsequent to the boat sinking, most of the survivors in the water were shot by the accused. In this case as well, the accused were found not guilty because they acted pursuant to a superior's orders (Scaliotti, 2001, p. 133).

Another important and famous case for the development of the superior orders defense was the trial of Adolf Eichmann in 1961. This case codified the "manifest illegality" principle, which states that a subordinate should disobey all orders that are clearly illegal (Scaliotti, 2001, p. 131). Another particularly relevant case arising from crimes committed during World War II was the trial of Klaus Barbie. In this case, the French Court of Cassation stated that the defense of superior orders is not an excuse, and may not qualify as a mitigating factor for punishment (Scaliotti, 2001, p. 132).



The most famous Obedience to Orders Defense case in modern times was that Lt. William Calley and the My Lai massacre. Calley was charged on September 5, 1969, with premeditated murder for the deaths of 104 Vietnamese civilians near the village of My Lai during the Vietnam war. As many as 500 villagers, mostly women, children, infants and the elderly, had been systematically killed by American soldiers during a bloody rampage on March 16, 1968.

Calley's trial started on November 17, 1970. It was the military prosecution's contention that Calley, in defiance of the rules of engagement, ordered his men to deliberately murder unarmed Vietnamese civilians despite the fact that his men were not under enemy fire at all. Testimony revealed that Calley had ordered the men of 1st Platoon, Company C, 1st Battalion, 20th Infantry of the 23rd Infantry Division (Americical) to kill everyone in the village, including the elderly, infirm, and infants.

Calley's defense was that he was following the orders of his immediate superior, Captain Ernest Medina. Taking the witness stand, Calley, under the direct examination by his civilian defense lawyer George Latimer, claimed that on the previous day, his commanding officer, Captain Medina, made it clear that his unit was to move into the village and that everyone was to be shot for they all were Viet Cong. Twenty-one other members of Charlie Company also testified on Calley's defense corroborating the orders. In his personal statement, Calley stated that:

"I was ordered to go in there and destroy the enemy. That was my job that day. That was the mission I was given. I did not sit down and think in terms of men, women and children. They were all classified as the same, and that's the classification that we dealt with over there, just as the enemy. I felt then and I

still do that I acted as I was directed, and I carried out the order that I was given and I do not feel wrong in doing so."

After deliberating for 79 hours, the six-officer jury (five of whom had served in Vietnam) convicted Calley on March 29, 1971, of the premeditated murder of 22 Vietnamese civilians. On March 31, 1971, Calley was sentenced to life imprisonment and hard labor at Fort Leavenworth, the Department of Defense's only maximum security prison.

Calley's conviction was upheld by the Federal Court of Military Appeals in *United States v. Calley*, 22 U.S.C.M.A. 534. The Appeals Court began its opinion by agreeing that an order directing Calley and his troops to kill unresisting Vietnamese would be an illegal order. The Court went on to say:

A determination that an order is illegal does not, of itself, assign criminal responsibility to the person following the order for acts done in compliance with it. Soldiers are taught to follow orders, and special attention is given to obedience of orders on the battlefield. Military effectiveness depends upon obedience to orders. On the other hand, the obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent, obliged to respond, not as a machine, but as a person. The law takes these factors into account in assessing criminal responsibility for acts done in compliance with illegal orders. Thus, the acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior's order is one which a man of *ordinary sense and understanding* would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful.

Of the 26 officers and soldiers initially charged for their part in the My Lai Massacre or the subsequent cover-up, only Calley was convicted. His sentence was later commuted, and ultimately, Calley served only three and a half years of house arrest in his quarters at Fort Benning.

### **The International Criminal Court's Test for the Obedience to Orders Defense**

The International Criminal Court Statute has the following provision on the Obedience to Orders Defense:

#### Article 33: Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

## **II. The Defense of Duress**

Another defense commonly associated with superior orders is duress or necessity. Duress requires that a person be put into a situation where he/she, or someone they know, is being threatened with imminent and severe bodily harm if the person does not comply. Again, a person under duress lacks the necessary *mens rea* or intent to be found guilty of committing a crime because they were simply trying to avoid a greater harm by committing their crime.

### **Historical Development**

Duress as a defense is accepted in nearly every jurisdiction around the world in some form or another. This defense has existed throughout time, yet has a relatively short history in international law. In the cases following World War II, duress was raised several times. First, in the *Einsatzgruppen* case, the Court found:

There is no law which requires that an innocent man must forfeit his life or suffer serious bodily harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real, and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever. (U.S. Military Tribunal, 1950, p. 480).

Other cases, such as *Stalag III*, *Holzer*, and *Feurstein*, took a different approach, understanding that duress is not a defense when an innocent life is taken but not denying that duress is a defense in general terms. This approach has been adopted by many civil law systems, while many common law systems have not required that condition.

The *Jepsen* case, decided by a British court, ruled that duress could qualify as a defense if “the evil threatened the accused was on balance greater than the evil which he was called upon to perpetrate” (Scaliotti, 2001, p. 149). This decision was the first to incorporate a standard of proportionality between the threat levied and the act committed into the consideration of the defense. In the *Hostage* case before the Nuremberg Tribunal, duress was ruled as a defense, even to murder, when “the threat is imminent, real, and inevitable” (Scaliotti, 2001, p. 149).



### The Yugoslavia Tribunal's *Erdemovic Case*

The defense of duress has become one of the most controversial issues the ICTY has decided upon. Some members of the Tribunal have even expressed reservations and concern over the finding of the Court regarding this issue (G. Mettreux, personal interview, May 20, 2003). Without a doubt, the most applicable case regarding duress at the ICTY is *Erdemovic* (ICTY, 1995a). A great deal has been written discussing not only how the decision was made, but also what implications it will have on subsequent cases and proceedings. While there is technically a difference between necessity and duress, in that necessity can involve natural occurrences that force a person to commit a certain act while duress implies a situation created by another that forces a person to commit a certain act, the two shall be used equivocally, as is the case in the literature (ICTY, 1996c). Judge McDonald and Judge Vorhah filed a joint, concurrent opinion, Judge Li filing a separate, partially concurring and partially dissenting opinion, while both Judge Cassese and Judge Stephen filed separate dissenting opinions. While each of these opinions warrants discussion, only the joint opinion filed by Judge McDonald and Judge Vorhah (ICTY, 1996b), as well as the dissenting opinion filed by Judge Cassese (ICTY, 1996b) will be analyzed here for the sake of brevity. A short summary of the case will be presented first to allow a better understanding of the arguments and the rulings made by the judges.

Drazen Erdemovic was a young man who joined the Yugoslavian army to provide for his wife and infant son. He had tried to stay out of the conflict for as long as possible, but was in desperate need of money. Erdemovic allegedly joined a specific unit because it was more ethnically heterogeneous in the hope that this group would be less likely to commit war crimes. He signed on to become a mechanic. However, after a short time, the command and the composition of the group became predominantly Serbian. In July 1995, Erdemovic, along with the rest of his unit, was sent to a farm outside of Pilica, where he was ordered to execute Muslim men from 17 to 60 years in age who were unarmed and had recently surrendered to the Bosnian Serb army. When Erdemovic refused to participate, his commanding officer told him he would be shot along with the others if he did not comply. Reluctantly, Erdemovic took part in the killings, personally murdering between 10 and 100 people that day. Following his leaving the army, Erdemovic turned himself in to the ICTY, pled guilty, and

cooperated fully with the Tribunal.

The sentencing chamber found that duress, while potentially a legitimate defense, was not applicable in this situation, because there was no corroboration for Erdemovic's claim that he acted under duress (ICTY, 1996a, Paragraph 91). Interestingly, the Court needed no additional evidence to convict him of the crimes he told the Court he committed. The standards for duress, as established in the *Krupp* case, were that the act threatened must be immediate and serious, that there was no means of escape, and that the act committed was not disproportionate to the act threatened (ICTY, 1996a, Paragraph 17). Complicating the "disproportionate" standard was the understanding of the Trial Chamber that the life of the accused and the victim are not equivalent when dealing with a crime against humanity, where, tautologically speaking, humanity is the victim (ICTY, 1996a, Paragraph 19). The Chamber concluded that:

On the basis of the case-by-case approach and in light of all the elements before it, the Trial Chamber is of the view that proof of the specific circumstances which would fully exonerate the accused of his responsibility has not been provided. Thus, the defense of duress accompanying the superior order will...be taken into account at the same time as other factors in the consideration of mitigating circumstances. (ICTY, 1996a, Paragraph 20)

On Appeal, the Chamber split 3-2 against accepting duress as a defense, instead acknowledging it solely as a mitigating factor in punishment. The majority opinion, presented by Judge McDonald and Judge Vohrah, expressed the view that law "must serve broader normative purposes," and that the potential for abuses would undermine one of the prime objectives of international law, namely, the "protection of the weak and vulnerable" (ICTY, 1996b, Paragraph 75). McDonald and Vohrah go on to argue that their decision cannot be examined in a purely legal framework, but must be understood as having serious and actual policy implications (ICTY, 1996b, Paragraph 78). They rejected the utilitarian framework adopted by Cassese and the *Masetti* case, and instead argue that "international humanitarian law should guide the conduct of combatants and their commanders" (ICTY, 1996b, Paragraph 80). While they concede their standard would not be met by an ordinary citizen (ICTY, 1996b, Paragraph 83), McDonald and Vorhah go on to assert that a soldier should be prepared to die given his/her job and that he/she consequently has a stronger resolve than other people (ICTY, 1996b, Paragraph 84).

Cassese's dissenting opinion is truly different in many respects. Cassese accepts the notion of duress as a complete defense, offering four standards for its application. Three of these are the same as those described above (immediacy, no recourse, and proportionality), but the fourth criterion states that "the situation leading to duress must not have been voluntarily brought about by the person coerced" (ICTY, 1996c, Paragraph 16). Essentially, this standard was subsumed in earlier understandings of duress in international law – it is not a very compelling argument to say that a person was forced to do something after he/she willingly put himself in a position to be forced. After analyzing the cases set forth as examples by the prosecution for the

invalidity of duress as a defense, Judge Cassese moves on to analyze the *Llandover Castle* case, the *Eichmann* case, and other previously discussed cases of precedent for duress (ICTY, 1996c, Paragraph 35).

Cassese spends a great deal of time analyzing the standard of proportionality, as well as its difficult applicability in cases of this nature. He seems to bear a similar reluctance demonstrated by Judge McDonald and Judge Vorhah to wholeheartedly endorse a purely utilitarian standard for duress, but because the present case involved a situation where the victims were going to die whether the accused participated in their execution, he seemed more willing to admit the need for it. Cassese even writes specifically about the difficulty a court would face in trying to weigh the life of the accused against that of the victim. He states:

The third criterion – proportionality will, in practice, be the hardest to satisfy where the underlying offence involves the killing of innocents. Perhaps...it will never be satisfied where the accused is saving his own life *at the expense of* his victim, since there are enormous, perhaps insurmountable, philosophical, moral and legal difficulties in putting one life in the balance against that of others in this way: how can a judge satisfy himself that the death of one person is a lesser evil than the death of another? (emphasis in original) (ICTY, 1996b, Paragraph 42)

While concluding just as the majority of the Appeals Chamber had that there was no specific rule applied to duress as a defense to a crime involving the murder of innocent civilians, Cassese instead decided to apply the general rule that duress was a defense to this case in particular (ICTY, 1996b, Paragraph 41). Judge Cassese seemed quite willing to allow future courts to apply the rule of duress where necessary, in a case-by-case approach, much like the Trial Chamber had decided. As he wrote in Paragraph 42:

Where it is *not* a case of a direct choice between the life of the person acting under duress and the life of the victim – in situations...where there is a high probability that the person under duress will not be able to save the lives of the victims whatever he does - then duress may succeed as a defense. Again, this will be a matter for the judge or court hearing the case to decide in light of the evidence available in this regard....The important point, however...is that this question should be for the Trial Chamber to decide with all the facts before it. The defense should not be cut off absolutely and *a priori* from invoking the excuse of duress by a ruling of this International Tribunal....(ICTY, 1996b, Paragraph 42)

Cassese, like McDonald and Vorhah, seemed to be very concerned with possible abuses of this defense, but he deemed its use necessary to set the bar very high to prevent misapplication of the rule (ICTY, 1996b, Paragraph 43). A point that seemed especially relevant to Cassese was the fact that the crime was going to occur whether the accused committed the act or not; it is unclear whether this defense would have received support from him had this not been the case (ICTY, 1996b, Paragraph 43b).

Cassese also acknowledged the relevance of the rank of the officer and the actions of the accused after the disputed act (ICTY, 1996b, Paragraphs 45, 46). Cassese summarizes his point quite clearly when he writes in his conclusion:

Law is based on what society can reasonably expect of its members. It should not set *intractable* standards of behavior which require mankind to perform acts of martyrdom, and brand as criminal any behavior falling below those standards. (emphasis in original) (ICTY, 1996b, Paragraph 46)

### **The International Criminal Court's Test for the Duress Defense**

The International Criminal Court Statute has the following provision on the Duress Defense:

Article 31  
Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

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

- (i) Made by other persons; or
  - (ii) Constituted by other circumstances beyond that person's control.
- 

### **III. Other Defenses recognized in the Statute of the International Criminal Court**

Article 31  
Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

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

- (i) Made by other persons; or
- (ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

### **Report of Medical Commission on Defendant Rudolf Hess**



**Rudolf Hess** was appointed Deputy Führer to Adolf Hitler in 1933, he served in this position until May 1941, when he flew solo to Scotland in an attempt to negotiate peace with the United Kingdom during World War II. He was taken prisoner and in 1945 was transferred to the Nuremberg Tribunal for trial with 22 other ranking Nazis. Almost immediately after his arrival

at Nuremberg, Hess began exhibiting bizarre behavior and amnesia, which may have been feigned in the hope of avoiding the death sentence. The Medical team that examined Hess issued the following report:

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According to the information obtained on 16 November 1945, during the interrogation of Rosenberg who had seen Rudolf Hess immediately before the latter's flight to England, Hess gave no evidence of any abnormality either in appearance or conversation. He was, as usual, quiet and composed. Nor was it apparent that he might have been nervous. Prior to this, he was a calm person, habitually suffering pains in the region of the stomach.

As can be judged on the basis of the report of the English psychiatrist, Doctor Rees, who had Hess under observation from the first days of his flight to England, Hess, after the airplane crash, disclosed no evidence of a brain injury, but, upon arrest and incarceration, he began to give expression to ideas of persecution, he feared that he would be poisoned, or killed, and his death represented as a suicide, and that all this would be done by the English under the hypnotic influence of the Jews. Furthermore, these delusions of persecution were maintained up to the news of the catastrophe suffered by the German Army at Stalingrad when the manifestations were replaced by amnesia. According to Doctor Rees, the delusions of persecution and the amnesia were observed not to take place simultaneously. Furthermore, there were two attempts at suicide. A knife wound, inflicted during the second attempt, in the skin near the heart gave evidence of a clearly hysterico-demonstrative character. After this there was again observed a change from amnesia to delusions of persecution, and during this period he wrote that he was simulating his amnesia, and, finally, again entered into a state of amnesia which has been prolonged up to the present.

According to the examination of Rudolf Hess on 14 November 1945, the following was disclosed:

Hess complains of frequent cramping pains in the region of the stomach which appear independent of the taking of food, and headaches in the frontal lobes during mental strain, and, finally, of loss of-memory.

In general his condition is marked by a pallor of the skin and a noticeable reduction in food intake.

Regarding the internal organs of Hess, the pulse is 92, and a weakening of the heart tone is noticeable. There has been no change in the condition of the other internal organs. Concerning the neurological aspect, there are no symptoms of organic impairment of the nervous system.

Psychologically, Hess is in a state of clear consciousness; knows that he is in prison at Nuremberg under indictment as a war criminal; has read, and, according to his own words, is acquainted with the charges against him. He answers questions rapidly and to the point. His speech is coherent, his thoughts formed with precision and correctness and

they are accompanied by sufficient emotionally expressive movements. Also, there is no kind of evidence of paralogism. It should also be noted here, that the present psychological examination, which was conducted by Lieutenant Gilbert, Ph. D., bears out the testimony that the intelligence of Hess is normal and in some instances above the average. His movements are natural and not forced.

He has expressed no delirious fancies nor does he give any delirious explanation for the painful sensation in his stomach or the loss of memory, as was previously attested to by Doctor Rees, namely, when Hess ascribed them to poisoning. At the present time, to the question about the reason for his painful sensations and the loss of memory, Hess answers that this is for the doctors to know. According to his own assertions, he can remember almost nothing of his former life. The gaps in Hess' memory are ascertained only on the basis of the subjective changing of his testimony about his inability to remember this or that person or event given at different times. What he knows at the present time is, in his own words, what he allegedly learned only recently from the information of those around him and the films which have been shown him.

On 14 November Hess refused the injection of narcotics which were offered for the purpose of making an analysis of his psychological condition. On 15 November, in answer to Professor Delay's offer, he definitely and firmly refused narcosis and explained to him that, in general, he would take all measures to cure his amnesia only upon completion of the Trial.

All that has been exposed above, we are convinced, permits of the interpretation that the deviation from the norm in the behavior of Hess takes the following forms:

**1.** In the psychological personality of Hess there are no changes typical of the progressive schizophrenic disease, and therefore the delusions, from which he suffered periodically while in England, cannot be considered as manifestations of a schizophrenic paranoia, and must be recognized as the expression of a psychogenic paranoid reaction, that is, the psychologically comprehensible reaction of an unstable (psychologically) personality to the situation (the failure of his mission, arrest, and incarceration). Such an interpretation of the delirious statements of Hess in England is bespoken by their disappearance, appearance, and repeated disappearance depending on external circumstances which affected the mental state of Hess.

**2.** The loss of memory by Hess is not the result of some kind of mental disease but represents hysterical amnesia, the basis of which is a subconscious inclination toward self-defense as well as a deliberate and conscious tendency toward it. Such behavior often terminates when the hysterical person is faced with an unavoidable necessity of conducting himself correctly. Therefore, the amnesia of Hess may end upon his being brought to Trial.

**3.** Rudolf Hess, prior to his flight to England, did not suffer from any kind of insanity, nor is he now suffering from it. At the present time he exhibits hysterical behavior with signs of a conscious-intentional (simulated) character, which does not exonerate him from his responsibility under the Indictment.

/ s / KRASNUSHKIN

Doctor of Medicine /s/ E. SEPP

Honorary Scientist, Regular Member of the Academy of Medicine

/ s / KURSHAKOV

Doctor of Medicine, Chief Therapeutist of the Commissariat of Health of the U.S.S.R.

17 November 1945

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#### **IV. Head of State Immunity**



#### **Possible Indictment of Pinochet in the United States, ASIL Insight**

**By Frederic L. Kirgis**

**March 2000**

The United States Department of Justice has reopened a grand jury investigation that could lead to the indictment in this country of General Augusto Pinochet, the former head of state of Chile, for the part he is alleged to have played in ordering or approving the murder of Orlando Letelier and a colleague in Washington, D.C. in 1976. Letelier was the former Chilean Ambassador to the United States and was a prominent opponent of Pinochet. He and his American colleague were killed when a bomb exploded in his car as he entered Sheridan Circle, on Massachusetts Avenue in Washington. The Republic of Chile was held liable for this act in a civil proceeding in the District of Columbia, and later paid the families of the victims a total of more than \$2.5 million (though it never admitted liability).

If Pinochet had been a private party and had orchestrated the murder, international law would not preclude his indictment in this country even though his actions were taken entirely in Chile. Because this would be an intentional act and the effect was felt in U.S. territory where the murder took place, international law would permit the United States to proscribe the conduct that produced the killing, including conduct that orchestrated it from abroad.

Since Pinochet at the time of the murder was the head of state of Chile, the matter becomes more complicated. Normally a head of state is entitled to immunity from prosecution in domestic courts anywhere outside that state, even after he or she is no longer the head of state. The British

House of Lords, however, has held that Pinochet is not entitled to head-of-state immunity for complicity in a universally-condemned human rights violation (torture in Chile, in that case). The House of Lords limited this exception from immunity to acts committed after the date on which the widely-adopted convention (treaty) prohibiting torture entered into force for the U.K., but this limitation appears to have been required only as a matter of British law, not by international law.

The principle of the Pinochet case in the House of Lords appears to be that a former head of state does not enjoy immunity for acts during his time in office when the acts violate very widely accepted human rights norms, at least insofar as those norms are reflected in a widely-adopted multilateral treaty (in that case the Convention Against Torture). There is also a multilateral convention requiring its contracting parties to treat the murder of an "internationally protected person" (including a diplomat) as a crime. Chile and the United States are parties to it, though the United States did not become a party until a month after the Letelier murder. More importantly, though, the convention defines "internationally protected persons" to include only those who hold their official positions at the time of the offense against them. Letelier was no longer in a diplomatic post when he was murdered.

Nevertheless, it is arguable that an officially-orchestrated murder rises to the same level of human rights violation as does officially-sponsored torture, even in the absence of an applicable treaty. The American Law Institute's *Restatement Third of Foreign Relations Law of the United States* places the two crimes on an equal footing as international human rights violations under customary international law, without regard to any treaty. Thus it could be argued that there is no immunity for a former head of state who, while in office, could be shown to have orchestrated the murder of a political foe such as Letelier.

Pinochet has returned to Chile. There is an extradition treaty between Chile and the United States, dating back to 1902. The treaty makes murder, including participation in murder, an extraditable offense if it is "committed within the jurisdiction of one of the contracting parties" and if the person charged with murder "shall seek an asylum or be found within the territories of the other." There is a proviso stating that extradition "shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment for trial if the crime or offense had been there committed."

Even though Pinochet was in Chile when Letelier was assassinated, the murder itself was committed in the United States. Moreover, it could be said that if Pinochet orchestrated the murder, his action would be "within the jurisdiction" of the United States because-as noted above-international law would give the United States jurisdiction to proscribe conduct leading to a murder in U.S. territory even if the person ultimately responsible for the murder is outside the territory.

Pinochet may currently be "found within the territories" of Chile, so the second condition quoted above from the extradition treaty would be met.

It is arguable that the proviso would be satisfied as well, even if Pinochet would not be committed for trial in Chile if Letelier had been murdered there. The proviso hinges on "such evidence of criminality" as would be sufficient for prosecution in Chile. Thus it appears to require only that there be sufficient evidence, under Chilean standards, that the accused committed the crime. Any immunity Pinochet might enjoy under Chilean law would be a matter of defense based not on a challenge to the evidence or to the criminality of murder under Chilean law, but based rather on his official position in Chile at the time of the crime.

Of course, even if Pinochet is extraditable, the United States might not insist on extradition—for example, if Chile were to agree to prosecute him at home, or if Pinochet's advanced age and deteriorating health dictate that public condemnation, rather than extradition and prosecution, should suffice.



**World Court Orders Belgium to Cancel an Arrest Warrant Issued Against the Congolese Foreign Minister, ASIL Insight  
by Pieter H.F. Bekker  
February 2002**

On February 14, 2002, the International Court of Justice (ICJ or Court), the principal judicial organ of the United Nations located in The Hague, The Netherlands, ruled that Belgium has violated international law by allowing a Belgian judge to issue and circulate an arrest warrant *in absentia* against the then Foreign Minister of the Democratic Republic of the Congo (DRC). The ICJ held, by 13 votes to three, that Belgium thereby failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Foreign Minister enjoyed under customary international law. By way of remedy, the Court found, by 10 votes to six, that Belgium must, by means of its own choosing, cancel the arrest warrant and so inform all the authorities to whom that warrant was circulated.

A dispute arose between the DRC and Belgium when, on April 11, 2000, Judge Damien Vandermeersch of the Brussels court of first instance issued an international arrest warrant for the detention of Mr. Abdulate Yerodia Ndombasi (Yerodia), who at that time was the DRC Minister for Foreign Affairs. The warrant accused Yerodia of having committed grave breaches of the 1949 Geneva Conventions and crimes against humanity while serving in a non-ministerial post by making speeches in August 1998 that allegedly incited the massacre of Tutsi residents of Kinshasa.

The arrest warrant was issued under a Belgian law (Belgian Law) that establishes its universal applicability and the universal jurisdiction of the Belgian courts in relation to alleged grave violations of international humanitarian law regardless of where they were committed, the presence of the accused in Belgium, or the nationality or legal status of either the victim/complainant or the accused. The Belgian Law does not recognize any immunities that defendants might enjoy due to their "official capacity." In this case, it was uncontested that (i) the arrest warrant referred to acts committed outside of Belgium; (ii) Yerodia was the DRC Foreign Minister at the time the warrant was issued; (iii) the accused was neither Belgian nor had he been present in Belgium when the warrant was issued; and (iv) no Belgian national was a direct victim of the alleged crimes. After November 2001, Yerodia ceased being the DRC Foreign Minister. At the time of the judgment, he no longer held any ministerial office.

On October 17, 2000, the DRC instituted proceedings against Belgium before the ICJ based on their declarations accepting the Court's compulsory jurisdiction and requested the Court to declare that Belgium must annul the arrest warrant issued against Yerodia, because it violates the principle of sovereign equality among States. Public hearings were held on October 15-19, 2001.

The DRC initially also challenged the legality of the Belgian Law itself, raising broader questions about the permissible scope of jurisdiction by national criminal courts over international crimes committed outside the territory of the prosecuting court. However, the DRC later condensed and refined its claim, leaving the ICJ with the following question: Did the issue and circulation of an arrest warrant by a Belgian judge against a person who was at the time the Congolese Foreign Minister, but who no longer holds government office, violate his immunity from criminal process and make the arrest warrant unlawful under international law? Thus, the case before the Court was about whether ministerial immunity affected the lawfulness of the Belgian arrest warrant, and did not deal with the question whether the disputed warrant, issued in an exercise of purported universal jurisdiction, complied with the rules and principles of international law governing the jurisdiction of national courts. Given that the DRC had dropped its challenge to the legality of the arrest warrant based on Belgium's claim to exercise universal jurisdiction, the Court assumed solely for the purpose of this case that Belgium had jurisdiction under international law to issue and circulate the warrant.

After rejecting Belgium's objections relating to jurisdiction, mootness and admissibility by 15 votes to one, the Court found that the issue against Yerodia of the arrest warrant and its international circulation constituted violations of a legal obligation of Belgium against the DRC, in that they failed to respect the immunity from criminal jurisdiction and the inviolability that the incumbent Congolese Minister for Foreign Affairs enjoyed under international law.

The Court found that there are no treaties that specifically define the immunities enjoyed by ministers for foreign affairs. Whereas Belgium claimed that no immunity attaches under international law for serious crimes under international law or for acts done in a private capacity or other than in the performance of official functions, the DRC argued that a sitting foreign minister's immunity is subject to no exception. The ICJ agreed with the DRC that, under customary international law, sitting foreign ministers when abroad enjoy full immunity from criminal jurisdiction as well as inviolability protecting them from "any act of authority" by another State which would hinder them in the performance of their duties. The Court could not discern any exception to this rule in State practice. Thus, it does not matter whether a foreign minister was, at the time of arrest, present in the territory of the arresting State on an "official" or a "private" visit, or whether the arrest relates to acts allegedly committed before the foreign minister took office or while in office. It also is immaterial whether or not the arrest relates to alleged acts performed in an "official" capacity or a "private" capacity. Moreover, there is no exception to an incumbent foreign minister's absolute immunity from criminal process where that person is accused of having committed crimes under international law.

The Court, which includes two judges who had formerly served as foreign ministers, emphasized that this immunity from jurisdiction does not affect their individual criminal responsibility: immunity does not mean impunity. Thus, a foreign minister's State may itself prosecute him or her or may waive immunity to prosecution by another State. In addition, after a foreign minister ceases to hold public office, a court of one State may, provided it has jurisdiction under international law, try the former foreign minister of another State for any acts committed prior or subsequent to the minister's period of office, as well as for *private* acts committed during his or her tenure. Finally, incumbent or former foreign ministers may be tried by *international* criminal tribunals having jurisdiction over the alleged crimes.

In this case, the Court found that the issuance of the disputed arrest warrant constituted an unlawful coercive measure by Belgium violating the immunity of the then Congolese Foreign Minister, even though it was never executed against him. It infringed his immunity as the DRC Foreign Minister by hampering him in his foreign travels and exposing him to arrest while abroad.

The Court considered that its finding that Yerodia's immunity as Foreign Minister had been violated itself constitutes a form of remedy to the moral injury of which the DRC complained. But international law also requires the reestablishment of the situation which would have existed if the illegal act had not been committed. Thus, the ICJ found that Belgium must, by means of its own choosing, cancel the disputed arrest warrant and so inform the authorities to whom the warrant had been circulated. The Court did not rule that third States are precluded from executing the arrest warrant, given that such States fall outside the Court's jurisdiction over this case between the DRC and Belgium.

Although the decision is limited by its terms to sitting foreign ministers and, by virtue of Article 59 of the ICJ Statute, is binding only on the DRC and Belgium and only with regard to this particular case, its impact is potentially much broader. The judgment indicates that the ICJ would apply a similar analysis to other high-ranking officials who, like foreign ministers, represent the State in international affairs and must travel to carry out their duties. In light of this decision, Belgium is reviewing the human rights probe against incumbent Israeli Prime Minister Ariel

Sharon for alleged crimes committed by him in Palestinian refugee camps while he was Israeli Army chief. If the Court's analysis regarding Yerodia is found to apply to Sharon's circumstances, the Sharon warrant likewise violates international law and Belgium must cancel that warrant and reissue it after Sharon leaves office.

The decision also is significant for what it did not decide. For example, it leaves unaffected the Belgian Law on which the Brussels magistrate based his arrest warrant in this and other prominent cases where the accused is a non-Belgian dignitary (including human rights probes involving the presidents of the Congo, Cuba, Iran and Ivory Coast). Given that the ICJ necessarily assumed for purposes of this case that Belgium had jurisdiction under international law to issue its arrest warrant, the Court did not reach the issue of whether a nation (including Belgium) may adopt "long-arm" statutes allowing its domestic courts to hear cases involving alleged crimes under international law against any State, person or company where neither the alleged criminal acts took place in the territory in which these courts sit, nor the victims/complainants and defendants were present in that nation. Even though the potential long-arm reach of domestic courts with regard to alleged violations of international law was not addressed in this case, it is very much alive, especially in light of the Court's pronouncement that immunity does not mean impunity.

The decision is confusing in that it is unclear how broadly or easily States may designate (so as to create bases for claims of immunity) present and former officials as carrying-out "foreign minister"-type duties. The judgment suggests that former foreign ministers may never be tried abroad for "official" acts committed during their tenure, even though under international law certain crimes (e.g., genocide) cannot be defended as having been "official" acts.

The Court's conclusion that incumbent foreign ministers are protected from "any act of authority" by another State that would hinder them in the performance of their duties presumably refers not only to criminal warrants, but also to civil subpoenas and other forms of process that could hinder a minister's performance because of the threat of judicial compulsion or enforcement. Thus, although the decision only addresses an incumbent foreign minister's immunity from *criminal* process and does not *bind* third States, it may affect how countries like the United States apply laws allowing private plaintiffs to sue foreign States, persons and companies in national courts for alleged violations of the law of nations (e.g., under the U.S. Alien Tort Claims Act). Civil deposition subpoenas issued in such cases carry the possibility of compulsion by a national court, including in the form of contempt sanctions. Even though the U.S. Government regularly has intervened in U.S. cases to suggest immunity for foreign Heads of State and other high-ranking officials, which suggestion the courts have routinely adopted, a broad range of incumbent and former officials remain subject to suit under the Court's narrow reasoning.

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**War crimes trial ending**

Judges to decide fate of Liberian ex-president Charles Taylor, who allegedly backed Sierra Leone rebels, in exchange for «blood diamonds»




- ▶ 3 years of hearings at International criminal court in The Hague
- ▶ 10 years of civil war in Sierra Leone
- ▶ 120,000 or more killed, and thousands mutilated by limb-chopping rebels
- ▶ 11 charges of war crimes and crimes against humanity

AFP

## Immunity from Prosecution for International Crimes: The Case of Charles Taylor at the Special Court for Sierra Leone, ASIL Insight, By C. Jalloh

October 2004

On May 31, 2004, the Appeals Chamber of the Special Court for Sierra Leone ("the Court"), a UN-backed hybrid criminal tribunal sitting in Freetown, Sierra Leone, ruled unanimously that Charles Taylor does not enjoy any immunity from prosecution by the Court though he was the serving Head of State of Liberia at the time criminal proceedings were initiated. This historic ruling by the Court is a significant contribution to the modern international law norm asserting that Heads of State and other high-ranking governmental officials are not absolved of criminal responsibility for serious international crimes.

### *Background to the Indictment of Charles Taylor*

On March 7, 2003, David Crane, the Prosecutor of the Court, issued an indictment against President Charles Ghankay Taylor of Liberia. The indictment alleged that Mr. Taylor had committed serious international crimes in Sierra Leone including crimes against humanity, war crimes and other serious violations of international humanitarian law. The seventeen-count indictment accused President Taylor of responsibility for terrorizing the civilian population of Sierra Leone, unlawful killings, sexual and physical violence, use of child soldiers, abductions, forced labor, looting, burning, and attacks on peacekeepers and humanitarian assistance workers.

However, the indictment was sealed until a warrant for President Taylor's arrest was issued on June 4, 2003 following his arrival in Accra, Ghana, to attend peace talks that had been convened by other West African leaders. The talks were aimed at ending bitter fighting between Taylor's forces and various rebel factions that had led to the deaths of many civilians on the outskirts of Monrovia, Liberia's capital. Because of procedural mistakes by the Office of the Prosecutor,

including an apparent lack of prior consultation and coordination with Ghanaian and other West African authorities, Mr. Taylor returned to Monrovia unmolested.

### ***Procedural and Factual History of the Case (paras. 1-5)***

On July 23, 2003, counsel for President Taylor and Liberia filed a motion before the Trial Chambers of the Court seeking an order 1) to quash the Indictment; 2) to nullify the warrant of arrest; and 3) for provisional measures restraining service of the indictment and arrest warrant on Mr. Taylor. The ground for the motion was that Mr. Taylor should enjoy absolute immunity from criminal proceedings under customary international law as the sitting Head of State of Liberia at the time of his indictment.

As the Prosecution and Defence exchanged briefs before the Court, Mr. Taylor announced that he would resign from the Presidency of Liberia in August of 2003. In return for his resignation, he accepted an offer of sanctuary extended to him by President Olusegun Obasanjo of Nigeria who promised not to hand him over to the Court.

Approximately one month after Taylor's departure from Liberia, the Trial Chamber referred the motion challenging the Court's jurisdiction to the Appeals Chamber on the basis that it raised a fundamental issue of jurisdiction. The Appeals Chamber heard oral arguments on the motion in late fall of 2003.

### ***Submissions of the Parties (paras. 6-16)***

The parties' submissions to the Court fall into two categories. The first category corresponds to arguments by the Defence and counterarguments by the Prosecution that the Court, by issuing an indictment and a warrant of arrest for President Taylor, had violated various rules governing jurisdiction, immunity, and sovereign equality under *international* law. The second category hinges on the *national* law of Sierra Leone and on the legality, or illegality, of the actions taken by the Prosecutor and the Court in respect of the case against Taylor, with particular reference to the consistency of those actions with various provisions of the Sierra Leone Constitution of 1991. This Insight discusses only the international law aspects of the case.

#### ***Defence Submissions on the Preliminary Motion***

The key submission of the Defence was that Mr. Taylor was entitled to absolute personal immunity from criminal prosecution as Liberia's incumbent Head of State at the time of his indictment. The Defence claimed that the immunity which attaches to Taylor shields him from prosecution whether he is on official business in a foreign State (Ghana) or in office in Liberia. Further, the Defence argued that immunity is not nullified by any exceptions arising under other international law rules, such as resolutions enacted by the Security Council pursuant to its Chapter VII powers permitting international criminal tribunals to indict incumbent Heads of State for egregious international crimes. In any event, because the Court was a Sierra Leonean tribunal that lacked Chapter VII powers, in contrast to the International Criminal Tribunals for Yugoslavia and Rwanda ("ICTY" and "ICTR" respectively), it had no authority to assert

jurisdiction over President Taylor since its judicial orders had the same (limited) force as those of a national court.

In addition, according to the Defence, by purporting to indict the President of Liberia, and by issuing and communicating a warrant for his arrest to Ghanaian authorities at a time when he was performing peace-making functions as Head of State, the Court had violated the sovereignty of Liberia and Ghana as well as the international law rule exempting incumbent Heads of State from criminal prosecution in foreign jurisdictions. Furthermore, it was argued, the Court's approval of both the indictment and the arrest warrant failed to account for the ruling of the International Court of Justice ("ICJ") in *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* ("Yerodia").

### ***Prosecution's Response***

The Prosecution's response focused primarily on procedural matters, and in respect of the bulk of substantive issues, wholly on international law. In sum, the Prosecution pleaded that under the Court's Rules, the motion by the Defence should be dismissed because 1) it improperly raised an issue of *immunity* rather than one of *jurisdiction*; 2) it was "premature" because Mr. Taylor had not made the mandatory initial appearance before the Court; and 3) Mr. Taylor lacked standing to bring the motion since he was not before the Court.

In response to the substantive issues raised by the Defence, the Prosecution submitted, *inter alia*, that 1) *Yerodia* concerned "the immunities of an incumbent Head of State from the jurisdiction of the Courts of another state" (which is not the case here); 2) customary international law permits international criminal tribunals, of which the Court is an example, to indict serving Heads of State; 3) the lack of Chapter VII powers does not encumber the Court's jurisdiction over Heads of States because the International Criminal Court, which does not possess Chapter VII powers, similarly denies immunity to Heads of States in respect of international crimes; 4) Taylor's indictment is for crimes committed within Sierra Leone rather than elsewhere; and finally, 5) the mere transmission of the relevant documents to Ghanaian authorities could not violate that country's sovereignty.

### **The Legal Basis of the Special Court for Sierra Leone (paras. 34-36)**

After disposing of the procedural issues, the Appeals Chamber turned to the merits. It explained that the Court is a unique treaty-based criminal tribunal authorized by UN Security Council Resolution 1315 (2000). The various reports, correspondence, briefings and other documents between the Secretary-General and the President of the Security Council, taken together, "demonstrate the high level of involvement of the Security Council in the establishment of the Court including, but not limited to, approving the Statute of the Special Court and initiating and facilitating arrangements" for its funding.

### ***Is the Special Court an International Criminal Tribunal? (paras. 37-42)***

In addressing the above question, the Appeals Chamber noted that the Court's novelty lay in the fact that it was established jointly by agreement between the UN and the government of Sierra

Leone. This is in contrast to the ICTY and ICTR, which were established as subsidiary organs of the UN by the Security Council acting pursuant to its Chapter VII powers. According to the Appeals Chamber, the immediate source of authority for the Security Council to participate in creating the Court emanates from Resolution 1315, but more fundamentally, is "derived from the Charter of the United Nations both in regard to the general purposes of the United Nations as expressed in Article 1 of the Charter and the specific powers of the Security Council in Articles 39 and 41." The Security Council's powers under Article 39 were sufficiently broad for it to establish the Court in agreement with Sierra Leone, since it had reiterated in Resolution 1315 that the situation in Sierra Leone "continued to constitute an ongoing threat to international peace and security in the region."

Second, the Appeals Chamber asserted that while much has been read into the lack of a Chapter VII mandate for the Court, such an omission by the Security Council is not determinative of the legal status of the Court. For on a disjunctive reading of the first sentence of Article 41 of the UN Charter, it is manifest that the Security Council is empowered to 1) decide what measures not involving the use of armed force should be taken to implement its decisions and 2) whether or not to call upon UN Members to apply such measures in order to maintain or restore international peace and security. Thus, the Court concluded,

Where the Security Council decides to establish a court as a measure to maintain or restore international peace and security it may or may not, at the same time, contemporaneously, call upon the members of the United Nations to lend their cooperation to such court as a matter of obligation. Its decision to do so in furtherance of Article 41 or Article 48, should subsequent events make that course prudent may be made subsequently to the establishment of the court.

In addition, in executing its duties under Article 39, the Security Council acts on behalf of all UN Members as per Article 24(1) of the UN Charter, and to that extent, the agreement that it entered into with Sierra Leone to create the Court is an Agreement that is "an expression of the will of the international community" as a whole. The Court is therefore "truly international."

In the result, the Appeals Chamber held that the Court is an international criminal tribunal with an international mandate exercising jurisdiction over international crimes. In so holding, the Appeals Chamber observed that the "constitutive instruments of the court contain indicia too numerous to enumerate to justify that conclusion. To enumerate those indicia will involve virtually quoting the entire provisions of those instruments. It suffices that having adverted to those provisions, the conclusion we have arrived at is inescapable."

### ***The Special Court and Jurisdictional Immunity (paras. 43-59)***

The Appeals Chamber explained that pursuant to Article 6(2) of the Court's Statute, the position of any accused as Head of State does not relieve that person of criminal responsibility nor does it mitigate punishment. It noted the similarity of that provision to ICTY Article 7(2), ICTR Article 6(2) and ICC Article 27(2), all of which are traceable to Article 7 of the Charter of the International Military Tribunal for Nuremberg which had become a part of customary

international law. Moreover, Article 6(2) of the Court's Statute is consonant with other (including peremptory) norms of international law.

Related to this point, the Court reasoned that the nature of the offences and the character of the tribunal asserting jurisdiction assist in determining the circumstances in which exceptions to immunity would be extended or denied. Thus, in the *Yerodia* case, the ICJ could not discern a rule denying incumbent foreign ministers immunity from criminal jurisdiction before national courts. On the other hand, the ICJ concluded that under customary international law, incumbent or former foreign ministers may be subject to proceedings before certain international criminal courts, assuming those courts have jurisdiction.

Noting the apparent differences in the treatment of immunities in national and international courts, the Appeals Chamber postulated that this may be because of "the principle that one sovereign state does not adjudicate on the conduct of another state; the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community."

The Appeals Chamber concluded that "the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court." Thus, according to the Appeals Chamber, the official position of Taylor as serving Head of State of Liberia at the time of his indictment is not a bar to his prosecution. Taylor was and still is subject to criminal proceedings before the Court. In view of this conclusion, the Court declined to discuss the cases in which immunity was claimed before national courts.

As to whether the issuance and transmission of the arrest warrant for President Taylor infringed the sovereignty of Ghana, the Court ruled that to the extent such a claim could be said to exist, vindication of it rests with Ghana rather than with Mr. Taylor. That said, the Court nevertheless observed that with two exceptions, warrants of arrest are not self-executing; consequently, their implementation would require the cooperation of the receiving state. Therefore, "merely requesting assistance, far from being an infringement of sovereignty of the receiving state is in fact a recognition of sovereignty."

Finally, the Court noted that Taylor had ceased to be Head of State at the time of its decision. Thus, whatever personal immunity he would have been entitled to is already spent. Accordingly, even if his motion had succeeded, the Prosecutor could have validly re-issued a new warrant. The motion was therefore dismissed.

### ***Conclusion***

*Prosecutor v Charles Ghankay Taylor* is an addition to the small but growing body of jurisprudence from national and international tribunals delineating the contours of the immunity accruing to Heads of State and other senior governmental officials. While the trend in the jurisprudence suggests that the scope of immunity is highly contested and will therefore continue

to evolve,] this decision is significant because it is the first application of the ICJ's decision in *Yerodia* to a former Head of State.

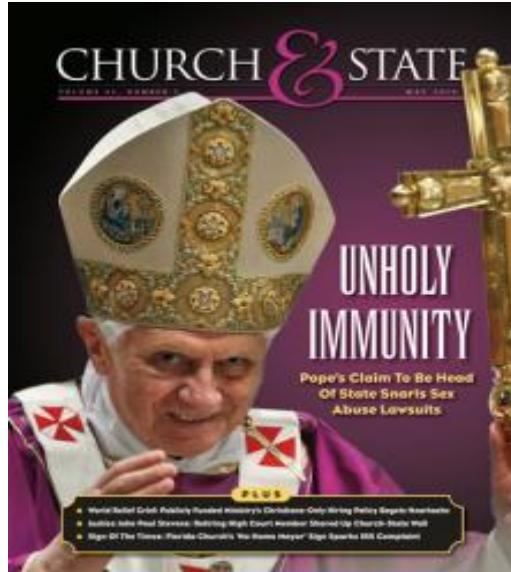
Though Taylor is not in the custody of the Court, the decision reaffirms the idea that the long arm of international criminal law would extend to reach the most powerful state official, so long as that person commits crimes that shock the conscience of the international community.

Regarding the Court's status as an international criminal tribunal, the Court focused on the UN's involvement with the creation of the tribunal, and in particular, the Security Council's authority to enter into an agreement with Sierra Leone to establish the Court. According to the Appeal's Chamber, that authority could emanate from 1) the general purposes of the UN as expressed in Article 1 of the Charter as well as 2) the specific powers under Article 39 and 41 to undertake appropriate measures to maintain or restore international peace and security. The Court examined the latter aspect of the Security Council's authority focusing on Resolution 1315. That resolution authorized the UN Secretary-General to negotiate the creation of the Court, while reaffirming that the situation in Sierra Leone continued to constitute a threat to international peace and security.

The Court did not elaborate on how the general powers of the Security Council applied to its establishment. Unlike the resolutions but a question remains whether mere reiteration in the preamble to Resolution 1315 that the situation in Sierra Leone continued to constitute a threat to the peace carries the same weight as the unequivocal language contained in the resolutions establishing the ICTY and ICTR. If the Security Council does not clearly state the nature and the scope of the authority under which it is acting. This is particularly so given the active role that the Security Council has assumed since the end of the Cold War to formulate and enforce decisions with serious ramifications for States and individuals as well as for the coherent development of international criminal law. Clearly, fundamental interests of States are at stake in situations wherein the Security Council purports to abrogate, through the creation of a tribunal, the immunity of a serving Head of State. creating the ICTY and the ICTR which specifically invoked Article Chapter VII of the UN Charter, the Security Council did not expressly state that it was acting under Chapter VII when it authorized the Secretary-General to conclude a treaty to create the Special Court for Sierra Leone. The Appeals Chamber noted that the lack of a Chapter VII mandate "does not by itself define the legal status of the Special Court," states may question, or perhaps even challenge, its authority to create criminal tribunals that were not contemplated by the framers of the UN Charter.

There is the additional question of the nature and status of the Court. The Court concluded that it is an international court and that there are numerous indicia to support that conclusion. However, an examination of the Court's constitutive instruments reveals that the Court also has the trappings of a national court. As the Court is distinct in its national and international character, the Secretary-General of the UN described it as a unique Court "of mixed jurisdiction and composition." By focusing purely on the factors that make the Court international, the Appeals Chamber may have missed an important opportunity to contribute to the jurisprudence defining the unique place of hybrid criminal tribunals in the machinery of international criminal justice.

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**Reuters, Feb. 13, 2013 - Pope Benedict's decision to live in the Vatican after he resigns will provide him with security and privacy. It will also offer legal protection from any attempt to prosecute him in connection with sexual abuse cases around the world, Church sources and legal experts say.**

"His continued presence in the Vatican is necessary, otherwise he might be defenseless. He wouldn't have his immunity, his prerogatives, his security, if he is anywhere else," said one Vatican official, speaking on condition of anonymity.

"It is absolutely necessary" that he stays in the Vatican, said the source, adding that Benedict should have a "dignified existence" in his remaining years.

Vatican sources said officials had three main considerations in deciding that Benedict should live in a convent in the Vatican after he resigns on February 28.

Vatican police, who already know the pope and his habits, will be able to guarantee his privacy and security and not have to entrust it to a foreign police force, which would be necessary if he moved to another country.

"I see a big problem if he would go anywhere else. I'm thinking in terms of his personal security, his safety. We don't have a secret service that can devote huge resources (like they do) to ex-presidents," the official said.

Another consideration was that if the pope did move permanently to another country, living in seclusion in a monastery in his native [Germany](#), for example, the location might become a place of pilgrimage.

#### POTENTIAL EXPOSURE

This could be complicated for the Church, particularly in the unlikely event that the next pope makes decisions that may displease conservatives, who could then go to Benedict's place of residence to pay tribute to him.

"That would be very problematic," another Vatican official said.

The final key consideration is the pope's potential exposure to legal claims over the Catholic Church's sexual abuse scandals.

In 2010, for example, Benedict was named as a defendant in a law suit alleging that he failed to take action as a cardinal in 1995 when he was allegedly told about a priest who had abused boys at a U.S. school for the deaf decades earlier. The lawyers withdrew the case last year and the Vatican said it was a major victory that proved the pope could not be held liable for the actions of abusive priests.

Benedict is currently not named specifically in any other case. The Vatican does not expect any more but is not ruling out the possibility.

"(If he lived anywhere else) then we might have those crazies who are filing lawsuits, or some magistrate might arrest him like other (former) heads of state have been for alleged acts while he was head of state," one source said.

Another official said: "While this was not the main consideration, it certainly is a corollary, a natural result."

After he resigns, Benedict will no longer be the sovereign monarch of the State of Vatican City, which is surrounded by Rome, but will retain Vatican citizenship and residency.

## LATERAN PACTS

That would continue to provide him immunity under the provisions of the Lateran Pacts while he is in the Vatican and even if he makes jaunts into [Italy](#) as a Vatican citizen.

The 1929 Lateran Pacts between [Italy](#) and the Holy See, which established Vatican City as a sovereign state, said Vatican City would be "invariably and in every event considered as neutral and inviolable territory".

There have been repeated calls for Benedict's arrest over sexual abuse in the Catholic Church.

When Benedict went to Britain in 2010, British author and atheist campaigner Richard Dawkins asked authorities to arrest the pope to face questions over the Church's child abuse scandal.

Dawkins and the late British-American journalist Christopher Hitchens commissioned lawyers to explore ways of taking legal action against the pope. Their efforts came to nothing because the pope was a head of state and so enjoyed diplomatic immunity.

In 2011, victims of sexual abuse by the clergy asked the International Criminal Court to investigate the pope and three Vatican officials over sexual abuse.

The New York-based rights group Center for Constitutional Rights (CCR) and another group, Survivors Network of those Abused by Priests (SNAP), filed a complaint with the ICC alleging that Vatican officials committed crimes against humanity because they tolerated and enabled sex crimes.

The ICC has not taken up the case but has never said why. It generally does not comment on why it does not take up cases.

#### NOT LIKE A CEO

The Vatican has consistently said that a pope cannot be held accountable for cases of abuse committed by others because priests are employees of individual dioceses around the world and not direct employees of the Vatican. It says the head of the church cannot be compared to the CEO of a company.

Victims groups have said Benedict, particularly in his previous job at the head of the Vatican's doctrinal department, turned a blind eye to the overall policies of local Churches, which moved abusers from parish to parish instead of defrocking them and handing them over to authorities.

The Vatican has denied this. The pope has apologized for abuse in the Church, has met with abuse victims on many of his trips, and ordered a major investigation into abuse in [Ireland](#).

But groups representing some of the victims say the Pope will leave office with a stain on his legacy because he was in positions of power in the Vatican for more than three decades, first as a cardinal and then as pope, and should have done more.

The scandals began years before the then-Cardinal Joseph Ratzinger was elected pope in 2005 but the issue has overshadowed his papacy from the beginning, as more and more cases came to light in dioceses across the world.

As recently as last month, the former archbishop of Los Angeles, Cardinal Roger Mahony, was stripped by his successor of all public and administrative duties after a thousands of pages of files detailing abuse in the 1980s were made public.

Mahony, who was archbishop of Los Angeles from 1985 until 2011, has apologized for "mistakes" he made as archbishop, saying he had not been equipped to deal with the problem of sexual misconduct involving children. The pope was not named in that case.

In 2007, the Los Angeles archdiocese, which serves 4 million Catholics, reached a \$660 million civil settlement with more than 500 victims of child molestation, the biggest agreement of its kind in the United States.

Vatican spokesman Father Federico Lombardi said the pope "gave the fight against sexual abuse a new impulse, ensuring that new rules were put in place to prevent future abuse and to listen to victims. That was a great merit of his papacy and for that we will be grateful".

(Reporting by Philip Pullella; Additional reporting by Robin Pomeroy; Edited by Simon Robinson and Giles Elgood)



CASE WESTERN RESERVE  
UNIVERSITY  
SCHOOL OF LAW

# **INTRODUCTION TO INTERNATIONAL CRIMINAL LAW**

**MOOC taught by Professor  
Michael P. Scharf**

**Module #6:**

**Gaining Custody of the Accused**

**International Criminal Law  
Module #6  
Gaining Custody of the Accused**

## **Part. I. Luring**

### **Simulation #1:**

Assume the following facts: Emanual Rutagonda is a dual national of Canada (where he was born and has lived for the past fifteen years) and Rwanda (where his parents are from, where he did military service, and where he lived the first fifteen years of his life). He has Hutu ethnicity. When Emanual was 14 years old, his father died and he was recruited into the *Interhamwe* militia. The next year, when genocide broke out in Rwanda, 15 year-old Emanual allegedly participated in a terrible atrocity: According to an indictment issued in 2001 by a Rwandan District Court, Emanual and several other members of Rwanda's *Interhamwe* militia locked 275 Tutsi children in the Boutaire High School, and then set the building on fire, killing all the Tutsis.

When the Hutu government fell to the Tutsis in August 1994, Emanual fled to Canada. Since 2001, the Rwandan government has been requesting that Canada surrender Emanual to Rwanda for prosecution on 275 counts of murder in an ordinary Rwandan District Court (not a *Gacaca* court), but Canada has denied these requests because: (1) Canada does not have an extradition treaty with Rwanda, (2) Canada views Emanual as a child soldier and therefore a victim not a criminal, and (3) Canada believes that the courts of Rwanda are not able to give Emanual a fair trial. At the request of Rwanda, Interpol has issued an international "wanted persons" notice for Emanual (a copy of this "Red Notice" document is attached to the Corrections/Clarifications).

The United States learned that Emanual was living in Canada when he was the subject of an episode of the reality TV series, "The Wanted." In July 2009 the United States government found out that Emanual's mother was having a heart procedure at the Detroit Clinic, and decided to try to lure Emanual from Canada to the United States so that he could be arrested and surrendered to Rwanda for trial. US agents sent Emanual an email purporting to be from the Detroit Clinic, telling him to come right away because his mother was about to die. Emanual borrowed a passport from a Canadian friend, entered the United States, was arrested by US agents, and subjected to "removal" (deportation) proceedings for transfer to Rwanda. All appeals have been exhausted.

Although the United States initially rebuffed Canada's protests, Canada convinced the United States to agree to have the dispute settled by the International Court of Justice by threatening to withdraw the Canadian troops from Afghanistan a year earlier than previously agreed.

Members of **Group A** (last names that begin with the letters A-H) will represent the Applicant, Canada. Members of **Group B** (last names that begin with the letters I-Z) will represent the Respondent, the United States. Based on the facts above and the reading material below, you are invited to upload a submission that argues the case from the point of view of your assigned country, addressing whether the “luring of a Canadian citizen from Canada violated international law, and in particular (1) Canada’s territorial sovereignty; (2) the US-Canada Extradition Treaty and the January 11, 1988 Exchange of Letters Between Canada and the US on Transborder Abduction; and (3) Emanuel’s internationally protected human rights under the International Covenant on Civil and Political Rights.

In order to complete the optional on-line simulations for this course, students must go to the Navigation Bar on the left panel. Under the Exercises section, you will find a button for “on-line simulations.” The simulations for each session are available under this button. Written work can be submitted directly or through file upload. Students who post five or more on-line submissions of over 200 words in length during the course (simulations and discussions) will be awarded a Statement of Accomplishment with Distinction for the course.

## Readings

**From 2010 Niagara Moot Court Competition, BENCH MEMORANDUM, written by Michael P. Scharf**

### **I. Did the luring and arrest of Emmanuel Rutaganda violate Canada’s territorial sovereignty or Rutaganda’s human rights?**

This issue raises two main questions: First, is “luring” the equivalent of “abduction,” which is generally viewed as a violation of territorial sovereignty and the human rights of the abducted person? Second, if they are equivalent, is this a case in which release of the individual would nevertheless not be appropriate because of the gravity of the charges?

Transborder abduction occurs when an individual is forcibly transferred across a State’s borders without that State’s consent. With the exception of cases falling within the self-defense exception contained in Article 51 of the UN Charter, “nations consider abduction illegal.”

Despite this view, historically, courts did not inquire into the means by which the accused was brought into their jurisdiction. Europe and the British Commonwealth in particular were governed by the rule of *mala captus bene detentus* – which said that even if wrongly captured, the accused was rightly kept and tried. The rule was first stated in 1829 in the English case of *Ex parte Scott*, and was generally applied by countries across the globe until the 1990s. One of the most famous cases of application of this rule was that of Adolf Eichmann, a leading architect of the Nazi’s genocidal policies during World War II. When Israel abducted Eichmann from Argentina, the UN Security Council condemned Israel’s violation of Argentina’s sovereignty. But the Security Council did not require Israel to return Eichmann to Argentina, and Israel

proceeded to try, sentence, and execute Eichmann for his genocidal crimes without protest by the Security Council.

In recent decades, courts around the world have increasingly departed from the *mala captus bene detentus* principle. A developing emphasis on individual rights, extradition treaties, and deterring abuses of process have all contributed to this evolution. Today, where law enforcement officers from one state cross into another state to abduct a suspect, the courts of most States would dismiss the case because of the violation of state sovereignty and the individual's rights. The law is much less settled as to Rutaganda's situation, which involves luring and trickery, rather than a direct breach of a national border and forcible abduction.

### A. Territorial Sovereignty

The first major issue related to luring a suspect from one nation to another for arrest is whether or not territorial sovereignty has been violated. In the present case, the United States will argue that luring does not violate state sovereignty and is an acceptable alternative to abduction when an asylum state is reluctant to extradite. Luring is not a violation of state sovereignty because the United States law enforcement officers did not enter Canada to arrest Rutaganda. There was no reason for them to make an extradition request since they were able to get the suspect to enter the U.S. voluntarily (although on false pretenses). Luring is seen by some as a way for nations to avoid the adverse impact on international relationships and reputation typically caused by transnational abduction, while still bringing international criminals to justice.

The International Criminal Tribunal for the Former Yugoslavia (ICTY) exercised jurisdiction in the *Dokmanovic* case on the basis of a distinction it drew between abduction and luring. The ICTY opined that abduction might well have provided grounds for dismissal, but “the trickery used by the Prosecution to arrest Dokmanovic did not amount to a ‘forcible abduction or kidnapping’ and such ‘luring’ was consistent with principles of international law and the sovereignty of the FRY.” The ICTY developed its approach further in the *Nikolic* and *Tolimir* cases. In those cases, the Tribunal weighed the severity of violations against the importance of prosecuting the individual. According to the ICTY, the more egregious the violation of territorial sovereignty or individual rights, the more likely the ICTY will be to dismiss the case. However, when dealing with crimes like genocide, war crimes, and crimes against humanity (universally condemned offenses), the Tribunal said dismissal would be appropriate only in the most extreme cases involving torture or other severe abuses. The ICTY thus did not dismiss either case, despite the fact that the defendants had been abducted by agents of the ICTY.

Given that Rutaganda is accused of 275 counts of murder in the context of genocide, the United States will argue that the international community has a strong interest in not releasing him despite the questionable way in which he was apprehended. Genocide is a universally condemned offense, while luring is accepted by many nations as a legitimate way to bring persons accused of serious crimes to trial. In *ex rel Lujan v. Gengler*, a U.S. court foreshadowed the ICTY approach when it said that the circumstances of the accused's arrest must, among other things, “shock the conscience” to warrant dismissal.

On the other hand, Canada will argue that its territorial sovereignty was in fact violated because the deception by U.S. law enforcement amounted to an abduction by trickery. As one commentator has put it:

“[I]t may prove difficult to distinguish the forcible abduction of a fugitive from the coerced or fraudulent luring of a fugitive into a jurisdiction. Force and fraud should be viewed as being on a continuum of coercion. While abduction by force will almost certainly create a strong presumption in favour of issuing a stay, the status of an abduction by fraud is less clear... The real question is how far the police may go before their conduct becomes objectionable.”

Getting a suspect to enter the jurisdiction through threats to the person’s family, for instance, is clearly extremely coercive and more likely to result in dismissal. Luring someone for their own personal gain (such as a lucrative drug deal) is less offensive, and the accused will most likely still face trial. Rutaganda’s case is situated somewhere in between. Lying to him about the health of his mother put him in a very difficult position, and certainly moved this incident farther down the “continuum of coercion.” The stress and emotional impact of receiving such information should also be considered. “The key question is the degree of duress imposed by the police upon the fugitive: the greater the duress, the more likely it is that a stay will be appropriate.”

Additionally, the perpetration of the lie itself may constitute a crime committed in Canadian territory by the U.S. authorities:

“The force-fraud distinction has been supported on the basis of policy arguments, namely, that fraud does not violate the territorial sovereignty of foreign states, and does not present the risk of violence to the fugitive or third parties. While the latter point may be accurate, it is not determinative of the issue. Further, the former point is simply untrue. According to conflict of laws rules, a fraud perpetrated upon a person located in a foreign state occurs in that state. Although fraud is not strictly equivalent to sending police agents into the territory of a foreign state, it still amounts to a wrong committed by domestic authorities in that foreign state.”

Even if luring is acceptable in some instances, Canada has a strong argument that it should not have been used against Rutaganda. The purpose of overlooking abuses and retaining jurisdiction is to bring to justice individuals that have committed heinous crimes and are a threat to the international community. Rutaganda was not a threat. He was living peacefully and without incident in Canada. The state sovereignty of Canada was violated without a valid excuse or justification. Finally, Canada may argue that the United States authorities should have tried other means, for example entering into negotiations with Canada for the trial of Rutaganda in Canada, or for Canada’s cooperation for his transfer to a third state or the ICTR for trial.

## B. Human Rights

In addition to the sovereignty issue, Canada will argue that the luring violated Article 9(1) of the International Convention on Civil and Political Rights (ICCPR), which states:

“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established in law.”

If a person is subject to an unlawful arrest or detention, that person may sue for release and/or compensation. But, the ICCPR gives limited guidance as to when and how a remedy would be applied.

The US will argue that it did not violate Rutaganda’s human rights. He voluntarily entered the US. He entered illegally (with someone else’s passport) and so the arrest should not have been a surprise. The arrest was not unlawful. As a result, his arrest and detention were not arbitrary and were consistent with the standard set forth in Article 9 of the ICCPR.

Even if it is established that the trickery used to lure him into the U.S. was a violation of his right to liberty and due process, the U.S. will argue that the violations were not serious enough to require the release of Rutaganda. The ICTY asserted in *Nikolic* that jurisdiction should be exercised unless the human rights violations were of an “egregious nature” – such as serious mistreatment, cruel, inhuman, or degrading treatment, or torture. This is consistent with the U.S. Federal Court of Appeals opinion in *Toscanino*. In that case, the suspect was abducted and tortured prior to being brought to trial. The court declined jurisdiction so as not to “reward police brutality and lawlessness”. The International Criminal Tribunal for Rwanda in the *Barayagwiza* case held that a court should not exercise jurisdiction when there are “serious and egregious violations of the accused’s rights.” Absent such extreme circumstances, refusal to exercise jurisdiction is a “disproportionate” response, when considering the interest of the international community in bringing criminals to justice.

On the other hand, Canada will respond that Rutaganda’s arrest and intent to return him to Rwanda to be tried for mass murder (rather than just the passport violation) was a complete surprise. Law enforcement used extremely coercive and deceitful means to lure him. So, the arrest and detention should be viewed as unlawful and arbitrary. As such, it was a violation of Rutaganda’s basic right to liberty and due process under the ICCPR. It is also important to note that the U.S. intends to give up Rutaganda to the Rwandan justice system where he may be subject to other violations of his rights. Canada provided him de facto asylum (and refused to send him to Rwanda), in part based on the risks that he faced in Rwanda from an overzealous justice system.

## **II. Does the Canada-US Extradition Treaty and January 11, 1988 Exchange of Letters Between Canada and the US on Transborder Abduction prohibit Luring?**

The US Supreme Court considered whether an abduction violated the US-Mexico extradition treaty in the case of *United States v. Alvarez Machain*. Although Supreme Court precedents are not binding on the International Court of Justice. The Court can choose to treat

either the majority opinion or the dissenting opinion as persuasive authority. In the *Alvarez Machain* case, the US Supreme Court ruled that even though the “forcible abduction from Mexico to the United States of a Mexican citizen who had been indicted on federal criminal charges may have been shocking and in violation of international law, the abduction was not in violation of the Extradition Treaty” and thus that the U.S. did not have to dismiss the case as a violation of the Treaty. However, (consistent with several Amicus Briefs including one submitted by Canada) the dissent in that case opined that the extradition treaty had been violated, providing grist for Canada’s argument in this case before the International Court of Justice.

Similar to the dissent in *United States v. Alvarez Machain*, Canada is likely to argue that there is an implied term in the Extradition Treaty prohibiting the prosecution of a lured individual. Here, Canada will contend that it is true that there is no express promise within the Extradition Treaty to refrain from luring but it is incorrect for one to conclude that the parties reserved this right. Explicitly, Canada will argue that just because certain means exist of circumventing the formalized process of extradition, this does not mean that those means constitute equally available methods within a consensual agreement which on its face appears to have been “intended to set forth a comprehensive and exclusive rules concerning the subject of extradition.”

To further this argument, Canada could bring up an analogy: assassination may be a more effective and efficient means of dispensing justice than extradition; but, just because it is not explicitly included within the extradition treaty does not mean that it is a permissible way to deal with fugitives located across the Canada-US border. This analogy, which was utilized by the dissent in *Alvarez-Machain*, is extreme but highlights that it would be counter to the object and purpose of the Extradition Treaty if it could be avoided in this manner. Similarly, Canada can argue that allowing luring would run counter to a treaty whose purpose is to transfer alleged defendants through a formalized process in order to protect the rights of the accused and the sovereignty of the States.

Thus, Canada might argue that although the current treaty does not explicitly include luring, the implicit reasons behind the treaty, cooperation between the two nations, would be frustrated. According to this argument, reading the Extradition Treaty to not include luring is a “highly improbable interpretation” of an agreement that is supposed to signify a cooperative relationship. Canada would urge one to look at the intent of the parties in drafting the Extradition Treaty, especially after it was clarified through the “January 11, 1988 Exchange of Letters Between Canada and the United States on Transborder Abduction” to spell out that transborder abductions by bounty hunters was an extraditable offense. Canada is likely to argue, much like Justice Stevens in *Alvarez- Machain*, that “in looking to the party’s expectations when making the Treaty [one would assume that] the drafters of the Treaty would not have imagined that the Treaty” would allow the United States to lure individuals, especially “given its stated purpose of fostering cooperation and mutual assistance.”

The United States will argue in turn that, while the January 11, 1988 Exchange of Letters Between Canada and the United States on Transborder Abduction clarifies that private transborder abductions, such as those committed by bounty hunters, constitute an extraditable offense, the Treaty is silent on the concept of luring. The United States may argue that Canada

had the opportunity, when it explicitly exchanged letters with the United States regarding transborder abductions, to include similar language on luring. Because it did not, the United States will offer, it must have meant that luring was not intended to be disallowed within the treaty. If luring does not violate the Treaty, “the treaty thereby [would] not prevent the United States Court from obtaining personal jurisdiction over the defendant” through luring. The reasoning of the majority in *Alvarez-Machain* supports the position of the United States. The Court in *Alvarez-Machain* read the Treaty between Mexico and the United States strictly, finding that because transborder abduction was not explicitly mentioned, it was not disallowed.

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## Part II. The Case Study of Osama Bin Laden

**Simulation #2:** The leader of al Qaeda, Osama bin Laden, was killed by US commandos on May 1, 2011. Assume it is a week earlier, April 25, 2011. The CIA has just confirmed that it has reliable intelligence that Osama Bin Laden is holed up in a private residential compound in the town of Abbottabad, Pakistan. The President has convened a high level team of his advisers to the White House Situation Room in order to determine the legal and practical implications of the following options: (1) requesting Pakistan to arrest and extradite Bin Laden, (2) Abducting Bin Laden, or (3) killing Bin Laden.

Based on the materials below, you are invited to upload a submission discussing what you think the pros and cons of these three options would be.

In order to complete the optional on-line simulations for this course, students must go to the Navigation Bar on the left panel. Under the Exercises section, you will find a button for “on-line simulations.” The simulations for each session are available under this button. Written work can be submitted directly or through file upload. Students who post five or more on-line submissions of over 200 words in length during the course (simulations and discussions) will be awarded a Statement of Accomplishment with Distinction for the course.



## A. Abduction

### **Frederic L. Kirgis, Alleged CIA Kidnapping of Muslim Cleric in Italy, ASIL Insight, July 7, 2005**

#### **Introduction**

In late June 2005, it was reported that an Italian judge had issued arrest warrants for 13 U.S. CIA agents accused of kidnapping imam Hassan Mustafa Nasr in Italy in 2003, and sending him to Egypt for questioning regarding possible terrorist activities. Nasr apparently is an Egyptian national, although he was living in Italy when he was abducted. Allegedly, when he arrived in Egypt he was imprisoned and tortured during interrogations. The Italian government has denied that it condoned his abduction, but former CIA agents have said that an Italian intelligence official gave his implicit approval.

The case raises several questions under international law. Did the United States violate Italy's sovereignty if CIA agents abducted Nasr in Italy, as alleged? Did the United States violate its international legal obligations if it delivered Nasr to the control of a government that would be likely to torture him or to acquiesce in acts of torture against him? Could Italy obtain extradition of the CIA agents (who apparently are no longer in Italy)? If Italy does get custody of them, would they be immune under international law from prosecution in Italian courts?

#### **Italy's Sovereignty**

In 1927 the World Court set forth a basic rule: "the first and foremost restriction imposed by international law upon a State is that -- failing the existence of a permissive rule to the contrary -- it may not exercise its power in any form in the territory of another State." Agents of one State who abduct someone in another State would be exercising State power. There is no general rule

of international law permitting that kind of State power in the territory of another State. Nevertheless, the latter State --Italy in this case -- could waive its right to object, by consenting to the exercise of power. If Italian officials did consent, even tacitly, that should do away with the violation-of-sovereignty issue.

### **The Torture Issue**

Torture is universally regarded as a violation of international law. No government openly asserts that torture is lawful. It is condemned under several treaties, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, a multilateral treaty to which 139 States (including Egypt, Italy and the United States) are parties. Article 3 of the Convention against Torture says, "No State Party shall expel, return (*"refouler"*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." It goes on to say that the existence of a consistent pattern of gross, flagrant or mass violations of human rights should be taken into account in ascertaining whether that standard is met. The United States understands "substantial grounds for believing that he would be in danger of being subjected to torture" to mean "if it is more likely than not that he would be tortured."

It could be argued that even if U.S. agents kidnapped Nasr and had him delivered to Egypt for questioning, the United States did not "expel, return or extradite him" within the meaning of the Convention. Clearly, the United States did not extradite him, and it probably could not be said to have "expelled" him within the meaning of the Convention. The question then would be whether it "returned" him to Egypt. Arguably not, since he apparently was living in Italy and had not come there from Egypt. But the contrary argument could also be made, since he apparently is an Egyptian national who lived in Egypt at some time in the past.

It could also be argued that there were not substantial grounds for believing that Nasr would be in danger of being subjected to torture, even if Egypt had tortured some prisoners in the past. But here again, a counter-argument could be made -- particularly if the United States had substantial grounds for believing that Egypt in the past had consistently tortured prisoners, or had in particular tortured prisoners like Nasr (for example, those suspected of terrorist activities). If there were substantial grounds, it would not matter for purposes of Article 3 of the Convention whether he was actually tortured once he got there. If there were not substantial grounds in advance to believe he would be in danger of torture, Article 3 would not be violated even if he was actually tortured after he arrived. Article 3, in other words, looks to what could be expected rather than to what actually happened after the individual has been turned over.

### **Extradition**

News reports have not indicated where any of the 13 CIA agents are now. Since they apparently are not in Italy, the Italian prosecutors are hoping to have them extradited back to Italy for trial if they can be located. Extradition is normally accomplished under an extradition treaty between the requesting and the requested State. Extradition requests are made through diplomatic channels, not directly by prosecutors or by the judge who issued the arrest warrants. If the Italian government acquiesced in the kidnapping, it is unlikely that it would request extradition of those who carried it out. That would end the matter, at least if none of the 13 return to Italy on their own.

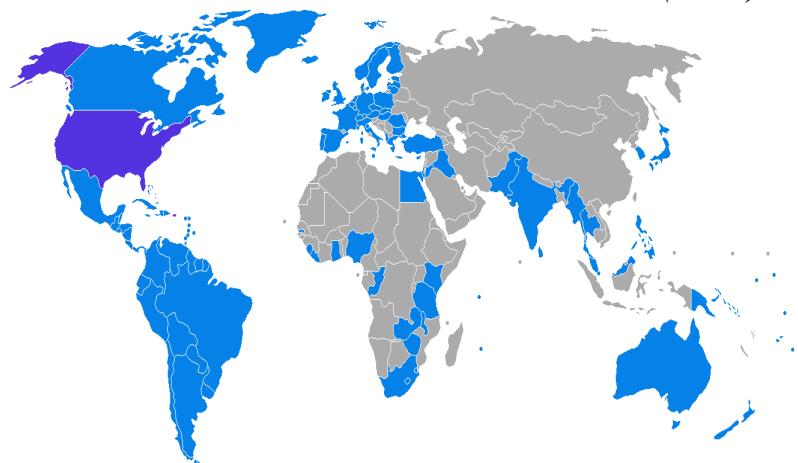
If an extradition request were made to the United States government, and if any or all of the 13 agents are in the United States, the controlling international legal instrument would be the 1984 Extradition Treaty between the United States and Italy. It says that an extraditable offense is one that is punishable under the laws of both States by a prison sentence of one year or more. Assuming that the conduct of the 13 agents would be treated as kidnapping under Italian law, the next question would be whether it would fall within a relevant kidnapping statute in the United States. Looking just at the federal kidnapping statute (which does provide for sentences of at least one year), it applies to “[w]hoever unlawfully . . . kidnaps . . . or carries away and holds for ransom or reward or otherwise any person . . . when the person is willfully transported in interstate or foreign commerce . . .” Because of the words “or otherwise,” the statute has been held not to require that the abductors’ purpose be pecuniary gain. But the U.S. Supreme Court has said that Congress’ evident purpose in adding the words “or otherwise” was to reach abductors who seek some benefit for themselves, even if it is non-pecuniary. That probably would not be the case with respect to the CIA agents, who presumably would not have been seeking direct benefits for themselves if they were carrying out instructions from their superiors in the U.S. government.

The United States-Italy Extradition Treaty does not permit either State party to decline extradition simply because the person sought to be extradited is its own national. But the Treaty does say that extradition shall not be granted when the offense for which extradition is requested is a political offense. Many other extradition treaties say the same thing. There is doubt about just how far the “political offense” exception extends. It has been said that “[t]he purpose of the political offense exception is to shield persons whose prosecution or punishment by the requesting state is politically motivated or for an offense whose genesis is the criminalization of conduct which constitutes an expression of political or religious belief.” It has also been noted that in practice, the political offense exception is rarely used successfully. The exception certainly could be asserted in the case of the CIA agents, but whether it would be successful (assuming that the kidnapping is otherwise covered by the Treaty) is hard to predict.

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## A. Extradition

*Countries with which the U.S. has extradition treaties (in blue)*



**Quinn v. Robinson, 783 F.2d 776 (9<sup>th</sup> Cir. 1986) (edited by Michael Scharf)**

Pursuant to the Extradition Statute, 18 U.S.C. Sec. 3184 (1982), and the governing treaty between the United States and the United Kingdom, the United Kingdom seeks the extradition of William Joseph Quinn, a member of the Irish Republican Army ("IRA"), in order to try him for the commission of a murder in 1975 and for conspiring to cause explosions in London in 1974 and 1975. The district court determined that Quinn cannot be extradited because a long-standing principle of international law which has been incorporated in the extradition treaty at issue--the political offense exception--bars extradition for the charged offenses. The United States government, on behalf of the United Kingdom, appeals.

In the case before us, we find, for reasons we will explain in full, that the charged offenses are not protected by the political offense exception. We vacate the writ of habeas corpus and remand to the district court.

**I. BACKGROUND**

The right of a foreign sovereign to demand and obtain extradition of an accused criminal is created by treaty. In the absence of a treaty there is no duty to extradite, and no branch of the United States government has any authority to surrender an accused to a foreign government except as provided for by statute or treaty.

The extradition treaty between the United States and the United Kingdom provides for the reciprocal extradition of persons found within the territory of one of the nations who have been accused or convicted of certain criminal offenses committed within the jurisdiction of the other nation. Murder and conspiracy to cause explosions, the offenses with which Quinn has been charged, are extraditable offenses under the Treaty..

United States citizenship does not bar extradition by the United States. However, under the doctrine of "dual criminality," an accused person can be extradited only if the conduct complained of is considered criminal by the jurisprudence or under the laws of both the requesting and requested nations. In addition, there must be evidence that would justify committing the accused for trial under the law of the nation from whom extradition is requested if the offense had been committed within the territory of that nation. United States courts have interpreted this provision in similar treaties as requiring a showing by the requesting party that there is probable cause to believe that the accused has committed the charged offense. The doctrine of "specialty" prohibits the requesting nation from prosecuting the extradited individual for any offense other than that for which the surrendering state agreed to extradite.

The treaty between the United States and the United Kingdom provides certain exceptions to extradition, notwithstanding the existence of probable cause to believe that the accused has committed the charged offense. In particular, the treaty specifies that "[e]xtradition shall not be granted if ... the offense for which extradition is requested is regarded by the requested party as one of a political character...."

## **II. THE DEVELOPMENT OF THE POLITICAL OFFENSE EXCEPTION**

### **A. Origin of the Exception**

The first-known extradition treaty was negotiated between an Egyptian Pharaoh and a Hittite King in the Thirteenth Century B.C. However, the concept of political offenses as an exception to extradition is a rather recent development. In the centuries after the first known extradition treaty, and throughout the Middle Ages, extradition treaties were used primarily to return political offenders, rather than the perpetrators of common crimes, to the nations seeking to try them for criminal acts. It was not until the early nineteenth century that the political offense exception, now almost universally accepted in extradition law, was incorporated into treaties.

The French and American revolutions had a significant impact on the development of the concept of justified political resistance, as did the political philosophers of the time. In 1834, France introduced the political offense exception into its treaties, and by the 1850's it had become a general principle of international law incorporated in the extradition treaties of Belgium, England, and the United States as well.

The political offense exception is premised on a number of justifications. First, its historical development suggests that it is grounded in a belief that individuals have a "right to resort to political activism to foster political change." This justification is consistent with the modern consensus that political crimes have greater legitimacy than common crimes. Second, the exception reflects a concern that individuals--particularly unsuccessful rebels--should not be returned to countries where they may be subjected to unfair trials and punishments because of their political opinions. Third, the exception comports with the notion that governments--and certainly their nonpolitical branches--should not intervene in the internal political struggles of other nations.

### **B. Comparative Legal Standards**

None of the political offense provisions in treaties includes a definition of the word "political." Thus, the term "political offense" has received various interpretations by courts since the mid-nineteenth century. Not every offense that is politically motivated falls within the exception. Instead, courts have devised various tests to identify those offenses that comport with the justifications for the exception and that, accordingly, are not extraditable.

Within the confusion about definitions it is fairly well accepted that there are two distinct categories of political offenses: "pure political offenses" and "relative political offenses." Pure political offenses are acts aimed directly at the government. These offenses, which include treason, sedition, and espionage, do not violate the private rights of individuals. Because they are frequently specifically excluded from the list of extraditable crimes given in a treaty, courts seldom deal with whether these offenses are extraditable, see *id.*, and it is generally agreed that they are not.

The definitional problems focus around the second category of political offenses--the relative political offenses. These include "otherwise common crimes committed in connection with a

political act," or "common crimes ... committed for political motives or in a political context," Courts have developed various tests for ascertaining whether "the nexus between the crime and the political act is sufficiently close ... [for the crime to be deemed] not extraditable." The judicial approaches can be grouped into three distinct categories: (1) the French "objective" test; (2) the Swiss "proportionality" or "predominance" test; and (3) the Anglo-American "incidence" test.

The early French test considered an offense non-extraditable only if it directly injured the rights of the state. Applying this rigid formula, French courts refused to consider the motives of the accused. The test primarily protects only pure political offenses, and is useless in attempts to define whether an otherwise common crime should not be extraditable because it is connected with a political act, motive, or context.

In contrast to the traditional French test, Swiss courts apply a test that protects both pure and relative political offenses. The Swiss test examines the political motivation of the offender, but also requires (a) a consideration of the circumstances surrounding the commission of the crime, and (b) either a proportionality between the means and the political ends, or a predominance of the political elements over the common crime elements. [This is the predominant test across the globe.]

The "incidence" test that is used to define a non-extraditable political offense in the United States and Great Britain was first set forth by the Divisional Court in *In re Castioni*, [1891] 1 Q.B. 149 (1890). In that case, the Swiss government requested that Great Britain extradite a Swiss citizen who, with a group of other angry citizens, had stormed the palace gates and killed a government official in the process. Castioni did not know the victim or have a personal grudge against him. The habeas court considered:

[W]hether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and [up]rising in which he was taking part.

The court denied extradition, finding that Castioni's actions were "incidental to and formed a part of political disturbances," and holding that common crimes committed "in the course" and "in the furtherance" of a political disturbance would be treated as political offenses.

American courts have continued to apply the incidence test set forth in *Castioni* with its two-fold requirement: (1) the occurrence of an uprising or other violent political disturbance at the time of the charged offense, and (2) a charged offense that is "incidental to" "in the course of," or "in furtherance of" the uprising.

The American approach has been criticized as being "both underinclusive and overinclusive," and as "yield[ing] anomalous ... results". Although these criticisms have some merit, neither flaw in the American incidence test is serious. Some commentators have suggested that the test is underinclusive because it exempts from judicially guaranteed protection all offenses that are not contemporaneous with an uprising even though the acts may represent legitimate political resistance. For example, the attempted kidnapping of a Cuban consul, allegedly for the purpose

of ransoming the consul for political prisoners held in Cuba, was held by a court not to be a political offense because the act was not "committed in the course of and incidental to a violent political disturbance."

There are several responses to the charge of underinclusiveness. First, in their critiques, the commentators fail to give sufficient weight to the existence of a number of ameliorative safeguards. For example, review of certifications of extradition by the Secretary of State serves partially to remedy any underinclusiveness problem. If a court finds the accused extraditable, the Secretary has, at the very least, broad discretion to review the available record and conduct a de novo examination of the issues and, if necessary, to consider matters outside the record in determining whether to extradite. The potential underinclusiveness dangers of the uprising requirement are also mitigated by the fact that purely political offenses are never extraditable. Additionally, because of the rule of dual criminality, individuals accused of offenses that constitute protected activity under the First Amendment will not be extradited. Second, it is questionable whether the incidence test is, in fact, underinclusive. While it does not protect all politically motivated offenses, it protects those acts that are related to a collective attempt to abolish or alter the government--the form of political offense that the exception was initially designed to protect, see *supra* pp. Third, any effort to protect all crimes that are in some way politically motivated would either require the abandonment of the objective test for determining which offenses fall within the exception--in our view a most undesirable result--or would result in the protection of innumerable crimes that fall far outside the original purposes underlying the exception.

A number of commentators suggest, on the other hand, that the American test is overbroad because it makes non-extraditable some offenses that are not of a political character merely because the crimes took place contemporaneously with an uprising. They all cite *Karadzole v. Artukovic*, 247 F.2d 198 (9th Cir.1957)--"one of the most roundly criticized cases in the history of American extradition jurisprudence"--to support their argument. In *Artukovic*, the Yugoslavian government sought the extradition of a former Minister of the Interior of the puppet Croatian government which took over a portion of Yugoslavia following the German invasion in April 1941. *Artukovic* was charged with directing the murder of hundreds of thousands of civilians in concentration camps between April 1941 and October 1942. Prior to a hearing by an extradition magistrate, the district court granted habeas relief, concluding that the charged offenses were non-extraditable political offenses. We affirmed, applying the Castioni language and noting that the offenses occurred during the German invasion of Yugoslavia and subsequent establishment of Croatia. We considered but were unpersuaded by the argument that because war crimes are so barbaric and atrocious they cannot be considered political crimes. We do not believe that *Artukovic* adequately supports the commentators' suggestion that the incidence test is overinclusive. We think it more likely that the problem lies not in the test itself but in the fact that we erred by applying it in that case.

The offenses with which *Artukovic* was charged fall within that very limited category of acts which have been labeled "crimes against humanity." In *Artukovic* we erroneously assumed that "crimes against humanity" was synonymous with "war crimes," and then concluded in a somewhat irrelevant fashion that not all war crimes automatically fall outside the ambit of the political offense exception. Our analysis was less than persuasive. We did not need then, and do

not need now, to reach a conclusion about whether all war crimes fall outside the bounds of the exception. The offenses with which Artukovic was charged were crimes against humanity; it matters not whether or not they were also war crimes; either way, crimes of that magnitude are not protected by the exception.

Crimes against humanity, such as genocide, violate international law and constitute an "abuse of sovereignty" because, by definition, they are carried out by or with the toleration of authorities of a state. While some of the same offenses that violate the laws and customs of war are also crimes against humanity, crimes of the latter sort most notably include "murder, extermination, enslavement, ... or persecutions on political, racial or religious grounds ..." of entire racial, ethnic, national or religious groups

Wholly aside from the Artukovic court's confusion of "war crimes" and "crimes against humanity," we do not believe that the political offense exception, even if meant to protect the acts of representatives of a former government, should have been extended to protect those carrying out a governmental policy calling for acts of destruction whose "nature and scope ... exceeded human imagination." These crimes are simply treated differently and are generally excluded from the protection of many normally applicable rules. They are certainly in our view to be excluded from coverage under the political offense exception.

Accordingly, we do not consider the "underinclusiveness" and "overinclusiveness" problems of the incidence test to have been as severe as has been suggested by some of the commentators. Rather, we believe that the incidence test, when properly applied, has served the purposes and objectives of the political offense exception well. More recently, a number of courts have begun to question whether, in light of changing political practices and realities, we should continue to use the traditional American version of that test. They have suggested that basic modifications may be required and, specifically, that certain types of conduct engaged in by some contemporary insurgent groups, conduct that we in our society find unacceptable, should be excluded from coverage. For the reasons we explain below, we believe that the American test in its present form remains not only workable but desirable; that the most significant problems that concern those advocating changes in the test can be dealt with without making the changes they propose; and that efforts to modify the test along the lines suggested would plunge our judiciary into a political morass and require the type of subjective judgments we have so wisely avoided until now.

### **C. The Recent Political Offense Cases**

Recently, the American judiciary has split almost evenly over whether the traditional American incidence test should be applied to new methods of political violence in two categories--domestic revolutionary violence and international terrorism--or whether fundamental new restrictions should be imposed on the use of the political offense exception.

In both *In re McMullen* (N.D.Cal. May 11, 1979), and *In re Mackin* (S.D.N.Y. Aug. 13, 1981), extradition magistrates applied the traditional United States incidence test despite expressing serious concern over the nature of the charged offenses. In McMullen, the United Kingdom sought the extradition of a former PIRA member accused of murder in connection with the

bombing of a military barracks in England. Finding that McMullen's acts took place during a state of uprising throughout the United Kingdom and were incidental to the political disturbance, the magistrate denied extradition noting that "[e]ven though the offense be deplorable and heinous, the criminal actor will be excluded from deportation if the crime is committed under these pre-requisites." The magistrate's formulation of the test for the political offense exception in Mackin was similar. In that case, the United Kingdom's request for the extradition of an IRA member accused of murdering a British soldier in Northern Ireland was denied.

In contrast, although asserting that the existing incidence test "is sufficiently flexible to avoid [the] abuses [noted by commentators]," and while ostensibly applying the traditional test, the Seventh Circuit in Eain v. Wilkes (7th Cir. 1981), superimposed a number of limitations on the exception that had not previously been a part of United States law. Abu Eain, a resident of the occupied West Bank and a member of the PLO, was accused by the State of Israel of setting a bomb that exploded in the Israeli city of Tiberias in 1979, killing two boys and injuring more than thirty other people. A magistrate granted Israel's extradition request, the district court denied habeas corpus relief, and the Seventh Circuit affirmed.

First, the Eain court distinguished between conflicts that involved "on-going, organized battles between contending armies," and conflicts that involved groups with "the dispersed nature of the PLO," noting that in the former case, unlike the latter, a clear distinction can be drawn between the activities of the military forces and individual acts of violence. Second, although acknowledging that motivation is not determinative of the political character of an act, and characterizing its next requirement as that of a "direct link" between the offense and the conflict, the court examined the motivation for and political legitimacy of the act. The court appears to have concluded that, according to the evidence presented, the PLO's objectives were not politically legitimate: the PLO sought changes in "the Israeli political structure as an incident of the expulsion of a certain population from the country," and its activities were therefore more properly characterized as aimed at Israel's "social structure" rather than its "political structure." Third, the court held simply that regardless what the political objective is, "the indiscriminate bombing of a civilian population is not recognized as a protected political act."

Thus, the Seventh Circuit in Eain redefined an "uprising" as a struggle between organized, non-dispersed military forces; made a policy determination regarding the legitimacy of given political objectives; and excluded violent acts against innocent civilians from the protection afforded by the exception. As part of its justification for the new limitations it imposed on the applicability of the exception, the Eain court expressed concern that, in the absence of these restrictions, nothing would prevent an influx of terrorists seeking a safe haven in America.... Terrorists who have committed barbarous acts elsewhere would be able to flee to the United States and live in our neighborhoods and walk our streets forever free from any accountability for their acts. We do not need them in our society.... [T]he political offense exception ... should be applied with great care lest our country, become a social jungle....

The District Court for the Southern District of New York has recently rejected portions of the Eain analysis but accepted some of the new restrictions propounded by the Seventh Circuit. In *In re Doherty*, (S.D.N.Y.1984), the court denied the United Kingdom's request that a PIRA member accused of attacking a convoy of British soldiers in Northern Ireland be extradited. The

extradition court rejected the notion that the exception protects only "actual armed insurrections or more traditional and overt military hostilities." Noting that "political struggles have been ... effectively carried out by armed guerillas," id., the court concluded that a dissident group's likelihood of success and its ability to effect changes by other than violent means were not determinative factors. Nevertheless, the court agreed with the Seventh Circuit's tacit conclusion that the traditional incidence test is "hardly consistent with ... the realities of the modern world,"

### **III. THE POLITICAL OFFENSE EXCEPTION AND THE REALITIES OF CONTEMPORARY POLITICAL STRUGGLES**

#### **A. The Political Reality: The Contours of Contemporary Revolutionary Activity**

The recent lack of consensus among United States courts confronted with requests for the extradition of those accused of violent political acts committed outside the context of an organized military conflict reflects some confusion about the purposes underlying the political offense exception. The premise of the analyses performed by modern courts favoring the adoption of new restrictions on the use of the exception is either that the objectives of revolutionary violence undertaken by dispersed forces and directed at civilians are by definition, not political, or that, regardless of the actors' objectives, the conduct is not politically legitimate because it "is inconsistent with international standards of civilized conduct." Both assumptions are subject to debate.

A number of courts appear tacitly to accept a suggestion by some commentators that begins with the observation that the political offense exception can be traced to the rise of democratic governments. Because of this origin, these commentators argue, the exception was only designed to protect the right to rebel against tyrannical governments, and should not be applied in an ideologically neutral fashion. These courts then proceed to apply the exception in a non-neutral fashion but, in doing so, focus on and explicitly reject only the tactics, rather than the true object of their concern, the political objectives. The courts that are narrowing the applicability of the exception in this manner appear to be moving beyond the role of an impartial judiciary by determining tacitly that particular political objectives are not "legitimate."

We strongly believe that courts should not undertake such a task. The political offense test traditionally articulated by American courts, as well as the text of the treaty provisions, is ideologically neutral. We do not believe it appropriate to make qualitative judgments regarding a foreign government or a struggle designed to alter that government.

A second premise may underlie the analyses of courts that appear to favor narrowing the exception, namely, that modern revolutionary tactics which include violence directed at civilians are not politically "legitimate." This assumption, which may well constitute an understandable response to the recent rise of international terrorism, skews any political offense analysis because of an inherent conceptual shortcoming. In deciding what tactics are acceptable, we seek to impose on other nations and cultures our own traditional notions of how internal political struggles should be conducted.

The structure of societies and governments, the relationships between nations and their citizens, and the modes of altering political structures have changed dramatically since our courts first adopted the Castioni test. Neither wars nor revolutions are conducted in as clear-cut or mannerly a fashion as they once were. Both the nature of the acts committed in struggles for self-determination, and the geographic location of those struggles have changed considerably since the time of the French and American revolutions. Now challenges by insurgent movements to the existing order take place most frequently in Third World countries rather than in Europe or North America. In contrast to the organized, clearly identifiable, armed forces of past revolutions, today's struggles are often carried out by networks of individuals joined only by a common interest in opposing those in power.

It is understandable that Americans are offended by the tactics used by many of those seeking to change their governments. Often these tactics are employed by persons who do not share our cultural and social values or mores. Sometimes they are employed by those whose views of the nature, importance, or relevance of individual human life differ radically from ours. Nevertheless, it is not our place to impose our notions of civilized strife on people who are seeking to overthrow the regimes in control of their countries in contexts and circumstances that we have not experienced, and with which we can identify only with the greatest difficulty. It is the fact that the insurgents are seeking to change their governments that makes the political offense exception applicable, not their reasons for wishing to do so or the nature of the acts by which they hope to accomplish that goal.

Politically motivated violence, carried out by dispersed forces and directed at private sector institutions, structures, or civilians, is often undertaken--like the more organized, better disciplined violence of preceding revolutions--as part of an effort to gain the right to self-government. We believe the tactics that are used in such internal political struggles are simply irrelevant to the question whether the political offense exception is applicable.

## **B. Relationship Between the Justifications for the Exception, the Incidence Test, and Contemporary Political Realities**

One of the principal reasons our courts have had difficulty with the concept of affording certain contemporary revolutionary tactics the protection of the political offense exception is our fear and loathing of international terrorism. The desire to exclude international terrorists from the coverage of the political offense exception is a legitimate one; the United States unequivocally condemns all international terrorism. However, the restrictions that some courts have adopted in order to remove terrorist activities from coverage under the political offense exception are overbroad. As we have noted, not all politically-motivated violence undertaken by dispersed forces and directed at civilians is international terrorism and not all such activity should be exempted from the protection afforded by the exception.

Although it was not accepted as international law, the position of the United States, not only on international terrorism but also on the extradition of international terrorists, was made clear in 1972 when it introduced its Draft Convention on Terrorism in the United Nations. The Draft Convention calls either for trial of international terrorists in the State where found or for their extradition. The policy and legal considerations that underlie our responses to acts of

international terrorism differ dramatically from those that form the basis for our attitudes toward violent acts committed as a part of other nations' internal political struggles. The application of the political offense exception to acts of domestic political violence comports in every respect with both the original justifications for the exception and the traditional requirements of the incidence test. The application of that exception to acts of international terrorism would comport with neither. First, we doubt whether the designers of the exception contemplated that it would protect acts of international violence, regardless of the ultimate objective of the actors. Second, in cases of international terrorism, we are being asked to return the accused to the government in the country where the acts were committed: frequently that is not a government the accused has sought to change. In such cases there is less risk that the accused will be subjected to an unfair trial or punishment because of his political opinion. Third, the exception was designed, in part, to protect against foreign intervention in internal struggles for political self-determination. When we extradite an individual accused of international terrorism, we are not interfering with any internal struggle; rather, it is the international terrorist who has interfered with the rights of others to exist peacefully under their chosen form of government.

There is no need to create a new mechanism for defining "political offenses" in order to ensure that the two important objectives we have been considering are met: (a) that international terrorists will be subject to extradition, and (b) that the exception will continue to cover the type of domestic revolutionary conduct that inspired its creation in the first place. While the precedent that guides us is limited, the applicable principles of law are clear. The incidence test has served us well and requires no significant modification. The growing problem of international terrorism, serious as it is, does not compel us to reconsider or redefine that test. The test we have used since the 1800's simply does not cover acts of international terrorism.

## **1. The "Incidence" Test**

As all of the various tests for determining whether an offense is extraditable make clear, not every offense of a political character is non-extraditable. In the United States, an offense must meet the incidence test which is intended, like the tests designed by other nations, to comport with the justifications for the exception. We now explain the reasons for our conclusion that the traditional United States incidence test by its terms (a) protects acts of domestic violence in connection with a struggle for political self-determination, but (b) was not intended to and does not protect acts of international terrorism.

## **2. The "Uprising" Component**

The incidence test has two components--the "uprising" requirement and the "incidental to" requirement. The first component, the requirement that there be an "uprising," "rebellion," or "revolution," has not been the subject of much discussion in the literature, although it is firmly established in the case law. Most analyses of whether the exception applies have focused on whether the act in question was in furtherance of or incidental to a given uprising. Nevertheless, it is the "uprising" component that plays the key role in ensuring that the incidence test protects only those activities that the political offense doctrine was designed to protect.

As we have noted, the political offense doctrine developed out of a concern for the welfare of those engaged in a particular form of political activity--an effort to alter or abolish the government that controls their lives--and not out of a desire to protect all politically motivated violence.

The uprising component serves to limit the exception to its historic purposes. It makes the exception applicable only when a certain level of violence exists and when those engaged in that violence are seeking to accomplish a particular objective. The exception does not apply to political acts that involve less fundamental efforts to accomplish change or that do not attract sufficient adherents to create the requisite amount of turmoil. Thus, acts such as skyjacking (an act that has never been used by revolutionaries to bring about a change in the composition or structure of the government in their own country) fall outside the scope of the exception.

Equally important, the uprising component serves to exclude from coverage under the exception criminal conduct that occurs outside the country or territory in which the uprising is taking place. The term "uprising" refers to a revolt by indigenous people against their own government or an occupying power. That revolt can occur only within the country or territory in which those rising up reside. By definition acts occurring in other lands are not part of the uprising. The political offense exception was designed to protect those engaged in internal or domestic struggles over the form or composition of their own government, including, of course, struggles to displace an occupying power. It was not designed to protect international political coercion or blackmail, or the exportation of violence and strife to other locations--even to the homeland of an oppressor nation. Thus, an uprising is not only limited temporally, it is limited spatially.

In his concurring opinion, Judge Duniway points out that the limitation to acts occurring within the territory in which there is an uprising means that persons committing acts of piracy, terrorism, or other crimes on the high seas will be unable to invoke the protection of the political offense exception. His observation is correct. Just as skyjackers and other international terrorists are not protected under the exception, neither are persons who commit or threaten to commit violent crimes on the high seas. The political offense exception was never intended to reach such conduct.

While determining the proper geographic boundaries of an "uprising" involves a legal issue that ordinarily will be fairly simple to resolve, there may be some circumstances under which it will be more difficult to do so. We need not formulate a general rule that will be applicable to all situations. It is sufficient in this case to state that for purposes of the political offense exception an "uprising" cannot extend beyond the borders of the country or territory in which a group of citizens or residents is seeking to change their particular government or governmental structure.

It follows from what we have said that an "uprising" can exist only when the turmoil that warrants that characterization is created by nationals of the land in which the disturbances are occurring. Viewed in that light, it becomes clear that had the traditional incidence test been applied in Eain, the result would have been identical to that reached by the Seventh Circuit. When PLO members enter Israel and commit unlawful acts, there is simply no uprising for the acts to be incidental to. The plain fact is that the Israelis are not engaged in revolutionary activity directed against their own government. They are not seeking to change its form, structure, or

composition through violent means. That the PLO members who commit crimes are seeking to destroy Israel as a state does not help bring them within the political offense exception. In the absence of an uprising, the violence engaged in by PLO members in Israel and elsewhere does not meet the incidence test and is not covered by the political offense exception. To the contrary, the PLO's worldwide campaign of violence, including the crimes its members commit in the state of Israel, clearly constitutes "international terrorism."

In short, the Eain and Doherty courts' objective that this country not become a haven for international terrorists can readily be met through a proper application of the incidence test. It is met by interpreting the political offense exception in light of its historic origins and goals. Such a construction excludes acts of international terrorism. There is no reason, therefore, to construe the incidence test in a subjective and judgmental manner that excludes all violent political conduct of which we disapprove. Moreover, any such construction would necessarily exclude some forms of internal revolutionary conduct and thus run contrary to the exception's fundamental purpose. For that reason, we reject the Eain test and especially the concept that courts may determine whether particular forms of conduct constitute acceptable means or methods of engaging in an uprising.

#### **IV. THE INCIDENCE TEST APPLIED TO THE CHARGED OFFENSES**

The magistrate correctly concluded that there was an uprising in Northern Ireland at the time of the offenses with which Quinn is charged. PIRA members, although a minority faction, sought to change the structure of the government in that country, the country in which they lived. Criminal activity in Northern Ireland connected with this uprising would clearly fall within the political offense exception. We cannot conclude, however, that the uprising extended to England. We do not question the fact that throughout the time of the alleged conspiracy, some politically motivated violence was taking place in England as well as in Northern Ireland. However, as the magistrate noted, in general the violent attacks and the responses to them were far less pronounced outside of Northern Ireland. It is clear from the record that the magistrate correctly concluded that the level of violence outside Northern Ireland was insufficient in itself to constitute an "uprising."

In light of the justifications for the political offense exception, the formulation of the incidence test as it has traditionally been articulated, and the cases in which the exception has historically been applied, we do not believe it would be proper to stretch the term "uprising" to include acts that took place in England as a part of a struggle by nationals of Northern Ireland to change the form of government in their own land. Because the incidence test is not met, neither the bombing conspiracy nor the murder of Police Constable Tibble is a non-extraditable offense under the political offense exception to the extradition treaty between the United States and the United Kingdom.

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#### **A. Targeted Killing**



***A License to Kill? The assassination of Osama Bin Laden: Has the USA gone too far in acting as a policeman or was the raid justified? Tuesday, Peace Palace Library, May 17, 2011, available at: <http://peacepalacelibrary-weekly.blogspot.com/2011/05/licence-to-kill-assassination-of-osama.html>***

Osama Bin Laden (OBL) is dead. After he had been assassinated by a special ops team from the United States of America (USA.), the special team of SEALS took the deceased body of the dangerous mastermind terrorist and several hard drives from the compound in Abbottabad. Bin laden had been hiding there with his family for several years without being noticed. When the Pentagon researched the hard drives, it appeared that OBL had been planning new attacks, at least on several US cities and also on European locations. Upon hearing this news so many have sighed with relief that the secret services of the USA found out about these planned attacks before they could actually take place.

On May 2<sup>nd</sup>, 2011, U.S. President Barack Obama told the American people in an official statement that Al-Qaeda leader and terrorist Osama Bin Laden was killed in a special military operation “after a firefight”. This statement led to divergent responses.

At Ground Zero, New York, and lots of other places in the USA people cheered loudly and celebrated the death of the terrorist that masterminded the attack on the Twin Towers. In other parts of the world the death of the terrorist OBL was also celebrated by many. In an official statement the UN Security Council (UNSC) welcomed the death of OBL. It stated that he will “never again be able to perpetrate such acts of terrorism”. The UNSC reaffirmed its call to states to “work together urgently to bring to justice the perpetrators, organizers and sponsors of terrorist attacks.” The UNSC also reaffirmed that its Member States should ensure that in combating terrorism they “comply with all their obligations under international law, in particular international human rights, refugee and humanitarian law”.

Secretary-General of the UN expressed his relief in a formal statement: “I am very much relieved by the news that justice has been done to such a mastermind of international terrorism”. German Chancellor Angela Merkel paid her respects to president Obama for the operation. She expressed her gladness that OBL has been killed by the US navy SEALS. Merkel regarded the killing of

OBL as an important strike against terrorism. Palestinian politician Ghassan Khatib was of the opinion that “getting rid of bin Laden is good for the cause of peace worldwide”. But he believed that what really counts is “to overcome the discourse and the methods -- the violent methods -- that were created and encouraged by bin Laden and others in the world”.

Not everybody reacted with relief and cheer to the killing of Bin Laden. Former Italian Prime Minister Massimo D'Alema for example, did not agree with the enthusiasm felt among so many over the death of OBL: “You don't rejoice at the death of a man. Maybe if Bin Laden had been captured and put on trial it would have been an even more significant victory”.

There were warning voices, exhorting to remain vigilant because of a fear of reprisals from Al-Qaeda, stressing that terrorism does not just end by killing OBL. And there were the disapproving voices. Worldwide there have been people questioning the legality and proportionality of targeting and killing OBL. Was the Obama Administration wrong in killing OBL? Was it the only option? The USA could have chosen to capture and try OBL in court instead of killing him. Besides this, it also has been questioned whether the USA violated the sovereignty of Pakistan by entering Pakistan in order to target OBL. The USA did warn the Pakistani government about the raid but not until the operation was about to take place.

As a candidate during the 2008 election campaign, Obama Barack already stated: "We will kill Osama bin Laden". The military operation was not intended to capture OBL in order to put him on trial. He was to be eliminated. A US national security official stated that it "was a kill operation".

## **Justice**

President Obama stated that “justice had been done” by executing OBL. Geert-Jan Knoops, Professor of International Criminal Law at Utrecht University, The Netherlands, wonders “what kind of justice” was referred to. “Justice by revenge or justice by law”? The killing of OBL has been compared to a Wild West scene from a movie and American rough, Wild West-style justice and the ‘rule of the jungle’.

Human rights lawyer Geoffrey Robertson does not regard the killing of OBL as ‘justice being done’, but as a perversion of the term. “Justice means taking someone to court, finding them guilty upon evidence and sentencing them [...] This man has been subject to summary execution, and what is now appearing after a good deal of disinformation from the White House is it may well have been a cold-blooded assassination”.

Dov Jacobs, a post-doctoral researcher at the University of Amsterdam, the Netherlands, questions the ambiguous attitude of the UNSC regarding international criminal justice as far as the killing of OBL is concerned. He disapproves of how the UNSC could defend values such as the rule of law and due process on the one side and then could approve “actions that run counter to them in the same breath”. He states: “if you believe in the rule of law and due process, then you cannot approve the killing of Bin Laden, however politically or logically justified it may be.”

In order to assess whether the assassination of OBL on Pakistani soil was legal or not, three areas of law are of importance: international human rights, international humanitarian law and *jus ad*

*bellum* (the right to wage war – in this case it concerns the use of force by the navy SEALS on Pakistani soil against OBL). In the case of the assassination of OBL, international human rights law refers to the question whether the action violated the human rights of OBL. International humanitarian law is concerned with the question whether the killing was part of an armed conflict or not and whether Al-Qaeda leader OBL should be considered as a combatant. If the raid is understood as an action which took place during an armed conflict with Al-Qaeda, OBL can be considered as a combatant and killing him during warfare would therefore be legal.

### **Why the act was considered to be *contra legem* (against the law)**

Why would the targeted military operation which led to the killing of OBL be *contra legem*? Which arguments are put forward? Many claim that instead of killing OBL, he should have been captured and extradited to the USA or an international criminal tribunal to be tried in court. Others claim that the action was lawful. Why?

In the opinion of Geert-Jan Knoops, killing terrorists is *contra legem*. According to international law, OBL should be apprehended and tried in court. He is of the idea that the operation was an “extrajudicial killing which is in principle not permissible under international law”. Geert-Jan Knoops warns for a wrongful interpretation of the earlier mentioned UNSC resolutions because this might lead to a situation in which “the whole world becomes one gigantic battlefield where every nation has the right to eliminate foreign nationals if they are suspected terrorists”. This could lead to questionable situations which should be avoided. According to Knoops, the selectivity in how politicians apply international law should “perhaps be one of our biggest concerns” after the 2nd of May.

Shooting OBL, while he was unarmed is, according to Helmut Schmidt, Former West German Chancellor, “quite clearly a violation of international law” which also could have an incalculable impact on the Arab world in these turbulent times. Navi Pillay, UN High Commissioner for Human Rights stated that the USA should give the UN more detailed information about the raid: “The United Nations has consistently emphasized that all counter-terrorism acts must respect international law”.

### **Why the act was considered to be "lawful, legitimate and appropriate"**

Those in favor of the elimination of OBL claim that UNSC resolutions 1368 and 1373 (2001) offer a legal basis for a war on terror. Because the USA is at war with terrorists, terrorist mastermind OBL and as head of Al-Qaeda is regarded as an enemy combatant who may be killed. Because the USA had announced it is in an armed conflict with Al Qaeda, the special operation aimed at killing OBL was legal under international law. Kenneth Anderson, a professor of law and fellow in national security and law at the Hoover Institution, USA: “It’s lawful for the United States to be going after Bin Laden if for no other reason than he launched an attack against the US”. US legal official Ben Wittes also is of the opinion that the action was lawful. He stated that the people responsible for the action are “on extremely solid legal footing”.

Many are of the opinion that OBL should have been tried before court. But before which court? Because of the gravity of the crimes committed by OBL people would have liked it if he would have been tried before the International Criminal Court (ICC).

However, the ICC only has a mandate to deal with crimes that took place after the ICC statute entered into force in 2002. So, OBL could never have been tried for masterminding the 9-11 attack on the twin towers - only for crimes he committed after 2002.

Besides, the USA would have to become signatory to the ICC Statute, in order to bring the case to the ICC. If OBL would have been captured alive, the Pakistani government would have had to make a decision whether OBL would have to face trial in a Pakistani court or whether they would want to extradite him to the USA.

It is clear that the Obama Administration carefully and thoroughly planned the operation aimed at eliminating Bin Laden. They thought everything through, and they even had a plan ready in case OBL would have surrendered. Obama gave the order to kill OBL but he made an effort to minimize collateral damage “and that is significant on the side of legality”, Professor Laura Dickinson of the Arizona State University Sandra Day O’Connor College of Law, USA stated.

Obama did not give an order to eliminate OBL by just bombing the compound. During the operation three men and one female died but the youngest wife of OBL was not killed. She was only shot in the leg. Before OBL was buried at sea, he was given a proper Islamic burial rite according to Islamic custom. Obama decided to have OBL buried at sea in order to prevent that his body could be taken away and to prevent that a burial place could become a place of pilgrimage for OBL’s followers.

By killing OBL and burying him at sea, the Obama Administration made sure that the curtain would forever fall for Osama Bin Laden disregarding the fact whether one is of the opinion that the raid was *contra legem* or whether one believes that it was legal.

**Pakistan's Sovereignty and the Killing of Osama Bin Laden, ASIL Insight,  
May 5, 2011  
By Ashley S. Deeks**



### Introduction

On May 2, 2011, U.S. forces entered Pakistan—without the Pakistani government’s consent—to capture or kill Osama Bin Laden. In the wake of the successful U.S. military operation, the Pakistan Government objected to the “unauthorized unilateral action” by the United States and cautioned that the event “shall not serve as a future precedent for any state.” Former President Musharraf

complained that the operation violated Pakistan’s sovereignty. The episode implicates a host of important legal and political issues. This *Insight* focuses on one of them: when may one state use force in another state’s territory in self-defense against members of a non-state armed group, and what constraint does the principle of sovereignty impose on that action?

Non-state actors, including terrorist groups, regularly launch attacks against states, often from external bases. When a state seeks to respond with force to those attacks, it must decide whether to use force on the territory of another state with which it may not be in conflict. Absent consent from the territorial state or authorization from the United Nations Security Council, international law traditionally requires the state that suffered the armed attack to assess whether the territorial state is “unwilling or unable” to unilaterally suppress the threat. Only if the territorial state is unwilling or unable to eliminate the threat may the victim state lawfully use force. This *Insight* explores the scope of that test and considers what types of factors the United States might have taken into account in concluding that Pakistan was “unwilling or unable” to address the threat posed by Bin Laden.

## **Background**

### ***A. Armed Conflict with Al Qaeda***

Both the Bush and Obama Administrations have taken the view that the United States is in an armed conflict with al Qaeda. In the U.S. Government’s view, al Qaeda undertook an armed attack against the United States on September 11, 2001, which triggered the U.S. right of self-defense consistent with Article 51 of the U.N. Charter. Perhaps the most controversial aspect of this position is the U.S. argument that this conflict can and does extend beyond the “hot battlefield” of Afghanistan to wherever members of al Qaeda are found. For the United States (and others that adopt this position), once a state is in an armed conflict with a non-state armed group, that conflict follows the members of that group wherever they go, as long as the group’s members continue to engage in hostilities against that state (either on the “hot battlefield” or from their new location).

Those who support the view that armed conflicts have geographic limits as a matter of international law usually begin with the proposition that one must determine the existence of an armed conflict based on the facts on the ground in a particular state. The hostilities there between a state and an organized non-state actor must be protracted and intense for an armed conflict to exist. If the level of violence is sporadic or the non-state actors lack a certain level of organization, no armed conflict exists, and any state wishing to address the threat posed by those non-state actors must use law enforcement tools.

These contrasting positions come into high relief in the Bin Laden case. If the U.S. conflict with al Qaeda is limited to the “hot battlefield” of Afghanistan (and possibly Yemen, Iraq, and the border regions of Pakistan), then the United States could not lawfully have targeted Bin Laden as a belligerent in an armed conflict. If, alternatively, the U.S. conflict with al Qaeda is not limited to “hot battlefields,” then the United States could make a determination that Bin Laden was a lawful target under the laws of armed conflict, even when unarmed and at home in his compound in Abbottabad. The United States clearly made the latter determination. However, this does not end the inquiry about whether using force in Pakistan against Bin Laden was internationally lawful.

### ***B. The “Unwilling or Unable” Test***

International law restricts the situations in which a state may use force in the territory of another state. There are three situations in which such an act is lawful: pursuant to U.N. Security Council authorization under Chapter VII of the U.N. Charter; in self-defense; or (at least in some cases) with the consent of the territorial state. Once a state concludes that it has a right of self-

defense, it must assess what specific types of actions it can take in response, including whether it can use force. The standard inquiry has three elements: whether the use of force would be *necessary*; whether the level of force contemplated would be *proportionate* to the initial armed attack (or imminent threat thereof); and whether the response will be taken at a point sufficiently close to the armed attack (*i.e.*, whether it would be *immediate*).

In determining whether it is necessary to use force against a non-state actor operating in another state's territory, the victim state must consider not just whether the attack was of a type that would require force in response, but also the conditions within the state from which the non-state actor launched the attacks. In this latter evaluation, states, absent consent, employ the "unwilling or unable" test to assess whether the territorial state is prepared to suppress the threat. If the territorial state is either unwilling or unable, it is reasonable for the victim state to consider its own use of force in the territorial state to be necessary and lawful (assuming the force is proportional and timely). If the territorial state is both willing and able, the victim state's use of force would be unlawful. Thus, if the United States located a senior member of al Qaeda in Stockholm, it almost certainly would be unlawful for the United States to use force against that individual without Sweden's consent, because there is no reason to believe that the Swedish government would be unwilling or unable to take appropriate measures against that al Qaeda member.

Although the test is easy to state, international law gives the United States (or any state in a similar position) little guidance about what the "unwilling or unable" test requires. Considerable state practice supports the existence of the test and reveals its historical roots in neutrality law, but neither states nor scholars have discussed what the standard means. What facts should the United States have considered when evaluating Pakistan's willingness or ability to suppress the threat Bin Laden posed to the United States, NATO and Afghan forces, and the security of other states that have suffered al Qaeda attacks? Does international law require the United States to ask Pakistan to take measures itself before the United States lawfully may act? If so, how much time must the United States give Pakistan to respond? What if Pakistan proposes to respond to the threat in a way that the United States believes may not be adequate?

Based on an examination of state practice, it is possible to ascertain a few key principles that the international community might expect a state using force (the "acting state") to follow. The principles might include requirements that the acting state: (1) ask the territorial state to address the threat and provide adequate time for the latter to respond; (2) reasonably assess the territorial state's control and capacity in the region from which the threat is emanating; (3) reasonably assess the territorial state's proposed means to suppress the threat; and (4) evaluate its own prior interactions with the territorial state. However, an important exception to the requirement that the acting state request that the territorial state act arises where the acting state has strong reasons to believe that the territorial state is colluding with the non-state actor, or where asking the territorial state to take steps to suppress the threat might lead the territorial state to tip off the non-state actor before the acting state can undertake its mission.

### **Applying the Test**

In an August 2007 speech, then-Presidential candidate Barack Obama asserted that, if elected, his Administration would take action against the leadership of al Qaeda in Pakistan if the United States had actionable intelligence about al Qaeda targets in Pakistan and then-President Musharraf failed to act. Obama later clarified his position, stating, "What I said was that if we

have actionable intelligence against bin Laden or other key al-Qaida officials . . . and Pakistan is unwilling or unable to strike against them, we should.”

Based on the facts that have come to light to date, the United States appears to have strong arguments that Pakistan was unwilling or unable to strike against Bin Laden. Most importantly, the United States has a reasonable argument that asking the Government of Pakistan to act against Bin Laden could have undermined the mission. The size and location of the compound and its proximity to Pakistani military installations has cast strong doubt on Pakistan’s commitment to defeat al Qaeda. The United States seems to have suspected that certain officials within the Pakistani government were aware of Bin Laden’s presence and might have tipped him off to the imminent U.S. action if they had known about it in advance. Further, it would have been reasonable for the United States to question Pakistan’s capacity to successfully raid Bin Laden’s compound, given that he was known to be a highly sophisticated and likely well-protected enemy.

Pakistan might argue that it would have been able to stage an effective mission against the compound, or that the United States at least should have constructed the mission as a joint operation, given that the two countries work closely together in other intelligence and military contexts. It also could point to the fact that it conducted searches for al Qaeda leaders in Abbottabad in 2003 and in subsequent years, and that it passed on information about the 2003 search to U.S. officials. On balance, however, Pakistan’s defense of its sovereignty in this case, while understandable from a political perspective, seems weak as a matter of international law.

### **Conclusion**

The facts and politics in this case make it unlikely that Pakistan’s defense of its sovereignty will find significant international support. Nevertheless, it would be useful as a matter of international law for states to agree that the “unwilling or unable” test is the correct test for situations such as the U.S. raid against Bin Laden in Pakistan and to provide additional content to that test. Doing so potentially could serve international law’s interests by minimizing legal disagreements at times when political and factual disagreements are running high.

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***The Lawfulness of the U.S. Operation Against Osama bin Laden by Harold Hongju Koh, Legal Adviser, U.S. Department of State, available at:***

***<http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/>***

I write in response to those who have raised questions regarding the lawfulness of the recent United States operation against Al Qaeda leader Osama bin Laden. United States officials have recounted the facts of that well-publicized incident, most recently in the interview of President Obama on *CBS News 60 Minutes* on May 8, 2011. In conducting the bin Laden raid, the United States acted in full compliance with the legal principles previously set forth in a speech that I gave to the American Society of International Law on March 25, 2010, in which I confirmed that “[i]n . . . all of our operations involving the use of force, including those in the armed conflict with

al-Qaeda, the Taliban and associated forces, the Obama Administration is committed by word and deed to conducting ourselves in accordance with all applicable law.” The relevant excerpts of that speech are set forth below:

The United States agrees that it must conform its actions to all applicable law. As I have explained, as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law. As a matter of domestic law, Congress authorized the use of all necessary and appropriate force through the 2001 Authorization for Use of Military Force (AUMF). These domestic and international legal authorities continue to this day.

As recent events have shown, al-Qaeda has not abandoned its intent to attack the United States, and indeed continues to attack us. Thus, in this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks. As you know, this is a conflict with an organized terrorist enemy that does not have conventional forces, but that plans and executes its attacks against us and our allies while hiding among civilian populations. That behavior simultaneously makes the application of international law more difficult and more critical for the protection of innocent civilians. Of course, whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses. In particular, this Administration has carefully reviewed the rules governing targeting operations to ensure that these operations are conducted consistently with law of war principles, including:

- First, the principle of **distinction**, which requires that attacks be limited to military objectives and that civilians or civilian objects shall not be the object of the attack; and
- Second, the principle of **proportionality**, which prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated.

In U.S. operations against al-Qaeda and its associated forces ... great care is taken to adhere to these principles in both planning and execution, to ensure that only legitimate objectives are targeted and that collateral damage is kept to a minimum.

...[S]ome have suggested that the **very act of targeting** a particular leader of an enemy force in an armed conflict must violate the laws of war. But individuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law. During World War II, for example, American aviators tracked and shot down the airplane carrying the architect of the Japanese attack on Pearl Harbor, who was also the leader of enemy forces in the Battle of Midway. This was a lawful operation then, and would be if conducted today. Indeed, targeting particular individuals serves to narrow the focus when force is employed and to avoid broader harm to civilians and civilian objects.

...

[In addition] some have argued that the use of lethal force against specific individuals fails to provide adequate process and thus constitutes **unlawful extrajudicial killing**. But a state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force. Our procedures and practices for identifying lawful targets are extremely robust, and advanced technologies have helped to make our targeting even more precise. In my experience, the principles of distinction and proportionality that the United States applies are not just recited at meetings. They are implemented rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with all applicable law.

... Finally, some have argued that our targeting practices violate **domestic law**, in particular, the long-standing **domestic ban on assassinations**. But under domestic law, the use of lawful weapons systems—consistent with the applicable laws of war—for precision targeting of specific high-level belligerent leaders when acting in self-defense or during an armed conflict is not unlawful, and hence does not constitute “assassination.”

In sum, let me repeat: ... this Administration is committed to ensuring that the targeting practices that I have described are lawful.” (emphasis in original)

Given bin Laden’s unquestioned leadership position within al Qaeda and his clear continuing operational role, there can be no question that he was the leader of an enemy force and a legitimate target in our armed conflict with al Qaeda. In addition, bin Laden continued to pose an imminent threat to the United States that engaged our right to use force, a threat that materials seized during the raid have only further documented. Under these circumstances, there is no question that he presented a lawful target for the use of lethal force. By enacting the AUMF, Congress expressly authorized the President to use military force “against ... persons [such as bin Laden, whom the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 ...in order to prevent any future acts of international terrorism against the United States by such ... persons” (emphasis added). Moreover, the manner in which the U.S. operation was conducted—taking great pains both to distinguish between legitimate military objectives and civilians and to avoid excessive incidental injury to the latter—followed the principles of distinction and proportionality described above, and was designed specifically to preserve those principles, even if it meant putting U.S. forces in harm’s way. Finally, consistent with the laws of armed conflict and U.S. military doctrine, the U.S. forces were prepared to capture bin Laden if he had surrendered in a way that they could safely accept. The laws of armed conflict require acceptance of a genuine offer of surrender that is clearly communicated by the surrendering party and received by the opposing force, under circumstances where it is feasible for the opposing force to accept that offer of surrender. But where that is not the case, those laws authorize use of lethal force against an enemy belligerent, under the circumstances presented here.

In sum, the United States acted lawfully in carrying out its mission against Osama bin Laden.

**Why it's absurd to claim that justice has been done, by Geoffrey Robertson (former Judge of the Special Court for Sierra Leone), The Independent, May**

**3, 2011, available at: <http://www.independent.co.uk/voices/commentators/geoffrey-robertson-why-its-absurd-to-claim-that-justice-has-been-done-2278041.html>**

America resembles the land of the munchkins, as it celebrates the death of the Wicked Witch of the East. The joy is understandable, but it endorses what looks increasingly like a cold-blooded assassination ordered by a president who, as a former law professor, knows the absurdity of his statement that "justice was done". Amoral diplomats and triumphant politicians join in applauding Bin Laden's summary execution because they claim real justice – arrest, trial and sentence would have been too difficult in the case of Bin Laden. But in the long-term interests of a better world, should it not at least have been attempted?

America resembles the land of the munchkins, as it celebrates the death of the Wicked Witch of the East. The joy is understandable, but in some respects, unattractive. It endorses what looks increasingly like a cold-blooded assassination ordered by a president who, as a former law professor, knows the absurdity of his statement that "justice was done". Amoral diplomats and triumphant politicians join in applauding Bin Laden's summary execution because they claim real justice – arrest, trial and sentence would have been too difficult in the case of Bin Laden. But in the long-term interests of a better world, should it not at least have been attempted?

That future depends on a respect for international law. The circumstances of Bin Laden's killing are as yet unclear and the initial objection that the operation was an illegitimate invasion of Pakistan's sovereignty must be rejected. Necessity required the capture of this indicted and active international criminal and Pakistan's abject failure (whether through incompetence or connivance) justified Obama's order for an operation to apprehend him. However, the terms of that order, as yet undisclosed, are all important. Bill Clinton admitted recently to having secretly approved the assassination of Bin Laden by the CIA after the US embassy bombings in the 1990s, while President Bush publicly said after 9/11 that he wanted Bin Laden's head on a plate. Did President Obama order his capture, or his execution?

Details of the so-called "fire-fight" remain obscure. The law permits criminals to be shot in self-defence. They should, if possible, be given the opportunity to surrender, but even if they do not come out with their hands up, they must be taken alive, if that can be achieved without risk. Exactly how Bin Laden came to be shot (especially if it was in the back of the head, execution-style) therefore requires explanation. Why the hasty "burial at sea" without a post-mortem, as the law requires?

But the chorus celebrating summary execution is rationalised on the basis that this is one terrorist for whom trial would be unnecessary, difficult and dangerous. It overlooks the downsides – that killing Bin Laden has made him a martyr – more dangerous in that posthumous role than in hiding, and that both his legend and the conspiracy theories about 9/11 will live on undisputed by the evidence that would have been called at his trial.

Even worse, killing Bin Laden gave him the consummation he most devoutly wished, namely a fast-track to paradise. His belief system required him to die mid-Jihad, from an infidel bullet – not of old age on a prison farm in upstate New York. For this reason he would have refused any offer to surrender, and no doubt died with a smile on his lips.

I do not minimise the security issues at his trial or the danger of it ending up as a squalid circus like that of Saddam Hussein. But the notion that any form of legal process would have been too hard must be rejected. Khalid Sheikh Mohammed - also alleged to be the architect of 9/11 - will shortly go on trial and had Bin Laden been captured, he should have been put in the dock alongside him, so that their shared responsibility could have been properly examined.

Bin Laden could not have been tried for 9/11 at the International Criminal Court – its jurisdiction only came into existence nine months later. But the Security Council could have set up an ad hoc tribunal in The Hague, with international judges (including Muslim jurists), to provide a fair trial and a reasoned verdict.

This would have been the best way of de-mystifying this man, debunking his cause and de-brainwashing his followers. In the dock he would have been reduced in stature – never more remembered as the tall, soulful figure on the mountain, but as a hateful and hate-filled old man, screaming from the dock or lying from the witness box.

Since his videos exalt in the killing of innocent civilians, any cross-examination would have emphasised his inhumanity. These benefits flowing from justice have forever been foregone.

America's belief in capital punishment is reflected in its rejoicing at the manner of Bin Laden's demise. It is ironic to reflect that Bill Clinton secured his election by approving the execution of Ricky Roy Rector (a convict so brain-damaged that he ordered pumpkin pie for his last meal and said that he would "leave the rest until later"). And now Barak Obama has most likely secured his re-election approving the execution of Bin Laden. This may be welcome, given the alternatives. But it is a sad reflection on the continuing attraction of summary justice.

It was not always thus. When the time came to consider the fate of men much more steeped in wickedness than Bin Laden – the Nazi leadership – the British government wanted them hanged within six hours of capture. President Truman demurred, citing the conclusion of Justice Robert Jackson that summary execution "would not sit easily on the American conscience or be remembered by our children with pride...the only course is to determine the innocence or guilt of the accused after a hearing as dispassionate as the times will permit and upon a record that will leave our reasons and motives clear". He insisted upon judgment at Nuremberg, which has confounded Holocaust-deniers ever since.

Killing instead of capturing Osama Bin Laden was a missed opportunity to prove to the world that this charismatic leader was in fact a vicious criminal, who deserved to die of old age in prison, and not as a martyr to his inhuman cause.



CASE WESTERN RESERVE  
UNIVERSITY  
SCHOOL OF LAW

# **INTRODUCTION TO INTERNATIONAL CRIMINAL LAW**

**MOOC taught by Professor  
Michael P. Scharf**

**Module #7:**

**Pre-Trial Issues**

**Self-Representation, Plea Bargaining, and  
Exclusion of Torture Evidence**

**International Criminal Law  
Module #7  
Pre-Trial Issues: Self-Representation, Plea Bargaining, and  
Exclusion of Torture Evidence**

## I. Self-Representation and Plea Bargaining

**On-Line Simulation #1.** Assume the following facts:

1. Serbia has recently surrendered Ratko Mladic (the most-wanted former Bosnian Serb General) and Mira Milosevic (the wife of former Serb leader Slobodan Milosevic, who was said to be the “real power behind the throne”) to the Yugoslavia Tribunal. Assume both have been indicted for Genocide, Grave Breaches of the Geneva Conventions, and Crimes against Humanity (under theories of joint criminal enterprise and command responsibility) in relation to the killing of 7,000 civilians at the UN Safe Area of Sebrenica in 1995.
2. Mira Milosevic has filed a motion to represent herself at trial. The Prosecution opposes the motion, and has asked the Tribunal to appoint counsel to represent Milosevic over her objection. During a press conference, Milosevic says:

“I plan to represent myself like my husband and Seselj have done. I have an absolute right under international law to do so, and I will use the televised trial to convince the Bosnian Serb people to take up arms once again against the Islamic traitors in Bosnia. I will turn the trial into a three ring circus, just like Saddam Hussein did at the Iraqi High Tribunal.”

3. The Prosecution desires to enter into a Plea Agreement with Rako Mladic, under which he will testify against Mira Milosevic, and plead guilty to violating the Geneva Conventions, if the Prosecution drops the charges of Genocide and Crimes Against Humanity, and if the Prosecution recommends a sentence of no more than 5 years.
4. The Yugoslavia Tribunal has scheduled a hearing to decide (a) whether to allow Mira Milosevic to represent herself in light of her pre-trial statements, and (b) whether to approve the Mladic Plea Agreement.

**Directions:** Based on these stipulated facts and the reading materials below, members of **Group A** (last names that begin with the letters A-H) are invited to upload a submission,

representing the Defense, arguing in favor of Mira Milosevic's right to self-representation and/or opposing the plea agreement that would enable Ratko Mladic to testify against Mira Mira.

Members of **Group B** (last names that begin with the letters I-Z) are invited to upload a submission, representing the Prosecution, opposing Mira Milosevic's request to be allowed to represent herself and/or arguing in favor of the Ratko Mladic plea agreement.

In order to complete the optional on-line simulations for this course, students must go to the Navigation Bar on the left panel. Under the Exercises section, you will find a button for "on-line simulations." The simulations for each session are available under this button. Written work can be submitted directly or through file upload. Students who post five or more on-line submissions of over 200 words in length during the course (simulations and discussions) will be awarded a Statement of Accomplishment with Distinction for the course.



Ratko Mladic

Mira and Slobodan Milosevic

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#### READINGS:

#### LIMITS TO THE RIGHT OF SELF-REPRESENTATION BEFORE INTERNATIONAL WAR CRIMES TRIBUNALS

By Michael P.Scharf

JOURNAL OF CRIMINAL JUSTICE 31-46 (Oxford University Press, 2006) (footnotes omitted).

## I. INTRODUCTION

Echoing the wording of Article 14 of the International Covenant on Civil and Political Rights, the statutes of the ICTR and all of the other modern war crimes tribunals provide that the defendant has the right “to defend himself in person or through legal assistance of his own choosing.” Relying on this language, former leaders standing trial for war crimes may seek to act as their own lawyers in order to transform the proceedings into a political stage. Is this a necessary evil attendant to the right to a fair trial under conventional and customary international law, as Judge Richard May, who presided over the trial of Slobodan Milosevic, concluded?” Or can the Covenant, customary international law, and the statutes of the international tribunals be read as permitting a war crimes tribunal to appoint counsel over the objections of the defendant as the ICTR held in the *Barayagwiza Case*?

How war crimes tribunals answer this question in the future will have a significant affect on their ability to contribute to peace, reconciliation, and the rule of law by establishing a historic record of atrocities committed by the former regime that is accepted by the target population. In the case of Slobodan Milosevic, for example, the tactic of self-representation enabled the former Serb leader to: generate the illusion that he was a solitary individual pitted against an army of foreign lawyers and investigators, when in fact he had a squadron of legal counsel assisting him from behind the scenes; make unfettered caustic speeches throughout the trial which were not restricted by the rules of relevance or subject to cross-examination by the prosecution; repeatedly challenge the legitimacy of the proceedings and treat the witnesses, prosecutors, and judges in a manner that would earn ordinary defense counsel expulsion from the courtroom. These tactics weren’t going to help Milosevic obtain an acquittal, but opinion polls in Serbia indicate that they have had the affect of convincing a majority of the Serb people that his trial was unfair and that he was not guilty of the charges.



Self-representation has thus enabled Milošević to cloud the historic record and to transform himself into a martyr, rather than a discredited war criminal. What if someone like Saddam Hussein were permitted to do the same thing at his trial? The thought of the former Iraqi leader appearing on the nightly news throughout the Middle East, riling against the illegal invasion of Iraq, insisting that the Western countries were complicit in war crimes against Iran, and encouraging his followers to commit acts of violence against the newly elected Iraqi government, is indeed frightening, especially in light of the stakes involved.

Given these grave implications, we must ask whether self-representation is indeed a fundamental right enshrined in international law. To that end, this article explores the negotiating record, scholarly commentary, and international jurisprudence related to the self-representation provision of the International Covenant on Civil and Political Rights on which the self-representation language of the statutes of the several war crimes tribunals is based. Next, it explores the two main reasons why a court in a major war crimes trial should be able to require the defendant to work through counsel: (1) the likelihood that a defendant will act in a disruptive manner; and (2) the unique need in a complex war crimes case for an orderly trial. Finally, it examines the conflicting positions taken by the ICTR, SCSL, and ICTY on this issue. The analysis contained herein suggests that the underlying purpose of the defendant's right "to defend himself in person or through legal assistance of his own choosing" is to ensure a fair trial, an objective that can best be met in cases of former leaders accused of international crimes by assigning the defendant a highly

qualified attorney who is vigilantly committed to representing his client's interests.

## **II. ARTICLE 14(3)(D) OF THE ICCPR: NEGOTIATING RECORD, SCHOLARLY COMMENTARY, AND JURISPRUDENCE**

It is helpful to examine the drafting history of Article 14(3)(d) of the ICCPR in order to locate the origins of the provision and its true meaning. The United States provided the first substantive contributions to the First Session of the Drafting Committee of the Universal Declaration of Human Rights, held from June 9–25, 1947. These provisions later became part of Article 14 of the ICCPR, but were originally aimed to be included in the proposed Articles 6 and 27 of the Declaration. It is noteworthy that the initial proposal for the text that eventually became Article 14 of the ICCPR included only the right to consult with and be represented by counsel; there was no mention of a right to self-representation. At the Second Session of the Drafting Committee, the United States introduced a revised draft Article, which provided that everyone is entitled to the aid of counsel. It was not until the draft wording at the end of the Committee's Fifth Session that the eventual Article 14 of the ICCPR added that, in the determination of any criminal charge, one is entitled “[t]o defend himself in person or through legal assistance which shall include the right to legal assistance of his own choosing, or, if he does not have such, to be informed of his right and, if unobtainable by him, to have legal assistance assigned.”

At the Sixth Session, the United States stressed that, in its legal system, the defendant has the right to refuse the assigned counsel and ask for another if the assigned counsel does not perform properly. According to the official records, no discussion ensued concerning an absolute right to represent oneself; rather the delegates were solely concerned about the right to access counsel, the choice of counsel, and who pays for counsel if the defendant is indigent. This evinces the limited weight the drafters placed on the wording which the *Milošević Trial Chamber* has interpreted as creating a right to self-representation.

It is noteworthy that distinguished scholars in the field have not read this clause as requiring a right of self-representation. According to Professor Cherif Bassiouni, “the right to self-representation complements the right to counsel and is not meant as a substitute thereof.” The purpose of the right to self-representation is to assure “the accused of the right to participate in his or her defense, including directing the defense, rejecting appointed counsel, and conducting his or her own defense *under certain circumstances*.” But this right is not unqualified as, Bassiouni continues, “representation of counsel is not only a matter of interest to the accused, but is also paramount to due process of the law and to the integrity of the judicial process.” Accordingly, this can be accomplished only by ensuring that such self-representation is adequate and effective. It logically follows that a court “should appoint professional counsel to supplement self-representation; conversely, whenever it is in the best interest of justice and in the interest of adequate and effective representation of the accused, *the court should disallow self-representation and appoint professional counsel*.”

It is also important to recognize that while most common law countries recognize a right of self-representation, civil law countries including France, Germany, and Belgium, among others, do not feel compelled to permit a defendant to represent himself. In civil law countries, defense counsel can be imposed on the defendant in serious cases, which

happen to be most criminal cases with the potential for long sentences. In France, during a trial, the presence of a lawyer is required before the *Cour d'Assises*, which has jurisdiction to try felonies (offenses punished by imprisonment with hard labor, for life, or for a fixed period of time). Germany similarly requires mandatory defense counsel in certain situations, including where the defendant is charged with a serious offense, where the presiding judge finds that the assistance of defense counsel appears necessary because of the difficult factual or legal situation, or where it is evident that the defendant cannot defend himself. In Belgium, the President of the court must verify whether the defendant has selected counsel of his choice to represent him in front of the *Cour d'Assises*; if the defendant has not so selected, the President must designate counsel for the defendant.

Given the contrary widespread practice of the civil law countries, it would be difficult to properly conclude that the right to self-representation has in fact attained the level of customary international law, as Judge May concluded in the *Milošević* case. Moreover, the jurisprudence of the European Court of Human Rights provides further evidence that Judge May was mistaken. Interpreting a clause in the European Convention with the same language as Article 14(d)(3) of the ICCPR, the European Court has “taken a relatively restrictive stance and affirmed the right of States to assign a defense counsel against the will of the accused in the administration of justice.” Judge May dismissed the importance of this precedent because of the fact that the nature of the proceedings at the ICTY is adversarial, and the imposition of defense counsel is a feature of the inquisitorial system, which is most prevalent among the European states. However, international and hybrid courts such as the ICTY, ICTR, ICC, SCSL, and IST are *sui generis*, representing a blending of the common law and civil law approaches. Thus, the practice of the civil law countries should not be discounted.

### **III. THE RATIONALE FOR REQUIRING A FORMER LEADER TO ACT THROUGH COUNSEL**

#### **A. *Likelihood that the Defendant Will Act in a Disruptive Manner***

The likelihood that a defendant will act in a disruptive manner may be inherent with certain types of defendants, especially former leaders who publicly challenge the court's authority to try them. It is particularly useful then to examine U.S. jurisprudence on limiting the right of self-representation in the case of disruptive defendants.

In *Faretta v. California*, the United States Supreme Court held that a defendant has a Sixth Amendment right to conduct his or her own defense in a criminal case. However, it is important to recognize that the Supreme Court qualified this pronouncement by stating that such a “right of self-representation is not a license to abuse the dignity of the courtroom.” As discussed below, since *Faretta*, several courts have found that self-representation may be terminated if the defendant acts in a disruptive manner.

Under American jurisprudence, the right to counsel is the paramount right in relation to the right to self-representation. As the United States Court of Appeals for the First Circuit

has reasoned, “if [the right to counsel is] wrongly denied, the defendant is likely to be more seriously injured than if denied his right to proceed *pro se*.” In *Tuitt v. Fair*, the appellant, convicted of armed robbery and carrying a firearm without lawful authority, alleged that his right to counsel was infringed when he was denied his requests for a continuance and for a substitution of counsel, or for permission to proceed unrepresented. On appeal, the First Circuit held that “[t]he right to counsel is subject to practical constraints,” such that “the right of an accused to choose his own counsel cannot be insisted upon in a manner that will obstruct reasonable and orderly court procedure.” Similarly, in *United States v. Mack*, the United States Court of Appeals for the Ninth Circuit stated that a defendant’s right to self-representation does not overcome the court’s right to maintain order in the courtroom. The court further reasoned that “[a] defendant does not forfeit his right to representation at trial when he acts out. He merely forfeits his right to represent himself in the proceeding.” The United States Court of Appeals for the Second Circuit in *United States v. Cauley* refused to allow a disruptive defendant to dismiss his legal aid lawyer and proceed unrepresented. The court found that his “behavior in court was that of an easily angered man,” and noted that the defendant “interrupted the cross-examination . . . with shouted obscenities.” He also refused to answer questions posed to him. In *United States v. West*, the United States Court of Appeals for the Fourth Circuit held similarly. The appellant in that case attacked the court’s “integrity and dignity by characterizing it as the ‘home team’ on the side of the government.” The court held that the lower court was correct in finding that the appellant forfeited his right to self-representation by “flouting the responsibility” given to him. Most recently, in *United States v. Harris*, the federal district court in New Jersey turned down a defendant’s request to self-representation. As justification for this, the court found that the defendant refused to acknowledge the authority of the court, showed disrespect for the court, and that his attempts to proceed unrepresented were meant to disrupt the court.

The above forms of disruption have accompanied the cases of former leaders before war crimes tribunals. As the description of Milošević’s antics in the introduction illustrates, such individuals openly question the legitimacy of the court, act disrespectfully to the judges, make speeches during cross-examination, and browbeat witnesses. In the ordinary case, the judges would threaten to expel from the courtroom, impose fines or prison time, or to suspend the license of an attorney who acted in such a manner, but these modes of discipline are not available to the judges with respect to a defendant who is serving as his own attorney. This type of inherently disruptive behavior, then, justifies appointment of defense counsel over the objection of the accused in war crimes trials.

## ***B. The Complexity of the Case and the Need for an Orderly Trial***

War crimes tribunals are initiated in response to some of the gravest of atrocities committed in the history of mankind. Cases involving former leaders accused of war crimes are particularly complex. Consequently, the right to self-representation may be inherently incompatible with war crimes trials involving such defendants in four respects. First, war crimes tribunals prosecute violations of international humanitarian law, and have the overwhelming obligation of bringing the perpetrators to justice. The gamut of legal

skills used in ordinary domestic criminal cases is insufficient for the trial of an accused war criminal. Defense counsel must be fluent in substantive and procedural legal aspects of international humanitarian law, comparative law, and trial and written advocacy skills. Second, international courts such as the ICTR, ICTY, SCSL ICC, and IST are *sui generis*, representing a blending of the common law and civil law approaches. The judges are from both systems, and the procedural and substantive outcomes will depend on a mixture of the two legal systems. Even though the procedure tends to be closer to an adversarial model, characteristic of common law countries, the international courts can be characterized as hybrid, creating unique challenges to even the most experienced and skilled international lawyer. Third, mounting a defense to a war crimes charge has proven to be quite daunting. In the first ICTY case of *Prosecutor v. Tadi\_*, for example, defense counsel was already spending 12 to 14 hours a day, 6 days a week in preparation for cross-examinations and direct examinations of witnesses. Finally, due to the nature of the crimes and the geographic location of the courts in relation to the actual “crime scenes,” access to the sites, evidence, and witnesses is especially challenging.

Although domestic courts in common law countries do not impose defense counsel on an unwilling defendant in the absence of disruptive conduct, some courts have propounded on the matter of competent self-representation in complex cases and offer useful commentary. The Supreme Court of India, for example, has found that the fairness of a trial may be implicated in circumstances where a self-represented defendant cannot understand all the legal implications of the trial and appellate proceedings, as intricate questions of law and fact are involved which require the skillful handling of a competent lawyer, especially when the best of the public prosecutors appear on the other side of the courtroom. The Australian High Court has similarly opined that defendants do not have the right to represent themselves on appeal because “the most important part of the oral discussion—the testing of the arguments by a Socratic dialogue—is rarely effective in the case of applicants who are without legal representation . . . because they generally lack the experience and legal knowledge to respond effectively to the justices’ questions.”

The concept of “equality of arms” further supports the position that a defendant in a trial for war crimes should not have the absolute right of self-representation. Article 19(1) of the ICTR Statute and Article 20(1) of the ICTY Statute firmly embrace the right to “equality of arms.” The jurisprudence of both tribunals has dealt extensively with the issue of “equality of arms” between the prosecution and the defense. Thus, in *Prosecutor v. Tadi\_*, the Appeals Chamber took the view that “equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.” To that end, these international tribunals make provision for specific rules on the appointment, qualifications, and assignment of defense counsel in the Rules of Procedure, as well as codes of conduct and directives for the assignment of defense counsel. It seems at odds with a system that makes such an effort to promote “equality of arms” and extensive qualifications upon defense counsel to accept that potentially unqualified defendants would be allowed to defend themselves. After all, the most legally gifted of defendants, such as

Miloševic, would, notwithstanding their own training, have difficulty following the rules of procedure of an international court, as well as standard international criminal law practices.

#### **IV. THE CASE LAW OF THE ICTR, SCSL, AND ICTY**

##### **A. *The International Criminal Tribunal for Rwanda***

The ICTR was the first international tribunal to face the question of a defendant's right to self-representation, holding in the case of Jean-Bosco Barayagwiza that defense counsel could be assigned over the objection of the accused. Barayagwiza, like Milosevic, was a lawyer by training and a former high level government official. The ICTR Trial Chamber took the right to self-representation as articulated in the Statute as a starting point, but noted that according to international (and some national) jurisprudence, this right is not absolute.

The Registrar declined Barayagwiza's request on January 5, 2000 for the withdrawal of his counsel, J.P.L. Nyaberi. Barayagwiza sought the withdrawal citing reasons of "lack of competence, honesty, loyalty, diligence, and interest." The Registrar's decision was confirmed by the President of the ICTR on January 19, 2000, but on January 31, 2000, the Appeals Chamber ordered the withdrawal of Barayagwiza's defense counsel, J.P.L. Nyaberi, and ordered the assignment of new counsel and co-counsel for Barayagwiza. Barayagwiza declined to accept the assigned counsel, and instructed them not to represent him at the trial. The ICTR Trial Chamber ordered counsel to continue representing Barayagwiza. Counsel filed a motion to withdraw on October 26, 2000, given their client's instructions not to represent him at trial, which was denied on November 2, 2000, on the basis that the ICTR Trial Chamber had to ensure the rights of Barayagwiza.

The ICTR Trial Chamber held Barayagwiza's behavior to be "an attempt to obstruct proceedings. In such a situation, it cannot reasonably be argued that Counsel is under an obligation to follow them, and that [sic] not do so would constitute grounds for withdrawal." It referred to the "well established principle in human rights law that the judiciary must ensure the rights of the accused, taking into account what is at stake for him." The ICTR Trial Chamber further noted that assigned counsel "represents the interest of the Tribunal to ensure that the Accused receives a fair trial. The aim is to obtain efficient representation and adversarial proceedings." In a separate concurring opinion, Judge Gunawardana <sup>stressed</sup> the effect a decision to grant the withdrawal of counsel would have on the administration of justice of the trial. He submitted that Article 20(4)(d), the provision founded on ICCPR Article 14(3)(d), is "an enabling provision for the appointment of a 'standby counsel,'" and in such circumstances the ICTR should make use of court-appointed standby counsel.

##### **B. *The Special Court for Sierra Leone***

The Special Court for Sierra Leone (SCSL) Statute has a similar provision concerning the right to counsel. In a recent decision, a SCSL Trial Chamber found that the defendant Samuel Hinga Norman could not represent himself without the assistance of standby counsel. Norman, who like Milosevic is a lawyer by training and a former high level government official, indicated in a letter of June 3, 2004, after the opening statement of the prosecutor, that he wished to represent himself and that he was dispensing of his defense counsel that had been acting on his behalf since March 2003.

In requiring the appointment of standby counsel, the SCSL Trial Chamber sought to distinguish Norman's situation from that of *Milošević* in two respects: First, the SCSL noted that Norman is being tried with two co-defendants. Second, Norman did not signal his intention to represent himself from the outset. The SCSL Trial Chamber then turned to the characteristics of the trial that made it impossible for Norman to represent himself. According to the SCSL Trial Chamber, the right of counsel is an essential and necessary component of a fair trial. Without counsel, the judges are forced to be a proactive participant in the proceedings instead of the arbiter, which is one of the greatest characteristics of an adversarial proceeding. The SCSL Trial Chamber turned to the complexity of the case and the intricacies of international criminal law, as well as the national and international interest in the "expeditious completion of the trial." The trial judges were also concerned with the impact on the court's timetable.

### **C. The ICTY: Milosevic Revisited**

On September 22, 2004, with the *Milošević* trial about to begin the defense phase, the Trial Chamber (now composed of Patrick Robinson, O-Gon Kwon, and Iain Bonomy who replaced the deceased Richard May) decided to revisit Judge May's ruling that Slobodan Milosevic had a right to represent himself in the courtroom. As discussed above, there were two independent grounds upon which Judge May's ruling could potentially have been reversed. First, the Trial Chamber might have held that the language of the ICTY Statute does not in fact give the defendant the right to self-representation. The language from the Yugoslavia tribunal statute originally comes from an identically worded clause contained in the European Convention on Human Rights and in the International Covenant on Civil and Political Rights. The negotiating record of these treaties indicates that the drafters' concern was with effective representation, not self-representation. In other words, the drafters felt that a defendant should have a right to either be represented by a lawyer or to represent himself; they did not state that each defendant must be asked to choose between the two. Unlike Britain and the United States, most countries of the world do not allow criminal defendants to represent themselves under any circumstances, and this has been deemed consistent with international law by the European Court of Human Rights."

Second, even if Judge May was correct in his reading of the law, as providing a right to self-representation, the Trial Chamber could find that he was wrong to treat that

right as absolute. As authority for his position, Judge May cited the U.S. Supreme Court's 1975 ruling in *Faretta v. California*, which held that there was a fundamental right to self-representation in U.S. courts. But the U.S. high court also added a caveat, which Judge May overlooked, stating that "the right of self-representation is not a license to abuse the dignity of the courtroom." U.S. appellate courts have subsequently held that the right of self-representation is subject to exceptions—such as when the defendant acts in a disruptive manner or when self-representation interferes with the dignity or integrity of the proceedings.

In its ruling on September 22, the Trial Chamber focused on this second ground, ruling that Miloševic's poor health, which repeatedly disrupted the trial, justified appointment of counsel to represent him in court for the remainder of the proceedings. In its view:

If at any stage of a trial there is a real prospect that it will be disrupted and the integrity of the trial undermined with the risk that it will not be conducted fairly, then the Trial Chamber has a duty to put in place a regime which will avoid that. Should self-representation have that impact, we conclude that it is open to the Trial Chamber to assign counsel to conduct the defense case, if the Accused will not appoint his own counsel.

Following the Trial Chamber's decision of September 22, Miloševic refused to cooperate in any way with assigned counsel. Believing that they could not adequately represent the defendant without such cooperation, assigned counsel brought an interlocutory appeal to the ICTY Appeals Chamber (consisting of Theodor Meron, Fausto Pocar, Florence Mumba, Mehmet Guney, and Innes Monica Weinberg de Roca).

The Appeals Chamber decision, which was authored by Judge Meron, represented an obvious attempt at compromise. Based on the language of the ICTY Statute (without any analysis of the negotiating record of the international instruments from which the language originated), the Appeals chamber agreed that defendants have "a presumptive right to represent themselves before the Tribunal." The Appeals Chamber also agreed with the Trial Chamber that the right was subject to limitations. According to the Appeals Chamber, the test to be applied is that "the right may be curtailed on the grounds that a defendant's self-representation is substantially and persistently obstructing the proper and expeditious conduct of his trial." Applying this test, the Appeals Chamber concluded that the Trial Chamber had not abused its discretion in deciding to restrict Miloševic's right to self-representation.

However, the Appeals Chamber felt that the Trial Chamber's order requiring Miloševic to act through appointed counsel went too far, and that the proportionality principle required that a more "carefully calibrated set of restrictions" be imposed on Miloševic's trial participation. Under these, when he is physically able to do so, Miloševic must be permitted to take the lead in presenting his case—choosing which witnesses to present,

questioning those witnesses, giving the closing statement, and making the basic strategic decisions about the presentation of his defense. “If Miloševic’s health problems resurface with sufficient gravity, however, the presence of Assigned Counsel will enable the trial to continue even if Miloševic is temporarily unable to participate.”

## V. CONCLUSION

This article has demonstrated the fallacy of Judge May’s conclusion in the *Miloševic* Case that a defendant in a war crimes trial has an absolute right to self-representation under conventional and customary international law. In contrast to Judge May’s position in *Miloševic*, the ICTR in *Barayagwiza* and the SCSL in *Norman* each recognized that assignment of counsel to an unwilling defendant is permissible under international law and is sometimes necessary to safeguard the legitimacy of the proceedings. After three years of Miloševic’s disruptions, the ICTY finally reversed Judge May’s ruling and required the former Serb leader to be represented by counsel over his objection.

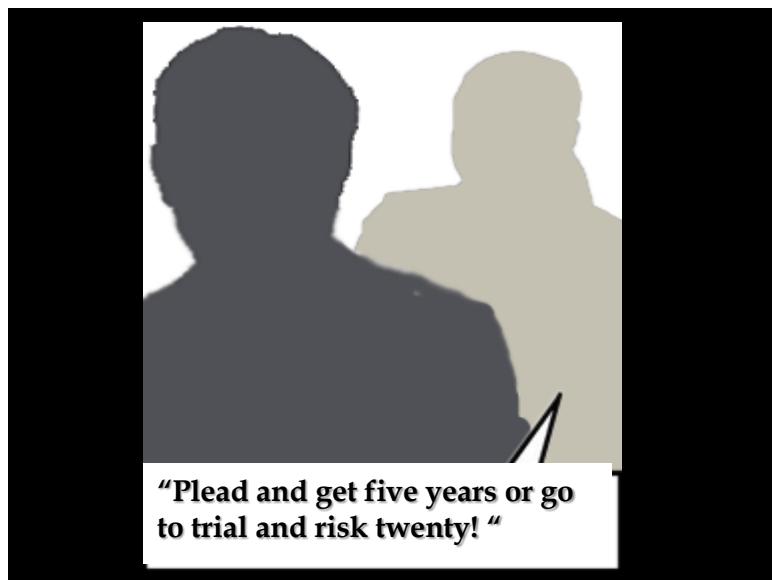
It is noteworthy that in doing so, the *Miloševic* Appeals Chamber concluded that self-representation was a fundamental (though qualified) right. In issuing that determination, the Appeals Chamber impliedly overruled the reasoning of the ICTY Trial Chamber in the case of *Prosecutor v. Šešelj*, which had ordered that the defendant Vojislav Seselj be represented by “standby counsel.” In order to rein in the defendant’s disruptive behavior in the courtroom, the *Šešelj* Trial Chamber had taken the position that ICCPR Article 14(3)(d), and similar provisions in the ICTY statute do not declare that the right to work through legal counsel is derivative of the primary right to represent oneself. As the *Šešelj* Trial Chamber observed: “It would be a misunderstanding of the word ‘or’ in the phrase ‘to defend himself in person or through legal assistance of his own choosing’ to conclude that self-representation excludes the appointment of counsel to assist the Accused or vice versa.” As justifying its decision to appoint counsel over the defendant’s objection, the *Šešelj* Trial Chamber concluded that “[t]he complex legal, evidential and procedural issues that arise in a case of this magnitude may fall outside the competence even of a legally qualified accused, especially where that accused is in detention without access to all the facilities he may need. Moreover, the Tribunal has a legitimate interest in ensuring that the trial proceeds in a timely manner without interruptions, adjournments or disruptions.

In contrast to the *Šešelj* Trial Chamber’s position that the ICCPR language does not require that a defendant be given a right to choose self-representation if appointed counsel is available, by interpreting the phrase as creating a presumptive right of self-representation, the ICTY Appeals Chamber decision may inadvertently fuel a spate of cases before the European Court of Human Rights, challenging the practice throughout Europe of requiring defendants to act through counsel.

It is also unfortunate that the ICTY Appeals Chamber focused only on Miloševic’s health as the source of disruption justifying restriction on his right of self-representation.

Evidently, the Appeals Chamber did not believe that his trial tactics rose to the level of “substantial and persistent” disruption that would justify requiring him to act through defense-counsel. If adopted by other tribunals, the stringent test formulated by the ICTY Appeals Chamber will make it difficult for judges to maintain decorum in future war crimes trials. In particular, Saddam Hussein, whose war crimes trial is set to begin in 2006, is likely to cite the precedent in arguing that he, too, has a right to represent himself before the Iraqi Special Tribunal despite his obvious intentions to use self-representation as a means of undermining the dignity of the proceedings and disrupting the trial. If Hussein were allowed to follow Miloševic’s playbook—using the unique opportunity of self-representation to launch daily attacks against the legitimacy of the IST—this would seriously undermine the goal of fostering reconciliation between the Iraqi Kurds, Shi’ites and Sunnis; the historic record developed by such a trial would forever be questioned; and the trial could transform Hussein and his subordinates into popular martyrs, potentially fueling violent opposition to the new Iraqi government.

In the final analysis, principles of justice and human rights require that former leaders like Miloševic and Hussein be given fair trials. This article has made the case that this can best be guaranteed by appointing distinguished counsel to defend them, not by permitting them to act as their own lawyers.



**Trading Justice for Efficiency:  
Plea Bargaining and International Tribunals  
By Michael P. Scharf**

2 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 170-181 (Fall 2004) (footnotes omitted).

## I. Introduction

“Plea bargaining” -- While no single definition of the term is universally accepted, the practice may encompass negotiation over reduction of sentence, dropping some or all of the charges, or reducing the charges in return for admitting guilt, conceding certain facts, foregoing an appeal, or providing cooperation in another criminal case. It is widely used in common law countries that employ the adversarial system; though far less common, there is a trend toward its increasing use (for less serious crimes) in a number of civil law countries that employ the inquisitorial system; and in 2001, the ad hoc international tribunals, based on a hybrid of the common law and civil law systems, began to experiment with the practice. Plea bargaining is also expected to play a role in the operation of other international and hybrid courts, including the Special Court for Sierra Leone, the permanent International Criminal Court, and the Iraqi Special Tribunal.

At its inception, the Yugoslavia Tribunal (ICTY), the first international criminal Tribunal since World War II, declared that plea bargaining was inconsistent with its unique purpose and functions. The crimes within the Tribunal’s jurisdiction were simply seen as too reprehensible to be bargained over. Its sister ad hoc, the Rwanda Tribunal (ICTR) followed suit, sentencing Jean Kambanda, former prime minister of Rwanda, to life imprisonment despite the fact that he pled guilty to genocide, enabling the Tribunal to forego a lengthy and uncertain trial.

But as the case loads of the ad hoc tribunals expanded exponentially, pressure mounted for them to begin to employ plea bargaining. One of the first international plea bargains occurred in the case of Biljana Plavsic, who had served as deputy to Bosnian Serb leader Radovan Karadzic, and later replaced him as President of the Republika Srpska. Known as the “Serbian Iron Lady,” Mrs. Plavsic had been charged with two counts of committing genocide and complicity in genocide, and six counts of committing crimes against humanity against Bosnian Muslims during the conflict in Bosnia. In return for her guilty plea on one count of persecution (a crime against humanity), the Prosecution agreed to drop all of the other charges and recommend a relatively light sentence. Though Mrs. Plavsic admitted responsibility for the killings of tens of thousands of civilians, and steadfastly refused to cooperate in any other way with the Tribunal (including turning down a request to testify against former Yugoslav President Slobodan Milosevic), the Trial Chamber sentenced her to all of eleven years imprisonment -- with full credit for time already served and the possibility of early release for good behaviour. Plavsic was sent to serve her term in a posh Swedish prison that reportedly provides prisoners with use of a sauna, solarium, massage room, and horse-riding paddock, among other amenities.



The Plasvic case engendered wildly divergent reactions. While some hailed the guilty plea as an important step toward reconciliation in war-torn Bosnia, others criticized the plea bargain as having edited history while elevating the interest in judicial economy over those of the victims. The Plasvic plea bargain thus presents an excellent case study in which to examine the costs and benefits of plea bargaining before international tribunals. This article begins with a short history of the policy on plea bargaining of the ad hoc tribunals. This is followed by an analysis of the pros and cons of plea bargaining, in the context of addressing three fundamental questions: First, does plea bargaining violate the treaty-based duty to prosecute and issue proportionate sentences for certain international crimes? Second, is plea bargaining necessary to conserve scarce judicial resources? And third, does plea bargaining generate a sufficient historic record? Drawing from this analysis, the article concludes with observations on how the practice of plea bargaining before international courts might be improved in the future.

## **II. From Rejection to Dependence: A Short History of Plea Bargaining Before the Ad Hoc War Crimes Tribunals**

International war crimes tribunals differ from their domestic counterparts in many ways. Chief among these differences is the purpose they were designed to serve. Rather than focusing on the traditional objectives of criminal law (retribution, prevention, rehabilitation, and deterrence), the Security Council stipulated that the major purpose of the ad hoc international criminal courts was to contribute to the restoration and maintenance of peace and the rule of law in Yugoslavia and Rwanda.

Specifically, the creators of the Yugoslavia Tribunal (ICTY) and Rwanda Tribunal (ICTR) believed that by pinning prime responsibility on high-level officials and disclosing the way the people were manipulated by their leaders into committing acts of savagery on a mass scale, the trials before the tribunals would help break the cycle of violence that has long plagued the target countries. While this would not completely absolve the underlings

for their acts, it would make it easier for victims to eventually forgive, or at least, reconcile with former neighbors who had been caught up in the institutionalized violence. This would also promote a political catharsis in the targeted countries, enabling the new leadership to distance themselves from the discredited nationalistic policies of the past. The historic record generated from the trials would educate the target populations, long subject to nationalist propaganda, about what really happened, and help ensure that such horrific acts are not repeated in the future.

Would plea bargaining be compatible with these unique objectives of international criminal justice? In one of their first official acts, the judges of the ICTY firmly answered that question in the negative. In announcing the promulgation of the set of rules of procedure that would govern the new Yugoslavia Tribunal (and later the Rwanda Tribunal as well), the President of the Tribunal, Antonio Cassese of Italy, explained that the judges had decided to reject a U.S. Government proposal that would have permitted plea bargaining as a way of eliciting evidence against the most important defendants. As Judge Cassese explained:

The question of the grant of immunity from prosecution to a potential witness has also generated considerable debate. Those in favour contend that it will be difficult enough for us to obtain evidence against a suspect and so we should do everything possible to encourage direct testimony. They argue that this is especially true if the testimony serves to establish criminal responsibility of those higher up the chain of command. Consequently, arrangements such as plea bargaining could also be considered in an attempt to secure other convictions. However, we always have to keep in mind that this Tribunal is not a municipal criminal court but one that is charged with the task of trying persons accused of the gravest possible of all crimes. The persons appearing before us will be charged with genocide, torture, murder, sexual assault, wanton destruction, persecution and other inhumane acts. After due reflection, we have decided that no one should be immune from prosecution for crimes such as these, no matter how useful their testimony may otherwise be.

While the judges of the ICTY initially determined that plea bargaining would be incompatible with the unique purpose of the international war crimes tribunals, seven years later they reversed course and began to aggressively pursue plea bargains. This about face occurred shortly after Judge Gabrielle Kirk McDonald of the United States replaced Antonio Casesse as President of the Tribunal. Unlike Judge Cassese, Judge McDonald had been a federal judge in a country where ninety-five percent of criminal cases are decided by plea bargains. Moreover, there were just a few cases pending while Judge Cassese was President of the ICTY; in contrast, by the time Judge McDonald took over, the Tribunal found itself with far more defendants in its custody than it could handle with its scarce resources. In response, between 2001 and 2003, the Tribunal approved twelve plea bargains, clearing forty percent of the cases from its crowded docket.

Initially, plea bargains before the two ad hoc international tribunals involved promises by the prosecutor to recommend a lenient sentence in exchange for a guilty plea and substantial cooperation provided by the defendant (sentence bargaining). But beginning with the *Plavsic Case*, the plea bargains included the dropping of charges in return for the guilty plea (charge bargaining). The use of both types of plea bargains is likely to further accelerate in response to pressure from the U.N. Security Council for the tribunals to wrap up their work by 2008.

### **III. The Pros and Cons of Plea Bargaining in the Context of International Justice**

#### **A. Are Plea Bargains Compatible with the Treaty-Based Duty to Prosecute and Impose Effective Sentences?**

There are a handful of international criminal law treaties that are unique in that they not only provide the basis for States and international organizations to exercise universal jurisdiction to prosecute perpetrators, they also require that such persons be prosecuted and that the sentence imposed be proportionate to the gravity of the crime. Among these are the four Geneva Conventions of 1949, which require prosecution and proportionate punishment for certain specified “grave breaches” committed in an international armed conflict, the 1948 Genocide Convention, which requires prosecution and proportionate punishment for the crime of genocide, and the 1984 Torture Convention, which requires prosecution and proportionate punishment for those who commit the crime of torture. The provisions, negotiating record and commentary to these treaties indicate that the obligation to prosecute and carry out “effective penalties” which “take into account their grave nature” is absolute, meaning that grants of amnesty, immunity, token sentences, or pardons are not permitted with respect to these offenses.

Judge Cassese likely had these provisions in mind when he declared that plea bargaining would simply be inappropriate in the case of “persons accused of the gravest possible of all crimes.” True, these provisions do not require a prosecutor to bring charges against all suspected perpetrators. Rather, they may be read to permit appropriate application of prosecutorial discretion in light of available resources to prosecute only those who are most culpable, who hold the highest positions, and as to whom the evidence is most compelling. In a similar vein, it would not violate the obligation to prosecute contained in these treaties where a plea agreement is made in order to obtain testimony or evidence for use in the case of a higher ranking or more culpable defendant. But where, as in the *Plavsic case*, the international tribunal has issued an indictment for genocide, it would seem to be incompatible with both the letter and spirit of these treaties for the tribunal to approve a plea bargain dropping this grave charge simply to expedite its case load.

A compelling counter argument can be made, however, that the statutes of the ad hoc international war crimes tribunals and permanent International Criminal Court incorporate only the substantive provisions of the Geneva Conventions, the Genocide

Convention, and the Torture Convention; and do not incorporate those procedural aspects of the treaties that require prosecution. Since the international tribunals have independent juridical personality from the states that are bound by these treaties, the obligations to prosecute do not flow to the tribunals. Thus, it may seem unseemly to some that Mrs. Plasvic, who was originally charged with genocide, ended up with a mere eleven-year sentence at a posh Swedish prison in return for her guilty plea, but such action may not technically violate the treaty-based duty to prosecute and render effective penalties.

## **B. Is Plea Bargaining Necessary to Conserve Scarce Judicial Resources?**

It is noteworthy that the international tribunals have primarily justified plea bargaining in terms of conserving scarce judicial resources, rather than as a way of obtaining evidence from underlings for use in the prosecution of leadership figures. Thus, in the *Plasvic case*, the international tribunal observed the chief benefit of the practice was that: “a guilty plea before the beginning of the trial obviates the need for victims and witnesses to give evidence and my save considerable time, effort and resources.” According to the current President of the ICTY, Judge Theodor Meron of the United States, now that the tribunal is “running at full steam,” it “cannot try all the defendants.” Extensive use of plea bargaining is simply “part of the court’s coming of age.”

This view reflects the experience of the United States where plea bargaining became increasingly prevalent as the number of criminal trials increased and as criminal proceedings became ever more complex, time-consuming, and expensive during the twentieth century. By 1971, the United States had become so dependent on plea bargaining as a means of managing its judicial case load that the U.S. Supreme Court observed that the practice “is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and Federal Government would need to multiply by many times the number of judges and court facilities.”

In the early days of the ICTY, few defendants were in custody, and most were relatively low level offenders who happened to fall into the hands of government authorities outside the Balkans. Later, through the international community’s use of financial incentives (including a deal to provide Serbia 1.5 billion dollars in return for the surrender of Slobodan Milosevic), Croatian, Serb, and Bosnian authorities were induced to transfer an increasing number of high level indicted war criminals to the Tribunal. A dozen others were apprehended and turned over to the Tribunal by NATO forces. As this article went to press, forty people have been tried, twenty-seven are in custody awaiting trial, and seventeen who have been indicted remain fugitives, chief among them the Bosnian Serb war time leaders Radovan Karadzic and General Ratko Mladic. The average ICTY trial takes over a year at a cost of about \$50 million a piece. The numbers for the ICTR are roughly the same.

The ICTY’s first response to its growing case load was to withdraw indictments against several lower-level officials. Next, it requested (and was given) the addition of

twenty-seven “Ad Litem Judges” to supplement the eleven judges initially assigned to the tribunal. It then implemented procedural elements found in continental systems in an effort to make Tribunal proceedings quicker and more efficient.

Despite these efforts, without substantial use of plea bargaining, the tribunal’s docket was likely to remain overburdened. This is because compared to domestic trials, cases involving charges of genocide, war crimes, and crimes against humanity are inherently complicated, lengthy, and costly. This is in large part due to the difficulty of proving the “chapeau elements” of the international crimes. To prosecute genocide, for example, the prosecution must prove that a substantial portion of the victim population was attacked; to prove grave breaches of the Geneva Conventions, the prosecution must prove that the offenses took place in the context of an international armed conflict; and to prove crimes against humanity, the prosecution must prove that the attacks were systematic and widespread. Establishing these requires the introduction of hundreds of exhibits and the testimony of dozens of both eye witnesses and expert witnesses. This process could have been streamlined, however, had the tribunals adopted a less conservative approach to judicial notice; there would have been far less need to employ the practice of plea bargaining had the ICTY and ICTR ruled that subsequent trials could rely on the general factual findings of the earlier cases. Instead, under the current practice, each ICTY trial alleging grave breaches of the Geneva Conventions, for example, begins with several weeks of testimony from the same experts that the war in Bosnia was an international conflict rather than a civil war.

Nor would plea bargaining be seen as quite so necessary if the U.N. Security Council, pressured by the United States, had been less insistent that the ICTY and ICTR wrap up their work by 2008. At a cost of more than one hundred million dollars for each tribunal per year, international justice might seem exorbitantly expensive, justifying clamors from financial endorsers like the United States, which pays one quarter of their bill, to bring the project to a close. But in light of the number of victims, complexity of the cases, and contribution to peace and security, the cost figure is actually quite reasonable. To put these amounts in perspective, consider the price of trials in the United States involving hundreds of victims (in contrast to ICTY/R trials involving hundreds of thousands). The 1992 trial of New York mob boss John Gotti, for example, cost the United States seventy million dollars, while the 1997 trial of Oklahoma City bomber Timothy McVeigh cost the United States Government fifty million dollars. Moreover, the price of international justice is a fraction of the costs of operating a single U.N. peacekeeping mission. If the ad hoc tribunals were given an additional five years to complete their mandate, the need for plea bargaining could have been avoided. The question then is whether it would be worth an extra five hundred million dollars to avoid the drawbacks of plea bargaining. The answer to that depends largely on the effect of plea bargaining on the two ad hoc tribunals’ efforts to establish an accurate historic record.

### C. Does Plea Bargaining Distort the Historic Record?

The creators of the ad hoc international tribunals viewed them as a potentially significant instrument of peace-building through their ability to generate an accurate historic record of responsibility for atrocities. If, to paraphrase George Santayana, a society is condemned to repeat its mistakes if it does not learn the lessons of the past, then a reliable record of those mistakes must be established in order to prevent their recurrence. Michael Ignatieff recognizes that the “great virtue of legal proceedings... is that their evidentiary rules confer legitimacy on otherwise contestable facts. In this sense, war crimes trials make it more difficult for societies to take refuge in denial – the trials do assist the process of uncovering the truth.

The chief prosecutor of Nuremberg, U.S. Supreme Court Justice Robert Jackson, underscored the logic of this proposition when he reported to President Truman that one of the most important legacies of the Nuremberg trials following World War II was that they documented Nazi atrocities “with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people.” Indeed, in recent times, there has been a movement to deny that the Holocaust actually happened, but the trial record from Nuremberg has served as an effective counter to such fantastic revisionism.

As with Nazi Germany, the need for an accurate accounting is particularly compelling in the cases of countries like Yugoslavia and Rwanda, whose nationalist leaders employed propaganda to generate hatred of the victims and support for the government’s genocidal policies. Thus, the ad hoc tribunals were designed to generate a comprehensive record of the nature and extent of crimes against humanity and genocide in the target states, how they were planned and executed, the fate of individual victims, who gave the orders and who carried them out. By carefully proving these facts one witness at a time on a level playing field in the face of vigilant cross examination by distinguished defense counsel, the founders of the tribunals expected the international trials to produce a definitive account that could pierce the distortions generated by official propaganda, endure the test of time, and resist the forces of revisionism.

Let us consider, then, whether the plea bargain in the *Plavsic case* advanced or hindered the truth-telling function of the ad hoc tribunal. The tribunal itself believed that Mrs. Plavsic’s plea agreement made it more likely that the historic record of her crimes would be accepted by the people of Serbia and Bosnia. It is noteworthy in this regard that not only did Plavsic plead guilty to the charge of persecution, but she also admitted the facts supporting the charge in a five-page document that was appended to the plea agreement. Whereas a defendant in a full criminal trial usually maintains her innocence to the end (thereby setting the stage for endless debates about the correctness of the court’s ruling), “an admission of guilt proffered by a defendant with such sterling nationalist credentials as the Serbian Iron Lady ... provides strong evidence to counteract the self-serving histories that still hold sway among Serbs.”

Indeed, one of the modern myths of Nuremberg is that the German people immediately accepted the findings of the International Military Tribunal because the defendants were convicted over their feeble denials on the strength of their own meticulously kept incriminating documents. Opinion polls conducted by the U.S. Department of State from 1946 through 1958, however, indicate that a large majority of West Germans did not believe the historic record developed at the Nuremberg trial as legitimate, and believed instead that the defendants were in fact innocent of the charges upon which they were convicted. That view changed only after Germany conducted its own domestic war crimes trials in the 1960s. Thus, from the perspective of developing a generally accepted historic record, a plea bargain may be more effective than a judgment developed via a full international trial in the face of the denials of the defendant.

On the other hand, there are several aspects of the Plavsic plea bargain that significantly undercut the effort to establish an accurate and full historic account of her involvement in atrocities. First, Mrs. Plavsic only admitted facts relevant to the one charge of persecution; she did not provide evidence related to the dropped genocide charges, and the dropping of those charges may be erroneously viewed in Serbia as an admission by the prosecutor that those crimes did not take place. Second, the document appended to the plea agreement was a scant five-pages long, enough for only the merest bare bones history of her involvement in atrocities. A full blown trial, in contrast, would have produced a judgment containing several hundred pages of factual findings and hundreds of thousands of pages of trial records, including witness statements, official documents, forensic evidence, and crime scene photographs. Third, despite Mrs. Plavsic's expressions of remorse, her plea bargain was not widely viewed as an act of truth telling, but rather a majority of Serbs saw it as an act of treachery and betrayal in return for generous benefits.

#### **IV. Conclusion**

The ad hoc international tribunals were right initially to be skeptical that plea bargaining could be employed consistent with their unique mission and in light of the grave nature of the international crimes involved. In her companion piece in this issue of the *Journal of International Criminal Justice*, Professor Damaska concludes that “arguments supporting bargained justice, other than those of practical utility, have a much lesser force in the international than in the domestic arena.” If practical utility is the only valid justification, it may not be sufficient to warrant the international adoption of the practice. While it is true that international trials are inherently complex and time consuming, it does not necessarily follow that plea bargaining was a functional necessity for these institutions or, in Judge Meron’s words, a reflection of their maturity.

Rather, the need for plea bargaining at the international level could have been avoided if: (1) the international prosecutors had been more selective in issuing indictments, charging only a handful of the highest level perpetrators instead of so many foot soldiers, prison guards, and mid-level military personnel; (2) the tribunals had adopted a broader notion of judicial notice, so that generally applicable facts would not have to be re-

established from scratch in every case; and (3) the Security Council had not been so anxious to prematurely close down the ad hoc tribunals purportedly due to the high cost of international justice. Yet, regardless of the validity of the justifications for its adoption, now that plea bargaining has been employed by the ad hoc tribunals, the precedent will undoubtedly prompt the permanent international criminal court and hybrid tribunals to adopt the practice as well.

As plea bargaining before international tribunals goes, sentence bargaining is far less controversial than charge bargaining, since the historic record is not affected by the deal. The ad hoc tribunals, which are said to be *sui generis*, represent a blending of the common law/adversarial and civil law/inquisitorial approaches. In adopting charge bargaining in the *Plavsic case*, the Trial Chamber tried to address the issue of establishing an accurate historic record by mixing elements from both approaches. Consistent with the common law system, Mrs. Plavsic was permitted to enter a guilty plea in return for the prosecutor's agreement to drop more serious charges and to recommend a lenient sentence. Consistent with the civil law system, Mrs. Plavsic was required to append to her plea bargain a statement admitting the facts underlying the charge to which she pled guilty.

In light of the goals of international justice, the addition of the confession element from the civil law approach is an improvement over using the pure common law model of charge bargaining. But as demonstrated above, even with this innovation, plea bargaining that results in the dropping of charges has the effect of editing out the full factual basis upon which a conviction rests, and thus has the potential to distort the historic record generated by the Tribunal.

In assessing the validity of a plea agreement, the international tribunals are required by their rules to ensure that the plea has been made voluntarily, that it has been made on an informed basis, that it is not equivocal, and that the existence of the crimes themselves and the participation of the particular accused in those crimes have an adequate factual basis. In light of the unique objectives of international justice, in cases of charge bargaining, the tribunal should require that the defendant append a signed document detailing the facts underlying the original charges (not just the reduced charges as in the *Plavsic case*). Similar to the full admissions that were required as a condition for receiving immunity from prosecution by the South Africa Truth and Reconciliation Commission, this would ensure that the full truth about the perpetrator's involvement in atrocities is revealed, while at the same time providing a benefit to the defendant in exchange for her admission and guilty plea. In the interest of fairness, if the court rejects the plea agreement, the defendant must be allowed to withdraw both her plea and the appended factual stipulation which cannot subsequently be used against her at trial.

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## II. Exclusion of Torture Evidence

### On-Line Simulation #2

This simulation is based on the following article about application of the exclusionary rule contained in Article 15 of the Torture Convention. For this simulation, assume the International Prosecutor of the Cambodia Genocide Tribunal wants to submit the following evidence in the trial of Kang Ling (a Khmer Rouge guard at the Choeng Ek concentration camp), Nuan Chea (one of the leaders of the Khmer Rouge), and Leng Sary (another leader of the Khmer Rouge):

1. Self-incriminatory biographical statements about the role that the Defendant Kang Ling played as a guard at the Choeng Ek concentration camp from 1977-1978 which were provided by the defendant to Khmer Rouge officers just prior to Ling's interrogation at the Tuol Sleng torture facility in 1979. Defendant was not abused prior or during this preliminary interview, but he knew that he would be subjected to electric shocks and whipping during the interrogation that was to follow.

The Prosecutor asserts that this information should be admissible because it was provided prior to the commencement of torture.

2. Statements incriminating Defendant Nuan Chea that were provided by Defendant Kang Ling to Khmer Rouge officers during interrogation at the Tuol Sleng torture facility. Defendant Kang Ling had been subject to electric shocks and whipping during the interrogation resulting in these statements.

The Prosecutor asserts that this information should be admissible under the "silver platter doctrine" because the Tribunal's personnel had not been involved in the torture and under the "exception for evidence against the torturer" since Nuan Chea was one of the Khmer

Rouge leaders responsible for establishing the Tuol Sleng torture facility and directing that suspected spies be sent there for harsh interrogation.

3. Statements incriminating co-Defendant Leng Sary which were provided by Defendant Kang Ling to investigators of the Cambodia Tribunal during Ling's pre-trial detention at the Tribunal's facility. Kang Ling was not apprised of his right to remain silent and was not provided a lawyer during the eight-hour interrogation resulting in these statements.

The Prosecutor asserts that this information should be admissible because, though the Tribunal's personnel were involved in the interrogation, mere failure to apprise a defendant of his rights or to provide a lawyer does not trigger the Torture Evidence Exclusionary Rule.

**Directions:** The Defense moves to exclude the evidence under the Torture Evidence Exclusionary Rule. Based on these stipulated facts and the article below, members of **Group A** (last names that begin with the letters A-H) are invited to upload a submission, representing the Prosecution, arguing in favor of admission of the evidence in one or more of the three scenarios described above. Members of **Group B** (last names that begin with the letters I-Z) are invited to upload a submission, representing the Defense, arguing that the evidence in one or more of the scenarios should excluded be under the Torture Evidence Exclusionary Rule.

In order to complete the optional on-line simulations for this course, students must go to the Navigation Bar on the left panel. Under the Exercises section, you will find a button for "on-line simulations." The simulations for each session are available under this button. Written work can be submitted directly or through file upload. Students who post five or more on-line submissions of over 200 words in length during the course (simulations and discussions) will be awarded a Statement of Accomplishment with Distinction for the course.



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## Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible?

**Michael P. Scharf**

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*It is one thing to condemn torture, as we all do. It is another to find a solution to the question that this case raises which occupies the moral high ground but at the same time serves the public interest and is practicable. Condemnation is easy. Finding a solution to the question is much more difficult.*

Lord Hope of Craighead, British House of Lords, 2005

### **I. Introduction**

This article examines whether there should be expanded exceptions to the torture evidence exclusionary rule, and if so, how those exceptions should be crafted to avoid abuse. Rather than explore the question in the hotly debated context of terrorist prosecutions, this article uses a very different kind of case study which presents the issue in a fresh light that challenges the general assumptions about the morality, efficacy, and legality of admitting evidence obtained by torture.

In October 2006, the author of this article was invited to help lead the first training session for the investigative judges and prosecutors of the U.N.'s newly established Cambodia Genocide Tribunal, known as the Extraordinary Chambers in the Courts of Cambodia. One of the most contentious issues that arose during the session was the question of whether the Cambodia Tribunal could admit evidence of the Khmer Rouge command structure that came from interrogation sessions at the infamous Toul Sleng torture facility. What makes the issue novel is that the evidence the Tribunal is interested in is not the substance of the victims' torture-induced confessions but the background biographical information provided by the victims at the start of their interrogation, such as the location and type of work they did for the regime, as well as the names and the responsibilities of their superiors and subordinates.

While in Phnom Penh, the author was given a tour of the Tuol Sleng facility, which has been maintained by the Cambodian government as a memorial exactly as it was the day the Khmer Rouge regime fell in January 1979. Each dank room at Tuol Sleng contains a rusty metal bed frame with large manacles and assorted implements of torment, under which can be seen the faded brownish stain from pools of blood, and above which hang large black and white photos of the anguished faces and broken bodies of the last occupant of that room the day the facility was liberated by the Vietnamese army. Over 17,000 people are documented to have entered Tuol Sleng for interrogation; only six are known to have survived.

At first blush, the Tuol Sleng interrogation statements would seem plainly to be barred by the international exclusionary rule, contained in Article 15 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 15 of the Torture Convention provides: "Each state party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

The problem for the Cambodia Tribunal is that the Tuol Sleng evidence is believed to be critical to proving command responsibility and/or joint criminal enterprise liability of the half dozen Khmer Rouge leaders being tried by the Tribunal. Under these circumstances, must the international rule excluding admission of torture evidence be mechanically applied, with the result that the prosecution of those responsible for mass

torture in Cambodia will be frustrated; or does some principled argument exist under which the evidence can be admitted in harmony with international law?

In addressing this question, this article begins by setting out the history and policies behind the international exclusionary rule for torture evidence and provides background about the importance of the Tuol Sleng evidence to the Cambodia Tribunal prosecutions. This is followed by an analysis and critique of three possible arguments for admission of the evidence: (1) that evidence resulting from preliminary questioning before the application of actual torture is not covered by the torture evidence exclusionary rule; (2) that the torture evidence exclusionary rule does not apply to evidence obtained by third-party authorities; and (3) under canons of statutory construction and principles of treaty interpretation, the exception contained in Article 15 of the Torture Convention should be interpreted broadly to apply to evidence used against the superiors of the perpetrators as well as the perpetrators themselves, so as not to undermine the object, purpose, and spirit of the Convention. The concluding section cautions that there are potentially significant negative long-term consequences that flow from judicial application of these arguments and, to minimize these, proposes specific criteria that a court should employ before admitting torture evidence in such a case.

## **II. Background**

### **A. History of the Torture Evidence Exclusionary Rule**



There was a time when evidence obtained by torture was not barred, but rather specifically authorized to be used in judicial proceedings. For example, four hundred years ago, when Guy Fawkes was arrested as he was preparing to blow up the British Parliament building, King James I sent orders authorizing torture to be used to persuade Fawkes to confess and reveal the names of his co-conspirators. The king's order stated that "the gentler tortours" were first to be employed, and that his torturers were then to proceed to

the worst until the information was extracted from Fawkes. Shortly thereafter, Fawkes signed a confession and provided the names of seven co-conspirators, all of whom were convicted on the basis of Fawkes' torture-induced confession.

Although England banned the practice of relying on torture evidence in British trials in 1640 when the Star Chamber was abolished, the admission of coerced confessions, including those elicited by violent means, was authorized for use in the special "Diplock Courts" employed by British authorities in terrorism trials in Northern Ireland as late as the 1980s. In the United States, during the twentieth century, Supreme Court precedent gradually expanded the exclusionary rule to prohibit confessions elicited by means of torture. However, like the British Diplock Courts, in 2005 the United States created an exception for evidence extracted under "cruel, inhuman or degrading treatment" used in military commissions to prosecute members of the al Qaeda terrorist organization interned at detention facilities in Guantanamo Bay.

In an effort to eliminate world-wide use of torture, the members of the United Nations negotiated the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was adopted in 1984 and entered into force on June 26, 1987. Today, this is one of the most widely ratified of multilateral treaties, with 144 parties, including Cambodia. Article 15 of the Torture Convention contains the first international codification of the exclusionary rule for evidence obtained by torture. No state party has made a reservation to Article 15.

In 1992, the UN Special Rapporteur on Torture, Mr. Peter Kooijmans, in his report to the UN Commission on Human Rights, explained the rationale for the exclusionary rule, observing that judicial acceptance of statements obtained under torture was responsible for the "flourishing of torture" and that the exclusion of such evidence would make torture "unrewarding and therefore unattractive." In addition to the public policy objective of removing any incentive to undertake torture anywhere in the world, the exclusionary rule has been justified on the basis of the unreliability of evidence obtained as a result of torture, and on the need to preserve the integrity of the judicial process.

Unlike the Rules of other international and hybrid tribunals, the Internal Rules of the Cambodia Tribunal do not contain an exclusionary rule mirroring Article 15 of the Torture Convention. Even though Cambodia is a party to the Torture Convention, the hybrid Tribunal as a separate legal personality is not itself bound by the treaties to which Cambodia is a party. However, both the Agreement between Cambodia and the United Nations which authorizes the Tribunal, and the Cambodia domestic statute which establishes it, contain provisions requiring the Chambers of the Cambodia Tribunal to "exercise their jurisdiction in accordance with international standards of justice." These standards arguably include the rule prohibiting the admission of torture evidence. Moreover, Article 31(3)(c) of the Vienna Convention on the Law of Treaties provides that when "interpreting a treaty a party shall take into consideration, together with the context, any relevant rules of international law applicable in the relations between the parties"

which would include the Torture Convention. At the very least, the Cambodia Tribunal would not want to be perceived as flouting the proscriptions of the Torture Convention, as this would erode its legitimacy and international support.

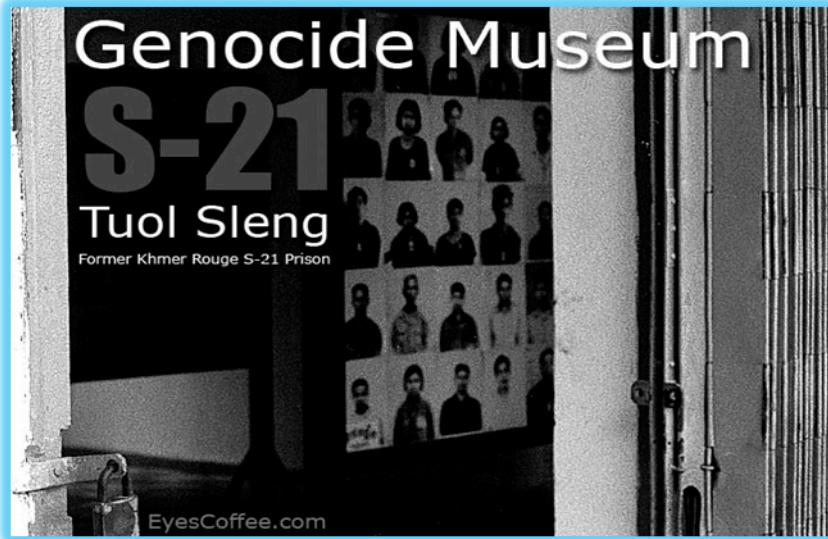
## B. The Importance of the Tuol Sleng Evidence

To enable the reader to comprehend the significance of the Tuol Sleng evidence which lies at the heart of this case study on whether there should be exceptions to the torture exclusionary rule, this section provides background about the atrocities committed by the Khmer Rouge in Cambodia in general, and at Tuol Sleng in particular.

In April 1975, after a protracted guerilla campaign, the Khmer Rouge, led by Pol Pot, captured Phnom Penh and consolidated its control over the whole of Cambodia. Immediately after completing its take-over of Cambodia, the Khmer Rouge emptied the cities into the countryside in their quest to transform Cambodia into a completely agrarian communist state. The Khmer Rouge then persecuted and murdered many of the deported townspeople (referred to as “the new people”) who tended to be more educated than the peasantry. The Khmer Rouge also expelled 150,000 Vietnamese residents from Cambodia, killed all 10,000 who remained in Cambodia, and carried out a larger, if less systematic, genocidal campaign against the country’s Chinese and Muslim minorities.”

During Pol Pot’s four-year reign of terror, the Khmer Rouge regime caused the deaths of approximately 1.7 million people in Cambodia. This number represents a full fifth of Cambodia’s pre-1975 population. At the same time as Cambodia’s rice fields were being converted into the killing fields for hundreds of thousands of Cambodians, political prisoners and their families were meeting a terrible fate inside Khmer Rouge interrogation centers, where between 500,000 and one million Cambodians were tortured to death or executed. The most infamous of these centers, codenamed “S-21,” was located in the abandoned Phnom Penh high school of Tuol Sleng (translation: “hill of the poisoned tree”).

Many of those executed within the Khmer Rouge’s interrogation centers were, in fact, members of the Khmer Rouge. In 1976, Pol Pot and members of the Khmer Rouge Central Committee became convinced that a vast conspiracy against their leadership existed within the lower levels of Khmer leadership and rank and file. The Central Committee subsequently adopted a policy of interrogating anyone not above suspicion, and executing all those within the party “found” to have been involved in this conspiracy. Tuol Sleng became the central location for implementation of this policy.



Tuol Sleng quickly earned a dark reputation for stunning brutality. The sole purpose of Tuol Sleng was to extract confessions from political prisoners, who were then executed and buried in mass graves outside of the capital near the farming village of Choeung Ek. Prisoners interrogated at Tuol Sleng were chained to iron beds, where they were tortured using electric shocks, water treatment, scorpions, beatings, and whippings. During the Khmer Rouge rule, some 17,000 people were interrogated and killed at Tuol Sleng/Choeung Ek.

The Khmer Rouge regime was peculiar among revolutionary governments in that, beyond its constitution, the regime issued no decrees and passed no laws. This reticence to document its orders, decisions, and command hierarchy is emblematic of the fact that the Khmer Rouge leadership intentionally kept its members as well as their individual responsibilities veiled in a shroud of secrecy. As one Khmer Rouge leader reportedly proclaimed: “Through secrecy [ ] we can be masters of the situation and win victory over the enemy, who cannot find out who is who.” Because of the Khmer Rouge’s policy of intense secrecy, the identities of the Khmer Rouge leadership, as well as individual culpability for the regime’s crimes have been obscured.

The little documentation that the Khmer Rouge produced, which would have tied individuals to the regime’s crimes, the Khmer Rouge burned as they retreated from Phnom Penh in the face of Vietnam’s 1979 invasion. There was one exception: the extensive archives of Tuol Sleng were captured intact. In a 1999 interview, Kaing Guek Eav, also known as Duch (pronounced “Doik”), the Khmer Rouge’s security chief who oversaw the operation of Tuol Sleng, explained that he had not been informed that the Vietnamese were on the verge of taking Phnom Penh, and thus had no time to destroy the records of the torture committed at Tuol Sleng.

Among the documents that Duch failed to destroy were the testimonial biographies of each of the prisoners who were interrogated at Tuol Sleng. These biographies are the primary source of information from which scholars have been able to construct a detailed understanding of the command structure of the Khmer Rouge. Before being questioned about their loyalty, prisoners were asked preliminary questions about where they worked, who served as their superiors and subordinates, and what their job entailed. In the absence of documentary evidence or witness testimony linking the Khmer Rouge defendants to particular atrocities, the Tuol Sleng evidence is seen as critical for their successful prosecution before the Cambodia Tribunal, which is set to commence in 2008.

### **III. An Analysis of Three Possible Grounds for Admitting the Tuol Sleng Evidence**

#### **A. An Exception for Preliminary Questions**

At Tuol Sleng, Khmer Rouge members were forcibly brought to a place widely known as a torture facility. The biographical information the Cambodia Tribunal is interested in, however, was obtained from the victims immediately before, rather than during the actual torture sessions. As indicated above, these statements consisted of background information such as the name and age of the person questioned, location and type of work they did for the regime, as well as the names and the responsibilities of their superiors and subordinates. The Tribunal is not interested in the substantive statements made by the detainees during actual physical torture. Since many of the 17,000 people interrogated at Tuol Sleng ended up “admitting” that they were a traitor or a CIA/Vietnamese/Soviet spy, those confessional statements are obviously unreliable. The preliminary biographical statements made as to the command structure of the Khmer Rouge, on the other hand, are in no way self-incriminatory and tend to corroborate one another to a high degree, suggesting that this information is highly reliable and probative.

That the preliminary biographical information might be reliable does not, however, mean that the statements were not the product of offenses under the Torture Convention. As victims were led into the blood-stained rooms of Tuol Sleng and asked these preliminary questions, they knew that certain pain, suffering, and likely death would follow. Anyone who visits Tuol Sleng, as the author did in 2006, can attest to the overpoweringly coercive and oppressive atmosphere of the setting. On the other hand, the Torture Convention recognizes a spectrum of abusive interrogation, ranging from cruel, inhuman and degrading treatment on one side to outright torture on the other. While the Convention prohibits both types of abuses, the distinction between the two is important, as the Convention's exclusionary rule by its terms only applies to the latter, a point recently highlighted by England's highest court in *A and Others v. Secretary of State for the Home Department*.

##### **1. Torture Versus Cruel, Inhuman, and Degrading Treatment**

The preliminary biographical information from the Tuol Sleng interrogations resulted from psychological pressure immediately before obvious physical abuse was going to commence. The principle question here is whether the knowledge that actual physical torture was about to begin is of sufficient gravity to constitute the level of mental pain and suffering that constitutes torture, thus triggering the Torture Convention's exclusionary rule. The Torture Convention defines torture as an act that is intentionally inflicted on a person by which *severe* pain or suffering, either physical or mental, is used to obtain information from that person.

The leading case focusing on the distinction between torture and cruel, inhuman or degrading treatment is *Ireland v. United Kingdom*, decided by the European Court of Human Rights in 1978. In that case, the European Court found that the five techniques in question (wall standing, hooding, subjection to noise, deprivation of sleep, and reduced diet) constituted cruel, inhuman and degrading treatment, but did not rise to the level of torture under the European Convention. In subsequent cases, the European Court for Human Rights has been extremely reluctant to attach what it calls the "special stigma to deliberate inhuman treatments causing very serious and cruel suffering" which accompanies a finding of "torture." In *Soering v. United Kingdom*, for example, the court determined that waiting on death row with the ever-present specter of death hanging over one's head created "mounting anguish" constituting cruel, inhuman and degrading treatment, but did not amount to torture. If the fear of impending death at issue in *Soering* is viewed as analogous to that with which the Tuol Sleng detainees were faced during their preliminary questioning, than the biographical information obtained from the Tuol Sleng detainees would not be barred by the Torture Convention's exclusionary rule.

In more recent cases, however, the European Court of Human Rights appears to have lowered its very high threshold for finding "torture." Thus, in the 1996 case of *Aksoy v. Turkey*, the European Court determined that subjecting the accused to prolonged hanging by the arms, which resulted in temporary paralysis of both arms, constituted torture; in the 1997 case of *Aydin v. Turkey*, the European Court found that rape by an official during incarceration constituted torture; and in the 1999 case of *Selmouni v. France*, the European Court found that blows to the body, sexual humiliation, and threats of bodily harm with a blowtorch constituted torture. In making these determinations, the European Court stated that the European Convention (which contains the same definition of torture as the Torture Convention) was a "living instrument" and that the *Ireland v. United Kingdom* severity test must be adapted to reflect contemporary understanding and evolution of the law."

Also relevant is the case law of the Inter-American Commission and Court of Human Rights, which have applied a lower threshold for finding torture than the European Court of Human Rights did in the case of *Ireland v. United Kingdom*. They have found the following measures to constitute torture: "prolonged incommunicado detention, keeping detainees hooded and naked in cells, interrogating them under the drug pentothal, holding a person's head in water until the point of drowning, standing or walking on top of

individuals, cutting with pieces of broken glass, putting a hood over a person's head and burning him or her with lighted cigarettes, rape; mock burials, mock executions, beatings, deprivation of food and water, threats of removal of body parts, and death threats.”

The UN Human Rights Committee has found similar acts or conduct to constitute torture, including: electric shocks, mock executions, forcing prisoners to remain standing for extremely long periods of time, and holding persons incommunicado for more than three months while keeping that person blindfolded with hands tied together resulting in limb paralysis, leg injuries, substantial weight loss, and eye infection. The UN Special Rapporteur on Torture has listed several acts determined to be torture, including beating; extraction of nails or teeth; burns; electric shocks; suspension; suffocation; exposure to excessive light or noise; sexual aggression; prolonged denial of rest or sleep, food, sufficient hygiene, or medical assistance; total isolation and sensory deprivation; and simulated executions.

While the trend in the case law of human rights bodies reflects a lowering of the threshold for finding torture, it is not clear that preliminary questions prior to commencement of a torture session would meet even the reduced standard, unless death was explicitly or implicitly threatened during the preliminary questioning.

## ***2. An Analogy to the Booking Questions Exception under the Miranda Rule***

The Torture Convention's exclusionary rule was designed to prevent torture-induced confessions or other substantive information from being used in judicial proceedings. In distinguishing the biographical information elicited from the Tuol Sleng detainees from their subsequent torture-induced statements, an analogy might be made to the “booking questions” exception under the American “Miranda Rule.”

The Supreme Court's opinion in *Miranda v. Arizona* established the basic guidelines for protecting a suspect's rights by requiring certain procedural safeguards during a custodial interrogation. Similar to the exclusionary rule of the Torture Convention, in the United States, statements made in violation of the Miranda safeguards are deemed inadmissible in court. The *Miranda* rule applies when a person in custody is subjected to either “express questioning or its functional equivalent.” The functional equivalent to express questioning refers to “any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect.”

Notably, courts in the United States have determined that the *Miranda* rule does not apply to information gained from “routine” booking questions. Such questions involve requesting information for basic identification purposes to secure the “biographical data necessary to complete booking” of the accused regardless of whether it occurred during custodial interrogation. U.S. courts have distinguished questions intended to elicit mere biographical data from lines of questioning intended to yield substantive evidence.

Similarly, the Tuol Sleng statements which the Cambodia Tribunal is interested in using were elicited at an early stage of the interrogations and are biographical in nature. The interrogators' preliminary questions were not intended to establish the guilt or innocence of those being interrogated, but rather were merely an attempt to gain basic background information. The analogy is not perfect, however, since evidence about the command structure of the Khmer Rouge may cross the line from processing information, identifying the detainee, to substantive testimonial evidence because it is disclosing the names of the detainee's superiors and colleagues.

### **3. *Should the Exclusionary Rule Apply to Cruel, Inhuman and Degrading Treatment as well as Torture?***

The original draft of the Torture Convention had provided that "Each State Party shall ensure that any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment shall not be invoked as evidence against the person concerned or against any other persons in any proceedings." However, at the suggestion of the United Kingdom, Austria, and the United States, the final text of what would become Article 15 of the Convention was substantially narrowed, by deleting the phrase "or other cruel, inhuman or degrading treatment," and inserting the phrase "except against a person accused of obtaining that statement by torture."

Although the final wording of Article 15 mentions only evidence obtained by torture, and not evidence procured by cruel, inhuman or degrading treatment, the U.N. has subsequently sought to expand the scope of the exclusionary rule through *The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, which was approved by the U.N. General Assembly and adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in September 1990. Principle 16 requires prosecutors to refuse to use as evidence statements obtained "by torture or other ill treatment except in proceedings against those who are accused of using such means."

Four years later, when the International Criminal Tribunal for the Former Yugoslavia was established, the judges adopted a rule rendering inadmissible evidence which was "obtained directly or indirectly by means which constitute a serious violation of internationally protected human rights" – a phrase broad enough to apply to both torture and cruel, inhuman or degrading treatment. The rule was amended in 1995, and now reads: "No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings." According to the Tribunal's second Annual Report, "The amendment to Rule 95, which was made on the basis of proposals from the Governments of the United Kingdom and the United States, puts parties on notice that although a Trial Chamber is not bound by national rules of evidence, it will refuse to admit evidence – no matter how probative – if it was obtained by improper means." Subsequently, similar

provisions were included in the rules governing the proceedings of the Rwanda Tribunal, the Special Court for Sierra Leone, the East Timor Tribunal, and the International Criminal Court.

It is noteworthy that the Cambodia Tribunal adopted a much narrower exclusionary rule than is present in the rules of the other international war crimes. Even if it had adopted the approach of the other international war crimes tribunals, however, it is significant that the rules of the various Tribunals do not automatically require exclusion of evidence obtained by techniques deemed to fall short of torture but to constitute cruel, inhuman, or degrading treatment. Rather, under what one noted commentator calls “the flexibility principle,” the way the exclusionary rules of the other tribunals are written suggest that the Cambodia Tribunal should examine all of the circumstances of the case within the context of the purposes behind the exclusionary rule, including the fact that the Tuol Sleng biographical statements are corroborative (suggesting reliability) and are being used against the regime that committed the torture.

#### *4. Application of the Doctrine of Necessity*



Even if the Torture Convention’s exclusionary rule were interpreted in light of subsequent developments to apply not only to torture but also to cruel, inhuman and degrading treatment, the Tuol Sleng evidence might nonetheless be admissible under the international law doctrine of “necessity.” The doctrine is set forth in Article 33 of the International Law Commission’s Draft Articles on State Responsibility, which provides:

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless: (a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and (b) the act did not seriously impair an essential interest of the State toward which the obligation existed.
2. In any case, a state of necessity may not be invoked by a State for precluding wrongfulness: (a) if the international obligation with which

the act of the State is not in conformity arises out of a peremptory norm of general international law; or (b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or (c) if the State in question has contributed to the occurrence of the state of necessity.

The International Court of Justice affirmed in the *Gabcikovo-Nagymaros* case of 1997, and again in its *Advisory Opinion on Construction of a Wall* in 2004, that the doctrine of necessity as reflected in Article 33 constitutes customary international law.

In the instant case, the threshold question would be whether the use of the Tuol Sleng evidence is necessary to safeguard an essential interest. The successful prosecution of the former Khmer Rouge leaders is seen as essential to transitioning Cambodia to a country that respects the rule of law, to avoiding outbreaks of vigilantism, and to deterring the commission of future atrocities in the country. These are unquestionably significant interests.

The next step is to determine whether the threat to the State's interest rises to the level of grave and imminent peril. If the Cambodia Tribunal cannot successfully prosecute the former Khmer Rouge leaders without the Tuol Sleng evidence, then the entire project of establishing accountability for the Khmer Rouge atrocities may be in imminent jeopardy.

Third, even if exclusion of the Tuol Sleng evidence threatens an essential interest, a necessity claim will nonetheless fail unless the State had no lawful alternative available to protect the essential interest. In other words, “the peril must not have been escapable by any other means, even a more costly one, that could be adopted in compliance with international obligations.” Investigators have opined that there are no available witnesses or documents that can paint a complete picture of the Khmer Rouge command hierarchy in the way the Tuol Sleng biographies do. Moreover, it is unlikely that any of the principal defendants can be induced to provide such information through the promise of a reduced sentence. Thus, there are no feasible alternatives to using the Tuol Sleng evidence.

Fourth, the doctrine of necessity requires a balancing of the interests in successfully prosecuting the Khmer Rouge leaders against the interest in generally deterring the use of torture to obtain evidence for use in judicial proceedings. An argument based on necessity will only succeed if the Tribunal decides that the former outweighs the latter. As one of the members of the British House of Lords (Britain's High Court) observed in *A and Others v. Secretary of State for the Home Department*, sometimes “the greater public good ... lies in making some use at least of the information obtained [by ill-treatment], whether to avert public danger or to bring the guilty to justice.”

Even if all the preconditions for the necessity doctrine set forth in Article 33(1) are satisfied, the doctrine cannot be used if one of the three exceptions set forth in Article 33(2) applies. First, the doctrine may not be invoked if doing so would violate a *jus cogens* norm, an issue that will be dealt with in detail below. Second, the doctrine is not available “if the issue of the competing values has been previously foreclosed by a deliberate legislative choice.” The Torture Convention provides in Article 2: “No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” This non-derogation clause, however, applies only to torture. While State Parties must “undertake to prevent” cruel, inhuman, or degrading treatment, the “no exceptional circumstances” provision does not explicitly apply to such conduct. Thus, if the preliminary questioning at Tuol Sleng is deemed to be “inhuman or degrading treatment” but not “torture,” then the language of the Convention does not foreclose reliance on the doctrine of necessity to justify admission of the evidence.

Finally, the doctrine is inapplicable in a “case in which the State invoking the state of necessity has, in one way or another, intentionally or by negligence, contributed to creating the situation it wishes to invoke as justification of its non-fulfillment of an international obligation.” The situation does not arise out of any negligence of the Cambodia Tribunal’s prosecutors or investigative judges, but because the Khmer Rouge regime made it a policy not to document its command structure and, with the exception of the Tuol Sleng biographies, the Khmer Rouge regime destroyed all of the evidence that could be used to prove command responsibility or joint criminal enterprise liability.

States have cited the necessity doctrine to justify departures from various human rights obligations in cases involving essential interests. For example, in 1995, when 50,000 Rwandan refugees and local Burundis fled to the border of Tanzania seeking safety after gunmen attacked a refugee camp in northern Burundi, Tanzania invoked the necessity doctrine as justification for deploying its army to keep the refugees from crossing into Tanzania in violation of its obligations under the Refugee Convention. Citing the necessity doctrine, both Israel and the United States have used the “ticking bomb” scenario to justify subjecting suspected terrorists to harsh interrogation techniques that fall short of actual torture but may constitute cruel, inhuman, or degrading treatment. This argument has been subject to much criticism, however, and human rights bodies have opined that notwithstanding the language of the Torture Convention, it should be interpreted as disallowing the necessity defense for cruel, inhuman, or degrading interrogation techniques, as well as for torture. It is therefore unlikely that courts would recognize a necessity exception to Torture Convention Exclusionary Rule.

## B. An Exception for Evidence Obtained by Third Parties

Even assuming that the Tuol Sleng biographical statements were the product of actual torture, or that the torture evidence exclusionary rule should be read to apply to evidence obtained through cruel, inhuman or degrading techniques that fall short of torture,

this section analyzes whether the evidence should nevertheless be admitted on the grounds that the Tribunal's personnel were not involved in the unlawful interrogations.

### *1. The Silver Platter Doctrine*



Since the exclusionary rule is based largely on the principle of deterring the misconduct of the state's authorities, the rule has generally been applied only when the state's authorities are themselves involved in the breach. As the U.S. Supreme Court has said, “[i]t is well established, of course, that the exclusionary rule, as a deterrent sanction, is not applicable where a private party or a foreign government commits the offending act.” This has become known in the United States as the “international silver platter doctrine,” which applies to evidence supplied by foreign authorities unless “the United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials.”

There is a compelling argument for applying the silver platter doctrine to the Cambodia Tribunal. Since the authorities seeking to use the Tuol Sleng evidence (the international Co-Prosecutors) are part of a separate legal system than the authorities that procured the statements by torture (the Khmer Rouge regime), there is no deterrent value to excluding the evidence from proceedings before the Cambodia Tribunal. The regime that employed torture is in no way benefiting from its misconduct; rather the evidence is being used against the regime’s former leaders in their prosecution by a war crimes Tribunal established by the United Nations.

Moreover, application of the silver platter doctrine by the Cambodia Tribunal would be consistent with the case law of other U.N.-established war crimes tribunals. Although they have not dealt squarely with the question of the admissibility of torture evidence, both the International Criminal Tribunal for the former Yugoslavia and the

International Criminal Tribunal for Rwanda have applied a version of the silver platter doctrine to admit evidence obtained in violation of attorney-client privilege, through warrantless searches, or through illegal wiretaps where the Tribunal's personnel or agents were not involved in the breaches. Thus, in refusing to exclude unlawful wiretap evidence obtained by Bosnian authorities, the Yugoslavia Tribunal stated: “[t]he function of this Tribunal is not to deter and punish illegal conduct by domestic law enforcement authorities by excluding illegally obtained evidence.”

Some courts, however, apply an exception to the international silver platter doctrine where the acts of the foreign authorities “shock the judicial conscience.” A leading case is *United States v. Fernandez-Caro*, in which the U.S. federal court found that the conduct of Mexican police “shocked the conscience” and therefore excluded statements that the Mexican police had obtained by severely beating the defendant, pouring water through his nostrils while he was bound and gagged, and applying electrical shocks to his wet body. The reason for this exception is that in addition to serving a deterrent function, the torture evidence exclusionary rule serves an important secondary function: to preserve the integrity of the judicial process and the honor of the judicial system.

In deciding not to apply the silver platter doctrine to torture evidence procured by foreign authorities in the case of *A and Others v. Secretary of State for the Home Department*, the British House of Lords stressed that “the rule must exclude statements obtained by torture anywhere, since the stain attaching to such evidence will defile [the] court whatever the nationality of the torturer.” As two of the Law Lords in that case put it, “torture is torture whoever does it.” Yet, that is not exactly true, since the Torture Convention does not apply to the conduct of private parties. Therefore, the exclusionary rule cannot really be justified on the grounds that a court can never admit torture evidence without degrading the administration of justice, since evidence obtained from private acts of torture would not be excluded by the Torture Convention, though using such evidence would seem to be equally defiling.

It is also noteworthy that the defendant in *Fernandez-Caro* was merely charged with narcotics trafficking in a domestic court and the petitioners in *A and Others v. Secretary of State for the Home Department* were alleged to have been part of a terrorist organization by an immigration court. In contrast, international war crimes tribunals have balanced the gravity of the alleged crimes against the severity of the mistreatment of the defendant in fashioning an appropriate remedy. Thus, in *The Prosecutor v. Nikolic*, the Appeals Chamber of the Yugoslavia Tribunal, departing from the approach of the European Court of Human Rights and numerous national courts, declined to dismiss a case where it was established that individuals in collusion with the NATO-led Stabilization Force in Bosnia had abducted and mistreated the defendant in violation of human rights law. Although the *Nikolic* case did not deal specifically with the admission of evidence gained by torture, by analogy it suggests that the Cambodia Tribunal could follow a more flexible approach in light of the fact that the defendants have been charged with the gravest crimes known to mankind by an international war crimes tribunal. The Tribunal could, for

example, deal with the problem of using third-party torture evidence by expressly discounting the weight to be accorded it, rather than excluding it altogether.

## C. An Expanded Exception for Cases against the Torturer

### *1. Cannons of Statutory Construction and Principles of Treaty Interpretation*

Article 15 of the Torture Convention contains a specific exception to the general prohibition of admitting evidence obtained from torture. The exception permits evidence gained from torture to be used “only against a person accused of torture as evidence that the statement was made.” This exception was inserted during the final stages of the negotiation of the Convention at the urging of the United Kingdom, Austria, and the United States. According to Burges and Danelius, the leading authorities on the negotiating history of the Convention, the purpose of the exception to the exclusionary rule was “not to prove that the statement is a true statement,” but to prove that a statement was said under torture.

The inclusion of this single specific exception would ordinarily trigger the cannon of statutory construction known as *expressio unius exclusio alterius*, meaning the inclusion of one thing implies the exclusion of another. In the case of the Torture Convention, the maxim would mean that a court should presume that since the drafters decided to include a single, specific exception to the exclusionary rule, they must have intended to exclude all other possible exceptions.

On its face, *expressio unius* supports the contention that there can be but one narrow exception to the Torture Convention’s exclusionary rule, namely that evidence gained from torture can be used to prove the existence of torture in a case against the torturer. The Tuol Sleng evidence would not be admissible under this narrow exception for two reasons: first, it would be used against high ranking members of the Khmer Rouge regime rather than the actual Tuol Sleng torturers; and second, it would be used to provide details about the command structure of the Khmer Rouge regime rather than to prove that the victims were tortured at Tuol Sleng.

However, *expressio unius* is limited by context, as when strict adherence to the text in a given case will lead to an absurd or unreasonable result. According to the Vienna Convention on the law of Treaties, which is the codification of the law of treaty interpretation, treaties “shall be interpreted in good faith in the light of their object and purpose.” In the instant case, strict adherence to a literal construction of Article 15 could convert the Torture Convention into a shield to protect high-ranking members of the Khmer Rouge from successful prosecution for committing acts of torture -- a result that would frustrate the object and purpose of the Convention. To avoid this unreasonable result, the limitation to the *expressio unius* maxim could be used to support a broader interpretation of the exception in Article 15, one that would permit the use of evidence of

the command hierarchy obtained by torture to be used in a case against the regime superiors who were responsible for the policy of torture and other atrocities.

The leading case that illustrates application of the limitation to the *expressio unius* maxim is *Church of The Holy Trinity v. United States*. In *Holy Trinity*, an Episcopal Church in New York City petitioned the United States Supreme Court to overturn its conviction for hiring an English citizen as rector, in violation of the Alien Contract Labor Act. Under the Alien Contract Labor Act, it was unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States for the purposes of labor. Despite its broad language, the actual purpose of the Alien Contract Labor Act was only to prevent an influx of unskilled labor into the United States. In overruling the petitioner's conviction for violating the Alien Contract Labor Act, the Supreme Court made two important points: First, the Court noted: “[a] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.” Second, the court observed: “[i]f a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity.”

Applying these principles -- first that a statute or treaty may contain language that is specific and yet undermines its purpose, second that a treaty is to be interpreted in light of its object and purpose, and third, that literal construction that leads to an unreasonable conclusion is to be avoided -- the exception contained in Article 15 of the Torture Convention could be interpreted to permit admission of the Tuol Sleng evidence in order to establish the command structure of the Khmer Rouge. If it is permissible under Article 15 to use evidence obtained through the use of torture against those that committed the torture to prove the torture occurred, then it should also be permissible to use the same evidence against those higher up in the chain of command that were responsible for the policies resulting in the torture, especially where there is no other evidence available for this purpose. Rather than undercut the deterrent function of the torture evidence exclusionary rule, this interpretation will provide an added incentive for regimes to forego torture. If the members of the leadership of a regime know that evidence derived through the use of torture can be used against them, it will be a more difficult decision for them to sanction the use of torture.

Support for this expanded interpretation of Article 15 may be found in the subsequent practice of the members of the United Nations, consistent with Article 31(3)(b) of the Vienna Convention on the Law of Treaties. As mentioned above, three years after the Torture Convention entered into force, the United Nations General Assembly approved *The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principle 16 of which requires prosecutors to refuse to use as evidence statements obtained “by torture or other ill treatment except in proceedings against those who are accused of using such means.” This subsequent reformulation of the exception to the torture evidence exclusionary rule drops the strict requirement that the statements can

only be used “as evidence that the statement was made,” thus permitting the use of evidence obtained by torture for any purpose in a case against those responsible for the torture.

## ***2. An Analogy to the Use of Unethically Obtained Medical Data***

The main argument against broadening the interpretation of Article 15 of the Torture Convention to permit the use of torture evidence to establish command responsibility or joint criminal enterprise liability in a case against the leaders responsible for torture is that as a matter of morality a court should never use such tainted evidence, regardless of its reliability or the public need. During the discussions at the judicial training sessions in Phnom Penh, an analogy was drawn to the controversy over whether the data from the infamous Nazi medical experiments during World War II could subsequently be used to help save lives or benefit society.



Following World War II, twenty-three leading Nazi doctors were tried for participating in crimes against humanity by the American Military Tribunal at Nuremberg. The Nuremberg “Doctors Trial” revealed evidence of sadistic human experiments conducted without the consent of the victims at the Dachau, Auschwitz, Buchenwald and Sachsenhausen concentration camps. These included freezing experiments where subjects were forced to remain in a tank of ice water for periods of up to three hours and then re-warmed; phosgene gas experiments where subjects were exposed to various concentrations of the poison gas and then autopsied; malaria experiments where subjects were deliberately infected with malaria to investigate immunization procedures; sulfanilamide experiments where subjects were deliberately wounded, infected with bacteria such as streptococcus, tetanus, and gangrene, and then treated with sulfanilamide to determine its effectiveness; and typhus experiments where subjects were deliberately infected with spotted fever virus.

The Nazi doctors defended their actions by arguing that first, human experimental research was necessary during war; and second, that prisoners were frequently used as research subjects around the world. At the conclusion of the eight-month-long trial, the Tribunal rejected these defenses and convicted sixteen of the Nazi doctors, sentencing seven to death.

In addition to documenting these atrocities, the primary legacy of the Doctors Trial has come to be known as the “Nuremberg Code” -- a judicial codification of ten prerequisites for the moral and legal use of human beings in medical experiments. The most important of these is the requirement of informed and voluntary consent, which was subsequently codified in the International Covenant on Civil and Political Rights. It is noteworthy, however, that the Nuremberg Tribunal did not consider the possible future use of Nazi medical data, and neither the Nuremberg Code nor the Covenant on Civil and Political Rights stipulate that the data from the Nazi experiments must never be used or cited in the future. Moreover, although the Prosecutor and prosecution witnesses at Nuremberg convincingly argued that the Nazi methods were inefficient, unscientific, and unsystematic, and that “the experiments performed added nothing of significance to medical knowledge,” in subsequent decades, researchers who have examined the Nazi data have opined that “at least some data might provide [useful] information unobtainable from ethical research.” Since the Doctors Trial, at least 45 articles in reputable medical journals have included data from the Nazi medical experiments. According to Arthur Caplan, Director of the Department of Medical Ethics at University of Pennsylvania, over the years the data from the Nazi medical experiments “have been studied, cited, and absorbed into mainstream science with little comment.”

The debate made front-page news, however, in 1988 when Robert Pozos, Director of the Hypothermia Laboratory at the University of Minnesota School of Medicine, sought to analyze for publication the Nazi doctor Sigmund Rascher’s freezing and re-warming data, which Pozos felt filled an important void in modern hypothermia research, saying “it could advance my work in that it takes human subjects farther than we’re willing.” In these experiments, the Nazi doctors, who were trying to increase the survival rates of Luftwaffe pilots shot down over the North Sea, immersed Dachau concentration camp subjects into vats of ice water at sub-zero temperatures. As the prisoners excreted mucus, fainted and slipped into unconsciousness, Rascher’s assistants meticulously recorded the changes in their body temperature, heart rate, muscle response, and urine. In experimenting with re-warming techniques on these victims, Rascher documented that re-warming in hot liquids was, contrary to the popularly accepted method of slow passive re-warming, the most efficient means of revival. When Dr. Pozos sought to republish the Nazi data in the *New England Journal of Medicine*, however, the Journal’s Editor-in-Chief, Arnold Relman, publicly refused to publish Pozo’s article.

The issue made national headlines again a year later, when the Environmental Protection Agency (EPA) was promulgating air quality regulations for “phosgene,” a toxic gas used in the manufacture of pesticides and plastic across the United States. The gas was

also believed to be in the arsenal of Iraqi leader Saddam Hussein. The EPA scientists used animal experiments to predict the effect of the gas on humans, since there was no human data available to them. Todd Thorslund, Vice President of ICF-Clement, an environmental consulting firm that was assisting the EPA, suggested using the Nazi data from their experiments on fifty-two French prisoners who were subjected to the toxic gas in an effort to develop a means of protecting the German soldiers against chemical weapons. However, after receiving a letter signed by twenty-two EPA scientists protesting the use of Nazi data, the EPA Chief Administrator, Lee Thomas, decided that the agency should not even review the records from the Nazi experiment -- even if the Nazi phosgene data could potentially have saved lives of residents living near manufacturing plants or American troops stationed in the Persian Gulf.

On one hand, there are those like Arnold Relman and Lee Thomas who believe that “when the medical profession uses Nazi data, [as] when a court of law uses tainted evidence, legitimacy is indirectly conferred upon the manner by which the data/evidence was acquired.” Analogizing the use of Nazi data to the inadmissibility of unconstitutionally obtained evidence, Harvard Medical School ethicist Henry Beecher stated, “this loss it seems, would be less important than the far reaching moral loss to medicine if the data were to be published.”

Yet there are numerous exceptions to the American exclusionary rule, and other medical researchers say they would like to use the Nazi data, partly to “salvage some good from the ashes.” As lawyer and medical ethicist Baruch Cohen explains, “[a]lthough the data is morally tainted and soaked with the blood of its victims, one cannot escape confronting the dreaded possibility that perhaps the [Nazi] doctors actually learned something that today could help save lives or benefit society. ... Absolute censorship of the Nazi data does not seem proper, especially when the secrets of saving lives may lie solely in its contents. ... When the value of the Nazi data is of great value to humanity, then the morally appropriate policy would be to utilize the data, while explicitly condemning the atrocities.”

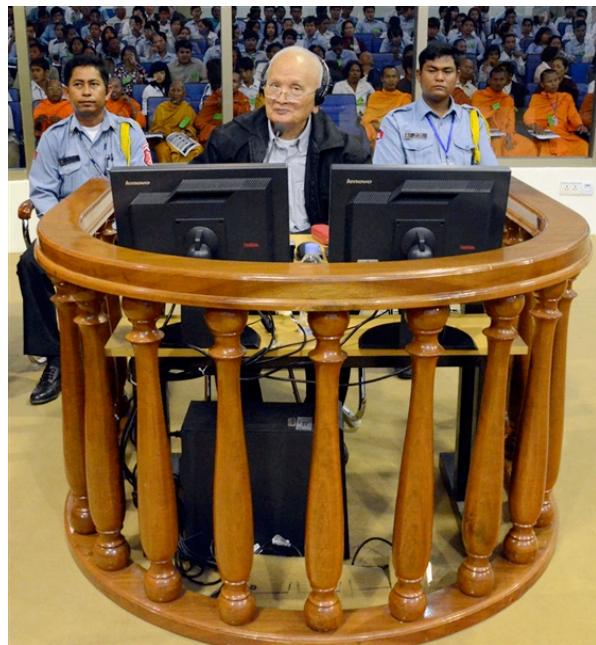
In considering Cohen’s proposition, one should view the issue of Nazi medical research within the broader context of other uses of unethically obtained medical data for the public good. For example, even as the Nuremberg Tribunal was passing judgment on the Nazi doctors, a number of their colleagues were being recruited by the United States military via “Project Paperclip,” through which the United States exploited the knowledge obtained through Nazi medical experiments by bringing these scientists to the United States to continue their work for government and private science facilities. The Nazis were not the only ones conducting unethical medical experiments during the war. The Japanese conducted biological warfare experiments on Allied prisoners at a site called Unit 731. Rather than prosecute these medical researchers at the post-war Military Commissions in Tokyo, the United States government granted them immunity in return for the data derived from their experiments. At the same time, the Australian Armed Forces Command conducted mustard gas and phosgene experiments on Australian soldiers to

develop effective protective gear for gas warfare. Meanwhile, British physicians deliberately infected Jewish refugees with malaria while interned in refugee camps in Australia in an effort to create a vaccine to protect British soldiers fighting on the Pacific front.

Nor has the use of unethically obtained medical data been confined solely to wartime. For example, from 1932 through 1972, physicians of the U.S. Public Health Service conducted the so-called “Tuskegee Syphilis Study,” in Macon County Alabama, involving 399 African Americans afflicted with syphilis. Though the subjects thought they were under the medical care of the U.S. Public Health Service, they were not informed of the nature of their illness, that they were participating in an experiment to study the natural history of untreated syphilis, or that a potent treatment – penicillin – was available. Similarly, in the late 1940s and early 1950s, the United States tested new polio vaccines on institutionalized mentally retarded children. And in 1994, the U.S. Government acknowledged that during the Cold War, over 23,000 Americans, including prisoners and mental patients, had been involved in at least 1,400 different studies involving unconsented radiation experimentation. The objective of these experiments was to measure the biological effects of radioactive materials, including plutonium, whether injected, ingested, or inhaled, in order to develop ways to survive nuclear war. In the present decade, U.S. physicians have tested experimental AIDS vaccines on unwilling and uninformed patients in Africa. Despite criticism that these vaccine trials violate the Nuremberg Code, the general scientific community views this work as the most likely hope for stemming the global epidemic.

All of these cases are deplorable, and in using the data from these unethical medical studies the scientific community should provide more than a simple disclaimer. Medical ethicists propose that such tainted data should only be used “in circumstances where the scientific validity is clear and where there is no alternative source of information.” Further, “the capacity to save lives must be evident,” and “citations to the data must be accompanied with the author’s condemnation of the data as a lesson in horror and as a moral aberration in medical science.” These criteria would seem to be equally useful in the context of the admission of torture evidence in cases against leaders accused of crimes against humanity under an expanded interpretation of Article 15 of the Torture Convention.

### **III. Conclusion**



Using the evidentiary challenge facing the Cambodia Tribunal as a case study, this article has established that there are several compelling arguments that could be made to justify the admission of statements obtained by torture or cruel, inhuman and degrading treatment under certain circumstances that go beyond the literal text of the narrow exception to the exclusionary rule contained in Article 15 of the Torture Confession. The aim of this article, however, was not to weaken the strong protections provided by the Torture Convention and its exclusionary rule, but instead to strengthen the Torture Convention itself. If Article 15 of the Convention is used as a bar to the successful prosecution of senior Khmer Rouge leaders, the purpose of the Torture Convention will not be served and respect for the Convention and the Cambodia Tribunal will be eroded.

The argument against judicial recognition of a broader reading of the exception to the Torture Convention's exclusionary rule rests on three assumptions: first, that exclusion of evidence obtained by torture is at all times necessary to render torture un-rewarding; second that exclusion is always warranted because evidence procured through torture is inherently unreliable; and third, that absolute exclusion is essential to protect the integrity of the judicial proceedings. The Tuol Sleng evidence at issue in this case study provides a severe test of those assumptions. Rather than undermine the deterrent function of the torture evidence exclusionary rule, admission of the Tuol Sleng biographical statements in cases against the leaders of the Khmer Rouge regime would provide an incentive for regimes to forego torture since regime leaders will know that evidence derived through the use of torture can be used against them. While confessions and other incriminating evidence obtained by torture are often unreliable, the thousands of biographical statements from the Tuol Sleng interrogations provided a great deal of corroboration with respect to information about the Khmer Rouge command structure and hierarchy, suggesting a high degree of reliability for that specific use. Finally, while some have argued that "the

admission of evidence obtained through the violation of human rights should be *per se* considered damaging to the integrity of the proceedings,” this case study demonstrates why it is more appropriate to adopt a more flexible approach, taking into account such factors as the non-involvement of the Tribunal’s personnel in the acts of ill-treatment; the fact that the evidence would be used against the regime leaders responsible for torture; the fact that the evidence is seen as crucial to successful prosecution; and the fact that the case involves charges of the gravest crimes known to humankind being tried by a tribunal established by the United Nations.

On the other hand, the author recognizes the wisdom in the adage “great cases, like hard cases, make bad law.” There is clearly danger inherent in judicial recognition of any of the three exceptions to the torture evidence exclusionary rule that are examined in this article – the exception for preliminary biographical information, the exception for evidence obtained by third-parties, and the exception for evidence to be used against the leaders responsible for the torture. For, to paraphrase Justice Robert Jackson’s dissent in *Korematsu v. United States*, once judicial approval is given to an exception to a fundamental principle of human rights, it “lies about like a loaded weapon ready for the hand of any authority” that can show an urgent need and bring forward a plausible claim. In particular, it is likely that if the Cambodia Tribunal applies one or more of these exceptions in justifying admission of the Tuol Sleng evidence, the precedent will subsequently be cited with respect to the admissibility of torture evidence in terrorism cases before military commissions and national courts across the globe.

To avoid pernicious use of these exceptions and to ensure that they are not applied in a manner that will undermine the purposes of the Torture Convention in future cases, four criteria should be satisfied before a court can consider evidence that was obtained by torture or cruel, inhuman or degrading methods of interrogation. First, evidence obtained by torture or cruel, inhuman and degrading means must never be used in a trial where the victim of such abuse is the defendant. Second, such evidence must never be used where the prosecuting authorities were directly or indirectly involved in the acts of ill-treatment. Third, evidence obtained through the use of such ill-treatment must not be considered unless it meets a high level of corroboration. Fourth, evidence derived from torture or cruel, inhuman or degrading treatment should not be admitted if, with reasonable efforts, the prosecution could obtain non-tainted evidence that would be effective in establishing criminal liability.

The first criterion, reflecting concerns about improper compulsion, recognizes that use of a defendant’s confession which is extracted by torture or cruel, inhuman, or degrading treatment, would violate the defendant’s right to a fair trial. In contrast, the Tuol Sleng evidence is sought for use not against the victims of the torture but rather against the leaders of the regime that committed the torture.

The second criterion is based on the international silver platter doctrine -- a doctrine which may be appropriate in cases involving the gravest crimes known to

mankind before international war crimes tribunals such as the Cambodia Tribunal. This criterion recognizes that the exclusion of torture evidence will not have a deterrent effect where the prosecuting authorities, themselves, were in no way involved in the acts of torture. Conversely, it recognizes that where there is involvement of the prosecuting authorities, admission of the evidence would render the court an accomplice in the torture and defile the judicial process.

The third criterion addresses one of the central concerns about the use of evidence derived from torture, namely the inherent unreliability of such evidence. In general, evidence obtained through torture is disdained, not only because of the immorality of using torture, but also because of the fact that an individual undergoing torture will answer in whatever manner the torturer wants. Thus, evidence obtained from the use of torture is often factually suspect. For this reason, evidence derived from torture must never be used unless there are strong indicia of its reliability, such as the extensive corroboration that exists in the case of the Tuol Sleng biographical statements. Even then, the court should explicitly give less weight to torture-induced statements than other types of evidence.

The fourth criterion recognizes that for moral reasons evidence obtained from torture must be used only as a last resort, when it is critical to proving criminal liability and there is no non-tainted evidence reasonably available that would serve the same purpose. Since there is no international version of the “fruit of the poisonous tree” doctrine, however, the investigative judges and prosecutors may use the torture evidence to lead to other evidence that will establish the same facts, which, if available, should be used instead of the torture evidence.

Finally, drawing from the debate concerning citations to unethically obtained medical data, if a tribunal or court were to admit evidence in a case that meets these criteria, it should specifically acknowledge that the evidence was obtained through torture or cruel, inhuman or degrading treatment, and would ordinarily have been excluded because of concerns about reliability, deterrence, and defiling the administration of justice. The Cambodia Tribunal is poised at the cutting edge of international criminal law. By applying this four-part test, and by acknowledging the tainted provenance of the evidence, the Cambodia Tribunal can simultaneously provide justice for the people of Cambodia and fulfill the promise of the Torture Convention.



CASE WESTERN RESERVE  
UNIVERSITY  
SCHOOL OF LAW

# **INTRODUCTION TO INTERNATIONAL CRIMINAL LAW**

**MOOC taught by Professor  
Michael P. Scharf**

**Module #8:**

**Maintaining Control of the Courtroom**

**International Criminal Law  
Module #8  
Maintaining Control over a War Crime Trial**

**On-Line Simulation:**

Read the article below, “Chaos in the Courtroom: Controlling Disruptive Defendants and Contumacious Counsel in War Crimes Trials,” 39 Case Western Reserve journal of International Law 155-170 (2007).

For purposes of the simulation, assume you are a judge presiding over an international war crimes tribunal. You are invited to post an on-line submission indicating how you would handle one or more of the following twelve scenarios:

1. While in pre-trial confinement at the Tribunal, the Defendant writes and has published slanderous biographical accounts about the Prosecutor and Chief Judge. Using made up facts, the book about the Prosecutor asserts that he is an alcoholic and closet homosexual, and the book about the Judge asserts that she has taken bribes from various governments to rule against the Defendant.
2. The Defendant refuses to rise when the Judge enters the room or to address the Judge respectfully as “Your Honor.” And he sits with his back to the judges.
3. The Defendant refuses to dress appropriately, coming into the Courtroom in his pajamas.
4. The Defendant loudly hums his country’s national anthem in order to create a distraction during the testimony of a particularly compelling witness.
5. The Defendant insists on taking a prayer break at the holy hour in the middle of witness testimony.
6. A self-represented Defendant files pleadings and briefs which employ frequent curse words and insults aimed at the Court.
7. A self-represented Defendant insists on making political speeches instead of asking questions during cross examination, and yells at the Prosecution witnesses, attempting to intimidate them.

8. While on the witness stand testifying on his own behalf, the Defendant looks into the camera and exhorts his followers to attack members and supporters of the new government.
9. The Defendant instructs his lawyer that he wants to boycott the proceedings to protest a particular ruling by the Court. Thereafter, the lawyer and Defendant refuse to show up in court.
10. A Defendant goes on a hunger strike, and becomes so weakened that his life is in imminent danger.
11. A Defense Lawyer gives interviews to the media in which he accuses the Court of bias and incompetence.
12. A Defense Lawyer gives interviews to the media in which he discloses the identities of “confidential witnesses.”

In order to complete the optional on-line simulations for this course, students must go to the Navigation Bar on the left panel. Under the Exercises section, you will find a button for “on-line simulations.” The simulations for each session are available under this button. Written work can be submitted directly or through file upload. Students who post five or more on-line submissions of over 200 words in length during the course (simulations and discussions) will be awarded a Statement of Accomplishment with Distinction for the course.

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**ORDER IN THE COURTROOM:  
THE UNIQUE CHALLENGE OF MAINTAINING CONTROL  
OF A WAR CRIMES TRIAL**

*By Michael P Scharf*

39 Case Western Reserve journal of International Law 155-170 (2007) (footnotes omitted).

## I INTRODUCTION

International war crimes trials are inherently messy, especially when former leaders invoke the right of self-representation in order to advance a political agenda that goes beyond defending themselves on the charges against them. In the past decade, we have seen Slobodan Milošević, Vojislav Šešelj, and Radovan Karadžić at the International

Criminal Tribunal for the former Yugoslavia (ICTY), Charles Taylor at the Special Court for Sierra Leone ('SCSL'), and Saddam Hussein at the Iraqi High Tribunal ('IHT') use self-representation in various ways to disrupt and delay the proceedings.

Of all the modern war crimes trials, Saddam Hussein's behaviour was perhaps the most creatively disruptive. A month after the conclusion of the *Saddam Hussein* trial, in September 2006, I was invited by Luis Moreno-Ocampo, the Prosecutor of the International Criminal Court, to speak to his staff in The Hague about the lessons from the *Saddam Hussein* trial concerning maintaining order in the courtroom during a war crimes trial. Subsequently, the United Nations Office of Legal Affairs asked me to present a video lecture on this topic for inclusion in the UN Audio Visual Library of International Law. Drawn from my ICC and UN lectures, this chapter examines some of history's previous messy trials and the strategies judges have employed with varying degrees of success to respond to disruptive conduct by trial participants. It then describes the various tactics employed by the judges in the *Saddam Hussein* trial and analyzes why they were not more successful. The chapter concludes with a detailed prescription for maintaining order in future war crimes trials.



## **II THE NEED FOR ORDERLY JUSTICE IN WAR CRIMES TRIALS**

Disruptive conduct may be defined as any intentional conduct by the defendant or defence counsel in the courtroom 'that substantially interferes with the dignity, order and decorum of judicial proceedings.' There are five main types of disorder: (1) passive disrespect, for example, the refusal to address the judge as "Your Honor," refusal to stand when the judge enters the courtroom; (2) refusal to cooperate with the essential ground rules of the judicial proceedings, for example, constantly insisting on making political speeches instead of asking questions during cross-examination; (3) repeated trial interruptions, ranging from insulting remarks to loud shouting or cursing; (4) in a televised trial, attempting to incite acts of mass violence; and (5) resorting to physical violence in the courtroom.

Former leaders and their counsel in war crimes trials are especially likely to engage in such forms of disruption. Because of the political context and widespread publicity, leaders on trial are more likely than ordinary defendants to have concluded that they do not

stand a chance of obtaining an acquittal by playing by the judicial rules. Instead, they seek to derail the proceedings, hoping for a negotiated solution (eg amnesty) outside the courtroom; to hijack the televised proceedings, hoping to transform themselves through political speeches into martyrs in the eyes of their followers; and to discredit the tribunal by provoking the judges into inappropriately harsh responses which will make the process appear unfair.

As Robert Jackson, the Chief Prosecutor at the Nuremberg trials, observed sixty years ago, war crimes trials, whether before international tribunals or domestic courts, seek to establish a credible historic record of abuses and elevate the rule of law over the force of might, thereby facilitating the restoration of peace and the transition to democracy. While tolerating dissent is a healthy manifestation of a democratic government, ‘a courtroom is not an arena in which dissension, particularly of a disruptive nature, may supplant, or even take precedence over, the task of administering justice.’ This is especially true in a war crimes trial.

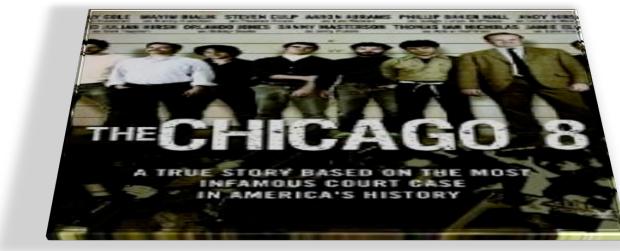
Unlike other forms of acceptable political expression, a disruptive defendant or defence lawyer who interferes with the ‘grandeur of court procedure’ (as Hannah Arendt once described the judicial process) threatens the proper administration of criminal justice in several fundamental ways. First, disruptive conduct renders it more difficult for the defendant and any co-defendants to obtain a fair trial. Second, it hampers the court’s ability to facilitate the testimony of victims and other witnesses. Third, it undermines the public’s confidence in and respect for the legal process.

There are those who would argue that a defendant has a right, through his own (or through his lawyer’s) disruptive and obstructionist conduct, to an unfair trial, but modern war crimes tribunals have held that the defendant’s right to employ disruptive tactics which seek to discredit the judicial process must give way to the tribunal’s obligation to protect ‘the integrity of the proceedings’ and ‘to ensure that the administration of justice is not brought into disrepute.’ The duty of a war crimes tribunal to ensure that a trial is fair has been interpreted as including concerns that go beyond just those of the accused.

## **II HISTORY’S MOST TUMULTUOUS TRIALS**

### **A FROM THE CHICAGO SEVEN TO ZACARIAS MOUSSAOUI**

The administration of justice has always endured a degree of disorder and there have been many notable occasions when trial participants have been particularly unruly and disrespectful to judicial authority. A list of history’s most disruptive defendants would include Sir Walter Raleigh (tried in Britain for high treason in 1603), William Penn (tried in Britain for unlawful assembly in 1670), Auguste Vaillant (tried in France for blowing up the Chamber of Deputies in 1894), Michele Angiolillo (tried in Spain for assassinating the Spanish premier in 1897), and Gaetano Bresci (tried in Italy for killing Italian King Humbert in 1899). But by far the most notorious disorderly trial in the 20<sup>th</sup> century was the *Chicago Seven* (sometimes known as Chicago Eight) trial of 1969–1970.



The *Chicago Seven* trial is particularly relevant to the *Slobodan Milošević* and *Saddam Hussein* trials because former US Attorney General Ramsey Clark assisted the defence in all three trials. In the *Chicago Seven* case, the leaders of the anti-Vietnam war movement — Bobby Seale, David Dellinger, Abbie Hoffman, Jerry Rubin, Rennie Davis, Tom Hayden, Lee Weiner and John Froines — were charged with conspiring, organising, and inciting riots during the 1968 Democratic National Convention in Chicago. The trial drew considerable public notice because of the defendants' notoriety and their courtroom antics.

On the first day of the trial, when the presiding judge, Julius Hoffman, refused to issue a postponement so that Bobby Seale's attorney would have time to recover from a gall bladder operation, Seale said to the judge, 'If I am consistently denied this right of legal defense counsel of my choice who is effective by the judge of this Court, then I can only see the judge as a blatant racist of the United States Court.' This brought a strong rebuke from Judge Hoffman. That same day, Judge Hoffman reprimanded Tom Hayden for giving a clenched fist salute to the jury and Abbie Hoffman for blowing kisses at the jurors. A few days later, the defendants tried to drape the counsel table with a North Vietnamese flag in celebration of Vietnam Moratorium Day, drawing another round of sharp words from the judge.

Throughout the trial, the defendants refused to rise at the beginning or close of court sessions. On two occasions, defendants Abbie Hoffman and Jerry Rubin wore judicial robes in court onto which were pinned a Jewish yellow star, meant to imply that Judge Hoffman was running his courtroom like the courts of Nazi Germany. The defendants frequently called Judge Hoffman derogatory names, accused him of racism and prejudice, and made sarcastic comments to him, such as asking 'How is your war stock doing?' The most serious disorder occurred two weeks into the trial, when Judge Hoffman learned that a few minutes before the commencement of the court session, Bobby Seale had addressed the audience of his supporters in the courtroom, telling them that if he were attacked 'they know what to do.' Judge Hoffman responded by having Seale bound and gagged. Defense counsel William Kunstler then scolded the Court, saying 'This is no longer a court of order, your Honor; this is a medieval torture chamber. It is a disgrace.'



At the conclusion of the trial, Judge Hoffman issued a total of 159 citations to the defendants and their lawyers for contempt in response to these incidents of disruption and disrespect. The Seventh Circuit Court of Appeals, however, reversed the contempt convictions on the ground that the judge cannot wait until the end of the trial to punish the defendants and their lawyers for misconduct. It also reversed the convictions on the substantive charges, in part due to the prejudicial remarks and actions of the trial judge and inflammatory statements by the prosecutor during the trial. It should come as no surprise that the *Chicago Seven* trial is universally seen as a low point in American courtroom management. Rather than viewing Judge Hoffman as a brave hero fighting anarchy, history remembers him more as an accomplice who unwittingly fanned the flames of disorder. Slobodan Milošević and Saddam Hussein, both of whom were advised by Ramsey Clark, set out to do the same thing to the judges of the International Criminal Tribunal for the former Yugoslavia ('ICTY') and the Iraqi High Tribunal.

Just a few months after the *Chicago Seven* trial, the U.S. Supreme Court held in *Illinois v Allen* that an unruly defendant could be excluded from the courtroom during his trial if his disruptive behaviour threatened to make orderly and proper proceedings difficult or wholly impossible. Allen had been tried in a state court in 1957 for armed robbery of a tavern owner. During his trial, Allan threatened the judge's life, made abusive remarks to the court and announced that under no circumstances would he allow his trial to proceed. The court responded by removing him from the courtroom, after appropriate warning, and Allen was convicted in his absence.

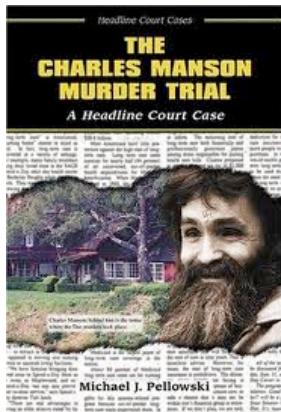
The Supreme Court affirmed Allen's conviction, ruling that removal after a warning was permissible and far less objectionable than use of restraints. In a passage that was obviously inspired by the publicity surrounding the *Chicago Seven* trial, the Supreme Court stated:

Trying a defendant for a crime while he sits bound and gagged before the judges and jury would to an extent comply with that part of the Sixth Amendment's purposes that accords the defendant an opportunity to confront the witnesses at the trial. But even to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort. Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings

about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.

Yet the Court declined to rule that physical restraints may never be used, saying: 'However, in some situations which we need not attempt to foresee, binding and gagging might possibly be the fairest and most reasonable way to handle a defendant who acted as Allen did here.'

The first major chaotic trial to arise after the Supreme Court's *Allen* decision was that of Charles Manson who, along with three female members of his cult, was tried from June 1970 to March 1971 for the gruesome murder of movie actress Sharon Tate and five others. During the trial, Manson constantly interrupted proceedings by shouting, chanting, turning his back on the judge, assuming a crucifixion pose, and singing (actions often parroted by the three women co-defendants). The court responded by repeatedly having the defendants removed from the courtroom. In one instance, the judge removed Manson after he leaped over the defence table to attack the judge with a pencil, shouting 'In the name of Christian justice, someone should cut your head off.'



More recently, in February 2006, accused al-Qaeda terrorist Zacarias Moussaoui, was thrown out of the courtroom by U.S. District Judge Leonie Brinkema, and then temporarily banned from returning to court, due to his disruptive and belligerent outbursts. 'This trial is a circus . . . God curse you and America' Moussaoui shouted at the judge as he was led away. 'You are the biggest enemy of yourself' Judge Brinkema replied, ordering that Moussaoui watch the remainder of the proceedings via closed-circuit feed from a jail cell inside the courthouse. Media outlets reported that most legal scholars agreed that Judge Brinkema acted appropriately.



## Moussaoui: The Final Verdict

### B DISORDER IN THE HAGUE

Slobodan Milošević was the first former head of state to be tried in an international war crimes trial. Although assisted by an army of defence counsel including Ramsey Clerk, Milošević asserted his right to act as his own lawyer in the televised proceedings before the Yugoslavia Tribunal, as this would enable him to make lengthy opening and closing statements and turn cross-examinations into opportunities for unfettered political diatribes. As the trial unfolded, Milošević exploited his right of self-representation to treat the witnesses, prosecutors, and the judges in a manner that would earn ordinary defence counsel expulsion from the courtroom. He often strayed from the forensic case into long vitriolic speeches and he was frequently strategically disruptive.



On numerous occasions, the presiding judge, Richard May, tried to reign in Milošević with little success. A defendant who is represented by a lawyer is ordinarily able to address the court only when he takes the stand to give testimony during the defence's case-in-chief. And in the usual case, the defendant is limited to giving evidence that is relevant to the charges, and he is subject to cross-examination by the prosecution. While a judge can control an unruly lawyer by threatening fines, jail time, suspension, or disbarment, there is little a judge can do to effectively regulate a disruptive defendant who is acting as his own counsel.

While Milošević antics did not win him points with the judges, they had a significant impact on public opinion back home in Serbia. Rather than discredit his nationalistic policies, the trial had the opposite effect. His approval rating in Serbia doubled during the first weeks of the trial, and two years into the trial he easily won a seat in the

Serb parliament in a nationwide election. In addition, opinion polls indicated that a majority of Serbs felt that he was not getting a fair trial, and that he was not actually guilty of any war crimes. Suspicion surrounding the circumstances of Milošević’s death just before the conclusion of his trial has only reinforced these widely held views.

Six months after Milošević’s death, another Serb leader, Vojislav Šešelj, decided that he, too, would utilise the right of self-representation as a means of disrupting his trial before the ICTY. Šešelj, a professor of law at Belgrade University-turned paramilitary group leader, made his unruly intentions clear on the eve of trial when he published three books in Serbia entitled *Genocidal Israeli Diplomat Theodor Meron* (about the President of the ICTY), *In the Jaws of the Whore Del Ponte* (about the Chief Prosecutor of the Tribunal), and *The Lying Hague Homosexual, Geoffrey Nice* (about the lead trial prosecutor). Šešelj tried repeatedly to provoke the judges at pre-trial hearings and made numerous obscene and improper statements in his pre-trial motions, including one submission which stated, ‘You, all you members of The Hague Tribunal Registry, can only accept to suck my cock.’



On the eve of trial in August 2006, the Trial Chamber revoked Šešelj’s right to self-representation.

While it is clear that the conduct of the Accused brings into question his willingness to follow the “ground rules” of the proceedings and to respect the decorum of the Court, more fundamentally, in the Chamber’s view, this behaviour compromises the dignity of the tribunal and jeopardizes the very foundations upon which its proper functioning is based.

The Appeals Chamber agreed that the Trial Chamber could revoke the right to self-representation where the Trial Chamber found ‘that appropriate circumstances, rising to the level of substantial and persistent obstruction to the proper and expeditious conduct of the trial exist.’ The Appeals Chamber, however, held that the Trial Chamber had to first give the defendant an explicit warning.

Šešelj’s obstructionist behaviour persisted at trial. He requested that judges remove their robes in his presence because the judges ‘reminded him of medieval inquisitors.’ He moved to have Judge Schomburg disqualified solely because he was from Germany, stating ‘the smell of crematoriums and gas chambers comes into The Hague courtroom with him.’

He publicly accused the judges and lawyers of bribing witnesses to testify against him. He intimidated witnesses on the stand and disclosed the name of confidential witnesses to an outsider so that the outsider could ‘disable’ them.

In the face of these continuing disruptions, the Trial Chamber issued repeated warnings, and then ruled that counsel could be rightly imposed on Šešelj. The Appeals Chamber disagreed, and reinstated Šešelj as primary counsel. The Trial Chamber later assigned standby counsel.

About this time, the trial of Bosnian Serb leader Radovan Karadžić commenced. On the eve of his trial in 2009, Karadžić, too, asserted his right to self-representation. Karadžić subsequently insisted on not recognising the authority of the Tribunal, he refused to abide by procedures, and he refused to attend trial sessions. After issuing repeated warnings, the Trial Chamber appointed stand by counsel to represent the interests of Karadžić if required. This time, the decision was upheld on appeal.



### C DISARRAY IN THE DUJAIL TRIAL

On August 11, 2005, the democratically elected Iraqi National Assembly adopted the Statute of the Iraqi High Tribunal with some modifications. Notably, the Assembly replaced the clause providing for a right of self-representation with a clause that said that all defendants before the Tribunal had to be represented by Iraqi Counsel, who could be assisted by foreign lawyers. The author was part of the team of international advisers that provided training workshops to the IHT judges in the months leading up to the trial. During the training sessions, I strongly advocated for such an amendment in order to ensure that Saddam Hussein would not be able to use self-representation as a means of hijacking and disrupting the IHT. What I did not comprehend at the time, however, was that this legislative change would not accomplish the goal if the judges decided to follow the unique Iraqi legal tradition of permitting a defendant to cross-examine each witness after his lawyer had done so, in essence enabling them to serve as co-counsel.



During the *Dujail* trial, Saddam Hussein and the other defendants were constantly disruptive and prone to political theatre. Hussein's disruptive conduct often coincided with the most emotionally compelling testimony of victims. He engaged in frequent angry outbursts. He yelled at the judge to 'go to hell' and called the judge a homosexual, a dog, and a whore-monger. He made wild accusations of mistreatment by his American jailers. He insisted on prayer breaks in the middle of witness testimony, went on hunger strikes, and repeatedly refused to attend trial sessions. Most troubling, he took advantage of the Iraqi legal tradition that permits the defendant to cross-examine each witness after his lawyer has finished his cross-examination by making frequent political speeches and impelling his followers — who were watching the television broadcasts of the proceedings — to kill American occupiers and Iraqi government collaborators.

Meanwhile, Hussein's co-defendant, Barzan al-Tikriti, who had served as head of the Internal Security Agency, competed with Hussein for the most offensive insults directed at the bench. On one occasion, he appeared in court wearing only his pajamas, and another time, he insisted on sitting on the courtroom floor with his back to the judge.



For their part, Saddam Hussein's retained lawyers, in particular Lebanese defence attorney Bushra al-Khalil and Jordanian lawyer Salah al-Armouti, frequently made outrageous political speeches and acted in outright contempt of the Iraqi High Tribunal. They engaged in tactics such as insulting Judge Ra'ouf, holding up photos of US prison

abuses at Abu Ghraib, and on one occasion pulling off their defence counsel robes and hurling them at the bench. Saddam Hussein's retained lawyers also staged a walk-out in the middle of a trial session and boycotted the majority of the trial sessions including the closing arguments. These acts violated Iraqi law and the Iraqi Code of Legal Professional Ethics, which provide that lawyers practicing in Iraqi courts must be respectful toward the court, must appear in court on the set dates, should not try to delay the resolution of a case, and must facilitate the task of the judge.

The first presiding judge, Rizgar Amin, attempted to deal with such disruptive behaviour by ignoring it. Although human rights groups applauded Judge Rizgar's calm demeanor in conducting the trial, the Iraqi population felt that he was losing the 'battle of the wills' against the former dictator, and he resigned under the weight of mass public criticism. The replacement presiding judge, Ra'ouf Abdul Rahman, employed a number of tactics to regain control of his courtroom.



Judge Ra'ouf began his first day as presiding judge by sternly warning defendants and counsel that outbursts and insults would not be tolerated. A few minutes later, he demonstrated his resolve by evicting defendant Barzan al-Tikriti and defence counsel Bushra al-Khalil when they failed to heed to his admonishment. When the retained defence counsel responded by boycotting the trial *en masse*, Judge Ra'ouf appointed public defenders to replace them. Notably, when the retained defence counsel later asked to return, Judge Ra'ouf permitted them to do so. He never imposed fines or other sanctions on them for their misbehaviour, despite the fact that they resorted to such tactics again and again throughout the trial. Nor did he revoke the defendants' right to question the witnesses or to address the court, despite the fact that it was frequently abused.

### **III REMEDIES FOR DISRUPTION**

#### **A. LIMITING SELF-REPRESENTATION**

Permitting a former leader to assert the right of self-representation in a war crimes trial is a virtual licence for abuse. While there is ongoing debate about whether there exists a customary international law right to self-representation, many countries of the world require that defendants be represented by counsel in all cases involving serious charges. The Iraqi National Assembly was prudent to require that defendants before the Iraqi High

Tribunal be represented by Iraqi lead counsel, who the Tribunal could control through various sanctions available under Iraqi law.

It was a huge mistake, however, for the presiding judges of the Iraqi High Tribunal to allow the defendants to question witnesses following their lawyers' cross-examinations, as this completely undermined the objective of the National Assembly's revisions to the IHT Statute. Instead, the judges should have recognised that departures from traditional Iraqi practices are warranted in an extraordinary trial of this nature, especially as the traditional practice was neither required by Iraqi nor international law.

In the United States, courts have held that a defendant who is represented by a lawyer has no right to act as co-counsel by, for example, cross-examining witnesses or addressing the bench. The rule limiting the defendant's participation is necessary 'to maintain order, prevent unnecessary consumption of time or other undue delay, to maintain the dignity and decorum of the court and to accomplish a variety of other ends essential to the due administration of justice.'

Even in a tribunal such as the ICTY, whose statute provides for the right of self-representation, the Appeals Chamber decision in the *Šešelj* case recognises that such a right is a qualified one. Abuse it and you lose it. Drawing from international tribunal precedent, defence counsel should be imposed on a defendant who seeks to represent himself where: (1) the defendant attempts to boycott his trial; (2) the defendant's self-representation would prejudice the fair trial rights of co-defendants; (3) the defendant is being persistently disruptive or obstructionist; or (4) self-representation would unreasonably prolong the trial.

Since most war crimes tribunal courtrooms are partitioned by sound-proof glass, a judge may effectively deal with minor disruptions by simply turning off the defendant's microphone. In the case of persistent disruptions, the judge must give a specific warning before revoking the right of self-representation. In addition, the defendant must be accorded at least a chance to reclaim the right if he manifests a willingness to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings. One commentator advocates a 'three strikes approach' after which the right would be permanently revoked, while others believe that the Court should have complete discretion to determine whether to provide the defendant yet another chance.

## B STANDBY PUBLIC DEFENDERS

Whether in a situation where a defendant is representing himself, or where he is represented by retained counsel, a war crimes tribunal must have standby counsel ready to step in when needed. Such occasions would include situations where the defendant or his counsel engage in persistently disruptive or obstructionist behaviour, where they become too ill to actively participate in court sessions, or where they stage a walk-out or a boycott of the proceedings.

Just as a war crimes tribunal should appoint at least one alternate judge who observes the trial from its commencement in case one of the judges should need to be replaced for health or other reasons, so too should standby public defenders be present from the beginning of the trial. Such counsel should be highly qualified, receive the same international training as prosecutors and judges, and be assisted by international experts. The very presence of standby public defenders can have a deterrent effect on misconduct by a self-represented defendant or by retained defence counsel because they will recognise that their disruptive actions will not successfully derail the trial, which can proceed without pause with standby counsel.

Ironically, the Iraqi High Tribunal did, in fact, appoint standby public defenders, but failed to provide timely notice to the media of their appointment, to describe their credentials, or to explain their function. Consequently, several print and broadcast media outlets erroneously reported that Saddam Hussein was not represented by any counsel during those periods in which his retained counsel were boycotting the proceedings. Similarly, human rights organizations, which were publicly critical of the skills and experience of the public defenders, failed to recognise that they were, in fact, being assisted by international experts obtained and paid by the International Bar Association.

### **C EXPULSION AND OTHER SANCTIONS**

The ICTY Appeals Chamber indicated in the *Milošević* case that the principle of proportionality must always be taken into account in crafting an appropriate response to disruption or delay. With this admonition in mind, a war crimes tribunal should deal with the five categories of defendant misconduct identified above as follows:

First, passive disrespect should generally be ignored unless it substantially interferes with the proceedings. The essential dignity and decorum of a courtroom does not turn on whether the defendant stands or addresses the judge as ‘Your Honor’.

Second, a judge should inquire as to why a defendant is refusing to cooperate with the fundamental ground rules of court proceedings. Often such behaviour is in response to perceived unfair decisions by the bench. The defendant should be assured that his rights will be protected, and warned that he faces exclusion from the courtroom or other appropriate and proportional actions.

Third, a single obscenity or outburst should be met with a warning that continued disruptions of this kind will lead to sanctions, including expulsion from the courtroom. But repeated interruptions of a trial may be dealt with by expulsion after appropriate warnings have been given. Where the defendant is excluded from his trial the court should make reasonable efforts to enable him to keep apprised of the progress of the trial and to communicate with his attorney.

Fourth, since a televised trial gives the defendant the opportunity to communicate directly with the population at large, the judge must be particularly vigilant not to permit

the defendant to use the courtroom as a stage to incite mass violence. Usually, there is a twenty-minute delay in broadcasting to enable the Tribunal to bleep out references to confidential witnesses. While it may be appropriate to also excise defence outbursts that seek to incite violence, since such statements will likely be reported in the print media this approach is of limited efficacy.

Fifth, physical violence in the courtroom cannot be tolerated and a court may deal with it by immediate expulsion or use of physical restraints.

Following the first incident of disruption, the judge should issue a warning, explicitly describing the sanction that will be imposed if the disruptive conduct continues. The warning should explain that the defendant's conduct is disruptive and will not be tolerated. It should also alert the defendant that future occurrences will result in expulsion from the trial for as long as his disruptive posture is maintained and that the trial will continue in his absence. The warning should explain that in addition to exclusion, the judge may impose other sanctions on the defendant, such as relocating him to a smaller cell, decreasing the time he gets for recreation, or reducing his access to other prisoners and family.

While the judicial process may well proceed more smoothly without the defendant in the courtroom, his absence may diminish the educative function of the trial. During Saddam Hussein's boycott of the *Dujail* trial, for example, print and broadcast media attention quickly dwindled, denying the public a chance to learn about some of the most important documents and testimony admitted into evidence. Thus, there are good reasons to avoid the sanction of expulsion if possible. Consequently, if disruptive conduct persists despite the initial warning, the judge should issue a firmer warning, recess to discuss the matter with the defendant and his lawyer, or briefly adjourn the proceedings to allow for a cooling-off period. Further disruption should result in temporary exclusion, followed by a calibrated response proportionate to the degree and persistence of disruption.

#### **D RESPONDING TO CONTUMACIOUS COUNSEL**

With respect to disorderly defence counsel, the judge should clearly set the ground rules of the trial from the beginning, warning that disruptive conduct will not be tolerated and describing the sanctions that will be imposed in response to such transgression. Although the demeanor and conduct of counsel that is deemed acceptable may vary somewhat from country to country, most of the world's legal professions follow the basic principle that a lawyer must be 'respectful, courteous and above-board in his relations with a judge' before whom he appears. Especially in a major war crimes trial, deferential courtroom behaviour is necessary to ensure that the judge's decisions are not perceived to be based on emotional reactions to insult.

Following the lead of the Special Court for Sierra Leone, all war crimes tribunals should adopt a Code of Professional Conduct, which spells out the rules of courtroom decorum applicable to both the prosecution and defence counsel. Consistent with such a

code, after an appropriate warning, persistent insults and disrespectful comments should be met with sanctions, including fines, jail time, suspension, and even disbarment. Because a judge has inherent power to remove a disruptive defendant from the courtroom, he also possesses the inherent power to deal with a disruptive lawyer in the same way and to temporarily or permanently replace him with standby counsel.

It is important in this regard to stress that the obligations of a defence counsel are not just to his client, but also to the court and to the larger interests of justice that the court is serving. Defense counsel are not merely agents of their client, permitted and perhaps even obliged to do for the accused everything he would do for himself were he trying his own case. As the American Bar Association has explained, '[i]t would be difficult to imagine anything which would more gravely demean the advocate or undermine the integrity of our system of justice than the idea that a defense lawyer should be simply a conduit for his client's desires.' If a client insists on his attorney asking improper questions, making irrelevant speeches, insulting the bench, or staging walk-outs or boycotts, the lawyer must reject those instructions, for he cannot excuse his own professional misconduct on the ground that his client demanded it.

Moreover, the defence counsel should seek to dissuade his client from improper courtroom behaviour, including explaining to him the sanctions that may be imposed by the judge and the probable prejudice to his case if he disrupts the proceedings. A defence counsel who encourages courtroom misconduct may be punished under the rules that establish his own responsibility for maintaining courtroom decorum. If he advises a client to act disruptively (or suggests methods for doing so), the court has authority to discipline counsel.

#### **IV CONCLUSION: FAIR TRIAL VERSUS INTEREST OF JUSTICE**

Revoking the right of self-representation, replacing retained counsel with standby public defenders, or expelling the defendant or retained defence lawyer from the courtroom may initiate a number of practical difficulties. After the revocation of Slobodan Milošević's right of self-representation, for example, the defendant refused to cooperate with the assigned counsel, and witnesses for the defendant refused to appear in court or to answer questions until the defendant's control of his case was restored. Vojislav Šešelj responded to the assignment of stand-by counsel by staging a hunger strike. Similarly, Saddam Hussein not only refused to cooperate with the public defenders during the boycott of his retained counsel, but he attempted (without success) to prevent the public defenders from delivering a closing argument on his behalf.

Such a situation obviously impacts negatively on the defendant's fair trial rights, but the international tribunals have interpreted the duty to ensure that a trial is fair to include concerns that go beyond just those of the defendant. The narrow fair trial rights of the defendant must be considered in the context of broader interests of justice which require 'that the trial proceeds in a timely manner without interruptions, adjournments or disruptions.'

## Books by Michael Scharf

