PART B

CRIMINAL ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES

INTRODUCTION AND OVERVIEW

Existing human rights protection regimes have one severe defect in common: they address only the respective member states and not the individual as the bearer of human rights' obligations. Lacking such recognition, the atrocities of an individual human rights violator do not fall under the provisions of the "inter-state" human rights regimes. The failure to establish accountability and responsibility, respectively, of the individual or corporate[1] perpetrator under the existing main human rights treaties is an important reason for their limited success.

The traditional perception of human rights as resembling either active or passive rights of the individual viz his home state[2] and which lack the necessary sanctions mechanism for the case of non compliance does not address a reality where gross human rights atrocities are first of all committed by individuals[3] and not by abstract entities such as states. Or with the famous opening address of the US Chief Prosecutor Jackson before the International Military Tribunal for the Trial of the Major War Criminals ("IMT") of Nuremberg: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[4]

Consequently, only through the establishment of a separate accountability system for the individual human rights violator can the necessary deterrence be created. Such an

[1] With the end of the cold war, multinational corporations have become prominent global human rights perpetrators. See part C chapter 2 for a detailed account on corporate human rights violations with their civil adjudication before US federal courts.

[2] See as an example the International Covenant on Civil and Political Rights (CCPR) which contains in its Articles 6 to 27 classical first generation human rights as rights which bind the individual state party to comply with and restrain from certain violating acts. The International Covenant on Economic, Social and Cultural Rights (CESCR) prescribes social and economic rights as second generation human rights.

[3] Acting either as an organ or agent of a state and/or in their individual capacity. The 2003 atrocities, committed in Liberia and Burundi by self appointed so called "War Lords" document the present reality where non state actors are increasingly the main perpetrators.

[4] IMT, judgment of 1 October 1946 in 22 *IMT Trials* 466, reprinted in 41 *AJIL* (1947) 172-221.

accountability system, however, cannot derive directly from the existing human rights protection regimes as long as existing instruments only establish and govern the relations between the signatory states.

Existing human rights instruments establish state responsibility[5] to a certain extent for human rights violations, which are attributable to state organs. Further options of establishing a working regime for individual criminal or civil responsibility[6] for such violations are obviously outside the scope of these instruments. At present, and considering the nature of the existing instruments, they can only serve as general guidelines and provisions for a future *corpus* of individual criminal law.

The following part outlines the present legal situation of holding individuals criminally accountable for human rights atrocities under international and domestic criminal law as a necessary supplement to existing ways of human rights protection.

Other aspects of this part are: the legal development of today's *corpus* of international criminal law with its historical sources, the development of the different types of criminal responsibility, the various forms of criminal forums suitable for the adjudication of human rights atrocities, the move from *ad hoc* tribunals to a permanent International Criminal Court with the various obstacles and questions accompanying this development, the key obstacles to exercising universal jurisdiction and the conclusion that the international community appears to be committed, to some extent, to the reign of international criminal justice.

[5] With the possibility of state civil liability at a more or less developed scale. See Part C Chapter 1 for an evaluation and discussion of the question of state civil responsibility.

[6] By requiring state parties to create workable means of criminal accountability for the individual perpetrator by imposing e.g. the prime obligation to either prosecute or extradite, the "aut dedere aut judicare" of international criminal law; see e.g. Articles 6,7 of the Genocide Convention.

CHAPTER 1

INTERNATIONAL CRIMES

1. DEFINING INTERNATIONAL CRIMINAL LAW

The point of departure for defining international criminal law is the general notion that there are certain criminal offences which are criminalized universally under domestic and international law. Generally speaking, international criminal law as part of public international law[7] refers in its terminology to certain offences which qualify as crimes under international law[8] because they violate not only domestic criminal law but also universal prescriptions and perceptions of international law.[9] The US Nuremberg Military Tribunal defined in its *Hostage case*[10] as such crimes under/against international law, acts "universally recognized as criminal, … considered a grave matter of international concern and (whose prosecution) for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances."[11]

Historically, one of the oldest crimes subject to universal prosecution was piracy as one of the "offences against the law of Nations"[12] which made the perpetrators as *hostes humani generis*[13] prosecutable in every state under (what we call now) universal criminal jurisdiction. War crimes also rate among these "historic" crimes with early examples of criminal prosecution dating back to the Middle Ages. [14]

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[7]Cassese, *International Criminal Law* (2003) 16.

[8]See Murphy, "Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution" in 12 *HHRJ* (1999) 4, qualifying as an "international crime" an act that is defined as criminal under international law." Cassese (n 7) 23, defines international crimes as "breaches of international rules entailing personal criminal liability" and Ratner and Abrams, *Accountability For Human Rights Atrocities In International Law-Beyond the Nuremberg Legacy*, (2001) 11 describe these breaches as "particularly serious violations of international law".

[9] "Must be regarded as a matter for international concern", Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights* (2003) 13.

[10] *United States of America v. Von List & Others*, Judgment of 19 February 1948, in The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. VII (1949), 34-76 and in *AD* (1948) 632, 636.

[11] Van der Vyver, "Prosecution and Punishment of the Crime of Genocide" in 23 *FILJ* (1999) 315, Fn. 124.

[12] US Constitution of 1789 where Article I Section. 8 Cl. 10 refers to war crimes and acts of piracy as crimes against humankind.

[13] "Enemies of all humankind", see Cassese (n 7) 38.

[14] One of the oldest examples for a war tribunal of an individual perpetrator took place in 15th century Germany when the German knight Peter von Hagenbach was tried before a court of the then Holy Roman Empire for several crimes like murder, rape and other crimes committed in times of war. He was found

The fact that a crime is prosecutable under universal jurisdiction serves as an indicator for the "international nature" of this crime. Some legal scholars, however argue that international crimes resemble in fact only common, domestic crimes, which just happen to be "prosecuted before an international criminal tribunal, whether *ad hoc* or permanent"[15] such as the International Criminal Court. Even when contested as a principle[16] the probable prosecutability before these *fora* serves nevertheless as an index for the internationality of a crime's nature.

The International Law Commission (ILC),[17] together with other legal authorities, distinguishes in respect of the *corpus* of international criminal law between international crimes and crimes against international law. The former term refers to certain offences as "serious breaches of international law" which can be committed by states only and which can give rise to inter-state civil liability. The latter describes offences which could be committed by individuals only as so-called "crimes under international law", giving rise to individual criminal responsibility.[18]

The author uses the term "international crimes" in this research to refer to crimes of an international nature (which include serious international human rights atrocities) which are committed by individuals, acting as state actors and non-state actors alike, or by organizations acting on the orders of governments or whose actions being sanctioned by them[19] and which constitute gross and massive violations of international law in the severity of their nature.

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guilty of these crimes and sentenced to death. See Schwarzenberger, "The Problem of an International Criminal Law" in 3 *CLP* 1950, 263 *et seq.*

[15] Kittichaisaree, *International Criminal Law* (2002) 3.

[16] This definition would exclude the historical crime of piracy and seems to be too narrow in their scope, see de Than and Shorts (n 9) 13.

[17] See "Review of further developments in fields with which the Sub-Commission has been or may be concerned" of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights for a definition of international crimes, UN Doc. E/CN.4/Sub.2/1997/29,

[18] *Id.*, paras 27, 28 of the review. See further Jørgensen, *The Responsibility of States for International Crimes*, (2003) 139.

[19] (n 17) para 69 and annexed Draft.

In conclusion, international criminal law can described as the part of public international law that combines[20] the criminal aspects of international law with the international aspects[21] of domestic municipal criminal law with the different judicial responses through the means of prosecution, extradition and judicial assistance.[22]

2. SOURCES OF INTERNATIONAL CRIMINAL LAW

International criminal law being part of general international law, shares the same main sources[23] with the latter. Following Article 38 (1) of the Statute of the International Court of Justice on the choice of applicable law, the following sources provide international criminal law with its substantive law:

Firstly, international multilateral treaties and/or conventions, which criminalize an act internationally, form the primary source. The Vienna Convention on the Law of Treaties[24] may serve hereby as a guide[25] on what international instruments qualify under this category.

Secondly, international recognition under customary international law[26] of an offence constituting a crime under international criminal law[27] is the secondary source of international criminal law.

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[20] Kittichaisaree (n 15) 3.

[21] Such an international aspect of domestic municipal law e. g. arises in cases where a domestic criminal court establishes its jurisdiction over a crime committed outside the territorial boundaries of the forum state, the "locus fori".

[22] Cassese (n 7) 15 on the legal consequences of international criminal law.

[23] *Id.* 26 and Ratner and Abrams (n 8) 17-8.

[24] Vienna Convention on the Law of Treaties of May 23, 1969, 1155 *UNTS* 331.

[25] Ratner and Abrams, (n 8) 18.

[26] The United States Supreme Court defines customary international law as the "practices of other countries, treaties, judicial opinions and the work of scholars." See the *Filartiga v. Pena-Irala* decision at 884-885, 630 F.2d.876. Such practices are established e. g. when states, although not having signed an international agreement that is criminalizing a certain act of behaviour, nevertheless accept the validity of this agreement through their actions or omissions. The further consequence hereof would be that there was then an international obligation not to commit that act. A prominent example of such a process was the recognition of the 1907 Hague Convention No. IV as having become customary international law in 1939 by the International Military Tribunal in Nuremberg in 1946. Article 53 of the Vienna Convention on the Law of Treaties, 1155 *UNTS* 331, defines the *jus cogens* character of a norm as a legal quotum, which is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

The third source is "general principles of law recognized by civilised nations" whose breaches may lead to criminal responsibility.

Fourthly, "judicial decisions and teachings […] as subsidiary means for the determination of the rules of law"[28] are an important source for international criminal law. There availability is, however limited by the non-retroactivity principle.[29]

This normative order of the sources of international criminal law neglects the reality of UN contributions to international law through binding UN SC resolutions and through non-binding UN GA resolutions.[30] Their impact on the shaping of international law is, however, indubitable. They fall under the first source, when they are of a binding nature, or under the second source, when non-binding.

The hierarchical order[31] of these sources follows the order which is apparent under authoritative instruments of public law as illustrated in Article 38 (1) of the ICJ and in Article 21 (1) of the Rome Statute of the International Criminal Court.[32]

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[27] Bassiouni, "International Crimes: Jus cogens And Obligatio Erga Omnes" in 4.59 *LCP* (1996) 28, identifies as main sources of International Customary Law besides international conventions "the recognition under general principles of international law that such conduct is or should be deemed volatile of international law and about which there is a pending draft convention before the United Nations" and second, "the prohibition of such conduct by an international convention though not specially stating that it constitutes an international crime".

[28] See Article 38 (1) of the Statute of the International Court of Justice, "ICJ".

[29] Kelsen in "The Rule Against Ex Post Facto Laws And The Prosecution Of The Axis War Criminals" in 3 *JAJ* (1945) 11 concedes the creation of new retro-active rules through custom or judicial decisions.

[30] Ratner and Abrams (n 8) 19.

[31] Cassese (n 7) 26.

[32] Article 21 (1) states:
"(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards."

3. INTERNATIONAL CRIMES

3.1. Overview

There is no absolute list of international offences which qualify as international crimes under international law. Presently, some twenty offences[33] qualify as international crimes under international criminal law: aggression, war crimes, unlawful use of weapons, crimes against humanity, genocide, apartheid, slavery and slave-related practices, torture, unlawful medical experimentation, piracy, hijacking, kidnapping of diplomats, taking of civilian hostages, unlawful use of mail, drug offences, falsification and counterfeiting, theft of archaeological and national treasures, bribery of public officials, interference with submarine cables, international traffic in obscene publications, theft of nuclear materials, falsification and counterfeiting and bribery of foreign public officials. Out of this wide range of international crimes, the crime of genocide, crimes against humanity, war crimes, the crime of aggression, the crime of torture and the crime of international (state-sponsored) terrorism are discussed further in this research because of their relevance for the protection of human rights.

3.2. The core crimes

Among the above crimes, the crimes of genocide, crimes against humanity, war crimes, the crime of aggression, torture and (state-sponsored) terrorism are referred to as so-called core crimes[34] of international criminal law, as constituting "the most serious crimes of concern to the international community as a whole"[35] or "serious international crimes".[36]

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[33] See e.g. Bassiouni (n 27) 28 and Murphy (n 8) 5. Cassese (n 7) 23-4 limits this list to serious crimes only.

[34] See Murphy (n 8) 6. Under his terminology falls only the first four international crimes and he justifies his terminology solely on the fact that the International Criminal Court's Statute establishes subject matter jurisdiction over these four crimes under its Article 5 (1) ICC Statute. The terms "Rome Statute" and "ICC" Statute are sometimes used interchangeably. The reference to the gravity of these crimes and their subsequent categorization in that sense would justify their characterization as "core crimes" With reference to Cassese (n 7) 23-5, the crimes of torture and terrorism were included.

[35] As codified in Article 5 (1) ICC Statute and Articles 16-18 and 20 of the 1996 ILC's Draft Code. Note that the crime of aggression as the most recent offence codified under international criminal law still remains a still undefined concept.

[36] *The Princeton Principles on Universal Jurisdiction* (2001) retrievable at http://www1.umn.edu/humarts.instree/princeton.html (hereafter *Princeton Principles***)** refers to them as "Serious Crimes Under International Law" in Principle 2 (1) and adds to the above listed four crimes the crimes of piracy, slavery and torture. See Ratner and Abrams (n 8) 162 for additional sources.

This terminology follows closely the definition in human rights law of "gross violations" and refers to the serious character and nature of committed offences which constitute in their intensity and impact a violation of the principles of international law.[37] Article 7 Paragraph 2 of the ECHR qualifies these acts as acts of gross violations of the laws of civilized nations and as behaviour that "…when it was committed, was criminal according to the general principles of law recognised by civilised nations".[38]

The international core crimes constitute *jus cogens* norms of international law,[39] creating further legal obligations[40] which are universally binding as obligations *erga omnes* applicable in times of peace and war alike.[41]

Among these obligations is the obligation to either prosecute or extradite, the *aut dedere aut judicare*[42] of international criminal law. Other consequences of such *jus cogens* norms can result in the non-applicability of statutes of limitation and immunity (even for heads of state), the denial of a legal defence based on grounds of obedience to superior orders and of any derogation on the grounds of state emergency and, finally, the

[37] See Commentaries to the draft articles on Responsibility of States for internationally wrongful acts at 285 in *Official Records of the General Assembly, Fifty-sixth session; Supplement No. 10 (A/56/10), chapter IV. E.2)* 245

[38] Article 7 II ECHR

[39] Resembling peremptory norms of international law and as such norms, which are "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. See Article 53 of the 1969 Vienna Convention on the Law of Treaties. UN Doc. A/CONF. 38/27. This principle is also accepted by the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, UN Doc. A /CONF.129/15, reprinted in 25 *ILM* 543.

[40] See Bassiouni (n 27) 63.

[41] Case law where the *jus cogens* character of international law was acknowledged is the *Krupp and others* case before the US military tribunal in Nuremberg concerning the use of French prisoners of war for work in the armament industry, the confiscation of Jewish production assets and acts of plunder against Dutch industrialists, reprinted in The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. X (1949) 130-159 and *AD* (1948) 620-632. The *Pinochet* case acknowledged the *jus cogens* nature of torture, *Regina v. Bow Street Magistrates Stipendiary Magistrate, ex parte Pinochet Ugarte (No.3)* in 2 *All ER* 97, 109.

[42] Referring to the obligation of a state to respond to the presence of an alleged perpetrator of international crimes in its territory by either extraditing or prosecuting him.

establishment of universal criminal jurisdiction before domestic and international courts.[43]

With the inclusion of the core crimes of genocide, crimes against humanity, war crimes and aggression under the universal jurisdiction of the International Criminal Court (ICC)[44] these international crimes were eventually acknowledged as universally applicable and enforceable *jus cogens* norms.[45]

3.3. The legal development of the core crimes

3.3.1. Genocide

The crime of genocide[46] was codified as a crime for the first time in Article 1 of the Paris Convention on the Prevention and Punishment of the Crime of Genocide of 1948[47] which criminalized certain "acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group".[48] The crime of genocide found its further codification under the following international instruments: Article 4 of the ICTY-Statute[49], Article 2 of the ICTR-Statute,[50] Article 17 of the ILC Geneva Draft Code of 1996[51] and Article 5 Section 1 Paragraph a of the Rome Statute of the International

[43] See Principle 3 of the *Princeton Principles* (n 36); Ratner and Abrams (n 8) 20-4; Shaw, *International Law*, (2003) 597, questions the validity of this conclusion, while acknowledging the existence of a state practice in establishing universal jurisdiction in respect of war crimes, crimes against peace and crimes against humanity.

[44] See Article 5 para 1 lit. a-d ICC Statute of the International Criminal Court. It should be noted that the crime of aggression has yet to be defined, see Article 5 par 2 which limits the scope of applicability unacceptably.

[45] See Bassiouni (n 27) 42.

[46] Other such examples of genocidal human rights atrocities before and after the Holocaust were: the mass-murder of tens of thousands of Boers in Britain's concentration camps during the Boer wars in South Africa between 1899 and 1902, the mass-executions of one million Armenians by the Turks in 1910, the killing of millions of Russians and other Soviet peoples by their (own) Soviet leaders between 1923 and 1939, the "killing fields" of Cambodia where up to 2 million people were killed between 1975 and 1979 and more recently, Rwanda, where up to 1 million people were killed over a period of approximately 3 months.

[47] Convention on the Prevention and Punishment of the Crime of Genocide, 78 *UNTS* 277, *entered into force* Jan. 12, 1951.

[48] *Id.*, Article 2.

[49] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia of May 25, 1993, ICTY-Statute hereafter.

[50] Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, UN SCOR, 49th Sess., UN Doc. S/RES/955 (1994), 33 *ILM* 1598, 1600 (1994).

[51] International Law Commission Draft Code of Crimes Against the Peace and Security of Mankind of 1996, (ILC Geneva Draft Code of 1996 hereafter).

Criminal Court (ICC). The crimes committed by Nazi Germany in connection with the "Holocaust"[52] against Jewish, Sinti and Roma[53] and other ethnicities in World War II, and which were prosecuted as crimes against humanity before the IMT, would qualify today as the crime of genocide under the 1948 Genocide Convention.[54]

3.3.2. Crimes against humanity

This international crime was for the first time codified[55] in Article 6 (c) of the Nuremberg Charter[56] (NC)[57] and found its way after that into other major international instruments.[58] The crime against humanity matches the definition of the crime of genocide but differs in its definition by the absence of the subjective element of the "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group" as it is required for genocide in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948.

Crimes against humanity, as codified in the Rome Statute, do not require any longer the mandatory link of a connection to an armed conflict, the so-called "nexus to armed conflict". The necessity of fulfilling the nexus requirement had become an open question over the last decades. Under the IMT Charter, crimes against humanity stood in the context of other acts committed in connection with World War II,[59] thus following the

[52] The plan of the Nazis to exterminate the Jewish people as an ethnic group led to the murder of approximately 6 million people.
[53] The terminus Sinti and Roma describe the ethnic group of what was formerly known as "gypsies"; this term is regarded as being derogatory.
[54] Under the IMT jurisdiction, the terminus genocide was only used as evidence of the severity of crimes of war crimes and crimes against humanity, see van der Vyver (n 11) 286.
[55] The first attempt to criminalize various acts "in violation of the established laws and customs of war and the elementary laws of humanity" took place after World War I through the considerations of the Commission on the Responsibility of the Authors of War and on Enforcement of Penalties. See *Report Presented to the Preliminary Peace Conference***,** March 29, 1919, reprinted in 14 *AJIL* (1920) 95, 115.
[56]Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 82 *UNTS* 280, *entered into force* Aug. 8, 1945.
[57] The terms NC, Nuremberg Charter or IMT Charter will be used interchangeably
[58] See Articles II and III (a) of the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948; Article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid of November 30, 1973; Article 3 of the ICTR Statute; Article 5 of the Statute of the international Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 of May 25, 1993; Article 18 of the ILC Geneva Draft Code of 1996;and finally Article 5 (b) of the Statute of the International Criminal Court of July 17, 1998.
[59] See Ratner and Abrams (n 8) 50

nexus requirement. The later post-IMT Control Council Law No. 10[60] gave up this nexus requirement as a probably unnecessary element of the crime.[61] While the ICTY Statute established[62] the nexus requirement through its jurisdictional linkage *ratione materiae* to the Yugoslavian civil war as an armed conflict *per se*,[63] the ICTR Statute and the Rome Statute gave up the nexus element as an obviously outdated principle[64] of international criminal law. Consequently, the nature of crimes against humanity was "freed" from this "nexus" requirement and restriction. Crimes against humanity penalize today a multitude of violent acts "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".[65]

Besides the nexus requirement, another important element of crimes against humanity is the jurisdictional element of "state action or policy",[66] which is used to distinguish crimes against humanity as an international crime from otherwise common criminal acts such as murder, ill-treatment (torture) and slavery, which would fall under the relevant domestic penal law provisions.

The crime of crimes against humanity has become an open-ended formula for prosecuting and punishing a variety of other inhumane acts committed in the context of a widespread and systematic attack. This wideness of its scope, however, may eventually create a conflict with the legality principle.[67]

[60] In its definition of crimes against humanity under Article II (1) c of CCL No. 10
[61] The CCL No. 10 created however confusion over the question, whether through its explicit legal linkage to the NC (as stated in its preamble) the nexus to armed conflict remained as a requirement. The jurisprudence of later courts differed in this regard, see Ratner and Abrams (n 8) 51.
[62] This view was later challenged by the US Government in its Amicus Curiae Brief in *Prosecutor v. Tadic* of July 25, 1995, 33, revoking the nexus requirement, cit. in Abrams and Ratner (n 8) 55.
[63]With its specific breaches of humanitarian and human rights law, see Article 5, Preamble and Article 1 of the ICTY Statute.
[64] See Article 3, preamble and Article 1 ICTR Statute and Article 5 (b) ICC Statute.
[65] Article 7 (1) ICC Statute
[66]"[…] when committed as part of a widespread or systematic attack", Article 3 ICTR Statute and Articles 5(b), 7 ICC Statute.
[67] In regard to the *nullum crimen sine lege* principle.

3.3.3. War crimes

This category of international crimes saw its most recent codification under Article 5 (c) of the Rome Statute, whereby certain unlawful acts in times of war and armed conflict are prohibited and criminalized. Developed as the so-called international humanitarian law, it combines the existing codifications on the laws of war and armed conflict, namely the law of Hague[68] and the law of Geneva.[69] As codified under the ICTY and the ICC statutes, war crimes penalize acts in times of armed conflict, which constitute either "grave breaches of the Geneva Conventions of 12 August 1949"[70] and/or "other serious violations of the laws and customs applicable in armed conflict".[71]

It is important in this context to remember that besides the body of international humanitarian law, the *jus in bello*,[72] which is only applicable in times of war or armed conflict,[73] the body of international human rights law, which is applicable in times of peace as well,[74] exists. Today, the term "humanitarian law" has become broader in its meaning and its applicability by outlawing and criminalizing the most severe human rights atrocities: the crime of genocide, crimes against humanity and war crimes as "core crimes" of international criminal law.[75] As a consequence, combatants and civilians /

[68] As violations of existing laws and customs of war according to the Hague Rules on Land Warfare of 1899 and 1907.

[69] See the humanitarian rules of war as defined and established by the pre- WW II Geneva instruments as the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, the Convention Relative to the Treatment of Prisoners of War of July 27, 1929 118 *LNTS*, the Geneva Chemical Weapons Protocol of June 1925 and later the the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects of October 10, 1980.

[70] See e.g. ICC Statute Article 8 para 2 (a) which refers to the "grave breaches" terminology of the GC. As such qualify Articles 50 GC I, 51 GC II, 130 GC III and Article 147 GC IV which define prohibited acts which constitute in their severity *jus cogens* norms of ICL

[71] *Id.*, Article 8 para 2 (b); thus referring to the original corpus of humanitarian law as established in the Hague and Geneva Conventions.

[72] The second law governing the state of war is the *jus ad bello* which defines when the use of war as legitimate means of a state's policy is justified as it is e.g. in cases of self defence as under Article 51 UN Charter.

[73] Examples for the law in war are the four Geneva Red Cross Conventions of 1949 and their two Additional Protocols 1977. See van den Wyngaert, *International Criminal Law***,** (2000), where most of the present instruments of international criminal law are compiled.

[74]The UN Convention on the Prevention and Suppression of the Crime of Genocide of 1948 is such an example for codified international human rights and international criminal law.

[75] With the crime of aggression, see Article 5 (d) of the ICC Statute as the fourth "core crime".

non-combatants alike are today protected by an overlapping, merging and converging regime of international humanitarian and human rights law.

Historically, these international rules of war *strictu sensu*[76] applied only to acts between belligerent forces *inter se*. With the second Hague Convention of 1907 (Hague IV), a minimum of protection of civilian non-combatants found its way into humanitarian law as well.[77] The explicit protection of non-belligerents as "victims of war", however, never became the subject of pre-WW II humanitarian law: the two Geneva Conventions of 1929 were concerned only with the protection of belligerents and not civilians.[78] A third draft on a convention concerning the protection of civilians as such did not receive the necessary support and was as a consequence never adopted.[79]

However, all of these pre-WW II conventions of humanitarian law lacked explicit penal provisions and enforcement mechanisms. Consequently, they failed to create the necessary deterrence. The IMT and its subsequent trials utilized the wordings of these conventions for determining whether the *actus reus* of a defendant accused of a war crime could be established.

After the codification of war crimes for the first time in the IMT Charter, international humanitarian law saw the further criminalizing of certain acts during times of war and armed conflict.[80] With the four Geneva Conventions of 1949 (GC I-IV), and its two Additional Protocols of 1977 (AP I and II), *jus in bello* has developed into an impressive humanitarian law concept. Humanitarian law of today fulfils the following main functions: firstly, the protection of certain specified vulnerable groups such as wounded

[76] Known as the *jus in bello* ensuring the regulation of combat and the use of lawful means of combat.
[77] See e. g. Article 25 of Hague IV which states that "the attack or bombardment […] of towns, villages […] which are undefended is prohibited".
[78] Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 118 *LNTS* 303, entered into force June 19, 1931, and the Convention Relative to the Treatment of Prisoners, 118 *LNTS* 343, entered into force on June 19, 1931.
[79] Draft on an International Convention on the Condition and Protection of Civilians of enemy nationality who are on territory belonging to or occupied by a belligerent, Tokyo, 1934; retrievable at http://www1.umn.edu/humanrts/instree/1934b.htm
[80] See the four Geneva Conventions, GC, of 1949 with its two Additional Protocols of 1977, the Nuremberg Principles of 1950, Article 20 ILC Draft Code of 1996, Article 3 ICTY where the terminus of Article 6 (b) NC is used and Article 5 (c) of the ICC Statute.

combatants, civilians etc.; secondly, humanitarian law contributes to the development of international criminal law by defining certain international crimes;[81] and, thirdly, it determines whether or not an action in an armed conflict can be considered a just act of armed conflict committed in combat,[82] which in its consequence would lead to the granting of impunity from prosecution or not.

The traditional perception that humanitarian law, as codified in the GC (I-IV), was only applicable in armed conflicts of an international character changed with the steady proliferation of civil wars as the predominant kind of conflict after the end of WW II. The end of the so-called "Cold War" in 1991 and the ensuing numerous civil wars, led to the extension of the applicability of humanitarian law to internal armed conflicts as well.[83]

The adjudication of the ICTY exemplifies the different opinions on such an extension. In *THE PROSECUTOR v. TADIC a/k/a "DULE"*,[84] the US government argued in its Amicus Curiae Brief that "the grave breaches provisions of Article 2 of the International Tribunal Statute (of the Geneva Conventions of 1949) apply to armed conflicts of a non-international character as well as those of an international character"[85] This opinion, however, was rejected by the Tribunal, which restricted the applicability of Article 2 of the ICTY, and with it the applicability of the grave breaches provisions under the GCs, to international armed conflicts only.[86]

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[81] See Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV which all define prohibited acts which constitute in their severity *jus cogens* norms of ICL. Violations of common Article 3 GC (I-IV) fall under this category as well.

[82] Important in this context is the present policy of the USA in respect to captured enemy personnel. For the present situation of the detainees and their legal status, see *Yaser Esam Hamdi v. Donald Rumsfeld*, "Petition for Writ of Certiori" in the Supreme Court of the United States of Oct. 1, 2003, 03-6696 retrievable at http://laws.findlaw.com/us/000/03-6696.htm and *HAMDAN v. RUMSFELD, SECRETARY OF DEFENSE, et al.*, certiorari to the united states court of appeals for the district of Columbia circuit Argued March 28, 2006--decided June 29, No. 05-184. 2006, retrievable at http://laws.findlaw.com/us/000/05-184.html.

[83] See Schindler "Significance of the Geneva Conventions for the contemporary world" in 81 *IRRC* (1999) 721; Ratner and Abrams (n 8) 84. Cassese, (n 7) 54-56 for a general overview of the changing custom towards the applicability of humanitarian law in internal war.

[84] *THE PROSECUTOR v. TADIC a/k/a "DULE"* Case No. IT-94-1-AR72, October 2, 1995.

[85] *Id.*, para 81.

[86] *Id.*, paras 84 and 608.

Humanitarian law and its applicability in internal war scenarios are subject to a changing custom *in statu nascendi*,[87] with the further consequence that these crimes presently already qualify as "serious violations of humanitarian law" and thus as violations of Article 3 common to the four Geneva Conventions and their AP II.[88] It is not far-fetched to predict that this present distinction will soon be overcome in order to address the reality that most armed conflicts are of an internal nature.

International humanitarian law forms an important part of the *jus cogens* of international law[89] and as such it establishes universal criminal jurisdiction without the further necessity of prior domestic implementation under national law.[90]

3.3.4. Aggression

Acts[91] which would today qualify as crime of aggression was penalized as so called "crime against peace" under Article 6 (a) of the Nuremberg Charter. This international crime constitutes a crime under Article 5 Paragraph 1 (d) of the Rome Statute of the new ICC and awaits its later definition.[92]

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[87] Cassese (n 7) 54, argues that the "grave breaches" provisions of the GCs would also be applicable to internal war in the near future.

[88] Cassese (n 7) 56 referring to Article 8 (2) (c)-(f) of the ICC-Statute and Article 4 ICTR-Statute. The Appeals Chamber provides international criminal law in its *Tadic* appeal decision (n 84) with an in depth analysis of the changing state practice of the applicability of international humanitarian law on internal armed conflicts, pars. 96-137.

[89] See e. g. Constitutional Court of the Republic of Colombia in Ruling No. C-225/95, Re: File No.: L.A.T.-040 at para 7 where "rules of international humanitarian law … forming an integral part of *jus cogens*", cit. in Sassoli and Bouvier, *How Does Law Protect in War* (1999) 1357ff.

[90] The USA joined the Geneva Conventions in 1956. It took the US over 40 years to enact the War Crimes Act of 1996 (WCA) as implementing legislation of the Geneva Conventions.

[91] Article 6 (a) of the Nuremberg Charter penalizes the following acts as (a) ' Crimes against peace: ' namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

[92] Aggression as a crime is not defined by ICC Statute. In 2009, that is seven years after the entry into force of the ICC Statute, the Assembly of State Parties to the Statute will adopt a definition of the crime of aggression as set out in Articles 5 (2) and 121 of the ICC Statute. For the present situation of the proposed definitions, see *United Nations-Preparatory Commission for the International Criminal Court* PCNICC/2002/WGCA/RT.1/Rev.2 *Discussion paper proposed by the Coordinator*.

The right of a state to resort to war, the *jus ad bellum*, was regarded as a legitimate instrument of any state's foreign policy[93] until the outbreak of WW I. War was seen as "a mere continuation of politics by other means".[94] With the end of the first global war in 1918 this perception changed completely: war was regarded as an outlawed instrument of inter-state policy. The victors of WW I, the "Entente" powers, condemned aggressive war in Article 227 of the Treaty of Versailles of 1919. Such kind of war had become stigmatized as a "supreme offence against international morality and the sanctity of treaties".[95]

The process of outlawing war under international law was supported by another important development in international law: the Kellog-Briand Treaty,[96] which renounced war as a legitimate instrument of any present and future state policy[97] in 1928. This important international instrument can be regarded as an early global peace charter. Unlike the Versailles Treaty, the Kellog-Briand Treaty resembled a multilateral treaty with voluntary membership. The Italian Abyssinia campaign in 1937 and the German attack on Poland in September 1939, which led to World War II, showed a universal lack of compliance with these noble treaty resolutions.

Less than twenty years and another bloody world war later,[98] the newly established United Nations renewed the attempt to outlaw aggressive war in 1945: Chapter 1 of the Charter of the UN stipulates as the UN member states' explicit duty "to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of

[93] With the inherit motive to acquire new territories and/or spheres of influence.
[94] Von Clausewitz, *On War*, Book I, 24
[95] The victors tried to hold the German Emperor, William II of Hohenzollern, responsible for the offence of waging war by siding with Austria and Hungary when following its declaration of war on the Kingdom of Serbia in August 1914. The attack on the neutral Kingdom of Belgium was regarded as such a crime against peace. The German Emperor was, however, never tried and died in Dutch exile in 1941.
[96] Kellog- Briand Treaty of August 27, 1928. The admittance of Germany as a signatory state to this European multinational instrument documents the renewed respect and recognition of the post- war German democracy of 1918 onwards.
[97] See Article 1 of the Kellog-Briand Treaty which imposes on the member states the duty to "condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another"
[98] The UN Charter was signed in June 1945 with fierce battles still under way in the Far East and the two nuclear bombs still to be dropped in August.

aggression or other breaches of the peace".[99] Aggression as the "threat or use of force" was declared an outdated and outlawed means of international state policy.[100]

Reality has shown, however, that universal compliance with this UN principle does not exist: the USSR's invasions of Hungary in 1956, of the (then) Czech-Slovak Republic in 1968 and of Afghanistan in 1979, the USA's invasion of Cambodia in 1970 and its military campaigns in Central America in the mid 80s[101] and South Africa's US intelligence-led Angolan campaign in 1985 are some "major" examples of the two superpowers and permanent UN SC's members (and their allies) resorting to the use of aggressive war in their foreign policy during the Cold War.

The end of the Cold War in 1991 did not improve state compliance with this rule: the USA with its last two military campaigns against the Taliban in Afghanistan and against the regime of the ousted Saddam Hussein in Iraq,[102] acted without explicit authorization of the UN Security Council[103] and ran the risk of having these campaigns stigmatized as constituting unlawful acts under international law.[104]

With the above-mentioned outlawing of aggressive war, the *jus ad bellum*, has become as *jus contra bellum* a prohibited instrument of state policy, constituting an internationally

[99] UN Charter, Article 1 (1).
[100] *Id*., Article 2 (4), whereas "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".
[101] The invasion of Panama in 1989 and the occupation of the island of Grenada in 1986.
[102] Resembling the two major military campaigns of the ongoing "war on terror".
[103] The UN SC supported in its Resolution 1413 of 2002 explicitly military measures directed against terrorism with implicit consequences for the Afghanistan and Iraq campaigns. See Helaire, "The Law of Armed Conflict, The Right To Self-Defence, And The Operation In Afghanistan" in 41 *MLLWR* (2002) 121.
[104] Ratner discusses in his article "Jus Ad Bellum And Jus in Bello After September 11" in 96 *AJIL* (2002) 905-921 the legality of US action in Afghanistan and its response worldwide. He concludes that any non-UN Security Council approved (future) military action against Iraq would question the US's view of leading a justified war in self defence against al-Quaeda's terrorism. History has shown that the US is willing to take this risk. *Id*. 920.

wrongful act under peremptory law,[105] and permitting only few exceptions[106] to that rule. Consequently, state civil liability for such conduct could be the consequence.[107]

Further attempts to define aggression as an international crime failed: prior to the Rome Statute, Article 16 of the ILC *Draft Code of Crimes Against the Peace and Security of Mankind of 1996*,[108] individual criminal responsibility was established for the acts of participating or ordering the "planning, preparation, initiation or waging of aggression committed by a State". The Preparatory Commission for the International Criminal Court is still in the process of finding an adoptable definition of the international crime of aggression for the 2007 amendment of the Rome Statute.[109]

Prior to this, in 1974 the General Assembly of the UN passed the Resolution on a Definition of Aggression[110] which qualifies aggression as an international crime which "gives rise to international responsibility",[111] without further determining whether such responsibility referred to state civil liability or individual criminal responsibility.[112]

Consequently, the *Nicaragua* case[113] of the ICJ is so far the only case where the international crime of aggression committed by a state has been adjudicated at inter-state level since the IMT's judgments.[114]

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[105] Sassoli and Bouvier (n 89) 84. Cassese (n 7) 114 *et seq*.
[106] Like individual and collective self-defence or SC measures under chapter VII UN Charter.
[107] With only the IMT regarding violations of international treaties as criminal acts resulting in international criminal responsibility, see below chapter 2. See in this context the important *Nicaragua v. United States of America* judgment of the ICJ of 27 June 1986, in *ICJ Reports 1986* 14-150. The judgment refers to the above mentioned GA Definition of Aggression. The ICJ's findings on the US state responsibility for their acts of aggression against the state of Nicaragua by its active support of the right wing "contra" rebels resemble an important acknowledgement of the unlawfulness of the recourse to aggression, notwithstanding the fact that the ICJ is not a criminal forum.
[108] *UN Doc. A/51/332* in *ILC Report* (1996) 14-120.
[109] See discussion paper *PCNICC/2002/WGCA/RT.1/Rev.2* as proposed by the Coordinator of July 11, 2002.
[110] Resolution 3314 (XXIX) of 14 December 1974.
[111] *Id.* Article 5 (2).
[112] Cassese, (n 7) 112.
[113] *Nicaragua v. United States of America* (n 107).
[114] Cassese (n 7) 112 on the absence of criminal prosecution for the crime of aggression and its negative implication for international criminal law.

3.3.5. The crime of torture

Acts of torture or other cruel, inhuman or degrading treatment or punishment are regarded today as a true *jus cogens* norm of international (criminal) law. The international crime of torture became globally criminalized under the UN Torture Convention of 1984.[115] Prior to that, certain acts of inhumane treatment had already developed customary law status under international law.[116]

The protection from torture through the Torture Convention has become a true means of human rights protection: Article 1 explicitly establishes the connection of torture to the existence of official acts (or omissions) of a state, thus qualifying the offence as an exemplary "state" crime.[117] The crime of torture has therefore become an independent crime whose scope exceeds the sole criminalizing of certain "inhumane acts" as listed in connection with war crimes and crimes against humanity.[118]

Interesting in this context is the fact that torture was not incorporated into the Rome Statute as a fifth "core crime". Considering the nature of the criminalizing of torture as a safeguard against (domestic) state torture in the first place, one can assume that the fear of possible interference in the internal affairs of a state led to its exclusion from the Rome Statute.

The Torture Convention has already proved its worth in prosecuting gross human rights perpetrators. In the *Pinochet*[119] case in the UK, for the first time since Nuremberg a former Head of State was found to be, in principle, responsible for his alleged role in the

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[115] "International Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment" of 1984, 1465 *UNTS* 113-114.

[116] Ratner and Abrams (n 8) 117. This qualification can be further based on the observation that the crime of torture with its two elements, namely that of torture *strictu sensu* and other acts qualifying as inhumane and cruel, has found its way into every major instrument of international criminal law as an inherit element of other international crimes.

[117] "any act […] inflicted by or at the instigation […] of a public official or other person acting in an official capacity […], Article 1 of the Torture Convention.

[118] See Article 6 (b) and (c) of the IMT Charter; Articles 2 (a) and 5 (f) ICTY Statute; Articles 3 (f) and 4 (a) of the ICTR Statute; Articles 2, 3 SCSL Agreement and lastly, Articles 7 Section 1 (f) and 8 Section 2 (a) (ii) of the ICC Statute.

[119] For a general overview, see *UK House of Lords: In re Pinochet* in 38 *I.L.M* at 432 (1999). The detailed decision can be found in *Regina v. Bow Street Magistrates Stipendiary Magistrate, ex parte Pinochet Ugarte (No.3)* in 2 *All ER* 97, 109.

commission of serious international crimes[120] under the provisions of the Torture Convention and the British Criminal Justice Act of 1988.

Thus torture has become, as the US Judge Kaufmann stated in the remarkable *Filartiga v. Pena-Irala*[121] decision prohibited by the "law of nations" and its perpetrators being deemed, "like the pirate and slave trader before him, *hostis generis*, an enemy of all mankind".[122]

3.3.6. The crime of international terrorism

Certain common crimes like murder and arson that are committed by a state qualify as being terrorist in their nature because their inherent aim is to spread terror among the population and they have an underlying political or ideological motivation.[123] They can, however, become international crimes through their nature: either through the fact that they are transnational in respect of the nationality of the perpetrators and the place where the crimes have their effect, or through the magnitude of their impact on human life on a global scale. In this case, these domestic crimes may become international through their nature. Other circumstances besides their transnational nature which may lead to the internationalization of this type of crime may be the existence of a link with an international or internal armed conflict[124] or the existence of a foreign state's promotion or toleration of such criminal activities.[125]

Consequently, certain acts of international terrorism have already become criminalized under various international instruments on specific terrorist acts such as hijacking of aircrafts, aircraft sabotage, crimes against diplomats, taking of hostages, theft of nuclear material, sabotage of airport security, crimes against maritime navigation, sabotage of

[120] See below chapter 2 for the complex of the Pinochet case.
[121] 630 F.2d 876 (2d Cir. 1980). The case concerned civil liability for gross human rights violations such as torture, For a more detailed outlook on civil liability, see Part C chapter 2 of this research.
[122] *Id.* 890.
[123] Examples of such intra state terrorism can be found in the terrorist actions of the "RAF" in West Germany in the 1970s, the "IRA" in Northern Ireland and Great Britain until the 1990s and the "ETA" in Spain until today.
[124] See Cassese (n 7) 125. Dinstein defines seven distinguishing features of international terrorism in "Terrorism As An International Crime", 5 *IYHR* (1975) 57.
[125] Cassese (n 7) 129.

offshore platforms and the crime of terrorist bombing in general.[126] The most recent instrument on acts of international terrorism is the Draft Nuclear Terrorism Convention, which will after being adopted criminalize the crime of international nuclear terrorism on a global scale.[127]

There is, however, still no UN instrument on terrorism in force which criminalizes acts of international terrorism in general.[128] It is interesting in this context that Article 2 of the 1999 International Convention for the Suppression of the Financing of Terrorism[129] criminalizes the financial support of any of the crimes listed in its annex, which covers a broad range of international acts that have already been criminalized. This convention thus establishes individual criminal accountability for the act of financing terrorism in general.

But even the absence of international substantive rules on terrorism in general has not prevented the emergence of a *jus cogens* to prosecute terrorists worldwide. The international terrorist of today has become as much the *hostis humani generis* as the pirate in the past.[130]

At present, the prosecution of this "enemy of all humankind" still takes place before domestic criminal courts of the states affected by such terrorist attacks. The domestic prosecution of the terrorists involved in the US World Trade Centre Case of 1993[131] is a

[126] The International Convention for the Suppression of the Financing of Terrorism of 1999, UN Doc. A/RES/54/109, lists in its annex nine different international instruments on the various forms of international terrorism. It is noteworthy that this list is not final but according to Article 23 open for the addition of further UN instruments on international terror.

[127] See UN Press Release L/3085 of April 1st 2005 of the Ad Hoc Committee on Assembly Resolution 51/210 "AD HOC COMMITTEE ADOPTS DRAFT NUCLEAR TERRORISM CONVENTION, retrievable at http://www.un.org/News/Press/docs/2005/l3085.doc.htm

[128] The reason for this reluctance was probably the UN's reluctance to criminalize acts which were often employed by so called "freedom fighters" in the decolonization struggle in the 1970s and 1980s. This stance, however, changed with the mid-90s when the UN addressed the terrorism issue more aggressively as a consequence to the then emerging Taliban- Al Quaeda liaison in international terrorism. See Bantekas, "The International Law of Terrorist Financing" in 97 *AJIL* (2003) 315.

[129] (n 126).

[130] Dinstein (n 124) 56.

[131] On February 26, 1993, a bomb inside a minivan was detonated by islamist terrorists inside the underground garage of the World Trade Centre's North Tower (WTC), killing six people and injuring

prominent example of how individual states try to cope judicially with the global threat of international terror.

The Lockerbie Tribunal against two Libyan masterminds of the 1989 bombing of Pan Am Flight 103 was thus a novelty in respect of the chosen forum and the applied law[132] in that it chose an internationalized forum for its prosecution. The prosecuting of the international crime of terrorism can in addition to such domestic prosecution be prosecuted as a criminal act related to war crimes and crimes against humanity. The ICTY in The Hague prosecuted certain acts such as sniping and shelling of civilians, which were committed with the explicit intention of inducing terror in the civilian population, as war crimes.[133]

As a consequence to the present legal situation, states affected by terror resort increasingly to preventative military and retaliatory means that remain doubtful under international human rights law. The USA provides a contemporary example of this: the 9/11 terrorist attacks on the USA by mostly Saudi-born terrorists on 11 September 2001[134] led to the present global US "war on terror" as a continuous state of war.[135] So far, the war against terror has seen two military campaigns of doubtful lawfulness under international law. The increased US involvement in counter-insurgency operations worldwide, operations and security efforts of different kinds affecting nearly all fields of modern society, has become almost routine[136] and includes the use of questionable means

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dozens others. Six Islamic terrorists were convicted for this "WTC I" attack in 1997 and 1998 and sentenced to prison sentences of 240 years each.

[132] The "Lockerbie" court was a Scottish court sitting in Camp Zeist, the Netherlands. This internationality of the judicial forum had been the requirement of the Libyan government for the extradition of the two prime suspects. The Libyan intelligence agent Abdelbaset Ali Mohamed (a.k.a. al Megrahi) was found guilty of murder and sentenced by the court to a minimum of 20 years imprisonment in Berlinie prison in Scotland in January 2001. His appeal was dismissed. See *Scottish High Court of Justiciary at Camp Zeist (The Netherlands): Her Majesty's Advocate v. Al Megrahi* of January 31, 2001 in 40 *ILM* (2001) 582.

[133] See Indictment in *The Prosecutor v. Galic* (Case No. IT-98-29-1), Cassese (n 7) 128, Fn. 25.

[134] Also referred to as "WTC II" attack.

[135] This situation leads to the paradox, where the Bush Administration on the one hand utilizes the rhetoric of war since September 11, 2001, while on the other hand the same Administration denies the detainees the status of prisoner of war as stipulated under the 3rd Geneva Convention (Geneva Convention relative to the Treatment of Prisoners of War). See Strydom and Bachmann "The case of the Guantanamo Bay detainees in United States (and other) courts" in 2 *TSAR* (2004) 294 *et seq.*

[136] *Id.*, cf also the creation of the Department of Homeland Security in 2002 with its manifold authorities in respect to domestic security. For an overview of the different homeland security measures see Appendix:

such as the indefinite detention of alleged terror suspects as so-called enemy combatants in US military installations[137] with the widespread use of torture and coercion for the purpose of intelligence-gathering.[138] The danger of the US becoming itself a promoter of a form of global terror has arisen as President Bush II's volatile response to Islamist terror changed the original war on terror into US state terror itself.[139]

4. FORMS OF CRIMINAL RESPONSIBILITY

4.1. State criminal responsibility

State responsibility for international crimes[140] is a concept of international public law which still awaits implementation. With its legal roots originating in the law of international torts and remedies, state criminal responsibility is therefore in its nature closely linked to the idea of civil liability, which prescribes financial reparations as a remedy. Consequently, examples of this concept of state responsibility[141] in history originated from a practice among the warring nations of all ages to impose on the defeated side a system of state financial accountability in order to compensate the winning side for its war efforts and to punish the losing party for its failure.

September 11 and America's Response at http://www.dhs.gov/interweb/assetlibrary/nat_strat_hls.pdf. See also Ratner (n 104) 905; Murphy "Contemporary practice of the United States relating to international law" in 96 *AJIL* (2002), 237.

[137] *Id.*, for a comprehensive legal analysis.

[138] The confidential *Article 15-6 Investigation of the 800th military Police Brigade*, the so called "Taguba" report, which investigated torture and other war crimes, allegedly committed by US military personnel assigned to guard duty in detention facilities, found that US Army soldiers had committed "egregious acts and grave breaches of international law". The report can be retrieved at http://news.findlaw.com/cnn/docs/iraq/tagubarpt.html. Following the investigations, disciplinary action against military personnel with command authority had been taken; interestingly, only the lower ranks had been subjected to court martials. For more information on the US military's use of coercive methods, see AMNESTY INTERNATIONAL PRESS RELEASE *USA: Pattern of brutality and cruelty -- war crimes at Abu Ghraib*, AI Index: AMR 51/077/2004 (Public) News Service No: 118 of May 7 2004, retrievable at http://www.amnesty.org and Human Rights Watch "GIs Against Torture" of March 13, 2005 retrievable at http://hrw.org/english/docs/2005/03/14/afghan10320.htm

[139] Chomsky *Hegemony or Survival-America's Quest For Global Dominance* (2003), 136 *et seq.*.

[140] As so called "serious breaches of international law".

[141] The terminus "state responsibility" is used here in respect of later remedies and not in the sense of authorship for international acts of armed attack or terrorism as defined by the International Law Commission. See International Law Commission "State Responsibility: Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts" General Principles pt. 1 & 2 UN Doc. A/CN.4/L.602/Revs.1,2 (2001).

Today, international state responsibility places a duty on the violating state to compensate for violations of inter-state obligations and other breaches of international (treaty and customary) law.[142] This principle of state liability for an international delict was first established in the *Chorzow Factory* decisions[143] of the Permanent Court of International Justice (PCIJ)[144] in 1927 and 1928.

This general principle of state responsibility was modified in respect of breaches of international humanitarian and human rights law where a state becomes strictly civilly liable for any acts committed by its organs in violation of these humanitarian and human rights obligations.[145] However, the right of an individual victim of human rights atrocities to an enforceable individual claim for financial redress is at present still underdeveloped in the major human rights instruments.[146] Even with a *de facto* recognition of such a right to financial redress under the three major human rights regimes,[147] which grant in

[142] With the following requirements: the existence of such a state obligation, the violation of this obligation and damage caused by this violation; see Shaw (n 43) 696.

[143] See on the topic of the international obligation to make reparations for breaches of international law, *Chorzow Factory* (Ger. v. Pol.) decision (Jurisdiction) of July 26, 1927 in 9 *PCIJ* (ser. A) (1927) 21; on the nature of reparations, *Chorzow Factory* (Ger. v. Pol.), decision (Indemnity) of September 13, 1927, 17 *PCIJ* (ser. A) (1928) 29.

[144] The PCIJ was the legal predecessor of the UN International Court of Justice, the ICJ.

[145] The 2001 Draft Articles on "Responsibility of States for internationally wrongful acts" establish in its Article 40 para 1 state responsibility for breaches of *jus cogens* violations with the further consequence of the duty to make reparation. Human rights atrocities and breaches of international humanitarian law such as aggression, slavery, genocide, racial discrimination, apartheid and torture are counted among these breaches of peremptory norms, see Commentaries to the draft articles on Responsibility of States for internationally wrongful acts at 283-84 and 291 in *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chapter IV. E.2).*

[146]See e.g. "Everyone has the right to an effective remedy … granted him by the (national) constitution or law", Article 8 of the Universal Declaration of Human Rights, G. A. Res. 217 A, UN Doc. A/RES/271 A (III) (1948), or Article 41 of the Protocol No. 11 of the ECHR which empowers the European Court of Human Rights to grant at least partial financial compensations in cases where the domestic legislation of the affected member state permit such remedies, see Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms in 33 *ILM* (1994) 960, 963.

[147] The European human rights system under the ECHR, the Inter-American human rights system under the American Convention on Human Rights and lastly the African human rights system under the African Convention on Human and Peoples' Rights. See part A above and part C below for more details.

general[148] financial compensation for human rights violations, the practice of actually granting such remedies remains at a low level.[149]

Any further legal development of state civil accountability into criminal state responsibility for international crimes has not yet materialized. The Nuremberg Charter established the principle of criminal responsibility of organizations under its articles 9-11. The four prosecuting powers indicted six groups or organizations as being criminal under article 9:[150] the Nazi government, the leadership of the Nazi Party, the SS, the Gestapo, the SA and the General Staff and High Command of the German Armed Forces.[151] These initial indictments included the whole political and military leadership of the German Reich. The scope of these indictments, which criminalized basically a state with its organs and agents *in toto*, amounts to *de facto* state criminal responsibility. The Nuremberg tribunal confirmed the indictments in three cases and declared the leadership of the Nazi Party, the SS and the Gestapo as resembling criminal organizations, thus establishing individual criminal responsibility for their respective members.[152]

Following Nuremberg, other attempts to establish an international legal regime on state criminal responsibility followed.

The explicit recognition of state criminal responsibility for serious breaches of obligations under international law was proposed in Article 19 of the ILC' s 1980 Draft

[148] See Article 63 of the American Convention on Human Rights of 1969, 1144 *UNTS* 123. Article 27 s. 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. The Protocol can be retrieved from http://www.africa-union.org/home/welcome.htm under [treaties].
[149] See Tomuschat, "Reparations for Victims of Grave Human Rights Violations" in 10 *TJICL* (2002) 157, 162ff. for a comprehensive evaluation of the present practice.
[150] The relevant provision reads: "At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.", Article 9 IMT Charter.
[151] See Jørgensen (n 18) 61-2.
[152] *Id.*, 19.

Articles on State Responsibility.[153] Besides this proposal, the concept of state criminal liability remains an unsolved and even disputed topic.[154]

However, the example of the Treaty of Versailles with its enormous financial obligations and other sanctions for the defeated Germany can in fact be regarded as an early form of "criminal" state responsibility considering the fact that it had been states' custom for centuries in European warfare[155] not to "cripple" a defeated state through excessive post-war demands in order to preserve the delicately balanced power system in Europe.[156] This tradition of not annihilating a defeated enemy came to an end in 1919 with the (second) Peace Conference of Versailles, when Germany became subject to financial and territorial reparations unknown in Europe since the Middle Ages.[157] The burdening of a whole nation with outrageous reparations for generations to come sowed to some extent the seed for the rise of Nazi Germany with its later legacy.[158]

In addition to these historic examples of state civil liability, the additional concept of individual civil liability for international human rights violations could develop into an important means of human rights protection through financial deterrence. Part C describes the concept of civil accountability for human rights violations in more detail.

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[153] See Reports of the International Law Commission on the work of its thirty-second and fiftieth session, UN Doc. A/35/10 reprinted in 1980 [II] 2 *ILCYB* 32 and UN Doc. A/53/10 (1998).
[154] See Ratner and Abrams (n 8) 16.
[155] At least since the two Congresses of Vienna of 1814 and 1815, where the post-Napoleonic shape and nature of Europe was designed by the then existing European powers. The aim of the Congresses' policy was to install a system of checked power balance between the European states thus legitimizing the reality created by Napoleon's restructuring of Europe between 1804 and 1813.
[156] An example for this policy of moderate war reparations is (the first) Peace Conference of Versailles in 1871 where the German Reich was proclaimed after the territorial inclusion of the French Department de Elsass-Lothringa. The French Republic was left infuriated, probably, but not vitally crippled and still in possession of all its colonies. Other examples of moderate reparations were the Crimean War of 1854-1856 and the Russo-Japanese War of 1906 which all lead to moderate territorial and financial reparations.
[157] Over 40 percent of the Reich's original territory, in addition to all German colonies of that time, were sequestered in order to punish the German people for a war guilt that had been determined solely by the victorious powers. Originally, the financial war dept would have affected the seventh generation of Germans.
[158] These acts of victors' justice were justified with the alleged sole German "war guilt" as established and imposed under Article 231 of the Peace Treaty of Versailles.

4.2. Individual criminal responsibility

Individual criminal accountability presently remains the strongest means of deterrence in the ongoing struggle to protect human rights. Since the days of the Nuremberg tribunals, nothing has changed the notion that crimes are committed by individuals and that only the establishment of a global regime of individual criminal responsibility will deter future human rights violators. Consequently, the concept of individual criminal responsibility has developed through a merger of elements from international public law, namely human rights and humanitarian law[159] together with the penal prescriptions of domestic penal law. This concept finds its most recent written acknowledgement in the 1996 ILC's Draft Code of Crimes Against Peace and Security of Mankind[160] and the 1998 Rome Statute of the International Criminal Court.[161]

The first attempt to establish individual criminal responsibility (in addition and as a supplement to the civil accountability of the German state described above) was the unsuccessful attempt of the World War I Allies, the so called Entente powers, to prosecute members of the German Imperial armed forces for alleged war crimes.[162] The German Emperor Wilhelm II was to be tried before an International Tribunal[163] for his alleged responsibility in waging an aggressive war as "a supreme offence against international morality and the sanctity of treaties",[164] particularly against the neutral Kingdom of Belgium in 1914. Other German individuals accused of war crimes were to be tried before separate military tribunals of the Allies[165] for the following "criminal acts against the nationals of one of the Allied and Associated Powers":[166] crimes against humanity directed against non-combatant civilians, and war crimes under the two Hague

[159] Shaw (n 43) 234.
[160] UN Doc A/51/10, Article 2, p. 9.
[161] See Article 25 Section 2 of the ICC Statute of the International Court of 17 July 1998.
[162] Defined in Articles 227 to 230 of the Treaty of Versailles as acts "in violation of established laws and customs of war and the elementary laws of humanity", which were defined by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties in its "Report Presented to the Preliminary Peace Conference, March 29, 1919" reprinted in 14 *AJIL* (1920) 95, 115. Ratner and Abrams (n 8) 6.
[163] See Article 227 of the Treaty of Versailles.
[164] Holland, where the German Emperor was exiled to, declined to extradite him on the grounds that the crime he was accused of did not constitute an extraditable crime under Dutch law. The Emperor died eventually untried in 1941.
[165] See Article 228 of the Treaty of Versailles
[166] *Id*., Article 229.

Conventions on Land Warfare of 1899 and 1907.[167] Prominent examples of such war crimes were the unrestricted U-boat war, aimed at every vessel approaching the shores of Britain, and the first use of toxic gas as a weapon by Germany at the Western front in 1916.[168] The then German Weimar Republic was forced to accept a list of alleged German war criminals whose extradition was requested by the Allies. Public outrage in Germany, however, prevented German politicians from complying with these requests. As an acceptable alternative for the Allies' demand for criminal prosecution, Germany agreed to try the alleged war criminals[169] before the German Reichsgericht of Leipzig.[170] As a direct consequence of this "compromise", an effective prosecution of German war criminals never took place.[171]

This failure to hold individuals accountable for war crimes, even as a one-sided and partial undertaking in respect of the selection of alleged offenders, certainly contributed to the later disregard for human life by major European powers in the years before and during World War II.

World War II cost the lives of approximately 55 million people, mostly civilian non-combatants, and saw the commission of widespread human rights atrocities on all sides. Nazi Germany's mass murder in its concentration and extermination camps and other human rights atrocities which were committed by its armed forces and security personnel mainly in Eastern Europe led to the establishment of the Military Tribunal of Nuremberg in 1946.[172]

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[167] As penalised under Article 228 Treaty of Versailles. The codification of the *jus in bello* in the two Hague Conventions outlawed certain conduct in war but did not establish individual criminal responsibility *per se*.

[168] For an excellent description of World War I and its phases, see Churchill, *The World Crisis 1911-1918*, (1923).

[169] A list with the names of high ranking German military who were accused of war crimes was handed over to the German representative at the Versailles accords in February 1922.

[170] The German Supreme Court of the Reich sitting in Leipzig.

[171] Out of the original 896 alleged war criminals as indicted by the Allies, only 12 were tried, of whom 6 were acquitted. Even those few verdicts were regarded by the German public as resembling victor's justice. See Schwarzenberger (n 14) 79.

[172] With the International Military Tribunal for the Far East in Tokyo (IMTFE), which was the forum for the prosecution of Japanese human rights atrocities committed in the Far East.

With the so-called "Principles of the Nuremberg Tribunal", the idea of individual criminal responsibility was for the first time acknowledged as a binding principle of international law.[173]

Even with the legacy of Nuremberg and its impact on the further development[174] of the codification of international humanitarian law and international human rights law, the doctrine of individual criminal responsibility for gross human rights violations was never recognized by the world community as a guiding principle of criminal law in the years of the "Cold War".

It took another four decades of widespread gross human rights atrocities worldwide[175] before the international community finally committed itself to hold gross human rights offenders criminally accountable. The 1990s brought important new developments for the development of the doctrine of criminal accountability: firstly, the establishment of the two UN *ad hoc* criminal tribunals for Yugoslavia and Rwanda;[176] secondly, the growing resolve of domestic courts worldwide to prosecute international crimes[177] regardless of the official status of the accused; and, thirdly, the establishment of the permanent International Criminal Court in the Hague in July 2002.

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[173] See the Nuremberg Principles of 1946, adopted by UN GA RES.174 (UN.Doc.A/180), as the first international written manifestation of individual criminal accountability. Principle I declares "any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment." Additionally, the Nuremberg Charter established criminal responsibility of a group in its Article 9. For the NC' s impact on international law see Cassese (n 7) 332-333 and Report of the International Law Commission Covering its Second Session, 5 June-29 July 1950, UN Doc A/1316, 11-14.

[174] See e. g. the codification of humanitarian law in the four Geneva Red Cross Conventions of 1949, of human rights law in the 1948 Genocide Convention and the 1948 Universal Declaration of Human Rights.

[175] Examples are China's Mao Tse Dong's "Cultural Revolution" with its tens of millions of victims in the 60s and Cambodia's Pol Pot's terror with estimated two million people killed between 1975 and 1979.

[176] The International Criminal Tribunal for the former Yugoslavia, ICTY, was established in 1993 by SC Resolution 827 and the International Criminal Tribunal for Rwanda, ICTR, was established in 1994 by SC Resolution 955.

[177] As e.g. the criminal proceedings against the former president of Chile, Augusto Pinochet, for alleged crimes of murder, torture and disappearances before UK courts. See final decision of the House of Lords in *R v Bow Street Stipendiary Magistrate, Ex P Pinochet (No 3)* [2000] in 1 AC (2000) 147. On the other hand there is the recent English Bow Street's Magistrate Court's refusal to issue an arrest warrant against Zimbabwe's dictatorial president Robert Mugabe because of immunity as a present Head of State. This decision follows the ICJ judgement in the *Democratic Republic of Congo v. Belgium*, *Case Concerning the Arrest Warrant of 11 April 2000*, retrievable at http://www.icj-cij.org,which effectively limited the prosecution of such crimes before domestic, national courts.

The Nuremberg principles on individual criminal responsibility for gross human rights violations were reaffirmed by the International Criminal Tribunal for Yugoslavia (ICTY) in its *Tadic*[178] judgement of 1995. The further adjudication of these two *ad hoc* criminal tribunals led to the universal recognition that the individual offender who commits human rights atrocities, regardless of whether he acts as an organ or agent of a state or in a private capacity, is criminally responsible for those crimes either before domestic courts under incorporated international treaties[179] and/or customary international law, or alternatively before international courts established under an international treaty.

4.3. Corporate criminal responsibility

History provides many examples of a direct involvement and responsibility of corporations in the commission of human rights atrocities. The exemplary prosecution of German industrialists before US Military Tribunals for their complicity in the commission of war crimes and crimes against humanity by using slave labourers in their factories during World War II is one rare example[180] where individual criminal conduct in connection with corporate operations was addressed. However, these trials addressed the criminal responsibility of individual perpetrators who acted within their corporate powers and authority and not of the business entities themselves. The Nuremberg tribunals failed to indict the main German corporations, which were involved in the slave labour complex, as criminal organizations under Articles 9-11 of the Nuremberg Charter and to prosecute them as legal entities accordingly. Consequently, the legacy of Nuremberg failed to establish an independent principle of corporate criminal responsibility in international criminal law.[181] Even the growing determination in international law in the 1990s to prosecute the genocides of Yugoslavia and Rwanda did

[178] *The Prosecutor v. Tadic a/k/a "DULE"*, ICTY Case No. IT-94-1-AR72, October 2, 1995 in para 128.
[179] See van der Vyver (n 11) 295. Examples are the English Criminal Justice Act of 1988, Chapter 33, para 134; the US provisions in 18 U.S.C: § 2340A (1994) as domestic implementations of the 1984 Torture Convention; the Belgium "Law of 10 February 1999", reprinted in *Moniteur Belge*, March 23, 1999, 9286 incorporating the 1948 Genocide Convention.
[180] See e.g. *U.S. v. Friedrich Flick* in VI *Trials of War Criminals Before The Nuremberg Military Tribunals Under Control Council Law No.10* (1950), *U.S. v. Alfred Krupp* in IX *Trials of War Criminals Before the Nuremberg Military Tribunal* 1327ff (1949) *and U.S. v. Krauch, et al., The I.G. Farben* Case in VIII *Trials of War Criminals Before the Nuremberg Military Tribunals*, iii-iv (1952).
[181] As supplement and extension to the criminalization of certain Nazi organizations and their members such as the Leadership of the Nazi Party, the SS and the Gestapo under Article 9 NC,(n 150) and Jørgensen (n 18) 61-2.

not end this exclusion of legal persons from criminal prosecution for international crimes and the impunity of their complicity in gross human rights atrocities. To date there is no recognition under international law of an independent principle of corporate criminal responsibility for the commission of gross human rights atrocities to supplement the existing principles on individual criminal responsibility.[182] Besides this, there are only a few domestic provisions which allow for the criminal prosecution of business entities[183] for – mostly – corporate law misconduct. As a supplement and possible alternative the example of the US legal system may serve: human rights lawyers have helped to develop before federal courts a civil liability adjudication on corporate human rights violations under the Alien Torts Claims Act (ATCA) since 1996.[184]

5. Conclusion

The four serious international crimes, as defined in the Rome Statute, resemble a new body of international criminal law which merges different sources of international public law: humanitarian law, which takes within its purview war crimes and crimes against humanity, was supplemented by human rights law with the crime of genocide. The (not yet defined) crime of aggression as a supreme offence against the sovereignty of states concludes this legal development by stigmatizing the use of force, which is often the necessary precondition for the commission of the former crimes. Adding the crimes of torture and terrorism to this selected list of international crimes, a collection of international crimes is compiled which covers the widest possible range of human rights

[182] Neither the new International Criminal Court (ICC) nor the International Criminal tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), are mandated by their statutes to prosecute business entities. There was, however, a futile French proposal during the 1998 Rome Conference on the ICC which called for an inclusion of legal persons as well. See below chapter 2, 2.2.2.

[183] Such an example is Section 332 of the South African Criminal Procedure Act 51 of 1977 which renders legal persons criminally liable for both statutory and common law offences. It further contains the provision that directors and servants of a corporation may be prosecuted for criminal acts of the corporation. See on corporate criminal responsibility and the question of the *mens rea* element under English common law the case *Meridian Global Funds management Asia Ltd v. Securities Commission* [1995] 2 *AC* 500.

[184] 28 U.S.C. § 1350. Part C focuses on this form of accountability and analyses its working methods within the context of human rights litigation.

and humanitarian law violations, which as *jus cogens* norms resemble the "core crimes" of international criminal law.[185]

[185] The ILC regards these international crimes as *jus cogens* violations of international law, see Commentaries to the draft articles on Responsibility of States for internationally wrongful acts at 283-84 in *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chapter IV. E.2)*

CHAPTER 2

THE PROSECUTION OF INTERNATIONAL CRIMES

1. THE CHOICE OF FORUM

Today, the prosecution of the core crimes may in principle take place before a variety of forums: two international "ad hoc" tribunals,[186] one permanent tribunal,[187] mixed (hybrid) legal courts[188] and domestic courts.[189]

This chapter gives an overview of the possibilities of prosecuting international crimes before these various forums and evaluates their effectiveness for the protection of human rights.

1.1. International Courts

The jurisdiction of international courts[190] derives directly from SC Resolutions and/or multilateral treaties. The establishment of the ICTY and ICTR were UN Chapter VII actions,[191] undertaken by the UN SC as a direct response to a threat to peace and as such freed from the necessary consent of the affected states.[192] Earlier, the International Military Tribunal at Nuremberg, as a legal predecessor to the current international tribunals, was imposed by a so-called "Agreement"[193] on defeated Germany with an obvious and inherent disregard and indifference to its sovereignty and consent.[194]

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[186] The ICTY in the Hague and the ICTR in Arusha as present examples of contemporary "ad hoc" tribunals. The IMT of Nuremberg resembles a historical predecessor.

[187] The International Criminal Court (ICC) in The Hague, the Netherlands.

[188] The Special Court for Sierra Leone, "SCSL", is such an example of a mixed legal court of domestic and international character and has its legal source in the terms of which it was established.

[189] Crimes against humanity committed in World War II by German and non-German perpetrators have been subject to prosecution before various domestic penal courts in Europe and Israel.

[190] With its three elements of *ratione materiae*, *ratione personae* and *ratione temporis*.

[191] Chapter VII of the UN Charter provides for measures in the connection to "Action with Respect to Threats to the Peace, breaches of the peace, and acts of aggression".

[192] Chapter VII measures can thus overrule sovereignty of the state in question. See *THE PROSECUTOR v TADIC JUDGEMENT*, para 27, 1162.

[193] The (London) Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 82 *UNTS* 280, entered into force Aug. 8, 1945; it was concluded by the four victorious powers, the USA, Great Britain, France and the Soviet Union.

[194] The Austro-American academic Kelsen argued in 1945 that through the assumption of the unlimited legislative, judicial and administrative jurisdiction over the German territory and its people after the factual "debellatio" of Germany through the four victorious powers, the absence of an international treaty with Germany was neglectable. Hans Kelsen (n 29) 11.

Breaking with the tradition of such forcibly imposed tribunals, the Special Court for Sierra Leone was established as the result of a genuine cooperation[195] between the UN and the (affected) state in prosecuting human rights violations before an international hybrid forum. The principle of voluntary accession as a precondition for the exercise of jurisdiction follows the International Rome Statute of the International Criminal Court of 1998, which allows for only one "forced" exercise of jurisdiction option as stipulated by Article 13 (b).[196]

The Iraqi Special Tribunal (ISTCH), which was established by the US-led Coalition Provisional Authority in Iraq on 10 December 10 2003,[197] is a modern example of a unilaterally established and imposed forum of victors' justice which finds its counterpart only in the Nuremberg and Tokyo Tribunals.

1.2. National Courts

The right of an individual state to exercise criminal jurisdiction as "the authority of states to prescribe their law, to subject persons to the adjudication in their courts and other tribunals, and to enforce their law, both judicially and non-judicially"[198] derives directly from a state's sovereignty and is as such a vital and central feature of its state power.[199]
This exercise of judicial power, however, contains the strong likelihood of an infringement of another state's sovereignty. The following principles[200] in international law establish criminal jurisdiction of domestic national courts: the territoriality

[195] See *Agreement between the United Nations and the Government of Sierra Leone* pursuant to Security Council resolution 1315 (2000) of 14 August 2000. UN Doc S/RES/1315.
[196] Article 13 (b), which allows the referral of "a situation in which one or more of such crimes appears to have been committed […] to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations". The recent referral of the Darfur, Sudan, human rights crisis to the ICC on 31st March 2005 by SC Resolution 1593 (2005) is such an example. See below under chapter 2.
[197] The text of the Statute of the Iraqi Special Tribunal can be found in 43 *ILM* 231 (2004). Organisation and jurisdiction of the Tribunal would allow the characterization of it as a domestic court as well. Considering the US domination in the court's establishment process, the term domestic seems to be inappropriate to describe a creation which has been imposed.
[198] See Joyner, "Arresting Impunity: The case for universal jurisdiction in bringing war criminals to accountability" in 59.4 *LCP* (1996), 163.
[199] See Shaw (n 43) 572.
[200] See e.g. "The Harvard Research Draft Convention on Jurisdiction With Respect to Crime" in 19 *AJIL* (1935) 443; Shaw (n 43) 579, Cassese (n 7) 277 *et seq.*, Ratner and Abrams (n 8) 161.

principle,[201] the nationality principle,[202] the passive nationality principle[203], the protective principle,[204] and finally the universality principle.[205] Among these, the passive nationality principle and the universality principle have a particular relevance for the prosecution of international crimes.

In the case of the former principle, the prosecuting state bases its jurisdiction on the ground that its citizen was the victim of an international crime. The importance of this principle of jurisdiction grew with the increase in terrorist activities directed against Western states in the last twenty years and led to the codification of various international and national law instruments criminalizing different terrorism-related crimes. The International Convention for the Suppression of the Financing of Terrorism of 1999[206] is one of the recent international instruments that acknowledges this principle.[207] At present, the USA, France and Belgium[208] have incorporated the passive nationality principle into their national laws as a ground for jurisdiction in direct response to terrorism.[209]

Universal jurisdiction over international crimes constitutes "criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the perpetrator, the nationality of the victim or any other connection to the state exercising such jurisdiction".[210] This definition follows therefore the historical practice in international law in respect of pirates, who were seen as *hostis humanis*

[201] Referring to the place of the commission of the crime.
[202] Referring to the nationality of the offender.
[203] Referring to the nationality of the victim; this principle is also known as the passive personality principle, see Ratner and Abrams (n 8) 161.
[204] Referring thus to certain interests and other connections between the state and the crime.
[205] Which referred originally solely to the custody connection of the offender. The *Lotus* case between France and Turkey in 1927 before the Court of International Justice confirmed this restricted application, 10 *PCIJ* Ser. A (1927). The restriction to the custody connection became obsolete with the Nuremberg legacy. See the *Eichmann* case where universal jurisdiction was regarded as deriving from the seriousness of the offence alone, *Attorney General of the Government of Israel v. Eichmann*, District Court of Israel in 36 *ILR* (1961) 5.
[206] International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly December 9, 1999. *A/C.6/54/L.2*, annex I.
[207] Cassese (n 7) 283 Fn. 9 with a list of international instruments incorporating the passive nationality principle.
[208] See §§ 2331 and 2332 of the US Federal Criminal Code and Article 113-17 of the French Code Penal, see Cassese (n 7) 283.
[209] *Ibid.*
[210] See Principle 1(1) of the *Princeton Principles* (n 36).

generis[211] and whose crimes as *delicta juris gentium*[212] were regarded as being universally prosecutable. International law has added to the historical crime of piracy crimes against peace/aggression, crimes against humanity, genocide, torture and international terrorism as international crimes prosecutable under universal jurisdiction.[213]

1.3. Choosing the appropriate judicial forum

Choosing the right forum for criminal prosecution is important for the success of the proceedings. Failure to do so can lead to the questioning of the legitimacy of the criminal proceedings.[214] Criminal prosecutions before domestic forums or before international tribunals have their advantages and disadvantages in regard to their future acceptance and legitimacy.

International tribunals illustrate the international community's apparent growing intolerance of serious international crimes that can be committed with impunity. In such "international" proceedings, existing international norms are applied, "tested"[215] and further developed. As a consequence, important questions of international law for the global legal community can thus be addressed and their responses tested. International tribunals are often the only way to "deliver" justice in cases where states have disintegrated or were broken up, with the consequence that their law enforcement bodies vanished or were rendered ineffective.[216] Internationalized proceedings are especially important when the context of the case demands the prosecution before an impartial, non-

[211] "Enemy of all humankind".
[212] "Crimes under the law of nations".
[213] See Shaw (n 43) 594 Fn. 95 with further sources.
[214] The majority of Japanese still refuses to acknowledge their country's and their own responsibility for the human rights' atrocities committed during World War II and therefore questions the legality of the Tokyo trials. See McCormack "Their Atrocities and Our Misdemeanours: The Reticence of States to Try Their "Own Nationals" for International Crimes" in Lattimer and Sands (eds.) *Justice for Crimes Against Humanity* (2003) 115.
[215] The legal development of the core crimes in the consecutive codifications under the various courts charters and statutes, as shown in chapter 2 supra.
[216] As e.g. in the case of states such as Rwanda, Bosnia and Sierra Leone. The example of Iraq, where former president Saddam Hussein is being tried since 2005 before the Iraqi Special Tribunal (ISTCH) documents these difficulties. In March 2005 an appointed judge was killed by Iraqi insurgents. See "Iraqi Tribunal Judge Assassinated in Baghdad-Car Bombs Rock Baghdad, Killing 6 Iraqi Soldiers" *Washington Post*, March 2, 2005, Page A 12.

domestic forum.[217] International *fora* since the Nuremberg tribunal have developed a mixed procedural model, with the common law adversarial model as the dominating element.[218] Consequently, the Anglo-American approach of safeguarding the rights of the accused is an essential feature in current proceedings before the two *ad hoc* tribunals. This fact alone creates confidence in their adjudicating work in an otherwise strongly emotional and very often prejudiced domestic environment. Choosing an international forum can be especially important in the context of transitional justice settings where the existence of country-specific historical, regional and socio-economic factors strongly indicate that an internationalized forum[219] would be the preferred judicial venue.

On the other hand, prosecution before national courts establishes a direct and visible link for the people most affected by the violations: victims, relatives and perpetrators can witness the progress of justice, thus establishing a public acknowledgement of the events in question in the direct vicinity of the *locus crimini*.

The lack of such a link to the actual "killing field" has created an unfortunate distance between the work of the ICTY and the people of Rwanda,[220] with the consequence that the Tribunal's future success in prosecuting core crimes becomes questionable. Especially when prosecuting mass human rights violations (as, for example, in Rwanda), the use of domestic procedures can assist in coping with the enormous volume of cases.[221] Choosing a domestic forum might be further advisable in transitional state

[217] See e.g. the examples of the former Yugoslavia, Rwanda and Iraq.
[218] Cassese (n 7) 376-88.
[219] Note in regard to the former Yugoslavia, the situation in the Kosovo province where criminal proceedings before domestic courts against alleged human rights perpetrators of the 1998/1999 conflict are internationally regarded as partial and biased. See OSCE Report *The Development of the Kosovo Judicial System*, January 2000. For a comprehensive list of studies about the inconsistencies and selectivity of the different national prosecutions of international crimes, see McCormack (n 214) 107.
[220] See e. g. Kritz, "Coming To Terms With Atrocities: A Review Of Accountability Mechanisms For Mass Violations Of Human Rights" in 59.4 *LCP* (1996) 131.
[221] It is interesting to note that the exercised two way prosecution of the Rwandan genocide through the ICTR and domestic courts have not solved these problems but even worsened by factually establishing a parallel system of two concurring and competing jurisdictions.

scenarios where the credibility of the new political leadership might be judged by the way in which it prosecutes the perpetrators of the old, now vanished system.[222]

Considering these aspects, the choice of forum plays an important role in achieving international justice for human rights atrocities.

2. CRIMINAL PROSECUTION BEFORE INTERNATIONAL TRIBUNALS

2.1. TEMPORARY "AD-HOC" TRIBUNALS

2.1.1. THE INTERNATIONAL MILITARY TRIBUNAL OF NUREMBERG

2.1.1.1. Introduction

The establishment of the two post-World War II criminal *ad hoc* tribunals for the prosecution of the main war criminals of the Axis powers in Nuremberg and Tokyo established a new accountability mechanism for human rights atrocities.

The four main victors of World War II, the USA, Great Britain, USSR and France, decided to bring the perpetrators of the defeated enemy to justice before their "own" international – albeit allied – tribunal,[223] with the prosecution following the explicit objective that "justice and not revenge" should be the main motive behind it. Consequently, the US view that the defendants were to be granted a fair trial, dominated.[224] Or, as US chief prosecutor Jackson stated in his well-known opening

[222] The German Mauerschützenprozesse, "Berlin Wall Guards Trials", where border guards of the former GDR were tried for acts of murder and manslaughter, committed at the former inner German frontier, were criticised for either resembling *retroactive justice* or for being too lenient. See Ott "Did East German Border Guards Along The Berlin Wall Act Illegally" in 34 *Israel Law Review* (2000) 352-72 for a summary on the prosecution of these crimes. *Id.*, 371 for additional sources.

[223] See United Nations War Crimes Commission, *Law- Report of Trials of War Criminals*, (1949) p. IX referring to the fact that the Leipzig Court cases had shown that the prosecution of war criminals before their own domestic courts did not achieve the desired effects in respect of establishing the factual context of the committed crimes and deterrence.

[224] See Articles 1, 16 of the Nuremberg Charter. It was mostly the USA that urged the other three powers to follow this principle (and that the understanding of justice somehow differed among the powers: e.g. did the British favour the idea of executing all German leaders without a formal trial. See Hogan-Doran "Aggression as a crime under International law and the Prosecution of Individuals by the proposed International Criminal Court" in *NILR* (1996), 330. Stalin favoured this procedure as well but suggested a pro forma trial in the tradition of the Soviet purgation trials of the thirties. See Steyn "Guantanamo Bay: The Legal Black Hole" in 53 *ICLQ* (2004) 9 Fn.33.

address, “the four great nations flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of law”.[225]

The International Military Tribunal[226] (IMT) at Nuremberg was established[227] following the joint declaration[228] of the four victors in their London Agreement of 8 August 1945 “for the Prosecution and Punishment of Major War Criminals of European Axis”.[229] The tribunal’s main purpose was the “just and prompt” trial and punishment of the major war criminals of Germany.[230]

The following paragraphs describe the law of the tribunal of Nuremberg, the main criticism of its legality and partiality, its impact on international law and whether there could have been alternatives to the IMT.

2.1.1.2. Jurisdiction and sentencing

The Tribunal had jurisdiction *ratione materiae* under Article 6 (a) to (c) over the following three offences: crimes against peace, war crimes and crimes against humanity. In Article 6 the Statute clarifies that this law constituted “new” retroactive law which was to be unaffected by existing domestic provisions.[231]

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[225] See Heydecker and Leeb, *Der Nürnberger Prozeß* (1958), 534.
[226] Judges and prosecution were made up by Allied personnel. This fact alone questions the nature of the IMT as being “international”.
[227] The Tokyo Tribunal was established in 1946 and had the jurisdiction over crimes committed by the Japanese in the Far East. Its jurisdiction, procedure and powers followed the NC. It sentenced twenty-five Japanese war criminals out of the original twenty-eight accused. See Ratner and Abrams (n 8) 189.
[228] The Allied Powers had already declared in their Moscow Declaration of 30 October 1943 “Concerning Responsibility of Hitlerites for Committed Atrocities” their intent to try all German war criminals.
[229] The (London) Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 82 *UNTS* 280, entered into force Aug. 8, 1945. The latter is referred to as Nuremberg Charter or “NC”, as well.
[230] *Id.*, Article 1.
[231] *Id*, Article 6 “whether or not in violation of the domestic law of the country where perpetrated.” See Renz “Völkermord als Strafsache. Vor 35 Jahren sprach das Frankfurter Schwurgericht das Urteil im großen Ausschwitz-Prozess”, Essay, retrievable at http://www.fritz-bauer-institut.de/texte/essay/08-00_renz.htm, 6 *et seq.*. This provision is also of relevance for the “mistake of law” defence, see below under 2.1.1.5.3.

The Nuremberg Charter excluded the admissibility of the defences of superior orders, command of law and act-of-state immunity,[232] thereby extending the IMT's jurisdiction *ratione personae* to former heads of state such as the last "Reichskanzler" of the Third Reich, Admiral Karl Dönitz.[233] The NC established not only individual criminal responsibility[234] but group responsibility as well.[235]

2.1.1.2.1. Crimes against peace

Article 6 (a) of the NC criminalized acts[236] which had been committed in connection with "waging a war of aggression" for e. g. the war against Poland in September 1939 or the attack on the "neutral" Denmark in 1940[237] as "a war in violation of the sanctity of international treaties".[238] Furthermore, the "participation in a common plan or conspiracy for the accomplishment of any of the foregoing" was punishable under Article 6 (a). Accused of this crime were members of the German Military High Command[239] as well as the political leaders who had been involved in the decision-making process before and during the war.

2.1.1.2.2 War crimes

Article 6 (b) of the NC[240] criminalized acts which constituted violations of the laws and customs of war at that time as defined in the two Hague Conventions of 1899 and 1907 and Geneva Conventions of 1929.[241] The definition of the NC included crimes such as

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[232] *Id.,* Articles 7 and 8.
[233] Who succeeded the "Führer" Adolf Hitler as Head-of-State after his suicide in April 1945.
[234] Article 6 NC.
[235] *Id.,* Articles 9 and 10. See chapter 1 on the different types of criminal responsibility.
[236] "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; […], Article 6 (a) NC.
[237] The war against France on the contrary could not qualify as a war of aggression because France had – together with Britain- declared war earlier on Germany on 3 September 1939 as a consequence of the German attack on Poland.
[238] The German attack on the USSR constituted a breach of the mutual assurance agreement of 1939, with the latter qualifying as a pact of non aggression.
[239] The OKW, the Oberkommando der Wehrmacht, the German Defence Force's then High Command.
[240] "War crimes": namely, violations of the laws or customs of war. The murder, ill-treatment and/or deportation and subjecting to forced labour of civilians in the occupied territories, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity resembled such crimes under Article 6 (b) NC.
[241] See above chapter 1 on the elements of humanitarian law.

murder, deportation to slave labour of civilians, murder or maltreatment of prisoners of war, wanton destruction of cities or devastations not justified by military means.[242] Accused of these crimes were members of the German Military High Command, the SS and the political leaders.[243]

2.1.1.2.3 Crimes against humanity

Article 6 (c) of the NC[244] applied to criminal acts such as murder, enslavement and extermination committed against any civilian population before or during the war or persecution on political, racial or religious grounds in execution of or in connection with any other crime within the jurisdiction of the Tribunal. Under this category fell the extermination of the Jewish people in the Nazi extermination camps in execution of the so called Final Solution Plan,[245] the interning and terrorizing of a significant percentage of the European population in concentration camps,[246] the German state's system of forced and slave labour[247] and the persecution of Germans before the war because of their political, sexual or religious beliefs.

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[242] Examples were the murder and maltreatment of millions of Soviet POW, the murder of hundreds of thousands of civilians as retaliation in the guerrilla- war in the occupied territories, and the execution of communist cadres of the USSR armed forces.

[243] It has to be noted in that respect that especially the criminalizing of military acts such as destructions or devastation which were not justified by military means led to the later criticism during and after the trials. Following the definition of the NC and the later judgment of the Tribunal, the USA and Great Britain had committed war crimes as well through their intense bombing campaigns of German cities such as Dresden or the USSR (and their satellites) for the murder of up to two million German fugitives during 1944 and 1945.

[244] 'Crimes against humanity' namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated, Article 6 (c) of the NC.

[245] The plan (and its later execution) to extinguish Jewish life in Europe was named the "Endlösung", the final solution of the Jewish "question".

[246] For a disturbing description of the suffering of a concentration camp inmate, see Kogon *Der SS-Staat. Das System der deutschen Konzentrationslager* (1993).

[247] The German industry forced millions of civilians, Jews and non-Jews alike, to work in various branches of the German military industry. SS run concentration camps provided the necessary labour. Kogon (n 242) 240 *et seq.*. See the IMT industry cases as e.g. *Krauch and others* (I.G. Farben trial), US Military Tribunal sitting at Nuremberg, Judgment of 29 July 1948, *AD* (1948), 668-80.

2.1.1.2.4 Sentencing

Sentencing took place under Article 27 NC and allowed the imposition of the death penalty and sentences. Interesting is the provision of Article 28, which allowed the Tribunal to order the stripping of the convicted "of any stolen property" – thus accounting for Germany's war-time policy of pillaging of occupied states and territories for the benefit of the state and Nazi individuals.[248] This provision resembles a necessary additional and supplementary means of criminal justice which is today known in most Western domestic criminal procedures in the form of the forfeiture of assets in the context of fighting organized crime.

2.1.1.3. The IMT and the criticism of retroactive law[249]

2.1.1.3.1. Overview

Besides the fact that the Nuremberg trials have been characterized by some critics as victors' justice and as "prosecution of World War II's losing parties by the victors",[250] the main criticism of the Nuremberg Charter and of later judgments of the IMT has been that they probably violated the non-retroactivity doctrine in international criminal law with its two principles of *nullum crimen sine lege* and *nulla poena sine lege*.[251] Other causes of criticism were related issues such as the "ex post facto" nature of the NC's codification, the use of legal analogies and the existence of legal ambiguities.

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[248] With Reichsmarschall Hermann Göring as the most prominent example of a Nazi official who engaged in plundering for his personal benefits. Göring accumulated Europe's biggest private art collection by pillaging private and state galleries in the occupied territories. This crime continued in 1945 when the allied victors committed similar acts in Germany with the Soviet theft of the century old "Bernsteinzimmer" as a prominent example for such plunder.

[249] This topic, as well as the subchapters on alternative prosecution under German domestic law and on the available defences, will be discussed in the context of the Nuremberg trial because of their historical and thematic proximity to this complex.

[250] See e. g. Kritz (n 220) 130. Chomsky (n 139) 21f characterizes the IMT trials as trials which were following the principle whereas "victors do not investigate their own crimes" and as such excluded e.g. the Allied bombing of the German civilian population. As another example of such one-sided victors' justice might serve the infamous example of the execution of up to 15,000 Polish POWs by the Soviets in 1940, the so called Katyn massacre. The Soviets tried unsuccessfully to hold Germany accountable for this crime and included it in the indictment of Göring and others. See Churchill, *The Second World War-Volume IV-The Hinge of Fate* (1951) 681.

[251] These principles state as requirements for any criminal prosecution that the crimes in question were qualified as a crime or criminal act by an existing law at the time of their commission.

The "law of Nuremberg"[252] resembles "retroactive"[253] law in the sense that it was codified after the commission of the crimes in question for the purpose of holding the German military and political leaders "ex post facto" criminally accountable. As mentioned above, this fact had been explicitly acknowledged in the Nuremberg Charter's Article 6 (c).[254] The ex post facto nature of the law of Nuremberg could therefore constitute a violation of international law in the case of an absence of applicable exceptions.

One of such exceptions may be found in the nature of the "new" law: Kelsen points out that "the application of unknown law is not without exceptions. The rule is effective only with respect to legislation, not against the creation of law by custom or judicial decisions".[255] Given this, the question arises whether the law of Nuremberg as "ex post facto" law can qualify as such an exception because of the existence of custom(s) criminalizing certain acts at the time of their commission by the accused. If that was the case, the fact that the law of Nuremberg had been retroactive would not constitute a violation of international law.

2.1.1.3.2. The legal nature of the different crimes under the NC

2.1.1.3.2.1. Crimes against peace

Crimes against peace as defined in Article 6 (a) of the NC applied to criminal acts which would today fall under the crime of aggression. The offences of crimes against peace were criminalized for the first time in the Nuremberg Charter. Prior to that, after World War I, the predominant view of regarding war as a legitimate means of states' international policy changed when aggressive war was condemned in the Treaty of Versailles of 1919 in Article 227.[256] The outlawing of war was again confirmed by Article I of the Kellog-Briand Treaty of August 27, 1928.

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[252] Consisting of the London Agreement of 8 August 1945, the Nuremberg Charter and its subsequent Control Council Law No. 10 of December 1945.
[253] Resembling as such "ex post facto" laws.
[254] Renz (n 231) 6.
[255] Kelsen (n 29) 9.
[256] See supra chapter 1, 3.3.4.

Consequently, the acts of planning, preparing and finally waging war against Poland in 1939 did not qualify as crimes under international law but nevertheless as breaches of international law at the time.[257] This argumentation finds support in the findings of the Sub-Committee of the Legal Committee of the United Nations War Crimes Commission in its majority report[258] of 1945 whereby "acts committed by individuals merely for the purpose of preparing and launching aggressive war, are *lege lata*, not war crimes". They were, however, regarded as "acts and outrages against the principles of the laws of nations and international good faith" and therefore were "subject to a formal condemnation in the peace treaties […] and that penal sanctions for the future should be provided".[259]

The IMT proceeded instead on the basis that the described offences qualified as crimes under then valid customary international law and were not merely non-punishable violations of international law. The tribunal justified its findings with the following arguments: firstly that the NC constituted an expression of international law which was valid at the time of its creation and as such contributed directly to the formation of (new) international law;[260] and, secondly, that punishment for crimes which were not punishable/prosecutable at the time of their commission should be allowed if the absence of punishment would otherwise appear to be "unjust".[261]

The IMT therefore regarded violations and breaches of international treaties as criminal acts resulting in international criminal responsibility. This view was confirmed in UN GA's Resolution 95 (I) in 1946.[262]

[257] The declaration of war on Germany by France and Britain in September 1939 and the begin of hostilities -first bombing raids on German cities in 1939 by French and British war planes – were seen as just acts of the lawful resort to force in order to comply with the obligations under French-British-Polish mutual defence treaty.
[258] See Hogan-Doran (n 224) 330ff.
[259] The Soviet attacks on Poland in September 1939 and Finland in December 1939 constituted comparable violations of international law.
[260] Cassese (n 7) 148
[261] *Id.* 72 with reference to the respective IMT judgments.
[262] See UN Doc A/ 64/ ADD.1.

Following the reasoning of the above-mentioned Majority Report and of Hans Kelsen[263] it has to be concluded that at the time of the commission of the respective acts, individual criminal responsibility for the act of illegally resorting to force could not have been established under international law, firstly because of the lack of precise multilateral criminal provisions or a respective customary law status at the time of their commission, and secondly because the non-retroactivity principle was a non-derogable principle of international law and not merely a general principle. The contrary legal opinion of the IMT and the subsequent allied military trials in the occupied zones were later subjected to heavy criticism by the defence teams and legal scholars.[264]

Consequently, the conviction of the major war criminals for crimes against peace under Article 6 (a) of the NC constituted the application of retroactive new law and did not resemble a justifiable exception as retroactive customary law. As a consequence of this, the judgements of the IMT as a whole were later considered a violation of the non-retroactivity principle.[265]

2.1.1.3.2.2. War crimes

War crimes as defined in Article 6 (b) of the NC applied to crimes that were only to a small extent criminalized under the then existing international rules of war as codified in the two Hague Conventions of 1899 and 1907 and the two Geneva Conventions of 1929.[266]

It is important in this context to note that the Hague Conventions itself did not contain an explicit list of war crimes but only a description of forbidden acts.[267] For the purpose of criminal prosecution, an explicit list of acts regarded as war crimes of the Central

[263] See Kelsen (n 29) 10.
[264] See below under 2.1.1.6.
[265] E.g., Ratner and Abrams (n 8) 22; Cassese (n 7) 111-12 on how the four victor powers avoided in the aftermath to define a binding legal concept on aggression in order not to limit their own policies of state aggression.
[266] Those international rules contained only weak provisions on the protection of civilians and nearly no penal provisions for breaches.
[267] See e. g. Article 23 of Hague IV.

Powers[268] was defined in the Report of the "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties" of 6 May1919.[269]

Even in the absence of explicitly codified humanitarian law provisions in 1939 for each and every war crime, criminal responsibility for various war crimes could have been established through customary international law. Or in the words of the Belgian Delegate to the United Nations War Crimes Commission, Mertens: "Until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience."[270]

As a consequence, humanitarian law provisions in the Hague and Geneva Conventions were regarded as having become part of customary international law in 1939. The voluntary and intentional violation of these rules led to the establishment of individual criminal responsibility under customary international law[271] with the consequence that Article 6 (b) of the NC could qualify as an exception to the rule on non-retroactive law because of an already existing custom at the time of their commission.

2.1.1.3.2.3. Crimes against humanity

Crimes against humanity as criminalized under Article 6 (c) of the NC partly overlapped in their scope with war crimes. Even when considering such an "overlap", punishment for these related crimes could not derive directly from a criminal sanction for violations of principles and rules of international humanitarian law such as the Hague Rules. An analogous application of these findings on war crimes could resemble a breach of the non-retroactivity principle.

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[268] The term Central Powers refers to the German Imperial Reich, the Imperial and Royal Empire of Austria-Hungary, Turkey and the Kingdom of Bulgaria.
[269] See "Report Presented to the Preliminary Peace Conference" of March 29, 1919, reprinted in 14 *AJIL* (1920) 115 *et seq.*
[270] See United Nations War Crimes Commission (n 223) xii-xiii, basically repeating the "Martens" principle of the first Hague Peace Conference of 1899.
[271] See Murphy (n 8) 5.

Crimes against humanity would therefore only then resemble already acknowledged *non-ex-post facto* law if there had been prior custom (or judicial decisions) criminalizing the conduct in question.[272] The criminalized acts of murder, extermination, enslavement, deportation or persecutions had to qualify as crimes under the then existing international customary law. As long as these acts had been committed in a direct connection with war crimes,[273] the criminality of such acts under international customary law could be established[274] under the above mentioned conditions applicable to war crimes.

With respect to the other "non-connected" acts, the crucial question was whether there was evidence of a general practice accepted as law amongst the civilized nations. The practice of criminalizing these "genocidal" acts directed against civilians could derive from established international treaties and/or state and domestic practice. The existence of such a practice could e. g. be found in the provision of Article 229[275] of the Treaty of Versailles and further in the considerations of the Commission on the Responsibility of the Authors of War and on Enforcement of Penalties[276] to criminalize various acts "in violation of the established laws and customs of war and the elementary laws of humanity". Another indicator for the existence of such a practice can be found in the 1907 Hague Convention No. IV,[277] which was regarded as having become customary international law in 1939, and which already included, on a limited scale, the protection of civilians.[278]

The strongest argument, however, for the existence of such a practice of criminalizing these acts could be found in the fact that these acts constituted in their major part punishable violations of national domestic penal laws and, in particular, German penal

[272] Kelsen (n 29) 13.
[273] See Article 6 (c) NC "[…] in connection with any crime within the jurisdiction of the Tribunal"
[274] Thus following the above mentioned reasoning whereas the humanitarian law provisions of the Hague and Geneva Conventions were regarded as having become part of customary international law in 1939.
[275] Which lists under "criminal acts against the nationals of one of the Allied and Associated Powers" the crime of "crimes against humanity" directed against non-combatant civilians.
[276] See Report (n 269) 116.
[277] Hague Convention (IV) Respecting the Laws and Customs of War on Land, reprinted in 2 *AJIL* (1907) Supp. 90, entered into force January 26, 1910.
[278] See e.g. Articles 2, 25, 27 and 42ff of the convention which provides for provisions for the protection of the civilian population.

law.[279] Following this argumentation, the crime of "crimes against humanity" was therefore punishable before the IMT without the non-retroactivity principle being violated because of the existence of international custom criminalizing such violations.

Following the legal reasoning, interpretation and argumentation of the IMT (and later of the UN General Assembly in respect of the Nuremberg Principles) it can be concluded that the law of Nuremberg, with the exception of the crime of "crimes against peace", which indeed resembled "new" ex-post facto law, did not resemble retroactive law and a breach of the non-retroactivity principle.[280]

2.1.1.4. The prosecution of war criminals after 1949 under domestic German criminal law as an alternative.

Even when following the conclusion that the law of Nuremberg did not resemble new, retroactive law, the Allied Powers could possibly have avoided later (legal) criticism of having promoted victors' justice by applying "ex post facto" law if they had considered, at least partly, the inclusion and application of domestic German penal law.[281]

2.1.1.4.1. Overview

The post-war democratic Germany (the Bundesrepublik Deutschland) after 1949 tried NS mass murderers or war criminals[282] in various subsequent trials.[283] The prosecution of German war criminals before German domestic penal courts started as a prosecution which was supplementary to the trials before the IMT and its consecutive trials under

[279] See Kelsen (n 29) 11.
[280] With Cassese (n 7) 148-49 *a majore ad minore* argument could be raised, whereas the fact that the explicit outlawing of the retroactive application of penal provisions in the statutes of the ICTR, ICTY and the ICC, eventually questions the legality of the IMT.
[281] Kelsen (n 29) 12 suggests that criminal prosecution could have taken place as well before the IMT applying German penal law of that time which criminalized the committed atrocities as ordinary crimes as an alternative to the prosecution of German war criminals before the IMT.
[282] The different cases of (mass) murder, committed in the context of the German race and occupation policy, were prosecuted either as crimes against humanity or war crimes, as defined under Article 6 (b) and (c) NC. Therefore the terminus "Nazi war criminal" refers not only to the war criminal *strictu sensu* but also to the perpetrator of other gross human rights violations such as genocide and crimes against humanity.
[283] 912 court trials took place against 1875 accused between 1945 and 1997. The death penalty was handed down in 14 cases (all pre 1949), life imprisonment in 150 cases and sentences in 842 cases. See the comprehensive study of Rüter and de Mildt *Die westdeutschen Strafverfahren wegen nationalsozialistischer Tötungsverbrechen 1945 - 1997. Eine systematische Verfahrensbeschreibung mit Karten und Registern*, 316.

CCL No. 10 and was originally only meant to take place in cases where both accused and victims had been of German origin. This restriction, however, was set aside eventually in 1949 and a truly German prosecution of Nazi crimes took place thereafter.

After a short "stalling" period in the early 1950s,[284] the German post-war prosecution of Nazi crimes started with the notorious "Einsatzgruppen" trial at Ulm in 1958 and the "Auschwitz" trial at Frankfurt in 1963,[285] which became "precedents" of German post-war prosecution of the Nazi legacy. These two trials brought the public's attention to the enormity of the Nazi crimes and, unlike the Nuremberg trials, changed the German people's attitude to and opinion of their own past.

2.1.1.4.2. The applicable law

German legislation did not implement the Nuremberg laws of the former victor powers. None of the instruments – the Nuremberg Charter, the Control Council Law No. 10, or the implementing laws and orders of the occupational powers[286] – was used as the legal basis for the prosecution of the alleged war criminals.

Consequently, the prosecutions and convictions were based solely on penal law which was valid and effective before and during wartime, namely the domestic German penal code, the "Reichsstrafgesetzbuch" of 1871[287] (RStGB).

German criminal courts tried and eventually sentenced the defendants either for acts of murder or manslaughter,[288] depending on the circumstances of the crimes in question.

[284] Post war Germany was in the beginning not very determined to prosecute Nazi crimes. The reasons for this were manifold: the general focus of the society to rebuild itself after the lost war, the suffering of its own citizens through post-war hardship in the occupied zones like deportation and internment and a general desire among the German people to "forget and move on with their lives". This attitude lasted until the 1960s and was, among other things, a key motive for the "revolution" of 1968 where the first post-war generation broke with their parents accusing them, among other things, of their omission to address their own involvement in the Nazi era.

[285] See Renz (n 231) for a general description of the significance of the Frankfurt trials for the German post- war public opinion.

[286] See e.g. for the post IMT-military tribunals *USA v. Pohl et. al* - Order Constituting Tribunal II by the OFFICE OF MILITARY GOVERNMENT FOR GERMANY (US) APO 724- GENERAL ORDERS No. 85 retrievable at http://www.yale.edu/lawweb/avalon/imt/pohl/order4.htm.

[287] "Reichstrafgesetzbuch", the German Reich's domestic penal code until 1953.

Killing without an existing order or the commission of this crime in a more excessive way than ordered[289] qualified as murder. This differentiation was relevant for the purpose of sentencing: a conviction for murder justified a maximum sentence of life imprisonment while manslaughter was punishable by a lesser sentence with the additional possibility of early pardoning.[290]

This differentiation was also important for the applicability of statutory limitations. While there was no limitation for acts of murder, acts of manslaughter fell under a limitation period of fifteen years.[291]

The next important legal question was the form of participation, namely whether the accused acted as the initiator of the crime or as an accomplice to the crime. The form of participation affected the sentence that followed, with the accomplice qualifying for a more lenient sentence than the main perpetrator of the crime.

This differentiation was important in another context, too. The post-1949 penal code[292] was changed in 1968 in that the sentence of an accomplice had to follow the sentence for an attempt of that crime with a facultative reduction of the sentence as a consequence if the accomplice had not acted out of the same (criminal) motives as the main perpetrator.[293] This change led to a maximum sentence of 15 years for an accomplice as opposed to life imprisonment prior to that change. Consequently, the statute of limitation for an accomplice was lowered from 20 to 15 years. The impact of this on the German prosecution of Nazi crimes was enormous. Since the majority of the accused who had

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[288] See Hanack, „Die Problematik der gerechten Bestrafung nationalsozialistischer Gewaltverbrecher“ in 2 *JZ* (1967) 300. Murder and manslaughter were punishable under § 211 para 2 RStGB and § 212 RStGB, respectively.

[289] Such excessive behaviour could be assumed whenever the execution of the killing orders was carried out by inflicting additional suffering and pain.

[290] § 211 para 1 RStGB carries the death penalty for the murderer. This punishment became, however, obsolete in 1949 when the death penalty was abandoned by Article 102 GG of the German Constitution of 1949, the “Grundgesetz”.

[291] The German “Bundestag” (Parliament) decided finally in 1979 that no statute of limitation should apply for the crime of murder.

[292] “Strafgesetzbuch”, StGB, the new penal code as valid as of 1954 onwards.

[293] See § 50 StGB after the 1968 change, published in *BGBl*. I, p. 503.

held organizational command responsibility in the execution of the "Holocaust"[294] had been charged with complicity to the original crimes, their criminal cases had to be dismissed because of this changed statutory limitation.[295]

The majority of the accused were found guilty and sentenced for their complicity in the crime of manslaughter[296] and not murder because their actions had not shown the above described additional elements. They had acted as willing instruments in the commission of the "Endlösung" mass murders by performing acts such as pulling the trigger or opening the gas valve.

The German post-war adjudication of Nazi crimes was solely based on the penal laws which were in force at the time of the commission of the crimes, namely the German Penal Code, the "Reichstrafgesetzbuch" of 1871 in its various amended versions valid during the war. This was not affected by the various "new" codifications of "Nuremberg law" on an international and domestic basis. The new legislation of 1954, for example, penalized the crime of genocide under § 220 a StGB by implementing the UN Convention on the Prevention and Suppression of the Crime of Genocide of 1948. The German judiciary, however, never applied that legislation to World War II crimes because of a possible violation of the doctrine of non-retroactivity.[297] By contrast, international multilateral legal instruments such as the ECHR did not know such legal differentiations. Article 7(2) of the ECHR of 1953 explicitly refused to recognize the doctrine of non-retroactivity in cases where persons had committed gross international crimes.[298] This international approach would have led to the general applicability of "new" post-war legislation for the prosecution of war criminals. Germany, however,

[294] The German terminus "Schreibtischtäter" refers to the kind of perpetrator who was never actively involved but organized and supervised the genocide by literally pulling the lever.
[295] See decision of the "Bundesgerichtshof", the German Supreme Court, of 20.05.1969, 5 StR 658/68, Lfd. Nr. 667.
[296] See Hanack (n 288) 331.
[297] Article 103 (2) GG and § 2 StGB clearly state that punishment for any crime requires prior legal definition of this crime and the applicable punishment as well.
[298] Resembling gross violation of the laws of civilized nations under Article 7 (2) ECHR, whereas a crime "…when it was committed, was criminal according to the general principles of law recognised by civilised nations".

opted out when ratifying the Convention in 1952 and restricted the applicability of Article 7 (2) ECHR domestically by Article 103 (2) of the German Constitution.[299]

The prosecution of Germany's WW II human rights perpetrators had been solely based on the domestic penal code, the "RStGB" of 1871 as the penal law which had been valid at the time of the commission of these crimes. Consequently, this procedure has not given rise to the criticism of violating the retroactivity principle. Even when criticized by some for its alleged "softness" in prosecuting high-ranking state officials such as judges, municipal officers etc., the German post-war adjudication of wartime human rights atrocities is one of the few examples of a newly formed state and its society having tried to seek justice for crimes committed by its nationals.

This successful and proud episode of German history serves also as an important example of how the criminal prosecution of war-time crimes can be conducted before domestic courts under domestic non-retroactive law.[300]

2.1.1.5. The IMT's limitations of other defences of criminal law

The IMT Charter established individual responsibility for criminal acts under its Article 6 (a) to (c). The bar to the Tribunal's jurisdiction on the grounds of a procedural immunity in respect of any form of official capacity of the alleged war criminal had been set aside in Article 7 of the IMT Charter. In addition, other defences, normally available in domestic common criminal law,[301] were not recognized in respect of the Nazi war criminals and their prosecution before the IMT under the IMT Charter and the subsequent Control Council Law No. 10. Consequently, the only effective defence was to challenge the prosecution's evidence as insufficient.[302]

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[299] This reservation under the so called "Nuremberg-clause" lasted until 1966 when Germany became a full member to the United Nations and a signatory state to the ICCPR of 1966.
[300] In contrast hereto stands the 1996 decision of the German Federal Constitutional Court in the "*Berlin Wall Guard Trials*", whereas under certain circumstances the strict prohibition of retroactive law as stipulated by Article 103 para 2 GG can be waived. See Ott (n 222) 360.
[301] Such as the defences of duress or mistake of law.
[302] See Kittichaisaree (n 15) 258.

2.1.1.5.1 Superior orders

This defence did not free the accused from his criminal responsibility but was taken into consideration for a possible mitigation of the sentence (see Article 8 of the IMT Charter).[303] Nuremberg put an effective end to the then existing approach under military law whereby a superior order was a complete defence to a criminal charge – without further considering the morality of such orders.[304] The legality of this defence was already questioned in the *Llandovery Castle*[305] case, where the German Reichsgericht in Leipzig found that certain orders, which were manifestly illegal because their execution would constitute an apparent violation of international law (as e.g. the law of Hague), could not qualify as a defence for the defendant. This judgment, together with the few other post-World War I sentences of German war criminals, was soon forgotten and did not change the attitude of any of the nations that participated in World War II.[306]

According to this negated defence, any crime committed in the execution of an order of a military superior would have been justifiable under the superior order defence and as such non-punishable.[307] The law of Nuremberg changed this legal situation in order to enable the prosecution of the "major war criminals" and their subordinates[308] by drastically reducing the scope of the defence of superior orders to such an extent that it was effectively abandoned. Later opinions indicate that this approach was criticized even by the military representatives of the victor powers as "a decision based on specific circumstances" which negates the fact that "soldiers are often as much victims of the

[303] See Article 8 of the IMT whereas "The fact that the Defendant acted pursuant to an order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires." Compare the similar provisions in Article 6 of the Tokyo Charter and Article II´(4)(b) of the Control Council Law No.10.

[304] This approach found its resemblance in the then valid Army manuals of the US and the British Army. See e.g. Article 347 of the US *Basic Field Manual: Rules of Land Warfare* (FM 27/10) by the US Dept. of War. See Garraway," Superior orders and the International Criminal Court: Justice delivered or justice denied" in 836 *IRRC* (1999) 785-794 for an overview of the "superior order" defence from a military perspective.

[305] *The Llandovery Castle case* (Reichsgericht Leipzig), 16 July 1921 (1933) in 2 *Ann. Dig.* 248-50, cit. in Kittichaisaree (n 15) 266, concerned the prosecution of a submarine officer for the killing of defenceless shipwrecked persons.

[306] Cassese (n 7) 328-329.

[307] See Kelsen, "Will The Judgement In The Nuremberg Trial Constitute A Precedent In International Law" in *International Law Quarterly* (1947) 161.

[308] In the subsequent military trials before each occupational power's regional courts, which were conducted under CCL No. 10.

decisions of their superiors as civilians."[309] This opinion found its recognition in some trials of German war criminals before domestic military courts situated in the formerly occupied territories.[310]

Consequently, the ICC tried with its Article 33 to solve the precarious situation created by the Nuremberg legacy whereby strict obedience to orders became questionable could result in later criminal responsibility. Criminal responsibility of a subordinate for ordered acts, which would constitute a crime under the ICC Statute, can fall away under the strict conditions of Article 33 (1) ICC Statute.[311] This exception is limited to war crimes only.[312]

2.1.1.5.2. Duress

Duress as a defence is closely related to the defence of superior orders.[313] In cases of duress, the culpability of the criminal act may fall away when the intent to commit the crime, the *mens rea*, was not apparently recognizable during the commission of the crime due to the existence of notable pressure to take part in the crime. This defence of duress became important in scenarios where war crimes and crimes against humanity had been committed in a systematic way and involved large units or groups of soldiers or other personnel.[314] The question therefore was whether the accused could establish as fact that

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[309] Garraway (n 304) 792.

[310] In *Kappler and others*, Tribunale militare territoriale, judgment of 20 July 1948, *Foro Penale* 1948, 603-22, the Italian Military Tribunal of Rome found in 1948 that the defendant Kappler was not criminally guilty for the execution of 320 persons as an unlawful reprisal for the murder of 32 German SS men in Rome because of a reduced *mens rea* element due to the fact that his "freedom of judgment" was diminished due to the fact that he regarded the superior orders for the reprisal killings as a non derogable and absolutely binding order; Cassese (n 7) 236.

[311] Article 33 (1) states that 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."

[312] See Article 33 (2) whereas "orders to commit genocide or crimes against humanity are manifestly unlawful" and as such not apt to relieve the accused from criminal responsibility under para 1.

[313] In the so called *Einsatzgruppen* case of *United States v. Otto Ohlendorf et al.* in *Trials of War Criminals*, Vol. XI, 1236, superior orders were regarded "as a form of duress".

[314] Such as the notorious "Einsatzgruppen", Special Service Units, that carried out large scale "ethnic cleansing" operations in the East.

there was no possible choice available for him to abstain from the commission of the crime without suffering severe, even life-endangering, consequences by refusing to carry out such a criminal order.[315] As a consequence of these two conditions, a defence on grounds of duress was only seldom successful. This defence again became relevant in the later German post-1949 prosecutions of Nazi war criminals.

2.1.1.5.3. Mistake of law

International law does not in general exclude criminal responsibility on the ground that the perpetrator of a crime was ignorant of the existence of legal prescriptions criminalizing his conduct. This rule of *ignorantia legis non excusat* finds its contemporary codification in international law in Article 32 (1) ICC Statute.[316] The only exception to this rule is that the *mens rea* was absent during the time of the commission of the crime due to the fact that the perpetrator's ignorance of the unlawfulness of his actions was so severe that it "negates the mental element required by such a crime".[317]

In the context of the Nuremberg IMT trials, the defence tried without success to argue that the *mens rea* was absent when the accused had committed the crimes because they had acted under the impression that their actions had been lawful under then existing Nazi laws.[318]

This defence had a particular relevance to the prosecution of former Nazi judges of special military tribunals who had freely handed down death sentences to soldiers who were accused of military-related offences such as desertion.[319] Other examples for the use

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[315] See *In re Krupp and Ten Others* in 15 *ILR* 1948 at 620 for the "choice" requirement and *In re Ohlendorf and Others* in 15 *ILR* (1948) 656 for the "consequence" requirement.

[316] Article 32 (1) ICC Statute stipulates that "A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. […]".

[317] *Id.,* Article 32 (2) s. 2 states that "A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33".

[318] An example of such a legal justification is the so called "Kommissarbefehl" of 1941, whereas the execution of commissars (political officers of the Soviet Army) and Jews taken prisoner of war in the campaign against the Soviet Union were explicitly ordered. Another example is the above mentioned reprisal order of Hitler, whereas for every killed German serviceman, 10 hostages should be executed. See the *Kappler and others* case (n 310).

[319] So called "Sondergerichte" (Special Military Courts) were established in 1944 for the prosecution of the military offence of desertion. Approximately 10,000 German soldiers were executed for this offence. The

of this defence were instances where former concentration camp guards, who were accused of the killing of inmates, defended their actions as having been in accordance with then valid guard orders and SOPs, and also military personnel accused of killing Russian soldiers, civilians and Jewish people as alleged communist political officers (aka politruks) of the Red Army and/or non-regular combatants affiliated with the former.

The IMT judges refused to accept this defence with the argument that the defendants had been capable of recognizing the apparent injustice of the applied Nazi laws and therefore could not rely on these laws as a statutory justification for their crimes. They referred to the provision in Article 6 (c), which explicitly forbade the acknowledgment of a statutory justification.[320] A further advisable differentiation and legal discourse on the existence of an apparent conflict of positivist statutory law with supra-positivist natural (moral law) did not take place.

As early as 1946, the German scholar Gustav Radbruch developed the so-called "Radbruchformel",[321] which practically confirms the court's refusal of the defence's argument. Radbruch argued in essence that the general rule, whereby positivist statutory law is valid even when unjust, becomes invalid when this law is manifestly unlawful on an unacceptable scale.[322] The German "Bundesgerichtshof" (Federal Supreme Court for Civil and Criminal Matters) acknowledged the validity of the Radbruch principle as early as 1951, when it found a defendant responsible for the unlawful execution of a deserter,

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majority was tried and executed in the last five months of the war. See the *Altstötter and others* case (aka *Justice* case) before the US Military Tribunal sitting at Nuremberg, judgment of 4 December1947, cited in Lauterpacht, *Annual Digest and Reports of Public International Law Cases: Year 1947* (1951) 278-289 for an example for the prosecution of members of the German Nazi judiciary.

[320] Article 6 (c) NC, which establishes individual criminal responsibility for acts of crimes against humanity committed "whether or not in violation of the domestic law of the country where perpetrated."

[321] The "formula or principle of Gustav Radbruch" was developed in 1946. See Radbruch "Gesetzliches Unrecht und übergesetzliches Recht" in *SJZ* (1946), 105 *et seq.*

[322] The relevant part of Radbruch's principle reads "Der Konflikt zwischen der Gerechtigkeit und der Rechtssicherheit dürfte dahin zu lösen sein, daß das positive, durch Satzung und Macht gesicherte Recht auch dann den Vorrang hat, wenn es inhaltlich ungerecht und unzweckmäßig ist, es sei denn, daß der Widerspruch des positiven Gesetzes zur Gerechtigkeit ein so unerträgliches Maß erreicht, daß das Gesetz als "unrichtiges Recht" der Gerechtigkeit zu weichen hat." (n 321) 107. The translation is the author's own.

thus applying the Radbruch principle on the unlawfulness of this form of punishment and awarded to his widow financial compensation for her loss.[323]

Radbruch's principle became again important in the 1990s in the unified Germany when the practice of GDR[324] border guards of killing fellow citizens of the GDR, who attempted to flee over the inner German border and the Berlin Wall, was adjudicated before German criminal courts. Radbruch's formula was acknowledged and reaffirmed in the "*Berlin Wall Guard Trials*".[325]

Consequently, the statutory positivist doctrine, which had been the dominant theory in international law prior to 1949, was replaced by the natural law doctrine whereby laws and orders were manifestly unlawful if they constituted violations of basic human rights or even amounted to core crimes under international law.[326]

2.1.1.6. Conclusion

Nuremberg's most important and least disputed contribution to the development of international criminal law lies in the definition of universally acknowledged principles of international criminal law.[327] These "Principles of the Nuremberg Tribunal" made individual criminal responsibility for serious international crimes an integral part of international law. The IMT summarized this legal development by stating that "it was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further that where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal both these submissions must be rejected".[328] This dictum of the IMT finds its further manifestation

[323] Judgment of July 12, 1951, III ZR 168/50, BGHZ 3, 94.
[324] German Democratic Republic as the former Soviet occupational zone was called from 1949 until 1990.
[325] The East German Border Guard Trials before the German BGH, see Judgment of March 20, 195, 5 StR 111/94, BGHST 41, 101.
[326] Article 33 ICC Statute with its para 2 is such a manifestation of the natural law doctrine.
[327] *Principles of the Nuremberg Tribunal*, Report of the International Law Commission Covering its Second Session, 5 June-29 July 1950, UN Doc. A/1316, pp. 11-14.
[328] *Judgment of the International Military Tribunal*, 220 cited in Wright "The Law Of The Nuremberg Trial" 41 *AJIL* 38, 55.

in Principle III of the Principles of the Nuremberg Tribunal, which refuses the granting of immunity from criminal prosecution in cases of such serious international crimes.

This approach was confirmed in 1946 by the UN General Assembly Resolution 95[329] and subsequently adopted as Principles of the Nuremberg Tribunal by the International Law Commission of the United Nations in 1950. Another legacy of Nuremberg was its catalyst role in the further development of international humanitarian and human rights law with the establishment of the international criminal courts.[330]

Criticism of the legacy of the trials of Nuremberg and Tokyo is mostly based on the nature of the tribunals as resembling "one sided" forums for the prosecution of the losing sides in the war[331] And, finally, the criticism of the IMT's judgments as resembling violations of the non-retroactivity principle could never be silenced.[332]

The actual contribution of the Nuremberg and Tokyo trials to international justice is further questioned by the fact that the international community after the dissolution of the Tribunals missed out completely on the opportunity to create an international body as a forum for prosecuting gross human rights violations on a permanent basis. All undertakings of the international community to establish an international criminal court as a permanent criminal world organ were halted when the Cold War brought to an end any further cooperation among the former Allies.[333]

[329] See UN Doc A/ 64/ ADD.1
[330] Ratner and Abrams (n 8) 7-8; Cassese (n 7) 333-34.
[331] Under the criminal jurisdiction "ratione materiae" of both tribunals would have fallen theoretically the bombing of Dresden in 1945 by the USA and GB, the mass murder of Germans in the East committed by the Soviets and their allies in 1944 and 1945 and the use of the two nuclear bombs by the USA against Japan in August 1945. For the Japanese opinion on the Tokyo tribunal see Ferencz, "From Nuremberg to Rome: A Personal Account", in Lattimer and Sands (eds.) (n 214) 38.
[332] See e.g. Ratner and Abrams (n 8) 22. Kelsen (n 307) 170 regards the authority of the IMT as being impaired because of the IMT's ruling that individual criminal responsibility for crimes against peace could be based on already existing custom.
[333] The International Law Commission produced a draft statute for an international criminal court already in 1951, *Report of the Committee on International Criminal Jurisdiction,* UNGAOR, 7th Sess., Supp.No.12 21, UN Doc A/26645 (1954). See Cassese (n 7) 333-34.

Consequently, with the dawning of the Cold War in Europe, the Nuremberg Principles had became mere rhetoric and ceased to exist as mandatory functional principles of human rights protection. This unfortunate development lasted until the 1990s, when after the collapse of the Warsaw Pact and the USSR new challenges for human rights protection arose with the atrocities committed in the civil wars in the former Socialist Republic of Yugoslavia (and particularly in its former Republic of Bosnia-Herzegovina) of 1991 and 1995 and the genocide in Rwanda in 1994.

The four signatory states of the London Agreement of 1945, which remained dominant post-WW II powers and became the signatory states of the four Geneva Conventions of 1949, seemed to have forgotten to honour the validity of their own principles. After all, their military forces have been involved in the commission of various war crimes, crimes against humanity and crimes against peace over the last six decades.[334]

The USA for example as the sole "superpower" remaining after the dissolution of the USSR in 1991, its government and its forces have established a legacy of committing a *crimen perpetum*, which under Bush II's administration most probably became a condition *ad aeternum* as well. The use of nuclear weapons in the history of humankind (against the already militarily crumbling Japan), the commission of acts of genocide and war crimes of the sort of My Lai[335] during the US Vietnam campaign,[336] the US aggression against the Central American states of Panama, Nicaragua and Grenada under the Reagan Administration, the war of aggression against Iraq in 2003 and the subsequent

[334] France's counterinsurgent war in former French Algeria saw the employment of coercive methods against civilians by French security organs. England's crimes against humanity in the Crown's war in Kenya in the 1950s; the USSR's breaches of international humanitarian law in the context of the suppression of the East German workers' strike in 1953, in Hungary 1956 and the Czechoslovakia in 1968; the Afghan campaign from 1979 to 1989 and more recently the Russian Federation's two military campaigns in Chechnya.

[335] See the case *Calley William L., Jr.*, US Army Court of Military Review, decision of 16 February 1973, in 46 *CMR* (1973) 1131 where the eventually unsuccessful attempt was made to prosecute an US Army officer for his war crimes in Vietnam; see Cassese (n 7), 240.

[336] See the findings of the Church Committee on the CIA's covert operations in 1960s and 70s which included besides acts of assassination, other acts of aggression, committed in Vietnam and Latin America. The Church Committee is the common term referring to the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, a Senate committee chaired by Senator Frank Church in 1975. The committee investigated the intelligence gathering by the CIA and FBI for proof of possible illegality after certain activities had been revealed by the Watergate affair.

acts of torture committed by US military forces against captured so-called "insurgents"[337] are only some examples of how the US understands "compliance" with the legacy and principles of Nuremberg.

Considering this, the IMT and its subsequent trials, notwithstanding their importance for the objective of "arresting impunity"[338] for human rights atrocities and the created momentum for the development of humanitarian law, resembled one sided (victors') justice and failed to establish a further safeguard for the protection of human rights worldwide.

2.1.2. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (ICTY)

The ICTY in The Hague was established in 1993 by Security Council Resolution 827[339] as one of the more powerful UN reactions to the horrendous human rights atrocities which were committed on the territory of the former Yugoslavia from 1991.

2.1.2.1. Jurisdiction and sentencing

The ICTY has *ratione materiae* jurisdiction over the following international crimes, prosecutable as "serious violations of international humanitarian law"[340]: grave breaches of the Geneva Conventions of 1949,[341] violations of the laws or customs of war,[342] genocide[343] and crimes against humanity,[344] committed on the territory of the former Republic of Yugoslavia since January 1991.[345] The tribunal's *ratione temporae* jurisdiction therefore covers all three stages of the Yugoslav conflict from its beginning in 1991 in Slovenia and Croatia to its end in Kosovo in 1999.

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[337] See below under 2.1.5.1 on possible US war crimes in Iraq.
[338] Joyner (n 198), 160 *et seq*.
[339] SC Res. 827, UN SCOR 48th Session, UN Doc. S/Res/827 (1993). The Statute was amended three times by the Resolutions 1166, 1329 and 1411.
[340] *Id.*, Article 1. The terminus "grave breaches of humanitarian law" seems to be too limited and could as well include "human rights law", considering the nature of the crime of genocide (Article 4) as a "human rights" crime par excellence.
[341] *Id.*, Article 2.
[342] *Id.*, Article 3.
[343] *Id.*, Article 4.
[344] *Id.*, Article 5 (g).
[345] *Id.*, Article 8.

The *ratione temporae* jurisdiction of the tribunal was limited by Security Council Resolution 1503,[346] which urged the two UN *ad hoc* tribunals, the ICTR and the ICTY, to complete all investigations by 2004, all trials by 2008, and all appeals by 2010.

The court's procedure follows the adversarial model of common law criminal procedures and thus strengthens the rights of the accused. Consequently, no *in absentia* trials are permitted in general. An exception is Rule 61 of the court's procedure, which allows court proceedings *in absentia* for the purpose of establishing the facts of a case[347] at the pre-trial stage.

The use of procedural defences is not explicitly outlined in the Statute. On the contrary, Article 6 excludes the "official position" defence and/or immunity objection and the superior order defence.[348] However, the possibility of raising defences exists under Rule 67 (A) (ii) of the ICTY and ICTR Rules of Procedure and Evidence.[349] The existence of just defence options as a cornerstone for the legality and fairness of the trial proceedings is highlighted by Rule 67 (B), whereby the "failure of the defence to provide notice under this Rule [under 67 (A) (ii)] shall not limit the right of the accused to rely on the above defences." The use of the defence of duress is therefore not precluded and its use is likely, given the circumstances of the crimes in question.

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[346] Adopted on 28 August 2003.

[347] See *Prosecutor v. Ivica Rajic* (IT-95-12).

[348] *Id.*, Article 6 (2) whereas "the official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment" and Article 6 (4) ICTR Statute whereas "the fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires."

[349] International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, UN Doc. ITR/3/REV.1 (1995), *entered into force* 29 June 1995. Rule 67 (A) (ii) reads "the defence shall notify the Prosecutor of its intent to offer:
a) the defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;
b) any special defence, including that of a diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence."

An important feature of the ICTY Statute is the fact that the sentencing takes into account the corresponding practice of Yugoslav criminal courts for comparable offences,[350] thus acknowledging the judicial practice of the *locus crimini*. This procedure constitutes an extension of the double criminality principle in international criminal law, which is normally applied in the context of the prosecution of non-citizens before criminal courts of an apprehending state.[351] Sentencing is limited to life imprisonment.[352] The court has the discretion "to order the return of any property and proceeds acquired by criminal conduct […] to their rightful owners".[353] This provision directly accounts for the consequences of "ethnic cleansing", which led to the loss of property of the victims and the enrichment of individuals as the successors in ownership of the deprived property. However, given the post-conflict partition into ethnic enclaves, or regions, under the Dayton Peace Accords of 1995, the realization of such restitution *in natura* seems to be highly unlikely.

2.1.2.2. Evaluation

The ICTY as an *ad hoc* tribunal is subject to limitations of time and place due to its Statute which limits its jurisdiction to specific crimes committed during the Yugoslav civil war from 1991 to 1999; the ICTY's justice will therefore always resemble a form of "selective" justice, which can never really satisfy the need to establish or improve universal justice.

But even with this inherent shortcoming, the ICTY has so far delivered an impressive number[354] of indictments and convictions on serious breaches of international humanitarian and human rights law. As of April 2006, the court has indicted 161 persons for serious violations of international humanitarian law, a total of 133 accused have appeared in criminal proceedings before the court, 47 accused are presently held in custody at the detention unit and 36 cases have been completed without trial through the

[350] *Id.,* Article 24 (1) and Rule 101 (B) (iii) of the Rules, therefore applying the mitigating factors as laid down in Article 41 (1) of the Socialist Federal Republic of Yugoslavia Criminal Code of 1 July 1977 in determining the sentence. See the corresponding provision under Article 23 Section 1 ICTR.
[351] See e.g. below the UK *Pinochet* case.
[352] Article 24 (1) of the ICTY Statute.
[353] *Id.,* Article 24 (3).
[354] See http://www.un.org/icty/cases-e/factsheets/procfact-e.htm, last visited on 7 April 2006.

withdrawal of the indictment or the death of the accused. Thus far 44 accused have been successfully convicted for their crimes. This adjudication has not only revitalized the temporarily stalled process of establishing an international forum of criminal responsibility[355] but also contributed significantly to the further development of international humanitarian and human rights law.

This contribution to the development of international law saw the extension of the grave breaches provisions of the four Geneva Conventions explicitly on "civilians" as such.[356] Furthermore, acts of torture and rape were categorized as crimes against humanity[357] – the categorization of the latter in this manner constituting an important recognition of the seriousness of a crime that has historically been part of armed conflict.[358] Consequently, the systematic use of rape became for the first time punishable under international law as violent acts directed against civilians.[359]

The *Tadic*[360] judgment is a judicial precedent of this extended applicability of the grave breaches provisions of the GC by classifying the Yugoslav conflict as being an

[355] See Cassese (n 7) 333-43 on the post Nuremberg history of establishing a permanent criminal court by the ILC and the overview in *ICC Statute of the International Criminal Court* at http://www.un.org/law/icc/general/overview.htm.
[356] See Article 2 ICTY Statute.
[357] *Id.*, Article 5.
[358] See Joyner (n 198) 160, citing further examples. The use of systematic rape as a means to further humiliate and even annihilate the enemy was e.g. frequently used by the Red Army in its war against Nazi Germany, resulting in the rape of millions German women during 1944 and 1945. See Nagorski, "Taking Revenge-The Germans of Eastern Europe paid the price for Nazi brutality" in *Newsweek* of 8 May 1995, 16-19.
[359] See e. g. *Nikolic*, Case No. IT-94-2-S, para 89 of the Judgement.
[360] *Prosecutor v. Dusko Tadic*, Judgement Appeals Chamber, 38 *I.L.M* (1999) 1518.

"international armed conflict".[361] This judgment overcame therefore the stricter "effective control" test requirement as stipulated in the earlier *Nicaragua* case.[362]

Tadic saw, together with the ICTR's[363] *Akayesu* case,[364] the conviction of an individual for sex crimes as acts committed in the context of crimes against humanity and war crimes.[365]

The Tribunal's indictment and subsequent trying of Slobodan Milosevic, former President of the Federal Republic of Yugoslavia, who was transferred to the ICTY on 29 June 2001, illustrates the international community's growing determination to hold human rights violators responsible for their atrocities without regard to their person or position.[366]

The *Milosevic*[367] case, together with *Pinochet* and the ICTR's *Prosecutor v. Jean Kambanda,*[368] is one of the few examples where former heads of state had to face the consequences of their human rights atrocities before a criminal court.

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[361] By regarding the Serb forces of the Republika Srpska in Bosnia and Herzegovina as having been under the overall control of the Former Republic of Yugoslavia (FRY) and by that "internationalising" the conflict, (n 360). para 162, p. 1549. The Appeals Chamber found that "the degree of control may, however, vary according to the factual circumstances of each case…"; *id.*, para 117. It further found the "effective control" requirement of the Nicaragua v. US case as not persuasive, *id*., para 115 and that the "overall control" of the FRY as it involved "*overall control* going beyond the mere financing and equipping of such forces and involving . . . participation in the planning and supervision of military operations." as sufficient, considering that "international rules do not require that such control should extend to the issuance of specific orders or instructions relating to single military actions whether or not such actions were contrary to international humanitarian law", *id.* para 145.

[362] In *Military and paramilitary Activities in and against Nicaragua (Nicaragua v. US), ICJ Rep.* 1986, p. 62 *et seq.*, the ICJ found that as requirement for incurring of US's state responsibility for actions of the "Contra" insurgents, it had to been proven that the individuals must not only have been paid or financed by the US as foreign state but also that their actions must have been coordinated or supervised by the US to the degree of issuing specific instructions for the commission of the actions.

[363] The International Criminal Tribunal for Rwanda (ICTR)

[364] *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T

[365] De Than and Shorts (n 9) 363.

[366] *Prosecutor v. Milosevic* (IT-02-54)

[367] The *Milosevic* case consisted of three indictments concerning Kosovo, Croatia and Bosnia and Herzegovina which were joined by court order on 1 February 2002. See http://www.un.org/icty/glance/milosevic.htm. Slobodan Milosevic died on 11 March 2006 before the court could find a verdict.

[368] ICTR-97-23-T

The judgment in *Prosecutor v. Radislav Krstic*[369] established criminal responsibility for perpetrators who were part of a chain of command and who instead of countering or at least disobeying obviously unlawful orders (for the commission of genocide) encouraged their execution. These actions of encouragement led to Krstic's conviction for the crime of aiding and abetting genocide under Article 7 (1) of the ICTY Statute.[370]

One of the main reasons for the apparent success of the ICTY's adjudicative work is the fact that the international community has since 1999 increased its pressure on the former Yugoslav Republic to cooperate with the ICTY by complying with its extradition requests or to face economic sanctions for non-compliance.[371] But even these achievements of the ICTY cannot hide the fact that the court does not have its own enforcement body and therefore depends on the political goodwill of more powerful states to provide "cooperation and judicial assistance".[372] As a consequence of this dependency, the ICTY's work has been slowed down to a certain extent by the existing political conditions in the territory of the former Yugoslavia. Before the 1999 NATO campaign against the FYR in connection with the Kosovo crisis, the situation with regard to enforcing arrest warrants was far from being promising: the Tribunal's requesting orders for extradition or judicial cooperation went widely unheard and un-enforced. The Security Council was criticized for not using its powers of sanction to enforce the Tribunal's orders by applying additional pressure on the FRY or the authorities of the so-called "Respublika Srbska" in Bosnia and Herzegovina.[373] The present successes of the ICTY are mainly due to the fact that, since the end of the Kosovo conflict in June

[369] *International Criminal Court For The Former Yugoslavia: Prosecutor v. Radislav Krstic* of April 19, 2004, case (IT-98-33), ICTY Appeals Chamber, April 19, 2004.
[370] *Id*., paras 138f.
[371] In the case of the Republic of Yugoslavia the threat consisted in the USA's announcement to withhold any financial support of the newly elected President Kostunica.
[372] As stipulated under Article 29 of the Statute.
[373] See Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court" in 10 *HHRJ* (1997) 46. Further discouraging in this regard is the fact that even with the presence of numerous UN peacekeepers in Bosnia and Herzegovina since the Dayton Peace Accord of 1995, all attempts to apprehend the major war criminals like Karadzic and Mladic have been futile so far.

1999,[374] the international community[375] with its occupation/protection forces, and NATO as the military muscle is the uncontested *de facto* force in the region and has the necessary executive means to apprehend indicted war criminals in the "protected" mandated territories and to force Belgrade to comply with court orders.

Apart from these shortcomings of the ICTY (which apply to a similar extent to the ICTR), the risk still exists that limited resources could allow only selective indictments and prosecutions. Other points of concern include the lack of powerful (US-styled) witness protection measures[376] including relocation programmes[377] and the absence of an independent institutionalized defence body at the seat of the court. The latter has the consequence that trial proceedings suffer under the presence of ill-prepared or even manipulated defence councils.[378] A major impact on the overall record of the ICTY in respect of its prosecution of human rights atrocities may have been the completion strategy,[379] which was imposed on the ICTY and the ICTR by Security Council resolution 1503 and which urges the two courts to complete all investigations by 2004, all trials by 2008, and all appeals by 2010.

As a consequence, these limitations carry the inherent danger of devaluing the tribunal's work.

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[374] The hostilities ended on June 2nd 1999 with the acceptance of the Petersberg Centre Principles of 6 May 1999 by the government of the Federal Republic of Yugoslavia. UN SC Res. 1244 was adopted on June 10th 1999 and NATO ground troops entered the province on June 12th 1999.

[375] 36 states contribute presently to KFOR (Kosovo Force) in Kosovo; Source http://www.nato.int/kfor/kfor/about.htm.

[376] With the drastic consequence of deterring future witnesses. See the authoritative report on international criminal law "Developments In The Law-International Criminal Law" in 114 *HLR* (2001) 1947-2071, 1984f. The ICTY and the ICTR have amended their rules of procedure in order to protect in particular witnesses and victims of rape and other forms of sexual assault. See e.g. Rule 96 of the ICTY Rules and de Than and Shorts (n 9) 357-60, the adoption of these measures seems to have stopped a practice where the victims of rape were too frightened and intimidated to testify, as e.g. in the *Tadic* case and led to the "most significant developments in criminalisation of sexual violence in international law", *id.*, 376.

[377] Kittichaisaree (n 15) 302 argues that the present witness protection means such as granting of anonymity and use of pseudonyms remain insufficient as long as there is no relocation programme in force, as used in the various US state witness programmes.

[378] Report (n 376) 2005. The report calls for the establishment of an independent defence unit.

[379] See Fact Sheet No. 1 *The Tribunal at a Glance* retrievable at http: http://www.ictr.org/default.htm., para 14.

2.1.3. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (ICTR)

As a consequence of the Rwandan genocide of 1994, where within three months almost 1 million people (mostly Tutsi) were killed in a civil war between the Hutu majority and the Tutsi minority, the UN Security Council established the ICTR under SC Resolution 955 in December 1994.[380] The ICTR resembles in its organization, Statute and rules of procedure a "judicial twin" of the ICTY. Both tribunals share the same prosecutor[381] and do not allow *ad absentia* trials.

2.1.3.1. Jurisdiction and sentencing

The Tribunal has the jurisdiction to prosecute individuals for the crimes of genocide,[382] crimes against humanity[383] and other serious violations of international humanitarian law as defined as violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II,[384] committed on the territory of Rwanda and its neighbouring states during the period between 1 January 1994 and 31 December 1994.[385] Alongside the ICTR, domestic Rwandan criminal courts have jurisdiction to prosecute persons responsible for the Rwandan genocide under the principle of concurrent jurisdiction.[386] Unlike the Tribunal, these courts can impose the death penalty.[387]

Important in respect of the *ratione materiae* jurisdiction of the Tribunal is the fact that the ICTR statute omitted the "nexus to an armed conflict" requirement for crimes against

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[380] Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, UN SCOR, 49th Session, UN Doc. S/RES/955 (1994), in 33 *ILM* (1994) 1598, 1600.

[381] *Id.,* Article 13 (3) reads "The Prosecutor of the International Tribunal for the Former Yugoslavia shall also serve as the Prosecutor of the International Tribunal for Rwanda."

[382] *Id.,* Article 2.

[383] *Id.,* Article 3 , the "nexus to an armed conflict" has been replaced through the requirement that the attack must be "widespread" and "systematic".

[384] *Id.,* Article 4. Violations of common article 3 were criminalized for the first time with the establishment of the ICTR, see ICTY decision *Prosecutor v. Delalic et al.,* ICTY Appeals Chamber Judgment, Case No. IT-96-21-A, rendered on 20 February 2001, para 178. The ICTY refers in this judgment to the *Report of the Secretary-General pursuant to paragraph 5 of Security Council resolution 955 (1994)* of 13. Feb. 1995, UN Doc.S 195/134. Its para 12 acknowledges the explicit criminality of common article 3 violations before the ICTR.

[385] *Id.,* Article 7.

[386] *Id.,* Article 8 para 1.

[387] This difference lead to the unfortunate situation where the organisers of the genocide face (only) life imprisonment as the maximum sentence for their participation in the genocide before the ICTR while the common "foot soldiers" who were following the orders face the death sentence before domestic Rwandan courts after having spent years under inhumane prison conditions.

humanity and thus acknowledged the progressive trend in international law to prosecute such crimes regardless of whether they are committed in an armed conflict or not.[388]

Sentencing is limited to life imprisonment.[389] The ICTR can, like the ICTY, order the return of property and proceeds to the rightful owners.[390]

2.1.3.2. Evaluation

The shortcomings of the work of the ICTY in respect of selective justice, *ratione temporae* and other defects apply to the work of the ICTR as well. The criticism of "selective" justice weighs even more heavily with respect to the ICTR due to the fact that in the years after the establishment of the court, thousands of civilians fell victim to one or another form of racially dominated violence,[391] implying that the ICTR with its limited jurisdiction did not deter other perpetrators in the region of the Great Lakes from committing such crimes.

The Tribunal has been criticized frequently for the long delays in its work and procedures. Since the first trial commenced in January 1997, the ICTR has handed down only seventeen judgments involving twenty-three accused and started trial proceedings against twenty-five other accused.[392] The delay in adjudicating the Rwandan genocide is worsened by the additional fact that in 2002 there were between 115,000 and 130,000 alleged perpetrators held in overcrowded and unsanitary jails in Rwanda awaiting trial before domestic Rwandan courts. This unfortunate situation was criticized internationally and labelled as an intolerable human rights situation.

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[388] The ICC-Statute follows this legal development in its Article 7 para 1 and the wording of Article 3 ICTR.
[389] *Id* Article 23 (1).
[390] *Id* Article 23 (3).
[391] Reference is made to the post- Rwandan regional war on the territory of the DRC, where between 1997 and 2001 approximately 2,8 million people were killed.
[392] See Fact Sheet No. 1 (n 379), para 1. Tomuschat *Human Rights - Between Idealism and Realism* (2003) 292 regards the "number of cases tried by the ICTR […] [as] almost irrelevant" in respect of tens of thousands of perpetrators.

The present situation with regard to prosecuting the Rwandese genocide of 1994 seems to be hopeless, considering the newly imposed completion strategy[393] for the ICTR under Security Council resolution 1503.[394] Combined with the present process in adjudicating the Rwandan genocide before domestic Rwandese courts, it could take another 100 years to try all the suspects being presently held. [395] The court's plans to speed up trials through procedural changes such as the use of more *ad litem* judges will first have to prove their effectiveness.[396]

A possible solution to the massive backlog in domestic cases might lie in the increased utilization of alternative, semi-judicial procedures of conciliation and accountability. The domestic "Gaccaca" courts are such a possible alternative and are already being used successfully in Rwanda.[397] The legality of the Gaccaca trials is, however, at least doubtful[398] under international law and its suitability for dispensing proper justice questionable in the context of such large-scale human rights crimes.

Another reason for the ICTR's mixed success is the general lack of acceptance of its work and jurisdiction among the local population in Rwanda. One of the reasons for this might be the fact that the decision to choose Arusha, Tanzania, as the location for the seat of the Tribunal has created an unfortunate distance between the Court and the actual

[393] Urging the ICTR and the ICTY to complete all investigations by 2004, all trials by 2008, and all appeals by 2010. See Fact Sheet No. 1 (n 379) para 14.
[394] Adopted on 28 August 2003.
[395] See *BBC News World Africa*, "Q&A: Justice in Rwanda" of Tuesday, 18 June, 2002, on http://news.bbc.co.uk/2/hi/africa/2051526.stm.
[396] The ICTR submitted a so called "Completion Strategy" to the UN SC in September 2003 *(S/2003/946)* that requested an increase of the number of *ad litem* judges from four to nine. See Fact Sheet No.1 (n 379), para 14.
[397] Gaccaca (or gachacha) courts refer to Rwandese laymen's courts which resemble a mixture between a court and a reconciliation committee. Individual amnesty is hereby awarded by the local communities to those accused who have confessed their crimes and asked the victims, their relatives and the community in toto for forgiveness. Eligible for this amnesty are only perpetrators who acted as accomplices but not original perpetrators to the genocide, see ch. 2. 2.1.1.4.2. on a German differentiation between these two forms of complicity in respect to the "Holocaust" genocide, see *BBC News World Africa* of Tuesday, 10 March, 2005, "Q&A: Rwanda's long search for justice", retrievable at http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/3246291.stm
[398] The pardoning gross human rights violators in such domestic procedures may be questionable in respect to their legality under international law, see the TRC case below. See Cassese (n 7) 312-16 on the legality of amnesty procedures before domestic forums. Tomuschat (n 392) 292 sees the possibility of a violation of the applicants' right to a fair trial as guaranteed under Article 14 of the CCPR.

"killing field", the *locus crimini* of its work. And, lastly, there is the same lack of its own enforcement mechanism as in the case of the ICTY.

The existing concurrent jurisdiction[399] between domestic Rwandan prosecution and the Tribunal has led to tensions and irritations between these two forums: a lack of judicial cooperation between the ICTR in Arusha and the domestic legal establishments in Rwanda is only one of the consequences.[400]

In conclusion, these shortcomings notwithstanding, the ICTR's adjudication has contributed to the development of the *corpus* of international criminal law. The Tribunal's judgements in *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*[401] and *Prosecutor v. Jean-Paul Akayesu*[402] constitute the first convictions for the crime of genocide since its first codification in the Genocide Convention of 1948.[403]

In *Nahimana*[404] the Tribunal extended criminal superior responsibility to non-military structures[405] such as radio networks, and developed basic principles[406] for the prosecution of acts of incitement to the crime of genocide from hardly existing international jurisprudence[407] on the incitement to discrimination and violence.

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[399] With the ICTR having "primacy over the national courts", see Article 8 (2) ICTR Statute.
[400] For a general account, see Orentlicher, "Striking a Balance: Mixed Law Tribunals and Conflicts of Jurisdiction" in Lattimer and Sands (eds.) (n 214), 230.
[401] Case No. ICTR-99-52-T, the so called "Media Case" (joinder), see http://www.ictr.org/default.htm, *Nahimana* hereafter.
[402] Case No. ICTR-96- 4- T
[403] Convention on the Prevention and Punishment of the Crime of Genocide, approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948 *entry into force* 12 January 1951,
[404] The case concerned the role of the media in inciting genocide. The addressed questions and principles of the role of the media as a tool for the commission of an international crime hadn't been subject to any form of international criminal prosecution since the IMT, where in the *Streicher* case Nazi hate propaganda was regarded as resembling criminal acts in connection with crimes against humanity, see *Nuremberg Proceedings* 501-2 in 41 *AJIL* (1947) 293-6.
[405] (n 402) para 976.
[406] *Id*., para 1000 list the principles of "purpose", "context" and "causation" as defining elements of "direct and public incitement to genocide".
[407] (n 404) and Cassese (n 7) 244 on the unsuccessful attempt by a German penal court to try the German director Veit Harlan for his role in directing the notorious Nazi movie "Jud Süss", which resembles a prime example of anti-Semite hate propaganda.

Prosecutor v. Jean Kambanda is also an illustration of the successful conviction of a former prime minister for the crime of genocide.[408]

The *Akayesu* and the *Kadic* cases mentioned above are two important judicial precedents for the prosecution of acts of sexual violence and rape, committed in the context of internal armed conflict and used as a tool to commit genocide.[409]

2.1.4. THE SPECIAL COURT FOR SIERRA LEONE (SCSL)

The Special Court for Sierra Leone is an example of a mixed "hybrid" court and resembles a possible alternative to imposed UN tribunals.[410] The SCSL was established by an agreement between the United Nations and the government of Sierra Leone in January 2002. The Tribunal is part ad-hoc tribunal and part domestic criminal court with the option to prosecute domestic crimes under Article 5 of the Statute of the Special Court for Sierra Leone (SCSL Statute) of 16 January 2002. [411]

2.1.4.1. Jurisdiction and sentencing

Under Article 1 of the SCSL Statute, the court's *ratione materiae* jurisdiction lies in the prosecution of "serious violations of international humanitarian law and Sierra Leonean law"[412] committed in the territory of Sierra Leone since the Abidjan Peace Agreement of 30 November 1996.

The court prosecutes crimes against humanity,[413] violations of Article 3 common to the Geneva Conventions and of Additional Protocol II[414] as "other serious violations of international humanitarian law",[415] and crimes under (domestic) Sierra Leonean law.[416]

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[408] ICTR-97-23-T
[409] De Than and Shorts (n 9) 366.
[410] Other examples of such hybrid courts which merge national and international judicial elements are the UN-administered courts in Kosovo and East Timor. See Orentlicher (n 401) 214 for a detailed analysis of this topic.
[411] The agreement was entered into pursuant to SC Resolution 1315 of 14 August 2000, UN Doc S/RES/1315. The Statute itself can be retrieved from http://www.sc-sl.org/scsl-statute.html.
[412] *Id.*, Article 1 (1).
[413] *Id.*, Article 2.
[414] *Id.*, Article 3.
[415] *Id.*, Article 4.

The question, whether the prosecution of such "serious violations of international humanitarian law", as criminalized under Articles 1, 2-4 of the SCSL Statute, constituted the use of "new", retroactive law, was answered by the court[417] with reference to the ICTY decision in *Prosecutor v. Delalic et al.*. There the ICTY found that these crimes had been criminalized under international criminal law since the establishment of the ICTR and therefore that these crimes did not resemble retroactive law.[418]

The SCSL can pass life imprisonment as the maximum sentence under Article 19 (1) of its Statute. The court is bound to consider for sentencing the established practice of the ICTR and of domestic Sierra Leonean criminal courts.[419] Article 19 (3) of the SCSL Statute establishes an additional civil liability element by stipulating the option of forfeiture and return of unlawfully acquired property and assets.[420]

2.1.4.2. Addressing jurisdictional immunity and amnesty

The SCSL delivered two important decisions on the questions of jurisdictional immunity and amnesty from prosecution as probable bars to criminal prosecution before such a hybrid court.

The Appeals Chamber of the SCSL found in *Prosecutor Against Charles Ghankay Taylor - Decision on Immunity from Jurisdiction* of 31 May 2004,[421] the then exiled former

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[416] *Id.*, Article 5.

[417] See SCSL decision in the case *Prosecutor against Morris Kallon and Birma Bazzy Kamara*, case Number SCSL-2004-15-AR 72(E) of 13 March 2004, para 81, retrievable at http://www.sc-sl.org/SCSL-04-15-PT-059-II.

[418] ICTY Appeals Chamber Judgment, Case No. IT-96-21-A, rendered on 20 February 2001, para 178.The ICTY referred in this judgment to the *Report of the Secretary-General pursuant to paragraph 5 of Security Council resolution 955 (1994)* of 13. Feb. 1995, UN Doc.S 195/134, para 12, on the criminality of common article 3 violations before the ICTR.

[419] SCSL Statute (n 411), Article 19 (1), whereas "In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone."

[420] *Id.*, Article 19 (3) reads "In addition to imprisonment, the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone" and corresponds with Article 23 (3) of the ICTR and Article 24 (3) of the ICTY.

[421] *Prosecutor Against Charles Ghankay Taylor – Decision on Immunity from Prosecution* of 31 May 2004 Case Number SCSL-2003-01-I, retrievable at http://www.sc-sl.org/Taylor-SCSL-03-01-I-059.pdf

president of Liberia, Charles Taylor,[422] not immune from prosecution for his alleged participation in the commission of crimes against humanity in (the neighbouring) Sierra Leone.[423] The court denied Taylor's application to set aside the warrant for his arrest: Taylor had argued that he had been the incumbent Head of State of a sovereign state at the time of the indictment and that therefore the issuing of the warrant of arrest itself was unlawful and constituted as such the interference in the sovereignty of states. The court based its decision to dismiss Taylor's motion particularly on the following reasons:

Firstly, the SCSL resembled a truly international criminal court[424] and not only a domestic criminal court of Sierra Leone. The issuing of the arrest warrant did therefore not constitute the action of a domestic court but of an international forum. The sovereignty of a foreign state did therefore not prevent the start of criminal proceedings against a Head of State.[425]

Secondly, the official position of the applicant as an incumbent Head of State did not resemble a bar to his later prosecution before the SCSL.[426] The criminal proceedings against the applicant were not barred because of his official position and further, that Article 6 (2) of the SCSL Statute was the legal basis for the ongoing criminal proceedings and not in conflict with any peremptory norm of general international law.[427]

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[422] Olusegun Obasanjo's Nigerian government agreed to consent to the transfer of Charles Taylor to Liberia in March 2006, see Human Rights Watch, "Nigeria: Agreement to Hand Over Taylor-Vital Step for Justice If Ex-Leader Sent to Special Court", of 26 March 2006, retrievable at http://www.hrw.org/english/docs/2006/03/26/nigeri13074.htm. One day later, Taylor went into hiding, see *CNN* "War crimes suspect Taylor missing-Ex-Liberian leader reportedly disappeared from villa in Nigeria", of 28 March 2006, retrievable at http://edition.cnn.com/2006/WORLD/africa/03/28/taylor.nigeria/index.htm. He was, however, recaptured the following day and flown to Sierra Leone to stand trial before the SCSL, see *Die Welt*, "Fürst der Finsternis", of 31 March 2006 p. 10.

[423] Charles Taylor's participation in the alleged crimes took part through his role of supporting the (now deceased) Sierra Leonean warlord Foday Saybana Sankoh, who was the founder and leader of the notorious Revolutionary United Front and in that capacity responsible for some of the most horrendous crimes, see http://www.sc-sl.org/RUF.html .

[424] (n 421), para 42, p. 20.

[425] *Id.*, para 52, p. 24; see below (n 428) for an example.

[426] *Id.*, para 52, p. 24; with reference to the case *Democratic Republic of Congo v. Belgium*, ICJ, *Case Concerning the Arrest Warrant of 11 April 2000*, retrievable at http://www.icj-cij.org.

[427] *Id.*, para 53, p. 24.

Thirdly, the issuing and circulation of the international arrest warrant for Taylor did not violate the international principle of sovereign equality of states.[428]

The decision of the SCSL to deny immunity to the accused Taylor, who was one of the main perpetrators of the Sierra Leonean bloodshed, sent a strong message to the perpetrators of human rights violations in Africa or elsewhere *viz* that there is no impunity for the individual perpetrator.

Related to the question of jurisdictional immunity is the complex issue whether domestic amnesty provisions could challenge the jurisdiction of the SCSL. In the decision *Prosecutor against Morris Kallon and Birma Bazzy Kamara*,[429] the Appeals Chamber found that the amnesty provisions of the *Lomé Peace Accord*[430] did not resemble a bar to prosecution before the court due to the fact that this agreement did not resemble a binding international treaty but only an agreement that was regulated by domestic Sierra Leonean Law.[431] It could therefore only grant a domestic amnesty and as such could not deprive the SCSL as an international court of law of its powers to prosecute an accused for the commission of international crimes or deprive the SCSL of its jurisdiction.[432] This court finding is even more remarkable when seen before the background of the "transitional justice" nature of the Lomé Accord. It ended a state of impunity for gross human rights violations which was established by the necessity of "nation healing" and replaced it with a state of accountability. A comparison with the South African post- apartheid past could be drawn.

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[428] *Id.*, para 57, p. 25; the applicant had argued that the issuing of the arrest warrant and its subsequent transmission to Ghana for execution (where Taylor resided before going into exile to Nigeria) constituted an infringement of the sovereignty of Ghana.

[429] *Decision On Challenge To Jurisdiction: Lomé Accord Amnesty* of 13 March 2004, Case Numbers SCSL-2004-15-AR72 (E) and 2004-16-AR72 (E), retrievable at http://www.sc-sl.org/ SCSL-04-15-PT-060-I.pdf and http://www.sc-sl.org/ SCSL-04-15-PT-060-II.pdf.

[430] Aka *Peace Agreement Between The Government Of Sierra Leone And The Revolutionary United Front Of Sierra Leone* retrievable at http://www.sierra-leone.org/lomeaccord.html.

[431] (n 429) para 86, p. 35.

[432] *Id*., para 88, p. 35. The ICTY found earlier in its *Anton Furundzija* decision TI-95-17/1-T, reprinted in 38 *ILM* (1999), 317 that national amnesty legislation does not qualify as a bar to prosecution before the ICTY.

2.1.4.3. Evaluation

The hybrid nature of the SCSL creates an opportunity for the prosecution of human rights atrocities before a domestic *forum* of the *locus crimini* under international supervision and guidance. There is hope that some of the above-mentioned[433] deficiencies of domestic[434] or international[435] criminal forums in adjudicating human rights crimes can be overcome by establishing judicial *fora* of this nature. The concept of a mixed legal forum could have been the option chosen by the USA for holding Saddam Hussein and the ruling elite of the Baath party accountable for serious international crimes committed in Iraq.[436]

The fact that the court showed its determination to overcome probable bars to its jurisdiction and refused to accommodate regional political interests gives rise to the hope that the SCSL will resemble the first hybrid African court that will end the legacy of impunity[437] among African human rights perpetrators.

2.1.5. THE SUPREME IRAQI CRIMINAL TRIBUNAL (SICT)

This court was originally established as the Iraqi Special Tribunal (IST) on 10 December 2003 by the then existing Iraqi Governing Council enacting order No. 48 of the defunct US led Coalition Provisional Authority (CPA).[438] Iraq's Transitional National Assembly and the Iraqi Transitional Government[439] abolished the IST and its Statute in October

[433] See above 1.3 of this chapter.
[434] Like e. g. lack of impartiality, "victors' justice" and a hardly existent domestic correctional service system.
[435] Compare e.g. the difficulties of the ICTR.
[436] The present proceedings against Saddam Hussein and other "war criminals" before the US-dominated Supreme Iraqi Criminal Tribunal without UN participation question the legality and impartiality of the forthcoming verdicts.
[437] As of April 2006, 11 individuals were on trial, indicted respectively, before the SCSL, see http://www.sc-sl.org/cases/-other.html.
[438] See *Coalition Provisional Authority Order Number 48: Delegation of Authority Regarding an Iraqi Tribunal*, CPA/ORD/9 Dec 2003/48 (2003). This order became the Statute of the Iraqi Special Tribunal (IST Statute), reprinted in 43 *ILM* (2004) 231. IST is the abbreviation for Iraqi Special Tribunal.
[439] The name of Iraq's new interim parliament and government since 2005.

2005 by enacting Iraqi Law Number 10 of November 2005.[440] This law re-establishes the IST as the Supreme Iraqi Criminal Tribunal (SICT) and serves as its Statute.[441]

The so-called Coalition Provisional Authority, as the (now) disbanded US occupation government under its envoy Bremer was called, followed suit with the terminology of President Bush and his "alliance of the willing" by trying to create the impression that the occupation of Iraq was different from any other historic example of an enemy occupation,[442] and that it was in fact a liberation of the Iraqi people.[443] Consequently, the IST and its Statute created the impression that the US-led CPA and the Iraqi governing council as the representative of the Iraqi people, had entered into an agreement after prior negotiations.

Following this characterization, the IST would have qualified as an international court for the adjudication of human rights atrocities. The reestablishment of the court as an Iraqi court that is wholly integrated into the domestic Iraqi legal system has ended any further academic *excursus* on the nature of the court.

2.1.5.1. Jurisdiction and sentencing

The SICT has *ratione personae* over Iraqi nationals or non-Iraqi residents[444] for crimes, that were committed from 17 July 1968 until 1 May 2003. It encompasses therefore the whole period of Saddam Hussein's Baath Party's rule in Iraq. The *ratione temporae* also

[440] Iraqi Law Number 10 of 2005, issued on October 9, 2005. A full English version was published in the *Al-Waqa'I Al-Iraqiya- Official Gazette of the Republic of Iraq,* retrievable at http://law.case.edu/saddamtrial/documents/IST_Statute_official_english_pdf.

[441] The new court is referred to as SICT, IST and Iraqi High Criminal Court (IHCC) as well; there is a certain uncertainty in respect to the use of the proper name of the court and its statutes; see e.g. the reference made in the official US state webpage http://www.loc.gov/law/public/saddam/saddam_trib.html and the one in the English version cited in (n. 438).

[442] Such a characterization and qualification of the situation in Iraq would have let to a limitation of the power of the USA as the main occupying power to change the penal law of the occupied territory, see Article 64 of the GC IV of 1949.

[443] Out of Iraq's three main ethnic groups, namely the Kurds who are located mainly in the northern provinces around the town of Kirkuk, the Arab Sunni who are mainly located around Baghdad and the "Sunni triangle" and the Arab Shi'ites of the South who settle mostly around the city of Basra, only the Kurds see the US led occupation as liberation and abstain from any attacks on the US led Coalition troops and their Iraqi allies. Since Bush II declared the end of major hostilities in May 2003, more than 2,500 US servicemen have died in Iraq, http://www.icasualities.org (last visited June 30, 2006).

[444] See SICT Statute, Article 1 (2).

precludes any prosecution of possible crimes committed by forces of the new Iraqi government and its western allies.[445]

Its *ratione materiae* includes besides the international crimes of genocide, crimes against humanity and war crimes[446] also crimes against domestic Iraqi laws as crimes committed by the former political leadership of the country.[447] The latter crimes refer to violations of Iraqi Law Number 7 of 1958[448] and the Iraqi Criminal Code Number 111 of 1969.

One particular aspect of the SICT Statute of significance is the criminalization of the unlawful detention of "a prisoner of war or other protected person" as a war crime under Article 13 (1) No. (f) SICT Statute.

Considering the role the US played in establishing the SICT, its own practice of detaining so-called "enemy combatants" at US military installations[449] without minimum *habeas corpus* standards such as the fundamental right to a fair trial,[450] appears to be even more questionable.

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[445] Examples for this are the widespread use of torture against detainees in US detention facilities with the Abu Ghraib torture scandal as the officially acknowledged example and the excessive use of military force in civilian areas like Falluja. See for Abu Ghraib, the above mentioned confidential US Investigation, the so called "Taguba Report" which concludes (Conclusion Par. 1) that several US Army soldiers "have committed egregious acts and grave breaches of international law at Abu Ghraib and Camp Bucca", (n 138); for Falluja, see AMNESTY INTERNATIONAL, *Iraq: Fears of serious violations of the rules of war in Falluja* Public Statement, AI Index: MDE 14/056/2004 (Public) News Service No: 287 retrievable at http://web.amnesty.org/library/index/engmde140542004

[446] SICT Statute, Article 1(2) a-c and 11 to 13.

[447] *Id*., Article 1 (2) d as so called "Violations of certain Iraqi laws listed in Article 14 below".

[448] The so called *Punishment of Conspirators against Public Safety and Corrupters of the System of Governance Law of 1958*.

[449] For the Guantanamo topic see Strydom and Bachmann, "The case of the Guantanamo Bay detainees in United States and (other) courts" in 2 TSAR (2004) 294 et seq.. There are around 660 non US citizen-suspects presently held at Guantanamo Bay. Most were captured in Afghanistan and Pakistan. See "Supreme Court will hear first appeals involving Guantanamo detainees", 11 November 2003, http://www4.cnn.com/2003/LAW/11/10/scotus.detainees/index.html. Strong criticism and the US SC ruling in *HAMDAN v. RUMSFELD, SECRETARY OF DEFENSE, et al* -decided 29 June 2006, case no. 05-184. 2006, retrievable at http://laws.findlaw.com/us/000/05-184.htm changed this treatment, see "Statement attributable to the Spokesman for the Secretary-General on decision by U.S. government to apply the Geneva Conventions to detainees", 13 July 2006, retrievable at http://www.un.org/apps/sg/sgstats.asp?nid=2138#

[450] See Sec. 7 (b) Subsection 2 of the "Presidential Military Order On The Detention, Treatment, And Trial Of Certain Non-Citizens In The War Against Terror" of November 13, 2001 where "any remedy or … proceeding" sought on behalf of the detainees before other than military tribunals is effectively barred. See 41 *ILM* (2002) 252.

Iraqi domestic penal law plays a direct role in respect of the sentencing: crimes of murder or rape, committed in connection with crimes under Articles 11 to 13, may carry the death penalty under Article 24 (3).

A progressive feature of the SICT Statute is the possibility to order the forfeiture of "proceeds, property or assets derived directly or indirectly from that crime".[451] This possibility accounts for the fact that human rights violations are often the necessary means to enrich the perpetrator and that forfeiture reflects a practice common to most domestic criminal justice systems.[452]

2.1.5.2. Evaluation

The fact that the internationally unpopular[453] sentence of capital punishment may be used makes it a moot point whether there will be any future international recognition of the tribunal's legitimacy. The additional fact, that the USA will continue to exert its influence in Iraq even after the formal hand over of (limited) sovereignty to an Iraqi government[454] raises doubts about SICT's capacity to be impartial in adjudicating the vanquished regime's crimes. The fact, that the USA initiated the process of establishing this court with the main intent to try ousted former President Saddam Hussein with his lieutenants before an US-dominated forum and not the International Criminal Court in the Hague, could qualify the SICT as a modern example of an unilaterally established (and even imposed) forum of victors' justice.[455]

Such an argument has been repeatedly raised regarding the Nuremberg Tribunal.

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[451] Article 24 (6) of the SICT Statute.
[452] Compare with Article 28 of the IMT Statute on the possibility of depriving "the convicted of any stolen property".
[453] See Second Optional Protocol to the International Covenant on Civil and Political Rights, aimed at the abolition of the death penalty, adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989, where Article 1 (1) stipulates that "No one within the jurisdiction of a State Party to the present Protocol shall be executed."
[454] In the End of June 2004.
[455] Olusanya "The Statute of the Iraqi Special Tribunal for Crimes Against Humanity-Progressive or Regressive?" in 5.7 *GLJ* (2004), 6 for an insightful discussion of the ISTCH's weaknesses.

The mounting criticism[456] of SICT's ongoing trial of Saddam Hussein[457] documents present concerns that this forum with its "individualized" procedure bears an unfortunate resemblance to the Nuremberg trials. Other severe difficulties for the SICT may arise from ongoing terror attacks, launched by insurgents and directed against the tribunal's officers.[458]

2.2. THE PERMANENT INTERNATIONAL CRIMINAL COURT (ICC)

> "For nearly half a century – almost as long as the United Nations has been in existence – the General Assembly has recognized the need to establish such a court to prosecute and punish persons responsible for crimes such as genocide. Many thought … that the horrors of the Second World War – the camps, the cruelty, the exterminations, the Holocaust – could never happen again. And yet they have. In Cambodia, in Bosnia and Herzegovina, in Rwanda. Our time – this decade even – has shown us that man's capacity for evil knows no limits. Genocide . . . is now a word of our time, too, a heinous reality that calls for a historic response."[459]

2.2.1. Introduction

History has shown that criminal prosecution of gross human rights atrocities through ad hoc tribunals and/or domestic criminal courts[460] has not been a sufficient short-term or long-term, individual or general deterrence. Following the Rwandese genocide of 1994, recent and ongoing atrocities in Nigeria, Liberia, Somalia, Ethiopia, Sudan, Sierra Leone,

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[456] The trial against the former leader started in October 2005. Human Rights Watch, as an early critic of the ISTCH, doubts the court's impartiality and independence, regards the defence counsel as being "cripplingly" disadvantaged and regards the final sentence as being already passed see e.g. "Iraq: Tribunal's Flaws Raise Fair-Trial Concerns For Justice to Be Done, Trials of Ba'ath Party Officials Must Be Fair" retrievable http://hrw.org/english/docs/2004/12/16/iraq9907.htm and Tisdall "Justice, the first victim?, *Mail & Guardian* October 21 to 27 (2005).

[457] The proceedings started in October 2005, for more information see http://www.loc.gov./law/public/saddam/saddam_pres.html.

[458] Including. the killing of a Tribunal judge, (n. 216).

[459] Kofi Annan, UN Secretary-General about the ICC. Cit. in the overview to the *Rome Statute of the International Criminal Court*, which is retrievable at http://www.un.org/law/icc/general/overview.htm.

[460] See as an example for the latter, Article 85 of the 3rd Geneva Convention of 1949 whereas prisoners of war could be prosecuted under the laws of the Detaining Power for unlawful acts committed prior to their capture.

Burundi, the Democratic Republic of Congo, Chechnya and Iraq serve as evidence of this conclusion.

As an immediate response to such past and present atrocities, the "new" universal "International Criminal Court" (ICC) in The Hague was established on 1 July 2002, when 60 of the original 120 signatory states to the Rome Statute of 1998 ratified the Rome Statute of the International Court of 17 July 1998.[461]

The creation and eventual establishment of the ICC were the result of a process that lasted nearly 80 years.[462] It started with the unsuccessful attempt to try German war criminals before allied tribunals,[463] gained momentum with the two *ad hoc* Nuremberg and Tokyo tribunals and found its culmination in the establishment of the ICTY and ICTR as forums of international criminal justice, where the traditional pattern of the victor as judge and the defeated as defendant was overcome. This process of creating the various forums of international criminal justice was supplemented, supported and even accelerated by developments in international criminal law[464] and the work of the International Law Commission (ILC). As early as 1947, the latter was entrusted[465] with the formulation of a *Draft code of offences against peace and security and mankind*, thus embedding the Nuremberg Principles into binding international criminal law.[466] The creation of a permanent international criminal court, as envisaged by the ILC as early as 1951[467] lay dormant until this process was revitalized in the early 1990s[468] with the 1994

[461] Under Article 126 para 1 of the ICC Statute. According to the official webpage of the ICC, 139 states had signed and 99 ratified the ICC Statute by July 2005, see http://untreaty.un.org/ENGLISH/
The text of the *Rome Statute of the International Criminal* can be retrieved at http://www.un.org/law/icc/general/overview.htm.
[462] Cassese (n 7), 327-46; Ratner and Abrams (n 8) 48-9.
[463] As planned under Articles 228-230 of the Versailles Peace Treaty.
[464] Noteworthy in particular is the 1948 Genocide Convention where under Article 6 an "international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".
[465] GA Res.177/II of 21 November 1947. Ratner and Abrams (n 8) 206 list the 1937 Convention for the Creation of an International Criminal Court as the earliest, however unsuccessful, attempt by the League of Nations to establish such a permanent forum of international criminal justice.
[466] See *Report of the International Law Commission to the General Assembly*, UN Doc. A/1316 (1950), reprinted in [II] *ILC Y.B.* 1950, 364.
[467] See *Report of the Committee on International Criminal Jurisdiction*, UNGAOR, 7th Session, UN Doc. A/26645 (1954) on the 1953 revised draft.
[468] See Cassese (n 7) 341 for a detailed account of the drafting process.

ILC Draft Statute[469] on a permanent criminal court as its most significant result. The draft provisions were subject to a revision and drafting process from 1996 to 1998 by a UN GA-elected preparatory committee[470] which led to the final 1998 adoption of the statute for a permanent international court at the UN conference in Rome as the "Rome Statute".

2.2.2 Jurisdiction and sentencing

The ICC adjudicates the "core crimes" of international criminal law: the crime of genocide, crimes against humanity, war crimes and the crime of aggression, which awaits later definition.[471] Its *ratione personae* is limited to natural persons (over the age of 18) and does not include states or juristic persons.[472] A 1998 French proposal for the inclusion of legal persons under the court's jurisdiction was rejected at the Rome Conference.[473] As regards the available penalties, the standard maximum sentence which the court can impose on the convicted defendant must not exceed 30 years,[474] with life imprisonment as an exception to this rule in cases where "the extreme gravity of the crime and the individual circumstances of the convicted person" may justify such an exception.[475] The additional possibility for the court to order the "forfeiture of proceeds, property and assets derived which directly or indirectly from that crime […]"[476] has the potential to generate additional effects of deterrence on the defendant who faces the possibility of losing the financial gains of his crimes.[477] As experience has shown, the commission of international crimes and the personal enrichment of the individual perpetrator are often interlinked.[478] The use of these financial gains for the future Trust

[469] *Report of the International Law Commission*, 46th Session, UN GAOR, 49th Session, Supp. No.10, UN Doc. A/49/10 (1994), reprinted in 2 *ILC Y.B.* (1994) [II] 18-87.
[470] See *Report of the Preparatory Committee on the Establishment of an International Criminal Court* of April 14, 1998, for more information on this drafting process. UN Doc. A/CONF.183/2/Add.1.
[471] Article 5 para 1 lit. a-d of the ICC Statute.
[472] See Article 25 paras 1, 26 of the ICC Statute.
[473] *Draft Statute for the International Criminal Court*, Article 23, paras 5-6, UN Doc.A/CONF.183/2/Add.1 (1998). The proposal extends the court's jurisdiction to legal persons for their complicity in crimes under the Statute and explicitly recognizes the separate criminal responsibility of the individual perpetrator.
[474] Article 77 (1) (a) of the ICC Statute.
[475] *Id.*, Article 77 (1) (b).
[476] *Id.*, Article 77 (2) (b).
[477] The deterrent effect of such asset forfeiture measures has been proven by its utilization by various domestic law enforcement agencies in their fight against organized crime and international terrorism.
[478] See e.g. *Republic of the Philippines v Marcos* case, 862 F 2d 1355 (9th Cir 1988), concerning the attempt of the democratic government of the Philippines to hold its former dictator Marcos financially liable for the

Fund for the compensation of victims and family members, as set forth under Article 79 (2) Rome Statute,[479] would add another aspect to the court's work: besides sentencing, the financial redressing of the injustice caused by the crime could become an additional element of the court's adjudication.

The Rome Statute restricts the availability of defences such as Head of State immunity, superior orders and statute of limitations.[480] The defences of duress and self-defence are in principle admissible under the strict provisions of Article 31 ICC Statute.[481] Available defences in domestic criminal law such as error of law or error of fact are restricted under Article 32 to cases where the *mens rea* was absent due to these errors at the time of the commission of the crime.[482]

2.2.3. Shortcomings and present difficulties

2.2.3.1. Restrictions and limitations to the court's jurisdiction

The following three aspects of the court's jurisdiction could limit the effectiveness of the Court with regard to the deterrence of human rights offenders.

(a) The transitional provision of Article 124, whereby a state party can exclude the court's jurisdiction in respect of war crimes for a period of up to seven years after the ratification of the Rome Statute, creates the opportunity for states with poor human rights records or even a proven history of human rights atrocities to opt out of their obligation under international law and the Rome Statute to prosecute human rights crimes. Examples of "home-made" immunities and amnesties as in Chile could become acceptable procedures under the ICC Statute. However, the "opting out" under Article 124 will often be the only way to enable and motivate states which are in the process of transition and nation building to join the ICC;

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human rights atrocities committed during his reign and to forfeit the assets he had brought to the USA, see part C chapter 2 for more information on this form of accountability.

[479] Article 79 (2) stipulates that the "Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund."

[480] *Id.*, Articles 27, 33 and 29. Kittichaisaree (n 15) 258-276 for an insightful analysis of the defences available under the Rome Statue with their historical context.

[481] *Id.*, Article 31 (1) (c) and (d).

[482] *Id.*, Article 32 (1) and (2)

(b) Secondly, the restriction of the court's jurisdiction to natural persons only, excluding juristic persons from its jurisdiction *ratione personae*. Taking into account the present reality where multinational corporations (MNCs) are becoming increasingly involved in human rights violations through their business actions and alliances with a multitude of non-democratic states,[483] this omission is at the very least unfortunate and does not address the realities of today;

(c) And lastly, the complementary nature[484] of the ICC statute, which, unlike the ICTY and ICTR does not establish primacy over national prosecutions, puts into question the court's future impact on the protection of human rights and could prepare already today the ground for later jurisdictional conflict.

2.2.3.2. The notorious opposition of the USA

The USA, after a short period of initial support for the ICC under the Clinton Administration, has become the fiercest opponent of the court. A prominent example of the US's policy of opposition and obstruction towards the ICC is the US "American Servicemembers' Protection Act" (ASPA) of August 2002.[485] The ASPA authorizes the President of the USA to use all necessary and appropriate (even military) means to free US or allied personnel detained by or on behalf of the ICC. Following the enactment of the ASPA, the US Embassy in The Hague stated in June 2002 that the US would not even rule out the use of force against a NATO ally under section 2008 ASPA in "…circumstances under which the United States would need to resort to military action

[483] Examples for the growing view that legal persons should be hold responsible for their involvement in human rights violations are e.g. the "UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights", UN Doc. E/CN.4/Sub.2/2003/12 Rev. 2 (2003) and the increasing number of civil liability court cases before US Federal (civil) courts under the Alien Torts Claim Act. See part C chapter 2 below.

[484] See Preamble and Article 17 of the ICC Statute; the efficiency of the ICC to prosecute crimes before this limitation will become an eventual "lackmus test" of its later credibility, see Lattimer and Sands (n 214) 413.

[485] The 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, *Pub. L. No*. 107-206; §§ 2001-2015, 116 Stat. 820 (2002).

against the Netherlands or another ally".[486] Consequently, the ASPA became infamously known as the "The Hague Invasion Act".[487]

Other measures under the ASPA include the authorization of the Administration to conclude bi-national non-extradition treaties with various ICC signatory states,[488] the barring of military assistance to states which are non-NATO members or major non-NATO allies[489] and the subjecting of US participation in UN present and future peacekeeping operations on the condition of a prior exemption from ICC jurisdiction.[490]

The US determination to follow its "hostile" policy towards the "world criminal court" was again highlighted by its actions in connection to the UN SC adoption of SC Resolution 1593 on 31 March 2005, which referred[491] the Darfur human rights crisis to the prosecutor of the ICC for further investigation.[492] While the USA seemed initially to have overcome its prior notorious opposition[493] to the ICC by not vetoing the resolution

[486] This statement and the diplomatic response of the Dutch ambassador to the US, classifying the ASPA with its Section 2008 as "ill-considered, to say the least", can be found in 96 *AJIL* (2002) 975 "Contemporary Practice Of The United States".
[487] "European Parliament Resolution on the Draft American Service-members' Protection Act (ASPA)" at http://www.globalpoliccy.org and "Rights: U.S. Threat on Aid over International Court under Fire", InterPress Service English News Wire, Aug 15, 2002.
[488]The USA bases its agreements on the following exemption clause in Article 98 (2) ICC Statute, whereas "the Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international agreements …" Around 60 states have so far signed such agreements, see http://www.iccnow.org/documents/otherissuesimpunityagreem.html.
[489] Under section 2007 ASPA.
[490] Section 2005 ASPA. The US threats to withdraw from peacekeeping missions have led to the adoption of UN Resolution 1487, S/RES/1487 (2003) 42 *ILM* (2003) 1025 where the ICC is requested to stay any criminal proceedings against UN peacekeeping personnel under Article 16 ICC Statute for a period of 12 months.
[491] This referral was necessary to establish jurisdiction over the crimes committed in Sudan because of the fact that Sudan is not a party to the ICC Statute. See Article 13 (b) ICC Statute.
[492] UN Press Release SC 8351 of 31/03/2005, para 1 of the Resolution reads" [the UN SC] "decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court", retrievable at http://www.un.org/News/Press/docs/2005/sc8351.doc.htm. Besides this referral by the UN SC, there are to date three referrals of situations to the Office of the Prosecutor by member states to the Rome Statute: the Republic of Uganda, the Democratic Republic of Congo and the Central African Republic. See http://www.icc-cpi.int/cases.html.
[493] See e.g. Human Rights Watch "The U.S. fiddles Over ICC While Darfur Burns - UN Security Council Should Reject U.S. Scheme for Ad Hoc Court" at http://hrw.org/english/docs/2005/01/31/usint10091.htm.

for the common sake of universal justice, it nevertheless abstained from casting its vote and explicitly upheld its objections to the creation of the ICC *in toto*.[494]

2.2.4. Conclusion

Because of its restricted jurisdiction and the supplementary nature of its jurisdiction, the ICC will only provide a rather limited safeguard and standard of human rights protection. Many future human rights violations will still be committed with impunity simply because they do not fall under the subject matter jurisdiction of the court. In addition thereto there are already some indicators of future problems such as the USA's attempts to sabotage the court's efficiency as indicated above.

However, considering the court's possible potential as a means of criminal deterrence, one can hope that it will soon develop into a fully operational organ for the protection of human rights.[495]

3. CRIMINAL PROSECUTION OF INTERNATIONAL CRIMES BEFORE NATIONAL COURTS

The last 60 years have seen an increase in the prosecution of international crimes before national courts. To date, domestic criminal courts worldwide have successfully prosecuted non-citizens for serious international crimes, asserting universal criminal jurisdiction under their own domestic penal laws. Criminal prosecutions before national courts in Israel, Belgium, Germany, Canada and the United Kingdom have contributed to

[494] The US delegate, Anne Woods Patterson declared explicitly that "while the United States believed that a better mechanism would have been a hybrid tribunal in Africa, it was important that the international community spoke with one voice in order to help promote effective accountability. The United States continued to fundamentally object to the view that the Court should be able to exercise jurisdiction over the nationals, including government officials, of States not party to the ICC Statute. Because it did not agree to a Council referral of the situation in Darfur to the Court, her country had abstained on the vote. She decided not to oppose the resolution because of the need for the international community to work together in order to end the climate of impunity in the Sudan, and because the resolution provided protection from investigation or prosecution for United States nationals and members of the armed forces of non-State parties.", see UN Press Release (n 492) 3.

[495] The ICC's recent indictments (and subsequent issuing of arrest warrants) of the head of the Lord Resistance Army (LRA) Joseph Kony and four of his captains for war crimes and crimes against humanity, committed in Uganda, are a "lackmus test" for the court's later success in adjudicating international crimes, ICC-02/04-01/05 of September 27, 2005.

the development of the body of international justice. The applicable substantial penal law with its relevant case law of the different national jurisdictions form part of this research.

3.1. Israel

A prominent example of a not undisputed domestic prosecution and later punishment of a "holocaust" perpetrator is the *Eichmann*[496]case, where Israel successfully tried, sentenced and subsequently executed the former SS colonel Adolph Eichmann for his leading role in the planning of the extermination of European Jews as Head of the Jewish Office in the SS Office for State Security ("Reichssicherheitshauptamt"). He was tried and convicted under the Israeli Nazi and Nazi Collaborators (Punishment) Law of 1950.[497] This law penalizes *ex post facto* acts of genocide committed against people of Jewish origin committed in German-occupied states. Eichmann, who had temporarily escaped post-World War II prosecution in Europe by emigrating to Argentina, was abducted there and brought to Israel. Israeli courts established the criminal jurisdiction of Israel's courts under the premise that the seriousness of the alleged crimes established universal jurisdiction "[…] as the right to prosecute and punish crimes of this order in every State within the family of nations".[498]

The accompanying circumstances of the trial – for example, the pre-trial abduction of Eichmann to Israel[499] by Israeli Mossad agents, the finding on the death penalty and his subsequent execution – have led to significant worldwide criticism.[500]

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[496] See *Attorney-General of Israel v. Eichmann* (District Court of Israel 1961), reprinted in 36 *ILR* (1962) 5-298.

[497]"Law of 1950 on the Doing of Justice to Nazis and their Collaborators".

[498]*Attorney-General of the Govt. of Israel v. Eichmann* (Dist. Ct. Jerusalem), judgment of 11 Dec. 1961 in 56 *AJIL* (1961) 805, para 30. This finding was confirmed by *Eichmann v. Attorney General of the Govt. of Israel* (Supreme Court Israel 1962), reprinted in 36 *ILR* (1962) 277-342.

[499] See for the question of the legality of the trial after the illegality of the seizure, de Than and Shorts (n 9) 48. Arguing with the findings in the South African case *S v. Ephraim*, (2) SA (1991) (A) 553, reprinted in 31 *ILM* (1992) 888, the illegality of the seizure would have automatically led to the lack of jurisdiction of the state Israel. See Dugard, *International Law-A South African Perspective* (2000) 144-147.

[500] Interesting is in this context that the three states whose sovereignty had been affected by the abduction and trying of the defendant, Argentina and the two German states, did not raise complaints against the Israeli procedure, Cassese (n 7) 293. Criticism against the abduction, trial and eventual execution of Eichmann was most prominently voiced by the UN and the USA, see for a summary Medoff "Saddam on Trial: Lessons from the Eichmann Case" of December 2003, retrievable at http://www.wymaninstitute.org/articles/2003-12-eichmann.php

Israel's resolute and determined stance in this affair, however, helped to establish the legacy of Israel's early determination and resolve to bring holocaust perpetrators to justice.[501] Furthermore, the judgment is one of the first cases worldwide in which the crime of genocide was adjudicated before a domestic penal forum.[502]

3.2. Belgium

Belgium's Law of 16 June 1993 established universal jurisdiction of Belgium courts for the crimes of genocide, war crimes and crimes against humanity[503] with a until then unknown scope. It was applied successfully in a 2001 case concerning the 1994 genocide in Rwanda.[504] The Belgium War Crimes Act has been used as the legal ground to indict Israeli Premier Ariel Sharon for crimes against humanity committed by Israeli troops under his command in 1982 in Lebanon.[505] The act with its far-reaching impact is a real landmark instrument for the global protection of human rights and humanitarian standards.

The enactment and resolute application of such a landmark instrument faced fierce opposition from the start. Besides the *Democratic Republic of Congo v. Belgium* judgement of the ICJ[506] (see below), where the court found that Belgium had violated

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[501] See *Attorney-General of the Govt. of Israel v. Ternek* (Dist Ct. of Tel Aviv), judgment of 14 December 1951, English summary in 18 *ILR* (1951), 539-40 as an early example for the application of the 1950 Law (n 435) on a case of atrocities committed among the internees of a concentration camp.

[502] Cassese (n 7) 97.

[503] Law of 16 June 1993, reprinted in 2 *Codes Belges* (Bruylant) 240/5 (62d Supp. 1996) and Law of 10 February 1999, reprinted in MONITEUR BELGE, 23 March 1999 at 9286. The Law of 16 June 1993 "concerning the Punishment of Grave Breaches of the international Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto", was amended by the Law of 19 February 1999 as "Act Concerning the Punishment of Serious Violations of International Humanitarian Law", and included the international crimes of genocide and crimes against humanity to its jurisdiction, see 38 *ILM* (1999) 918 for an unofficial translation; (hereafter the "Belgian War Crimes Act").

[504] *Rwandan case* (Court of Appeal of Brussels Chambre des mises en accusation), decision of 17 May 1995, in *Journal des Tribunaux* 1995, 542-3, retrievable at http://www.icrc.org/ihl-nat.nsf cit. in Cassese (n 7) 287.

[505] *Sharon and others* (Court of Appeal of Brussels Chambre des mises en accusation), decision of 6 March 2002, cit. in Cassese (n 7) 287. See Ratner, "Belgium's War Crimes Statute-A Postmortem" in 97 *AJIL* (2003) 888-897, for a comprehensive description of this remarkable law, its features and its further development. On appeal, the Belgian Supreme Court decided against the applicants on the grounds that Sharon enjoyed *functional* immunity while in office, see http://news.bbc.co.uk/2/hi/middle_esat/2754877.stm.

[506] See *Democratic Republic of Congo v. Belgium*, ICJ, *Case Concerning the Arrest Warrant of 11 April 2000*, retrievable at http://www.icj-cij.org.

international law by disrespecting immunity and the inviolability of the incumbent foreign minister of the DRC by allowing the issuing and circulating of an international arrest warrant by a Belgium judge for his alleged participation in the commission of international crimes, other, more direct political pressure was used to reduce the act's impact on international justice. The USA asserted the utmost pressure on the Belgian government, even threatening to cut down financial contributions to NATO headquarters in Brussels and the total withdrawal of the US elements, in order to have the act downscaled and severely reduced in its universal impact.[507]

As a consequence, a new version[508] was enacted in August 2003 which contained two major amendments to the original version: the requirement of a legitimizing link between Belgium and both the victim and accused in terms of nationality or residence and the respecting of *functional* immunity of present governmental officials as a bar to prosecution and arrest.[509] An important consequence of the "link" requirement is the "right" (or duty) of the prosecutor to refuse to prosecute a case and refer it instead to the courts of the home state of the accused or an international tribunal.[510] Belgium has therefore decided to "row back" in respect of its universal criminal prosecution of gross crimes under international law, reversing a contrary trend in other domestic jurisdictions.[511]

The fate of an initially impressive domestic instrument of international criminal law illustrates the present difficulties, which the prosecution of international crimes faces in respect of possible infringements of binding principles of international law (such as

[507] Ratner (n 505) 890-891.
[508] "Loi relative aux violations graves du droit humanitaire" of August 5, 2003.
[509] See "Belgium restricts "genocide law"", BBC International, April 6, 2003, available at http://news.bbc.co.uk/2/hi/europe/2921519.stm
[510] As it was the case in May 2003, when Iraqi citizens filed a case against the US Supreme military commander during the invasion, General Tommy Franks, "Belgium passes lawsuit against US Iraq commander to American prosecutors", Agence-France Press, May 20, 2003, available at http://story.news.yahoo.com/news?tmpl=story&u=/afp/20030520/wl_mideast_afp/belgium_us_iraq_03052 0191721
[511] See e.g. Germany's new Code of Crimes Against International Law (CCAIL) of June 2002 that establishes universal criminal jurisdiction of German criminal courts for the prosecution of the core crimes, below under 3.3.2.

sovereign equality of states, immunity of heads of state and other types of official immunities)

3.3. Germany

3.3.1. Overview

The German post-1945 transition trials took place in two phases: the first phase comprised the criminal prosecution before military courts[512] and to a lesser extent before German national courts; the second phase took place before German criminal courts from 1955 onwards. This latter prosecution of Nazi crimes produced the impressive number of more than 91,000 trial proceedings against German citizens[513] for their participation in severe human rights atrocities and war crimes during World War II.

Apart from this impressive adjudication of the Nazi legacy of human rights atrocities, which is described in depth above,[514] there have been other important developments in German law with respect to the prosecution of international crimes: with the onset of the Yugoslav conflict in 1991, Germany and her legal system have become increasingly involved in the prosecution of international crimes. As early as February 1994, when the Bosnian Serb Dusko Tadic[515] was arrested in Munich for his participation in acts of genocide against Bosnian Muslims, German criminal justice took an interest in bringing those responsible for the Yugoslav atrocities to justice.

3.3.2. The prosecution of international crimes before German courts

Germany introduced in June 2002 a new Code of Crimes Against International Law (CCAIL)[516] which establishes universal jurisdiction of German criminal courts for the punishment of core crimes.

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[512] Before the IMT in Nuremberg in 1946 and subsequent trials before allied military courts under CCL No.10 until 1949.
[513] See McCormack (n 214) 111 with further annotations.
[514] Chapter 2, 2.1.1.4 above.
[515] Dusko Tadic was indicted by German prosecution authorities. After the surrender to the ICTY in April 1995, which had requested his transferral in October 1994, these proceedings came to an end. Tadic was subsequently tried by the ICTY and handed over to Germany in 2000 to serve his sentence. See *Prosecutor v. Dusko Tadic*, Judgment Appeals Chamber in 38 *.ILM* (1999) 1518.
[516] "Völkerstrafgesetzbuch", (VStGB), of June 30, 2002, published in *BGBl* I 2254; see 42 *ILM* 995 (2003) for a commented English version of this code. For the binding German version see homepage of the Max-

3.3.2.1. Criminal Prosecutions of serious international crimes before the introduction of the CCAIL

Before the introduction of the CCAIL the prosecution of international crimes before German courts faced various legal difficulties in respect of subject matter jurisdiction and applicability of law. This notwithstanding, German courts successfully tried until 2001 six Bosnian Serbs for crimes of genocide and war crimes committed during the Yugoslav conflict.[517]

German courts then established criminal jurisdiction either under section 6 No. 1 StGB for the crime of genocide or, alternatively, under section 6 No. 9 StGB for war crimes as offences prosecutable on the basis of a binding treaty. Consequently, German courts applied in the latter case GC IV and AP I.[518] One of the thresholds in respect of exercising jurisdiction had been the requirement of establishing the so called "legitimizing link" between the offence and Germany in order to prevent a violation of the principle of sovereign equality in international law.[519] This requirement was confirmed by the German Federal Supreme Court (BGH) in respect of the crime of genocide but left open with respect to war crimes.[520]

An additional restriction for the prosecution of international crimes lies in the scope of the applicable law. While the crime of genocide was prosecutable under section 220a of the StGB, crimes against humanity and war crimes were not codified in the German Penal Code and as a consequence had to be prosecuted as ordinary crimes of murder and manslaughter under sections 211 and 212 of the StGB.[521]

Plank Gesellschaft at http://www.mpg.de. The code is abbreviated in academic terms as both, CCAIL and CCIL as well.

[517] See Ambos and Wirth, "Genocide and War Crimes in the Former Yugoslavia Before German Criminal Courts", in 44 *Bochumer Schriften zur Friedenssicherung und zum Humanitären Völkerrecht* (2001), 771 for a discussion of these six judgments.

[518] *Id*. 777.

[519] Such a link exists e.g. in the presence of the accused person in Germany.

[520] BGH, Decision 13 February 1994 in *Tadic* BGs 100/94 in 47 *NJW* (1994), 232 for the crime of genocide and BGH, Judgment 30 March 1999 in *Jorgic* 3 StR 215/98 in BGHSt 45,65 for war crimes. For a further discussion of this requirement, see Ambos and Wirth (n 497) 778-783.

[521] This fact has got to be seen before the background that while Germany had ratified the GCs and their two APs, the application of the criminal sanctions of the grave breaches system could not take place

3.3.2.2. Criminal Prosecution of international crimes under the new CCAIL

These difficulties in the effective criminal prosecution of international crimes, however, will belong to the past after the introduction of the new CCAIL. Criminal jurisdiction of German courts under German general criminal law and the special provisions of the CCAIL is established for the prosecution of serious international crimes without requiring any further link to German territory.[522] The CCAIL punishes the crime of genocide and crimes against humanity as serious violations of human rights law[523] and further war crimes as violations of humanitarian law.[524] Of particular interest is the criminalization of the omission to report a crime by persons under a duty to act.[525] The role of US military superiors in the reported maltreatment of detainees in Iraq and other locations in 2003/4 is an example where such penal sanctions could apply.[526]

3.4. Canada

Two laws, namely the "War Crimes Act" of 1946[527] and the "Act to Amend the Criminal Code, the Immigration Act of 1976 and the Citizenship Act" of 1987[528] are the present instruments for the prosecution of war crimes and crimes against humanity. While the former act has mostly been used to prosecute crimes committed by Nazis during WW II apprehended in Canada, the latter enables the retroactive and future prosecution of war

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because of the lack of the necessary implementing domestic German legislation. This fact led therefore to non retroactivity limitation as stipulated by Article 103 (2) GG.

[522] CCAIL, Section 1 reads "serious criminal offences […] even when the offence was committed abroad and bears no relation to Germany."

[523] *Id.*, Sections 6 and 7.

[524] *Id.* Sections 8-12, covering the whole range of humanitarian law including the provisions of the GC I-IV and AP I and II.

[525] *Id.* Section 14 para 1 imposes on military and civilian commanders the duty to "draw the attention" of the respective disciplinary organs on offences committed by their subordinates.

[526] The USA had been accused of the torturing and maltreatment of detainees particularly in Iraq. See the now official report *Article 15-6 Investigation of the 800th MP Brigade* conducted by Major General Antonio Taguba, (n 138). An attempt to prosecute high-ranking U.S. officials for these alleged acts of torture under the CCAIL failed when the Higher Regional Court Stuttgart dismissed a petition for a court decision against an earlier decision of the German Attorney General not to proceed with criminal inquiries. The reasons given were mainly based on considerations concerning the principles of subsidiarity and non-interference of German criminal proceedings *viz* the sovereignty of the US. The future prospect to utilize the CCAIL as a persecutive tool is severely questioned by this decision. See docket of the Centre for Constitutional Rights, retrievable at http://www.ccr-ny.org/v2/home.asp.

[527] S.C. 1946, c. 73

[528] S.C. 1987, ch. 37, Can. Stat. 1107. The Amending Act authorizes Canadian authorities to denaturalize and deport human rights offenders, a practice well used in the Anglo-American sphere but nearly unknown to continental Europe.

crimes and crimes against humanity as offences under Canadian domestic law on a universal scale. It is interesting that the members of the Canadian Armed Forces are, unlike the US military, not exempted from this jurisdiction. This is made even more remarkable by the fact that Canada has a long history of sending her troops on UN-mandated missions.[529]

A possible future indictment[530] against Zimbabwean president Robert Mugabe for gross human rights violations in connection with the insurrection of the Ndebele in the Matabeleland in the 1980s could strengthen the trend of modern international jurisprudence that head-of-state immunity does not protect former and present heads of state from criminal prosecution.

3.5. United Kingdom

Section 134 of the Criminal Justice Act of 1988, Chapter 33, of the United Kingdom is another example where municipal law became applicable to grave crimes committed outside the territorial borders of the forum state. This Act enacted the 1984 UN Torture Convention into British law and established universal criminal jurisdiction for UK's courts for the international crime of torture.

The Criminal Justice Act has been used successfully to establish subject matter jurisdiction of British courts in the *Pinochet*[531] case for fulfilling the "double criminality" requirement of international extradition law.[532]

3.6. Conclusion

The prosecution of international crimes before domestic courts can contribute significantly to the creation of international justice. However, there are many examples

[529] For an evaluation and comparison of the Canadian criminal legislation, see Zaid, "Will or Should the United States Ever Prosecute War Criminals?: A Need For Greater Expansion in the Areas of Both Criminal and Civil Liability" in 35 *NELR* (2002) 460-461.
[530] See Nolan, "Can Ottawa Act Against Mugabe?" in *Globe and Mail* of November 5, 2004, retrievable at http://www.globalpolicy.org/intljustice/universal/2004/1105mugabe.htm on the prospects of a future indictment.
[531] UK House of Lords: *Ex Parte Pinochet* in 38 *ILM* (1999) 581.
[532] *Id.* 661.

where such trials of transitional justice went seriously wrong and turned into farcial situations. An example of this is the post-World War II liberation purges, which were often conducted with very doubtful standards of justice.[533] Another criticism of national prosecutions of international crimes might be based on the fact that the applied law very often has a retroactive nature.[534] Finally, the multitude of diverse domestic prosecution instruments and their respective forums may lead in the end to ineffectiveness, conflict of interest and confusion in respect of the establishment of a homogeneous system of universal criminal justice.

[533] See Posner and Vermeule "Transitional Justice As Ordinary Justice" in *HLR* (2004), 770 ff for an detailed account on transitions with its impacts and implications for international law.
[534] *Id.* 790 about the so called "dilemma of retroactive justice".

CHAPTER 3

IMMUNITIES AND DOMESTIC AMNESTIES AS KEY OBSTACLES TO AN EFFECTIVE CRIMINAL PROSECUTION

1. IMMUNITY

1.1. Introduction

The principles of state sovereignty and immunity from prosecution before the courts of a foreign state are interwoven with respect to their origin and their consequences. State sovereignty as protected under Article 2 of the UN Charter limits the scope of other states' lawful actions such as criminal prosecutions of the citizens of a foreign state.

Cassese[535] distinguishes three classes of immunities: the so-called functional immunity under customary international law; personal immunity under international customary and treaty law; and personal immunity under domestic law. The first two concepts are relevant to this research. Functional immunity, *ratione materiae*, as the "older", classic version of immunity, exempts all state agents from jurisdiction for their official actions, thus accounting for the Act-of-State doctrine. Personal immunity, *ratione personae*, as the protection from jurisdiction for certain individuals while in office, is of particular relevance for the exercise of international criminal justice with regard to incumbent state officials.

In general, state sovereignty with its related concepts of functional and personal immunity is a pillar of international state law. However, the unconditional acceptance of this principle would create impunity even for the most egregious human rights violations.

Criminal jurisdiction in the sense of the exercise of judicial state authority is generally restricted by the territorial borders of the own territory. This territorial restriction of state (judicial) jurisdiction is a principle under international law[536] and safeguards the efficacy of other principles of state sovereignty such as non-interference and sovereign equality among all members of the UN.

[535] Cassese (n 7) 264.
[536] See the *Lotus* case, France v. Turkey, *PCIJ* Ser. A (1927), 10.

This principle is valid even in cases where the nature and gravity of the act qualify the offence as an international crime and as such gives rise to universal jurisdiction under multilateral treaty law or customary international law since a valid claim to jurisdiction does not automatically justify an incursion into another state's territory. Only the existence of an additional authorization for the prosecuting state's authorities to exercise its jurisdictional powers on another state's territory can justify such an infringement. Such an authorization can either lie in the explicit waiver of a state's sovereignty in respect of the exercise of universal jurisdiction established in multilateral treaties and bi-national agreements,[537] or to a lesser extent in the *jus cogens*[538] nature of customary international law.[539]

1.2. The present concept and practice of immunity from criminal prosecution in respect of human rights atrocities

The traditional concept of state immunity protects acting heads of state or government officials of a foreign state from criminal prosecution as an "absolute" principle in international law. This doctrine of absolute immunity was, however, watered down with respect to serious human rights violations through the practical outlawing of such an unrestricted protection under international law. Examples of this process can be found in explicit provisions in international multilateral instruments[540] and in the redefining of the *jus cogens* concept.

Besides these "new" human rights-driven changes, a new judicative practice before international and higher national courts has emerged, demonstrating the extent to which practice and legal theory have already merged.

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[537] See e. g. Article 4 (2) of the ICC-Statute.

[538] Such a waiver of immunity as a consequence for *jus cogens* violations is questioned by the ICJ' s *Case Concerning The Arrest Warrant Of 11 April 2000 (Democratic Republic Of The Congo v. Belgium)* 2002, 14 February, General List, No. 121. *ICJ Reports* (2002) See below under 1.2.2.

[539] *Id*, 60, where the court emphasizes the difference of the two concepts of immunity, namely procedural immunity and material immunity.

[540] See Article 7 IMT Charter, Article 6 Tokyo Charter, Principle III of the ILC Nuremberg Principles of 1950, Article 7 ILC Geneva Draft Code of 1996, Article 7 of the ICTY Statute, Article 6 of the ICTR Statute and Article 27 of the ICC Statute.

1.2.1. The House of Lords' *Pinochet* decision

1.2.1.1. Overview

The *Pinochet* case[541] draws its relevance from the fact that it exemplifies the growing international determination to hold individuals criminally accountable for serious international crimes regardless of the official status of the alleged offender. The case further demonstrates to what extent politics may influence the judiciary, the executive and public opinion and lastly the changed role of head-of-state immunity in the human rights context.

1.2.1.2. Facts of the case

Former President Pinochet ruled Chile from 1973 to 1990 after a bloody coup, which overthrew the democratically elected socialist government under President Allende. During this period an estimated 3,200 people were executed or simply "disappeared".[542] Some of the crimes qualified as torture as defined in terms of the 1984 United Nations Torture Convention.

The former dictator and ex-president of Chile was arrested in London in 1998 on grounds of an arrest warrant issued by the Spanish magistrate Garzon for acts of various human rights violations, committed specifically against Spanish citizens, during his presidency. At the time of his arrest he had become a senator for life and as such was immune to any criminal prosecution in Chile. He visited London in a private capacity for the purpose of seeking medical attention. Both countries, Spain and the UK, were parties to the 1957 European Convention on Extradition, which established a strong system of judicial cooperation.

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[541] *R v Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet Ugarte* (No. 3) (HL) (E) [2000] in 1 AC 147; the earlier judgements were *R v Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet Ugarte* (No. 1) (E) [2000] 1 AC 61 and *R v Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet Ugarte* (No.2) (HL) (E) [2000] 1 AC 119.

[542] See e. g. Krauss, "Chile's Effort to Try Pinochet is Running Out of Steam", 2001, *N.Y. Times*, June 25, A3.

The Divisional Court, faced with Pinochet's habeas corpus writ, complied with his application to set the arrest warrant aside.[543] The judges found the application successful on the grounds that the issuing of the arrest warrant had been unlawful. In respect of the first warrant of 16 October 1998 the judges ruled that the jurisdiction of the British courts could not be established because of the absence of the double criminality requirement. According to this requirement, British courts would have had jurisdiction over an analogous case where a British citizen had been a victim abroad. A subsequent second arrest warrant was rejected on the grounds that "Pinochet as a former Head of State was entitled to absolute immunity from British jurisdiction".[544] The court therefore did apply in its decision the traditional, absolute immunity doctrine.

This decision was appealed to the House of Lords by the Crown Prosecution Service on request of Spanish magistrate and on 25 November 1998 the Law Lords ruled that there was no immunity for Pinochet as a former non-incumbent head of state and that therefore the extradition process could be resumed.[545]

This verdict, however, was challenged on the grounds of possible bias of one of the judges because of the fact that his wife was an active campaigner of an human rights NGO and he as her spouse being prejudiced. The defence lodged a complaint and the House of Lords formed a new panel consisting of members of the court's Judicial Appeals Committee to rehear the case.[546]

1.2.1.3. The legal findings

The Judicial Appeals Committee established criminal jurisdiction of the British courts on the basis of the 1984 United Nations Torture Convention and its implementing British

[543] *UK House of Lords: In re Pinochet* 38 *ILM* (1999) 432.
[544] *Id*. 432
[545] *R v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte* in 3 W.L.R. at 1456, (H.L. 1998).
[546] *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No. 2)* in *All ER* (1999) 577 and 38 *ILM* (n 542) 434, 437.

Act, the Criminal Justice Act of 1988.[547] Criminal jurisdiction of the Crown's court could therefore only be established for acts of torture that were committed after 1988.

The argument of Pinochet's legal defence, that he as a former head of state during the time when the crimes were committed enjoyed absolute *functional* immunity from British criminal jurisdiction and its subsequent extradition procedures, was not followed by the House of Lords. With a majority of six the panel upheld the decision of the Law Lords denying immunity on 24 March 24 1999[548] and ordered the resumption of the extradition proceedings. These came to an end, however, when Pinochet was eventually found to be unfit to stand trial because of his poor health. Home Secretary Jack Straw decided on 2 March 2000 that Pinochet was to be sent back to Chile.

1.2.1.4. Comment

The decisions in the *Pinochet* case are relevant for the development of international criminal law because of the final ruling that denied Pinochet head-of-state immunity from prosecution. The *Pinochet* dictum therefore constitutes, together with the *Milosevic* indictment before the ICTY, one of the few cases where criminal responsibility for international crimes was extended to a former head of state. The Law Lords thus reconfirmed the validity of the "Nuremberg principles" on individual criminal responsibility. As a consequence, the "*causa*" Pinochet could have opened the legal possibility to create deterrence by setting a precedent of international criminal law whereby human rights offenders would not escape criminal prosecution for their atrocities.[549]

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[547] Under Chapter 33, Section 134. The majority of charges were therefore dismissed. See *Regina v. Bow. St. Metro. Stipendiary Magistrate* in 2 *WLR* (1999) 827, 848 (H.L.).

[548] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* in 2 *WLR* (H.L. 1999) 827.

[549] Pinochet, however, could not enjoy his health related freedom long: a Chilean criminal court indicted Pinochet on kidnapping and murder charges stemming from his involvement in the infamous "operation Condor", which was launched as a joint operation by right-wing, military governments in South America. In the course of this operation, tens of thousands of political opponents and dissidents were tortured and killed in the mid-1970ies. Former President Pinochet is still awaiting trial while under house arrest, see *Associated Press* "Chile's high court upholds Pinochet indictment-Panel backs house arrest of ex-dictator on kidnap, murder charges", retrievable http://msnbc.msn.com/id/6786911.

1.2.2. The ICJ's *DRC v. Belgium* decision

1.2.2.1. Overview

The *Democratic Republic of Congo v. Belgium* decision[550] of the ICJ has put an end to any further hopes of prosecuting high-ranking human rights offenders at the international level. The judgment has reaffirmed the strict state immunity doctrine even in respect of *jus cogens* violations and thus limits the scope of developing trends in international criminal law towards a prosecution of gross human rights perpetrators who had so far been protected by their official capacity from criminal and civil jurisdiction.

1.2.2.2. Facts of the case

On 11 April 2000, a Belgian investigating judge issued and afterwards circulated an international arrest warrant against the incumbent Minister of Foreign Affairs of the Democratic Republic of Congo, (DRC), Yerodia Ndombasi. The charges of grave breaches of the Geneva Conventions of 1949, of the Additional Protocols thereto and crimes against humanity were punishable in Belgium under its "Genocide" Law of 1993 as amended in 1999.[551] Yerodia was indicted for his hate speeches, aimed at inciting violence against Tutsi residents in Kinshasa, DRC. On 17 October 2000 the DRC issued the ICJ with an application instituting proceedings against Belgium in respect of the inter-state dispute arising from the issuing of the arrest warrant. The DRC claimed that Belgium had violated the "principle that a State may not exercise its authority on the territory of another State", the "principle of sovereign equality among all Members of the United Nations" […] as well as "the diplomatic immunity of the Minister of Foreign Affairs […]".[552]

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[550] Judgment in *Case Concerning The Arrest Warrant Of 11 April 2000 (Democratic Republic Of The Congo v. Belgium)* 2002, 14 February, General List, No. 121. *ICJ Reports* (2002), retrievable at http://icj-cij.org; *DRC v. Belgium* case hereafter.

[551] Law of 16 June 1993 "concerning the Punishment of Grave Breaches of the international Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto", as amended by the Law of 19 February 1999 "concerning the Punishment of Serious Violations of International Humanitarian Law", hereafter the "Belgian Genocide Law".

[552] *DRC v. Belgium* case (n 550) para 1.

1.2.2.3. Legal findings

In essence, the court's judgement of 14 February 2002 found that the DRC' s application was admissible, the issuing of the arrest warrant "constituted violations of a legal obligation" of Belgium towards the DRC under international law and that "Belgium failed to respect the (full) immunity from criminal jurisdiction" that Yerodia enjoyed as an incumbent foreign Minister.[553] Important are the following two findings of the court: firstly that there was a rule of customary international law granting *functional* immunity to incumbent Foreign Ministers by extending the concept of state immunity for heads of state;[554] and secondly that this granting of immunity does not imply a general impunity with respect to the crimes from further criminal proceedings under certain (unlike) conditions.[555] The dictum of the ICJ thus distinguishes between substantial and procedural immunity.

1.2.2.4. Comment

These two findings of the court were challenged and criticized in the international law community.[556] The ICJ has effectively limited the scope of domestic universal criminal prosecution to an extent which renders it questionable whether the present concept of *jus cogens* in international criminal law with its obligation of *aut dedere aut judicare* can still be effectively utilized by the individual state to prosecute non-citizens outside their jurisdiction for international crimes.[557] The ICJ has thus upheld the doctrines of state sovereignty and sovereign equality. Also interesting in this regard is the *Al Adsani v. UK* judgement[558] of the ECHR, where the court reaffirmed prior UK courts' decisions granting sovereign immunity to the State of Kuwait in respect of a civil claim brought by

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[553] *Id*. para 78 (1) and (2).
[554] *Id.* paras 53 ff.
[555] *Id.* paras 60, 61.
[556] See "Dissenting Opinion Of Judge Van Den Wyngaert" 2002, 14 February, at http://www.cij-icj.org. She challenges the findings that there was a rule of customary international rule extending immunity to foreign ministers and that immunity does not mean impunity.
[557] See Human Rights Watch press statement, whereas "This decision goes against the international trend towards accountability for worst abuses …", press statement of 17 May 2002, retrievable at http://www.hrw.org/press.
[558] App. No. 35763/97 Judgment of 1 Nov. 2001 in 34 *EHRR* (2002) 273 *et seq*, which upheld the Court of Appeals' granting of immunity to Kuwait and the subsequent refusal to permit service out of the Kingdom's jurisdiction against the state of Kuwait, *Al-Adsani v. Government of Kuwait and Others* (Court of Appeal) in 107 *ILR* 536.

an individual for acts of torture. The ECHR ruled that the UK courts did not deny the petitioners' right of access to court and an effective remedy because the granting of state immunity on the grounds of a national immunity law was "a legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty".[559] The ECHR has therefore set a "civil" precedent which confirms the reluctance of international courts to "tamper" with traditional concepts of state sovereignty. Its implications for the protection of human rights through the means of human rights litigation are profound and far-reaching.[560]

1.2.3. Conclusion

These two decisions on the issue of immunity from prosecution before domestic courts have demonstrated[561] that the idea of immunity for international crimes committed by official representatives of a state has become an ambiguous "Janus-like" concept in international law.

On the one side there is the *Pinochet* decision which follows the present trend in international law of denouncing and outlawing the concept of immunity for individuals from criminal prosecutions for serious human rights crimes. This decision certainly helped to water down the concepts of absolute immunity and absolute state sovereignty.

The *DRC v. Belgium* decision of the ICJ and the more recent ruling of a British magistrates' court whereby *Mugabe* enjoys absolute immunity from criminal prosecution before British courts as a serving head of state,[562] have reaffirmed the notion whereas

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[559] *Id*, paras 53-56.

[560] The ECHR decision limits and seriously impairs any future human rights litigation where states are named as defendants. See part C for a detailed account of this civil liability alternative to criminal prosecution.

561 See Prosecutor Against Charles Ghankay Taylor – Decision on Immunity from Prosecution of 31 May 2004 Case Number SCSL-2003-01-I, retrievable at http://www.sc-sl.org/Taylor-SCSL-03-01-I-059.pdf as an example for an international court dealing with the question of immunity. The SCSL found in its decision that that the then exiled former president of Liberia Charles Taylor561 was not immune from prosecution for his alleged participation in the commission of crimes against humanity in neighbouring Sierra Leone.

[562] See *The Guardian* "Mugabe arrest bid fails", January 15, 2004, at http://www.guardian.co.uk. The ruling Justice Workman based his decision granting absolute immunity on international customary and

perpetrators of human rights atrocities continue to enjoy impunity for their crimes as long as they hold on to their present "protected" offices.[563]

2. OTHER OBSTACLES

2.1. Pardoning and amnesty

The granting of amnesties for serious international crimes at the domestic level may in general violate the international obligation of states to prosecute such acts because of their "erga omnes" nature.[564] The ICTY found in *Anton Furundzija*[565] with respect to the international crime of torture that national amnesty legislation did not qualify as a bar to hold such violators of international human rights law "criminally responsible for torture, whether in a foreign state, or in their own state under a subsequent regime".[566] This view was later confirmed by the SCSL in its decision *Prosecutor against Morris Kallon and Birma Bazzy Kamara*[567] where the court found that amnesty provisions granting a domestic amnesty could as such not deprive the SCSL as an international court of law of its powers to prosecute an accused for the commission of international crimes or deprive the SCSL of its jurisdiction.[568]

These opinions are corroborated by the views and opinions of the Inter-American Commission and the Inter-American Court of Human Rights on the illegality of domestic amnesties and the subsequent state obligation to annul or repeal such amnesties.[569]

Consequently, impunity from subsequent criminal prosecution seems to have become outdated and even illegal under international law even in cases where qualified amnesties

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domestic law, thus following the reasoning of the ICJ in its *DRC v. Belgium* case (n 530), whereas there is an binding international custom of granting immunity.

[563] In order to enjoy immunity, as the case *Mugabe* (n 561) exemplifies.

[564] See e. g. Principle 7 of the *Princeton Principles* (n 36). This restriction applies first of all in cases where so called "blanket" amnesties are used in order to avoid future criminal proceedings.

[565] ICTY decision TI-95-17/1-T, in 38 *ILM* (1999) 317

[566] *Id.*, para 155

[567] *Decision On Challenge To Jurisdiction: Lomé Accord Amnesty* of 13 March 2004, Case Numbers SCSL-2004-15-AR72 (E) and 2004-16-AR72 (E), retrievable at http://www.sc-sl.org/ SCSL-04-15-PT-060-I.pdf and http://www.sc-sl.org/ SCSL-04-15-PT-060-II.pdf. See supra chapter 2, 2.1.4.2. on the related questions of head of state immunity and amnesty.

[568] *Id.*, para 88, p. 35

[569] See part A, chapter 2, 2.4.

were granted after individual hearings as in the case of the South African Truth and Reconciliation Commission[570] and the Rwandese "gachacha" courts.[571]

Amnesty proceedings, however, are sometimes the only possible means of building a peaceful post-transition society. This necessity (with its legal implications) is recognized under the ICC Statute where, under Article 124, a state can declare its "opting out" for a period of seven years in respect of war crimes.[572] in order to forge a peaceful transition.

2.2. Lack of will and means to prosecute

The example of Charles Taylor, who was responsible for gross human rights atrocities and who was granted exile in Nigeria[573] in exchange for his withdrawal from power, exemplifies and documents a reality where the prosecution of such perpetrators has to stand back for the goals of *Realpolitik*. Considering that this exchange deal was effectively backed by the UN,[574] doubts arose with regard to the international community's determination to actively protect human rights through criminal prosecution. Even the later indictment of Charles Taylor by the SCSL[575] could not erase the impression that the international community was forced to use double standards vis-à-vis Taylor in order to secure peace in Sierra Leone.

Even with the increase in numbers of criminal prosecutions before domestic courts, there is no guarantee that international justice will benefit in the long run. In a growing number of states the efforts of the judiciary to prosecute alleged human rights perpetrators are

[570] The Truth and Reconciliation Commission (TRC) in South Africa was established in 1995 under the Promotion of National Unity and Reconciliation Act 34 of 1995. The objective of the TRC was to investigate nature, causes and extent of the violations committed by all parties to the conflict. The Constitutional Court of South Africa found in the landmark case of *AZAPO v. President of The Republic Of South Africa*, Case CCT 17/96 of July 25, 1996, that the granting of amnesties under this act did not violate international law because such international provisions were "relevant only in interpretation of the Constitution itself.", para 26. Cassese (n 7) 10 on the flaws of relying on the successful work of such TRCs alone. For more information on the TRC and its criticism, see the following part C. Another state which adopted the TRC approach is Sierra Leone, for more information, see http://www.sierra-leone.org/trc.html and supra, chapter 2, 2.1.4.2.
[571] See supra, chapter 2, 2.1.2.
[572] See Article 124 ICC, Article 8 ICC Statute.
[573] See above under 2.1.4. The Special Court for Sierra Leone.
[574] See statement of Mr. Gambari, special adviser to UN SG Kofi Annan, in Mail & Guardian Oct.3 to 9 2003 11.
[575] See *supra* chapter 2, 2.1.4.

severely hampered by their own governments directly influencing the proceedings.[576] The motivation behind this behaviour is often dictated by apparent economic and strategic interests, which would be jeopardized should the interests of international justice be pursued.

CONCLUSION PART B

The present concepts of establishing individual criminal responsibility for core crimes and the subsequent prosecution before international and domestic *fora* have developed rapidly into an emerging system of international criminal justice.

The balance sheet of prosecuting international crimes looks quite impressive at a first glance: the last decade saw the establishment of three "ad hoc" tribunals,[577] one permanent criminal court,[578] the determination to prosecute high-ranking officials for core crimes[579] and the development of various domestic penal codes asserting universal jurisdiction.[580]

This development of international justice, however, must be seen as the direct consequence of "a crisis in the international system of human rights protection"[581] which in effect denounces forty years of human rights protection as weak, underdeveloped and even in some cases even futile.

Obstacles still stand in the way of an effective protection of human rights through the means of criminal prosecution: the supplementary and limited jurisdiction of the ICC, the ad hoc tribunals' current difficulties in prosecuting effectively because of an overload of

[576] Examples are the UK's Home Secretary Jack Straw's decision not to extradite *Pinochet* on medical grounds, the presence of former Haiti's "President" Duvalier in France notwithstanding his involvement in serious human rights violation and ousted Haiti's Aristide in South Africa as an honorary research fellow of UNISA. See for more examples Brody "Using Universal Jurisdiction To Combat Impunity" in Lattimer and Sands (eds.) (n 214) 377 ff.
[577] The ICTY (1993), the ICTR (1994) and the SCSL as a mixed legal court in 2002.
[578] The International Criminal Court.
[579] Besides the cited *Pinochet* case, there is the conviction for genocide of the former Rwandan prime minister Jean Kambanda in 1998, ICTR-97-23-T, the indictment before the ICTY of Slobodan Milosevic and the Belgian indictment of the Israel Premier Ariel Sharon.
[580] Lattimer and Sands (eds.), (n 214) 12.
[581] *Id.*, 387 with additional references.

cases, the lack of sufficient resources, the absence of the political will to comply with requests of judicial cooperation and enforcement, etc. With the *DRC v. Belgium* decision of the ICJ, the evolving attempts to prosecute international crimes before domestic criminal courts have been severely impaired for the sake of upholding an outdated principle of state sovereignty. As a consequence, the perception that "states have only established or engaged domestic or international fora to hold persons accountable sporadically and often with reluctance"[582] seems to continue to hold its worth.

These shortcomings demand alternative, supplementing measures against the perpetrators of international human rights law. Examples can be found in the US and Canadian practice[583] to use denaturalization and deportation as additional means to hold human rights offenders accountable. This practice, which is well used in the Anglo-American sphere, is nearly unknown to continental European criminal law practice. Its value is limited to cases where the deportee perceives such measures as "punishment". It is doubtful to what extent it may create a general deterrence.

Given these obstacles and shortcomings, it seems unlikely that the goal of establishing a more comprehensive system of international criminal justice will be achieved soon.

Other supplementary and additional ways and means of human rights protection as an alternative to criminal prosecution should be utilized and, if necessary, further developed. One such additional means of human rights protection may be the concept of human rights litigation as developed over the last three decades in the USA. The next part of this study explains the development of the concept of civil liability for international human rights atrocities, the realization of this principle through human rights litigation and its impact on the protection of human rights.

[582] Ratner and Abrams (n 8) 331.
[583] See e.g. the US Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. 104-208, Div. C, 110 Stat. 3009-546 and the Canadian Citizenship Act.