

STATE CRIME: CRIMES OF THE POWERFUL

One-week Post-Doc Graduate Course for Ph.D.
and advanced Master's Students in Marburg
Philipps-University Marburg

June 21-25, 2021

READER

Course Directors:

Prof. Dr. Kirstin Drenkhahn | Freie Universität Berlin, Germany | kirstin.drenkhahn@fu-berlin.de
Dr. Wolfgang Form | Philipps-Universität Marburg – ICWC, Germany | form@staff.uni-marburg.de

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Short biographies of the speakers

Gustave Emilio Cote-Barco is an Associated Professor at the Javeriana University in Bogota, Criminal Law Department; external consultant of the International Center for Transitional Justice (Bogota, Colombia); and co-judge (*conjuez*) of the Chamber of Amnesty or Pardon of the Colombian Special Jurisdiction for Peace. He received his doctoral degree at the Göttingen University (Germany) in 2017. His dissertation on the principle of legality in international criminal law, written under the supervision of Professor Kai Ambos, was honored with the distinction *summa cum laude* and received the award to the best dissertation of the law faculty in that year (*Appellhagen-Stifterpreis* 2018). He also has an LLM from the Göttingen University (2013), a master's degree in criminal law and criminological sciences from the Externado University of Colombia (2009), and a postgraduate study (*especialización*) in criminal law institutions of the National University of Colombia (2006). Until 2011 he was Academic Coordinator of the Criminal Law Department at the Javeriana University and researcher of the Toledo International Centre for Peace in Bogota.

Robert Bridson Cribb

ACADEMIC QUALIFICATIONS

1984: PhD, School of Oriental and African Studies, University of London.

1978: BA (First Class Honours in History), University of Queensland

RECENT ACADEMIC CAREER

2016 – present: Professor, Department of Political and Social Change,
Coral Bell School of Asia-Pacific Affairs, College of Asia and the Pacific, Australian
National University.

2009 – 2016: Professor, Department of Pacific and Asian History,
College of Asia and the Pacific (formerly Research School of Pacific and Asian
Studies), Australian National University (Head of Department 2013-2016).

2003 – 2009: Senior Fellow, Division of Pacific and Southeast Asian History,
Research School of Pacific and Asian Studies, Australian National University

MAJOR PUBLICATIONS

BOOKS

Sandra Wilson, Robert Cribb, Beatrice Trefalt and Dean Aszkielowicz, *Japanese War Criminals: the Politics of Justice after the Second World War* (New York: Columbia University Press, 2017).

Li Narangoa and Robert Cribb, *Historical Atlas of Northeast Asia, 1590-2010: Korea, Manchuria, Mongolia, Eastern Siberia* (New York: Columbia University Press, 2014)

Robert Cribb, Helen Gilbert and Helen Tiffin, *Wild Man from Borneo: a Cultural History of the Orangutan* (Honolulu: University of Hawaii Press, 2014)

Digital Atlas of Indonesian History (Copenhagen: NIAS Press 2010).

Robert Cribb and Audrey Kahin, *Historical Dictionary of Indonesia* 2nd edition, 2004; translated into Indonesian as *Kamus sejarah Indonesia* (Depok: Komunitas Bambu, 2012)

Historical Atlas of Indonesia (London and Honolulu: Curzon Press and University of Hawaii Press, 2000)

Robert Cribb and Colin Brown, *Modern Indonesia: a history since 1945* (London & New York: Longman, 1995)

Historical Dictionary of Indonesia. (Metuchen N.J.: Scarecrow Press, 1992).

Gangsters and revolutionaries: the Jakarta people's militia and the Indonesian revolution 1945-1949. (Sydney: Allen & Unwin, 1991).

Gejolak revolusi di Jakarta 1945-1949: pergulatan antara otonomi dan hegemoni (Jakarta: Grafiti, 1990).

EDITED BOOKS - major

Carolyn Strange, Robert Cribb and Christopher E. Forth, eds, *Honour, Violence and Emotions in History* (London: Bloomsbury, 2014)

Robert Cribb and Michele Ford (eds), *Indonesia beyond the Water's Edge: Managing an Archipelagic State* (Singapore: ISEAS, 2009)

Li Narangoa & Robert Cribb, eds, *Imperial Japan and National Identities in Asia, 1895-1945* (Richmond: RoutledgeCurzon, 2003, ISBN 0700714820)

The Late Colonial State in Indonesia: political and economic foundations of the Netherlands Indies (Leiden: KITLV Press, 1994).

The Indonesian killings of 1965-1966: studies from Java and Bali (Clayton, Vic.: Monash University Centre of Southeast Asian Studies, Monash Papers on Southeast Asia no 21, 1990).

Kirstin Drenkhahn is a full professor of criminal law and criminology at the Department of Law, Freie Universität Berlin. She is working on several fields in criminology including the criminology of state crimes which she also emphasizes in teaching criminology to law students.

Taxiarchis Fiskatoris is an adjunct lecturer at the Philipps-University in Marburg, where he teaches public international law, international human rights and humanitarian law courses. He holds a PhD in Law from Middlesex University London. His thesis dealt with the doctrinal foundations and history of international criminal law. He has previously studied international relations and international law in Greece, Italy and France, and worked as a Fellow at the International Research and Documentation Centre for War Crimes Trials. His primary academic interests lie at the intersection of international law, politics and history.

Wolfgang Form, studied Political Science, Sociology, Social- and Economic History and Public Law in Marburg. He received his doctoral degree on political criminal justice during National Socialism in Germany at the University of Marburg. 2003 he co-founded the International Research and Documentations Center for War Crimes Trials, Marburg (ICWC) and is his research director since then. From 1992 lecturer for political science, international criminology, peace and conflict studies and gender studies at the University of Marburg, Kiel, Wolfenbüttel (Germany), Changsha (China) and Phnom Penh (Cambodia). Main fields of research: political criminal and military justice, history of international criminal law, peace and conflict studies and on local and regional history of National Socialism.

Stefan Harrendorf is a full professor at the Department of Criminology, Criminal Law, Criminal Procedure and Comparative Criminal Law and Justice at the University of Greifswald (Germany) since 2015. His criminological research focuses, inter alia, on international crimes, radicalization processes, crimes prepared or committed on the Internet, and criminological theory. He is also working and publishing on methodological aspects for the international comparison of crime and criminal justice statistics."

Barbora Holá is Senior Researcher at the Netherlands Institute for the Study of Crime and Law Enforcement (NSCR) and associate professor at the Department of Criminology at Vrije Universiteit Amsterdam.

Markus Kienscherf is an assistant professor of sociology at the John F Kennedy Institute for North American Studies, whose research focuses on security, political economy, race and class. He published a research monograph on *US Domestic and International Regimes* and articles in *Capital & Class*, *Critical Sociology*, *Critical Military Studies*, *Security Dialogue* and other journals.

Linn-Sophie Löber studied Political Science and Peace and Conflict Studies at Philipps University Marburg and at Sciences Po in Rennes (France). She also participated in the ICWC Trial-Monitoring Programme as a team leader.

Recently, she started working as a research associate at the International Research and Documentation Centre for War Crimes Trials (ICWC) at Philipps University. Her main field of interest is the research on female perpetrators.

Thomas Lutz, Dr. phil., is a historian, history didactician and political scientist. He heads the memorial department of the Topography of Terror Foundation, Berlin. In this function, he advises in a variety of ways, from small regional initiatives and new conceptions of institutions, to governments and international organizations. He is the responsible editor of the *Gedenkstätten Rundbrief* (current issue no. 199) and the online *Gedenkstätten Forum*. He was appointed to the expert panel of the Federal Government Commissioner for Culture and the Media in the allocation of funds under the Federal Memorial Sites Fund. He serves as the German delegate to the International Holocaust Remembrance Alliance (IHRA) and was a founding member of the International Committee for Memorial Museums for Victims of State Crimes (IC MEMO in ICOM) in 2001. Thomas Lutz is chairman of the international advisory board of the Brandenburg Memorials Foundation.

Beatriz Mayans-Hermida is a Mexican lawyer specialized in international human rights law and international criminal law. She is now pursuing a PhD at Vrije University Amsterdam and the Netherlands Institute for the Study of Crime and Law Enforcement (NSCR). Her PhD research is on punishment and sanctions for international crimes in transitional contexts and has as a case study the case of Colombia. She also holds an LLM in International Legal Studies from NYU School of Law. Before her PhD, Beatriz worked as a lawyer in Mexico. She litigated a wide range of human rights cases and previously worked as a monitor in immigration issues at the Mexican National Commission for Human Rights. She has also done traineeships in international organizations and tribunals, such as the International Criminal Court, the International Bar Association, and the European Center for Constitutional and Human Rights (ECCHR).

Chantal Meloni is associate professor of international criminal law and criminology at the University of Milan (Italy) and senior legal advisor at the European Center for Constitutional and Human Rights (ECCHR) of Berlin (Germany) on international crimes and accountability.

After the law degree, in 2006 she completed a PhD in Italian and comparative criminal law at the University of Pavia with a thesis on “command responsibility in international criminal law”. In 2006/2007 she was first visiting professional and then associate legal officer at the International Criminal Court in the Hague assigned to the Pre-Trial Chamber.

From 2011 to 2014, she was Alexander von Humboldt fellow at the chair of international criminal law of the Humboldt University of Berlin, working on a research project on the protection of the right to life in the context of asymmetric armed conflicts. As part of this project, she spent several months in Gaza (Palestine), at the Palestinian Center for Human Rights.

Chantal Meloni is a trained criminal lawyer admitted to the Italian Bar and is included in the list of assistant counsels before the International Criminal Court, where she currently represents victims in the situation Palestine.

In addition to her regular teaching activities, she lectures on international criminal law in various universities, has been a speaker in numerous international conferences and has been invited as an expert in round tables organized by the UN on international law issues. She is a member of several national and international research projects on criminal law, international criminal law and victims' rights.

She is on the board of the criminal law journal *Sistema Penale* and the editor of the "observatory on the International Criminal Court" in the *Italian Review of Criminal Law and Procedure*.

Chantal Meloni is the author of numerous scientific articles, papers and book chapters on international criminal law, including the book "Command Responsibility in International Criminal Law" (Asser T.M.C., 2010), and is the co-editor of the book "Is There a Court for Gaza?" (Asser/Springer 2012).

Viktoria Piekarska studied law at the Humboldt University and Wrocław University. She is a research assistant and doctoral candidate at Leipzig University. Her PhD research focusses on the sanction of imprisonment at the International Criminal Court.

Astrid Reisinger Coracini is a postdoctoral lecturer and researcher at the Institute of European, International and Comparative Law at the University of Vienna and Director of the Salzburg Law School on International Criminal Law, Humanitarian Law and Human Rights Law. Her research focuses on sources of international law, the use of force, and international criminal law. Ms. Reisinger Coracini has been a member of the Austrian delegations at the Assembly of States Parties of the International Criminal Court and at the first Review Conference of the Rome Statute of the International Criminal Court. She was a member of the expert group for the implementation of crimes under international law into Austrian criminal law and she serves on the Advisory Board of the Austrian Research Centre for Post War Trials.

Andrea Rudorff is a Research Associate at the Fritz Bauer Institute in Frankfurt am Main. She is currently working on a project entitled »Polish postwar trials against members of the Auschwitz camp personnel«. Previously, she conducted research on the history of the Katzbach Concentration Camp in Frankfurt am Main. She received her PhD in 2012 from the Center for Research on Antisemitism at the Technical University, Berlin, with a thesis on women in the Groß-Rosen subcamps. From 2013 to 2018, she was involved in the editing project »Die Verfolgung und Ermordung der europäischen Juden durch das nationalsozialistische Deutschland 1933–1945 / The Persecution and Murder of the European Jews by Nazi Germany, 1933–1945«; she is executive editor of volume 16 *Das KZ Auschwitz 1942–1945 und die Zeit der Todesmärsche 1944/45* (2018).

Sophie Straßer studied law at the Humboldt University Berlin and the Istanbul Üniversitesi and completed the second state examination at the Kammergericht Berlin in 2020. She is a research assistant and doctoral candidate at Friedrich Schiller University Jena as part of the DFG project "Spandau, Sugamo, and Landsberg – The Origins of Sentence Enforcement in International Criminal Law, and their Relevance for the International Criminal Justice System of Tomorrow".

Valeria Vegh Weis, LL.M, PhD., is Argentinean/German and teaches Criminology and Transitional Justice in at Buenos Aires University and National Quilmes University. She is an Alexander von Humboldt Post-Doctoral Researcher at Freie Universität Berlin and an Associate Researcher at the Max Planck Institute for European Legal History in Germany.

SANDRA WILSON

Professor and Academic Chair of History, Philosophy and Sociology, Murdoch University, Murdoch, Western Australia 6150.

Fellow of the Asia Research Centre, Murdoch University

Fellow of the Royal Historical Society (UK)

Fellow of the Australian Academy of the Humanities

Email: S.Wilson@murdoch.edu.au

QUALIFICATIONS

- BA with First Class Honours in History, University of Western Australia, 1979.
- Master of Japanese Studies, University of Western Australia, 1981
- D. Phil. in Modern History, University of Oxford, 1989.

APPOINTMENTS

1987-88	Senior Tutor, Japanese Studies, University of Western Australia
1988-96	Lecturer, Department of History, La Trobe University
1996-2002	Senior Lecturer, Asian Studies, Murdoch University
2002-2010	Associate Professor, Asian Studies, Murdoch University
2010-	Professor, Asian Studies, Murdoch University
2015-	Professor and Academic Chair, History, Murdoch University (Academic Chair of History, Philosophy and Sociology 2021-)

SELECTED PUBLICATIONS

Books

The Manchurian Crisis and Japanese Society, 1931-33, London, Routledge, 2002.

Sandra Wilson, Robert Cribb, Beatrice Trefalt and Dean Aszkielowicz, *Japanese War Criminals: the Politics of Justice after the Second World War*, New York: Columbia University Press, 2017.

(edited) *Nation and Nationalism in Japan*, London, RoutledgeCurzon, 2002.

(edited with D. Wells) *The Russo-Japanese War in Cultural Perspective*, London: Macmillan, 1999.

(edited with Timothy Tsu and King-fai Tam) *Chinese and Japanese Films on the Second World War*, London: Routledge, 2015.

Chapters and articles

'Family or State? Nation, War, and Gender in Japan, 1937-45', *Critical Asian Studies*, 38:2, 2006.

'War, Soldier and Nation in 1950s Japan', *International Journal of Asian Studies*, 5:2, 2008.

'Enthroning Hirohito: Culture and Nation in 1920s Japan', *Journal of Japanese Studies*, 37:2, 2011.

'Exhibiting a New Japan: the Tokyo Olympics of 1964 and Expo '70 in Osaka', *Historical Research*, 85:227, 2012.

'Film and Soldier: Japanese War Movies in the 1950s', *Journal of Contemporary History*, 48:3, 2013.

'War Criminals in the Post-War World: the Case of Katō Tetsutarō', *War in History*, 22:1, 2015.

'The Sentence is Only Half the Story: From Stern Justice to Clemency for Japanese War Criminals, 1945-1958', *Journal of International Criminal Justice*, 13, 2015.

'The Shifting Politics of Guilt: the Campaign for the Release of Japanese War Criminals', in B. Kushner and S. Muminov (eds), *The Dismantling of Japan's Empire in East Asia*, 2017.

'Koreans in the Trials of Japanese War Crimes Suspects', in K. von Linggen (ed.), *Debating Collaboration and Complicity in War Crimes Trials in Asia, 1946-1956*, 2017.

Sandra Wilson and Robert Cribb, 'Japan's Colonial Empire', in S. Saaler and C.W.A. Szpilman (eds), *Routledge Handbook of Modern Japanese History*, 2018.

'War Crimes Trials and the Politics of Justice: the Case of Kinoshita Eiichi, 1945-57', *Historical Research*, 92:257, 2019.

'Clemency for War Criminals Convicted in the Tokyo Trials', in Viviane E. Dittrich et al. (eds), *The Tokyo Tribunal – Perspectives on Law, History, and Memory*, 2020.

'Why Were There No War Crimes Trials for the Korean War?', *Journal of Global History*, Early View 2021: doi:10.1017/S1740022821000164.

Introduction to the criminology of state crimes

by Kirstin Drenkhahn

Mon., 21 June 2021, 10:30 – 11:00

Abstract

Introduction to the criminology of state crime

In recent years, there has been an increase of criminological research on state crime and crimes of the powerful and this area has expanded beyond what one could call the criminology of international criminal law. Still, most of the research focusses on atrocity crimes and the question why people engage in such behavior. This presentation gives an overview about the very late adoption of state crime as a topic of criminological inquiry and outlines challenges for theory development that these phenomena pose.

Article:

Rothe, Dawn L. and Friedrichs, David O. (2006): The State of Criminology of Crimes of the State.

The State of the Criminology of Crimes of the State

Dawn L. Rothe and David O. Friedrichs

Introduction

THE FIRST DECADE OF THE 21ST CENTURY IS AN ESPECIALLY APPROPRIATE TIME AND venue for addressing the state of the criminology of crimes of the state. One need only watch the international news, or visit international governmental or nongovernmental web sites to grasp the amount of state crime that is occurring around the world (e.g., Sudan, the Democratic Republic of Congo, Israel, the United States, Russia, North Vietnam, etc.). Despite the significant number of state crimes committed in recent years, most criminologists worldwide continue to focus on conventional forms of crime, efforts to prevent such crime, and the criminal justice system response to traditional street crime. Surely we have much to learn from each other's experiences with, and research on, such forms of crime and their control. However, it is more important for criminologists to increase the focus on transnational and non-conventional forms of crime, international institutions of control, and the challenges in addressing such crime.

Indeed, transnational forms of terrorism, organized crime (especially that involving drugs), corporate crime, and computer crime have received increasing attention from criminological researchers. Transnational forms of policing also receive some attention, as do other transnational issues, such as democratization, trust, and civil society, and crime in relation to human development. However, governmental crime—or crime carried out in a governmental context—receives significantly less attention. Although many forms of governmental crime have an internal focus—i.e., they primarily victimize various constituencies within their own borders—many other forms of state crime either cross borders, or have a measurable transnational impact in various ways.

For more than a decade in the United States, a widely diffused story has been declining rates of conventional crime—or the leveling off of such crime. There may be reason to believe that the constraint of many conventional forms of crime in the future will be increasingly successful. The challenges of successfully addressing

DAWN L. ROTHE, Western Michigan University, Department of Sociology, 1903 W. Michigan University, Kalamazoo, MI 49008 (e-mail: dawnlr@chartermi.net). DAVID O. FRIEDRICH, University of Scranton/Flinders University School of Law, Department of Sociology/Criminal Justice, University of Scranton, Scranton, PA 18510 (e-mail: friedrichsd1@scranton.edu). This article was previously presented at the 14th World Congress of Criminology, August 2005, in Philadelphia, Pennsylvania.

crimes of states, however, are far greater and more complex, and such crimes will continue to have far more devastating consequences than those associated with conventional forms of crime.

Historical assessments have often highlighted the immense impact of crimes of the state during the course of the 20th century, with the crimes of Nazi Germany, Stalinist Russia, and Maoist China being especially large-scale and dramatic cases. Early in the 21st century, crimes of the state—and the prospect of crimes of the state involving weapons of mass destruction—are an especially conspicuous element of the contemporary historical environment. For instance, alleged state support of terrorists led to the invasion of Afghanistan under the Taliban, and alleged possession of weapons of mass destruction and the intent to use them led to the U.S. invasion of Saddam Hussein's Iraq. Other countries—e.g., Iran and North Korea—inspired similar concerns in the United States and among some of its allies. Conversely, the perception in many countries of the United States as a criminal state intensified due to the policies of the George W. Bush administration, and Israel was also viewed as a criminal state by many people in the Arab world and those who sympathized with the Palestinian cause.

The last years of the 20th century were also marked by major new initiatives to bring perpetrators of crimes of the state to trial, including tribunals focusing on genocidal actions in Bosnia and Rwanda, and the establishment of the Permanent International Criminal Court (Mullins, Kauzlarich, and Rothe, 2004; Rothe, 2004; Rothe and Mullins, 2006). All of these matters have generated voluminous commentary, but far too few criminologists have contributed to this discourse. This should not be the case.

Our objective here is to survey the present state of the criminology of crimes of the state, to identify a potential agenda to advance this criminological enterprise, to promote the visibility of a somewhat marginalized criminological specialty, to foster further contacts between criminologists in different parts of the world who are interested in the study of crimes of the state, and to intensify transnational dialogue on some of the key issues in this realm. Generally, our purpose is to explore the origins of a criminology of crimes of the state. Fundamental conceptual and definitional issues relating to crimes of the state are surveyed and some key contributions to the literature are reviewed. The interrelationship of a criminology of crimes of the state with cognate areas of criminological inquiry (e.g., corporate crime, state-corporate crime, finance crime, crimes of globalization) is delineated. Some of the core sources of resistance to, recognition of, and engagement with such an endeavor within the field of criminology are then explored. Finally, we offer an agenda for a criminology for crimes of the state.

Origins of Crimes of the State

The study of crimes of the state is relatively new to the field of criminology. William Chambliss (1989) introduced the concept of "state-organized crime" in

his 1988 presidential address to the American Society of Criminology. Chambliss (1989: 184) argued that state-organized crime, which he characterized as "acts defined by law as criminal and committed by state officials in pursuit of their jobs as representatives of the state," was a legitimate topic for criminological inquiry. He was not the first to call for more criminological attention to such crime.

At the end of the 19th century, for example, a French judge, Louis Proal (1898), focused on the crimes of statesmen and politicians in his book *Political Crime*. A few years before Chambliss' presidential speech, the prominent conflict criminologist, Austin Turk (1982), published *Political Criminality*. This work advanced a theory that addressed the question of how and when international criminal law prevails when political crimes occur. Yet for most of the 20th century, criminologists largely disregarded the topic of crimes of the state.

In another presidential address (before the American Sociological Society in 1939), Edwin Sutherland (1940) also called attention to a then-neglected form of crime, namely, the crimes of respectable people in the context of a legitimate occupation, and of corporations. The significance of such crime—white-collar crime—would be conceded by some criminologists in response to Sutherland and the publication of his landmark book, *White Collar Crime* (1949). Since the 1970s, however, a fairly rich literature and substantial interest in white-collar crime has developed within criminology (e.g., Friedrichs, 2007). The White Collar Crime Research Consortium has a membership of over 100 people. Nevertheless, white-collar crime remains somewhat underrepresented in the criminological literature as a whole, and in the criminology and criminal justice curriculum (Lynch, McGur-in, and Fenwick, 2004; Simpson, 2003). Perhaps the study of crimes of the state will follow a similar trajectory, although our hope is that the level of interest and criminological research on this topic will develop more rapidly.

E.H. Sutherland did not address crimes of states. For him, "war crime" referred to the black market activity of businessmen, and he disregarded the massive crimes of Nazism, which were taking place during the decade that he was working on his *White Collar Crime* book. Yet his extension of the concept of crime beyond its conventional parameters did provide an important foundation, built upon by many later scholars, for the establishment of a criminology of crimes of the state (Clinard, 1946; Geis, 1967, 1988; Schwendinger and Schwendinger, 1970; Kramer, 1982; Vaughn, 1999; and Michalowski and Kramer, 1987). Although the concept of state crime had been addressed by other criminology scholars (Kramer, 1982; Turk, 1982; Michalowski and Kramer, 1987), one can nevertheless argue that Chambliss' (1989) American Society of Criminology presidential address provided the more direct and immediate inspiration for more systematic attention to crimes of the state on the part of a number of criminologists, from the early 1990s on (Barak, 1990; Friedrichs, 1992; Kramer, 1995; Ross, 1995; Tunnell, 1993).

Conceptual Issues

Within criminology, the idea of a state being criminally liable was met with significant resistance. The common argument was that "governments and their agencies do not commit crimes, but only because the criminal law does not take cognizance of them as criminal actors." Instead, states commit "noncriminal deviance" (Cohen, 1990: 104). Other criminologists claimed that using a legalistic basis would result in a loss of scientific autonomy (Sellin, 1938) and such definitions would restrict criminologists to acts defined as criminal by the state, omitting socially injurious acts committed by the state itself (Schwendingers, 1970; Michalowski, 1985). Several criminologists argued that the standard for defining a crime by the state needed to be expanded to include social definitions. The earliest proponents of this view were the Schwendingers (1970), who proposed that crime could be socially defined using the notion of human rights. Some criminologists followed the idea of human rights (Galliher, 1989), but broader definitions were also put forth. For example, Michalowski (1985) suggested that socially analogous harm could be used to define state or corporate crimes (see also Barak, 1990). Nonetheless, from its inception, the growth and development of state crime studies have been faced with a key conceptual problem: How can the state be a criminal actor when, legally, the state itself defines criminal behavior? According to Barak (1991: 8):

the study of state criminality is problematic because the concept itself is controversial, in part because of a debate over whether one should define crime in terms other than law codes of individual nations. Some argue that if a state obeys its own laws, it should be judged by no higher criterion.

Sharkansky (1995) presents such a critique, arguing that although states may commit many undesirable behaviors, one cannot call them criminal unless they expressly violate their own laws. Labeling a state criminal on other grounds violates key precepts of national sovereignty and a nation's right to regulate itself. However, this critique sees even well recognized instances of state criminality, such as the Holocaust, as "nasty" behaviors, but not criminal.

In Chambliss' 1989 presidential speech, he suggested that state crimes are "acts defined by law as criminal and committed by state officials in pursuit of their jobs as representatives of the state" (p. 184). Kramer and Michalowski (1990) quickly followed with a definition of state-facilitated crime as activities of the state that fail to constrain criminal and dangerous behaviors. Chambliss (1995: 9) subsequently called for resolving the key question at the foundation of the discipline, the definition of crime, so that the discipline could remain viable and vital. He stated,

State organized crimes, environmental crimes, crimes against humanity, human rights crimes, and the violations of international treaties increasingly must take center stage in criminology.... Criminologists must define

crime as behavior that violates international agreements and principles established in the courts and treaties of international bodies (*Ibid.*).

In general, the critical critique of using legal codes as the base definition of crime has been covered well in previous literature. Alternative formulations have been advanced, from international legal codes to basic human rights precepts, and the perceptions of the state's citizens (Barak, 1991; Chambliss and Zatz, 1993; Tunnell, 1993; Ross, 1995; Friedrichs, 1996a and b; Kauzlarich and Kramer, 1998; Ross et al., 1999; Green and Ward, 2000). Yet, the definitional issue continues to be a theme within the field. For example, Green and Ward (2000) recently asserted that state crimes are only offenses when the action is labeled as such by a social audience. Other definitions, they claim, lack legitimacy. Moreover, their latest work (2004) examined state crime in relation to corruption, state-corporate crime, natural disasters, police crime, organize crime, state terror and terrorism, torture, war crimes, and genocide—all under the rubric of International Human Rights Law (IHL) and the labeling of such by some social audience.

Others, such as Kramer and Michalowski (2005b), have responded to the call by claiming that the more general frame of human rights can indeed be incorporated within the body of an international legalistic frame. Kramer, Michalowski, and Rothe (2005) have proposed a more recent definition:

State crime is any action that violates public international law, international criminal law, or domestic law when these actions are committed by individuals acting in official or covert capacity as agents of the state pursuant to expressed or implied orders of the state, or resulting from state failure to exercise due diligence over the actions of its agents.

The controversy over the appropriate definition of crimes of the state is certain to continue, as standards used for defining state crime remain problematic and have not been fully resolved (see Ward and Green, 2004). However, most critical criminologists studying state crime agree that the use of international law (customary, codified treaties, charters, and the newly emerged criminal law) constitutes a basic foundation for defining state crime as this framework includes standards such as human rights, social and economic harms, while providing a legalistic foundation.

Beyond the Conceptual Quagmire

Historically, criminologists have almost totally neglected what some consider to be the greatest threat facing human beings: that of nuclear war. However, Kauzlarich, Kramer, and Smith (1992) published "Toward the Study of Governmental Crime: Nuclear Weapons, Foreign Intervention, and International Law." In 1998, David Kauzlarich and Ronald Kramer expanded their previous work on nuclear weapons with the publication of *Crimes of the Nuclear State: At Home and Abroad*. This seminal book provided a detailed account of state criminality based on domestic

and international law violations. Kauzlarich and Kramer's theoretical analysis expanded on work by Kramer and Michalowski to provide and utilize a thorough and integrated theoretical frame that examines three levels of analysis (interactions level, organizational level, and the historical-structural level), along with the catalysts of motivation, opportunity, and operation of controls.

During this period, a two-volume collection of readings, *State Crime* (Friedrichs, 1998), was added to the International Library of Criminology, Criminal Justice, and Penology. The collection may help to legitimize this area of inquiry for criminologists. It includes the work of some criminologists, but also that of scholars affiliated with many other disciplines, whose work on crimes of the state is deemed to have some specific criminological relevance. Inevitably, a criminology of crimes of the state must adopt an interdisciplinary framework.

Most recently, Jeffrey Ian Ross' book, *The Dynamics of Political Crime* (2003), surveyed the state of a criminology of crimes of the state, with attention to oppositional political crimes, state crimes, political corruption, illegal domestic surveillance, human rights violations, state violence, and state-corporate crime. Ross lays out some preliminary theoretical initiatives relating to crimes of the state and their control. In a parallel exercise, British criminologists Penny Green and Tony Ward have usefully surveyed the terrain of a criminology of crimes of the state and posed many questions for further exploration in their book *State Crime* (2004).

The year 2005 witnessed advancement within the field. Examples include Kramer and Michalowski's article "War, Aggression, and State Crime: A Criminological Analysis of the Invasion and Occupation of Iraq," Kramer, Michalowski, and Rothe's "The Supreme International Crime: How the U.S. War in Iraq Threatens the Rule of Law," and Rothe and Mullins' "The International Criminal Court: Symbolic Gestures of Global Control." All examine crimes of the state and issues of social control.

Consequently, by the late 1990s and the early years of the 21st century, a significant literature on crimes of the state has developed (Friedrichs, 1996b, 1998; Friedrichs and Friedrichs, 2002; Kauzlarich and Kramer, 1998; Kauzlarich et al., 2003; Mullins et al., 2004; Mullins, 2006; Rothe and Mullins, 2006; Rothe, 2006; Ross, 1995, 1998, 2000; Simon, 2002).

At the present stage, though, one would still have to concede that a criminology of crimes of the state is still very much in its infancy. Moreover, a general neglect of research on controls for state crime is increasingly apparent. Specifically, relatively little attention has been given to international institutions of social control within the context of state crime (Rothe and Mullins, 2006; Rothe, 2004; Mullins, Kauzlarich, and Rothe, 2004).

Most criminologists involved with the study of crimes of the state have principally been associated with some strain of conflict, radical, or critical criminology. An exception to this pattern is John Hagan, one of the most prolific and widely respected criminologists of the recent era and a past president of the American Society of

Criminology. Hagan's work generally fits within the mainstream of criminology. In his *Justice in the Balkans*, Hagan (2003) focuses on a high-profile trial for crimes of the state, that of Slobodan Milosevic of Serbia. In an article in *Criminology*, Hagan and Scott Greer (2002) explore the little-known contribution of Sheldon Glueck, the prominent mid-20th century criminologist, to the development of the Nuremberg Trials. Hagan's work may help to legitimate attending to crimes of the state in the eyes of other mainstream criminologists, even though he disregards the work of critical criminologists who have addressed issues concerning crimes of the state (war crimes, crimes of aggression, genocide, crimes against humanity, and state crime, which is more subjectively defined) and his book is principally concerned with the institutional factors involved in the creation of this international tribunal and the collective actions of some of its key U.S. personnel.

Also noteworthy is that sessions on "Analyzing the War on Iraq as State Crime" and "Crimes of the State and Powerful" at the 2004 and 2005 Annual Meetings of the American Society of Criminology drew standing-room-only audiences. It is unknown whether this indicates a measurable growth of interest in crimes of the state among criminologists, or whether many of those attending did so more as citizens concerned about the war. Nonetheless, such interest does suggest the potential for a significant expansion of criminological attention to crimes of the state.

Crimes of the State and Cognate Areas of Inquiry

Although burdened by definitional and conceptual difficulties, an emerging criminology of state crime has prompted several critical criminologists to incorporate other cognate areas. For example, Kramer and Michalowski (1990) provided the earliest and most widely cited definition of state-corporate crime:

State-corporate crimes are illegal or socially injurious actions that occur when one or more institutions of political governance pursue a goal in direct cooperation with one or more institutions of economic production and distribution.

The concept of state-corporate crime has provided a basic point of departure for a growing body of research. State-corporate crime increasingly came to be seen as taking two forms, although these forms often interacted with one another. Accordingly, a distinction emerged between state-facilitated and state-initiated crimes (Kramer, 1992; Kauzlarich and Kramer, 1993; Aulette and Michalowski, 1993). Specifically, state-facilitated crimes are those in which the state fails to take necessary action, thus aiding illegal actions on the part of corporations, while state-initiated crimes are those in which the state sets the stage for, or initiates, illegal corporate activities.

A volume edited by Ronald Kramer and Raymond Michalowski (2005a), *State-Corporate Crime: Wrongdoing at the Intersection of Business and Government*,

brings together research on corporate crime facilitated or initiated by the state. It reprints pioneering case studies on state-corporate crime, along with newer cases such as Christopher Mullins' (2006) "Blown Tires and Lost Lives: Bridgestone-Firestone, Ford and the FTA" and Dawn Rothe's (2006) "War Profiteering and the Pernicious Beltway Bandits: Halliburton and the War on Terror." From the earliest adoption of "state-corporate crime" as a term, ongoing research and case studies explored how the state and corporations intermingle or act cooperatively, resulting in policies and practices with immensely harmful consequences (Mathews and Kauzlarich, 2000; Mullins, 2006; Rothe, 2006).

Other cognate areas of inquiry include the examination of state crime in relation to the political economy (Michalowski, 1985), political crime (e.g., espionage and assassination; see Hagan, 1989; Ross, 2003), political white-collar crimes (e.g., corruption by politicians; see Friedrichs, 2007), environmental crimes (Burns and Lynch, 2004), and finance crimes (Friedrichs, 2007). Perhaps the latest addition to the list of forms of crime with a cognate relationship to crimes of the state would be "crimes of globalization" (Friedrichs and Friedrichs, 2002). Crimes of globalization refer to forms of harm that result from the policies and practices of international financial institutions such as the International Monetary Fund (IMF) and the World Bank. These policies and practices can have disparaging effects, whether from the IMF's imposition of "structural adjustment" conditions on countries such as Argentina, which can devastate the economic well-being of people in those countries, or from support for dam-building projects by the World Bank that destroy the way of life of large numbers of indigenous peoples.

These institutions may not intend to do harm; indeed, they even claim as a central mission the alleviation of economic and other forms of suffering. Yet the privileging of transnational corporate interests and those of the most powerful countries (G7), as well as a certain arrogance with which these institutions implement a "top down" form of globalization, has harmful consequences that are immense and demonstrable, including premature deaths. Since international financial institutions work closely and cooperatively with high-level government officials in developed and developing countries, such crimes of globalization are inevitably intertwined with crimes of the state.

For criminologists, the challenge is to investigate and explain how these different, cognate forms of crime interact and have reciprocal influences. In "Crime on the High Seas: Crimes of Globalization and the Sinking of the Senegalese Ferry *Le Joola*," Rothe, Mullins, and Muzzatti (2006) explore the interrelations between international institutions such as the IMF and World Bank, the legacies of colonialism, and foreign policies that in effect set the stage for atrocities, state victimization, and state crime, as well as one form of crimes of globalization. Unlike most of the work on state crimes committed by strongly empowered nation-states—e.g., international piracy, crimes of the U.S. nuclear state, and the U.S.-led invasion of Iraq (see Chambliss, 1989; Kauzlarich and Kramer, 1998; Kramer and Michalowski,

2005b; Kramer, Michalowski, and Rothe, 2005)—the *Le Joola* sinking has a strikingly different macro-level context due to the position of the nation-state *vis-à-vis* international financial institutions. Essential to understanding such crimes are the economic contexts generated by the pro-capital, anti-human emphasis of the IMF and World Bank. Thus, Rothe, Mullins, and Muzzatti (2006) suggest the need to examine the domination of global capital and its criminogenic effect on these “developing” states. For the IMF and World Bank, like other capital-generating organizations, have stockholders and a board that emphasize profits, often at the cost of individual states such as Senegal, but also in terms of humanity as a whole.

Sources of Resistance to a Criminology of Crimes of the State

Beyond the disputes fixated on standards used (legalistic, social harms, analogous harms, human rights, etc.), and definitional issues of crimes of the state, other sources of resistance to a criminology of the state continue to impede the development of this field of inquiry. In *States of Denial*, Stanley Cohen (2001) explores the general resistance to confronting both large-scale forms of human suffering and massive forms of atrocities. The forms of denial he identifies surely apply to criminologists. Steve Tombs and Dave Whyte (2004: 262) support Cohen’s thesis regarding academic censorship, but also suggest that the “compliant context” and “ready momentum based on widespread academic self-regulation” account for “current attempts to silence, discredit, and marginalize alternative views of the world.” These are “elements in and symptoms of the political reconfiguration of university research.”

Ross et al. (1999) suggest that those who have chosen to address crimes of the state encounter difficulties in terms of carrying out and getting their research published. Among the obstacles are obtaining research funding, the lack of policy implementation, a disciplinary “preoccupation” with quantitative research, a lack of “official” documents and data, official and public opposition to the concept of crimes of the state, and a paucity of publications when compared to the traditional focus on the etiology of street crime. The complexities of researching and analyzing crimes of the state can be a source of resistance, as university expectations continue to shift toward producing multiple articles on the etiology of conventional forms of crimes. Academic survival itself thus contributes to resistance to the criminology of the state.

Criminological inquiry into state crime generates its own resistance to articulating a more holistic view of state crime within its international contingencies, which stymies the development of a comprehensive theoretical frame guiding such analysis. In part, this is due to the lack of interdisciplinary knowledge. As a criminologist specializing in state crime, one must have knowledge of international relations, international law, international institutions, history, political science, and economics.

A Provisional Agenda for a Criminology of Crimes of the State

If a criminology of crimes of the state is to develop and thrive, the criminological "community" must be made much more aware of the work being undertaken on this topic. It must also be persuaded that it is a legitimate realm of inquiry for criminologists. Indeed, this form of consciousness-raising and legitimation has been one objective of the present article. Going forward, many of the traditional and existing lines of demarcation between disciplinary and substantive areas of scholarly inquiry may become eroded and be reconfigured. In a rapidly changing world, criminologists need not feel constrained by the theoretical and methodological parameters established to date in their field, but should be open to expanding and rearranging these parameters. Paul Roberts and Nesam McMillan (2003) are among those who argue that criminology must be part of any sophisticated endeavor to make sense of the expanding problem of international, state-based criminality.

Ideally, a criminology of crimes of the state will resolve some of the conceptual and definitional issues in a manner that is widely accepted within the field. The subfield of scholarship on white-collar crime remains plagued by definitional controversies, more than 65 years after Sutherland introduced the concept to the discipline. Hopefully, a criminology of crimes of the state will avoid this fate, at least partially. The recasting or reframing of key issues relating to crimes of the state into specifically criminological terms must be more fully addressed. Moreover, as we explore state crimes in the context of international institutions, we must seek to agree upon a foundational level for standards upon which to base such criminality. International law and principles provide one such foundational basis. Though this may sound legalistically constraining, a scholar familiar with international law and principles realizes that this incorporates nearly all the definitions and standards used by criminologists of state crime (e.g., human rights, social harms, and codified criminal law or treaties). Thus, we can move beyond part of the resistance or conundrum left from issues of definitions and standards to begin to address potential avenues of control.

Criminologists can then engage in a systematic program of inquiry on parallels and differences between crimes of the state and other forms of crimes, with some attention to their reciprocal influences. A criminology of crimes of the state would systematically explore how knowledge that has been produced on the conventional range of crimes, and the control of these crimes, applies (or fails to apply) to crimes of the state and the control of such crimes. Indeed, criminologists who explore and theorize the issue of control must examine the role of the newly instituted International Criminal Court (Rothe and Mullins, 2006).

In the best of all possible worlds, criminological knowledge will in time demonstrably contribute to a deeper and richer understanding of crimes of the state, as well as to effective ways to prevent some of these crimes, limit their scope, and more adequately address them when they occur as problems of justice. Moreover,

it is clear that globalization provides an impetus for some forms of state crime. To ignore it as a catalyst of foreign policies or international institutional policies will further impede the development of a criminology of crimes of the state. Beyond this, as we consider the transnational setting of many state crimes, we should expand beyond the pervasive ethnocentric academic ethos and include an agenda for promoting more cooperative transnational criminological endeavors that focus upon crimes of the state. Such initiatives would expand our knowledge of our field. We must also be willing to cross into other fields of specialty to better explore the complexities of state crime within the context of globalization and the international arena.

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The Crime of Aggression before the ICC

by Astrid Reisinger Coracini

Mon., 21 June 2021; 12:00 – 13:00

Abstract:

In its judgment, the International Military Tribunal (IMT) at Nuremberg held that '[t]o initiate a war of aggression [...] is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.' Ex post, this statement is noteworthy for two reasons. First, it exemplifies the importance of crimes against peace in the aftermath of the Second World War. Not only for a historical narrative and prosecutorial strategy, but also with regard to the subject matter jurisdiction of the IMT. The latter included crimes against humanity committed (only) 'in connection with' a crime against peace or a war crime. War crimes were those committed in a war between states and thus presumed the occurrence of a crime against peace. Second, the statement of the IMT focusses on a 'war of aggression' and leaves aside other acts constituting crimes against peace. While the tribunal had made clear that it saw no need to elaborate broadly on other acts as it had established the most serious one, this focus previews the future development of the supreme crime from crimes against peace to the crime of aggression. This presentation will cover the international customary law and treaty law definitions of the crime of aggression. Part 1 provides a historical overview of the definition of the crime from the half-hearted and unsuccessful early attempt to prosecute the former German emperor, Wilhelm II, for 'a supreme offence against international morality and the sanctity of treaties', to the charter and judgment of the IMTs in Nuremberg and Tokyo. From drafting exercises under the auspices of the United Nations to negotiations in the context of the establishment of the International Criminal Court (ICC), that eventually led to the adoption of a provision on the crime of aggression at the first review conference of the ICC Statute. Part 2 analyses the definition of the crime of aggression in article 8bis of the ICC Statute: the leadership clause, the individual conduct, and the collective conduct (including the state act of aggression and the threshold clause). Part 3 contemplates the crime of aggression before the ICC in practice; possible situations involving the crime, as well as legal and political challenges to its effective prosecution.

Article:

Reisinger Coracini, Astrid; Wrangé, Pal (2016): 'Is the Crime of Aggression Different from the other Crimes under International Law?'.

In preparation of the session, read:

Article 5(2) of the (unamended) ICC Statute

Articles 8bis, 15bis, 15ter of the (amended) ICC Statute

General Assembly Resolution 3314 (XXIX) 1974

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THE CRIME OF AGGRESSION:
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The Specificity of the Crime of Aggression

ASTRID REISINGER CORACINI AND PÁL WRANGE

11.1 Introduction

It has been averred by commentators that the crime of aggression is different from the other three categories of crimes within the jurisdiction of the International Criminal Court (the Court). This chapter will examine these claims and will show that it is not justified to speak of the crime of aggression as something completely apart from the other core crimes. There are significant structural differences between all four categories of crimes. Furthermore, the differences that do exist are – at least from a practical point of view – differences in degree, rather than differences in kind.

Nevertheless, there are certain specific traits of the crime of aggression. An understanding of what distinguishes the crime of aggression from the other crimes under international law will enable a better understanding of the provisions on the crime, and may thus serve a heuristic or didactic purpose. These differences might have legal, practical or political consequences in the application of the definition of this crime and its enforcement.

There are many ways to understand what may be specific about the crime of aggression and what may not. Some traits are inherent in the concept of the crime (as understood by the majority view); namely, the leadership element, the reference to the law on the use of force, the reference to an act of state and the victim being a state.¹ Other traits are incidental to the particular provisions on the crime of aggression adopted at the Review Conference in Kampala, such as the provisions on the exercise of jurisdiction, as well as the details of the definition adopted. Yet other aspects are merely potential, such as the political nature of the crime and the controversies surrounding it both *in abstracto* and with respect to concrete investigations and prosecutions. While the latter set of characteristics is not legal in the strict sense of the word, they will nevertheless be discussed here, since they are of

¹ These elements are not unchallenged, as will be discussed below, but they shaped the discussions leading to the adoption of a provision of the crime of aggression for the Rome Statute.

great practical interest and since this chapter is the most appropriate place to deal with them.

In section 11.2, this chapter will analyse whether and how the crime of aggression is different from a legal point of view. Most of the issues dealt with here will be developed more thoroughly in other chapters. The analysis will be based upon the definition of the crime of aggression adopted in the 2010 Resolution on the Crime of Aggression. However, that definition was not inevitable, but was the result of long deliberations among a particular group of people in a particular context. The legal sources of the definition in international customary law and treaty law could have yielded a different definition, and the authority of the Rome Statute definition for purposes other than the jurisdiction of the Court is yet to be seen. The analysis will therefore also make intermittent references to other possible renditions of the crime of aggression. In addition to interpreting the elements of the definition, section 11.2 will also take a look at broader claims of a legal nature related to the definition of the crime as such.

Section 11.3 will bring in some alleged practical, political and ethical elements, which are connected to the legal characteristics (although they do not follow by logical necessity). This covers many issues, such as the alleged particularly controversial nature of the crime and the moral controversy surrounding aggression, as well as the practical exigencies of investigations of the crime of aggression.

This chapter will not focus on the conditions for the exercise of jurisdiction or on the entry into force provisions. The differences between the crime of aggression and the other core crimes in this regard are obvious, but they are not part of the crime as such, and the relevant provisions are analysed elsewhere.² However, it is equally obvious that the special provisions adopted for this purpose are a consequence of the alleged special features of the crime of aggression and of perceptions of such uniqueness. Hence, there will be passing references to these conditions.

The allegedly different nature of the crime of aggression has been invoked as an argument against its inclusion in the Rome Statute, as well as an argument for special procedures relating to this crime. It will further be invoked in national debates about what position a country should take regarding the provisions adopted in the 2010 Resolution on the Crime of Aggression. The authors of this chapter are of the view that the 'difference' or the 'special' character of the crime of aggression has been greatly exaggerated, and the scope of this chapter is limited to addressing that characterisation.

² The Rome Statute definition of the crime of aggression was largely determined by existing legal sources, and it was the assumption of negotiators that the concept had a content under customary international law, even if the reach of some elements was partly disputed. By contrast to the definition, the procedural rules were subject to negotiation long after the definition had been agreed, and the options on the table before the Review Conference in Kampala were so varying that it is very difficult to say that one or the other procedural solutions had any necessary link to the concept as such.

11.2 Legal Elements

11.2.1 Leadership Element

According to article 8 bis(1) of the Rome Statute, a crime of aggression is committed 'by a person in a position effectively to exercise control over or to direct the political or military action of a State'.³ In order to ensure that not only the primary perpetrator but also accomplices fulfil this requirement, the element is reiterated in article 25(3 bis).⁴

The 'absolute leadership character'⁵ of the definition of the crime of aggression significantly reduces the Court's jurisdiction *ratione personae* with respect to this crime. The Court will presumably be able to prosecute only a small group of people, usually leaders or policymakers at the top of governmental or political hierarchies or influential to them. This may have a number of consequences, as leaders are more likely to invoke immunities and other 'avoidance techniques'.⁶

Such a limitation by way of definition cannot be found in the definition of the other three categories of crimes falling within the jurisdiction of the Court.⁷ It is also questionable whether this was the only conclusion available to the drafters of the crime of aggression. The International Criminal Court Preparatory Commission established agreement on the inclusion of a leadership clause as well as its (since then unchanged) formulation at an early stage of the negotiations.⁸ Continued discussions of the Special Working Group on the Crime of Aggression clarified the drafters' understanding of the leadership clause as an element of the definition of the crime of aggression as well as its absolute nature.⁹ Arguments brought

³ For the Statute's general attribution of individual criminal responsibility to persons, see Articles 1, 25(1) of the Statute.

⁴ Article 25(3 bis) of the Statute provides that: 'in respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State'. Given the clear wording in article 8 bis, that reiteration was probably not necessary. The leadership clause is further confirmed by Element 2 of the Elements of Crimes of the crime of aggression.

⁵ For details, see R. Clark, 'Individual Conduct', Chapter 15, this volume.

⁶ See, for example, C. Krauß, 'The Crime of Aggression before the First Review Conference of the ICC Statute', *Leiden Journal of International Law*, 20 (2007), 851–65, at 856.

⁷ See generally and interestingly, H. Fox, 'International Law and Restraints on the Exercise of Jurisdiction by National Courts of States', in M. D. Evans (ed.), *International Law*, 2nd edn (Oxford University Press, 2006), 361–94; for further consequences, see section 11.3 below. With regard to domestic proceedings, where such invocations may sometimes be successful, see P. Wrange, 'The Crime of Aggression, Domestic Prosecutions and Complementarity', Chapter 21, this volume.

⁸ The argument could be made that the definition limits the jurisdiction rather than sets out a global definition. After all, the definitions of the crimes in the Statute are for the purpose of the Statute only. It is therefore not surprising that the States Parties in Kampala decided to make additions to the list of war crimes, and that these newly inserted types of acts probably had been war crimes under international customary law already in 1998. Under this view, the definitions in the Statute are minimum definitions, which may not necessarily cover all acts that are criminalised under international customary law.

⁹ 'Discussion Paper Proposed by the Coordinator', 11 July 2002, UN Doc. PCNICC/2002/WGCA/RT.1/Rev.2, in *Report of the Preparatory Commission for the International Criminal Court*, UN Doc. PCNICC/2002/2/Add.2, Part II, 3; also published in *ASP Official Records*, ICC-ASP/2/10, 234.

¹⁰ On the discussion of the nature of the leadership clause as a definitional or jurisdictional element, see 'Informal Intersessional Meeting of the Special Working Group on the Crime of Aggression', held at the Liechtenstein

forward during the negotiation process emphasised the customary nature of the leadership clause. In particular, the definition of crimes against peace in Control Council Law No. 10 as well as the definition of the crime of aggression in the 1991 and 1996 ILC Draft Codes of Crimes (which both contained a leadership clause¹⁰) served as references. However, a customary law argument could also be established against a different treatment of the crime of aggression from the other core crimes. The 1945 London Charter and the 1946 Tokyo Charter did not contain a special leadership clause for crimes against peace.¹¹ The International Military Tribunals at Nuremberg and Tokyo were both established to prosecute 'major war criminals', and this jurisdictional limitation applied equally to all crimes within their respective competence.¹² Furthermore, the International Law Commission (ILC) worked on the basis of a uniform definition of perpetrators for crimes against the peace and security of mankind until 1991 without giving further reasons for its change in approach.¹³ Hence, both positions have support in sources of international law and either of those positions could have been a solid basis for a statutory definition reflecting customary international law. Since then, however, the *opinio iuris* expressed during the negotiations of the crime of aggression, as well as the adoption, recent ratification and implementing practice, strongly indicate the existence of a leadership element as part of the definition of the crime of aggression – different from other core crimes – under customary international law.¹⁴

It has been argued that the leadership element is inherently linked to the commission of the crime of aggression, since its commission requires a certain position of power within a state.¹⁵ While this argument does not necessarily apply to the execution phase of an act of aggression, it is convincing with respect to the planning, preparation and initiation phase. Still, it does not in itself support the need for an explicit inclusion of a leadership clause in the definition of the crime.

Institute on Self-Determination, Woodrow Wilson School, Princeton University, New Jersey, United States, from 11 to 14 June 2007', ICC-ASP/6/SWGCA/INF.1, in *ASP Official Records*, ICC-ASP/6/20, Annex III, 96, para. 9, on its absolute nature and ways to reflect it in the definition, see 'Informal Intersectoral Meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, New Jersey, United States, from 13 to 15 June 2005', ICC-ASP/4/SWGCA/INF.1, in *ASP Official Records*, ICC-ASP/4/32, Annex II, A, 357, paras. 19 ff.

¹⁰ For the different formulations, see article II(2)(f) of the 1945 Control Council Law No. 10; article 15 of the 1991 ILC Draft Code of Crimes; article 15 of the 1996 ILC Draft Code of Crimes.

¹¹ Article 6(a) of the 1945 London Charter; article 5(a) of the 1946 Tokyo Charter.

¹² Article 1 of the 1945 London Charter; article 1 of the 1946 Tokyo Charter.

¹³ ILC, 'Report of the Commission to the General Assembly on the Work of its Forty-Third Session', Yb ILC (1991), vol. II, 93. For this development, see A. Reisinger Coraoni, 'Defining the Crime of Aggression for the Rome Statute of the International Criminal Court', in C. Stahn and L. van den Herik (eds.), *Future Perspectives on International Criminal Justice* (The Hague: TMC Asser, 2010), 425–49, at 431 ff.

¹⁴ At least with regard to the principal perpetrator. For a more reluctant view regarding accomplices, see K. Ambos, 'The Crime of Aggression after Kampala', *German Yearbook of International Law*, 53 (2010), 463–509, at III B 3.

¹⁵ I. K. Müller-Schieke, 'Defining the Crime of Aggression under the Statute of the International Criminal Court', *Leiden Journal of International Law*, 14 (2001), 409–30, at 419 ff; G. Westdickenberg and O. Fiss, 'Das Verbrechen der Aggression im Römischen Statut des Internationalen Strafgerichtshofes', in J. Frowein et al. (eds.), *Verhandeln für den Frieden: Liber Amicorum Tono Eitel* (Berlin: Springer, 2003), 483–525, at 504.

Similar needs for a position of power within a state or organisation may also apply to the planning, preparation and initiation of other core crimes committed on a massive scale. An explicit reference with regard to these crimes was, however, not considered necessary in the context of article 25 of the Rome Statute.

Beyond legal arguments, states' preference for an express limitation of the circle of perpetrators, as well as their strong support for the absolute character of the leadership element, can be explained on the basis of sovereignty and criminal policy. States wanted to ensure that soldiers in the field could not be held criminally accountable for an act of aggression.¹⁶ It might be reasonable to assume that soldiers cannot be expected to evaluate the legality of the use of force by their state. It might, however, also be that states do not want their soldiers to be given a reason to review decisions and corresponding orders of this nature.¹⁷

While the leadership element limits the circle of perpetrators of the crime of aggression in the Rome Statute definition, in its concrete application it may not be so different to the other categories of crimes. Most importantly, the leadership clause does not reduce criminal accountability to one person. A decision to employ the use of force is usually a shared one, even in autocratic regimes.¹⁸ Every person fulfilling the pre-conditions of the leadership clause may face prosecution before the Court. The perpetrator need not hold a political or military position, but must be able to exercise control over or to direct 'the political or military actions' of a state. This involves persons in *de iure* as well as *de facto* positions of power, within and outside the internal organisation of a state.¹⁹

Although the definitions of the other core crimes in the Rome Statute do not contain a leadership element, prosecutorial policy expressly targets a comparable

¹⁶ 2005 Princeton Report, *supra* note 9, at para. 19; see also Commentary on Article 16, in ILC, 'Draft Code of Crimes against the Peace and Security of Mankind', Yb ILC (1996), vol. II, 15; and ILC, 'Report of the Commission to the General Assembly', Yb ILC (1950), vol. II, 376.

¹⁷ For a discussion, see, for example, Westdickenberg and Fiss, *supra* note 15, at 504. See also 'Informal Intersectoral Meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, New Jersey, United States, from 21 to 23 June 2004', ICC-ASP/5/SWGCA/INF.1, in *ASP Official Records*, ICC-ASP/5/25, Annex II, 341, at para. 59. Similar considerations also shape the discussion on the defence of superior order with regard to war crimes.

¹⁸ For a rejection of the argument that Hitler was solely responsible for the outbreak of the Second World War, see International Military Tribunal (Nuremberg), Judgement, 1 October 1946, in *American Journal of International Law*, 41 (1947), 172, at 226.

¹⁹ For details, see 2007 Princeton Report, *supra* note 9, at para. 12; 'Report of the Special Working Group on the Crime of Aggression', ICC-ASP/5/SWGCA/2, in *ASP Official Records*, ICC-ASP/5/35, Annex II, 9, para. 13; 'Proposal Submitted by Cuba', 6 February 2003, ICC-ASP/1/L.4; for the possibility of individual criminal responsibility of industrialists for the crime of aggression, see, for example, *United States of America v. Alfred Krupp et al.*, in United Nations War Crimes Commission (ed.), *Law Reports of Trials of War Criminals*, vol. X (London, 1949), 103 ff; ILC, 'Report of the Commission to the General Assembly on the Work of its Fortieth Session', Yb ILC (1988), vol. II(2), 72. For a detailed discussion, see, for example, S. Barniga, 'Against the Odds: The Results of the Special Working Group on the Crime of Aggression', in R. Belloli (ed.), *International Criminal Justice Law and Practice from the Rome Statute to Its Review* (Farnham and Burlington: Ashgate, 2010), 591–608, at 628 ff; R. Clark, 'The Crime of Aggression', in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff, 2009), 709–24, at 715.

circle of perpetrators, which has a considerable impact on the selection of cases at the Court. As early as 2003, the first Court prosecutor outlined his focus 'on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible' for crimes within the jurisdiction of the Court.²⁰ The early Court cases reflected this approach, but also revealed challenges in connecting leaders to the crime base in high-profile cases. In order to better prepare such cases, the new prosecutor consequently suggested a 'strategy of gradually building upwards', whereby cases of mid- and high-level perpetrators would prepare a case against those most responsible.²¹ Both strategies could target persons well within the definition of the leadership clause in article 8 bis. Against this background, the leadership clause of the definition of the crime of aggression is at most a difference of degree, not of quality.

11.2.2.2 An Act of State

The structure of the crime of aggression in the Rome Statute assumes that the individual is participating in a collective act – the act of aggression – which by definition must be an act of state. In other words, the act of aggression must be attributable to a state. The *chapeau* of article 8 bis(2) provides that an 'act of aggression means the use of armed force by a State'. In the same vein, each act of aggression described in the subsequent list in article 8 bis(2)(a)–(g) repeats the act of state requirement.²² Even the definition of the leadership clause refers to the perpetrator's ability to control or direct the actions of a state.²³

The existence of a state act of aggression has been referred to as a *conditio sine qua non* for establishing individual criminal responsibility for the crime of aggression.²⁴ Such an exclusive requirement of state involvement cannot be found in the definitions of the other three categories of crimes falling within the jurisdiction of the Court; individual criminal responsibility does not depend on state involvement.²⁵

²⁰ International Criminal Court, Office of the Prosecutor, 'Paper on Some Policy Issues before the Office of the Prosecutor', September 2001, The Hague.

²¹ International Criminal Court, Office of the Prosecutor, 'Strategic Plan', June 2012–2015, The Hague, para. 22.

²² See also Element 3 of the Elements of Crime of the crime of aggression. For details on the collective act, see C. Kreß, 'The State Conduct Element', Chapter 14, this volume.

²³ Article 8 bis(1) of the Statute.

²⁴ See, for example, H.-P. Kaul, 'The Crime of Aggression: Definitional Options for the Way Forward', in M. Politi and G. Nesi (eds.), *The International Criminal Court and the Crime of Aggression* (Aldershot: Ashgate, 2004), 97–108, at 98.

²⁵ See for example the statement by Mr Nathan (Israel) in Committee of the Whole, Summary Record of the 6th Meeting, 18 June 1998, UN Doc. A/CONF.183/C.1/SR.6, para. 48. The ILC felt that this 'unique' trail merited joint exclusive jurisdiction of an international court and the home state of the offender; see 1996 ILC Draft Code of Crimes, *supra* note 16, Commentary to draft Article 8, paras. 14–15.

The act of state requirement in article 8 bis(2) stems from the rule of international law underlying the definition of the crime of aggression. The prohibition of the use of force under article 2(4) of the UN Charter is directed at states ('all members...') and the corresponding customary international law prohibition is also traditionally held to cover states only. The definition of an act of aggression in 1974 GA Resolution 3314, which was decisive for article 8 bis(2) of the Rome Statute, links back to the wording of the general prohibition of the use of force in the UN Charter.

This state-centric definition of the crime of aggression may be seen as conservative. Criminal responsibility of individuals for the use of force of non-state actors has, for instance, been discussed previously by the ILC in the context of mercenaries.²⁶ The Security Council has even condemned 'mercenary aggression' against the Seychelles.²⁷ Commentators have long advocated a definition of the crime of aggression focusing on individual acts instead of a collective act.²⁸ At the regional level, the African Union adopted a wide definition of the crime of aggression, establishing individual criminal responsibility for 'acts of aggression, regardless of a declaration of war by a State, group of States, organizations of States, or non-State actor(s) or by any foreign entity'.²⁹ At the other end of the spectrum, the ILC Draft Articles on the Responsibility of International Organizations acknowledge that international organisations may engage in self-defence, which may mean that they are equally covered by the international legal regime on the use of force.³⁰ Following the attacks against the United States of 11 September 2001 (9/11) and the International Court of Justice (ICJ) judgment in *DRC v. Uganda*,³¹ the idea of opening the definition of the crime of aggression to acts of non-state actors was brought forward during the negotiations of the crime of aggression.³² However, it was not discussed in detail. States did not seem ready to burden the complex discussion on the definition of the crime with an additional issue. Further, many

²⁶ ILC, 'Draft Code of Crimes against the Peace and Security of Mankind', Yb ILC (1991), vol. II, 79, chapter III A 3 e.

²⁷ Security Council, Resolution 496 (1981) concerning Seychelles, 15 December 1981, UN Doc. S/RES/496.

²⁸ See, for example, A. Cassese, 'On Some Problematic Aspects of the Crime of Aggression', *Leiden Journal of International Law*, 20 (2007), 841–49, at 847; R. Rayfuse, 'The Draft Code of Crimes against the Peace and Security of Mankind: Eating Disorders at the International Law Commission', *Criminal Law Forum*, 8 (1997), 43–86, at 59–60.

²⁹ Article 28M of the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (adopted June 2014), EX.CL/846(XXV), Annex 5.

³⁰ See articles 21 and 53 of ILC, 'Draft Articles on the Responsibility of International Organizations', Yb ILC (2011), vol. II(2), 54.

³¹ Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Uganda*), ICJ Reports (2005), 168.

³² See, for example, 'Report of the Special Working Group on the Crime of Aggression', ICC-ASP/7/SWGCA/2, in *ASP Official Records*, ICC-ASP/7/20/Add.1, Annex II, 20, at para. 16; 2007 Princeton Report, *supra* note 9, at para. 51.

felt that it was quite doubtful that non-state actors were covered by the prohibition of aggression in customary international law.

After 9/11, developments in the law of use of armed force highlighted the question of legitimate self-defence under article 51 of the UN Charter against armed attacks by non-state actors. The claim that the wording of article 51 covers armed attacks by non-state actors was widely supported.³³ However, the question remains whether this also has an impact on the state-centric general prohibition of the use of force in article 2(4) of the UN Charter, and whether an armed attack equates to an act of aggression.³⁴ Furthermore, while discussions in the aftermath of the attacks acknowledged a right to self-defence against armed attacks by non-state actors, the discourse subsequently changed back to a more state-centric framework. This discourse focused on state involvement and the attribution of responsibility on the basis of providing a safe-haven for non-state actors using force.³⁵ Thus, there is some support for the claim that acts of aggression can be committed by non-state actors, but the customary status of this (potentially emerging) rule is not fully established.

In contrast to genocide, crimes against humanity and war crimes – each of which have been liberated from the requirement of an act of state – the underlying rules of the prohibition of the use of force remain more conservative. While this assertion holds true, it should nevertheless be kept in mind that these three categories of crimes are usually (albeit not necessarily) committed on behalf of or with the involvement of a state.³⁶ The definition of crimes against humanity refers to 'a

³³ For the commission of an armed attack by a non-state actor such as a terrorist organisation or a non-state armed group, such as al-Qaida or Hezbollah, see M. S. Stein, 'The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council's Power to Determine Aggression?', *Indiana International and Comparative Law Review*, 16 (2005), 1–36, at 4; G. M. Dawson, 'Defining Substantive Crimes within the Subject Matter Jurisdiction of the International Criminal Court: What is the Crime of Aggression?', *New York Law School Journal of International and Comparative Law*, 19 (2000), 413–52, at 444. See also R. E. Fife, 'Criminalizing Individuals for Acts of Aggression Committed by States', in M. Bergsmo (ed.), *Human Rights and Criminal Justice for the Downrodden: Essays in Honour of Asbjørn Eide* (Leiden: Martinus Nijhoff, 2003), 53–74, at 72. This, of course, builds on the assumption that the 9/11 attacks indeed constituted an armed attack (that could, but does not have to be inferred from Security Council Resolution 1368 (2001) concerning Threats to International Peace and Security Caused by Terrorist Acts, 12 September 2001, UN Doc. S/RES/1368). *Contra*, R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2007), at 267 and 274. For other sub-categories of non-state politico-military actors that may be subjected to the prohibition of the use of force, for example, entities with territorial control such as Taiwan, Gaza under Hamas and South Ossetia, see O. Corten, *The Law against War* (Oxford: Hart, 2010), 126–97.

³⁴ In that regard, see, for example, the authentic French version of article 51 of the UN Charter ('agression armée') *of America*, ICJ Reports (1984), 392, at para. 195. See also B. Broms, 'The Definition of Aggression', *Recueil des Cours*, 154 (1977), 301–99, at 370.

³⁵ For a detailed discussion, see C. Gray, *International Law and the Use of Force*, 3rd edn (Oxford University Press, 2008), 173 ff.; C. Kreß, 'Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force', *Journal on the Use of Force and International Law*, 1 (2014), 11–54, at 41–54.

³⁶ K. Marxen, 'Beteiligung an schwerem systematischem Unrecht', in K. Lüderssen (ed.), *Aufgeklärte Kriminalpolitik oder der Kampf gegen das Böse?*, vol. III: *Malprokriminalität* (Baden-Baden: Nomos, 1995), 220–36, at 227–28.

State or organizational policy'.³⁷ With regard to war crimes, an act of state is the decisive factor to categorise the contextual elements of an armed conflict of an international or non-international nature, and, at any rate, at least two collectives (armed groups) need to be involved. The definition of the crime of genocide does not include any reference to a collective act, but the crime is typically carried out in an organised form.³⁸ Therefore, although state involvement is not a *conditio sine qua non* for the establishment of individual criminal responsibility for genocide, crimes against humanity and war crimes, it is a frequent factor. Therefore, any consequences arising from the prosecution of a core crime involving an act of state always need to be taken into account not only with regard to the crime of aggression, but also in many cases with regard to the other core crimes.

11.2.2.1 International Jurisdiction over State Acts Presupposes State Consent

According to the definition of the crime of aggression, an act of aggression by a state is a prerequisite to establish individual criminal responsibility. This requirement may give rise to consequences with respect to the enforcement of the crime of aggression. At the international level, it has been argued that the consent principle, as applied by the ICJ in its *Monetary Gold* decision, would preclude the Court from adjudicating on the existence of an act of aggression in certain cases.³⁹ In particular, the ICJ held that 'where ... the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it'.⁴⁰ This concerned cases where a state's 'legal interests would not only be affected by a decision, but would form the very subject-matter of the decision'.⁴¹

Although the principle has been applied by the ICJ and other international adjudicating bodies,⁴² it is doubtful whether the *Monetary Gold* principle relates to international criminal courts and tribunals; such courts and tribunals do not issue binding decisions upon states but upon individuals, and do not follow the state

³⁷ Article 7(2)(a) of the Statute.

³⁸ See in this regard the last common element of the Elements of Crime of genocide, which provides that: 'The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.' For a discussion, see, for example, C. Kreß, 'The Crime of Genocide and Contextual Elements: A Comment on the ICC Pre-Trial Chamber's Decision in the Al Bashir Case', *Journal of International Criminal Justice*, 7 (2009), 297–306; G. Weste, *Völkerstrafrecht*, 2nd edn (Tübingen: Mohr Siebeck, 2007), margin No. 702–5.

³⁹ For details, see D. Akande, 'Prosecuting Aggression: The Consent Problem and the Role of the Security Council', *Oxford Institute for Ethics, Law, and Armed Conflict Working Papers* (May 2010), 1–41, referring to *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States)*, ICJ Reports (1954), 19. See also *East Timor case (Portugal v. Australia)*, ICJ Reports (1995), 90.

⁴⁰ *Monetary Gold case*, *ibid.*, at 33. ⁴¹ *Ibid.*, at 32. ⁴² Akande, *supra* note 39, at 14, 18 ff.

consent principle which underlies the jurisdiction of the ICJ.⁴³ In addition, even if the establishment of an act of state is a precondition for the adjudication of individual criminal responsibility, the 'very subject-matter' of a criminal judgment would remain a verdict against an individual.

Independent of these theoretical considerations, the compromise reached at the Review Conference in Kampala on the conditions for the exercise of jurisdiction over the crime of aggression builds strongly on consent.⁴⁴ With regard to a referral by the Security Council, indirect consent of a potentially affected Non-State Party may be assumed. With regard to a State Party referral and *proprio motu* investigations, the Court cannot exercise jurisdiction over a crime of aggression arising from an act of aggression committed by a Non-State Party,⁴⁵ or 'over the crime of aggression when committed by that State's nationals or on its territory'.⁴⁶ In addition, States Parties (whose consent to the exercise of jurisdiction is generally assumed under article 12(1) of the Rome Statute) may declare that they do not accept the Court's jurisdiction over the crime of aggression by lodging a declaration with the Registrar.⁴⁷ The jurisdictional framework is therefore consent-based. In this context, cases in which the Court may need to adjudicate on the existence of an act of aggression by a non-consenting state in order to establish whether it may exercise jurisdiction will be marginal.

If the *Monetary Gold* principle were applicable, the question would remain: to what extent is its applicability specific to the crime of aggression? The difference with the other core crimes would seem more of a quantitative rather than qualitative nature. In the case of the crime of aggression, the Court will need to determine the commission of an act of aggression prior to the determination of individual criminal responsibility. The determination of the Court – which has no mandate to pronounce on the responsibility of a state – is a mere preliminary question and will not be binding outside the context of the criminal trial. With regard to genocide, crimes against humanity and war crimes, the situation is similar, though the logic is reversed: with every conviction of a state official or any other person whose actions are attributable to a state,⁴⁸ a Court judgment may become the basis for invoking state responsibility.⁴⁹ Such an attribution is independent of the question of whether or not

the action of such a person reflects a policy adopted by that state.⁵⁰ This indirect determination of state responsibility has been no obstacle to establishing an international criminal court with jurisdiction over nationals of non-consenting states.⁵¹

11.2.2.2 National Jurisdiction over State Acts Presupposes State Consent

A domestic court's handling of a crime of aggression case would be different in several respects from the International Criminal Court's treatment of cases. First, the *Monetary Gold* consent principle does not apply to domestic courts. The ICJ is an international institution created by treaty, and treaty bodies only have as much jurisdiction as states give them. On the contrary, when sovereignty is applied to a dispute between states – such as a dispute about criminal jurisdiction – the matter is a clash between sovereignties, and the presumption against jurisdiction does not apply.⁵² Further, as is the case for the Court, a national court in a crime of aggression case does not have to determine rights, obligations or powers of a foreign state.

Related to the consent principle at the international level, the principle *par in parem non habet imperium* was argued to be an impediment to national jurisdiction.⁵³ But states routinely make statements on the legality or otherwise of acts by foreign states. No one has claimed that such pronouncements violate the equality of states. In fact, some states impose sanctions or even employ force against other states for alleged violations of international law. A domestic court may also consider the legality or otherwise of state acts in other circumstances, such as with respect to the other international crimes. There are also a number of cases in which states have indeed been prosecuting individuals for acts of aggression by other states, or when they have adopted laws that would enable that.

11.2.3 The Target is a State

In order to fulfil the legal definition of article 8 bis(2), the collective act does not only need to be attributable to a state. The collective act must also target another

⁵⁰ In fact, even aggression may be committed outside the scope of state policy; this may be the case, for instance, if security services outside the full control of the civilian government send 'armed bands' against another state.

⁵¹ Critically, M. Morris, 'High Crimes and Misconceptions: The International Criminal Court and Non-Party States', *Law and Contemporary Problems*, 64 (2000), 13–66. Similar arguments with a view to other international criminal tribunals have been rejected on the basis of an indirect consent of the relevant states (e.g., Nuremberg, Tokyo, Security Council establishment of referral).

⁵² Permanent Court of Criminal Justice, *The Case of the SS 'Lonia'*, PCIJ Series A, No. 10, at 18–19.

⁵³ B. van Schaack, 'Par in Parem Imperium Non Habet. Complementarity and the Crime of Aggression', *Journal of International Criminal Justice*, 10 (2012), 133–64, at 149. For a detailed discussion, see Wrangé, *supra* note 6.

⁵⁴ See N. Straptasas, 'Complementarity and Aggression: A Ticking Time Bomb?', in C. Stahn and L. van den Herik (eds.), *Future Perspectives on International Criminal Justice* (The Hague: TMC Asser, 2010), 450–74, at 453–56.

⁴³ For an overview, see D. Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits', *Journal of International Criminal Justice*, 1 (2003), 618–50, at 635–37.

⁴⁴ Article 15 bis and 15 ter of the Statute; for details, see S. Barriga and N. Blokker, 'Conditions for the Exercise of Jurisdiction based on State Referrals and *Proprio Motu* Investigations', Chapter 19, this volume, and N. Blokker and S. Barriga, 'Conditions for the Exercise of Jurisdiction based on Security Council Referrals', Chapter 18, this volume.

⁴⁵ Article 15 bis(4) of the Statute.

⁴⁶ Article 15 bis(5) of the Statute.

⁴⁷ Article 15 bis(4) of the Statute.

⁴⁸ ICTY judgments played a very prominent role in the case *Bosnia and Herzegovina v. Serbia and Montenegro* before the ICJ, and the ICJ said 'that it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial'. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), ICJ Reports (2007), 43.

state, by constituting 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations'. Equally, the listed acts constituting aggression in article 8 bis(2)(a)-(g) of the Rome Statute refers to states as targets of the respective use of force.⁵⁵

At first glance, this state-centric formulation may suggest that compared with the other categories of core crimes under the Court's jurisdiction, the crime of aggression is less concerned with the protection of individual rights than with the protection of state rights.

However, insofar as the criminalisation of aggression protects a collective entity, the difference is less apparent. The protection of 'a national, ethnic, racial or religious group' (article 6 of the Rome Statute), 'any civilian population' (article 7), as well as certain groups recognised under international humanitarian law (article 8), equally concern a collective. Individuals are protected only in an indirect way, by belonging to a particular group. It is also individuals (a state's population) that form a state and that are consequently protected indirectly by the criminalisation of aggression.⁵⁶

This indirect protection of individuals goes back to the doctrinal foundation of international criminal law. As the criminal law of the international community as a whole, international criminal law protects *ultima ratio* the highest values of this community. They are expressed in the UN Charter as 'international peace and security';⁵⁷ a formulation that the Rome Statute expanded to 'the peace, security and well-being of the world'.⁵⁸ Next to this primary protection of legal values, international criminal law protects individual rights (e.g., the right to life, well-being or property) only in a subsidiary manner.⁵⁹ The development of international criminal law indeed reveals the challenges of protecting individual rights through international law. At Nuremberg and Tokyo, the justification for enforcing violations of individual rights before an international tribunal was based upon their commission in the context of the use of force between states.⁶⁰ In the postwar era, the emancipation of individuals as subjects of international law and the rapid

development of international human rights law paved the way to a victim-oriented approach to international criminal law. It is only from that perspective that a potentially different view of the crime of aggression may be brought to mind. However, even today, international criminal law in its *ultima ratio* function does not protect individuals *per se*. Individual victims still need to be connected to a violation of international legal values and are therefore protected by international criminal law only conditionally, so to speak. As distinct from international human rights law, international criminal law is not applicable in every case where an individual is under threat, even if the threat is very serious. Rather, it is applicable only if that threat appears in a *situation* that merits international attention. In the definition of crimes under international law, this connection is expressed through the international element of the crime – usually the context in which individual rights were violated.⁶¹ Individuals are consequently protected as part of a collective in the context of the unlawful use of force (article 8 *bis*), an armed conflict (article 8), an attack against a civilian population (article 7) or when targeted 'with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such' (article 6).

With regard to the primary protection of the highest values of the international community as a whole, the crime of aggression safeguards its very essence: international peace or the peaceful coexistence of states. While the norm underlying the crime of aggression protects states from the unlawful use of force, the most serious cases of the unlawful use of force additionally fall under the ambit of international criminal law. Article 2(4) of the UN Charter mandates that all member states shall refrain from the threat or use of force in contravention of the Charter.⁶² The reference to 'territorial integrity or political independence of any state' exemplifies characteristics of a state that may be violated by an unlawful use of force. This list was eventually expanded in the context of 1974 GA Resolution 3314 to 'sovereignty, territorial integrity or political independence', and remained unchanged in article 8 bis(2) of the Rome Statute. The list is purely illustrative.⁶³ The essence of the crime of aggression remains the protection against the unlawful use of force against a state. This essence is a concretisation of the highest value that the UN Charter expresses: international peace.

The primary victim of a crime of aggression is consequently a state as a subject of international law. As a collective, its individual members are equally victimised.

⁶¹ Werle, *supra* note 38, at margin No. 90–93.

⁶² The formulation safeguards that the use of force allowed by the UN Charter, self-defence in accordance with Article 51 and measures under the system of collective security, Article 41, UN Charter fall outside the prohibition.

⁶³ A. Randelzhofer and O. Dörr, 'Article 2(4)', in B. Simma (ed.), *The Charter of the United Nations, A Commentary*, 3rd edn (Oxford University Press, 2012), 200–34, margin No. 37, 39; L. M. Goodrich and E. Hambro, *Charter of the United Nations, Commentary and Documents*, 2nd edn (Boston, MA: World Peace Foundation, 1949), 104 ff.

⁵⁵ See also Element 3 of the Elements of Crimes of the crime of aggression. For details on the legal values protected by the crime of aggression, see F. Mégret, 'What is the Specific Evil of Aggression?', Chapter 51, this volume.

⁵⁶ G. Jellinek, *Allgemeine Staatslehre*, 3rd edn (Berlin: O. Häring, 1914), 406 ff.

⁵⁷ For many, see Preamble and Article 2 UN Charter.

⁵⁸ For details, see O. Triffterer and M. Bergsmo, 'Preamble', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers Notes Article by Article*, 2nd edn (Baden-Baden: Nomos, 2008), 1–14, margin No. 9–11.

⁵⁹ O. Triffterer, 'Preliminary Remarks', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers Notes Article by Article*, 2nd edn (Baden-Baden: Nomos, 2008), 15–47, margin No. 20 ff.

⁶⁰ Crimes against humanity fell within the jurisdiction only when committed in the context of a crime against the peace or a war crime (covering international armed conflict only); see article 6(c) of the 1945 London Charter.

In this context, the (yet not fully accepted) right to peace, which has gained more attention in recent years, should be pointed out.⁶⁴ In addition, individuals may suffer concrete harm through loss of life or the destruction of property. In some cases, such conduct may also amount to a war crime; in others, it might be lawful under the laws of war, for example, when justified as collateral damage or by military necessity. The shortage of goods during a blockade in accordance with article 8 bis(3)(c) might also lead to concrete harm.

Individual victims of the crime of aggression are also exposed to abstract harm. First, the use of force triggers the application of the laws of war and individuals face a reduced protection of their human rights. While international humanitarian law strives to reduce the horrors of war, it cannot make war 'humane'. Civilians are at a heightened risk of becoming collateral damage, common goods are at a heightened risk of destruction, and military personnel and objects become legitimate targets. This heightened risk concerns the entire population of a state – civilians as well as combatants. It concerns not only the victim state, but equally the aggressor state.

Second, war unleashes violence and creates an environment in which other crimes are more likely to be committed.⁶⁵ It is true that the existence of inter-state use of force is no longer a precondition for the prosecution of war crimes (which can be committed in international as well as non-international armed conflict), genocide or crimes against humanity (both of which can also be committed in peacetime).⁶⁶ However, the use of force creates conditions that make the commission of those other core crimes much more likely. To launch an act of aggression is akin to creating risks. In that sense, victims of atrocities committed in the wake of a crime of aggression can also be considered as indirect victims of aggression.

As a consequence, a state as well as individuals may have standing as victims before the Court.⁶⁷ It could be argued that in a case of aggression, most individuals are subjected to abstract rather than concrete harm. The Court has not yet adjudicated in detail on concrete and abstract harm. But in *Lubanga*, Trial Chamber I held that 'victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights'.⁶⁸ Further, the notion

⁶⁴ See, for example, General Assembly, Right of People to Peace, 12 November 1984, UN Doc. A/RES/39/11, General Assembly, Promotion of a Democratic and Equitable International Order, 18 March 2009, UN Doc. A/RES/63/189. For a recent initiative by the Human Rights Council, see A/HRC/RES/20/15 (2012). On the concept, see D. Rothe, *The Human Right to Peace* (Ottawa: Novalis, 2003); W. Schabas, 'Aggression and International Human Rights Law', Chapter 12, this volume.

⁶⁵ See the statement by Ms Dascalopoulou-Livada (Greece) in 1998 Rome Summary Records (18 June), *supra* note 25, at para. 68.

⁶⁶ See *supra* note 60.

⁶⁷ Rule 85(a) and (b) of the ICC Rules of Procedure and Evidence.
⁶⁸ Trial Chamber I applying Principle 8 of the 2006 Basic Principles, see *Prosecutor v. Lubanga Dyilo*, Decision on Victim's Participation, ICC-01/04-01/06, 18 January 2008, para. 35; the Principles were adopted by General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross

of abstract harm is not unique to the crime of aggression. For instance, the war crime of declaring that no quarter will be given also relates to a more abstract harm, as it does not require the actual denial of quarter.⁶⁹

11.2.4 The Crime only Covers the Most Serious Forms of the Prohibited Acts

Not every 'use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations'⁷⁰ gives rise to individual criminal responsibility. Only 'an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations' may establish the necessary state act as an element of the crime of aggression in accordance with the Rome Statute definition.⁷¹ There have been warnings that this alleged trait of the crime of aggression may suggest that a use of force that does not reach that threshold will be taken to be legal, and that this would effectively entail a narrowing of the scope of the prohibition of the use of force.⁷²

This threshold clause stems from a political compromise between a majority of states that advocated for the criminalisation of an act of aggression as defined in 1974 GA Resolution 3314, on the one hand, and states that preferred a narrow definition of the crime of aggression, on the other.⁷³ The *travaux préparatoires* clearly establish that the filtering function of the threshold clause excludes minor incidents, such as border skirmishes, from the definition of the crime of aggression.⁷⁴ Next to this quantitative scope, the threshold clause also has a qualitative one. In this context, it might exclude individual criminal responsibility in instances where 'reasonable international lawyers may legitimately disagree in their assessment of the *lex lata*'.⁷⁵ It might also serve as a defence for the

Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 21 March 2006, UN Doc. A/RES/60/147.

⁶⁹ Article 8 of the Statute.

⁷⁰ Article 8 bis(1) of the Statute. See also Element 5 of the Elements of the crime of aggression. For details, see Kreß, *supra* note 22.

⁷¹ A. Paulus, 'Second Thoughts on the Crime of Aggression', *European Journal of International Law*, 20 (2010), 1117–28, at 1124.

⁷² See, for example, 'Report of the Special Working Group on the Crime of Aggression', in *ASP Official Records*, ICC-ASP/6/20/Add.1, Annex II, 9, at paras. 24–28; 2007 Princeton Report, *supra* note 9, at paras. 46–53.

⁷³ See, for example, 'Informal Intersessional Meeting of the Special Working Group on the Crime of Aggression', held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at Princeton University, New Jersey, United States, from 8 to 11 June 2006', ICC-ASP/5/SWGCA/TNF.1, in *ASP Official Records*, ICC-ASP/5/32, Annex II, 387, para. 19; 2009 SWGCA Report, *supra* note 32, at para. 13; Barriga, *supra* note 19, at 629; E. Wilmschurst, 'The Crime of Aggression: Custom, Treaty and Prospects for International Prosecution', in I. Buffard, J. Crawford, A. Pellet and S. Witich (eds.), *International Law between Universalism and Fragmentation, Festschrift für Gerhard Hafner* (Leiden and Boston, MA: Martinus Nijhoff, 2008), 603–26, at 611.

⁷⁴ Kreß, *supra* note 5, at 858.

commission of an act of aggression, which may exonerate the alleged perpetrator under specific circumstances.⁷⁶ In any case, the threshold clause does not *per se* exclude certain types of inter-state use of force from individual criminal responsibility. Its application, as part of the definition of the crime, must be established on a case-by-case basis.

The fact that the criminalisation does not fully cover the underlying norm is not unique to the crime of aggression. International criminal law in its current doctrinal understanding serves three areas of law: international human rights law, international humanitarian law and the law on the use of armed force. Due to its *ultima ratio* function, international criminal law protects only certain parts of these legal fields. Genocide and crimes against humanity criminalise violations of certain human rights, and only when the violations are committed with a genocidal intent or in the context of a systematic or widespread attack against a civilian population. War crimes cover grave breaches of the Geneva Conventions and other serious violations of the laws of war. However, not all violations of this body of law are criminalised. The same is true with regard to the crime of aggression. The situation is no different in domestic law, where not all violations of rules prohibiting or regulating a certain conduct are subject to criminal law, but may instead be dealt with by administrative law or disciplinary measures.

In spite of the need for a political compromise, it is not clear whether the threshold clause is a part of customary international law or if it is just a limitation of the jurisdiction of the Court.⁷⁷ One may further wonder from a criminal policy point of view whether such a limitation of individual criminal responsibility was appropriate. An act of aggression already constitutes the most serious violation of the prohibition of the use of force. The crime of aggression now seems to target the most serious of these most serious violations. It would have been legally arguable and plausible to accept any act of aggression as a basis for individual criminal responsibility.⁷⁸ Even then, minor incidents could have been ruled out by way of interpretation or under the gravity test in accordance with article 17(1)(d) of the Statute.⁷⁹ As has been stated, the significant deviation of the criminalisation of aggression from the scope of its underlying norm may be considered regrettable, and may lead to unfortunate claims as to the legality of certain unlawful (but not

⁷⁶ See, for example, with regard to the potential justification of an unauthorised humanitarian intervention, L. May, *Aggression and Crimes against Peace* (Cambridge University Press, 2008), 273. See also section 11.3.4, below.

⁷⁷ See the 2006 Princeton Report, *supra* note 74, at para. 56. The corresponding question has been asked above about the leadership clause; see section 11.1, above.

⁷⁸ For an even wider approach, see the efforts to criminalise all aspects of the prohibition of the use of force in the 1991 ILC Draft Code of Crimes, *supra* note 26.

⁷⁹ See also M. E. O'Connell and M. Niyazmatov, 'What is Aggression? Comparing the *Ius ad Bellum* and the ICC Statute', *Journal of International Criminal Justice*, 10 (2012), 189–207, at 201, with regard to the protection of nationals abroad.

criminalised) acts.⁸⁰ However, it should be noted that the political choice to reduce the scope of the criminal norm does not change the unlawfulness of violations of the prohibition of force that fall outside of that scope. A leader who initiates an act of aggression makes his or her state responsible for a violation of international law. Therefore, a responsible leader knows that he or she should not engage in such acts, regardless of whether they reach the threshold of criminal law or not. It will be for the Court and international criminal law advocates to counter attempts to instrumentalise any misinterpretation of the law in that regard. That may be a difficult task, but it is one that is common to all core crimes.

11.2.5 The Crime of Aggression Refers to the *Ius ad Bellum*

A specificity that has been pointed out by commentators is that 'aggression differs markedly from genocide, crimes against humanity and war crimes in that, unlike those crimes, it concerns the *ius ad bellum*'.⁸¹

This is certainly true, but it is hardly convincing to make a case for a difference in nature of the crime of aggression. While it is correct that the crime of aggression concerns the *ius ad bellum*, it is not the case that the other three core crimes relate to one different body of law. Only war crimes exclusively concern *ius in bello*, as a direct counterpart of *ius ad bellum*. Genocide and crimes against humanity, by contrast, can be committed in times of war and in times of peace. The core crimes simply relate to different bodies of international law. While the provisions on the crime of aggression criminalise manifest violations of the prohibition of the use of force, war crimes criminalise grave breaches and other serious violations of international humanitarian law and the laws of war, while crimes against humanity and genocide criminalise serious violations of human rights law (and of international humanitarian law in armed conflict). Again, it is the *ultima ratio* function of international criminal law that protects these three areas of international law.

The potential consequences of this alleged difference also seem exaggerated. It has, for instance, been claimed that dealing with the crime of aggression will require special competence of the organs of the Court.⁸² That is true, but dealing with war crimes, crimes against humanity and genocide also requires special competence. It is a well-known fact that international humanitarian law and international human rights law are quite different traditions, and that the professional cultures of these two disciplines are not the same, even if there is considerable communication between the two fields these days. In addition, international criminal law is formed by the various domestic traditions of criminal law and criminal

⁸⁰ Paulus, *supra* note 72, at 1124.

⁸¹ Cryer et al., *supra* note 33, at 267.

⁸² 2006 Princeton Report, *supra* note 74, at para. 67.

procedure. One must expect that the staff at the International Criminal Court have a solid foundation in various branches of international law, given that already today general questions of public international law are among the most controversial issues dealt with at the Court.⁸³ This is particularly true for the judges, who are elected for their competence in 'relevant areas of international law'.⁸⁴ The Court and states must elect staff with the required competences, judges and staff have the obligation to maintain expertise in all areas relevant to international criminal law, and one must always be able to expect the judiciary to be familiar with and able to apply the law.⁸⁵

To conclude, a claim of specificity solely based on the applicable branch of international law is not persuasive as a claim of difference between the crime of aggression and the other core crimes. Insofar as the argument aims at showing the specificity of each core crime vis-à-vis other core crimes, it only underlines the diversity of legal fields protected, *ultima ratio*, by international criminal law. Insofar as the argument may aim at specific procedural rules that attach to the *ius ad bellum*, this will be dealt with in section 11.2.6.

11.2.6 Under the Mandate of the Security Council

It has been suggested that in distinction to genocide, crimes against humanity and war crimes, the crime of aggression is the only crime that falls under the mandate of the UN Security Council, since article 39 of the UN Charter provides that the Security Council 'shall determine the existence of . . . an act of aggression'.⁸⁶ Under this argument, the Court might interfere with the work of the Security Council.⁸⁷

Starting from this premise, the potential role of the Security Council in proceedings on the crime of aggression remained a strongly debated issue during the negotiations of the crime. One view was that due to its mandate, only the Security Council would be competent to determine the existence of an act of aggression as a matter of substantive law. In the strictest manifestation of this approach, the definition of the crime of aggression should focus only on the description of individual criminal responsibility; the determination of the collective act would not be further defined, and would simply refer to a respective substantive determination

⁸³ See, for example, the relevance of immunities of a head of state of a Non-State Party to the Rome Statute in *Prosecutor v. Al Bashir*, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ICC-02/05-01/09, 9 April 2014, and *Prosecutor v. Al Bashir*, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, 12 December 2011.

⁸⁴ Article 36(3)(b)(i) of the Statute.

⁸⁵ For an example of national judges confronted with the crime of aggression, see for instance, House of Lords, *R v. Jones* [2006] UKHL 16, 741. For details, see R. O'Keefe, 'United Kingdom', Chapter 28, this volume.

⁸⁶ For a more detailed discussion, see N. Strapatsas, 'The Practice of the Security Council Regarding the Concept of Aggression', Chapter 5, this volume, as well as section 11.3. below.

by the Security Council.⁸⁷ In a less stringent version, the definition of the crime of aggression would describe the collective act. Individual criminal responsibility would still presuppose a positive substantive finding of the Security Council.⁸⁸

A non-definition of the collective act was seen as contrary to the principle of *nullum crimen sine lege*.⁸⁹ But the determination of an element of the crime of aggression by the Security Council was also criticised, particularly because of the political nature of the Council, its wide discretion, and the absence of participation and defence rights of the accused.⁹⁰ In addition, attempts to argue for an exclusive right of the Security Council regarding the determination of an act of aggression were refuted on the merits. The overwhelming majority of states shared the understanding that the Charter did not provide the Security Council with an exclusive competency to determine an act of aggression, but only with a primary competency; an exclusive competence of the Security Council was restricted to decisions under Chapter VII to maintain or restore international peace and security.⁹¹ This understanding is also supported by practice.⁹²

The debate on the role of the Security Council eventually shifted to the question of whether a determination of an act of aggression was a necessary procedural precondition for the Court's exercise of jurisdiction.⁹³ The final compromise acknowledges a primary role for the Security Council, while safeguarding the

⁸⁷ See, for example, 'Proposal Submitted by the Russian Federation: Definition of the Crime of Aggression', 29 July 1999, UN Doc. PCNICC/1999/DP.12; reprinted in 1999 *Compilation of Proposals*, M. M. Gona, (eds.), *The International Criminal Court and the ICC Jurisdiction over that Crime*, in M. Politi and G. Nesi (eds.), *The International Criminal Court and the Crime of Aggression* (Aldershot: Ashgate, 2004), 55–77, at 76; for a critical view see, for example, D. D. N. Nsereko, 'Defining the Crime of Aggression: An Important Agenda Item for the Assembly of States Parties to the Rome Statute of the International Criminal Court', *Acta Juridica*, (2003), 256–86, at 278; M. Politi, 'The Establishment of an International Criminal Court at a Crossroads: Issues and Prospects after the First Session of the Preparatory Committee', *Nouvelles Etudes Pénales*, 13 (1997), 115–57, at 129.

⁸⁸ See, for example, 'Proposal Submitted by Germany: Definition of the Crime of Aggression', 30 July 1999, UN Doc. PCNICC/1999/DP.13; reprinted in 1999 *Compilation of Proposals*; 2002 Discussion Paper (July), *supra* note 8, at 1.2 Option 2.

⁸⁹ Article 22 of the Rome Statute. See, for example, S. A. Fernández de Gurmendi, 'An Insider's View', in M. Politi and G. Nesi (eds.), *The International Criminal Court and the Crime of Aggression* (Aldershot: Ashgate, 2004), 175–88, at 181.

⁹⁰ See in this regard, for example, already General Assembly, 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court', UN GAOR, 50th session, UN Doc. A/50/22, Supp. 22, para. 70 ff. 2005 Princeton Report, *supra* note 9, at para. 60; J. Trahan, 'Defining "Aggression": Why the Preparatory Commission for the International Criminal Court Has Faced Such a Conundrum', *Loyola of Los Angeles International & Comparative Law Review*, 24 (2002), 439–74, at 460 ff. T. McCormack and G. J. Simpson, 'A New International Criminal Law Regime?', *Netherlands International Law Review*, 42 (1995), 177–206, at 196.

⁹¹ See article 39, 24, 12 UN Charter. For a detailed discussion, see Stein, *supra* note 33, at 1 ff. C. McDougal, 'When Law and Reality Clash – the Imperative of Compromise in the Context of the Accumulated Evil of the Whole: Conditions for the Exercise of the International Criminal Court's Jurisdiction over the Crime of Aggression', *International Criminal Law Review*, 7 (2007), 277–333, at 277.

⁹² For an overview of General Assembly Resolutions on an act of aggression as well as relevant judgments of the ICJ, see N. Strapatsas, 'Rethinking General Assembly Resolution 3314 (1974) as a Basis for the Definition of Aggression under the Rome Statute of the ICC', in O. Olusanya (ed.), *Rethinking International Criminal Law: The Substantive Part* (Oxford: Europa Law, 2007), 153–90, at 156.

⁹³ See, for example, 'Discussion Paper 2: The Conditions for the Exercise of Jurisdiction with Respect to the Crime of Aggression', in *ASP Official Records*, ICC-ASP/4/32, Annex II, C, 385.

proper functioning of justice through an alternative authorisation by the Court's Pre-Trial Division in the event of the Security Council's inaction.⁹⁴

This compromise shows the general acceptance of the Security Council's primary role under Chapter VII of the UN Charter. It also reveals the firm negotiating positions retained by the permanent members of the Security Council,⁹⁵ which led to specific procedural rules (conditions for the exercise of jurisdiction as stipulated in article 5(2) of the Rome Statute of 1998) for the crime of aggression. This is noteworthy for two reasons: first, the Rome Statute already acknowledges the specific role of the Security Council for the maintenance or restoration of international peace.⁹⁶ Second, the UN Charter provisions do not differ so dramatically with respect to situations involving either the crime of aggression or other core crimes.

True, article 39 of the UN Charter expressly mentions an act of aggression. The notion is, however, already covered by the general terms of a threat or breach of the peace. Its specific inclusion does not lead to any particular consequences in the event that a breach of the peace also constitutes an act of aggression. The determination of any of the three preconditions triggers the competences of the Security Council under Chapter VII of the Charter to take measures 'to maintain or restore international peace and security'.⁹⁷ Since the end of the Cold War, the Security Council has interpreted this mandate to also cover internal situations of violence, on the assumption that such violence has international repercussions.⁹⁸ It may be debatable whether this practice – by and large accepted by the membership of the United Nations – constitutes an expansion of the Security Council's competence or just a clarification of a mandate that was already inherent in the Charter.⁹⁹ What matters is that it now forms part of the Charter as applied. Under these circumstances, the Security Council's mandate under Chapter VII does not only relate to inter-state use of force, which typically involves acts of aggression and potentially other core crimes. It also relates to situations of internal armed conflict, where

⁹⁴ Article 15 *bis*. For details see, for example, A. Reisinger Coracini, 'The International Criminal Court's Exercise of Jurisdiction Over the Crime of Aggression: At Last ... in Reach ... Over Some', *Göttingen Journal of International Law*, 2(2) (2010), 745–89, at 783.

⁹⁵ While France and the United Kingdom changed their position and accepted fair trial considerations as an impediment to the Security Council adjudicating an element of the crime of aggression, they retained their views regarding an exclusive procedural role of the Security Council in the determination of an act of aggression based on article 39 of the UN Charter. See in this regard, for example, the explanation of position after the compromise adoption of Resolution 6 in Kampala by France, 'Explanation of Position', in *Review Conference Official Records*, RC/11, Annexes VII–IX, 122.

⁹⁶ Articles 13(b) and 16 of the Statute.

⁹⁷ Article 39 of the UN Charter. The Security Council has, in fact, avoided any determination of an act of aggression in order to trigger its Chapter VII powers. Many relevant resolutions do not even refer to one of the other two instances, but only generically to 'acting under chapter VII'. For a detailed discussion see, for example, Gray, *supra* note 35, at 255–56; McDougall, *supra* note 91, at 310.

⁹⁸ See, for example, K. Wellens, 'The UN Security Council and New Threats to the Peace: Back to the Future', *Conflict & Security Law*, 8 (2003), 15–70.

⁹⁹ See, for example, E. de Wet, *The Chapter VII Powers of the United Nations Security Council* (Portland: Hart, 2004), 133 ff.

genocide, crimes against humanity or serious violations of international humanitarian law applicable in non-international armed conflicts may occur. All categories of crimes under the Court's jurisdiction consequently (and equally) fall within the Security Council's mandate to maintain and restore international peace.

Against this background, it is not surprising that the Security Council has dealt extensively with situations involving the other core crimes. The creation of the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda as a measure under article 41 of the UN Charter is but one example.¹⁰⁰ Furthermore, the commission of 'genocide, war crimes, ethnic cleansing and crimes against humanity' has meanwhile been accepted as falling within the Security Council's mandate, and as giving rise to collective military measures under the responsibility to protect doctrine.¹⁰¹ This doctrine is based on the argument that the commission of these crimes *per se* constitutes a breach of international peace. As such, it goes beyond even the necessity of showing that these situations have spill-over effects.¹⁰²

It remains to underline the fact that despite a common legal framework covering all categories of crimes under the jurisdiction of the Court, special procedural rules were accepted for the crime of aggression. The relationship between the criminalisation of aggression and the mandate of the Security Council will be further discussed in section 11.3, below.

11.2.7 Alleged Vagueness of the Definition of the Crime

It has been argued that the definition of the crime of aggression, in particular the formulation of the threshold clause, lacks legal certainty.¹⁰³

¹⁰⁰ Security Council, Resolution 808 (1993) concerning International Criminal Tribunal for the Former Yugoslavia (ICTY), 22 February 1993, UN Doc. S/RES/808.

¹⁰¹ General Assembly, 2005 World Summit Outcome, 24 October 2005, UN Doc. A/RES/60/1, para. 138; for Security Council endorsement of the responsibility to protect, see Security Council, Resolution 1674 (2006) concerning Protection of Civilians in Armed Conflict, 28 April 2006, UN Doc. S/RES/1674; and Security Council, Resolution 1894 (2009) concerning Protection of Civilians in Armed Conflict, 11 November 2009, UN Doc. S/RES/1894.

¹⁰² Traditionally, the Security Council, whenever it has intervened in internal situations, has made an effort to show that the situation has a potential international spill-over effect, beyond the borders of the target state, which might jeopardise international peace and security. In a first test case of a new policy, the Security Council invoked responsibility to protect language in the situation of Libya. However, while it emphasised 'the responsibility of the Libyan authorities to protect the Libyan population' (Security Council, Resolution 1970 (2011) concerning Peace and Security in Africa, 26 February 2011, UN Doc. S/RES/1970, preambular para. 9; Security Council, Resolution 1973 (2011) concerning Libya, 17 March 2011, UN Doc. S/RES/1973, preambular para. 4) and referred to the potential commission of crimes against humanity (Security Council, Resolution 1970 (2011), preambular para. 6; Security Council, Resolution 1973 (2011) preambular para. 7), it did not expressly invoke the international community's responsibility to protect but rather seems to justify authorising the use of force under Chapter VII of the UN Charter with traditional language, such as a failure to comply with previous Security Council resolutions, the need for humanitarian assistance, spill-over effects of refugees and foreign workers, as well as concern about foreign nationals in Libya (see Security Council, Resolution 1973 (2011), preambular paras. 2, 8, 9, 15, 18).

¹⁰³ While Paulus criticises in particular the unclear meaning of terms, Paulus *supra* note 72, at 1121, Glennon provides an overall critique of the definition suggesting it fails to establish minimum standards of legal certainty, see M. J. Glennon, 'The Blank-Prise Crime of Aggression', *Yale Journal of International Law*, 35

From a development point of view, the threshold clause is the youngest element of the crime. It entered the definition of the crime of aggression as a diplomatic compromise. It is not a formulation that has been previously adjudicated, and it is potentially an element that is based on criminal policy rather than on customary international law.¹⁰⁴ The threshold clause attempts to distinguish acts of aggression that invoke individual criminal responsibility from acts of aggression that are unlawful under international law but remain beyond the reach of the Court. It thereby sought to find a compromise between two opposing views: the views of those states that preferred a wide definition of the crime of aggression in line with its underlying norm protecting against acts of aggression, and those states that argued for a narrower definition of the crime that included only some types of state aggression. The threshold clause is an example of 'constructive ambiguity'¹⁰⁵ that entered the Rome Statute.¹⁰⁶ It is, however, not the only one, and examples may be found among the definitions of the other core crimes. Controversies equally surround the following issues, to name but a few: a potential contextual requirement of the crime of genocide; the need for a state or organisational policy as a required element of an 'attack against a civilian population'; and the exact scope of concepts such as proportionality or military necessity in the context of war crimes.¹⁰⁷ In spite of the considerable body of jurisprudence on the other core crimes by international criminal tribunals, these ambiguities remain.

The problem is consequently not unique to the crime of aggression. While the principle *nullum crimen sine lege* has been generally accepted as limiting international criminal law, not all of its aspects are equally developed.¹⁰⁸ In particular, the standards of *nullum crimen sine lege certa* cannot be compared

(2010), 71–114, at 98; for a critique, see J. Trahan, 'A Meaningful Definition of the Crime of Aggression: A Response to Michael Glennon', *University of Pennsylvania Journal of International Law*, 33 (2012), 907–69.

¹⁰⁴ It is true that the threshold clause narrowed the definition and, hence, made it more in line with what many commentators and negotiators held to be the definition of the crime of aggression under customary international law. However, regardless of whether that is correct or not, the particular wording of the threshold was not based on customary international law. Another fact that needs to be mentioned is that in the view of some commentators and negotiators even the current definition of the crime of aggression is too wide. That question is, however, immaterial for the present discussion, since the issue at hand is whether the definition is too vague, not whether it is too wide (or too narrow).

¹⁰⁵ Or, more accurately, 'constructive imprecision'.

¹⁰⁶ As stated in footnote 104, the argument could be made that the threshold brings the definition more in line with customary international law. Even though the particular words of the threshold clause cannot be referred directly to particular instances of customary international law, custom may still provide guidance for their interpretation and consequently narrow the ambiguity or vagueness of these terms.

¹⁰⁷ See, for example, the deviation of the definition of genocide in article 6 of the Statute and the Elements of Crime of genocide; on article 7 of the Statute, see Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, 31 March 2010, para. 83 ff., as well as Dissenting Opinion of Judge Hans-Peter Kaul, *ibid.*, at paras. 32 ff.

¹⁰⁸ See, for example, A. Cassese, *International Criminal Law*, 2nd edn (Oxford University Press, 2008), 41 ff.

with domestic legal systems. This is particularly true against the background of the sources of international criminal law. Customary law, as well as negotiated treaty law, does not always adhere to the highest national standards of legal certainty, but requires additional concretisation.¹⁰⁹ The Rome Statute, which contains the highest protection of the principle *nullum crimen sine lege* on the international level, confirms that 'the definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.'¹¹⁰

It is argued that while the formulation of the threshold contains a number of undetermined notions, they can be determined by interpretation 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose', and with a view to the preparatory work.¹¹¹ It should also be noted in this context that notions such as 'manifest' or 'gravity' are not new to the Rome Statute, but appear in articles 33(1)(c) and (2) and 85,¹¹² as well as articles 17 and 53. While the judges are expected to determine the definition of the crime of aggression on this basis, they will not be able to arrive at a conclusion that will satisfy all states that accepted the threshold clause. Again, this is not an uncommon tension between the drafter's attempt to reflect their legal intent in the wording of a provision of an international treaty and subsequent interpretation of the norm. Should any ambiguities remain, the rule of interpretation provided in article 22 solves any doubt in favour of the accused.

11.3 Other Characteristics

This section will deal with some of the practical, political and moral aspects of the crime of aggression. Several of them have already been alluded to in the preceding part, and this is the place to cover them more comprehensively from a non-legal perspective. These features flow from the legal characteristics of the crime, in that they are possible, or even likely, consequences of the way that the crime of aggression is defined in a legal instrument: the Rome Statute. However, this is not to say that they are inherent properties or that they are unique to the crime of aggression.

¹⁰⁹ Nevertheless, it should be noted that a number of states have implemented the Kampala definition of the crime of aggression in their domestic criminal codes and seem not to have difficulties with regard to the legal certainty of the definition of the crime. A. Reisinger Coricini, '(Extended) Synopsis: The Crime of Aggression under Domestic Criminal Law', Chapter 31, this volume.

¹¹⁰ Article 22(2) of the Statute. ¹¹¹ Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

¹¹² For the term 'manifest', see also the general introduction and last common context element of the Elements of Crime of genocide.

11.3.1 Practical Consequences: Investigations and Arrests

Since the crime of aggression is a leadership crime typically committed by state leaders in formal hierarchies, the crime will be committed through linguistic rather than physical acts (planning, initiating, etc.). It will often be recorded in minutes, orders and other documents. This means that written documents will provide an important source of evidence, while crime scene investigations will play a smaller role, if any. Relevant documents will typically be found in the government quarters of the aggressor state, which will make access difficult.¹¹³ Further, it is very likely that not only the perpetrators but also many of the most important witnesses will be far removed from the scene where the act of aggression is executed. In many cases, though, it is obvious that the decision to initiate the crime was taken by the responsible leaders, and no further documentation will be needed. A decision to go to war will often be made public, in distinction to decisions to initiate genocide or a crime against humanity. In addition, it will often be easy to establish who is in a leadership position, since that will be set out in public laws and decisions.¹¹⁴

One particularly interesting – and often overlooked – aspect is that since the leadership requirement is *exclusive*, non-leaders cannot incriminate themselves by cooperating with investigating authorities. This may in some cases make an investigation into the crime of aggression easier than an investigation into any of the other crimes.

One difficulty is that some leaders responsible for a crime of aggression may enjoy immunities.¹¹⁵ While immunities do not apply before the Court in accordance with article 27, there might still be arrangements to which article 98 applies with regard to suspects that the Court has requested be surrendered from third states.¹¹⁶ In addition, immunities may be provided for under national laws. Even if, say, a presidential immunity under a national constitution is no excuse for non-compliance with a request for surrender under article 89 of the Rome Statute, such a national provision may still constitute a practical problem.

Hence, it is likely that compared with investigations of the other core crimes, investigations of crimes of aggression will be easier in some respects and more difficult in others. At the same time, these differences should not be exaggerated. Decisions to initiate genocide and crimes against humanity will generally be taken at a high level far removed from the concrete crime scene, and such decisions may be reflected in documents. For instance, the well-known controversy over what

¹¹³ See Fife, *supra* note 33, at 59; N. Blokker, 'The Crime of Aggression and the United Nations Security Council', *Leiden Journal of International Law*, 20 (2007), 867–94, at 873.

¹¹⁴ Sometimes, however, this might not be as evident when it comes to *de facto* leaders; see section 11.2.1.

¹¹⁵ This would apply to incumbent heads of state, heads of government, foreign ministers, diplomats and, potentially, some other categories. See further Wrangé, *supra* note 6.

¹¹⁶ See further H. Kreicker, 'Immunities', Chapter 20, this volume.

is often referred to as the Armenian genocide arguably turns on the content of documents stored in Turkish archives. Further, the difficulty of having suspects of genocide, crimes against humanity and war crimes surrendered to the Court from Sudan is well known.

11.3.2 Is the Crime of Aggression More Political?

The crime of aggression is often claimed to be more political than the other core crimes.¹¹⁷ This claim can mean several things: for instance, that it involves political acts; that it is conducted as a part of a political struggle; that any proceedings involving the crime of aggression will play a role in a political struggle; or that such proceedings can be politicised. While all these understandings are relevant, it is the firm view of the authors of this chapter that there is no such thing as an inherently non-justiciable political question. Any legal issue may, under some circumstances, involve political aspects, and any political issue may be regulated by law.¹¹⁸

These above-mentioned understandings of the word 'political' will be dealt with one by one, although they are related. There is also another, more fundamental, meaning of political to which the others are related but which is still distinct; namely, that the crime of aggression concerns the very basis of the international political order. That issue, which can only be indicated quite briefly in this chapter, will be dealt with later. Another aspect that may also be labelled 'political' is the relationship between the respective mandates of the Court and of the UN Security Council. That issue has been discussed from a legal perspective in section 11.2.6 and will be developed from a political perspective in section 11.3.3.

11.3.2.1 The Crime of Aggression Involves Political Acts

The crime of aggression is political in the sense that it necessarily involves political acts (decisions by political organs). This is because it concerns acts by a state,¹¹⁹ decided upon by one or more leaders in the exercise of that state's sovereignty.

¹¹⁷ The then legal adviser at the State Department, Harold Koh, spoke in 2010 of 'this crime, which by its very nature, even if perfectly defined, would inevitably be seen as political – both by those who are charged, as well as by those who believe aggressors have been wrongly left uncharged'. Statement by Harold Hongju Koh, Legal Advisor, US Department of State, Regarding Crime of Aggression at the Resumed Eighth Session of the Assembly of States Parties of the International Criminal Court, 23 March 2010, available at <http://usun.state.gov/briefings/statements/2010/139000.htm>.

¹¹⁸ See also D. M. Ferencz, 'The Crime of Aggression: Some Personal Reflections on Kampala', *Leiden Journal of International Law*, 23 (2010), 905–8, at 906.

¹¹⁹ See J. Hogan-Doran and B. T. van Ginkel, 'Aggression as a Crime under International Law and the Prosecution of Individuals by the Proposed International Criminal Court', *Netherlands International Law Review*, 43 (2009), 321–51, at 346; J. van der Vyver, 'Prosecuting the Crime of Aggression in the International Criminal Court', *University of Miami National Security & Armed Conflict Law Review*, 1 (2011), 1–56, at 19; G. Kemp, 'Individual Criminal Liability for the International Crime of Aggression', Doctor of Law dissertation, Stellenbosch University, 2008, 263–64.

Such a finding may have legal consequences. The *Monetary Gold* argument that state consent is necessary has been discussed above. Further, some commentators would say that acts of such a nature are beyond even the purview of law.¹²⁰ Under such views, acts of this nature are beyond the competence of judges, since they are political rather than legal in nature. Alternatively, such acts are deemed inappropriate for judicial determinations, since a leader is responsible to his or her electorate rather than to a court. While arguments of this sort have not been presented very often in the deliberations on the crime of aggression, they have played a role in US debates both on the Court in general and on the crime of aggression.¹²¹

In legal terms, considerations of this nature translate into domestic doctrines of judicial restraint, the 'political questions doctrine' and the act of state doctrine, or into the international law rules on state immunity.¹²²

The argument about the inappropriateness of having judges deal with political matters goes back to philosophical issues about the division of power. Arguments of this nature will have more resonance in some countries (such as the United States) than in others. It is beyond the scope of this brief chapter to discuss this issue. It may nevertheless be appropriate to point out that at the international level, the political questions doctrine has been rejected repeatedly by the ICJ,¹²³ and that this rejection has met with general approval among international lawyers.

The view that a leader is accountable only to his or her own electorate is even easier to dismiss, because it is based on unreasonable assumptions. It may be fair to maintain that a political community may decide on how it holds its leaders accountable for acts that affect that community.¹²⁴ To maintain that a political community (state A) should have the sole prerogative to hold its leader accountable for acts that affect state B is, however, a very different proposition. A crime of aggression will always, *per definition*, affect a foreign political community, but the other crimes may do that as well.

Further, there is no qualitative difference between the crime of aggression and the other core crimes in this respect. While some of the other core crimes may be

¹²⁰ See further Wrangé, *supra* note 6.

¹²¹ See, for example, M. Morris, 'The Democratic Dilemma of the International Criminal Court', *Buffalo Criminal Law Review*, 5 (2002), 591–99.

¹²² That issue came up in the case *R v. Jones* (*supra* note 85) in the UK. For a comment, see C. Villarino Villa, 'The Crime of Aggression before the House of Lords: Chronicle of a Death Foretold', *Journal of International Criminal Justice*, 4 (2006), 866–77. See further Wrangé, *supra* note 6.

¹²³ For example, 'Legality of the Threat or Use of Nuclear Weapons', *ICJ Reports* (1996), 226, at 234; *Nicaragua case*, *supra* note 34, at 435–37.

¹²⁴ This is essentially what the Kenyan complementarity challenge in the cases against Uhuru Kenyatta and others is about. In the judgment, the appeals chamber said: 'Although article 17(1)(a)–(c) of the Statute does indeed favour national jurisdictions, it does so only to the extent that there actually are, or have been, investigations and/or prosecutions at the national level.' *Prosecutor v. Muthaura/Kenyatta/Ali*, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', ICC-01/09-02/11 OA, 30 August 2011, para. 43. For another variant of that argument, see Morris, *supra* note 121, at 591–99.

non-political in this sense (like war crimes committed by ordinary soldiers in violation of the policy of the government), some other acts are almost by necessity political. A decision to initiate genocide or a widespread or systematic attack against civilians will typically be a political decision.¹²⁵

11.3.2.2 A Crime of Aggression is Conducted as Part of a Political Struggle

A related aspect is that an act of aggression is necessarily a part of a political struggle. Therefore, to criminalise a certain means – war – is to change the conditions for such a struggle. In distinction to the above argument, this relates not to the nature of the act, but to the nature of the context in which the act was carried out. This argument will also be referred to in section 11.3.6, below.

However, by outlawing the use of force, the international community has already rejected the idea that war is a generally allowed means in a political struggle. In addition, the criminalisation of other acts – genocide, crimes against humanity and war crimes – may also affect the outcome of a political struggle. For sure, war crimes are sometimes unrelated to the political goals of a conflict, but sometimes they are a central part of the political strategy (for instance, when they contribute to ethnic cleansing¹²⁶ or when they involve extensive and unjustified destruction of civilian property). Genocide is the most radical way of dealing with an inter-ethnic struggle.

11.3.2.3 Proceedings on a Crime of Aggression will Play a Role in a Political Struggle

Proceedings involving the crime of aggression will probably play a role in a political struggle or process, and such proceedings may be used for political purposes by various protagonists.¹²⁷ A decision to either prosecute or not to prosecute a certain person will affect the legitimacy of that person. It will also affect the legitimacy of the state that he or she represents and the cause for which she or he is fighting. A leader sought for surrender or extradition will be less effective, and the arrest of a leader will of course fundamentally affect the struggle. This will necessarily change the possibility of that party achieving the cause for

¹²⁵ See for an example, *Prosecutor v. Al Bashir*, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-1, 4 March 2009. See further A. Nollkaemper, 'System Criminality in International Law: Introduction', in A. Nollkaemper and H. van der Wilt (eds.), *System Criminality in International Law* (Cambridge University Press, 2009), 1–25.

¹²⁶ This could be the case for any attacks on civilians that induce civilians to flee from an area.

¹²⁷ See the statement made by David Scheffer, then chief negotiator for the United States, discussed in McDougall, *supra* note 91, at 307. Scheffer later played a helpful role in the negotiations as an independent academic.

which the alleged act of aggression was committed – a cause that may in itself be just or unjust.¹²⁸

However, it is for the international community and its organs (and, in particular, the UN Security Council) to distinguish between any underlying claims and the means used to settle those claims.

Further, this political effect may also apply in many cases involving the other core crimes. When Bosnian-Serb leader Radovan Karadzic (1995) and later Serbian President Slobodan Milosevic (1999) were indicted by the International Criminal Tribunal for the former Yugoslavia (ICTY), that affected the outcome of the Dayton negotiations regarding Bosnia and the aftermath of the Kosovo campaign, respectively. It is difficult to find any prosecution by the Court so far that has not benefitted the other protagonist. And it may even be asked whether 'aggression' is the crime that is most amenable to politicisation. Is it really true that, for instance, the 2007 ICJ judgment between Bosnia-Herzegovina and Serbia on the matter of genocide¹²⁹ was less politically and emotionally charged than the dispute between the Democratic Republic of the Congo and Uganda on aggression, adjudicated little more than a year earlier?¹³⁰

Hence, to sum up, it is fair to say that the criminalisation of aggression may have political effects in various respects and that the crime is political in a sense. However, that does not mean that the crime of aggression is not a legal concept. Furthermore, the other core crimes may also be labelled political, and their prosecution may also (in fact, will likely) have political repercussions.

11.3.3 Will a Prosecution for a Crime of Aggression Interfere with the Security Council's Mandate?

This chapter has already noted that situations in which a crime of aggression is alleged to have occurred will generally fall under the mandate of the Security Council. In many instances the situation may be on the Security Council's agenda. It may interfere with the plans of the Security Council and limit its room for manoeuvre if the Court were to deal with the issue by finding that one party to

¹²⁸ The purpose of an act of aggression by state A against state B might have been to recover disputed territory C that actually belongs to state A. If state A has been branded as an aggressor and its leader has been arrested, that will likely affect state A's possibility of recovering the territory. In may also affect the inhabitants of C, who might or might not want to belong to A. Hence, while it may be justified to punish the leader of state A for using a prohibited means for a just cause, it is likely that the pursuit of the just cause itself will suffer.

¹²⁹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 49, at 43.

¹³⁰ Armed Activities on the Territory of the Congo, *supra* note 31, at 168.

a conflict has or has not committed an act of aggression, and that the responsible leaders shall or shall not be prosecuted.¹³¹

The prosecution of 'small fish' for war crimes may not necessarily be of great consequence for the Security Council's task of restoring and maintaining peace and security, but the prosecution of leaders will be.

This is a relevant observation. First, the mere existence of the Court introduces a dynamic beyond the control of the Security Council. From the perspective of the Security Council, this dynamic introduces an element of uncertainty into its work. But considerations of this nature have not prevented states from forming an ever-increasing number of global and regional bodies acting in the field of peace and security. Further, in contrast to regional political bodies, the Court is not specifically focused on providing the kind of measures that the Security Council usually provides.

More importantly, in concrete situations, an investigation or prosecution into the crime of aggression may interfere with the Security Council's work. Certainly, the Security Council can order investigations or proceedings to be stayed under article 16 of the Rome Statute, but that requires nine votes including the consent of all the permanent members. At that stage, the proceedings in the Court may have already gone far enough to interfere in the political process. But the contrary case may also happen. The Court's involvement may prompt the Security Council into acting in a conflict in which it has not been able to act; in spite of the Security Council's greatly increased activity since the end of the Cold War, there are a number of conflicts that it has not been involved in at all or where it has been very ineffective.¹³² Whether or not one finds that possibility to be a good thing depends on whether one takes the Security Council's 'responsibility for the maintenance of international peace and security' as a licence or as an obligation.

Furthermore, the crime of aggression is no different from the other core crimes in this respect. It will often be the case that the very people who are prosecuted before the Court are those who would be important actors in a peace process (as partners or as spoilers). This has allegedly been the case for a number of the persons presently prosecuted before the Court for other core crimes, such as Omar Hassan al-Bashir and Joseph Kony. To extend this state of affairs to the crime of aggression is therefore just a matter of degree, not a completely new situation.

¹³¹ McDougall, *supra* note 91, at 309; Glenon, *supra* note 103, at 106; K. M. Fletcher, 'Defining the Crime of Aggression: Is there an Answer to the International Criminal Court's Dilemma?', *Air Force Law Review*, 65 (2010), 229–62, at 254; A. C. Carpenter, 'The International Criminal Court and the Crime of Aggression', *Nordic Journal of International Law*, 64 (1995), 223–42, at 233; R. Wedgwood, 'The Irresolution of Rome', *Law and Contemporary Problems*, 64 (2001), 193–214, at 210; Blocker, *supra* note 113, at 868.

¹³² Many cases come to mind, such as the Kashmir conflict, the disputes in the East and South China Sea, the Middle East conflict and the civil war in Syria.

11.3.4 May Acts of Aggression be Less or More Morally Reprehensible than the Commission of the Other Core Crimes?

One feature of the crime of aggression that has been less discussed is that an act of aggression may in some situations be less morally clear. This follows in particular from the connection with the *ius ad bellum* debate and the fact that the direct target is a political entity rather than human beings. The use of armed force may be legitimate in the eyes of many observers, and still be illegal under international law. For instance, while the criminalisation of attacks against civilians corresponds with the moral convictions held by almost all people, not all will agree that it is wrong to attack a ruthless dictator.

There are several ways to understand this complex of issues. An act of aggression can, in theory, take place without any other violations of international law – a 'clean war', so to speak.¹³³ This means that it is not always the case that an act of aggression unleashes other types of atrocities. An act of aggression can even take place without any casualties or major destruction.¹³⁴ In such cases, the moral evil consists in the intervention in the political affairs of the target state.¹³⁵ Whether that is morally reprehensible or not may depend on the nature of the status quo before the intervention and the nature of the intervention itself (for instance, the overthrow of a democratic regime and the introduction of a dictatorship or an occupation).¹³⁶

Even if there are casualties – some of which are the result of violations of international law – the aggregate end outcome might be decidedly positive. This was the calculation made at the time of the NATO operation in Yugoslavia in 1999 (which was accepted by many).¹³⁷ While many international lawyers at the time hoped that international law would allow operations of this nature, it appears that no such change has taken place.¹³⁸ There were also some voices that supported the

¹³³ The NATO bombings against Yugoslavia in 1999 were not completely 'clean', but there were comparably few acts of warfare that were allegedly in violation of international humanitarian law, and certainly very few in relation to the huge number of sorties made by NATO bombers during the conflict. See Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (published 13 June 2000), available at: www.un.org/icty. See further, May, *supra* note 76, at 213.

¹³⁴ Very few people died in combat during the German invasion of Denmark in 1940, and the German annexation of Austria (1938) and Czechoslovakia (1938, 1939) were peaceful.

¹³⁵ In legal terms, this could be translated into a violation of the sovereignty, political independence and territorial integrity of a state, if the emphasis is on the political process.

¹³⁶ As Michael Walzer puts it, while all states 'have the same legal value... they do not, however, have the same moral value'. M. Walzer, 'The Crime of Aggressive War', *Washington University Global Studies Law Review*, 6 (2007), 635–43, at 636.

¹³⁷ See, for instance, B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects', *European Journal of International Law*, 10 (1999), 1–22. See also May, *supra* note 76, at 225.

¹³⁸ Some lawyers take a different view, but that is immaterial for the present argument, which is about the moral quality of the acts concerned. If a certain humanitarian intervention is legally justified, the issue of prosecution will never arise. However, even lawyers who believe that some humanitarian interventions may be in accordance with international law will not endorse military intervention for any 'good' cause. Assuming the position of these lawyers, there will still be potential situations where an invasion is in contravention of

US invasion of Iraq in 2003 for similar reasons.¹³⁹ Many observers believe that it would be unfortunate if a military operation that is undertaken for humanitarian purposes and/or that has beneficial consequences¹⁴⁰ were to be criminalised.¹⁴¹

There are many arguments against these positions. First, even in a war pursued with legal means only, the lives of soldiers may count too, morally speaking. To unleash violence against combatants is, hence, not necessarily morally legitimate, since they are usually not guilty in any relevant sense (and often not any more guilty than civilians).¹⁴² The distinction between combatants and non-combatants follows from the cold calculus that such a distinction is the best way to realistically minimise the loss of lives in war, or from the premise that combatants (but not civilians) may pose a threat to the other party; it does not necessarily entail a lower evaluation of the lives of combatants.¹⁴³ In addition, there will almost inevitably be destruction of civilian property, since such property – such as communications infrastructure – are often military targets during a conflict.¹⁴⁴ This will equally inevitably entail severe consequences for the civilian population.

Second, while human life has an undisputed intrinsic value, and while some would hold that certain communities (families, nations, etc.) have intrinsic value, few today think that the state has an intrinsic value. Whatever value a state has is extrinsic, as a means to other goals, and the value of the concrete state depends

international law but still brings beneficial consequences from the perspective of humanity, the wider good, or some other perspective, or where it would otherwise be morally (but not legally) justified.

¹³⁹ Consider, if counterfactually, that Operation Iraqi Freedom of 2003 had been well planned and welcomed by the population. Would not the toppling of a ruthless and dangerous dictatorship and the installation of a more democratic regime mean that a utilitarian calculus would have ended up in a large surplus of good over evil? And this in spite of the fact that the invasion would still have been considered illegal in the assessment of the vast majority of international lawyers. See A.-M. Slaughter, 'Good Reasons for Going Around the UN', *New York Times*, 18 March 2003.

¹⁴⁰ By this we mean consequences that are laudable from an international law perspective, such as increased respect for human rights.

¹⁴¹ DeNicola holds that the ICC should 'grant the "knights of humanity" a shield to defend themselves from aggression charges'. C. P. DeNicola, 'A Shield for the Knights of Humanity: The ICC Should Adopt a Humanitarian Necessity Defense to the Crime of Aggression', *University of Pennsylvania Journal of International Law*, 30 (2008), 641–89, at 670. Van Schaack warns that the criminalisation of aggression may have a 'chilling' effect on the willingness to conduct humanitarian interventions. B. Schaack, 'The Crime of Aggression and Humanitarian Intervention on Behalf of Women', *International Criminal Law Review*, 11 (2011) 477–93, at 487. See also Statement by Harold Hongju Koh at the Review Conference of the International Criminal Court, ICC Review Conference, 4 June 2010, available at: www.state.gov/s/press/releases/remarks/142665.htm.

¹⁴² For instance, a nationalist party may be voted into power through strong support from an older generation, while it is the young soldiers that have to stand the consequences of any war initiated by such a government. In his historiography of an important part of the genealogy of the crime against peace at Nuremberg, Bush describes how it was 'difficult to find a logical place to draw the line between the guilty and the innocent among the great mass of German people. It is, of course, unthinkable that the majority of Germans should be condemned as guilty of committing crimes against peace. This would amount to a determination of collective guilt'. J. A. Bush, 'The Supreme Crime' and its Origins: The Lost Legislative History of the Crime of Aggressive War', *Columbia Law Review*, 102 (2002), 2324–424, at 2380.

¹⁴³ J. McMahon, 'Just Causes for War', *Ethics and International Affairs*, 19(3) (2005), 1–21, at 9.

¹⁴⁴ During the Kosovo campaign in 1999, there was extensive destruction of civilian property, including infrastructure, and many Serbian soldiers died.

upon whether it actually serves those goals.¹⁴⁵ Still, that does not mean that the state is without value. As moral philosopher Michael Walzer puts it: 'The moral meaning of aggression requires that there is common life being lived on this piece of territory, which this state protects, and which the attacking state puts at risk.'¹⁴⁶ When there is such a common life, the state does have a value, albeit an extrinsic one. At any rate, even when there is no such common life, an invader needs to show that it has a right to interfere in a domestic political process. To hold that the government of state X is illegitimate is not to say that the government of state Y has a right to intervene.

A third counterargument, borrowed from the Nuremberg Tribunal, is that the crime of aggression 'is the supreme international crime differing only from the other war crimes in that it contains within itself the accumulated evil of the whole'.¹⁴⁷ Though there is no longer universal consensus that aggression is necessarily the greatest evil,¹⁴⁸ an act of aggression unleashes dangerous forces. Even if the attacker intends to carry out a clean war, an armed conflict brought about by an act of aggression brings devastation or risks of devastation,¹⁴⁹ as has been discussed in section 11.2.3, above. Even if the unleashing of dangerous forces may also be the result of a defensive war,¹⁵⁰ it is difficult to prevent war without allowing self-defence, so a distinction must be made.

Fourth, an act of aggression always disturbs international peace and security. Further, the argument goes, even if some particular uses of offensive force may, on balance, have positive outcomes, the dangers of an erosion of the prohibition of force may still outweigh those benefits. It is not possible to fine-tune the rules on the use of force, which need to be strict in order to be effective.

This is not the place to settle these debates, but rather to take note of the fact that these controversies mean that for many people the criminalisation of aggression is more morally ambivalent than the other crimes.

However, even though this undoubtedly constitutes a difference between the crime of aggression and the other crimes in the abstract, the moral and political implications are not necessarily different in concrete cases. Most crimes of aggression are not clinical and popular. Rather, they will be as morally and politically repugnant as the more 'typical' atrocity crimes. Furthermore, moral ambiguity is

¹⁴⁵ See May, *supra* note 76, at 222–23.

¹⁴⁶ Walzer, *supra* note 136, at 639.

¹⁴⁷ 1946 Nuremberg Judgment, *supra* note 18, at 186.

¹⁴⁸ M. Schuster, 'The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword', *Criminal Law Forum*, 14 (2003), 1–57, at 49.

¹⁴⁹ J. Trahan, 'The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference', *International Criminal Law Review*, 11 (2011), 49–104, at 51. The invasion of Iraq in 2003 is a case in point. While a very large (probably an overwhelming) part of the atrocities have been committed by parties other than the US-led coalition, it was the war that created the conditions for these atrocities to be committed.

¹⁵⁰ See May, *supra* note 76, at 6. See also Schuster, *supra* note 148, at 13.

not introduced by the criminalisation of aggression. It is the same ambiguity that is inherent in a central pillar of the international legal order – the prohibition of the use of force. Despite this, states have still agreed to make that prohibition a cornerstone of international law.

Lastly, we should add that there may in some cases also be moral ambiguity in the other crimes. We have already noted that international humanitarian law builds on the assumption that combatants are permitted targets while civilians are not. And yet, in real life, combatants are very often no less culpable than civilians.¹⁵¹ The politicians that have made the decision to initiate a war are protected as civilians, and very often there is broad support – or at least tacit acceptance – among the population for an aggressive policy. Still, the killing of huge numbers of combatants is allowed, while the targeting of any civilian is prohibited.

11.3.5 A Stronger Deterrent Effect?

It is arguable that the criminalisation of aggression will have a stronger deterrent effect than the other crimes. This is so because of some of the traits that have already been mentioned. Since a decision to initiate an act of aggression can only be taken by a state, this means that there will be bureaucratic procedures and hierarchies involved, and there will often be time to deliberate. Further, since only leaders can take such decisions, the potential culprits of aggression will often have access to good advice. Hence, state leaders will be more likely than other leaders (such as lower level commanders or leaders of non-state actors) to make rational deliberated decisions that run the risk of being prosecuted.

It is quite likely that there will be few or no prosecutions of the crime of aggression – partly because crimes of aggression are not very common, and partly because the leaders likely to commit such crimes will have shielded themselves through the various devices contained in article 15 *bis* of the Rome Statute. Nevertheless, there will be a risk of prosecution in some foreign national jurisdictions.¹⁵² That risk will be more real for many state leaders, for the simple reason that they generally travel more and will rely more on international legitimacy (which may erode after a prosecution).

In addition, the fact that the crime is now unambiguously on the books means that the label 'crime of aggression' can be used for the purpose of naming and shaming. The criminalisation will therefore contribute to strengthening the

¹⁵¹ See McMahon, *supra* note 143 and surrounding text.

¹⁵² See Wrangé, *supra* note 6.

prohibition of the use of force, even if not actually prosecuted very often. Hence – all other things being equal – increased criminalisation will deter the use of force, at least to some extent.¹⁵³

There is also a converse argument concerning deterrence. It has been claimed that the criminalisation of aggression may undermine the respect for other relevant rules, not least international humanitarian law.¹⁵⁴ If a leader is culpable already for initiating a war, he or she may be less concerned with avoiding serious violations of the rules on the conduct of the war. However, to the extent that this is a real risk, it applies only to those in a leadership position who may be held responsible for a crime of aggression.

Some leaders will no doubt think that the criminalisation of aggression will limit their freedom of action in a negative way. As John Bolton put it, the Rome Statute 'is a threat to the independence and flexibility that America's military forces need to defend U.S. national interests around the world'.¹⁵⁵ Others may feel that the criminalisation of aggression may deter some actions that many endorse, namely, military interventions for humanitarian purposes, as discussed above. Whether or not one thinks that this potential negative consequence is worth bearing depends on whether one feels that the positive consequences, on balance, outweigh the negative ones. In determining whether a humanitarian intervention would constitute a 'manifest violation' of the UN Charter, prosecutors and judges must exercise the most important faculty of the human mind – judgement.

11.3.6 The Relation to World Order

This brings us to another aspect: namely, that the criminalisation of aggression affects power relations. As Julius Stone noted with regard to the definition of aggression, the legal regulation of warfare changes relations between powers. 'Those States with more capacity for a kind of action prohibited by the Definition, would thereby be legally deprived of that superior capacity and of the resources which could be protected or commanded by it ... A demand or a particular content of definition is a demand for global redistribution of resources, corresponding to the lines drawn between prohibited and non-prohibited capacities

¹⁵³ B. Ferencz, 'Can Aggression be Deterred by Law?', *Pace International Law Review*, 11 (1999), 341–60, at 341. See also May, *supra* note 76, at 322 and 326.

¹⁵⁴ Paulus asks: 'If the leadership of one party has already been singled out by the Court as the culprit in an armed conflict, what incentive does it have for upholding the *jus in bello*?' Paulus, *supra* note 72, at 1126.

¹⁵⁵ J. Bolton, 'The Risks and Weaknesses of the International Criminal Court from America's Perspective', *Law and Contemporary Problems*, 64 (2000), 167–80, at 169; Wedgwood, *supra* note 131, at 214. See also W. Schabas, 'United States Hostility to the International Criminal Court: It's all about the Security Council', *European Journal of International Law*, 15 (2004), 701–20, at 717.

of States.¹⁵⁶ However, that is no different from the other crimes. To exclude genocide as a policy tool of course affects the outcome of some conflicts dramatically. To exclude rape and other forms of attack against civilians as a lawful strategy may affect the outcome of an inter-ethnic conflict.

But there are further consequences. As Philip Jessup wrote in 1947, 'The two aspects of the precedent afforded by the trial of the war criminals [in Nuremberg] which are most important for the future are, first, the control of war by law and, second, the application of international law to the individual'.¹⁵⁷ A contemporary of Jessup's, of a quite different persuasion – Carl Schmitt – had written a few years earlier of two kinds of 'Sprengung' (bursts) in international law: that between the people and the government (a burst in the concept of the state); and that between licit and illicit war.¹⁵⁸ Those cleavages were created by human rights law and international criminal law and by the outlawry of force. The uniting of these aspects in the criminalisation of aggression before a permanent international court is yet another development, but is not a novelty in itself.

11.4 Conclusion

The crime of aggression is a classical crime under international law. It shares most of the features of other categories of crimes under international law: the core crimes under the jurisdiction of the Court. The crime of aggression was, however, largely unaffected by the revival and modernisation period of international law starting in the 1990s. It was largely left out of the debates driven by human rights-based and victim-centred approaches, partly because practical considerations and policy issues guided that discussion. Most importantly, the customary norm did not undergo concretisation through the vast jurisprudence of international(ised) criminal courts and tribunals. However, it is often overlooked that the other categories of core crimes are based on the same doctrinal foundations. These have not changed, despite the 'modernisation' of the definitions of crimes. The focus in recent decades has been on overcoming state elements of the definitions of crimes under international law in order to expand the concept of those crimes to non-state actors. On the one hand, this change of focus reflected the increasing role of non-state actors in armed conflicts and in the commission of crimes. On the other hand, it facilitated compromise

¹⁵⁶ J. Stone, *Conflict through Consensus: United Nations Approaches to Aggression* (Baltimore, MD: Johns Hopkins University Press, 1977), 156.

¹⁵⁷ P. C. Jessup, 'The Crime of Aggression and the Future of International Law', *Political Science Quarterly*, 62 (1947), 1–10, at 4.

¹⁵⁸ C. Schmitt, *Die Wendung zum diskriminierenden Kriegsbegriff* (1938), 2nd edn (Berlin: Duncker & Humblot, 1988), 46.

positions among states by avoiding sensitive issues and legal difficulties potentially connected to state involvement. Furthermore, the focus on atrocities against individual victims gained momentum and blurred differences that might exist on the side of perpetrators. However, it should not be overlooked that all the difficulties that the crime of aggression may face also remain inherent in the other categories of core crimes, just to a lesser degree.

All the core crimes under the Rome Statute have their specifics, and so too the crime of aggression. Some differences were created or cemented as a result of the drafting of the Statute (e.g., the leadership element or the threshold clause). Some differences point to the fact that the scope of the other categories of crimes under international law was widened (the necessity or not of a state act). Yet other alleged differences are not founded in law. Most of the elements of the legal definition that set the crime of aggression apart are not so different as may appear at first sight. The same can be said about the non-legal typical characteristics, such as the risk of politicisation. There is, however, one trait that sets it apart; namely, that the direct target of a crime of aggression is an abstract entity – a state – and not one or more concrete individuals. Even that trait is not necessarily unique, however, if one takes the ultimate object of protection to be international peace and security rather than concrete individuals or states.

The criminalisation of aggression is a part of an incremental revolution in world affairs; from a horizontal international system in which states were essentially free to use violence as they pleased, inside and outside their borders, to a situation in which both international and internal relations are subjected to regulation, including state responsibility and international criminal responsibility. But, as such, the crime of aggression is no more revolutionary than the other components of the international criminal law regime and those regimes that underpin it, such as human rights, the law of armed conflict and international humanitarian law. The idea that states and state officials are internationally responsible for the way that they treat their own is as radical – if not more so – than the idea that they are responsible for their use of force against other states.

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Aggression and International Human Rights Law

WILLIAM SCHABAS

12.1 Introduction

In January 1941, at the dawn of the modern international human rights law system and before the most terrible of armed conflicts had reached its paroxysm, US President Franklin D. Roosevelt set out his succinct vision of a 'friendly, civilised society'. It was 'no distant millennium', but rather 'a kind of world attainable in our own time and generation', one that was the 'very antithesis of the so-called new order of tyranny which the dictators seek to create with the crash of a bomb'. Roosevelt distilled his message into an inspired slogan: the celebrated 'four freedoms'. The first two, speech and belief, are drawn from the classic civil rights of the Enlightenment and the revolutionary declarations of the eighteenth century. The third, 'freedom from want', reflects a notion of entitlement that was nourished by socialism and the welfare state. 'The fourth is freedom from fear – which, translated into world terms,' Roosevelt explained, 'means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor – anywhere in the world.'¹

An intense period of legal codification followed the end of the Second World War. The resort to force to settle international disputes was outlawed by the United Nations Charter and subsequently condemned as an international crime – indeed, 'the supreme international crime' – by the International Military Tribunal. Under Eleanor Roosevelt's leadership, the four freedoms were expanded and developed into thirty concise provisions: the Universal Declaration of Human Rights. Confirming the paternity of this 'common standard of achievement', the preamble of the Universal Declaration explicitly invokes the four freedoms, as do the preambles of the two international covenants adopted subsequently to complete the International Bill of Rights.

The importance of 'freedom from fear' manifested itself in the earliest drafts of the Universal Declaration of Human Rights. The initial text, prepared by the Secretariat under John Humphrey's direction, proposed:

¹ *Congressional Record*, 1941, vol. 87, Pt. 1.

The Responsibility to Protect

by Taxiarchis Fiskatoris

Mon., 21 June 2021; 15:00 – 16:00

Abstract:

Manifestations of State criminality in the 1990s, and the lively debate on the legality of humanitarian interventions in the post-World War II international legal order, prompted the question: “If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?”. The “Responsibility to Protect” doctrine has been presented and institutionalized by the United Nations as the answer to the above question. By sketching out the evolution, theory, and practice of the “Responsibility to Protect”, this lecture aims to encourage participants of the summer school form their own opinion on the novelty, legal status, potential and limits of the concept.

Article:

Kersten, Mark (2013): Whose R2P is it? The Responsibility to Protect Post-Syria.

Syria Insta-Symposium: Mark Kersten—Whose R2P Is It? The Responsibility to Protect Post-Syria

 opiniojuris.org/2013/09/03/syria-insta-symposium-mark-kersten-whose-r2p-responsibility-protect-post-syria/

September 3, 2013

[Mark Kersten is a PhD candidate in International Relations at the London School of Economics and author of the blog [Justice in Conflict](#). You can find him on Twitter [@MarkKersten](#)]

Who would have thought that the most pressing question regarding the Responsibility to Protect in 2013 would be: what is it? The answer to this question is as unclear today as any time in R2P's political life. It might even be less clear.

In the midst ongoing questions regarding the legality and legitimacy of direct military intervention in Syria, scholars and observers have passionately rehashed the main tenets of R2P, defending or castigating it depending on their political persuasions and which interventions they've cut their political teeth on. At the core of their debate is that pesky, simple question: what, exactly, is R2P?

The cacophony of reactions to plans of a potential military intervention in Syria by the US (perhaps with some coalition of powers) has been a déjà vu of the year 2000. There has been a lot of talk about reconciling international commitments to preserve and protect sovereignty with obligations to preserve and protect inalienable universal human rights. All of a sudden, the phrase "humanitarian intervention" is back with a vengeance. Echoing Richard Goldstone's famous judgement regarding NATO's intervention in Kosovo, many are suggesting that a military intervention without UN sanction being "illegal but legitimate". Of course, it was out of this rather curious and, for many, frustrating proposition as well as the inability to reconcile universal human rights with the sovereign prerogatives of states, that the concept of R2P was born. Which begs the question: how did we get back to square one?

The early- to mid-2000s helped establish not one R2P but multiple R2Ps and that these have never been sufficiently reconciled. There are two dominant and distinct versions of R2P at play. First is R2P as a package of norms. This package of norms represents liberal cosmopolitan convictions, namely that the commission of mass atrocities against individuals is of concern to all other human beings and that sovereign inviolability of states is conditioned upon their respect of individual rights and freedoms. R2P as a package of ideals is broadly appealing. NGOs, activists and key normative entrepreneurs like the UN Secretary General have been working tirelessly for over a decade to talk these norms into reality. But R2P in this context is also sometimes fuzzy. This has been made clear over the question of who can legitimately authorize R2P. If R2P is a set of principles, then it can be authorized outside of the UN Security Council. After all, the International Commission on Intervention and State Sovereignty (ICISS) stated that, in the situation where the Security Council is deadlocked, intervention by a coalition of states or a regional organization would be appropriate. Legally, however, this is highly dubious.

Distinct from R2P as a normative prescription for world politics is R2P as a legal doctrine. It is less fuzzy and rests primarily upon the two paragraphs in the World Summit Document, accepted by the UN General Assembly in 2005. With the experience of Iraq looming over UN member states, virtually none were inclined to support granting authority to invoke R2P outside the Security Council. And so they didn't. Hence, whatever its merits, R2P can only lawfully be invoked through the Security Council.

R2P as law and R2P as a set of normative ideals are often in tension. But it is also something else. R2P has emerged as a language with its own vocabulary. The various reports and commissions, UN resolutions, nation state policies, and diplomatic statements are R2P's lexicon. But as a language, R2P is a double-edged sword. All language can, after all, be used and abused. R2P as a vocabulary provides the invaluable discursive space within which any intervention is weighed against its ability to protect civilians. But it also allows its defenders and its critics to abuse the concept by pretending that R2P is something that it isn't – or at least not yet.

Proponents of R2P have largely been uninterested in resolving the nature and tensions inherent between the different conceptions of R2P. Instead, many have used R2P language dressed up as R2P law in order to propagate their own desired version of the doctrine. To do so, they cherry-pick from passages in the ICISS Report, UN Secretary General Reports, and previous interventions.

The ultimate aim for R2P proponents is to turn the conceptual doctrine into a legal doctrine and thus to establish it as an integral part of a liberal cosmopolitan international legal landscape. There has been a concomitant belief that so long as R2P keeps chugging along, receiving endorsements in UN reports and being put in motion in situations like Libya and Ivory Coast, then the concept's trajectory would guide it to the promise land of legal stature. But this trajectory is very unlikely to be fulfilled if the tensions within different conceptions of R2P aren't resolved.

Importantly, it won't be the 'realists' against 'liberal internationalists' who will diminish the concept. It will be liberal internationalists against themselves. Look closely. The most vicious fight today over R2P is not between proponents and critics of R2P but between proponents of the concept who have fundamentally different visions of what R2P is and should be.

As a result, non-intervention into Syria would be neither a success nor failure of R2P. It would be both. It would be a failure because the type of suffering of Syrian citizens (since the beginning of the civil, not just since the chemical weapons attack) is precisely why R2P was created in the first place. But it would also be seen as a success because if R2P is understood as a legal doctrine with resultant obligations on the part states, then it can *only* authorized by the Security Council. Intervention into Syria without a UN mandate might be moral and it might be imminent. But whatever its enactors suggest, it's not the legal version R2P, it's the normative dream of R2P.

The case of Syria could actually save R2P by helping to decipher what it is and, more importantly, what it should be. R2P desperately needs conceptual consistency if it has any hope in emerging as an accepted norm in international relations. But if R2P is simultaneously a fledgling legal doctrine, a package of normative prescriptions as well as a widely used and abused language, it risks meaning everything to everyone and thus meaning very little at all – especially to those in whose name it was supposedly established. If this is R2P's destiny, for every future Syria we will be doomed to debate what R2P is and isn't at cross-purposes and ad nauseum.

Social Identity and International Crimes: Legitimate and Problematic Aspects of the 'Ordinary People' Hypothesis

by Stefan Harrendorf

Mon., 21 June 2021, 16:30 – 17:30

Abstract:

In the criminological discourse, international crimes are often seen as a kind of exceptional category not only with respect to the scale of these crimes, but also with respect to their inherent qualities. Hence, there is some agreement in scientific literature that such crimes cannot easily be explained when relying on theories of crime that were developed for “normal”, everyday crimes. Moreover, the relationship between ordinary and international crimes is often described as a dichotomy between crimes of obedience or conformity on the one hand and crimes as acts of individual deviance from social and legal norms on the other. Save the masterminds behind genocidal operations, the other perpetrators of international crimes are often seen as “ordinary people within extraordinary circumstances” (*Smeulers 2008*).

This paper advocates a more differentiated view in which the spectrum of crimes is seen more like a continuum with international crimes as an extreme form of criminal conduct, which, however, could be explained by the same, comprehensive theory as ordinary crimes. In order to develop such a theory, crime theories need to be reshaped to some degree.

Rejecting purely situationist or individualistic approaches to explain international crimes, an interactionist theory is seen as the only viable option. Action theories of crime are seen as a possible starting point for such a theory, although some adaptations will be necessary. Based on Social Identity Theory (*Tajfel/Turner 1986*) and Self-Categorization Theory (*Turner et al. 1987*), the paper provides a first glance on a Social Identity Approach to international crimes, integrating other situational forces such as ideology or obedience processes as far as possible into the overall social identity scheme.

An interactionist theory of (international) crimes needs, however, also to identify the characteristics of individual perpetrators that make them prone to adopt a potentially genocidal or politically violent social identity. Based on the assumption that there are at least three different possible actions in a context of collective violence (participate, do nothing about it or resist/rebel) the author then focuses on the identification of “sleeper” (*Steiner 2000*) traits of potential perpetrators. As a result, a clarification of the meaning of “ordinary” in the abovementioned “ordinary people” hypothesis is suggested.

Summing up, the paper concludes that an interactionist theory of (international) crimes is feasible. Integrating the Social Identity Approach into criminological action theories is seen as the starting point of a comprehensive theory of crime that allows the explanation of international crimes as well as ordinary crimes.

Article:

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Beyond the Banality of Evil: Three Dynamics of an Interactionist Social Psychology of Tyranny

S. Alexander Haslam and Stephen Reicher

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Beyond the Banality of Evil: Three Dynamics of an Interactionist Social Psychology of Tyranny

S. Alexander Haslam

University of Exeter

Stephen Reicher

University of St. Andrews

Carnahan and McFarland critique the situationist account of the Stanford prison experiment by arguing that understanding extreme action requires consideration of individual characteristics and the interaction between person and situation. Haslam and Reicher develop this argument in two ways. First, they reappraise historical and psychological evidence that supports the broader “banality of evil” thesis—the idea that ordinary people commit atrocities without awareness, care, or choice. Counter to this thesis, they show that perpetrators act thoughtfully, creatively, and with conviction. Second, drawing from this evidence and the BBC [British Broadcasting Corporation] Prison Study, they make the case for an interactionist approach to tyranny that explains how people are (a) initially drawn to extreme and oppressive groups, (b) transformed by membership in those groups, and (c) able to gain influence over others and hence normalize oppression. These dynamics can make evil appear banal but are far from banal themselves.

Keywords: *social identity; interactionism; evil; tyranny; prison study*

Carnahan and McFarland (2007 [this issue]) propose that if we want to understand how people behave in extreme situations, we should not overlook the character of those who place themselves in such situations. This is a simple point that has far-reaching implications. Most fundamentally, it forces us to reconsider a consensus concerning the roots of evil that has prevailed for more than 40 years. According to this consensus, evil

triumphs because ordinary, decent individuals turn helplessly into monsters when they find themselves in monstrous circumstances—notably, when their judgment is subverted by deference to a powerful group.

This view is encapsulated in the idea of the “banality of evil,” and its force derives from a unique symbiosis between the views of philosophers, historians, and social psychologists. These have been mutually reinforcing and have had a profound impact on society at large. As Lozowick (2002) observes, the banality-of-evil thesis “has become a permanent feature of Western consciousness, a staple of modern culture” (p. 274).

In this article, our concern is less with the specific details of Carnahan and McFarland’s (2007) article than with its general implications for our understanding of the human capacity for evil. In contrast to the prevailing situationism, these researchers make a plea for an interactionist approach. However, there are many forms of interactionism, the most common of which is to argue that behavior is simply the product of two independent factors: person and situation. We argue for a more radical approach that asserts that both person and situation are transformed through their interplay. Given limitations of space, our aim is not to specify this approach in detail but to explain why it is needed and to outline the elements it should include.

Authors’ Note: Authorship is alphabetical. The authors contributed equally to this article.

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THE ORIGINS OF THE BANALITY OF EVIL

In 1961, Adolf Eichmann stood trial in Jerusalem for his role in the Holocaust. He was subsequently found guilty and sentenced to hang—primarily for his role as a chief architect of the “final solution to the Jewish question” that led to the murder of millions in Nazi extermination camps. Psychiatrists had previously claimed that Eichmann was “a man obsessed with a dangerous and insatiable urge to kill” who had “a dangerous and perverted personality” (Arendt, 1963, p. 21). Famously, though, Hannah Arendt commented that the details of Eichmann’s biography—as borne out at his trial—showed this analysis to be wholly mistaken. Eichmann was no psychopath. Rather, he was a thoroughly normal career civil servant who simply followed orders. For Arendt, Eichmann’s life thereby offered one key lesson: “the lesson of the fearsome, word-and-thought-defying *banality of evil*” (p. 252).

Arendt’s (1963) point (at least as it is routinely understood; but see Newman, 2001) was not just that Eichmann was an ordinary man with ordinary motives. It was that he also killed mechanically, unimaginatively, unquestioningly. For her, the truly horrifying thing about Eichmann was that he had lost his capacity for moral judgment. Obsessed with the technical details of genocide (e.g., timetabling transport to the death camps), he and his fellow bureaucrats had no awareness that what they were doing was wrong.

As fate would have it, at the same time that Eichmann was standing trial, Milgram (1963, 1974) was conducting his studies of obedience. In these, well-adjusted men participating in a bogus memory experiment proved willing to deliver electric shocks of increasing magnitude to another person who posed as learner. Indeed, every single “teacher” was prepared to administer intense shocks of 300 volts, and 65% obeyed *all* the experimenter’s requests, dispensing shocks apparently in excess of 450 volts (beyond a point labeled *Danger, Severe Shock*).

Not only did Milgram’s findings support Arendt’s contention that unremarkable people can commit remarkably cruel acts, but so too, his explanation mirrored hers. As he saw it, when confronted by strong leaders, people enter an “agentic state” in which they suspend their own judgment and cede responsibility for their actions to those in charge.

There is nothing coincidental in the correspondence between these accounts. For as Blass (2004) points out, Milgram (1974) had no theory to guide him when he carried out his studies. Accordingly, he drew openly on Arendt’s ideas when interpreting his data and concluded,

Arendt’s conception of the banality of evil comes closer to the truth than one might dare to imagine. The ordinary person who shocked the person did so out of a sense of obligation—a conception of his duties as a subject—and not from any peculiarly aggressive tendencies. (pp. 23-24)

Yet, when it came to their impact on popular consciousness, neither Milgram’s nor Arendt’s account had precedence. It was their combination that proved crucial. As Novick (2000) puts it:

From the sixties on, a kind of synergy developed between the symbol of Arendt’s Eichmann and the symbol of Milgram’s subjects, invoked in discussing everything from the Vietnam War to the tobacco industry, and, of course, reflecting back on discussions of the Holocaust. (p. 137)

Subsequent inquiry only served to strengthen and extend researchers’ confidence in the banality-of-evil thesis. In psychology, particular impetus came from the Stanford Prison Experiment (SPE; Haney, Banks, & Zimbardo, 1973). In this, the researchers randomly assigned college students to be either guards or prisoners in a simulated prison and planned to explore the group dynamics that developed over a 2-week period. The study had many twists and turns, but the feature that commentary routinely dwells on is that the guards adopted their roles with such brutality and vigor that the study was halted after only 6 days. At this point, serious concerns were raised about the welfare of the prisoners, who had been subjected by the guards to an incessant diet of ridicule, degradation, and abuse.

The key point that Zimbardo and colleagues abstracted from the complex events in their study was that these acts of guard aggression were “emitted simply as a ‘natural’ consequence of being in the uniform of a ‘guard’ and asserting the power inherent in that role” (Haney et al., 1973, p. 62). According to this analysis, people do not necessarily need the influence of strong leaders (as Milgram hypothesized) in order to suspend their sense of moral judgement and commit appalling acts.

These claims are central to the impact of the SPE. As a reviewer in *The New York Times* recently argued,

Zimbardo’s prison study was even more shocking [than Milgram’s research], if only because the students assigned to play guards were not instructed to be abusive, and instead conformed to their own notions of how to keep order in a prison. (Stanley, 2006)

As with Milgram’s work, the influence of Zimbardo’s ideas has also been consolidated by their

correspondence with narratives in other disciplines—particularly Browning's (1992) historical examination of the activities of Reserve Police Battalion (RPB) 101, a mobile killing unit that roamed German-occupied Poland and murdered at least 38,000 Jews between July 1942 and November 1943. Browning shows that the members of this unit were not fanatics; they were not even particularly pro-Nazi. At the same time, however, they were not forced to do what they did. As the title of his book puts it, for Browning they were just "ordinary men" who, like Milgram's participants, had entered an agentic state in which judgment and moral restraint were suspended. But echoing Zimbardo, Browning argues that this occurred without leadership. In 1940s Poland, the situation itself was sufficient to turn normal men into mass murderers—just as in the SPE "the prison system alone was a *sufficient* condition to produce aberrant, anti-social behaviour" (Browning, 1992, p. 168).

Browning (1992) thus concludes his book by asking, "If the men of Reserve Police Battalion 101 could become killers under such circumstances, what group of men cannot?" (p. 189). In light of seemingly powerful and convergent evidence from multiple disciplines, it might seem hard to give a comforting answer.

QUESTIONING THE BANALITY OF EVIL

The banality-of-evil perspective remains influential, but it is not without critics. Most visibly, several historians have begun to reconsider the role of moral agency in acts of genocide (e.g., Goldhagen, 1996; Mandel, 1998; see also Haslam & Reicher, 2006a; Newman & Erber, 2002; Reicher & Haslam, 2006a). Some of the most insightful of these contributions deal with the specific case of Eichmann and his fellow Nazi bureaucrats who first inspired the notion that evil is banal (Cesarani, 2004; Lozowick, 2002; Vetlesen, 2005).

In setting about challenging received wisdom, Cesarani (2004) starts with the telling observation that Arendt (1963) only attended the first few days of Eichmann's trial, in which he presented his own testimony. But here, Eichmann's aim was precisely to present himself as dull and ordinary in order to blunt the prosecution's claim that he was a murderous fanatic. And by leaving prematurely, Arendt avoided a string of witnesses who testified to the fact that Eichmann was anything but a banal bureaucrat. As Vetlesen (2005) puts it, "in suggesting that he was 'merely thoughtless,' she in fact adopts the very self-presentation he cultivated" (p. 5).

A close examination of the historical record also corrects the received image of Eichmann on a number of counts (see Cesarani, 2004; Lozowick, 2002). First, he

was comfortable with Nazi anti-Semitism and found the general ideology of the party congenial. Second, his views were *transformed* in the context of his *increasing identification* with the Nazi movement. In particular, his position regarding Jewish people changed from one of seeking voluntary emigration to one of enforcing transportation to the death camps. Third, he did not simply follow orders. Rather, he pioneered creative, new methods of deportation—in part because this won him the approbation and preferment of superiors. Indeed, in 1944 he was so zealous in his innovative schemes to destroy Hungarian Jewry that he even came into conflict with Himmler (his superior) over the latter's more conciliatory policies. Fourth, Eichmann was well aware of what he was doing and was constantly confronted with the realities of the deaths he caused. Fifth, he was equally well aware that others considered his acts to be wrong, but even after the war he displayed neither remorse nor repentance.

Cesarani (2004) thus concludes, "Eichmann had to learn what it meant to be a *génocidaire* and then chose to be one. It is a myth that [he] unthinkingly followed orders" (p. 11). Indeed, as Rees (1997) points out, the orders issued by the Nazi hierarchy were typically very vague, so that imagination—what Kershaw (1993) refers to as "working towards the Führer"—was required in order for them to be interpreted and enacted (see also Sofsky, 1993, pp. 228-231). Vetlesen (2005), too, reviews a mass of evidence that shows that Nazi killers knew what they were doing, believed in what they were doing, and even celebrated what they were doing. This was deliberate policy. For instance, when the Minsk ghetto was exterminated, all Schutzstaffeln (SS) officers were ordered to participate in the executions because some had not yet killed anyone. "As a matter of principle," Vetlesen shows, "even the cadres traditionally referred to as 'desk-murderers' had plenty of blood on their hands" (p. 44).

In this way, old images of the Holocaust that supposedly illustrate the banality of evil are being challenged by evidence that mass murder is not something that happens simply, easily, or mindlessly. Rather, it is the endpoint of a long and arduous journey of individual socialization and social transformation. It is not a slippery slope down which individuals tumble unwittingly but more akin to a mountain that can only be scaled with energy and application:

Eichmann and his ilk did not come to murder Jews by accident or in a fit of absent-mindedness, nor by blindly obeying orders or by being small cogs in a big machine. They worked hard, thought hard, took the lead over many years. They were the alpinists of evil. (Lozowick, 2002, p. 279)

What then of the “ordinary men” of RPB 101? Could one still argue that only the evil of the Holocaust planners was exceptional whereas that of its functionaries was banal? Not really. For when one looks at the details of Browning’s (1992) analysis, there is no evidence that everyone mindlessly obeyed orders. Instead, some of those he studied were “enthusiastic killers,” but others were “shooters and ghetto clearers [only] when assigned,” and still others were “refusers and evaders” (p. 168). The enthusiasts, in particular, made *active* choices to engage in their designated tasks, just as the refusers made conscious decisions to disengage (Goldhagen, 1996; see also Rees, 1997; Staub, 1989; Steiner, 1980).

Of course, to challenge the view that Nazi killers were unwitting minions who were only doing as they were told is also to challenge the relevance of Milgram’s obedience research for the Holocaust—and thereby to deprive it of much of the basis for its widespread influence (Miller, 2004). Accordingly, Cesarani (2004) argues that the analysis provided by Milgram and Arendt (1963) has actually served to impede our understanding of the Holocaust and, by extension, of human evil in general. As he puts it, “[The] notion of the banality of evil, combined with Milgram’s theses on the predilection for obedience to authority, straightjacketed research for two decades” (p. 15).

Nevertheless, even if one contends that the banality of evil does not apply to the specific example of Nazi Germany, one might still argue that the work of Milgram—and even more dramatically of Zimbardo—shows that evil *can* be banal. Again, though, if one looks closely at these landmark studies, one begins to doubt whether the explanations that are advanced can even account for the behavior of their own participants, let alone make sense of larger social phenomena.

To be absolutely clear, we do not deny that in these studies many “ordinary people” were led to inflict ostensibly severe punishment and to abuse and humiliate others. What we do doubt is whether, in Milgram’s case, this was simply because they entered into an agentic state in the presence of a powerful authority. For such a notion does not explain the dramatic variability in levels of obedience across variations of the experiment (e.g., from 65% in the standard “remote” condition to 30% in the “touch proximity” condition in which participants had to push the hand of the “learner” onto the electronic plate). And it sits uncomfortably with the fact that far from being concerned only with following orders, the transcripts of experimental sessions show that many of those who displayed total obedience experienced chronic doubt and articulated profound moral conflicts between their responsibilities to the learner and their responsibilities to

“science” (Blass, 2004; Milgram, 1974). All in all, then, Milgram’s theoretical account is as weak as his empirical evidence is powerful (Blass, 2004; Miller, 2004).

Similar points can be made about the SPE. As noted above, Zimbardo (2004) goes somewhat further than Milgram by arguing that the descent into tyranny is not dependent on deference to the authority of leaders but is determined by a “natural” tendency to conform to role. In relation to the SPE, he thus asserts that

Participants had no prior training in how to play the randomly assigned roles. Each subject’s prior societal learning of the meaning of prisons and the behavioral scripts associated with the oppositional roles of prisoner and guard was the sole source of guidance. (p. 39)

As we have seen in statements by Browning (1992, p. 168) and Stanley (2006), this assertion is central to reproduced accounts of the Stanford study. Yet it sits uncomfortably with the fact that during Zimbardo’s (1989) “guard orientation” on August 14, 1971, he instructed his guards:

You can create in the prisoners feelings of boredom, a sense of fear to some degree, you can create a notion of arbitrariness that their life is totally controlled by us, by the system, you, me—that they’ll have no privacy at all. . . . There’ll be constant surveillance. Nothing they do will go unobserved. They’ll have no freedom of action, they can do nothing, or say nothing that we don’t permit. We’re going to take away their individuality in various ways. In general what all this leads to is a sense of powerlessness.

The significance of this passage does not just lie in the details of how to oppress the prisoners. It also lies in the fact that Zimbardo speaks of himself and his audience as “we.” By positioning himself among the guards rather than as a neutral experimenter, Zimbardo acts as an “entrepreneur of identity” who exerts *leadership* over the guards through his invocation and management of a *shared social identity* (Reicher, Haslam, & Hopkins, 2005; Turner, 1987).

Yet the existence of leadership in the SPE should not be equated with the passivity of followers. For, as in RPB 101, it is clear that not all the guards were brutal. Zimbardo (1989) himself acknowledges that they could be divided into three categories: those who sided with the prisoners, those who were strict but fair, and those few who actively humiliated their charges (a structure that, as Browning [1992, p. 168] observes, bears an “uncanny resemblance” to that of RPB 101). Even the guard who was most engaged with his ascribed role—the participant dubbed “John Wayne”—was far from a simple cipher. Instead, he was thoughtful and original in

the humiliations he devised. This is poignantly captured in the following postexperimental exchange:

John Wayne: What would you have done if you were in my position?

Prisoner: I don't know. But I don't think I would have been so *inventive*. I don't think I would have applied as much *imagination* to what I was doing. Do you understand? . . . If I had been a guard I don't think it would have been such a masterpiece. (Zimbardo, 1989)

Clearly, then, Zimbardo's leadership may have legitimized oppression in the SPE such that the brutality epitomized by "John Wayne" prevailed. However, neither leadership nor role could be said to *substitute* for the agency of participants or to have left them in a state where they were no longer responsible for their actions. People chose whether or not to be brutal, and they used their imaginations in exercising that choice.

Accordingly, what becomes apparent when we look behind the received versions to the evidence itself is that there is indeed considerable convergence between studies of Holocaust perpetrators and classic social psychological studies. However, this convergence serves to subvert, not support, the banality-of-evil thesis. For although it is certainly true that their acts are inexplicable independently of the societal and group contexts in which they occurred, neither Hitler's bureaucrats, members of the killing units, Milgram's "teachers," nor Zimbardo's guards became amoral automatons.

For this reason, the true horror of Eichmann and his ilk is not that they were unaware they were doing wrong. On the contrary, it is that they *really believed* that what they were doing was right. This is a critical difference, because the awful impact of these Nazi functionaries derived not from their mechanical compliance but precisely from their creative ideological zeal (Rees, 1997, p. 10). Critically, too, this implies that in order to understand the psychological bases of human evil we need to do some fundamental rethinking. We need to "escap[e] our theoretical prisons" (Turner, 2006, p. 41) and throw off the "mental straitjacket" by which understanding has hitherto been so constrained (Cesarani, 2004, p. 15).

BEYOND THE BANALITY OF EVIL

We must start by acknowledging that human evil is not banal in the sense of being simple. As shown above, people do not follow brutal leaders or enact brutal roles in groups unquestioningly and automatically. For those who eventually succumb, the journey to the depths of depravity is conscious and demanding. We therefore

have to ask questions about *when* tyranny prevails, *why* it prevails, and *how* people are transformed into tyrants. These have preoccupied us since our own study of intergroup relations in a simulated prison setting produced a number of findings that challenge the view that tyranny arises because people succumb naturally to role requirements (Reicher & Haslam, 2006b). Instead, the study gelled with other research in pointing to the importance of three social dynamics that we will now consider briefly in turn.

Dynamic 1: Who Is Drawn to Tyrannical Groups?

Carnahan and McFarland's (2007) findings speak clearly to this dynamic. They suggest that those who volunteer to participate "in a psychological study of prison life" (the wording used in the original advertisement recruiting participants for the SPE) are not necessarily "as normal as possible" (to quote Zimbardo, 2004, p. 39). They tend to be more authoritarian, socially dominant, aggressive, Machiavellian, and narcissistic than those who volunteer for more innocuous research.

Such findings accord closely with the well-documented observation that people who support hierarchy are drawn to hierarchical institutions and that the more extreme the actions of these institutions, the more extreme the individuals that are drawn to them (e.g., Sidanius, Pratto, Sinclair, & van Laar, 1996). It also accords with Vetlesen's (2005) observation that those drawn to Nazism or to similar groups do so "on the condition that *the ideology in question resonate deeply and existentially with psychological dispositions*—needs and longings, desires and fears—to be found in the individual" (p. 50).

Along related lines, Vetlesen (2005) also points to the importance of strategic factors and careerism when analyzing how various individuals became Nazis. Thus, doctors, geneticists, engineers, and others embraced National Socialism because they saw that it gave them exceptional and unfettered opportunities to pursue their professions (see also Lifton, 1986; Muller-Hill, 1988). Hence, he argues that organized evil occurs not when the group obliterates individuality but when "individual and institutional factors meet halfway, when they are allowed to *merge*, to work in tandem in the same direction" (Vetlesen, 2005, pp. 50–51).

The implication, then, is that differences between individuals cannot be discounted when explaining how people come to act as oppressors. However, it is important not to conflate explanations of individual difference with individualistic explanations—especially those that see collective behavior as a straightforward expression of personality. For us, individuality should be seen

as the sum of social relations, both past and present, that determine how people exercise choices about the futures that are available to them. For instance, whether a person embraces one position or group will depend critically upon its implications for their membership of other valued groups (Emler & Reicher, 1995). Whether this view is accepted or not, our core point is that we must never entirely lose sight of the individual in the collective (Postmes & Jetten, 2006) or in the explanation of collective evil.

Dynamic 2: How Are People Transformed by Group Membership?

If people join the groups they like (at least where others will let them), it is equally true that people come to like the groups they join. And if what people understand about groups leads them to join them, it is also true that what people learn about their groups as members changes the way they understand themselves. These are two core insights of self-categorization theory (Turner, Hogg, Oakes, Reicher, & Wetherell, 1987).

In this way, groups *transform* the individuals who join them by changing the dispositions of their members and the way they express them (Turner & Oakes, 1986). So where individual beliefs are consonant with group norms, people are far more likely to articulate, to strengthen, and to act on their convictions. This is especially relevant in the case of expressions and acts of stereotyping, prejudice, and callousness that might otherwise be muted (Haslam & Reicher, 2006a; Haslam, Turner, Oakes, McGarty, & Reynolds, 1998).

In this way, too, individuals with hyperauthoritarian tendencies can act as “sleepers” (Staub, 1989) who only become mobilized and energized when the group sanctions oppression. Thus Eichmann, in common with many other Nazis, started off with authoritarian leanings but was emboldened through his involvement in the party to embrace and promote ever more extreme ideology and practice that took anti-Semitism to new and ever more abhorrent depths.

Dynamic 3: When Do Authoritarian Views Gain Influence?

Yet in order for tyranny to triumph, it isn't enough for the Eichmanns of this world to become more brutal. It is also essential that others, including those originally less extreme, go along with them—or at least that they don't actively sabotage or resist them. In short, to be effective, tyrants need to have *social influence*.

In this respect, a further transformation that can happen in groups is that as social context changes, individuals who were previously marginal and uninfluential

begin to be seen as representing group values (i.e., as prototypical of its social identity) and hence assume a position where they are able to define what is right and what is wrong for other group members (Turner, 1987). That is, they become *leaders* who gain the power to influence events through their influence over others (Turner, 2005). Moreover, as leaders they do not just exploit the changed social context, they actively seek to transform the social context in order to broaden their influence (Reicher et al., 2005).

Again, this is demonstrated in the success of Nazism. On one hand, the early Nazis actively sought to destabilize the Weimar Republic and to provoke a sense of crisis. On the other, they were able to claim power by posing as a solution to the chaos they themselves had created. In such a context, authoritarian solutions based on the promise of restoring traditional German values gained attraction at the expense of those that were associated either with the existing state in crisis or else with the radical movements promising further revolutionary transformation (Hobsbawm, 1995). Moreover, once in power, this psychological dynamic became underpinned by an increasingly effective political and legislative system that shaped not only people's moral sensibilities but also the material facts of life and death. This system ensured not just that Nazis and Nazism flourished, but that they came to define the very essence of what it meant to be a normal, law-abiding citizen.

Three lessons flow from these points. First, authoritarianism is not a stable, individual difference but an *emergent product* of the dynamics of group life (Haslam & Reicher, 2005, 2006b; Reicher & Haslam, 2006a, 2006b; see also Schmitt, Branscombe, & Kappen, 2003; Turner, Reynolds, Haslam, & Veenstra, 2006). Second, authoritarians are only able to exercise leadership and set about creating an authoritarian world when circumstances move them from a position of extremism to one where they represent the wider group. Third, people are much more likely to embrace extreme social systems when their own groups have failed and when authoritarian leaders seem to be required to bring order to a world in chaos (Haslam & Reicher, in press). In this way, as historical analyses of the rise of Nazism suggest (e.g., Abel, 1986; Hobsbawm, 1995), the foundations of autocratic groups are often built on the failure of more democratic ones. To blame group psychology *per se* for tyranny is therefore to avoid the more complicated debate about how democratic and humanitarian groups can be made to work.

Our argument has now come full circle. We have discussed how individuals are drawn to radical groups, how this can radicalize them further, and how conditions can enable them to radicalize a broader population. Note, though, that once these dynamics have played out, tyranny

itself may no longer be radical—from the perspective of the given society. Indeed, at their most potent, tyranny and oppression are taken for granted. This is the real site of the banality alluded to by Arendt (1963; Newman, 2001). At this point, the critical issue is no longer who goes along with brutality (and why) but rather why certain individuals are exceptional enough to oppose it (Billig, 1976; Oliner & Oliner, 1988).

CONCLUSION

In May 1939 . . . Eichmann's attitude and conduct towards Jews underwent a significant metamorphosis. There was a new arrogance. . . . He behaved like a man with power: a young god in a shiny black uniform. His appetite for promotion and power had meshed with the dynamic of the SD [Sicherheitsdienst—the intelligence service of the SS in whose Berlin head office Eichmann worked] and the Nazi regime. For the first time, and without compunction, he took responsibility for the detention and death of Jews. (Cesarani, 2004, p. 71)

In meticulously documenting this “metamorphosis,” Cesarani (2004) wrestles with two seemingly countervailing facts about Adolf Eichmann. On one hand, he *was* unremarkable. Certainly, there was nothing in his personal history that marks him out as a sadist, a psychopath or a “natural born killer” (p. 11). At the same time, though, he *was* different. In particular, his personal background drew him toward the Nazi movement, and the more he drew himself (and was drawn) into it, the more callous he became. Ultimately, this meant that he played a *highly creative leadership* role in imagining, organizing, and bringing about the single policy that is the most vivid and horrific testament to Nazi atrocity.

One obviously has to be very careful in drawing parallels between someone such as Eichmann and the behavior of participants in any social psychological study. Nevertheless, history and social psychology do hold out important lessons for each other. Significantly, too, when it comes to the analysis of tyranny, both fields are themselves undergoing a metamorphosis. Arendt, Milgram, and Zimbardo played a critical part in taking us beyond reductionist explanations of tyranny as a simple product of pathological individuals. But now, their reductionist explanations of tyranny as a simple product of pathological situations—the banality-of-evil hypothesis—seem equally untenable. Instead, the case is emerging for an interactionist understanding that sees the social psychology of individual tyrants and collective tyranny as interdependent and mutually reinforcing.

Clearly, the debate is only just starting as to exactly what form this interactionism should take (see Postmes

& Jetten, 2006). For us, particular individuals with particular beliefs make tyranny possible whether in our psychological studies or in the world beyond. But this individuality is not prefabricated, prepackaged, or prepotent in the sense envisioned by classical personality theory (Turner et al., 2006). Instead, whether in social psychological experiments or in fascist bureaucracies, individual psychologies are as much an outcome as a determinant of group dynamics.

Looking at these dynamics, it is true that evil can become normal and indeed normative in groups and hence can end up appearing banal. However, the development of these norms and of their appeal is a long and intricate process. This process—the *normalization of evil*—is far from banal. Our theories of it should no longer be either.

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Breaking the Cycle of Mass Atrocities

*Criminological and Socio-Legal Approaches
in International Criminal Law*

Edited by
Marina Aksenova
Elies van Sliedregt
and
Stephan Parmentier

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PART V

Prevention

10

Social Identity and International Crimes: Legitimate and Problematic Aspects of the ‘Ordinary People’ Hypothesis

STEFAN HARRENDORF

‘Us and them
And after all we’re only ordinary men
Me and you
God only knows
It’s not what we would choose to do’
(Us and Them, Pink Floyd, 1973).¹

I. Introduction

In the criminological discourse, international crimes are often seen as a kind of exceptional category not only with respect to the scale of these crimes (‘Makrokriminalität’, as Jäger put it),² but also with respect to their inherent qualities. Hence, there is some agreement in scientific literature that such crimes cannot easily be explained when relying on theories of crime that were developed for ‘normal’, everyday crimes, but need a specific approach, which might, however, build on existing theories.³ Moreover, the relationship between ordinary and international crimes is frequently described as a dichotomy between crimes of obedience or conformity on the one hand and crimes as acts of individual deviance from social

¹ The song ‘Us and Them’ appeared on Pink Floyd’s album ‘The Dark Side of the Moon’ (1973).

² H Jäger, *Makrokriminalität: Studien zur Kriminologie kollektiver Gewalt* (Frankfurt aM, Suhrkamp, 1989).

³ eg, Jäger, *ibid*, 187–213; D Rothe, *State Criminality: The Crime of All Crimes* (Plymouth, Lexington Books, 2009).

and legal norms on the other.⁴ Save the masterminds behind genocidal operations, the other perpetrators of international crimes are often seen as 'ordinary people within extraordinary circumstances'.⁵

Such a notion is also included in the above quotation from Pink Floyd's song 'Us and Them', which was released in 1973 on the album 'The Dark Side of the Moon'. While the band seems to have never made a clear statement on the meaning of this song, it is usually understood as an anti-war song, probably influenced by the experience of the war in Vietnam,⁶ but also by the fate of Roger Water's father in the Second World War.⁷ Hence, it is not a song directly about genocide or mass atrocities, but it could as well be (especially if you take into account that war situations are typically prone to such crimes and that both the Second World War and the Vietnam war show various examples of this).

What is especially interesting with this quotation is that it seems to assume a social psychological interpretation of the individual's involvement in mass violence. It could summarise the basic assumptions of a Social Identity Approach⁸ not only to war, but also to international crimes. In the song, such occurrences are understood as a product of group polarisation, of a strict, depersonalised differentiation between an in-group ('us') and an out-group ('them'), leading people to do things they would not do as individuals: 'Me and you ... It's not what we would choose to do.'

In the following, I will try to unfold such a Social Identity Approach to international crimes. I will also show that it leads to the interpretation of international crimes as products of the *interaction* of individual and situational characteristics.⁹ An interactionist theory of (international) crimes needs, however, also to identify the characteristics of individual perpetrators that make them prone to adopt a potentially genocidal or politically violent social identity. Based on the assumption that there are at least three different possible actions in a context of collective violence (participate, do nothing about it or resist/rebel) it is necessary to identify

⁴ See, eg, HC Kelman and VL Hamilton, *Crimes of Obedience: Toward a Social Psychology of Authority and Responsibility* (New Haven, CT, Yale University Press, 1989); Jäger, above (n 2).

⁵ A Smeulers, 'Perpetrators of International Crimes: Towards a Typology' in A Smeulers and R Haveman (eds), *Supranational Criminology: Towards a Criminology of International Crimes* (Antwerp, Intersentia, 2008); likewise JJ Savelsberg, *Crime and Human Rights: Criminology of Genocide and Atrocities* (London, Sage Publications, 2010) 52; CR Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (New York, Harper Collins, 1992).

⁶ Newseum, 'Vietnam Music Monday: "Us and Them"' *Newseum.org* (2016), available at: www.newseum.org/2016/02/01/vietnam-music-monday-us-and-them/.

⁷ O Klatt, 'Pink Floyds Jahrhundertalbum: Die dunkle Seite des Menschen' *Spiegel Online* (2013), available at: www.spiegel.de/einestages/pink-floyd-und-the-dark-side-of-the-moon-a-951078.html.

⁸ For this theoretical position, see the seminal work by H Tajfel and JC Turner 'The Social Identity Theory of Intergroup Behavior' in S Worchel and WG Austin (eds), *The Psychology of Intergroup Relations*, 2nd edn (Chicago, IL, Nelson-Hall, 1986); JC Turner, MA Hogg, PJ Oakes, SD Reicher and MS Wetherell *Rediscovering the Social Group: A Self-Categorization Theory* (Oxford, Basil Blackwell, 1987).

⁹ cf SD Reicher and SA Haslam, 'Rethinking the Psychology of Tyranny: The BBC Prison Study' (2006) 45 *British Journal of Social Psychology* 1.

the ‘ sleeper’¹⁰ traits of potential perpetrators. As a result, a clarification of the meaning of ‘ ordinary’ in the abovementioned ‘ ordinary people’ hypothesis will be suggested.

The chapter also advocates a differentiated view on the position of international crimes in criminological theory. The spectrum of crimes is seen like a continuum with international crimes as an extreme form of criminal conduct, which, however, could be explained by the same, comprehensive theory as ordinary crimes. Group interaction is not only important for international crimes. All crimes in which groups are involved cannot only be understood as deviant acts (with regard to social norms of a larger society), but also as conformist acts (with respect to group norms). This is an assumption that also has historical roots in subculture theory,¹¹ but was not in the focus of most of the more recent developments in criminological theory. One aim of this chapter is therefore also to rediscover the social group¹² in criminology and try to integrate it into modern criminological action theories, most prominently the Situational Action Theory.¹³

II. A Social Identity Approach to International Crimes

The Social Identity Approach is probably the most influential¹⁴ endeavour towards a social psychological understanding of group behaviour. It is based on two separate, but related theories, the Social Identity Theory¹⁵ and the Self-Categorization Theory.¹⁶ In these theories, social identity is defined as the part of the individual identity that derives from the individual’s perceived belonging to a social group.

According to Social Identity Theory,¹⁷ humans strive for a positive social identity. Now imagine the situation of a person who belongs to a group that does not provide him or her with a sufficiently positive social identity, since the group has a bad reputation and its members are seen as inferior or problematic by the members

¹⁰ JM Steiner, ‘The Role Margin as the Site for Moral and Social Intelligence: The Case of Germany and National Socialism’ (2000) 34 *Crime, Law & Social Change* 61.

¹¹ AK Cohen, *Delinquent Boys: The Culture of the Gang* (Glencoe, IL, Free Press, 1955); JM Yinger, ‘Contraculture and Subculture’ (1960) 5 *American Sociological Review* 625.

¹² Turner et al, above (n 8).

¹³ P-O Wikström ‘Crime as Alternative: Towards a Cross-Level Situational Action Theory of Crime Causation’ in J McCord (ed), *Beyond Empiricism: Institutions and Intentions in the Study of Crime* (New Brunswick, Transaction Publishers, 2004); P-O Wikström, ‘Why Crime Happens: A Situational Action Theory’ in G Manzo (ed), *Analytical Sociology* (Hoboken, Wiley, 2014); an application of this theory on international crimes can also be found in K Drenkhahn, ‘Why Do People Engage in State Crime? Some Thoughts about Criminological Theory’ in F Neubacher and N Bögelein (eds), *Krise – Kriminalität – Kriminologie* (Mönchengladbach, Forum Verlag Godesberg, 2016).

¹⁴ cf SD Reicher, R Spears, and SA Haslam ‘The Social Identity Approach in Social Psychology’ in MA Wetherell and CT Mohanty (eds), *The SAGE Handbook of Identities* (London, SAGE, 2010).

¹⁵ Tajfel and Turner, above (n 8).

¹⁶ Turner et al, above (n 8).

¹⁷ Tajfel and Turner, above (n) 8.

of other, relevant outgroups. Now there are different ways to try to achieve a positive identity, one individualistic and two group-related, social strategies: *individual mobility* would mean for the individual to try to leave his or her group and gain membership in a group with a higher social standing, which can then provide for a positive social identity. Yet, there is not always a possibility for such individual mobility. Take the example of a strongly racist or patriarchal society: Neither the racial nor the sexual classification of an individual can be easily changed by him or her.

Yet, there are other options to improve social identity for members of such groups that cannot easily be left. One option would be *social creativity*, which means a redefinition of the criteria of comparison, the value attached to it and the relevant outgroups against which to compare in order to come to a more positive result. The other option would be *social competition*, ie, a struggle with other groups in order to actually achieve an objectively better standing for the own group in the meaning of better access to scarce resources. Racial and sexual discrimination, for example, can be overcome by a mixture of social creativity (redefinition of the values associated with skin colour or sex) and social competition (a struggle to achieve a better, equal social position for females or black people).

Social Identity Theory is complemented by Self-Categorization Theory.¹⁸ While Social Identity Theory focuses on group conflict, Self-Categorization Theory explains how humans categorise themselves, thus automatically or deliberately selecting a cognitive representation of the self that is adapted to the given situation. The theory differentiates between different levels of this self-concept. Hence, a person could categorise him- or herself as a human being, as just one member of the whole human species (human identity). More often, a person will categorise him- or herself as a member of a certain in-group in differentiation from a relevant out-group (social identity). Finally, it is also possible that in a certain situation the self-concept as a unique individual is activated (personal identity). The theory assumes that there is a functional antagonism between the different levels of self-categorisation. With increasing salience of an in-group/out-group categorisation the salience of personal identity decreases. This is called *depersonalisation* and means that a person begins to stereotype him- or herself, losing focus on his or her individuality, while concentrating on the assumed commonalities of the collective. Such depersonalisation must not be confused with deindividuation, a concept that was central to deindividuation theory.¹⁹ While this older theory of group behaviour associated the deindividuated state of a person strictly with antinormative and disinhibited behaviour, a depersonalised person is simply more susceptible to

¹⁸ Turner et al, above (n 8).

¹⁹ L Festinger, A Pepitone, T and Newcomb, 'Some Consequences of De-Individuation in a Group' (1952) 47 *Journal of Abnormal and Social Psychology* 382; PG Zimbardo, 'The Human Choice: Individuation, Reason, and Order vs Deindividuation, Impulse, and Chaos' in WJ Arnold and D Levine (eds), *Nebraska Symposium on Motivation* (Lincoln, University of Nebraska Press, 1969) 237.

situational group and context norms. Adaptation to group norms occurs regardless of their accordance with general social norms.²⁰

The validity of the assumptions of the Social Identity Approach has been proved by several experiments.²¹ A thorough meta-analysis also showed that deindividuation effects found in different studies can better be explained with a social identity model based on the Social Identity Approach,²² the 'Social Identity Model of Deindividuation Effects' (SIDE).

Human beings can be categorised by their belonging to very different groups. These groups can be small (like a group of friends) or large (like a group defined by nationality or religion). Obviously, not all of these possible group-related categorisations are important for a specific situational self-concept. According to Self-Categorization Theory, the relevant in-group/out-group dichotomy will be chosen based on the *salience* of the differentiation in a current situation. Salience is a function of *accessibility* and *fit*.²³ Accessibility of an in-group/out-group differentiation depends on how far a person is used to thinking in such categories. Fit, on the other hand, is an aspect of the situation: How strong are the situational cues that activate a certain in-group/out-group dichotomy?

The accessibility of a certain social identity can be enhanced by ideology: ideologies (ie, 'systems of shared beliefs, ideas, and symbols that help us make sense of the world around us', according to Alvarez)²⁴ are the backdrop of in-group/out-group categorisations. People tend to rely on ideologies allowing for positive group distinctiveness in problematic times.²⁵ Apart from manipulating accessibility, an ideology is also a tool of social creativity (in the meaning defined above) and redefines for the in-group the criteria of comparison, the value of these criteria and/or the relevant out-groups to compare with.

Alvarez²⁶ identifies several ideologies which are especially prone to political or genocidal violence.²⁷ These are nationalism, glorification or mythologisation of past victimisation, dehumanisation, scapegoating, an absolutist worldview and utopianism. I have explained the contents and relevance of each of these ideology

²⁰ T Postmes and R Spears, 'Deindividuation and Antinormative Behavior: A Meta-Analysis' 123 (1998) *Psychological Bulletin* 238, 254.

²¹ Groundbreaking H Tajfel, MG Billig, RP Bundy and C Flament 'Social Categorization and Inter-Group Behaviour' (1971) 1 *European Journal of Social Psychology* 149; for further references, cf Reicher, Spears and Haslam, above (n 14).

²² Postmes and Spears, above (n 20).

²³ Turner et al, above (n 8) 54–55.

²⁴ A Alvarez 'Destructive Beliefs: Genocide and the Role of Ideology' in A Smeulers and R Haveman (eds), *Supranational Criminology: Towards a Criminology of International Crimes* (Antwerp, Intersentia, 2008) 216.

²⁵ See E Staub, 'Individual and Group Identities in Genocide and Mass Killing' in RD Ashmore, L Jussim and D Wilder (eds), *Social Identity, Intergroup Conflict, and Conflict Reduction* (Oxford, Oxford University Press, 2001) 164–66.

²⁶ Alvarez, 'Destructive Beliefs', above (n 24).

²⁷ See also the partially differing approach by JL Maynard, 'Rethinking the Role of Ideology in Mass Atrocities' (2014) 26 *Terrorism and Political Violence* 821.

types elsewhere.²⁸ But it is necessary to take a closer look at dehumanisation from a social identity perspective. Dehumanisation helps persons overcome their natural inhibitions against murder and killing by defining others as sub-human or non-human. There are several examples for ideologies that dehumanise an out-group, like the anti-Semitic ideology of the Nazis that led to the Holocaust or the ideology of the Hutu in the Rwandan genocide of the Tutsi. In the light of the Social Identity Approach, the specific dangerousness of a dehumanising ideology becomes obvious: dehumanisation shifts the level of comparison. From the perspective of the Self-Categorization theory it allows people to understand these ideology-defined 'sub-humans' or 'non-humans' not simply as members of a certain out-group, but as enemies of humankind.

Now, how would ideology as a tool for social identity improvement play out in practice? Think of a group of lower-class, poor, insufficiently educated and socially disadvantaged persons, who, by the accident of birth, happen to be white males with a certain nationality. If they embraced a racist, sexist and nationalistic ideology, this would help to improve their social identity: they would continue to be uneducated, poor and socially disadvantaged, yet the groups they compare with and the categories of comparison would shift. According to their ideology, they could see themselves as automatically superior to others, who do not share the same criteria. Comparisons with such out-groups becomes both more relevant and more advantageous. Yet, they will perhaps feel that their being poor and disadvantaged is very unfair, given the reputed 'natural superiority' of their kind. Thus, such an ideology will also foster social competition and from the ideology-blurred perspective of the in-group justify violent acts against out-groups.

As mentioned before, ideology is also a powerful tool to manipulate accessibility: one subscribing to a racist, sexist and nationalistic ideology will get used to give priority to these criteria and will more often and more easily find situational cues triggering the specific in-group/out-group dichotomy. As ideology spreads and is learned and adopted by others, accessibility increases in a population and more situations fitting the ideology-based dichotomy will be identified.

Within groups sharing a social identity, the social influence of prototypical group members (for example, the group leaders) leads to an adaptation of individuals to group norms. Social influence is even important for the knowledge and information shared by the group. It could be shown that the social influence of the person sharing a piece of information is more important than the objective truth of it.²⁹ This is also the reason why fake news, superstitions or prejudice are gladly adopted and shared as long as they stem from influential in-group members. This leads to a distorted perspective on reality.³⁰

²⁸ S Harrendorf, 'How Can Criminology Contribute to an Explanation of International Crimes?' (2014) 12 *Journal of International Criminal Justice* 234.

²⁹ Reicher, Spears and Haslam, above (n 14).

³⁰ See also with respect to such occurrences on the internet G Nordheim, 'Poppers Alptraum' (2016) *European Journalism Observatory*, available at: de.ejo-online.eu/digitales/poppers-alptraum; M Del Vicario, A Bessi, F Zollo, F Petroni, A Scala, G Caldarelli, HE Stanley and W Quattrociocchi

Social identity also underlies obedience effects. For example, Milgram's famous experiments³¹ are open to a social identity interpretation,³² which is more plausible than the classical way these experiments are understood. Before discussing this, it is necessary to recapitulate the experiments,³³ as we will have to go into some of the details of the experimental arrangements. Milgram's subjects seemingly had to administer increasingly strong electric shocks (from 15 up to 450 Volts in steps of 15 Volts) to a third person (the learner) by command of the experimenter each time the learner made a mistake in a simple memory test. The learner was just played by an actor and true electric shocks were not delivered, but this was unknown to the subjects. With increasing shock level, the learner reacted more strongly (up to outright screaming), showed growing protest and finally refused to give any further answers. If the naive subject wanted to stop, the experimenter used four different so-called 'prods':

Prod 1: Please continue, or, please go on.

Prod 2: The experiment requires that you continue.

Prod 3: It is absolutely essential that you continue.

Prod 4: You have no other choice, you must go on.³⁴

If prod 1 was successful, the experimenter would not use the other prods. Otherwise, prod 2 would be chosen. If this was unsuccessful, prod 3 would be next and eventually the experimenter would come to prod 4.

Overall, many more persons conformed than anticipated, although with strong variation based on the proximity to the fake victim. In the so-called remote feedback condition, where the learner was placed in another room and was not heard by the subject, except for a loud banging on the wall at 300 Volts, followed by no response to any further questions of the naive teacher, 66 per cent of the subjects continued until the highest voltage level. In the touch-proximity condition, on the other hand, the subject was not only in the same room as the learner, but the learner also had to touch a metal plate in order to receive the (fake) shocks. From 150 Volts on, the learner refused to touch the plate voluntarily and the subject had to push his hand down onto the plate in order to execute the next shocks. In this condition, only 30 per cent of all subjects continued until the highest

'The Spreading of Misinformation Online' (2016) 113 *Proceedings of the National Academy of Sciences* 554.

³¹ S Milgram 'Some Conditions of Obedience and Disobedience to Authority' (1965) 18 *Human Relations* 57; S Milgram, *Obedience to Authority: An Experimental View* (New York, Harper & Row, 1974); citations based on the 2017 e-book edition of the work.

³² SD Reicher and SA Haslam 'After Shock? Towards a Social Identity Explanation of the Milgram "Obedience" Studies' (2011) 50 *British Journal of Social Psychology* 163.

³³ See also Harrendorf, above (n 28) 237–41.

³⁴ Milgram, *Obedience to Authority*, above (n 31) 48.

voltage level.³⁵ There were several replications of the experiments carried out by other researchers, which generally confirm Milgram's findings.³⁶

Reicher and Haslam noticed that in all the transcripts of the experiments Milgram published, prod 4 is only used once, and with a negative effect.³⁷ Being confronted with prod 4, the subject states: 'If this were Russia maybe, but not in America' and refuses to continue. The experiment is terminated at the 150 Volts level.³⁸ If prod 4 was ever used successfully by Milgram cannot be found out. Yet, we can turn to the replication study by Burger for further information. As is shown in Burger, Girgis and Manning,³⁹ subjects confronted with prod 1 continued with the procedure in 64.3 per cent of all cases. After prod 2, 45.7 per cent of the subjects continued, 10.5 per cent continued after prod 3, and 0.0 per cent (!) continued after prod 4. This result casts some doubt on the common assumption that the continuation of subjects in Milgram's experiments was due to obedience to orders.

While it is true that many subjects conformed to the requirements of the experiments, seemingly this is not due to orders they received, as the only prod that is exactly phrased as an order was the one that was always unsuccessful. It is more plausible that the obedience Milgram found was due to group effects: the test subjects usually teamed up with the experimenter in the remote feedback condition and remained at his side, while the proximity conditions made it easier to change sides and support the victim. Milgram also saw this and clearly refers to this 'incipient group formation' in his 1965 publication.⁴⁰ Indeed, the experiments show that many test subjects were able to socially identify with the experimenter and join him in a seemingly important scientific endeavour. Accordingly, obedience rates drop as soon as the experimenter is not associated any more with the prestigious University of Yale, like in experiment 10, which is carried out in a rundown office building in Bridgeport.⁴¹ Even lower obedience rates were found as soon as an ordinary man was chosen to give orders as a substitute for the experimenter, who seemingly had to leave the experiment earlier.⁴²

But why did people conform less the more the prods were phrased as orders? The reason might be that the illusion of a shared social identity as partners in an important scientific endeavour is destroyed as soon as the experimenter tries to

³⁵ Milgram, 'Some Conditions of Obedience and Disobedience to Authority', above (n 31) 62.

³⁶ eg, JM Burger, 'Replicating Milgram: Would People Still Obey Today?' (2009) 64 *American Psychologist* 1; J-L Beauvois, D Courbet and D Oberlé, 'The Prescriptive Power of the Television Host: A Transposition of Milgram's Obedience Paradigm to the Context of TV Game Show' (2012) 62 *Revue Européenne de Psychologie Appliquée* 111. See also with further references A Smeulders and F Grünfeld, *International Crimes and other Gross Human Rights Violations* (Leiden, Martinus Nijhoff Publishers, 2011) 222–27.

³⁷ Reicher and Haslam, 'After Shock?', above (n 32) 167–68.

³⁸ Milgram, *Obedience to Authority*, above (n 31) 74–75.

³⁹ JM Burger, ZM Girgis and CC Manning 'In Their Own Words: Explaining Obedience to Authority Through an Examination of Participants' Comments' (2011) 2 *Social Psychological and Personality Science* 464.

⁴⁰ Milgram, 'Some Conditions of Obedience and Disobedience to Authority', above (n 31) 64.

⁴¹ Milgram, *Obedience to Authority*, above (n 31) 93–97.

⁴² Experiment 13, Milgram, *Obedience to Authority*, above (n 31) 119–24.

impose himself over the test subjects.⁴³ Therefore, while it can still be assumed that Milgram's experiments refer to legitimate authority, these are not experiments that show an isolated obedience effect with regard to orders or commands. It is plausible that – apart from situations where force or threat of force is present – authority depends on processes of social identification.

This is also somewhat confirmed by the seminal work of Tyler who showed that spontaneous conformity to legitimate authority can be separated from the effect of threat of force as a means of obedience enforcement, but also from conformity due to an internalised value system.⁴⁴

There are further studies that show the relevance of a Social Identity Approach to international crimes. In an earlier publication,⁴⁵ I already showed how strongly processes of social identification influence the results of the (in)famous Stanford Prison Experiment.⁴⁶ In that experiment volunteer students were randomly assigned to become guards and prisoners of a mock prison and were briefed accordingly.

From a social identity perspective, it is especially important what Zimbardo, who was also playing the role of prison superintendent, told the students assigned to become guards in their initial briefing. As can be seen in original film footage of the experiment,⁴⁷ Zimbardo said that they can create in the prisoners

feelings of boredom, ... a sense of fear in them to some degree, you can create a notion of arbitrariness that their life is totally controlled by us, by the system, you, me, ... and they have no privacy at all ... We are going to take away their individuality in various ways. In general, what all this leads to is a sense of powerlessness. That is, we have total power in this situation and they have none.

Guards and prisoners also received costumes that were designed to reduce their individuality and increase a common group identity;⁴⁸ the prisoners' clothing additionally had a humiliating and degrading quality. They were only addressed by numbers instead of names.

The experiment had to be ended much earlier than planned, as mock guards had started to show increasingly abusive behaviour and some mock prisoners were in states of severe stress. Prison guards had set up an oppressive regime, with a faction of the guards group showing sadistic or very strong oppressive behaviour, another faction being tough but fair and a third faction reluctant to use their power.⁴⁹ Zimbardo himself preferred a purely situational interpretation, stressing

⁴³ Reicher and Haslam, 'After Shock?', above (n 32) 168.

⁴⁴ TR Tyler, *Why People Obey the Law* (New Haven, CT, Yale University Press, 1990).

⁴⁵ Harrendorf, above (n 28) 242–45.

⁴⁶ C Haney, C Banks and PG Zimbardo 'Interpersonal Dynamics in a Simulated Prison' (1973) 1 *International Journal of Criminology and Penology* 69; PG Zimbardo, *The Lucifer Effect: Understanding How Good People Turn Evil* (New York, Random House, 2007).

⁴⁷ K Musen and PG Zimbardo, *Quiet Rage: The Stanford Prison Experiment* (DVD, Stanford, Stanford University, 2004).

⁴⁸ Haney, Banks and Zimbardo, above (n 46) 75–76.

⁴⁹ *ibid*; Zimbardo, *The Lucifer Effect*, above (n 46) 196–97.

that he selected only persons for the experiment who did not show any psychological abnormalities and who were randomly assigned to play guards or prisoners.⁵⁰

Yet, a more plausible explanation of the results of the experiment relies on the Social Identity Approach: apart from the symbols of power provided to the guards as social cues, the role expectations were clearly stated by Zimbardo in his initial briefing, which could be understood as an invitation to abuse of power.⁵¹ In Reicher's and Haslam's own replication of the prison experiment, they left it up to the guards themselves to develop a joint social identity and did not provide them with role expectations. This newer experiment (the BBC prison study) ended very differently. The guards, who were never able to develop a strong group identity, did not install a regime of terror, but were overthrown by the prisoners.⁵²

A Social Identity Approach also offers an excellent explanation for the well-known effect of group polarisation.⁵³ Groups whose opinions on a certain topic tend towards one extreme of the possible spectrum of opinions before a discussion of the topic develop an even more radical opinion on the topic after the discussion.⁵⁴ According to Self-Categorization Theory, this is due to adaptation processes towards the opinion of the prototypical group member. Prototypicality does not only require an opinion to represent the opinions of the other group members, but also to distinguish the in-group as well as possible from the out-group: the prototypical opinion needs an optimal meta contrast.⁵⁵ Indeed, studies have shown that polarisation mainly depends on the need to be distinct from a relevant out-group.⁵⁶

Group stereotypes and group support⁵⁷ also help to reduce the amount of cognitive dissonance a person incurs who does not act in accordance with his or her moral standards. Social identity effects are therefore also important for the theory of neutralisation techniques, a theory that, although initially developed

⁵⁰ Zimbardo, *ibid.*

⁵¹ Reicher and Haslam, 'Rethinking the Psychology of Tyranny', above (n 9).

⁵² For a discussion of the BBC prison study, also see consenting JC Turner, 'Tyranny, Freedom and Social Structure: Escaping our Theoretical Prisons' (2006) 45 *British Journal of Social Psychology* 41; dissenting PG Zimbardo, 'On Rethinking the Psychology of Tyranny: The BBC Prison Study' (2006) 45 *British Journal of Social Psychology* 47; and summing up SA Haslam and S Reicher, 'Debating the Psychology of Tyranny: Fundamental Issues of Theory, Perspective and Science' (2006) 45 *British Journal of Social Psychology* 55.

⁵³ *cf* Turner et al, above (n 8) 142–70.

⁵⁴ See, eg, DG Myers, 'Group Polarization' in JM Levine and MA Hogg (eds), *Encyclopedia of Group Processes and Intergroup Relations* (Thousand Oaks, CA, SAGE, 2010) 361.

⁵⁵ Turner et al, above (n 8) 142–70; E-J Lee, 'Deindividuation Effects on Group Polarization in Computer-Mediated Communication: The Role of Group Identification, Public-Self-Awareness, and Perceived Argument Quality' (2007) 57 *Journal of Communication* 385.

⁵⁶ SP Nicholson, 'Polarising Cues' (2012) 56 *American Journal of Political Science* 52, 56; E Suhay, 'Explaining Group Influence: The Role of Identity and Emotion in Political Conformity and Polarization' (2015) 37 *Political Behavior* 221.

⁵⁷ Regarding the latter, see BM McKimmie, DJ Terry, MA Hogg, ASR Manstead, R Spears and B Doosje, 'I'm a Hypocrite, but so is Everyone Else: Group Support and the Reduction of Cognitive Dissonance' (2003) 7 *Group Dynamics* 214; also see L Festinger, H Riecken and S Schachter, *When Prophecy Fails* (Minneapolis, MN, University of Minnesota Press, 1956).

to explain juvenile delinquency,⁵⁸ has turned out to become perhaps the most preferred explanatory approach to international crimes.⁵⁹ Yet, the available variants of this theory, plausible as they seem as an at least partial explanation of international crimes,⁶⁰ do not sufficiently address group effects. These effects are somehow reflected in the technique called 'appeal to higher loyalties', but it needs to be considered that for group crimes (like international crimes) group effects interfere with the other techniques, too.

III. Individual Characteristics and Self-Selection of Perpetrators

Nowadays it is widely accepted that individual involvement in mass atrocities for the vast majority of perpetrators is not due to specific psychological abnormalities.⁶¹ Only few of those who participate in such events can be diagnosed with a sadistic paraphilia or can be considered as 'psychopaths' in the meaning of a person scoring high on the PCL-R checklist.⁶² When authors write that the perpetrators of international crimes are 'ordinary people', this is often done in relation to this fact. But what does this actually mean? From history⁶³ and from the famous social psychological experiments that are considered to shed light on the willingness of people to participate in international crimes, like the Stanford Prison Experiment⁶⁴ or Milgram's experiments,⁶⁵ we know that not everyone participates in international crimes. Even under the exceptional circumstances that allow for international crimes to occur, individuals retain the possibility to decide. And the decision to participate is only one option; the majority in a population usually acts as mere bystanders, not perpetrators. Finally, some try to resist or rebel against the murderous plans and actions of the perpetrators. The 'ordinary people' hypothesis somewhat obfuscates this finding, as it entails the notion that there is nothing special about the perpetrators. But perhaps there is?

⁵⁸ GM Sykes and D Matza 'Techniques of Neutralization: A Theory of Delinquency' (1957) 22 *American Sociological Review* 664.

⁵⁹ See A Bandura, *Agression: A Social Learning Analysis* (Englewood Cliffs, NJ, Prentice-Hall, 1973); Jäger, above (n 2); A Alvarez, 'Adjusting to Genocide: The Techniques of Neutralization and the Holocaust' (1997) 21 *Social Science History* 139; S Cohen, *States of Denial: Knowing about Atrocities and Suffering* (Cambridge, Polity Press, 2001).

⁶⁰ For a more detailed discussion, see Harrendorf, above (n 28) 249–51.

⁶¹ Smeulers, above (n 5); T Blass, 'Psychological Perspectives on the Perpetrators of the Holocaust: The Role of Situational Pressures, Personal Dispositions, and their Interactions' (1993) 7 *Holocaust and Genocide Studies* 30.

⁶² RD Hare, *Hare Psychopathy Checklist-Revised (PCL-R): Technical Manual*, 2nd edn (North Tonawanda, NY, Multi-Health Systems, 2007).

⁶³ See, eg, DR Mandel, 'The Obedience Alibi: Milgram's Account of the Holocaust Reconsidered' (1998) 20 *Analyse & Kritik* 74, 86–87.

⁶⁴ Haney, Banks and Zimbardo, above (n 46).

⁶⁵ Milgram, 'Some Conditions of Obedience and Disobedience to Authority' and Milgram, *Obedience to Authority*, both above (n 31).

Another problematic issue of this hypothesis is that being psychologically 'normal' is seen as something that is specific for perpetrators of international crimes. Yet, this is not true: criminological research shows that at least minor criminal offences are ubiquitous in every society around the world.⁶⁶ At least during adolescence, almost everyone commits at least some minor offences. Crime is a normal by-product of maturation processes.⁶⁷ And even 'career criminals' are usually not 'abnormal'. Of course, a relevant number of them can be diagnosed with an antisocial personality disorder,⁶⁸ but this is not surprising, as this disorder revolves around the core personality elements of habitual felons. Therefore, the notion of 'ordinariness' can mainly be explained with a view to the large discrepancy between the exceptional brutality and mercilessness of macro-criminal events and the unexceptional personality traits of the perpetrators. It is a means to express our astonishment and bewilderment about what humans are capable of, but it is of limited explanatory value.

All facts available on actual international crimes that have occurred in the history of humankind and all empirical results of social psychological experiments simulating atrocity-prone situations show that we must not only reject a purely individual, but also a purely situationist approach to explain international crimes. We have to assume that individual and situational factors interact.⁶⁹ The term 'ordinary people' refers to people, who would not have committed such acts under 'normal' circumstances, but it does not mean that there are no personality traits that foster participation. Therefore, it is necessary to identify such 'sleeper' traits.⁷⁰

From a social identity perspective, we can systematise the interactionist approach as follows: although a Social Identity Approach to international crimes relies on group effects to explain individual behaviour, everything begins with self-selection. Which groups persons join or refrain from joining is not at all random but can be largely explained by processes of self-selection.⁷¹ Joining the group then usually means self-categorisation of oneself as a group member in situations in which the social identity derived from this group becomes salient. In such situations, depersonalisation sets in, leading to an adaptation to group norms. Further polarisation of the whole group occurs after discussion of topics for which the group tends towards an extreme position. In addition, a common group knowledge emerges, not necessarily related to an 'objective' truth. Finally, criminal acts may occur, motivated by group ideology and in accordance with group norms.

⁶⁶ See, eg, E Durkheim, *Les règles de la méthode sociologique* (Paris, Félix Alcan, 1985).

⁶⁷ See M Rocque 'The Lost Concept: The (Re)emerging Link between Maturation and Desistance from Crime' (2015) 15 *Criminology & Criminal Justice* 340.

⁶⁸ SA De Brito and S Hodgins, 'Die Antisoziale Persönlichkeitsstörung des DSM-IV-TR: Befunde, Untergruppen und Unterschiede zu Psychopathy' (2009) 3 *Forensische Psychiatrie Psychologie Kriminologie* 116.

⁶⁹ SA Haslam and S Reicher 'Beyond the Banality of Evil: Three Dynamics of an Interactionist Social Psychology of Tyranny' (2007) 33 *Personality and Social Psychology Bulletin* 615.

⁷⁰ Steiner, above (n 10).

⁷¹ Haslam and Reicher, 'Beyond the Banality of Evil', above (n 69).

The interactionist perspective, therefore, means that humans, as far as possible, decide which group to found or join. Each individual influences the topic, knowledge, norms and positions of the group. But the group also changes the persons who join it.

This interactionist perspective shows that it is crucial to identify the individual reasons leading people to join certain groups or feel like a group member, stay in the group and influence its position in a certain way. First, it is necessary to understand the ongoing self-selection processes. Take, as an example, the reserve police battalions in Nazi Germany. They might perhaps have consisted of ordinary reserve police officers, but not simply of 'ordinary men', as Browning insinuates.⁷² Several had a policing career in Nazi Germany, were Nazi Party members etc.⁷³ Studies also show that police officers even in our times and in a democratic society often show a stronger tendency toward right-wing authoritarianism than average persons outside the police forces.⁷⁴

For the Stanford Prison Experiment, Haney, Banks and Zimbardo report that they took out a newspaper advertisement, searching for male college students willing to take part in a psychological study on 'prison life'.⁷⁵ They carried out several psychological tests on the 75 volunteers found this way and only included in the study 'the 24 subjects who were judged to be most stable (physically and mentally), most mature, and least involved in anti-social behavior'.⁷⁶ Finally, the roles of guards and prisoners were also assigned randomly. Yet, self-selection might have been an important factor here, since the newspaper advertisement looked for volunteers for a study on 'prison life'. Carnahan and McFarland showed that such an advertisement attracts people with significantly higher scores of aggressiveness, authoritarianism, Machiavellianism, narcissism and social dominance, but lower scores on empathy and altruism than in a control group, where the words 'prison life' were omitted from the advertisement.⁷⁷ In addition, the test results of the participants in the Stanford Prison Experiment reported by Haney, Banks and Zimbardo for the authoritarianism (F-)Scale and the Machiavellianism scale seem to have been well above average,⁷⁸ although this cannot be fully confirmed due to a somewhat insufficient description of the exact versions of the scales used. In comparison, the participants in the BBC prison study, in which the guards did not show abusive behaviour, scored distinctly lower on the F-Scale.⁷⁹

⁷² Browning, above (n 5).

⁷³ M Mann, 'Were the Perpetrators of Genocide "Ordinary Men" or "Real Nazis"? Results from Fifteen Hundred Biographies' (2000) 14 *Holocaust and Genocide Studies* 331.

⁷⁴ J Gatto and M Dambrun, 'Authoritarianism, Social Dominance, and Prejudice among Junior Police Officers: The Role of the Normative Context' (2012) 43 *Social Psychology* 61; J Gatto, M Dambrun, C Kerbrat and P De Oliveira, 'Prejudice in the Police: On the Processes Underlying the Effects of Selection and Group Socialisation' (2010) 40 *European Journal of Social Psychology* 252.

⁷⁵ Haney, Banks and Zimbardo, above (n 46).

⁷⁶ *ibid*, 73.

⁷⁷ T Carnahan and S McFarland, 'Revisiting the Stanford Prison Experiment: Could Participant Self-Selection Have Led to the Cruelty?' (2007) 33 *Personality and Social Psychology Bulletin* 603.

⁷⁸ Haney, Banks and Zimbardo, above (n 46).

⁷⁹ Carnahan and McFarland, above (n 77).

Individual characteristics are also of explanative value for Milgram-type experiments. This becomes already visible in Milgram's original experiments. He wrote:

This subject did not want to shock the victim, and he found it an extremely disagreeable task, but he was unable to invent a response that would free him from E's authority. Many subjects cannot find the specific verbal formula that would enable them to reject the role assigned to them by the experimenter. Perhaps our culture does not provide adequate models for disobedience.⁸⁰

In a study by Begue et al.,⁸¹ which adapted the experimental condition of Milgram to a (fake) TV show context and found results very much in line with Milgram's original studies, the researchers showed that obedience is significantly and positively influenced by high scores of conscientiousness and agreeableness, two factors of the well-known five-factor personality model. Persons scoring high on conscientiousness tend towards self-discipline, sense of duty, aim for achievement and organisation and favour norms and conformity.⁸² Agreeable persons also avoid norm violations and prefer not to upset people; they tend to conform with social expectations.⁸³ Hence, it is not so very surprising that these seemingly 'positive' character traits are connected with obedience in Milgram-type experiments. The above quotation by Milgram seems to be a good description of the inner conflicts a highly conscientious or agreeable person has to endure when confronted with such a task.⁸⁴ He also found significant influences of political orientation and political activism: persons who defined themselves as being on the Left of the political spectrum tended towards less obedience. The same was true for people who showed higher political activism, measured by whether they had ever signed a petition, attended a lawful demonstration, joined an unofficial strike, and/or occupied buildings or factories, or if they would at least consider doing so in the future. Yet, a more detailed analysis showed that this factor was only significant for female participants (without any explanation given).

The above-mentioned replication study by Burger did not find any significant correlations between the decision to stop and empathic concern or desire for control, i.e. the desire to have personal control over occurring events.⁸⁵ Yet, he found at least correlations between these scores and the individual first prod score, i.e. the moment at which the first of the standardised prods (i.e. 'Please continue' or 'Please go on') had to be used to motivate subjects to continue. Obviously neither empathic concern nor desire for control were able to predict defiance. It can be theorised that they will not help much if a person is highly agreeable and

⁸⁰ Milgram, 'Some Conditions of Obedience and Disobedience to Authority', above (n 31) 67.

⁸¹ L Bègue, J-L Beauvois, D Courbet, D Oberlé, J Lepage and A Duke 'Personality Predicts Obedience in a Milgram Paradigm' (2015) 83 *Journal of Personality* 299.

⁸² *cf* *ibid*, 301.

⁸³ *ibid*, 300.

⁸⁴ *ibid*.

⁸⁵ Burger, above (n 36).

conscientious. With respect to the replication study by Burger, the individual comments of the test subjects during and after the experiment were also systematically analysed. Here, it turned out that significantly more persons who expressed a feeling of personal responsibility for what happened to the learner during the experiment or in the de-briefing session stopped their participation in the experiment before reaching the 150 Volts level.⁸⁶

These important findings already show some personality traits and personality aspects that might predict participation in international crimes for 'normal' persons. They show that, apart from the occasional sadist or dark triad personality,⁸⁷ much more common traits are relevant.⁸⁸

This also allows for some relevant prevention strategies to be developed. Conscientiousness and agreeableness are not necessarily fully positive character traits. Although some degree of compliance and friendliness in social contacts is obviously necessary for society to exist, we should educate our children to become critical thinkers, not accepting rules just because they exist, but only because they are useful and necessary. The ideals of the Enlightenment and the Kantian categorical imperative should become primary moral goals of education. Children should also learn that being a 'good boy' or 'good girl' is not a virtue in itself, and that there might come situations in which they need to stand up against someone and reject his or her demands politely, but firmly. This is, obviously, not only helpful for the prevention of international crimes, but also helps to prevent more common events like sexual abuse. It can also be assumed that the preventive effect of a left-wing political orientation found by Begue et al⁸⁹ is actually due to the absence of authoritarianism in these test subjects. Therefore, this result fits well with the results from experiments of the Stanford Prison type. The educational ideals described above should actually also reduce the prevalence of authoritarian personality traits. Finally, a feeling of personal responsibility for outcomes of situations and a desire for control should be related to each other from a theoretical viewpoint. An education aiming at raising children to become freethinking, independent adults should foster such traits, too.

IV. Towards a Comprehensive Interactionist Theory

Which consequences has the social identity perspective on international crimes developed here for criminological theory? Ideally, we should have a comprehensive interactionist theory, integrating personality and situational aspects in a general

⁸⁶ Burger, Girgis and Manning, above (n 39).

⁸⁷ 'Dark triad' = Machiavellianism, psychopathy and narcissism. See DL Paulhus and KM Williams, 'The Dark Triad of Personality: Narcissism, Machiavellianism, and Psychopathy' (2002) 36 *Journal of Research in Personality* 556.

⁸⁸ For an offender typology, cf Smeulers, above (n 5).

⁸⁹ Bègue et al, above (n 81).

causal model. Such a model should not be eclectic,⁹⁰ but should be based on a thought through general concept. It should also not be too specific and limited in applicability, as is the case for the Collective Action Theory of Genocide by Hagan and Rymond-Richmond.⁹¹ Pruitt suggested certain expansions and modifications of the theory,⁹² but it would still remain a theory aiming only at the explanation of genocide. Ideally, the same theory should be applicable for international crimes as for other crimes.

Which modifications would a Social Identity Approach to international crimes bring for criminological theory? As already mentioned in the introduction, it should lead to the rediscovery of the social group in criminology.⁹³ What we can learn from the study of international crimes is that criminality cannot simply be understood as deviance from legal and social norms, but also as a result of an adaptation to and conformity with group norms. This is not only true for international crimes, but also applies to 'normal' criminality.

It is a well-known fact that delinquent peers are a relevant risk factor for offending.⁹⁴ Behind this correlation, we can expect some situational aspects, but also the effects of group formation and social identity processes. Early subculture theories⁹⁵ have seen this prescriptive effect of deviant group norms, yet they over-simplified by assuming inverse normative values, while reality is much more complex. However, it is interesting to see that Cohen in an early publication had already stressed the importance of social identity for the understanding of criminality.⁹⁶

Until now, the theory of neutralisation techniques⁹⁷ has been the one used most frequently to explain international crimes.⁹⁸ While there is some truth in this theory,⁹⁹ it cannot be expanded to a full explanatory concept. Neutralisation theories only explain how perpetrators may overcome moral inhibitions against offending by redefining a situation in a way that its immoral aspects are neutralised, but they cannot explain why someone would want to commit the crime in the first place: motivation is necessarily absent from this theory and can also not easily be added to it. Another theory commonly understood to be of explanatory value for international crimes is Tittle's Control Balance Theory.¹⁰⁰ Yet, in this respect it

⁹⁰ Like the one developed by Rothe, above (n 3).

⁹¹ J Hagan and W Rymond-Richmond, *Darfur and the Crime of Genocide* (Cambridge, Cambridge University Press, 2009).

⁹² WR Pruitt, 'How Criminology Can Engage in the Theorizing on Genocide?' (2014) 9 *International Journal of Criminal Justice Sciences* 1.

⁹³ To borrow from the title of Turner et al, above (n 8).

⁹⁴ Just see Wikström, 'Why Crime Happens', above (n 13).

⁹⁵ AK Cohen, *Delinquent Boys* above (n 11); Yinger, above (n 11).

⁹⁶ AK Cohen, 'The Sociology of the Deviant Act: Anomie Theory and Beyond' (1965) 30 *American Sociological Review* 12.

⁹⁷ Sykes and Matza, above (n 58).

⁹⁸ eg, by Bandura, above (n 59); Jäger, above (n 2); Alvarez, 'Adjusting to Genocide', above (n 58); Cohen, above (n 59).

⁹⁹ cf Harrendorf, above (n 28) 248–51.

¹⁰⁰ CR Tittle, *Control Balance: Toward a General Theory of Deviance* (Boulder, CO, Westview Press, 1995); CR Tittle, 'Refining Control Balance Theory' (2004) 8 *Theoretical Criminology* 395.

is mainly a theory that helps explain the criminality of the masterminds behind macro-criminal events,¹⁰¹ while it has nothing specific to offer with respect to the participation of 'ordinary' people. It is very plausible that many of them live their lives in a state of control balance and should therefore not offend at all.

There have been many other approaches to explain international crimes in the recent years, inter alia, an approach trying to explain international crimes from a life-course perspective.¹⁰² Yet, the most promising theoretical development of the last few years has emerged in the field of action theories. While for many years, criminology mainly knew one fully-fledged action theory, the overly simple rational choice theory,¹⁰³ in recent years theory development in this area has made important progress. In the English literature and internationally, it is mainly Situational Action Theory that comes to mind here.¹⁰⁴ German sociologists also developed the Model of Frame-Selection as a general sociological action theory,¹⁰⁵ which can also be applied to criminal actions.¹⁰⁶

Such action theories are excellent candidates for an explanation of international crimes,¹⁰⁷ as they are interactionist per se. They explain the decision of an actor in a situation based on the interaction of him or her with a certain situational setting: 'It's all about interactions.'¹⁰⁸ Situational Action Theory explains crimes as 'moral actions.'¹⁰⁹ According to the theory,¹¹⁰ the first important issue is that we automatically apply a moral filter, when assessing the action alternatives that are available to us when we react on motivations (temptations or provocations). The theory assumes that not only persons have moral values, but that the setting also provides us with moral cues. In situations in which a criminal action alternative runs counter to our own morality and is also against the morality of the setting, this option will not pass the moral filter and we will habitually choose a legal action. If, on the other hand, a criminal action alternative does not violate our individual morality and is also in line with the moral cues of the setting, it is equally plausible that only this criminal action alternative is seen and, once again, habitually chosen (or choice is only made between different criminal actions). Finally, if individual

¹⁰¹ See HE Müller, 'Staatsführungen als Tätergemeinschaften am Beispiel der Gefangenenmisshandlungen und Folter in Guantanamo und Abu Ghraib' in HE Müller, GM Sander and H Válková (eds), *Festschrift für Ulrich Eisenberg zum 70. Geburtstag* (München, Beck, 2009) 83.

¹⁰² HN Brehm, C Uggen and J-D Ne Gsanabo, 'Age, Gender, and the Crime of Crimes: Toward a Life-Course Theory of Genocide Participation' (2016) 54 *Criminology* 713.

¹⁰³ GS Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 *Journal of Political Economy* 169.

¹⁰⁴ Wikström, 'Crime as Alternative' and 'Why Crime Happens', above (n 13).

¹⁰⁵ See C Kroneberg, 'Die Definition der Situation und die variable Rationalität der Akteure: Ein allgemeines Modell des Handelns' (2005) 34 *Zeitschrift für Soziologie* 344.

¹⁰⁶ S Eifler, *Kriminalität im Alltag: Eine handlungstheoretische Analyse von Gelegenheiten* (Wiesbaden, Springer VS, 2009).

¹⁰⁷ Situational Action Theory is insofar also utilised by Drenkhahn, above (n 13).

¹⁰⁸ P-O Wikström, D Oberwittler, K Treiber and B Hardie, *Breaking Rules: The Social and Situational Dynamics of Young People's Urban Crime* (Oxford, Oxford University Press, 2012) 405.

¹⁰⁹ Wikström, 'Why Crime Happens', above (n 13).

¹¹⁰ Wikström, 'Crime as Alternative' and 'Why Crime Happens', above (n 13); Wikström et al, above (n 108).

morality is not in line with the moral cues of the setting, usually both criminal and legal action alternatives will be identified. Then, an actual conscious decision process is necessary. Here, morality becomes important once again. If the criminal action alternative does not run counter to our own moral standards and allows us to fulfil our motivation, we will, in principle, choose it, if no external controls active in the setting (deterrents) hinder us. If, on the other hand, the criminal action alternative is not in line with our moral standards, but fits the moral cues of the setting, we will still choose the criminal action alternative if it fulfils our motivation and the internal controls active in the setting (self-control) do not sufficiently hinder us.

The Model of Frame-Selection¹¹¹ also provides a (somewhat more complex) action theory. This theory assumes that the process of deciding upon an action can actually be structured into three phases: frame selection, script selection and action selection. Prior to each of these phases, a subconscious process of mode selection takes place, in which the brain decides whether the following selection process can be carried out in an automatic-spontaneous (AS) mode or needs to be carried out in a reflective-calculative (RC) mode. The AS mode is selected if accessibility and fit (two concepts already explained above) allow for it, since we already have an accessible frame, script or action available that fits the current situation. If such a frame, script or action is not available, we will need to decide in RC mode, which Kroneberg bases on rational choice criteria.¹¹² Frame selection means the initial definition of a situation, ie, the interpretation of what Wikström in his theory would call the 'setting'. Based on this frame selection, one would then choose a script, ie, a possible chain of action that is adapted to the setting that was identified before. Finally, an individual action from this script is chosen and carried out. Mode selections for each stage (frame, script, action) are independent from each other, ie, it is possible that frame selection happens in AS mode, but the setting identified is so unusual or complex that we do not have an automated script available for it, but need to choose our course of action in RC mode, etc. Crimes can, in this model, be explained as a product of rational deliberation in RC mode, but also as habitual actions in AS mode. Morality is relevant for both modes. In RC mode, Kroneberg treats it as a factor in the rational choice process.¹¹³ The AS mode of the Model of Frame Selection works somewhat similarly to the moral filter in Wikström's theory if the individual morality and the moral cues of the setting are in line with each other.

Now to the most important question: how can we 'import' the assumptions of the Social Identity Approach into these action theories? As for Situational Action Theory, social identity affects the moral filter. If a certain social identity becomes salient, an actor becomes depersonalised, focuses on and adapts to group norms. This means that the individual morality is adapted due to moral cues active in

¹¹¹ Kroneberg, above (n 105).

¹¹² *ibid.*

¹¹³ *ibid.*, 352.

the setting. In group situations the moral cues of the setting can therefore actually change individual morality. This can result in a criminal action alternative passing the moral filter that would otherwise not have passed it. The Social Identity Approach therefore shows that individual morality is something flexible and depends on the self-categorisation that is active in a given situation. Social identity will also affect moral deliberation.

Similar to this, depersonalisation and group identification in the context of Kroneberg's Model of Frame Selection will affect frame selection (settings are interpreted differently), but also script and action selection (scripts and actions will be selected in line with group norms and group knowledge). As self-categorisation depends on accessibility of the categorisation and the fit of the situation, factors also relevant for automatic selections in AS mode, social identity is not only relevant in RC mode, but also influences all the automated decisions we make. A combination of the Social Identity Approach with action theories therefore also helps explain how biased interpretations of situations and biased decisions on a course of action can come about.

V. Conclusions

Summing up, a Social Identity Approach to international crimes helps to find a common framework for many situational aspects that have been discussed somewhat separately so far. It can be part of an interactionist criminological theory, for example based on the Situational Action Theory or the Model of Frame-Selection. Such a theory understands international crimes as elements of a continuum of crimes. In that sense, perpetrators of 'international' crimes are 'ordinary' in the same way as many perpetrators of 'normal' crimes are 'ordinary' as well, while the notion that everyone would have reacted exactly this way in that situation needs to be rejected.

Protecting and/or Punishing the Population: The Contradictory Role of Civilians in Western Counterinsurgency Operations

by Markus Kienscherf

Tue., 22 June 2021; 09:00 – 10:00

Abstract:

This paper will address the contradictory role of civilians in western counterinsurgency both at the doctrinal level and at the operational level;

Firstly, the paper will outline US and NATO counterinsurgency doctrine and

Secondly, the paper will map out the colonial history of counterinsurgency. Thirdly, the paper will discuss two concrete examples drawn from on-the-ground US-led military operations in Afghanistan to underscore the contradictory position of local civilians in Western counterinsurgency.

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A programme of global pacification: US counterinsurgency doctrine and the biopolitics of human (in)security

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**Markus Kienscherf**

Department of Sociology, Graduate School of North American Studies, Free University Berlin, Germany

Abstract

This article argues that US counterinsurgency doctrine forms a programme of both liberal rule and liberal war whose ultimate purpose is the pacification of recalcitrant populations and their eventual (re)integration into the networks of liberal governance. Designed to promote ‘safe’ forms of life while eradicating ‘dangerous’ ones, the doctrine constitutes a response to both the biopolitical problematization of human (in)security and the geostrategic problematization of US national security. Counterinsurgency aims to harness sociocultural knowledge in order to conduct a form of triage between elements of targeted populations. It also seeks to inscribe the divisions on which such a triage is based into space by means of practices that derive from earlier methods of imperial policing. Ultimately, counterinsurgency’s production and implementation of a biopolitical differentiation between ‘safe’ and ‘dangerous’ human lives is likely not only to reinforce existing societal divisions within targeted populations but also to create new global, regional and local divisions and to generate resistance to what many people will always view as imperial domination. The societal divisions and resistance engendered by counterinsurgency may reinforce Western problematizations of insecurity and hence lead to further counterinsurgency campaigns in the future. Counterinsurgency doctrine is thus not so much a programme of peace and stability as one of spatially and temporally indeterminate pacification.

Keywords

counterinsurgency, human security, biopolitics, liberalism, imperialism

Introduction

On 13 February 2010, US, Canadian, British, Danish and Estonian forces launched Operation Moshtarak in Afghanistan’s Helmand province – the first major assault on Taliban insurgents since US President Barack Obama’s decision to deploy an additional 30,000 troops in the country (BBC, 2010a). Operation Moshtarak (which means ‘together’ in the local Dari language) differed from

Corresponding author:

Markus Kienscherf

Email: markus_kienscherf@yahoo.com

earlier attacks on Taliban strongholds in that, contrary to the common military practice of trying to maintain an element of surprise, the local population was informed about the impending offensive. Several weeks prior to the launch of the operation, Afghan government officials and Western troops sought to persuade locals to throw in their lot with the Afghan central government and its Western backers (Gardner, 2010). Although the first days of the operation were overshadowed by reports of civilian casualties, the operation was said to have been designed with the express purpose of avoiding civilian deaths (BBC, 2010b). US Chairman of the Joint Chiefs of Staff Admiral Mike Mullen (2010) asserted that Operation Moshtarak was more than just a conventional military offensive:

There's great focus on – and [Afghan] President Karzai has made this point, and I think this is critical – on having – we would like to have no civilian casualties. I mean, this is focused on the people. This is not focused on the Taliban. And it is a strategy that will not just clear the area, but that will hold it and then build right behind it. So there's a civilian component here, and there's a local governance piece, which is going to be installed immediately, as well.

Operation Moshtarak was meant to showcase 'the new "counter-insurgency" approach of US and NATO commander Gen Stanley McChrystal' (BBC, 2010a; see also McChrystal, 2009).¹ The operation was based on a counterinsurgency-style clear–hold–build model that was aimed at providing security, development and good governance to the local population, rather than merely killing insurgents.

However, as Operation Moshtarak progressed and US-led NATO forces seized the largely rural area of Marja,² Robert Watkins, deputy special representative for the UN secretary-general, openly criticized what he saw as the 'militarization of aid' in Afghanistan, stating that 'we do not wish to be part of that process because we would not want to have the humanitarian activities we deliver to be linked with military activity' (quoted in Tran, 2010). Such isolated criticisms notwithstanding, humanitarian aid and development efforts have become closely tied to (mostly Western) security concerns. In fact, a growing number of academics, policymakers and aid workers agree that security and development are interconnected (see Duffield, 2005, 2007, 2008, 2010; Hettne, 2010; Stern and Öjendal, 2010).

According to Mark Duffield (2008: 146), security and development have merged into a potentially global strategy for the management of at-risk and risky populations – a biopolitical containment strategy 'that seek[s] to restrict or manage the circulation of incomplete and hence potentially threatening life' (see also Duffield, 2003, 2005, 2007, 2010). Duffield even goes so far as to assert that 'liberal practices of development traditionally associated with NGOs have been rediscovered as essentially civilian forms of counterinsurgency' (Duffield, 2008: 157; see also Slim, 2004). The attempt to control and contain flows of risky life is also one of the major objectives of the global pacification efforts that, according to Michael Dillon and Julian Reid (2009), characterize 'the liberal way of war'. What is more, 'the liberal way of war' is inextricably intertwined with 'the liberal way of rule' and its biopolitical 'commitment to making life live' (Dillon and Reid, 2009: 11).

Indeed, the relevance of Michel Foucault's ideas of biopower and biopolitics to critical analyses of 'the liberal problematic of security' has been amply demonstrated (Evans, 2010: 414, 428; see also Dillon and Neal, 2008; Dillon and Reid, 2009; Duffield, 2007; Edkins et al., 2004). These largely theoretical analyses, however, should be complemented by more empirical interrogations of the actual governmental programmes by means of which biopolitical imperatives are supposed to be implemented on the ground. In other words, we should also attend to the design and deployment of specific governmental rationalities meant to respond to a biopolitical problematization of human (in)security.

This article deals with one such programme. It sets out to show that US counterinsurgency doctrine is a rationality of both rule and warfare whose ultimate purpose is the pacification of recalcitrant populations and their eventual (re)integration into the networks of liberal governance. First, the article will argue that US counterinsurgency doctrine forms a response to *both* the biopolitical problematization of 'human security' *and* the geostrategic problematizations of US national security. In a security environment said to be defined by the global circulation of threats emanating from so-called ungoverned spaces, the imperatives of human security and the goals of US national security are frequently supposed to coincide. Second, the article will demonstrate how counterinsurgency doctrine aims to harness sociocultural knowledge in order to conduct a form of triage between elements of targeted populations, and how the divisions on which such a triage is based are inscribed into space by means of practices that derive from earlier methods of imperial policing. Ultimately, counterinsurgency's production and implementation of a biopolitical differentiation between 'safe' and 'dangerous' life is likely not only to reinforce existing societal divisions within targeted populations, but also to create new global, regional and local divisions and to generate resistance to what many people will always view as imperial domination. The societal divisions and resistance engendered by counterinsurgency may reinforce Western problematizations of insecurity and hence lead to further counterinsurgency campaigns in the future. Counterinsurgency doctrine is thus not so much a programme of peace and stability as one of spatially and temporally indeterminate pacification.

Counterinsurgency revamped

We are opposed around the world by a monolithic and ruthless conspiracy that relies primarily on covert means for expanding its sphere of influence – on infiltration instead of invasion, on subversion instead of elections, on intimidation instead of free choice, on guerrillas by night instead of armies by day. (Kennedy, 1961: 336)

John F. Kennedy's obsession with guerrilla warfare is well documented. Roger Hilsman (1967: 413), a key aide and foreign policy adviser to Kennedy, wrote that one of the first questions Kennedy put to his aides after his inauguration as president was, 'What are we doing about guerrilla warfare?' Kennedy took a strong personal lead in pushing for a programme aimed at counterinsurgency in particular and what he saw as a 'monolithic and ruthless conspiracy' in general (see Blaufarb, 1977; McClintock, 1992; Shafer, 1988). Kennedy's obsession immediately led to a flurry of activities at all levels of the US national security apparatus: seminars and courses on counterinsurgency; major efforts at bureaucratic restructuring; and the frenetic formulation of new policies and doctrine. In 1962, the Kennedy administration promulgated its Overseas Internal Defense Policy (US Government, 1962) – a comprehensive counterinsurgency programme that sought to merge security and development into a coherent policy geared towards containing the threat of communism. Yet, following the US defeat in Vietnam, counterinsurgency quickly faded into doctrinal oblivion and US military strategy shifted back to more conventional concerns.

These days, however, counterinsurgency (COIN) is once again fashionable among policymakers, members of the armed forces, Pentagon officials and civilian academics. Indeed, counterinsurgency is now widely touted not only as an instrument for defeating Iraqi or Afghan insurgents but also as a panacea for fighting global terrorism (Cassidy, 2006; Kilcullen, 2005, 2009; Nagl, 2007; for a critique, see Bacevich, 2010). So, what is counterinsurgency all about?

The new *U.S. Army/Marine Corps Counterinsurgency Field Manual*, which was introduced in 2006 and published by the University of Chicago Press in 2007 (I will refer to the latter edition throughout this article), defines insurgency as ‘an organized, protracted politico-military struggle designed to weaken the control and legitimacy of an established government, occupying power, or other political authority while increasing insurgent control’. Counterinsurgency in turn is defined as ‘military, paramilitary, political, economic, psychological, and civic actions taken by a government to defeat insurgency’ (US Department of the Army, 2007: 2). What becomes immediately obvious is that counterinsurgency doctrine ought to be understood as a programme of *both* rule *and* warfare that seeks to assemble humans, technologies, tactics and modes of knowledge (production) into an ambiguous machine geared towards pacifying ungoverned spaces and populations that more often than not tend to be located in the post-colonial south.

This pacification effort hinges on providing security to the local population while (re)building the politico-economic infrastructure that would ultimately enable the so-called host nation to govern itself. Moreover, the provision of security and development is supposed to occur against the backdrop of an overall battle over perceptions to be waged through effective information operations (US Department of the Army, 2007). According to the current field manual, ‘the primary objective of any COIN operation is to foster development of effective governance by a legitimate government’ (US Department of the Army, 2007: 37). What is thus at stake in counterinsurgency is government.

According to Michel Foucault (2000: 341), government aims to act on somebody else’s actions – or, in Foucault’s own words, ‘to structure the possible field of action of others’. Government involves knowledge, expertise and representations concerning both the objects and the activity of government, as well as technologies, techniques, instruments and tactics by means of which the day-to-day business of governing is actually conducted (see Dean, 1999; Larner and Walters, 2004; Rose and Miller, 1992). Government is thus characterized by the interrelations between rationalities or programmes – ‘deliberate and relatively systematic forms of thought’ – and specific ‘regimes of practices’ (Dean, 1999: 32, 27, 28; see also Rose and Miller, 1992; Miller and Rose, 2008). Government therefore operates within the frame of what Foucault termed ‘governmentality’ and constitutes a mode of power that cuts across ‘the problematics of consensus and will on the one hand and conquest and war on the other’ (Lemke, 2000: 4; see also Foucault, 2003, 2007).

Military theorist Carl von Clausewitz (1976: 83) famously described war as ‘an act of force to compel our enemy to do our will’. But, in contemporary unconventional warfare the use of force is just one particular channel for imposing one’s will on the enemy. In what Thomas X. Hammes (2006: 207–8) calls ‘fourth-generation warfare’ (4GW), which he describes as ‘an evolved form of insurgency’, war has shifted from the industrial-scale destruction of one’s opponent’s armed forces to undermining the political will of enemy decisionmakers through both violent and nonviolent means. In fact, war can no longer be clearly distinguished from nonviolent forms of imposing one’s will on others. Likewise, the traditional divide between crime and war and the concomitant division between domestic public safety and foreign defence has become increasingly fuzzy (see Feldman, 2004). Thus, what Anthony Giddens (1987) called the internal pacification of society has bled into the defence against external threats, and vice versa. Indeed, as Hardt and Negri (2004: 7) suggest, ‘war seems to have seeped back and flooded the entire social field’.

When Foucault (2003: 15) inverted Clausewitz’s (1976: 99) famous dictum that war is ‘a continuation of political intercourse, carried on with other means’ in order to frame the problematic of political power as the ‘continuation of war by other means’, he sought to draw out the war-like force relations that persist even within internally pacified societies. Yet, Foucault’s later focus on

‘government’ was a move both beyond the juridical conception of power as repression and his own earlier bellicose notion of power as domination (Dean, 1999). In Foucault’s (2000: 341) own words:

The relationship proper to power would therefore be sought not on the side of violence or of struggle, nor on that of voluntary contracts (all of which can, at best, only be instruments of power) but, rather, in the area of that singular mode of action, neither warlike nor juridical, which is government.

Government in the Foucauldian sense of acting on somebody else’s actions thus always consists of and constantly shifts between relations of both coercion and consent. In counterinsurgency, this tension between coercion and consent also operates across the divide between internal pacification and external defence. Combining the use of force with the engineering of consent through development and so-called information operations, counterinsurgency seeks to internally pacify foreign societies in order to check the global flow of threats and thereby also secure already pacified societies.

Indeed, counterinsurgency doctrine has been presented not only as a fix to the steadily deteriorating post-invasion security situations in Iraq and Afghanistan, but also as a much more general programme aimed at transforming US security capabilities in the face of a specific biopolitical problematization of human (in)security. But, what are the referent objects of this problematization of security and danger?

Human security and biopolitical imperialism

The post-Cold War period has witnessed a conceptual shift from traditional state-centred security to so-called human security (Commission on Human Security, 2003; see also De Larrinaga and Doucet, 2008; Duffield, 2008, 2010; Hettne, 2010; Manwaring, 2005; Stern and Öjendal, 2010; Makaremi, 2010). Human security is broadly defined as processes for protecting ‘people from critical (severe) and pervasive (widespread) threats and situations’ and for ‘creating political, social, environmental, economic, military and cultural systems that together give people the building blocks of survival, livelihood and dignity’ (Commission on Human Security, 2003: 4). The notion of human security is deeply biopolitical in that it seeks to promote species-life and protect it from threats arising from species-life itself (De Larrinaga and Doucet, 2008; Duffield, 2008).

Moreover, as human security is now frequently presented as a ‘response to the narrative of global chaos’, it also provides impetus to a new militarized interventionism (Makaremi, 2010: 108). Mary Kaldor, one of the most vociferous proponents of human security, states that “‘bad neighborhoods’ like the Horn of Africa, the Upper Nile, the Middle East, the Caucasus, and Central Asia’ provide breeding grounds for violence that could spread into the world’s ‘good neighborhoods’, ‘through refugees and displaced persons, through transnational criminal activities; and through polarizing activities’ (Kaldor and Beebe, 2010: 37; see also Glasius and Kaldor, 2005; Kaldor, 1999). There is a considerable overlap between Kaldor’s global distribution of ‘bad neighborhoods’ and the Pentagon’s ‘arc of instability’ that stretches from Africa through the Middle East all the way to Central and Southeast Asia. Thomas Barnett’s (2004) idea of the ‘Gap’ is even more extensive and also includes wide swathes of Central America and the Caribbean. Yet, the fundamental logic remains the same: a division of the globe into an integrated metropolitan system of stable states, on the one hand, and a kind of peripheral global borderlands marked by failed and failing states, violence, crime, corruption, etc., on the other.

Counterinsurgency doctrine is held up as an effective remedy to the global spread of violence and instability. General David Petraeus, one of the chief architects of US counterinsurgency

strategy, told Mary Kaldor that counterinsurgency and human security are pretty much the same because both cluster around the 'two key principles' of providing security and vital services to the population and separating 'the reconcilables from the irreconcilables' (quoted in Kaldor and Beebe, 2010: 68). Although she comes out in support of the US military's recent move towards counterinsurgency, Mary Kaldor, however, maintains that there remain significant differences between counterinsurgency and human security:

In counterinsurgency, human security, or population security, is a tactic, not a strategy. The end goal is not the security of Afghans or Iraqis – that is a means to an end. The end goal is the defeat of America's enemies, a point that General Petraeus and others frequently repeat. (Kaldor and Beebe, 2010: 73)

In effect, Kaldor argues that counterinsurgency is not biopolitical enough, because it remains an instrument of US geostrategy.

Yet, most proponents of counterinsurgency doctrine suggest that in the face of global circulations of violence and instability US geostrategic goals largely overlap with the pursuit of human security. For instance, in the Introduction to the University of Chicago Press edition of the *Counterinsurgency Field Manual*, Sarah Sewall (2007: xlii), director of Harvard's Carr Human Rights Center, argues that with the disappearance of the stabilizing framework of the Cold War, the major security challenge for the United States now consists in 'buttressing multiple failing state structures to legitimize the interstate system'. According to Sewall (2007: xxxvii), this requires (re)building the capacities of fledgling states through a combination of military and civilian means:

U.S. unwillingness to govern other nations is, in this account, a fatal national flaw. The field manual stresses the importance of effectively employing nonmilitary power. It is not a responsibility that can be left to a beleaguered host nation. Counterinsurgents must harness the ordinary administrative functions to the fight, providing personnel, resources, and expertise.

For Sewall (2007: xlii), in order to meet the 'strategic challenge' of stabilization, the United States has to get into the business of governing nations that are deemed unable to govern themselves.

Moreover, Mark Duffield (2008: 149) points out that 'while [human security] prioritizes the security of people rather than states, it privileges the state as vital for providing the public goods that constitute human security'. Indeed, the discourse of human security has it that if certain states are unable to provide security for their populations, other more powerful states have a moral duty to intervene, secure the targeted population and develop the host nation's capacities so that it may eventually be able to secure its own population. In fact, the discourse of human security both legitimizes and entails a biopolitical form of imperialism. This form of imperialism is driven not so much by limited national geopolitical ambitions (although they still play a major role) as by the unlimited aim of securing humanity from its own inherent threats. Since its objectives are boundless, biopolitical imperialism's campaigns of pacification also tend to be both spatially and temporally indeterminate. And counterinsurgency doctrine forms a concrete governmental programme of biopolitical imperialism insofar as it is presented as a therapy for particular pathologies of insecurity and danger.

A 'therapy' for ungoverned spaces

So-called ungoverned spaces – also often referred to as 'failed', 'failing' or 'weak' states – and their unruly populations are among some of the most significant referent objects of discourses of both human security and US national security (Kilcullen, 2005, 2009; Sewall, 2007).

The 2010 *Quadrennial Defense Review Report*, which will be the chief blueprint for US military planning and budgetary allocations for the next couple of years, asserts that ‘the changing international environment will continue to put pressure on the modern state system, likely increasing the frequency and severity of the challenges associated with chronically fragile states’ (US Department of Defense, 2010: 32). In this environment, the US military can no longer simply rely on its formidable conventional arsenal but must develop the capabilities to mount a series of low-intensity operations across the global south:

The wars we are fighting today and assessments of the future security environment together demand that the United States retain and enhance a whole-of-government capability to succeed in large-scale counterinsurgency (COIN), stability, and counterterrorism (CT) operations in environments ranging from densely populated urban areas and mega-cities, to remote mountains, deserts, jungles, and littoral regions.... Accordingly, the U.S. Armed Forces will continue to require capabilities to create a secure environment in fragile states in support of local authorities and, if necessary, to support civil authorities in providing essential government services, restoring emergency infrastructure, and supplying humanitarian relief. (US Department of Defense, 2010: 43)

In this context, counterinsurgency forms a particularly significant programme insofar as it is designed to cut across the divide between civilian assistance and military intervention in order to address especially problematic cases of state failure. Indeed, counterinsurgency seems to combine what Duffield (2010) calls ‘the liberal way of development’ with what Dillon and Reid (2009) call ‘the liberal way of war’. The liberal way of development seeks to foster ‘adaptive patterns of household and communal self-reliance in the global south’, while the liberal way of war is aimed at securing global life itself from those ‘patterns of self-reliance’ that are viewed as threats to global (liberal) life (Duffield, 2010: 55–6, 68; Dillon and Reid, 2009).

Counterinsurgency is supposed to rid particular regions of ‘forms of radical autonomy and emergence [that] are deemed to be a risk to the system as a whole’, while establishing and promoting modes of ‘adaptive self-reliance’ that are viewed as safe (Duffield, 2010: 68). The latter task is often relegated to nongovernmental and intergovernmental organizations that are expected to operate under the military umbrella of what the *Counterinsurgency Field Manual* calls ‘unity of effort’:

All organizations contributing to a COIN operation should strive, or be persuaded to strive, for maximum unity of effort. Informed, strong leadership forms the foundation for achieving it. Leadership in this area focuses on the central problems affecting the local populace. A clear understanding of the desired end state should infuse all efforts, regardless of the agencies or individuals charged with their execution. (US Department of the Army, 2007: 57)

Counterinsurgency’s reliance on a deeply biopolitical problematization of security and danger as well as its commitment to eradicating risky forms of life while promoting safe ones are best illustrated by the writings of David Kilcullen, former senior counterinsurgency adviser to General Petraeus. Kilcullen (2009: 35–38) argues that international terrorist groups, most notably Al-Qaeda, ‘opportunistically exploit existing breakdowns in the rule of law, poor governance, or pre-existing conflict. Terrorist infection is thus part of the social pathology of broader societal breakdown, state weakness, and humanitarian crisis’. Although Kilcullen makes a number of points about terrorism in general, much of his discussion centres on Al-Qaeda, which he considers to be at the heart of a globalized insurgency against the West. What he calls the ‘accidental guerrilla syndrome’ sets in

with the ‘infection’ of ungoverned spaces by Al-Qaeda. It then proceeds to the ‘contagion phase’, in which Al-Qaeda uses these safe havens to spread propaganda and launch terrorist attacks. In the ‘intervention phase’, external forces, most likely Western powers led by the United States, decide to take military action. This leads to the so-called rejection phase, in which the local population rejects the foreign intervention and enters into alliance with Al-Qaeda:

Again, I use medical analogy advisedly here. The *rejection* phase looks a lot like a social version of an immune response in which the body rejects the intrusion of a foreign object, even one (such as a pin in a broken bone or a stent in a blocked blood vessel) that serves an ultimately beneficial purpose.

Kilcullen’s use of medical tropes is highly illustrative. Indeed, processes of state failure are often presented in terms of pathology. Medical tropes shift the terms of debate from the political to the ultimately technocratic terrain of fixing social pathologies through the outside intervention of agents whose superior expertise and superior values are taken for granted (McFalls, 2010: 318–19). Any debate about whether to intervene in the first place is thereby effectively forestalled – the only debate that is still possible is one about the ‘how’ of intervention. This holds also true for Kilcullen’s *The Accidental Guerrilla*. Even though Kilcullen acknowledges that outside interventions may well exacerbate processes of radicalization, he fails to question the utility of intervention *per se*. He merely concerns himself with devising politico-military instruments that do not feed the ‘accidental guerrilla syndrome’. In fact, Kilcullen takes the necessity of outside intervention for granted, because he assumes that something has to be done about ‘terrorist infection’. He does not ask the question as to whether the initial ‘infection’ might have been an ‘immune response’ to earlier Western interference.

Kilcullen’s arguments about the growth of cancerous terror cells in ungoverned spaces are profoundly biopolitical. In his analysis of the ‘technical armature and rhetoric of counterinsurgency’ in Iraq, Derek Gregory (2010: 277) suggests that ‘the emphasis on danger, or on what Foucault called “dangerousness”, is vital to the development of a martial biopolitics’. What Gregory calls ‘martial biopolitics’ is nothing but a global liberal strategy of pacification and stabilization geared towards securing humanity from threats emanating from within humanity (Dillon and Reid, 2009). These threats are inevitably problematized in terms of pathologies and therapies:

Every account of life is therefore contoured by its allied discourse of danger, every account of order is contoured by an account of the disorder which threatens it. The biopolitics of liberal rule and war differs only in the account that it gives of ordered and disordered life and is self-endangering. To employ a medical term which therefore fits this condition of rule precisely, the emergency of emergence requires a form of global triage. Global triage specifies who gets what treatment, where, when and how. Some of that treatment – a lot of that treatment – is directly and indirectly lethal. (Dillon and Reid, 2009: 89–90)

Counterinsurgency is thus envisaged as a specific therapeutic programme for the actual implementation of ‘global triage’. This is exactly what Kilcullen suggests. He contends that the ‘accidental guerrilla syndrome’ can be countered by way of a global therapeutic strategy aimed at extending stable governmental structures into ungoverned spaces while disrupting terrorist networks – what he calls ‘counterinsurgency plus’ (Kilcullen, 2009; see also Kilcullen, 2005). This professedly benevolent strategy, however, inevitably entails the killing of both actual and suspected insurgents and terrorists – as well as, potentially, scores of innocent civilians.

Yet, counterinsurgency not only centres on a strategy of global triage but also seeks to triage targeted populations. The authors of the current field manual maintain that successful counterinsurgency efforts pivot on differentiating between an active minority supporting the insurgency, an

active minority opposing the insurgency, and a neutral or passive majority that can swing either way (US Department of the Army, 2007: 36). The main objective of the so-called population-centred or 'hearts and minds' variant of counterinsurgency is then to convince the passive majority to throw in their lot with the counterinsurgents.

However, in order to achieve the ultimate goal of winning over the majority of a targeted population, soldiers and marines require a thorough understanding of a host nation's culture and society. Apart from acting as soldiers, policemen, relief workers and spin doctors, soldiers and marines are also expected to become amateur social scientists, capable of producing knowledge not only about the insurgents but also about all aspects of the society in which they operate:

Intelligence in COIN is about people. U.S. forces must understand the people of the host nation, the insurgents, and the host-nation government. Commanders and planners require insight into cultures, perceptions, values, beliefs, interests and decision-making processes of individuals and groups.... All Soldiers and Marines collect information whenever they interact with the populace (US Department of the Army, 2007: 80).

We will now turn to some of the modes of knowledge (production) that are supposed to render the terrain – or rather the targets – of counterinsurgency intelligible.

Mapping the 'human terrain'

Current doctrine was shaped not only by members of the armed forces but also by civilian academics, above all social scientists. The most prominent of them, cultural anthropologist Montgomery McFate (2005b: 47), co-author of the field manual's chapter on intelligence, regular contributor to military publications and chief scientific consultant with the US Army's Human Terrain System, argues:

Understanding foreign cultures and societies has become a national security priority. The more unconventional the adversary, the more we need to understand their society and underlying cultural dynamics. To defeat non-Western opponents who are transnational in scope, nonhierarchical in structure, clandestine in their approach, and operate outside of the context of nation-states, we need to improve our capacity to understand foreign cultures and societies.

In another article, published in *Military Review*, McFate (2005a: 24) deplores anthropology's 'brutal process of self-flagellation' and demands that the discipline should accept its role as 'a warfighting discipline':

Once called 'the handmaiden of colonialism,' anthropology has had a long and fruitful relationship with various elements of national power, which ended suddenly following the Vietnam War. The strange story of anthropology's birth as a warfighting discipline, and its sudden plunge into the abyss of postmodernism, is intertwined with the U.S failure in Vietnam. The curious and conspicuous lack of anthropology in the national-security arena since the Vietnam War has had grave consequences for countering the insurgency in Iraq, particularly because political policy and military operations based on partial and incomplete knowledge are often worse than none at all.

When, after initially successful invasions, the United States became embroiled in protracted insurgencies in both Iraq and Afghanistan, and US armed forces realized that they lacked the linguistic and cultural competence for understanding the 'operational environment', 'culture-centric

warfare' became something of a mantra among officers and civilian security experts (Clemis, 2009; Kipp et al., 2006; McFate, 2005a,b; McFate and Jackson, 2006; Renzi, 2006; see also Kienscherf, 2010).

From 2005, US armed forces have endeavoured to incorporate sociocultural knowledge and expertise into both doctrine and force structure. The 2006 *Counterinsurgency Field Manual*'s chapter on intelligence, which was co-authored by McFate, is peppered with social-scientific terms – such as 'social networks', 'roles and statuses', 'social norms', 'taboo', 'culture', 'identity', 'narratives', 'myths', 'beliefs', 'ideologies' – that one would hardly expect to find in a military field manual (US Department of the Army, 2007: 79–135).³ The manual also contains an appendix entitled 'Social network analysis and other analytical tools' (US Department of the Army, 2007: 305–33). In fact, the observation that 'intelligence in COIN is about people', that successful operations require a thorough understanding of the human terrain, is constantly reiterated throughout the manual.

Between 2005 and 2006, the identified general need for sociocultural knowledge in counterinsurgency operations and the particular absence of such expertise in the ongoing campaigns in Iraq and Afghanistan led to the launch of the so-called Human Terrain System. This programme was 'specifically designed to address cultural awareness shortcomings at the operational and tactical levels by giving brigade commanders an organic capability to help understand and deal with "human terrain" – the social, ethnographic, cultural, economic, and political elements of the people among whom a force is operating' (Kipp et al., 2006: 9). The Human Terrain System aims to embed Human Terrain Teams consisting of between five and nine members into military units. These Human Terrain Teams are to be 'composed of individuals with social science and operational backgrounds that are deployed with tactical and operational military units to assist in bringing knowledge about the local population into a coherent analytical framework and build relationships with the local power-brokers' (Finney, 2008: 2). Human Terrain Teams combine social-network analysis with the geospatial analysis of human and physical geography in an effort to render the sociocultural environment of insurgency intelligible, so that the military can differentiate between active supporters of the insurgency, a passive majority, and active supporters of the host-nation government and its foreign backers (Finney, 2008; Kipp et al., 2006; US Department of the Army, 2007: 36, 305–33).

However, a growing number of anthropologists firmly oppose what they see as 'the weaponization of anthropology' (Feldman, 2009; González, 2007, 2009a,b; Sahlins, 2009). In 2007, a group of anthropologists set up the Network of Concerned Anthropologists to 'take collective action and produce a statement of our objections to developing trends in the militarization of anthropology' (González et al., 2009: 18). And in October 2009, the American Anthropological Association's Commission on the Engagement of Anthropology with the US Security and Intelligence Communities (CEAUSSIC) unequivocally stated its disapproval of the participation of anthropologists in military operations (Albro et al., 2009).

Moreover, according to David Ucko (2009), the actual on-the-ground deployment of Human Terrain Teams in Iraq and Afghanistan proved to be fraught with difficulties. First of all, Ucko (2009: 166) maintains that the use of civilian Human Terrain Teams cannot solve the long-term problems associated with an 'absence of an equivalent capability within the existing force structure' – that is to say, the lack of linguistic and cultural skills among the military's own specialist civil affairs personnel. Second, owing to the scarcity of 'qualified volunteers', the teams had to be 'placed at the brigade level rather than at the battalion or company level, where they might have had a greater impact'. Lastly, Ucko holds that since the members of Human Terrain Teams were often poorly trained and 'the managerial practices and protocols governing their use and activity in a war zone were at times undefined', they only produced knowledge of 'varied quality'.

The Human Terrain System was designed to enable the military to triage between different levels of risk so that modes of both lethal and non-lethal targeting might be adapted accordingly. As Marshall Sahlins puts it, 'the principal role of academics in the service of counterinsurgency is to develop the human intelligence (HUMINT) that will allow a *triage* between those elements of the population to be attacked (or assassinated) and those it would be better not to – in brief, sophisticated targeting' (Sahlins, 2009: vi; emphasis added).

In counterinsurgency, sociocultural knowledge thus serves the purpose of facilitating a triage within targeted populations that have already been singled out through the global triage of biopolitical liberal rule (Dillon and Reid, 2009). The objectives of biopolitics – namely, promoting species-life and securing it from threats arising from within species-life – entail 'modes of discrimination exercised at the level of the biological life of individuals and populations which are explicitly as well as implicitly racialized' (Dillon and Reid, 2009: 133). However, liberal biopolitics cannot openly profess to privilege some aspects of the species over others purely on the basis of race:

Liberal biopolitics had therefore somehow to elide the ways in which all biopolitically driven regimes, including those at one time of liberal imperialism itself, are disposed to favour some aspects of the species over others, as a necessary consequence of seeking to promote the life of the species. (Dillon and Reid, 2009: 49)

In other words, liberal governance can no longer triage between 'safe' and 'dangerous' species-life purely on racial grounds. Yet, the notion of culture, even if it remains implicitly racialized, is not nearly as politically suspect as the category of race. As Brad Evans (2010: 427) puts it, 'racism is not what it used to be. Cultural fitness has now replaced biological heritage to contour the new lines of political struggle'.

A number of critics suggest that the use of sociocultural knowledge in counterinsurgency amounts to a new form of Orientalism (see Feldman, 2009; Gregory, 2008; Kienscherf, 2010). In its classical sense, Edward Said's (1979) term Orientalism describes the complex and ambiguous historical interrelations between the production of knowledge about spaces and populations construed as Oriental and the actual imperial project of establishing Western control over these spaces and populations. Montgomery McFate's demand that anthropology should once again shoulder its responsibilities as a 'warfighting' discipline 'ultimately amounts to saying that the discipline of anthropology should once again turn into a machine for the production of Orientalist discourse – something anthropologists have struggled against for many decades' (Kienscherf, 2010: 135; see McFate, 2005a: 24).

In counterinsurgency, sociocultural knowledge about the Other ultimately serves to identify the circulation and enable the targeting of threatening species-life and thereby ends up producing and reinforcing both the conceptual and the physical borders between 'us' and 'them':

The emphasis on cultural difference – the attempt to hold the Other at a distance while claiming to cross the interpretive divide – produces a diagram in which violence has its origins in 'their' space, which the cultural turn endlessly partitions through its obsessive preoccupation with ethno-sectarian division, while the impulse to understand is confined to 'our' space, which is constructed as open, unitary, and generous. (Gregory, 2008: 11)

Moreover, the conceptual production and mapping of endlessly partitioned, internally divided and inherently dangerous spaces and populations bleeds into the actual physical division of these spaces and populations (Gregory, 2010).

Securing and controlling the 'human terrain'

Designing the physical environment in such a way as to make it possible to control flows of people and resources plays a fundamental part in the provision of security:

The logic of 'security' ... presupposes that the danger is already inside, presented by a population in which subversive elements exist. The relation that 'security' implies between 'inside' and 'outside', as well as between military and police action, is ambiguous.... 'Security' conceives new spatial practices and arrangements. It erects barriers and channels and rechannels the flow of people and resources through space. According to the logic of security, only a constantly configured and reconfigured environment is a safe environment (Weizman, 2007: 106–7).

Counterinsurgency doctrine is designed to straddle the divide between policing and war-fighting, in order to counter the complex threat of insurgents hiding among civilian populations. I have already discussed the Orientalist modes of knowledge (production) that counterinsurgents rely on in their attempts to differentiate between elements of the population. In examining some of the 'spatial practices and arrangements' deployed in counterinsurgency, I will now show that the actual provision of security is based on efforts to control the movement of people and resources in space – efforts that derive from much older imperialist practices (Weizman, 2007: 107).

Attempts to control flows of people and resources frequently take the form of border regimes. Besides demarcating territory, borders are complex assemblages of tactics, technologies and forms of knowledge (production) that serve as instruments for tracking, targeting and managing the circulation of people and goods. Thus, border assemblages are best described as sorting mechanisms aimed at distinguishing flows whose mobility needs to be facilitated from those that need to be interdicted (Lyon, 2008; Salter, 2005, 2008a,b).

In counterinsurgency, border assemblages, first of all, serve the traditional purpose of protecting the territorial integrity of the host nation. Above all, border control is supposed to deny insurgents cross-border support and sanctuary (Celeski, 2006: 51). But, border assemblages do not just aim to demarcate and protect the host-nation territory: counterinsurgents also seek to configure host-nation space in such a way as to be able to separate the civilian population from the insurgents. Such practices have a profoundly imperialist genealogy. They were, in fact, a staple of 20th-century British imperial policing and French counter-revolutionary warfare, as well as US counter-insurgency efforts in Vietnam (see Galula, 1964; Marshall, 2010; McClintock, 1992; Townshend, 1986; Tyner, 2009: 97–104).

According to Alex Marshall (2010), the practices of British imperial policing and French counter-revolutionary warfare had a huge influence on the formation of contemporary counterinsurgency doctrine. Many counterinsurgency enthusiasts today tout the British practice of imperial policing as a viable model for current campaigns (see Crawshaw, 2007; Nagl, 2005). As Michael Crawshaw puts it in a paper published by the UK Defence Academy:

The 'British Model', tied as it is to the era of colonial counter-revolutionary war and earlier, is dated. Nevertheless, much of its methodology can be applied to modern insurgencies *provided that there is a legitimate indigenous government capable of taking ownership of the campaign*. (Crawshaw, 2007: 31 emphasis in original)

Especially the so-called hearts-and-minds approach to counterinsurgency, which the British are widely held to have pioneered, is frequently heaped with praise in the counterinsurgency literature (see Long, 2006: 21–3).⁴

The French model of counter-revolutionary warfare, moreover, differed from British imperial policing only in the extent 'to which it sought not to maintain or manage the existing status quo, but rather to actively physically and mentally *transform* the societies concerned, in order to produce more loyal clients' (Marshall, 2010: 242; emphasis in original). In the words of French veteran and counterinsurgency expert, David Galula (1964: 95), whose work also heavily informed the current US *Counterinsurgency Field Manual*, 'the basic mechanism of counterinsurgency warfare ... can be summed up in a single sentence: Build (or rebuild) a political machine from the population upwards'.

French policy centred on isolating the insurgents from the population. To this end, French counterinsurgent forces sought to divide operational space into colour-coded zones, physically marked by fences, watchtowers, travel restrictions and infantry patrols: white for government-controlled areas; pink for contested zones; and red for insurgent-controlled areas. Accordingly, the task of the counterinsurgents was to turn pink areas white and red areas first pink and then white (Galula, 1964: 49; Marshall, 2010: 243).

A strikingly similar approach was adopted during the 'surge' in Iraq: the cities of Baghdad and Ramadi were divided into sectors that 'were subjected to intense yet discriminate infantry operations and were cordoned off with checkpoints and barriers; the population was issued identity cards, and any travel to and from the area was strictly controlled' (Ucko, 2009: 128). Officers frequently referred to these fenced-in neighbourhoods as 'gated communities' (Brulliard, 2007; Kilcullen, 2007). In his characteristic penchant for medical tropes, Kilcullen (2007) contends that, 'Gated Communities in counterinsurgency are like tourniquets in surgery' – an effective, or so he claims, albeit somewhat painful, instrument for breaking the cycle of violence. He suggests that the 'gated communities' approach can achieve this aim in three ways:

First, it makes it much harder for terrorists to infiltrate a community. We only establish perimeter security (checkpoints, T-walls, etc.) once the area has been cleared and secured, close relations are established with the population, and we have troops on the ground securing the district in conjunction with the people. Once the gated community goes in, this makes it much harder for extremists to re-enter.

Second, the perimeter controls make it much harder for terrorists to launch attacks from within that district, because they have to smuggle a car bomb or suicide vest out, through a limited number of controlled access points. This reduces extremists' ability to use gated districts as a base to attack neighboring areas.

Third, if the terrorists do manage to mount an attack, the security controls protect the gated community against retaliation by 'death squads'. This reduces fear within the community, alienates extremists from the population (since they can no longer pose as defenders) and emboldens people, who would otherwise be too intimidated, to tip off the security forces to enemy presence (Kilcullen, 2007).

Kilcullen's account of gated communities in Iraq shows that once an area is cleared of insurgents, the population is subjected to a border regime so that the insurgents can be kept out. This regime takes the form of a complex assemblage of *technologies* (technologies of command, control, communication, surveillance and reconnaissance; biometrics; but also fences, walls, checkpoints, etc.), *modes of knowledge production* (gathering of census data; mapping the physical and human terrain; etc.), *organizations* (US and allied military units; host-nation security forces; international aid organizations; etc.) and *tactics* (saturation patrols; raids; searches and seizures; enlisting the help of the local community; etc.), geared towards permanently pacifying previously cleared spaces.

Pacification efforts in counterinsurgency bear a closer resemblance to the high-intensity, and often also oppressive, policing of domestic crime hotspots than to conventional military operations. According to one RAND corporation analyst, 'pacification is best thought of as a massively enhanced version of the "community policing" technique that emerged in the 1970s (encouraged in part by RAND research)' (Long, 2006: 53). Indeed, in counterinsurgency operations, 'low-intensity warfare meets high-intensity policing' (Hardt and Negri, 2004: 14–15).

In counterinsurgency, the installation of border assemblages is seen as an important step towards (re)building the infrastructure, or what Galula (1964: 95) called the 'political machine', necessary to permanently pacify and stabilize ungoverned spaces:

Population security, is the first requirement of success in counterinsurgency, but is not sufficient. Economic development, good governance, and the provision of essential services within a matrix of effective information operations, must all improve simultaneously and steadily over a long period of time if America's determined insurgent enemies are to be defeated (Nagl, 2007: xix).

Current US doctrine seeks to rehabilitate older imperial, and highly oppressive, practices of population security, and to harness them to the imperatives of a new biopolitical imperialism that is not limited by the geostrategic objectives of individual nation-states, but rather driven by the potentially unlimited aims of promoting life while securing it from its own inherent threats.

Conclusion

Cutting across the fields of liberal war and liberal rule, counterinsurgency doctrine aims to promote certain forms of species-life while combating those that are deemed dangerous. Counterinsurgency doctrine seeks to articulate security and development into a governmental programme for pacifying spaces and populations that are viewed as threats to the international system of (liberal) states, in order to eventually (re)integrate them into the networks of liberal governance. This programme has been designed and deployed in response to problematizations of (in)security that are both biopolitical and geostrategic. In fact, the very distinction between discourses of human security and US national security is meaningless in a security environment held to be marked by the global circulation of threats emanating from ungoverned spaces.

Counterinsurgency is set to triage between lives that need to be promoted and lives that need be destroyed within spaces and populations that have already been designated as dangerous by the global triage of liberal governance (Dillon and Reid, 2009: 91–4). What is more, the triage of targeted populations is conducted on the basis of Orientalist modes of knowledge (production) and implemented through oppressive population-security measures that derive from the methods of imperial policing.

However, the use of such oppressive regimes of practices will likely continue to swell the ranks of 'accidental guerrillas', who see themselves as merely resisting foreign imperialist occupation, and will ultimately exacerbate the very symptoms of violence that counterinsurgency professes to be able to cure. Because of its biopolitical tendency to pathologize and depoliticize certain forms of violence, and despite its professed aim to address the legitimate grievances of targeted populations, counterinsurgency is unable to acknowledge the genuinely political grievance of foreign military occupation. And foreign occupation will likely breed more resentment and cause further instability that can easily spread across and beyond affected regions. The spread of instability, in turn, will only reinforce Western problematizations of human insecurity and may thus incite Western policymakers to embark on further pacification campaigns in the future. In short,

counterinsurgency doctrine is not so much a programme of global peace and stability as one of spatially and temporally indeterminate pacification. In fact, what was first known as the 'war on terror' and was then rebranded as the 'Long War' is now also often referred to as 'Global Counterinsurgency' or GCOIN (Bacevich, 2010; see also Kilcullen, 2005, 2009; Nagl, 2007).

Counterinsurgency's (re)production of divisions between lives that are viewed as safe and those that are seen as threatening is perfectly in line with the broader discourse of human security. With their references to 'bad neighbourhoods', liberal proponents of human security, such as Mary Kaldor, also (re)produce divisions between 'good' liberal cosmopolitans and their 'evil' illiberal Others that can easily be colonized by more explicitly racialized discourses (see Kaldor, 1999, 2003; Glasius and Kaldor, 2005; Kaldor and Beebe, 2010). This, in fact, is a consequence of a biopolitical logic 'disposed to favour some aspects of the species over others' (Dillon and Reid, 2009: 49). And, ultimately, this disposition is what drives biopolitical imperialism and its programmes of global pacification.

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Notes

1. General McChrystal resigned (or was sacked) as commander of US and NATO forces in Afghanistan in July 2010 after disparaging remarks made by him and his staff about their civilian leaders appeared in a controversial *Rolling Stone* article (see Hastings, 2010). McChrystal was replaced by General David Petraeus, who is considered one of the chief architects of current US counterinsurgency doctrine.
2. Marja was repeatedly referred to as a town in the Western media. US investigative journalist Gareth Porter (2010), however, pointed out that Marja 'was an agricultural area whose population of about 35,000 was spread over some 120 square kilometres'. This is also borne out by Google Maps' satellite views of the area.
3. David Price revealed that the definitions of basic social science terms in Chapter Three of the manual, entitled 'Intelligence in counterinsurgency', were based on 'pilfered scholarship'. Apparently, the manual has 'borrowed' terms, phrases and even entire paragraphs from a large number of unacknowledged sources (see Price, 2009, 2007).
4. However, Marshall (2010: 241) argues that British imperial policing was not nearly as focused on the 'hearts and minds' of the population as some of its contemporary adherents claim: 'In practice, British methods remained above all reliant upon the threat of the maximum use of force, and included such techniques as crowd control via the use of indiscriminate volley fire, ethnic displacement, mass floggings and torture, the poisoning of wells and burning of villages, the napalm area bombing of Malayan forests, and the creation of "free fire" zones – all conducted under extremely permissive legal constraints.'

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Markus Kienscherf has recently earned his doctorate in sociology from Free University Berlin. He is currently working on a research monograph about the intersections between US domestic and international security.



Anatomy of a village razing: Counterinsurgency, violence, and securing the intimate in Afghanistan

Oliver Belcher

Department of Geography, Durham University, Lower Mountjoy, South Road, Durham DH1 3LE, UK



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ABSTRACT

In autumn 2010, the United States military partially or completely razed several villages in Helmand and Kandahar provinces as part of its counterinsurgency campaign in southern Afghanistan. In the spring 2011, U.S.-led forces rebuilt one of the villages, Taroke Kalacha, to showcase the “humane” side of contemporary U.S. counterinsurgency doctrine. This article analyses the logics and rationalities informing the reconstruction of Taroke Kalacha, and why the rebuilding effort ultimately failed. I examine a wide spectrum of biopolitical initiatives involved in the 2010–2011 “Hamkari” counterinsurgency operations, and show how violence became a protracted condition for displaced villagers as durable lines of force were inscribed into the communal relations and material arrangements of the built environment(s) in Kandahar. I focus on what I call “securing the intimate”; namely, the attempts by U.S. forces to harness Afghan households as sites of indirect rule. In this anatomy of a village razing, I analyse two specific problems with the reconstruction of Taroke Kalacha: (1) the bid to establish a new political order by bringing the villagers closer to local governance structures through the dubious process of U.S. military compensation schemes; and (2) how the rebuilt structures in Taroke Kalacha deviated from the “local style” with devastating effect, especially for women in the village.

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On April 1, 2011, Lieutenant Colonel David Flynn, the commanding officer for the U.S. Army's 1-320th Field Artillery Regiment, presided over a mosque opening ceremony in Taroke Kalacha, a small village in Arghandab district, located just north of Kandahar City in southern Afghanistan. In the previous autumn 2010, Taroke Kalacha was one of several villages either partially or completely destroyed by Flynn's forces as part of the U.S.-led Hamkari¹ counterinsurgency campaign in the northern and western sections of Kandahar province (Fig. 1). The “clearing operations,” as they were called, entailed the systematic destruction of “abandoned” homes, compounds, mud walls, farm plots, and, in a few cases, entire villages in Kandahar and Helmand provinces.² The *macabre tableau* left in the wake of the operations was justified by military officials

as a legitimate means to deprive sanctuary for Taliban insurgents (Broadwell, 2011). As he stood alongside Kandahar Governor Torkyalai Wesa and other provincial leaders, Afghan military commanders, and village elders, Flynn presented the mosque as the centrepiece of a broader U.S. military effort to rebuild Taroke Kalacha's homes, walls, and surrounding fields amidst the charred rubble.

For Flynn, the reconstruction of Taroke Kalacha was as much symbolic as it was strategic. The rebuilt homes were intended to send a message to returning villagers that the motivations of the U.S. military were very different than the scorched earth tactics used by the Soviets, who, during their own counterinsurgency operations in the 1980s, decimated the countryside of southern Afghanistan (Ackerman, 2011b). Instead, Flynn wanted to demonstrate the power of the “clear, hold, build” mantra then popular among U.S. counterinsurgency doctrine advocates, and rebuild the Afghan village in a way that established “order” and prevented the (re)infiltration of Taliban insurgents (Flynn, 2011). While village destruction and reconstruction has many precedents in U.S. and British counterinsurgency operations—e.g., the early 1960s strategic hamlet program in South Vietnam, and the New Villages scheme in Malaysia (Scott, 2016; Sioh, 2010)—this phase of U.S.-led

E-mail address: oliver.belcher@durham.ac.uk.

¹ Hamkari translates as “Cooperation” in Pashto and Dari.

² The number of villages completely or partially destroyed in the Hamkari operations is contested. U.S. officials claim three villages, while the Arghandab District Governor, Shah Muhammad Ahmadi, named seven villages in an interview with the *New York Times* (Shah & Nordland, 2010). Ahmadi estimated 120 to 130 homes demolished in his district alone. The four villages discussed in this article are confirmed by interviews and cross-referenced with multiple sources, but it is important to keep in mind that there could be more.



Fig. 1. The destruction of Taroke Kalacha. Source: Broadwell, 2011.

operations (summer 2010 to March 2012)³ marked a dramatic shift in the counterinsurgency strategy in southern Afghanistan.

In this article, I critically analyse the logics and rationalities informing the military operations conducted by Flynn and other U.S. commanders during the Hamkari campaign and its aftermath. The overt “gloves off” approach taken by U.S. forces during Hamkari signalled a radical departure from the “population-centric” mission outlined by the International Security Assistance Force (ISAF) Commander General Stanley McChrystal as part of President Obama’s 2009 troop “surge” (Chandrasekaran, 2012, pp. 270–285; Forsberg, 2010a). McChrystal’s tenure as ISAF commander retains a

certain novelty against the historical backdrop of America’s longest war, as he took notable steps to “win” over the Afghan population using “conventional” counterinsurgency statebuilding tactics. While Special Operations missions increased under his command (Niva, 2013; Robinson, 2013), McChrystal curtailed the use of air-strikes, increased ground patrols, encouraged face-to-face dialogue with local Afghan elders, and, relevant to my discussion here, issued strong guidance against property destruction: “destroying a home or property jeopardizes the livelihood of an entire family – and it creates more insurgents. We sow the seeds of our own demise (McChrystal, 2009).”⁴

McChrystal’s sweep of “non-kinetic” guidelines were largely

³ The build-up of U.S. troops (Obama’s “surge”) occurred in summer 2010. On March 11, 2012, Staff Sergeant Robert Bales went on a shooting rampage in three villages in Panjwai district, killing sixteen civilians, including nine children. The fallout from Bales’ actions effectively ended formal counterinsurgency operations in Kandahar.

⁴ This is not to say that McChrystal’s approach was *less* violent. On the refined violence of “non-kinetic and non-lethal targeting” in counterinsurgency doctrine, see Gregory (2008, p. 9).

jettisoned by his successor, General David Petraeus, who assumed command in June 2010. Under pressure to produce “results” in the face of a growing insurgency and a 2014 timeline for withdrawal from the conflict, Petraeus reintroduced the full-spectrum of coercive instruments into the counterinsurgency campaign. Air strikes increased. There was an uptick in house-to-house night raids. Military-aged Afghan men suspected of supporting the Taliban were arbitrarily arrested or summarily killed by U.S. Special Forces (Aikens, 2013). In a bid to build what Petraeus called a “community watch with AK-47s” (Chandrasekaran & Partlow, 2010), U.S. forces trained and heavily armed village-based militias (“*arbakai*”) dubbed “local police” to assist in the Hamkari operations (Belcher, 2015; Hakimi, 2013). The notorious warlord and commander of the Afghan Border Police (ABP), Adbul Razzik, was heavily supported by the U.S. military to restore “order” in Kandahar.⁵ During Hamkari, Razzik assisted Flynn’s forces in the “clearing operations” in Arghandab, far afield from the APB’s jurisdiction in Spin Boldak, inflaming tensions with local residents (Gopal, 2010).

Petraeus’s shift in tactics exacted a heavy toll on the social fabric of Kandahar, Helmand, and elsewhere. However, the “population-centric” counterinsurgency component was not entirely abandoned. Indeed, what interests me, and is best captured in Flynn’s reconstruction effort of Taroke Kalacha, was the equally violent campaign undertaken in 2010–2011 by U.S. forces and civilian agencies to productively reconfigure the biopolitical landscapes and intimate geographies of Afghan life as part of a wider strategy to “secure” the largely Pashtun population of Kandahar and Helmand from the Taliban insurgency. By “biopolitical reconfiguration,” I mean the U.S. military’s direct intervention into and modification of life processes, “environments,” and modalities of social reproduction—bodily security, shelter, food—in a bid to manage and control the Afghan population on a local and regional level (Anderson, 2011; Kienscherf, 2011). While the projects of biopolitical reconfiguration in Kandahar and Helmand were varied—from establishing juridical orders and rebuilding destroyed homes, to crop substitution and food security—the sites I interrogate are the intimate relations that make up Afghan village life and political order; namely the military targeting of the Afghan household and its ties to the surrounding agricultural environment.

By concentrating on biopolitical reconfigurations at the level of the Afghan household, I wish to accentuate a mode of military violence beyond the obliteration of bodies and landscapes with which we have tragically become too familiar, and instead shift the attention to military projects that, in their productive dimensions, amount to something like a “slow death” (Berlant, 2007) for local Afghan residents. As Hannah Arendt (1970) reminds us, modes of instrumental violence—such as aerial bombings, drone strikes, and the special operations raids unleashed by Petraeus—are often characterized by their effectiveness in an immediate sense (Shaw & Akhter, 2012), arguably amounting to repressive “police” actions (cf. Bachmann, Bell, & Holmqvist, 2015). However, in this article, I go beyond Arendt’s rich accounting of violence as the instrumental inhibition of free action and dialogue and attempt to show a mode of violence that becomes a *protracted condition* for those living amidst the debris, a violence whose “durable traces” (Stoler 2013; cf.; Leshem, 2016; Povinelli, 2011; Springer, 2011) persist long after an occupying force leaves. My account does not seek to diminish the importance or immediacy of instrumental violence about which Arendt and others so eloquently write. Rather, my intention is to emphasize the fact that Afghan residents must continue to live in the detritus of destruction, and the “reconstruction” of Taroke

Kalache illustrates how violence endures in the aftermath, that is, in the lived textures and built environments that make up every day Afghan life.

In the next section, I draw on the work of feminist geographers and political theorists to analyse the logics informing the U.S. military’s targeting of Afghan homes, villages, and kinship relations. I foreground the U.S. military’s desire to secure the intimate (Pain, 2015; Pratt and Rosner 2012) as Afghan domestic spaces and village life became the primary site of intervention. In the following sections, I explore how durable lines of force were inscribed into the communal relations and material arrangements of the built environment of Kandahar in general, and Taroke Kalacha in particular. By durable “lines of force,” I am referring to the design structure of the village and surrounding landscapes to facilitate population control in the U.S. military’s *absence*, in the same way that Deleuze (1992: 160) argued, following Foucault, that “lines of force” are always embedded in the operational spaces of any apparatus of power. The lines of force range from the redrawing of property lines to building (or not building) walls, to the establishment of surveillance “sight lines” for military and police patrols in the village and countryside. Indeed, the carceral logic (cf. Foucault, 1977, pp. 293–308) informing the reconstruction of Taroke Kalacha was intended to both confine and discipline Afghan bodies at the level of the household, although the project ultimately failed as it compromised the inhabitability of the village, for reasons I explain in great detail.

My account is based on a review of policy documents, journalistic accounts, and interviews with journalists, village elders, and U.S. State Department and U.S. Agency for International Development (USAID) officials operating in Arghandab at the time of Taroke Kalacha’s destruction and reconstruction. In this anatomy of a village razing, I examine two specific problems with the reconstruction effort: (1) the attempt to bring the villagers closer to local governance structures and the dubious process of U.S. military compensation schemes; and (2) how the rebuilt structures in Taroke Kalacha deviated from the “local style” with devastating effect, especially for the women of the village. I close by arguing that the spaces of the Afghan home and the ends of the household are a critical nexus for operationalizing power relations in U.S. counterinsurgencies.

1. Securing the intimate

In the lead up to the October 2001 invasion of Afghanistan, Derek Gregory once wrote that Western policymakers and military officials required a “peculiar cartographic performance of sovereignty through which the space of Afghanistan could be simulated as a coherent state (2004: 50).” If the purpose of this cartographic gaze was necessary, as Gregory argues, to construct Afghanistan as a “bounded locus of transnational terrorism,” whereby an essentially “deterritorialized opponent” (Elden, 2009, p. 72) such as al-Qaeda could be targeted, then it was a very short-lived performance. Almost immediately after the U.S. invasion, Afghanistan was quickly re-framed in the Western press and policy discourse as a “failed state” run by a Taliban “militia” who lacked sovereign control in a country still reeling from the 1980s Soviet occupation and 1990s civil war (Colls, 2004; Rashid, 2000). In fact, this reframing of Afghanistan as a “failed state” was critical step for Bush Administration lawyers to construct the Taliban movement and al-Qaeda as “non-state actors” without standing under the Geneva Conventions dictating the laws of war, a precondition for indefinite detention in Guantanamo Bay.⁶

⁵ See Memos 4–13 on the “Application of Treaties and laws to al Qaeda and Taliban Detainees” in Greenberg & Dratel, 2005.

⁶ On Razzik’s record of corruption and human rights abuses, see Aikens (2011).

By 2009–2010, the interpretative cartographic gaze noted by Gregory had effectively been inverted by the U.S. military in Afghanistan, and no longer operated merely at the “state-level” of sovereignty. Instead, the U.S. military operationalized a different set of cartographic performances in its counterinsurgency campaign which targeted the fluid networks of Afghan households, small farms, villages, and cultural institutions animating rural life far from the capital of Kabul.

Although there were many reasons for the “scaling down” of military operations to the lived textures of the village in Afghanistan, two primary factors stand out. First, by 2009, Western diplomats and military officials were disillusioned by the corrupt Karzai regime and the possibilities of liberal peacebuilding at the state level (Maley, 2013). While the formal state apparatus operating in Kabul was highly centralized and effectively governed the capital, the rural areas where the conflict was largely taking place remained highly contested. As William Maley writes, “Rural Afghanistan [presented] an exceptionally complex political landscape, in which the agencies of the Afghan state provide[d] but one set of participants in a ceaseless renegotiation of power relations involving civil society, the state, and transnational actors, all using diverse strategies to realize their objectives (2013: 263).” The insistence of U.S. civilian, military, and even Kabul-based officials to build local governance structures (“community resilience”) unwittingly contributed to the erosion of a “national solution” to local security problems (Hakimi, 2013, p. 400). For example, the (failed) 2010 Operation Moshtarak to deliver “government-in-a-box” to the town of Marjah in Helmand was intended, in part, to build local governance institutions that could function (Ucko, 2013), even if the relationship with Kabul was tenuous.

Second, and more importantly, a persistent narrative appeared around this time that painted rural Afghans, particularly Pashtuns, as culturally predisposed to “traditional” and “tribal” modes of authority fundamentally anathema to a centralized state (Hakimi, 2014). Drawing on a long pedigree of Orientalist tropes (Said, 1978, pp. 31–49), U.S. forces turned to patriarchal relations rooted in Afghan village life as the legitimate basis for establishing Pashtun authority and order at the level of the village in conflict-ridden areas, regardless of a village’s relationship with Kabul. In this strategic “local turn” to the village, the male-dominated household became rich terrain for structuring social relations in southern Afghanistan (Jones, 2010). As Afghan rural life was interpreted as irreparably “tribal,” displays of force were frequently posited as the most profitable means to earn “respect” with villagers. As one U.S. Special Forces practitioner of “village stability operations” put it,

Family life is structured around the *qalat* (citadel)—a mud-walled compound that serves both to contain (women, possessions, goats) and to repel (intruders and the public). Afghan village life is simple and Hobbesian—nasty, brutish, and short ... In rural Afghanistan, demonstrating sufficient cultural understanding while exhibiting the ability to act powerfully earns respect. Personal relationships are paramount, but they must grow from positions of strength ... Villages and villagers principally aim to survive and prosper. To do so, *they will visibly align or subjugate themselves to the dominant, lasting presence* (Petit, 2011: 26–27; my emphasis).

It is obvious that this type of racist neo-Darwinian cultural representation lacks nuance (Belcher, 2015; Gonzalez, 2009). At best, it misunderstands the dynamics of “community governance” in Pashtun areas (cf. Shahrani, 1998). Nevertheless, it is important to consider the posture the U.S. military assumes towards a population once dubious stereotypes forcefully frame villagers as

primordially “traditional” and motivated by informal kinship relations and force.

The widespread cultural stereotypes of Afghans in general, and Pashtuns in particular, prompted U.S. military soldier-scholars and operators to advocate an operational approach at the local level as the most effective means to stem the Taliban insurgency (Flynn, 2010; Jones, 2010; Kilcullen, 2009, pp. 39–114; cf. Moe & Muller, 2017). The “tribal” inhabitants of Kandahar and Helmand were framed as *outsiders* vis-à-vis the central Afghan state, albeit an outside never fully separated from the state apparatus. Instead, an “inclusive-exclusion” (Agamben, 1998) was produced under the aegis of “self-governance” by and for local Afghans (Kienscherf, 2016). The radical alterity of villagers, embedded in their native traditional ways, always-already placed rural Pashtuns *in-between* the insurgents and “legitimate” state actors, exposing communities as targets for “kinetic” and “non-kinetic” coercion. As RAND analyst Seth Jones, a principal architect of “village stability operations,” put it:

Pashtuns are organized according to a patrilineal segmentary lineage system. This presupposes that the tribe will segment, or split, among multiple kin groups that will engage in competition with each other most of the time. When a common enemy outside the tribe poses an existential threat, the different segments tend to band together—since they are related by common descent—until the emergency is over ... Saying that Pashtuns in a particular area identify only with the particular valley in which they live, as opposed to a tribe, suggests a misunderstanding of how a decentralized tribal system works. Tribalism is localism. There are many examples of segmented tribes that are deeply divided. But this does not make them any less “tribal.” (Jones & Muñoz, 2010: 16–17)

This kind of broad cultural generalization is one of the reasons Mullah Abdul Zaef’s autobiography *My Life with Taliban* (2010) was so influential in U.S. soldier-scholar circles at the height of the Hamkari counterinsurgency campaign. When an ultraconservative like Zaef wrote, “As an Afghan you are always more than one thing: your kin, your tribe, your ethnicity and the place where you were born; all are part of you. Pashtuns who emigrated long ago to the big cities of Afghanistan, Pakistan or abroad might have forgotten this, but their true identity lies with their tribe, their clan, their family and their relatives. As a foreigner, you can never truly understand what it means to be an Afghan” (Zaef, 2011: 2), it reinforced every essentialist stereotype of Pashtun’s operating at the time within the U.S. military-civilian apparatus in Afghanistan. It also enabled a “scaling down” of operations to the “local” that opened up Afghan households as a terrain for military violence.

In a way, the U.S. military’s turn to the informal and intimate structures that make up Afghan village life was a “rediscovery” of the scale on which counterinsurgencies have always been most violently felt: the colonized body and the home (Khalili, 2013). Of course, the process of “un-forming and re-forming communities” has a rich colonial legacy (Loomba, 2005, p. 8); that U.S. counterinsurgency operations in southern Afghanistan resulted in the destructive re-composition of biopolitical landscapes is hardly surprising given the colonial roots of U.S. counterinsurgency doctrine (Khalili, 2010). The story of counterinsurgencies re-engineering the political, economic, and cultural arrangements of societies on the receiving end of U.S. imperial violence is familiar one, from the Philippines (McCoy, 2009) to Haiti (Greenberg, 2017), Vietnam and Central America (McClintock, 1992) to Iraq (Dodge, 2013, pp. 31–52). At the height of the Vietnam War, for instance, Samuel Huntington (1968) wondered aloud if a positive side-effect of “modernization” could be gleaned from the American carpet

bombings on South Vietnamese peasant hamlets and villages. By destroying the bases of support for the National Liberation Front, it was possible that a “social revolution” was in the making as South Vietnamese peasants were forced into “modernizing” urban slums.

[The U.S. bombings] take place on such a massive scale as to produce a massive migration from the countryside to the city, [and thus] the basic assumptions underlying the Maoist doctrine of revolutionary war no longer operate. The Maoist-inspired rural revolution is undercut by the American sponsored urban revolution ... The rural poor may well find life in the city more attractive and comfortable than their previous existence in the countryside (Huntington, 1968: 650–652).

In his retrospective reading of Huntington, Mike Davis (2006: 56) concluded that U.S. counterinsurgencies are perhaps “one of the most ruthlessly efficient levers of informal urbanization.” Indeed, the mass destruction of homes and the mass displacement of populations is the signature wound of counterinsurgency warfare.

It is significant that the “modernizing” impulse once fashionable in Huntington’s generation is entirely absent in the ideological caricatures of Afghans animating the imaginations of Flynn (2012) and his peers. The motivations driving the village razings and reconstructions in Kandahar and Helmand were *not* to deprive the Taliban of a succouring population by permanently resettling Afghan villagers in Afghanistan’s cities. (Although, tens of thousands were forced to flee the countryside into refugee camps outside Kabul and Kandahar City during the Hamkari campaign; Refugees International, 2010). Rather, the military goal was to *reform a political order* on the basis of “culture” and kinship, specifically on the foundation of the patriarchal Afghan household, that was at once “culturally appropriate” and amenable to U.S. military domination and population control.⁷ The logic underpinning this “residential approach” to counterinsurgency is succinctly captured by David Kilcullen in his influential “Twenty-eight Articles”:

In traditional societies, women are hugely influential in forming the social networks that insurgents use for support. Co-opting neutral or friendly women, through targeted social and economic programs, builds networks of enlightened self-interest that eventually undermines insurgents. You need your own female insurgents, including interagency people, to do this effectively. Win the women, and you own the family unit. Own the family, and you take a big step forward in mobilizing the population (Kilcullen, 2006: 7).

The practice of specifically targeting households in counterinsurgencies is again not entirely novel. Feminist geographers have long demonstrated the ways in which violence manifests in the intimate geopolitics of the household (Pain, 2015; Brickell, 2014), and how kinship and gender are mobilized in war contexts (Dowler, 1998). In her sweeping historical survey on counterinsurgencies “socially administering” colonized populations in revolt, Patricia Owens argues that counterinsurgents throughout the twentieth century coveted households as a site for indirect rule:

[Counterinsurgents] drew on and innovated organisational devices of direct and indirect household governance to create or shape units of rule in which populations were to be domesticated. They variously sought to achieve this aim through the

selective delivery and withholding of humanitarian supplies and inside and through small-scale family homes, detention and concentration camps, depopulation and re-concentration in new villages and strategic hamlets, the creation or shaping of tribes and sectarian militia, and at the largest scale inside newly formed or reformed postcolonial and/or postwar national-states. In each of the campaigns, liberal counterinsurgents attempted, although never wholly succeeded, to negate the meaningful political agency of local people by turning to old – as well as creating new – techniques of household rule (Owens, 2015: 24).

By aiming to secure the intimate, any boundary that may exist between “private” and “public” in the household breaks down (Nowicki, 2014; Porteous & Smith, 2001). Culture, kinship, and “home” are taken less as sociological constructs than as instruments for coercion (Martin, 2012; Belcher, 2014, pp. 1018–1019). For this reason, Khalili writes (2011: 8), “the conventional privacy measures for homes and the peacefulness of everyday spaces is no longer guaranteed [in counterinsurgencies] ... What counterinsurgency does ... is to try to transform these spaces without necessarily destroying them (although destruction—especially in the wake of population resettlement is often inevitable), thus co-opting everyday spaces into the landscape of war.” Interiority becomes a terrain as important as exteriority. Controlling *hearths* and minds matters as much as “hearts and minds.”

The violent encroachments into Afghan domestic spaces were wide-ranging, from rapport-building home visits by U.S. commanders for “tea” with the household patriarch (Adey, 2014) and “Female Engagement Teams” trained to work with Afghan women on domestic social programs (McBride & Wibben, 2012) to house-to-house searches, night raids and targeted drone strikes on houses. In southern and eastern Afghanistan, where U.S. forces worked diligently to resituate the Afghan household and village as a site of intervention, such an approach was particularly pernicious as “there remains a general respect for the boundary between public space and home – private family spaces. Non-familial breaches to this boundary are largely identified as a violation of family autonomy and honour” (Fluri, 2011, p. 285), often creating “more ill-will than civilian casualties” (Azerbaijani-Moghaddam et al., 2008: 27). Once these boundaries collapse – the “un-wall-ing of the wall,” as Eyal Weizman puts it – the “breaching of the physical, visual, and conceptual border/wall exposes new domains to political power (Weizman, 2007, p. 210).” As I argue below, when boundaries collapse, or are erected again in malicious ways, political power resides not merely in the relationship between governing institutions and the population. Rather, modalities of violence and power are instantiated in the material arrangements (re)established in the (re)built environments. In the next section, I show how this political power manifests in concrete terms in the destruction and reconstruction of Taroke Kalacha.

2. Hearths and minds

“The place was completely riddled with evil.”

Lt. Col. David Flynn, *Washington Post*, 16 April, 2011

2.1. Clearing

To fully appreciate the biopolitics of the Taroke Kalacha reconstruction, it is important to consider the wider context of the

⁷ The criticisms of the U.S. military’s approach to “cultural awareness” and “human terrain” are well known (Belcher, 2014; Gregory, 2008; Price, 2011; Wainwright, 2016).

Hamkari operations in Kandahar and Helmand. Ben Anderson has written that counterinsurgency is fundamentally a “violent environmentalism,” meaning that operations “advocate a type of ‘environmental’ intervention on the relation between the life and perception of a population (2011: 208).” During the Hamkari operations, it was widely acknowledged that while U.S. commanders had difficulty decoding the cultural milieu in Kandahar—the so-called “human terrain”—the *material terrain* in which U.S. forces were moving posed equally considerable challenges for securing a dominant military presence (Chandrasekaran, 2011; Forsberg, 2010a). In Arghandab, for example, the combination of un-pruned pomegranate orchards, fields dotted by five-foot high grape drying earth mounds, irrigation canals, high-walled villages, mud-walled lined footpaths and dirt roads hindered U.S. troop mobility, and provided effective cover for insurgents to plant IEDs. To the west, in Panjwai and Zhari, while trees and orchards were less dense, the districts were heavily irrigated with canals as the area relied on the Arghandab River for agriculture. Tall earthen mounds with elevated grapevine trellises also obstructed military movements in the area. Further west in Maiwand, the dense foliage, earth mounds, and irrigation canals tapered off as settlements are increasingly sparse, but the district remained a major trafficking point for the insurgency (Forsberg, 2009, p. 11). From the U.S. military’s perspective, the complex mosaic of obstacles and chokeholds of the socio-physical landscape provided the Taliban with a substantial amount of cover for compounds, weapons caches, and deadly mines. Therefore, the violent reconfiguration of the material spaces of the districts was necessary for enacting a viable political order.

It is difficult to overstate the extent of the damage wrought by U.S. operations in the Arghandab River Valley in 2009–2011. Throughout Arghandab, Zhari, and Panjwai, mudbrick walls, homes, and dense foliage were razed to create sightlines and prevent cover for insurgents (Taimoor Shah, journalist in Kandahar, interview 05/12/2015). Starting in July 2010, hundreds of “abandoned” homes and buildings of displaced villagers in the districts were identified by U.S. military commanders as “IED factories,” and systematically bombed to rubble (Gall & Khapalwak, 2011).⁸ It is unclear whether all the homes and buildings were permanently or temporarily abandoned. U.S. forces used Mine Clearing Charges to destroy hundreds of acres of pomegranate and grape orchards not only to clear IEDs, but to create breaches and roads for patrolling military vehicles.

The technologies of ruination were diverse. In one instance, a BBC crew filming the documentary *The Battle for Bomb Alley* (2010) shadowed Captain Matt Petersen, commander of the U.S. 3rd Battalion 5th Marines who was leading demolitions in Sangin in Helmand Province. The footage shows Marines using bulldozers to level houses and mud walls, as well as a mosque situated next to the Marines’ base. Soldiers tell villagers their homes have to be “cleared” to “make room for military vehicles” and deny insurgents the capacity to plant IEDs. “It’s going to look a lot different,” a Marine is filmed saying as a village wall is bulldozed. The reporter asks, “Do you feel bad seeing that?” “Not really,” the Marine replies. At one point, an Afghan interpreter for the Marines has difficulty explaining to the villagers why their houses must be torn down. “I would be angry,” he says, “and I know you are.” In another scene, a villager is running over debris, desperately pointing to his home

and shouting, “All our belongings are in that house! Are you destroying it?” He pleads to interpreter, “Tell them our stuff is there. We are poor people, what should we do? Tell him that our children are there.” He was too late. The reporter asked Captain Petersen about the principle or logic behind the demolitions, and Petersen replied, “I know that most people in the world probably wouldn’t understand, ‘Now, wait a minute. You’re trying to build up a country by destroying it.’ And it seems like a paradox. But those are people who have not been to Afghanistan, and don’t understand that the nature of conflict inevitably includes destruction before you can start to build it the way it should be.”⁹

In another instance, the U.S. military worked in tandem with the Office of Transitional Initiatives (OTI), a branch of USAID, to train Arghandab farmers in pruning practices for the overgrown pomegranate trees that hindered military patrol mobility. Initiated as part of USAID’s “Afghanistan Vouchers for Increased Production in Agriculture” (AVIPA-Plus) program, the pruning project served a dual purpose. In part, AVIPA-Plus was a “cash-for-work” stabilization scheme to provide training and vouchers for Kandahar and Helmand farmers to increase agricultural outputs, grow alternative crops to poppy, and provide employment for young men who might otherwise join the Taliban (USAID Fact Sheet 2010; Green, 2010). As the OTI representative who ran the program told me, AVIPA was a “knowledge sharing” project to recover “traditional” pruning practices: “A lot of people who had either fled or been killed were people who had the knowledge on how to take care of the orchards. That knowledge was sort of gone. And people taking care of the orchards didn’t know how to prune their trees, didn’t know how to till their soil. They didn’t know how to do that sort of thing” (Kevin Melton, USAID/OTI representative in Arghandab (2010–2011), interview 28/12/2015). More importantly, AVIPA-Plus was a critical component of the counterinsurgency campaign, as the lush and overgrown pomegranate trees hindered U.S. aerial surveillance capabilities in support of troop movements and locating insurgents planting IEDs. The un-pruned trees were frequently likened to the dense hedgerows at Normandy, and made establishing sightlines from above and below nearly impossible (Department of State official, interview; cf. Chandrasekaran, 2011). Under the auspices of recovering “traditional” farming techniques and practices destroyed by thirty-plus years of war (cf. Attewell, 2017), the pruning project was designed to enhance the U.S. military’s ability to more effectively see the terrain.

The destruction of Taroke Kalacha and other villages (Khosrow Sofla, Khosrow Ulya, Lower Baber, and others) was part of this wider set of “clearing operations” occurring in the Arghandab River valley. “We obliterated those towns,” Flynn’s colleague Colonel Jeffrey Martindale boasted at the time to the *Washington Post* (Partlow & Brulliard, 2010). “They’re not there at all. These are just parking lots now.” However, the destructive clearing was only one side of the coin. The other side was dedicated to rebuilding Afghanistan “the way it should be.”

2.2. Building

Alongside the systematic demolitions, the U.S. military also engaged in several “building” projects. Tall concrete walls were strategically installed along roads and through farmland for purposes of population control, hindering movements on secondary roads and footpaths, and channelling military-aged males through police checkpoints along main roads. In Zhari district, a five-mile long “great wall of Kandahar” topped with razor wire—described

⁸ On the notion of “IED factories”: “They [U.S. military] would patrol that area, and there was a Taliban presence that was using some of those villages for firing positions and for IED factories as they were termed. I mean, I don’t know if you can call a guy making some HMEs [homemade explosives] a factory, but I guess that is what they were called, factories.” (Department of State official, interview).

⁹ *The Battle for Bomb Alley*, BBC Films, 2010.

by one journalist as “overly penal” for local residents (Chandrasekaran, 2011)—was partially built by U.S. forces to cut off ISAF-controlled villages and areas from Taliban infiltration. In neighbouring Maiwand, soldiers built a mile-long, twelve-foot high “Wolfpack Wall”¹⁰ made of Hesco containers—large, wire mesh boxes filled with dirt—as an *ad hoc* initiative to cut off Taliban lines of communication between Helmand and Kandahar, and expose insurgents to targeting in the open desert (Robson, 2010). In the provincial capital, journalists evoked the imagery of Baghdad’s “Green Zone” to describe the changes occurring in Kandahar City under Obama’s troop surge, such as newly erected blast walls, roaming military patrols, and anxiety-inducing checkpoints (Chandrasekaran, 2010).

The reconstruction of Taroke Kalacha was the highest profile “building” project in Kandahar. On October 6, 2010, Flynn ordered the aerial demolition of Taroke Kalacha and three other villages located west of the Arghandab River, near the U.S. forward operating base in Jelawar. The name “Taroke Kalacha” means that the village belonged to the Taraki tribe, a minority tribe in Arghandab. After 2001, the village suffered many raids by American Special Forces and the Afghan government, which is one of the reason the village sympathized with the Taliban (Anand Gopal, journalist in Kandahar and New York City, interview 10/12/2015). There was never any trust built between the U.S. military and the village residents. In the bombings, over forty structures and the surrounding fields were destroyed. According to Flynn (2011), the villages were densely populated with mines, preventing military access for foot patrols. Flynn’s battalion and villagers tending their fields suffered heavy casualties from IEDs while patrolling around their combat post in Jelawar.

All summer long, in spite of our casualties, the local population was hit worse by the Taliban’s indiscriminate maiming of civilians by their IEDs. Children maimed while playing in the fields; fathers killed in front of their children while working in the orchards. The people of displaced villages told me that they could not return to their homes due to the threat. I have witnessed more Afghans express desire for retribution against the Taliban than coalition forces in my area (Flynn, 2011).

Moreover, the U.S. claimed its military personnel came repeatedly under fire from Taliban “based” in the villages (Ackerman 2011a,b). In autumn 2010, several reports emerged of Flynn and his subordinates collectively threatening villagers with the demolition of their homes if they did not reveal the insurgent networks planting IEDs in the area (Farmer, 2010), an accusation that Flynn denies (Broadwell, 2012, p. 162). It is a curious denial, as Flynn and other U.S. commanders frequently claimed that the reason they demolished the villages was that civilians had long fled after the Taliban arrived (Shah & Nordland, 2010). It remains unclear how Flynn’s forces could threaten or negotiate terms of destruction and compensation of homes with villagers who had fled. Nevertheless, Flynn worked throughout September to secure approval to destroy the “compounds” from Kandahar governor Torkyalai Wesa, the district governor Shah Muhammed Ahmadi, as well as landowners and villagers (Flynn, 2011). There was little to no strategic input from U.S. civilian agencies in Arghandab on the wisdom of Flynn’s plan. As the State Department representative in Arghandab in 2010–2011 told me:

We were consulted, I guess. We were informed that it was going to happen. The strategy was not developed in any sort of joint manner, at least not with the district or with the district governor at first. The idea was presented to the district governor in a very leading way. And, the USAID and State didn’t really give them much buy-in. My specific opinion was that it should not have been done. But, if they were going to be levelled, for lack of a better word, then because it was a necessity, then they certainly should rebuild (Chris Harich, U.S. Department of State representative in Arghandab (2010–2011), interview 13/01/2016).

In late September, the district governor ordered any remaining residents to flee the villages, with over 900 families fleeing Zhari and Arghandab in September and October (Forsberg, 2010b, p. 11; Shoaib, 2010). Once the villages in the district were empty, the homes, surrounding farms, and orchards were destroyed. 49,000 pounds of bombs were dropped on Taroke Kalacha (Ackerman, 2011a). U.S. officials claim that based on pattern-of-life analysis, there was no loss of life in the village demolitions other than the insurgents “based” there.¹¹ As Flynn wrote of the operation,

Did I want to destroy the entire Taliban sanctuary and leave no structures for the people to return to? No. The choice, based on my previous experience, was to lose or maim more of my soldiers or raze the structures and rebuild later. I had the greater context of the population in mind and felt with the relationships that we had already made in the past three months, already solidified by the previous unit, that we could successfully resettle the population in the area (Flynn, 2011).¹²

The timing of the house demolitions is important to keep in mind, as they occurred at the height of harvest and prior to the onset of winter. In December 2010, when villagers were given permission to return, they were dumbfounded by the extent of the destruction—houses, village walls, and fields reduced to rubble, their livelihoods in jeopardy (Lawrence, 2011).

After the demolitions, the focus immediately turned to compensation and rebuilding the villagers’ homes in Taroke Kalacha. I noted above that we need to understand violence as a protracted condition. In this case, it was through the redrawing of property boundaries, the planned layout of the new Taroke Kalacha, and the design of the rebuilt houses that lines of force were inscribed in the built environment. In what follows, I highlight two problems in the reconstruction process: the access to compensation (or lack thereof) through local governance councils, and the design failure of the rebuilt structures.

(I) Local governance and compensation

The reconstruction effort was exceptional insofar as the entire process – planning, compensation, and rebuilding – was carried out by the U.S. military, who paid local sub-contractors to rebuild the village using Commander’s Emergency Response Program (CERP) money (cf. Gilbert, 2015b, pp. 207–210). General Petraeus and Flynn immediately touted the rebuilding scheme as a counterinsurgency tactic to separate the population from the insurgents

¹¹ It must be noted that the U.S. military has a poor track record of discerning civilians, especially military-aged males, from combatants (Gregory, 2006).

¹² As Flynn told Paula Broadwell: “I literally cringed when we dropped the bombs on these places – not because I cared about the enemy we were killing or the HME destroyed, but I knew that the reconstruction would consume the remainder of my deployed life” (Broadwell, 2011).

¹⁰ The 3rd Squadron, 2nd Stryker Cavalry Regiment that built the wall is known as the “Wolfpack.”

(McCloskey, 2010). Prior to the razings, much of the local population west of the river in Arghandab, Panjwai, and Zhari were opposed to the presence of U.S. troops, who they blamed for the rise in violence in the area (Dorransoro, 2010, p. 12). The razings only exacerbated the local population's fear and animosity towards the U.S. military (Chandrasekaran, 2010; McCloskey, 2010; Shah & Nordland, 2010). U.S. officials, however, were unable or unwilling to admit that their presence fostered insecurity. They routinely chalked up local hostility either to "Taliban sympathizers," or to inter-tribal conflict between the U.S.-favoured tribal aristocracy of Alikozai and Barakzai east of the river in Kandahar City and Dand, and the less-favoured "conservative" Ishaqzai and Noorzai located in the rural areas west of the river (Forsberg, 2010a, pp. 11–14; Gopal, 2010, p. 12). Given this resentment, as well as fear of Taliban reprisals, most of the population in Arghandab was reticent to engage with the district governor's office and local councils (*shuras*). The U.S. seized the "opportunity" offered by the razings to crudely force reluctant villagers to "engage with the process" of district governance (USAID/OTI official, interview).

One way to "connect the government to the people," as the ISAF Deputy Commander (British) Major General Nick Carter put it (Porter, 2010), was to require displaced farmers to prove their residence in Taroke Kalacha and elsewhere as a prerequisite for compensation. Emily Gilbert (2015a) has argued that military payments serve a special function in counterinsurgencies. On the one hand, money payments function to exonerate the military (at least in the eyes of the U.S.) of wrongdoing. On the other hand, since payments are packaged as a "gift," they open possibilities for population control: "Military payments, with their bureaucratic information-gathering practices ... [can] be understood as a kind of biopolitics exerted in the interest of the social welfare of the population ... [through] appeals to sympathy and condolence ... the needs and interests of the victims are suspended, and the imperial noose tightened (Gilbert, 2015a, p. 405)." In Arghandab, the U.S. military had two requirements for compensation. Proof of residence had to be vetted in person by the district governor at the district centre, then approved by the military officer, Captain Pat McGuigan, in charge of the task force overseeing the reconstruction. Then, proof of ownership in the form of a deed had to be presented to assess land valuation and stake out property lines. All the data gathered in the damage reports was stored by the U.S. military in computer systems (Shah & Nordland, 2010).

Three problems arose in the compensation process. First, the U.S. military quickly learned that most of the farmers residing in Taroke Kalacha and the other villages did not in fact own the land. Rather, due to thirty years of conflict, most of the landowners of the fields and buildings in the villages resided in Kandahar City, and hired tenant farmers to tend the fields. Thus, the tenant farmers living in the villages were triply damaged by the Hamkari operations: they were displaced from their homes and animals; their livelihoods were jeopardized by the destroyed vineyards and irrigation systems; and they were not the primary beneficiaries of the compensation packages, which instead went to the landlord in possession of the deed. Second, the proof of ownership via a deed is not straightforward in southern Afghanistan, where property relations are typically "customary" (Murtazashvili & Murtazashvili, 2016: 112–117), and do not conform to the Lockean liberal tradition of "property ownership" informing the American military's compensation process. In general, property ownership was a collective understanding and acknowledgement. Ironically, "tribal" customs in this case did not extend to property relations. The proof of paper was necessary, opening up the process to "leakages" and bribery.

As news spread of the village razings, landowners living Kandahar City showed up to the district centre to claim compensation,

and many claims were made for non-existent property (Gall & Khapalwak, 2011). If landowners possessed deeds, they tended to be temporally discontinuous, as some pieces of land had four or five deeds depending on the regimes in power in Afghanistan over the past forty years, with some deeds dating back to the rule of Mohammed Zahir Shah before he was overthrown by Mohammed Daoud Khan in 1973 (USAID/OTI official, interview). Therefore, most of the property lines in the villages had to be re-drawn. An OTI/USAID official involved in determining land rights after the razings in Arghandab (and later in Kabul) told me:

I remember this aspect being frustrating. Which, from trying to talk with (State Department) lawyers, trying to build land rights and land tenure stuff was like, Oh my god, what piece of paper makes the most sense? Well, land rights at that point, we had to make them up. Here's a house. Here's a tree. What's the cost? What is that? And it was, this was why I had to go back and [have discussions with] the district governor, the provincial government, and the local people at Jelawar at the base, and say, Okay, how are we going to look at compensating this? And then, were there actors that felt left out, that sort of thing.

However, the U.S. military compensation scheme, specifically the issued document indicating property ownership containing the district governor's stamp, in effect "rationalized" property ownership – at least for those landowners present and with the monetary means to secure a deed, whether or not they were the "real owners" of the land prior to the demolitions (Gall & Khapalwak, 2011). From the perspective of Taraki villagers, the issuing of deeds was a method of "putting villagers in their place" (Mitchell, 2002, p. 59). Since Taraki's had a disfavoured status post-2001, they often lacked a broker or supporter in the government to facilitate compensation or secure deeds (Gopal, interview). Therefore, issuing deeds was not a moment whereby private property emerged as a "right won by individuals against the state" (Mitchell, 2002, p. 67), but rather a form of penalty for the villagers, and as a means of enhancing population control by monopolizing land ownership in a small number of well connected landlords in Kandahar city.

Finally, discrepancies in compensation estimates quickly emerged between the Americans and Afghans. In January 2011, a six-member Afghan presidential commission formed by President Karzai estimated that the Hamkari operations caused over \$100 million in damage to farms and homes. According to the commission's chairman, Mohammed Sediq Aziz, over 800 homes and more than 100,000 fertile and non-fertile trees (not including crops and fields) were destroyed in Arghandab, Panjwai, and Zhari. By contrast, the U.S. military estimated \$1.4 million in damages and 81 homes destroyed (Shah & Nordland, 2011). Whether the Afghan numbers were too high, and the American's too low, local officials and journalists placed the number of structures destroyed in the hundreds (Shah, interview; Gopal, interview).

In Taroke Kalacha, residents complained of being under compensated. One village elder and landowner in the village, Haji-Abdul Hameed, claimed that he lost four plots of pomegranate trees, plums and apricot vineyards, as well as his house, but that the monetary value of the loss was not fully recovered.

We were called by American forces to talk about compensation, and they promised us that the damage of gardens and homes caused by bombs and widening of paths would be compensated. But estimate and calculated costs and offers to Americans were not accepted. For each pomegranate tree we calculated 15,000 Afghanis (\$228.00), as each tree was fifteen years of age and ready for good produce. For the vine trees 12,000 Afghanis (\$182.00) were estimated as the vines take ten years to age and

be ready for product. What was their reaction to our calculations estimate? They offered 5000 Afghanis (\$76.00) for pomegranate trees and 1500 Afghanis (\$23) for vine trees, and I was not compensated at all (interview, 23/12/2015; translated by Tai-moor Shah).

This is not the place to adjudicate the discrepancies between American and Afghan estimates. However, as Gilbert argues (2015b: 204), money in counterinsurgencies should be understood as a “weapon system” that “brings its own kinds of violence;” namely, the enormous power differential between those with the guns and those with precarious livelihoods at stake. Such a power differential allows for the military to pick winners and losers, and “low-ball” estimates against members of a “culture” widely taken as “corrupt.” Or, in this case, compensation could work to punish communities such as the Tarakis who had a history of supporting the Taliban.¹³

(II) Rebuilding Taroke Kalacha

In October and November 2010, the property lines of Taroke Kalacha were redrawn, and fourteen deeds were issued to land-owners after they were vetted by the district governor (Broadwell, 2011). After the New Year, the U.S. military cleared the rubble from the village, and used CERP money in a “cash-for-work” program to hire sub-contractors and displaced farmers and rebuild the destroyed homes. The “cash-for-work” scheme was touted as “development,” as it “prevented” young men from being incentivized to join the insurgency (Flynn, 2011) (Fig. 2). The mosque and houses were finally completed in May 2011, and many displaced villagers returned to Taroke Kalacha. However, the new housing, which amounted to a haphazard and crude attempt at indirect rule, was a disaster for the villagers.

Military sub-contractors used confab structures that were reminiscent of buildings on U.S. military bases (cf. Gillem, 2007). The villagers complained that the houses were not built in a local style but in a Western style without border walls or many rooms (Gopal, interview). While the U.S. military installed concrete blast walls along the road leading up to the village, in a bid to mitigate against Taliban infiltrators using new boundary walls for sniper cover and/or hiding IEDs, Flynn initially required a height requirement no higher than four feet for the boundary walls, which deviated sharply from local “custom” (Chandrasekaran, 2011). In the end, no formal boundary walls were ever built, which transgressed from the local style. Instead, as Taroke Kalacha was reconstructed in the shape of a square, the back walls of the domiciles served as “boundary walls” (Fig. 3).

Importantly, no boundary walls were built internally within the village. The lack of internal walls was a particularly insidious form of violence, as it came as a great imposition on the women in the village, who were confined to the house for fear of being exposed to the male residents in the village. The violence of no internal walls was exacerbated by another problem. The buildings themselves were made of concrete walls and bricks, with steel doors and sheet-metal roofs. During the summer, the villagers could not live in houses as they were too hot, and the women residents were confined to homes that were practically ovens. However, the carceral logic informing the reconstruction effort did produce durable

lines of force since the straight and “rational” layout of Taroke Kalacha allowed for more effective patrolling by U.S. and Afghan forces (USAID/OTI official, interview).

Finally, the military’s desire for material transparency extended beyond the walls and into the types of crops planted in the fields. To counteract the dense foliage produced by pomegranate and grape vineyards, the U.S. encouraged farmers to plant alternative crops (such as soybeans). The Afghans insisted on continuing to grow traditional crops. However, the conditions of security collided with the conditions of agriculture and the “recurrent rhythm conditions” (Arendt, 1958, p. 120) of human labour toiling in the fields. The replanted pomegranate trees were estimated to take four to five years to bear fruit. The timeline to bear fruit conflicted with the date set for U.S. withdrawal of military and civilian personnel from Afghanistan, jeopardizing the security conditions necessary to engage in the agricultural practices that were the basis of the residents’ livelihood, thus making the whole effort to “help” the displaced villagers seem, at best, disingenuous (Department of State official, interview).

3. Conclusion

Hannah Arendt once argued that although violence and power often appear together, they must be understood as opposites. In her famous essay “On Violence” (1970), Arendt offered a conception of power as the art of persuasion, that is, the capacity to mobilize people through the means of effective speech, intersubjective dialogue, and a leader or institution’s ability to compel the body politic to act in concert (1970: 143). In Arendt’s liberal-democratic conception, power is legitimate only insofar as it is realized through the consent and free action of the polity. Power’s antithesis, violence, depends upon a different set of means and instruments for its realization. Rather than consensus and action, violence is the radical inhibition of dialogue and the prohibition of (free) action. For Arendt, the opposition of power and violence is most clear if we consider the extreme form of coercive rule, authoritarian tyranny, and the way in which this ultimate “command-obedience” model cancels out meaningful political activity.

In its mid-to late-2000s popularity in Western capitals, advocates of counterinsurgency often presented the revived military doctrine as the pursuit of power in a liberal-democratic sense, placing checks on overt “kinetic” violence, and advocating a conception of power that echoed something like Arendt’s notion of “coercion-free force” (Habermas, 1983, p. 174). However, what the case of Taroke Kalacha shows is that counterinsurgencies *in practice* fall outside Arendt’s dichotomy. Instead, counterinsurgencies are much closer to Fanon’s (1965) understanding of violence (which Arendt criticized) as the glue that holds together the colonial order of things at both the institutional and structural level and at the existential and psychological level. In counterinsurgencies, it is impossible to determine where violence ends and power begins, and vice versa.

In this account of the destruction and reconstruction of Taroke Kalacha, I have made two arguments. First, the U.S. military’s biopolitical reconfiguration of socio-physical landscapes rests on a logic that marks “tradition” and the “local” as the privileged sites of military intervention. Why? Because the U.S. military assumes that “real power” resides in timeless Pashtun “tribal customs,” and that Afghans at the village level are always already motivated by displays of patriarchal strength and power. Thus, the Afghan household becomes the locus for securing the intimate and indirect rule.

Logics, however, are never confined to the level of discourse or ideology. Rather, second, in the targeting of villages and households during the Hamkari counterinsurgency operations, the demolition of Taroke Kalacha and other villages was a violently biopolitical (re)

¹³ When I read Hameed’s account to the USAID/OTI official, he replied: “Yeah, it sounds very familiar. I mean, look. The number of folks that we saw, and I’m not saying this is him. I’m saying that the number of people who came out of the woodwork to try to make money out of things like this was sickening, quite frankly.”



Fig. 2. CERP “cash-for-work” scheme to rebuild houses in Taroke Kalacha. Source: U.S. Defense Video & Imagery Distribution System.



Fig. 3. The reconstructed Taroke Kalacha. Source: Google Earth 31°38′46.0″N 65°37′03.0″E (Image captured by author, 2 September 2017).

composition of the communal and material relations of everyday life. Through the design and rebuilding of Taroke Kalacha, new lines of force were inscribed into the built environment. On the one hand, the Tarakis were coerced to recognize the authority of local governing institutions and a foreign military that had historically punished them for tacitly or overtly supporting the Taliban and could only receive compensation through those institutional bodies. On the other hand, the villagers' fields and homes were rebuilt in a way that maximized military surveillance rather than the needs (such as external and internal boundary walls) of the

villagers. The entire reconstruction scheme, from the design to the arrangement of the domiciles, illustrates how violence must not be understood in Arendt's sense as an instrumental means to an end, but rather as a protracted and durable condition for the residents that persists long after the “immediate” military violence of bullets and bombs passes.

At the time of this writing, the U.S.-supported Afghan President Ashraf Ghani faces multiple crises, from daily street protests to power struggles with his ruling partner Abdullah Abdullah and Vice President Rashid Dostum. The Taliban have taken over nearly a

majority of rural districts, most notably in Helmand where the insurgency controls almost all the districts, with Lashkar Gah remaining as the last bulwark of government power. In Kandahar, the insurgency is percolating in the north and west. On 13 April 2017, President Trump authorized the use of a massive bomb, the GBU-43, known within the U.S. military as the “mother of all bombs”, against supposed ISIS militants in eastern Afghanistan near Pakistan's border. On 21 August 2017, sixteen years into the American war in Afghanistan, Trump announced that the U.S. would be sending 4000 more military personnel to bolster the Afghan military and maintain what the Pentagon describes as “stalemate” in the war. To be sure, counterinsurgency has recently returned to its status as a dead letter. However, “winning the war” no longer appears to be the motivation or goal of the U.S. military, even though their extended presence remains a fact of life for most Afghans who must continue to endure a seemingly endless cycle of violence.

Conflict of interest

None.

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War on Terror
by Taxiarchis Fiskatoris
Tue., 22 June 2021, 10:30 – 11:30

Abstract:

On September 11, 2001, members of the terrorist group Al-Qaeda crashed four hijacked commercial airplanes into the World Trade Center in New York, and the Pentagon in Virginia, causing the death of more than 3000 civilians. The G.W. Bush administration reacted declaring war on terrorism, and invading Afghanistan and Iraq, which it believed had sponsored the assault. The lecture will explain the interplay between counterterrorism and counterinsurgency, and adduce some of the most significant jus contra bellum, jus in bello, and international criminal law issues that arose from the 9/11 attacks, and the so-called “war on terror”.

Article:

O’Connell, Mary Ellen (2005): When Is a War Not a War? The Myth of the Global War on Terror.

2005

When Is a War Not a War? The Myth of the Global War on Terror

Mary Ellen O'Connell

Notre Dame Law School, maryellenoconnell@nd.edu

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WHEN IS A WAR NOT A WAR? THE MYTH OF THE GLOBAL WAR ON TERROR

*Mary Ellen O'Connell**

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The starting point of human rights law is the right of the individual, including the right not to be arbitrarily killed. The international law of armed conflict, which is very much older in its origins than human rights law, starts from totally different premises. The soldier has the right to kill another soldier.¹

Françoise Hampson’s observation is a good place to begin a discussion of the “war on terror” proclaimed by President George H. Bush within hours of the September 11, 2001 attacks. She presents starkly the importance of accurately classifying situations as war or peace. First, as she notes, human lives depend on the distinction, but so do liberty, property, and the integrity of the natural environment. This brief article reviews the reasons why the Bush Administration declared war after September 11. It considers whether that declaration and related policies are consistent with international law as to the meaning of war. The conclusion here is that they are not. The President’s “war on terror” does not meet the legal definition of war. Moreover, to the extent there is ambiguity, the United States should err on the side pursuing terrorists within peacetime criminal law, not the law of war. Not only does the criminal law better protect important human rights and other interests, it avoids elevating terrorists to the status of combatants in a war with the world’s only superpower.

* Robert and Marion Short Chair in Law, Notre Dame Law School. B.A., Highest Honors (History), Northwestern University, 1980; M.Sc. (International Relations), London School of Economics, 1981; LL.B., First Class Honors, Cambridge University, 1982; J.D., Columbia University, 1985. This article is a revised version of oral remarks presented at the International Law Weekend 2005, held at the House of the Association of the Bar of the City of New York, from October 20 to 22, 2005.

1. Françoise Hampson, *Human Rights Law and International Humanitarian Law: Two Coins or Two Sides of the Same Coin?*, 1 BULLETIN OF HUMAN RIGHTS 46, 50 (1991), quoted in Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 42 COLUM. J. TRANSNAT’L L. 1, 3 (2004).

I. UNDERSTANDING THE "WAR ON TERROR"

Within hours of the September 11 attacks President Bush declared that the United States was at war.² Shortly, thereafter, he said the "war" "will not end until every terrorist group of global reach has been found, stopped, and defeated."³

Many of us in international law, even those of us who work on the international legal regulation of the use of force, were slow to take in that the President meant literally that the United States would act as though it were in an armed conflict in every part of the globe wherever a terrorist might be found. This was not the "war on drugs" or "war on poverty", this was "World War III."

On November 13, 2001, the Administration gave its first public indication that, indeed, it did consider the U.S. to be in an actual war. Executive Order, Detention, Treatment, & Trial of Certain Non-Citizens in the War Against Terrorism states that terrorist suspects will be tried before military tribunals and subjected to military detention, irrespective of whether they are captured in an armed conflict or not.⁴ Asked in October 2002 when the Afghan war detainees at Guantanamo Bay would be released, lawyers for the Administration answered not until every terrorist in the world has been found, killed or captured.

About a week later, the world learned how serious the Administration really was about treating the entire world as a war zone. On November 3, 2002, agents of the CIA, using an unmanned Predator drone, launched a Hellfire missile at a vehicle in remote Yemen, killing six men. Yemen recognized no armed conflict on its territory at the time of the strike, nor was the United States at war with Yemen. National Security Adviser Condoleezza Rice explained, however, that "We are in a new kind of war. And we've made very clear that it is important that this new kind of war be fought on different battlefields."⁵ The Deputy General Counsel of the Department of Defense for International Affairs said in the global war on terrorism the U.S. could target Al Qaeda suspects and kill them without warning wherever they are found. He indicated

2. See George W. Bush, President's September 11, 2001 Address to the Nation on the Terrorist Attacks, 37 WEEKLY COMP. PRES. DOC. 1301 (Sept. 17, 2001).

3. See George W. Bush, President's September 20, 2001 Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1348 (Sept. 24, 2001).

4. Military Order of Nov. 13, 2001, Detention, Treatment, & Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 16, 2001).

5. Interview: Tony Snow and Condoleezza Rice (FOX NEWS SUNDAY, Nov. 11, 2002), available at http://www.foxnews.com/prINTER_friendly_story/0,3566,69783,00.html (last visited Feb. 10, 2006).

that that included targeting persons on the streets of a peaceful city like Hamburg, Germany.⁶

It is clear that the Administration following September 11 wanted the wartime privileges of killing without warning, detention without trial, and trials under wartime rather than peacetime rules. It has exercised all of these rights quite separately from the wars in Afghanistan and Iraq.⁷

II. UNDERSTANDING THE MEANING OF WAR IN INTERNATIONAL LAW

A war or armed conflict, however, has two important components: It consists of two or more organized armed groups engaged in protracted and intense armed hostilities. In *Prosecutor v. Tadić* before the International Criminal Tribunal for the Former Yugoslavia, the Tribunal defined "armed conflict" as existing "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state."⁸ The Additional Protocols to the Geneva Conventions also incorporate concepts of intensity and organized fighting for a situation to be an "armed conflict." Additional Protocol II applies only to conflicts "more than situations of internal disturbances and tensions such as riots and isolated and sporadic acts of violence." Even "many isolated incidents, such as border clashes and naval incidents, are not treated as armed conflicts. It may well be, therefore, that only when fighting reaches a level of intensity which exceeds that of such isolated clashes will it be treated as an armed conflict to which the rules of international humanitarian law apply."⁹

Nathaniel Berman suggests, however, that a worldwide struggle with Al Qaeda could meet the definition of armed conflict as long as "protracted" is deemed to include "a conflict that is both spatially dispersed and temporally discontinuous, waxing and waning by fits and starts for over ten years—and provided that such a discontinuous conflict is not disqualified as an armed

6. ANTHONY DWORKIN, CRIMES OF WAR PROJECT, LAW AND THE CAMPAIGN AGAINST TERRORISM: THE VIEW FROM THE PENTAGON (Dec. 16, 2002), *available at* <http://www.crimesofwar.org/print/onnews/pentagon-print.html> (Feb. 10, 2006).

7. It is beyond the scope of this article to discuss the Administration's conduct of its global war on terror. Suffice it to say that serious charges have been leveled that the Administration has not complied with the law of war.

8. *Prosecutor v. Tadić*, Case No. IT-94-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995).

9. Christopher Greenwood, *Scope of Application of Humanitarian Law*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT 39, 42 (Dieter Fleck ed., 1995). "International humanitarian law" or "IHL" are the more common terms used for the law that applies to the conduct of hostilities and occupation.

conflict by describing it as 'sporadic.'"¹⁰ Outside the real wars of Afghanistan and Iraq, al Qaeda's actions and our responses have been too sporadic and low-intensity to qualify as armed conflict.

Some try to argue that a war began on September 11 because the attacks were an "act of war," or those attacks plus others by Al Qaeda during the previous ten years. Wars, however, do not begin with an attack. They begin with a counter-attack. States may have the right to engage in a war of self-defense following an attack. If they chose not to do so, there is no war. War, as discussed above requires exchange, intensity and duration.

Kenya, the United Kingdom, Indonesia and Spain have all been attacked by al Qaeda. They have all responded, but not with a military counter-attack. They have turned to their law enforcement agencies. None of these countries declared they were in a war. As the United Kingdom stated when it became a party to the 1977 Additional Protocol I to the Geneva Conventions: "... 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation."¹¹

In addition to the legal definition of war, governments have had strong policy reasons for avoiding calling terrorism "war." Governments typically prefer not to acknowledge that a terrorist group can challenge the state at the level of "war" rather than mere criminality. War connotes a loss of control. Crime, on the other hand, can remain under control. Every society has crime, while few are engaged in war and those few are perceived to have failed in some important sense. Nor do governments normally wish to extend the privileges of humanitarian law to armed groups. They prefer to apply national criminal law to their enemies and even to their own armed forces when fighting enemies within the state. Calling opponents "combatants" and declaring the struggle against them "war" elevates their status above that of mere criminals. According to Greenwood,

[i]n the language of international law there is no basis for speaking of a war on Al-Qaeda or any other terrorist group, for such a group cannot be a belligerent, it is merely a band of criminals, and to treat it as anything else risks distorting the law while giving that group a status which to some implies a degree of legitimacy.¹²

10. Berman, *supra* note 1, at 32–33.

11. Reservation by the United Kingdom to art. 1, ¶ 4 & art. 96, ¶ 3 of the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3 (cited in Marco Sassòli, *Use and Abuse of the Laws of War in the "War on Terrorism,"* 22 LAW & INEQ. 195 (2004)).

12. Christopher Greenwood, *War, Terrorism and International Law*, 56 CURR. LEG. PROBS. 505, 529 (2004); see also, Mary Ellen O'Connell, *Enhancing the Status of Non-State Actors Through a Global War*

When President Bush declared war on al Qaeda and other terrorist groups, he elevated Osama bin Laden to his own status, commander-in-chief, in a war with the world's only superpower.

It was a strategic blunder to have enhanced the status of terrorists through declaring a war on them. Apparently this was belatedly recognized in the Pentagon and an attempt was made in the summer of 2005 to back away from the policy. Secretary Rumsfeld and Chairman of the Joint Chiefs of Staff Myers began using the phrase "global struggle against violent extremism" (G-SAVE) instead of global war on terrorism (GWOT). President Bush, however, rejected the change, saying the U.S. was in a war.¹³ Without a war, there could be no wartime privileges to kill, detain without trial, and try without peacetime due process.

III. CONCLUSION

International law has a definition of war and it refers to places where intense, protracted, organized inter-group fighting occurs. It does not refer to places merely where terrorist suspects are found. Nevertheless, the definition may not be clear enough or comprehensive enough given the lack of international protest against the Bush Administration, especially following the Yemen strike. There appears to be some tolerance for a return to the old days of formalism when a government's declaration of war was all it took for international law to recognize a *de jure* war. Yet, in war human beings and the natural world lose important protections. Therefore, it is time to restate and strengthen a narrow definition of war. War should be considered an aberration. It should only be recognized when compelled by the facts: facts of real fighting and situations of emergency where normal peacetime law and protections cannot operate. Doubtful situations should be treated under the law of peace. The human right to life, to a speedy trial, to peacetime due process, and the duty to protect the environment should be respected unless the state is compelled by intense and protracted armed hostilities from doing so.

on Terrorism, 43 COLUM. J. TRANSNAT'L L. 435 (2005).

13. Ronald Brownstein & Mark Mazzetti, *Dissonance on Message for Bush*, *Pentagon*, L.A. TIMES, Aug. 13, 2005. In early 2006, Pentagon officials from "GWOT" to the "Long War." See, e.g., Vicky O'Hara, *U.S. Government Plans for "The Long War,"* NPR ONLINE, Feb. 22, 2006, available at <http://www.npr.org/templates/story/story.php?storyId=5227711> (last visited Feb. 23, 2006); Patrick Walters, *It's the New Cold War, and It May Go On Even Longer*, AUSTRALIAN, Feb. 11, 2006, at 19.

COIN in Argentina – Forced Disappearances

by Valeria Vegh Weis

Tue., 22 June 2021; 12:00 – 13:00

The Colombian Special Jurisdiction for Peace and the Prosecution of Serious Crimes in Macro Cases

by *Gustavo Emilio Cote-Barco*

Tue., 22 June 2021; 15:00 – 16:00

Abstract:

The Special Jurisdiction for Peace (SJP) is a transitional justice mechanism created as a result of the peace agreement signed in 2016 by the Colombian Government and the former guerilla group FARC (*Fuerzas Armadas Revolucionarias de Colombia*). The SJP is the justice component of a broader System called “System of Truth, Justice, Reparation and Non-Repetition.” This System involves also a truth commission (*Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No repetición*), a missing people searching commission (*Comisión de Búsqueda de Personas Desaparecidas*) and an administrative reparations program.

The SJP has a complex structure. To understand this transitional justice mechanism, one must keep in mind that it is not just one judicial body, similar to the International Criminal Court. The SJP is a special *jurisdiction*, which means, at least in Spanish, that it has the power to prosecute crimes and impart justice, but also, in an institutional sense, that it is a group of judicial organs connected hierarchically. The SJP is then composed of a tribunal, called Special Tribunal for Peace, which has four sections; it also has three independent “justice chambers” and a prosecutor office (Investigation and Accusation Unit – *Unidad de Investigación y Acusación*). The annexed figure illustrates its structure.

The SJP has three main objectives: (i) it must grant amnesties for former rebels that only have criminal liability for political crimes, like the crime of rebellion as such, as well as similar benefits for members of the Colombian security forces, who during the armed conflict did not commit serious crimes; (ii) it also has the task of defining the legal situation of combatants (rebels and security forces members) that already have been prosecuted by the Colombian ordinary criminal judges and are serving criminal sanctions; and last but not least, (iii) the SJP has to prosecute the most serious crimes perpetrated in the context of the Colombian armed conflict, among them, international crimes. We want to focus mainly on this third task.

The most serious crimes’ prosecution in this context takes place through two types of procedures. On the one hand, there is the procedure with acknowledgment of truth and individual responsibility. This procedure is inspired by the so-called “dialogic principle” and the restorative justice paradigm. On the other hand, there is the procedure without acknowledging truth and responsibility, which is essentially an adversarial procedure. The sanctions to be imposed in each kind of procedure are not the same. As a result of the “dialogical procedure,” the sanction is mainly restorative. It does not entail the deprivation of liberty in jail, only restricting the freedom of movement to a particular area. The sanction in the “adversarial procedure”, in contrast, could indeed be the deprivation of liberty until twenty years.

The procedure with acknowledgment of the truth is the first alternative. Only when the defendant refuses to recognize their criminal liability, the second kind of procedure—or adversarial procedure—takes place. The “dialogical procedure” starts, then, in the so-called Chamber for Acknowledgment of Truth, Responsibility, and Determination of Facts and Conducts (CATR). The CATR conducts criminal investigations based on reports from NGOs, the Colombian General Prosecutor Office, and other public institutions. After contrasting the information at its disposition, the CATR hears the victims and the defendant and subsequently presents the charges to him. If the defendant is willing to recognize its responsibility and to contribute to the construction of the conflict’s truth, the CATR submits a sort of indictment (*resolución de conclusiones*) before the Special Tribunal for Peace;

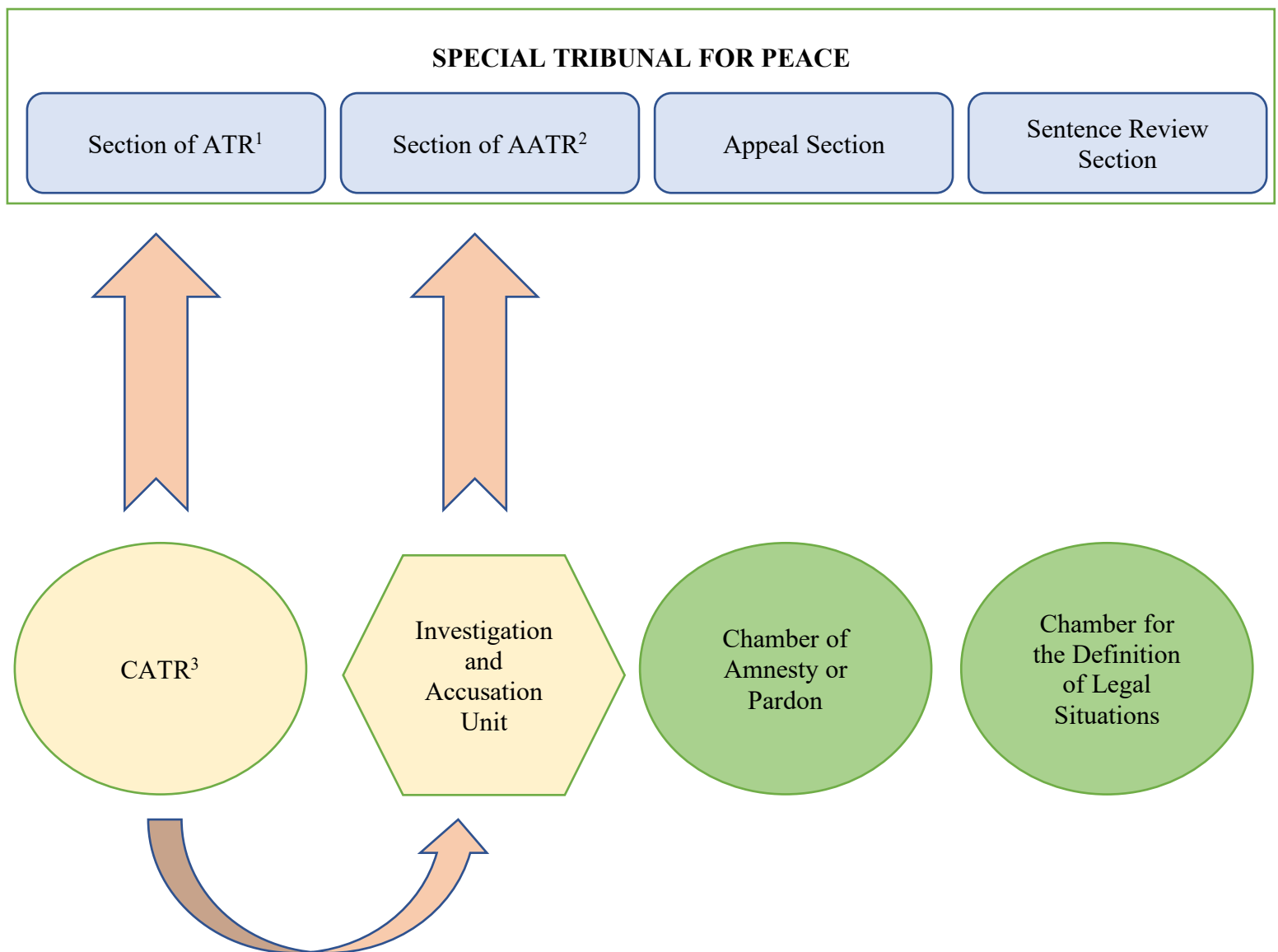
otherwise, it must transfer the case to the prosecutor's office, opening the door to the adversarial procedure. The CATR's indictment must contain a sanction proposal and consider the victims' and the defendant's views. In the end, it is the task of the Special Tribunal's Section for Acknowledgment of Truth and Responsibility to render the judgment and impose the sanction.

The CATR conducts macro-cases, meaning that the procedures are not limited to one or a few defendants, who are prosecuted for a relatively restricted number of individual crimes. The CATR investigates macro-criminality's phenomena and shall focus on the most responsible individuals for those specific phenomena. Each macro-case, therefore, encompasses a high number of individual crimes and victims. For this purpose, the CATR has developed two approaches: (i) a thematic approach and (ii) a territorial approach. The cases that answer to the thematic approach cluster crimes sharing the same features; for example, that the same group committed them. They could also be connected in that they were perpetrated systematically, under the same policies, and following the same pattern. The aim is to reveal plans, motives, and circumstances that led to the crimes or made their perpetration possible across the country. The cases within the territorial approach focus on specific regions of Colombia; they shall identify different actors responsible for the violence in each selected region and understand the violence in regional contexts. Until now, the CATR has opened seven macro-cases, and—after three years of hard work—only one of them has reached the phase of acknowledgment of truth and responsibility. It is then still to be seen how these approaches suit the victims' expectations of truth and justice.

For more information see the website of the SJP:

<https://www.jep.gov.co/JEP/Paginas/Jurisdiccion-Especial-para-la-Paz.aspx> (English version available).

General Structure of the Colombian Special jurisdiction for Peace



1. Section of Acknowledgment of Truth, Responsibility and Determination of Facts and Conducts.
2. Section of Absence of Acknowledgment of Truth, Responsibility and Determination of Facts and Conducts.
3. Chamber for Acknowledgment of Truth, Responsibility and Determination of Facts and Conducts.

Research on female perpetrators – an introduction

by Linn-Sophie Löber

Wed., 23 June 2021; 09:00 – 10:00

Abstract:

Research on perpetrators in general is a controversial research area and by far not as popular as its counterpart, victimology. This holds even more true for a special subcategory of research on perpetrators: Research on *female* perpetrators of *international crimes*.

Here, various approaches from gender studies, feminist criminology as well as feminist activism come into play to figure out which types of crimes are typically perpetrated by women, whether their motives vary from those of male offenders, how gender norms influence female conduct – especially in conflict settings – or how female perpetrators are perceived by the public. Moreover, the negative effects of neglecting female perpetration in post-conflict settings, as it is still common practice, can be addressed by this field of research.

The lecture aims at providing an introductory overview of the research on female perpetrators in the various contexts of state crime and shall encourage the participants to include the idea of female perpetration as a complex and rather unexplored field of investigation into their perception of international crimes and state crime.

Article:

Hodgson, Natalie (2017): Gender Justice or Gendered Justice? Female Defendants in International Criminal Tribunals.

Smeulers, Alette (2015): Female Perpetrators: Ordinary or Extra-ordinary Women?

Gender Justice or Gendered Justice? Female Defendants in International Criminal Tribunals

Natalie Hodgson¹ 

Published online: 27 November 2017

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Abstract Recent scholarship has given increasing attention to studying women’s involvement in conflict and mass violence. However, there is comparatively less discussion of the experiences of women as actors and perpetrators in conflict, and limited discussion of women as defendants in international criminal tribunals. This article explores this under-researched area. By analysing legal materials from the cases of six female defendants, this article investigates the extent to which legal discourses are shaped by stereotypes regarding femininity, conflict and peace. It identifies three gender narratives—mothers, monsters and wives—used in relation to female defendants, which highlight the incompatibility of femininity with violence, and deny women’s agency in political and military contexts. Thus, this article concludes that female defendants in international criminal tribunals are viewed through gendered lenses, and discussed in accordance with gendered themes. This gendered justice is problematic, as it reinforces patriarchal gender stereotypes, and may hinder attempts to facilitate gender justice.

Keywords Defendants · Gender · Gender justice · International criminal justice · Women

Introduction

Traditionally, conflict and mass violence were seen as masculine domains. Due to their roles as mothers and carers, women were perceived as inherently peaceful “beautiful soul[s]”, who were physically and psychologically incapable of engaging in violence (Elshtain 1987, 109). While men were “just warriors” (Elshtain 1987,

✉ Natalie Hodgson
n.hodgson@unsw.edu.au

¹ Faculty of Law, UNSW Sydney, Sydney, NSW 2052, Australia

110), actively engaged in fighting wars to protect the civilian population, women were viewed as passive objects in need of protection (Gardam 1997). Further, in the era of “new wars”, women have been positioned as victims, with gender violence used to reinforce masculine supremacy, and devalue and subordinate femininity (Chinkin and Kaldor 2013).

In contrast to these stereotypes, in recent years a more diverse understanding has emerged of the roles that women occupy during conflict and instability. In particular, a developing field of research is examining the under-acknowledged role that women play as participants and perpetrators in mass violence. Researchers have examined how and why women participate in conflict (see e.g. Alison 2009; Brown 2014; Hogg 2010), and have identified the social and media discourses surrounding these violent women (see e.g. Åhäll 2015; Sjöberg and Gentry 2007; Sperling 2006). However, less attention has been given to studying the experiences of these women in the criminal justice system. The limited number of studies examining female defendants in international criminal tribunals have tended to focus on analysing the cases of one or two defendants in depth (see e.g. Drumbl 2012; Sperling 2006). Thus, there is a need for further research considering broader trends in the cases of female defendants across the international criminal justice system.

This article examines the extent to which gender stereotypes surrounding women, peace and conflict, underpin the legal discourses relating to six female defendants who have been the subject of proceedings before international criminal tribunals. Firstly, it gives an overview of gender justice in international criminal law, and the gender stereotypes that exist surrounding women’s participation in mass violence. Secondly, it examines existing research on the gendered frames used to assess female defendants in national criminal courts, and the gender narratives surrounding women’s involvement in mass violence. Thirdly, it presents the results of a feminist discourse analysis, which identifies three gendered themes emerging from the cases of female defendants in international criminal tribunals: mother narratives, monster narratives, and wife narratives. Finally, the implications of these findings for gender justice in international criminal law are discussed. Female defendants are largely discussed in accordance with gender stereotypes about femininity, conflict and peace. This language has the potential to undermine gender justice efforts by perpetuating patriarchal views about a woman’s role in conflict and mass violence.

Gender Justice and Gender Stereotypes in International Criminal Law

Gender justice refers to the ending of inequalities between men and women, and the provision of redress to overcome these inequalities (Goetz 2007, 30). Thus, gender justice aims to facilitate full citizenship for women, so that women are treated as moral equals to men and are able to participate in social life to the same degree as men (Fraser 2009). Fraser argues that three things are necessary for gender justice to exist: *recognition* of the equality of women and men (Fraser 1997, 45); *representation* of women in institutions and decision-making positions (Fraser 1997, 46); and *redistribution* of economic wealth so that women can overcome the economic structures that prevent them from full participation in social life (Fraser

2009, 84). These criteria have been applied to international criminal justice by Chappell (2016), who argues that gender justice in international criminal law requires *recognition* of gender concerns, including sexual and gender based crimes; *representation* of women in the courtroom, by providing participatory opportunities for victims and ensuring women's representation as criminal justice officials; and gender just *redistribution* of wealth through reparations schemes.

Early international criminal tribunals, including the Nuremberg International Military Tribunal, the International Military Tribunal for the Far East, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), were criticised for their management of gender justice issues. Sexual and gender based violence was overlooked when framing prosecutions (Franklin 2008), victims were exposed to re-traumatising court processes (Dembour and Haslam 2004), and women were poorly represented in prosecutorial and judicial positions (Niarchos 1995, 680). Accordingly, in the late 1990s, there was a push from feminist academics, practitioners and civil society actors for a focus on gender justice issues in international criminal law (Chappell and Durbach 2014, 533). During the Rome Conference, where the Rome Statute of the International Criminal Court (Rome Statute) (1998) was drafted, the Women's Caucus for Gender Justice advocated for gender justice provisions. Their participation in this process contributed towards the International Criminal Court (ICC) being granted "the most advanced gender justice mandate of any international institution" (Chappell and Durbach 2014, 534). Subsequent initiatives aimed at facilitating gender justice in the ICC include the appointment of a Special Adviser on Gender Crimes to the Office of the Prosecutor (OTP) (ICC OTP 2008), and the introduction of the Policy Paper on Sexual and Gender Based Crimes, which emphasises the commitment of the OTP to integrate "a gender perspective and analysis" into all areas of its work (ICC OTP 2014, para. 5) and "[a]void any gender discrimination" (ICC OTP 2014, para. 27).

However, Chappell (2016) notes that formal gender justice initiatives do not always translate to actual gender justice outcomes. Formal legal rules are interpreted and applied in the context of the "gender legacies" of international law (Chappell 2016, 3). These gender legacies, which are "existing social norms, practices and expectations", including gender stereotypes about women and conflict, can prevent courts from giving full effect to gender justice initiatives (Chappell 2016, 3). As such, Chappell (2016) argues that while the ICC has facilitated gender justice in some areas, in other areas the ICC has been prevented from realising its gender justice mandate because gender legacies have operated to preserve existing traditions and a patriarchal status quo.

Otto (2013) describes gender as a social construct that is both dualistic and asymmetrical. That is, male and female are binary categories, with the masculine more highly valued than the feminine. In situations of mass violence, masculinity has traditionally been associated with aggression, violence and strength, while femininity is associated with peacefulness, passivity and weakness (Åhäll 2015; Moser and Clark 2001). Thus, in conflict the "quintessential gender male [is] the warrior" (Gardam 2010, 62), while the typical image of a woman has historically been that of a "beautiful soul" who "waits at the home front, who prays before the

battle, but who is not herself deeply immersed in the bone-crushing, body-destroying business of war” (Elshtain 1987, 109).

This dichotomy has continued, and been heightened, in the era of new wars (Kaldor 2012). While old wars were fought by military armed forces, new wars are increasingly fought by non-state actors, in the name of an exclusive political identity that typically contains a significant gender dimension (Chinkin and Kaldor 2013). Sexual and gender violence is a strategy to gain and enforce political control, ethnic cleansing is perpetrated through rape, and women and girls are forcibly married and coerced into performing conjugal duties (Chinkin and Kaldor 2013). Thus, in these new wars, masculinity continues to be associated with violence, aggression and dominance, while femininity is devalued and associated with victimisation.

The international legal framework pertaining to mass violence reinforces these gender stereotypes. Provisions of international humanitarian law (IHL) emphasise that women need specific protection in their roles as mothers and the victims of sexual violence (Geneva Convention IV 1949, arts 14, 16, 17, 27(2); Additional Protocol I 1977, arts 75(2), 76). Further, the Rome Statute contains a comprehensive list of sexual and gender based violence crimes, the inclusion of which was the culmination of many years of feminist advocacy, drawing attention to the widespread and horrific violence perpetrated against women in conflict (Gardam and Charlesworth 2000). These protections are undoubtedly necessary. However, Grewal (2015) notes that the advocacy for these protections may have had the unintended consequence of reinforcing the association of femininity with vulnerability and victimisation.

The UN Security Council’s women, peace and security agenda has both reinforced and challenged gender stereotypes. Resolution 1325 (UN 2000) provided the first formal recognition that women had a role in conflict beyond that of victims. However, Shepherd (2008, 120) argues that in Resolution 1325, women were still essentially framed as being in need of protection. In contrast, she argues that the later resolutions move towards recognising women as actors in peacebuilding and post-conflict reconstruction efforts (Shepherd 2011). Thus, while legal documents have traditionally confirmed the link between femininity, conflict and victimisation, their language is gradually shifting to acknowledge the broader roles that women occupy in conflict.

In contrast to stereotypes of women as victims and peaceful, studies have shown that women do participate in mass violence. Women have been found to play an active role in 60% of rebel groups, serving as combatants in 33% of rebel groups, and holding leadership positions in 25% of rebel groups (Henshaw 2016). They have been guerrilla fighters, suicide bombers, prison guards and torturers (Linton 2016; Lower 2013). Further, women have supported violent regimes in their role as an administrative or secretarial assistant, or as a passive bystander to violence, and have profited from violence through pillaging and looting, theft, or handing over their neighbours to the authorities (African Rights 1995; Lower 2013; Smeulders 2015). Following the Rwandan genocide, 96,000 women appeared in Gacaca (national, community justice) courts, representing 9.0% of cases (Linton 2016).

Women comprise an even smaller minority of cases in international criminal tribunals. To date, six women have appeared in international criminal tribunals for

international criminal law offences,¹ representing 1.1% of defendants.² The small number of female defendants in international criminal tribunals may be attributed to women's underrepresentation in government and military decision-making positions, given that international criminal tribunals focus on prosecuting perpetrators who bear the greatest responsibility for the violence (Côté 2005). Accordingly, the female defendants who do appear in international criminal tribunals are often involved in politics at a national or local level, and have contributed to the planning and execution of the mass violence, in contrast to the other forms of participation discussed above.

Violent Women, Gendered Judging and Gender Narratives

In national criminal courts, criminologists have examined the extent to which gendered assumptions regarding women and criminality feature in cases involving female defendants. Overwhelmingly, women are more likely than men “to be processed according to an assessment of their personal circumstances, rather than their offence” (Worrall 1981, 90). That is, while male defendants are judged by reference to the crime they have committed, female defendants are evaluated regarding the extent to which they embody traditional notions of femininity. Smart (1976) suggests that this occurs because crime, and particularly violent crime, is seen as incompatible with womanhood (see also Lloyd 1995). Thus, courts seek to identify whether the defendant is a woman who is “out of place” in the criminal justice system (Worrall 1981, 91), or a “doubly deviant” criminal, who has both committed a crime and transgressed notions of appropriate female behaviour (Lloyd 1995, 36).

In her study of Magistrates' Courts, Worrall (1990) found that this gendered assessment occurred in three ways. Firstly, judges examined “domesticity”, assessing the defendant's adequacy as a mother and her contribution to the home and family unit (Worrall 1990, 60). If a woman had family responsibilities, her offending behaviour was positioned as out of character, because of a belief that a woman who is a mother cannot also perpetrate crimes, particularly violent crimes (see also Eaton 1986). However, if a woman demonstrated inadequate skill as a mother, carer or housewife, her failure to embody these typically feminine attributes was used to provide some explanation as to why she had acted in an un-womanly manner by engaging in criminal activities. Secondly, judges examined “sexuality”, considering the extent to which the defendant had made unwise choices in relation to men that resulted in her offending behaviour (Worrall 1990, 62). A man who was

¹ That is, excluding administration of justice offences.

² Calculated with reference to the number of people subject to an arrest warrant, summons or indictment for an international criminal law offence in the Extraordinary African Chambers, the Extraordinary Chambers in the Courts of Cambodia, the ICC, ICTR, ICTY, the International Military Tribunal for the Far East, the Nuremberg International Military Tribunal, the Special Court of Sierra Leone, the Special Tribunal for Lebanon, the War Crimes Chamber of the Court of Bosnia and Herzegovina, and prosecutions arising out of the United Nations Mission in Kosovo. The total number of people subject to an arrest warrant, summons or indictment in these courts was 566 as of October 2017.

a bad influence could explain a woman's offending (Steward 2006; Worrall 1990), while the presence of a male spouse who was a positive influence, and would act as a guardian over the defendant to prevent further bad behaviour, could be used as a mitigating factor in sentencing (Eaton 1986). Thirdly, judges examined "pathology", examining the defendant's involvement with psychologists and mental illness (Worrall 1990, 63). This examination reflected the belief that violent women were either 'bad' or 'mad' (Berrington and Honkatukia 2002). By attributing a woman's offending to a biological or psychological factor, judges and courts reinforced the gendered assumption that no woman in a sane state of mind would commit a crime (Commerson 2003).

These three gendered frames of inquiry are fuelled by gender stereotypes about appropriate feminine behaviour. Similar themes have been observed in relation to the discourses surrounding women involved in political violence and mass conflict. For example, Sjoberg and Gentry (2007) identified three gender narratives used in media reports, academic writings and courtroom discourses to refer to female soldiers, suicide bombers and genocidaires. Firstly, the mother narrative emphasised that women commit acts of violence due to their biological need to belong to, nurture, and take care of men (Sjoberg and Gentry 2007, 32). Women were violent in order to support loved ones who were also engaged in fighting, or they were driven to violence, revenge and vengeance because of a lost love or a destroyed family. Secondly, the monster narrative emphasised that women who committed acts of violence were pathologically damaged and insane (Sjoberg and Gentry 2007, 37). Through monster narratives, women were demonised and denied their femininity; unlike mothers, who acted violently because they were women, monsters acted violently because they rejected their womanhood. Thirdly, in the whore narrative, women were shown to commit acts of violence because of their sexuality (Sjoberg and Gentry 2007, 41). Women were positioned as violent, either because they were hyper-sexual or sexually perverted and the violence brought them gratification, or because they were acting under the control of a man who could grant them sexual gratification.

Sjoberg and Gentry's (2007) findings are supported by other research. Åhäll (2015) analysed media narratives to understand perceptions of women participating in conflict. She found that these women were positioned as "abject subjects" who had lost their natural femininity, thus confirming the "myth of motherhood" and traditional gender roles (Åhäll 2015, 107, 137). Further, Smeulers (2015, 227) argued that there was a "clear gender bias" in the portrayal of female perpetrators of international crimes compared to male perpetrators. Women perpetrators were either portrayed as mentally insane sadists, suggesting that women must be unnatural and abnormal to commit such crimes, or as lacking agency, suggesting that they only committed such crimes because they were forced.

These themes exist because of a perception that 'real' women are peaceful, passive, conservative and restrained. When a woman contravenes these norms, narratives are used to reinforce the link between femininity and peace, by either negating a woman's violence, or by denying the violent woman her femininity. Therefore, these discourses undermine rational and calculated female violence and

criminality, deny violent women's agency, and thus confirm the incompatibility of femininity with violence and aggression.

Gendered Language and Female Defendants in International Criminal Tribunals

Method

Six female defendants have been charged in international criminal tribunals for international criminal law offences: Im Chaem (Extraordinary Chambers of the Courts of Cambodia [ECCC]), Simone Gbagbo (ICC), Rasema Handanović (War Crimes Chamber in Bosnia and Herzegovina), Pauline Nyiramasuhuko (ICTR), Biljana Plavšić (ICTY) and Ieng Thirith (ECCC). To gain an understanding of the extent to which traditional understandings of femininity, peace and conflict underpin the legal discourses surrounding these defendants, a sample of court documents relating to each defendant was analysed through a feminist discourse analysis. While this is a small sample, it nonetheless enables a more expansive study of the international criminal justice system than previous research, by analysing the experiences of defendants across different tribunals.

Court documents were purposively sampled. Documents were chosen if they were likely to involve a discussion of the defendant's culpability and role in the crimes she was charged with. Thus, court documents primarily relating to procedural issues were excluded. Using this process, documents were selected that covered the following stages of proceedings:

- Im Chaem: Introductory submission (1 document); closing order (1 document).
- Simone Gbagbo: Arrest warrant (2 documents); admissibility challenge (8 documents).
- Rasema Handanović: Sentencing (1 document).
- Pauline Nyiramasuhuko: Indictment (1 document); trial and sentencing (12 documents); appeal (3 documents).
- Biljana Plavšić: Indictment (4 documents); guilty plea and sentencing (13 documents).
- Ieng Thirith: Provisional detention order (5 documents); closing order (7 documents).

Once documents had been selected, a feminist discourse analysis was used to analyse the language of the texts. Feminist discourse analyses explore the extent to which taken-for-granted gender assumptions underpin social discourses, and thus how language reflects, reproduces and/or challenges the dominance of men over women (Lazar 2005; Lazar 2007). This analysis was supported by an iterative categorisation approach (Neale 2016), where data is both deductively and inductively coded. Six broad themes, identified from existing literature, provided the starting point for the coding: femininity, marriage, motherhood, peacefulness, politics and violence. More specific subcategories were inductively added to these

themes as different ideas emerged from the data. Attention was paid to both the broader ideas present in the text, and how these ideas manifested in linguistic and semantic structures. At the conclusion of this analysis, the themes that had emerged from the data were considered in light of their broader social, cultural and historical context. Three gender narratives were identified: mother narratives; monster narratives; and wife narratives.

“I Cannot Commit that Kind of Sin”³: Mother Narratives

Mother narratives featured in the cases of five defendants. In this narrative, the defendant’s status as a mother and motherly qualities were highlighted, often to frame her as either a ‘good’ or ‘bad’ mother. Consequently, this narrative bore a number of similarities to Worrall’s (1990) theme of domesticity and Sjöberg and Gentry’s (2007) mother narrative, both of which suggest that women’s violence is examined in light of their role as caregivers. Further, this narrative incorporated the idea that women are peaceful and peacemakers, a connection that is often based on women’s experience as mothers (Åhäll 2015, 17; see also Ruddick 1989). Thus, this narrative reflected not only biological notions of motherhood, but also some of the broader, symbolic mothering functions that women serve in society (see e.g. Yuval-Davis 1997).

Pauline Nyiramasuhuko’s mother/son relationship with co-defendant, Arsène Shalom Ntahobali, was given significance by both parties in her case. The prosecution used this relationship to show a contrast between Pauline Nyiramasuhuko’s actions and the behaviour that is expected from a mother. For example, in their closing statement, the prosecution consistently referenced Pauline Nyiramasuhuko’s motherly connection to Shalom Ntahobali, referring to how “Pauline Nyiramasuhuko ordered the Interahamwe and *her son Shalom* to rape the Tutsi women and girls” and how, “following Pauline Nyiramasuhuko’s orders, *her son Shalom* and Interahamwe raped young Tutsi girls and women” (emphasis added).⁴ By referencing Pauline Nyiramasuhuko’s maternal relationship with her son, the prosecution depicted Pauline Nyiramasuhuko as a bad mother, who had not only raised a criminal son, but who had also been involved in committing crimes with him. Thus, the prosecution discredited Pauline Nyiramasuhuko’s status as a mother, and consequently, her status as a woman. By invoking the theme of motherhood in their closing statement, the prosecution reinforced that Pauline Nyiramasuhuko’s actions were not those of a mother, and were out of place for a woman.

On the other hand, Pauline Nyiramasuhuko’s status as a mother was used by her personally, and her defence counsel, to advance the argument that she was incapable of committing the crimes with which she was charged, particularly those involving her son. An argumentation strategy was employed that highlighted Pauline

³ *Prosecutor v Nyiramasuhuko, Ntahobali, Nsabimana, Nteziryayo, Kanyabashi and Ndayambaje (Nyiramasuhuko et al.)*, Transcript, 6 September 2005, 22.

⁴ *Prosecutor v Nyiramasuhuko, Ntahobali, Nsabimana, Nteziryayo, Kanyabashi and Ndayambaje*, Transcript, 20 April 2009, 25.

Nyiramasuhuko's role as a mother and her motherly qualities, in order to play on these social understandings of appropriate motherly behaviour, and thus highlight the unlikeliness of a mother having committed violent crimes:

Q. Madam, did you, at any point in time between April and July 1994, and I am suggesting this to you, order Interahamwe, led by your son, Shalom, to abduct, rape, kill, Tutsi refugees who were at the office of the préfecture?

A. No, I believe I answered that question. That is impossible. Nobody can hurt another in such a manner. Supervise acts committed by one's child. That saddens me a lot...⁵

In this statement, Pauline Nyiramasuhuko argues that her actions should be viewed through the lens of her maternal status. However, while the prosecution argued that Pauline Nyiramasuhuko's actions showed that she was not a real mother, Pauline Nyiramasuhuko argued that her status as a mother showed that she could not have committed the crimes she was charged with. Hence, both the prosecution and defence endorsed the idea that mothers cannot be violent criminals, and that Pauline Nyiramasuhuko must be either a mother or a criminal; she could not be both.

Ieng Thirith's status as a mother also featured in her case. In the Closing Order, in a section titled "Character Information", the Co-Investigating Judges stated that "Ieng Thirith has explained that, because of her involvement in the revolution and operating from the jungles of Cambodia, she did not see her children for 10 years."⁶ It is not clear what relevance this information was given, and whether it was simply remarked upon as a matter of fact, or if the Co-Investigating Judges thought it was somehow relevant to evaluating Ieng Thirith's character. Nonetheless, this line of inquiry was clearly gendered. None of Ieng Thirith's three male co-defendants had their role as a caregiver and contact with their children similarly mentioned in their "Character Information", including co-defendant Ieng Sary, Ieng Thirith's husband and the father of her children. This asymmetrical inquiry demonstrates the significance given to the maternal status of female defendants.

Simone Gbagbo's defence team similarly referenced motherly characteristics in her case. In their response to Côte d'Ivoire's challenge to the admissibility of Simone Gbagbo's case, in a section entitled "Defence Position", Simone Gbagbo's defence team emphasised her contribution to educating the youth of Côte d'Ivoire. In doing so, Simone Gbagbo was positioned as someone who nurtured and cared for women and children: a metaphorical mother figure to the Côte d'Ivoire population:

She has devoted most of her adult life, striving to advance the education of the people of Côte d'Ivoire in so far as they came under her sphere of influence in general and the women and children of Abidjan in particular.

⁵ *Prosecutor v Nyiramasuhuko, Ntahobali, Nsabimana, Nteziryayo, Kanyabashi and Ndayambaje*, Transcript, 6 October 2005, 7.

⁶ *Co-Prosecutors v Chea, Sary, Thirith and Samphan (Chea et al)*, Closing Order, 002/19-09-2007-ECCC/OCIJ D427, para. 1608.

As a University Professor in Abidjan for many years, she strove to impart her knowledge to the young and to imbue in them, respect for human rights of all persons irrespective of nationality or creed.⁷

These paragraphs have no immediate legal significance. The issue at this stage of the proceedings is whether Simone Gbagbo's case is admissible at the ICC, a question upon which her social contributions have no bearing. Accordingly, this section of the defence submissions appears to be designed to humanise Simone Gbagbo as a defendant, and present her in a positive light to the judges in the Pre-Trial Chamber, rather than to address any legal issues in the case. The use of motherly attributes suggests that themes of domesticity and motherhood pervade all stages of a female defendant's case, and that females are analysed with respect to these themes even when the defendant's character or conduct is not the main issue before the court.

Although not a mother, Biljana Plavšić's peacemaking qualities were highlighted by her and her defence when making their argument for mitigation. Biljana Plavšić was portrayed as an older, caring, remorseful woman, who had accepted responsibility for her actions, and regretted her role in the conflict. In the statement that accompanied her guilty plea, Biljana Plavšić stated that by "accepting her responsibility and expressing her remorse fully and unconditionally" she hoped "to offer some consolation to the innocent victims – Muslim, Croat and Serb – of the war."⁸ Further, in her testimony at her sentencing hearing, Biljana Plavšić told the Trial Chamber that:

You have heard, both yesterday and today, the litany of suffering that [my actions] produced. *I have accepted responsibility for my part in this...* The knowledge that I am responsible for such human suffering and for soiling the character of my people will always be with me (emphasis added).⁹

The repetition of the language of "accepting responsibility" was used to demonstrate that Biljana Plavšić was behaving as a woman in her position should behave. She was not arguing about her conduct or challenging those who accused her. Rather, she was submitting to authority of the court and apologising for her behaviour, actions intended to facilitate reconciliation and peace. Thus, the defence projected an image of Biljana Plavšić as a peacemaker: as a woman who deeply regretted her actions during the conflict, and who consequently wanted peace for the region.

The manner in which Biljana Plavšić is referred to throughout her case indicates her success in highlighting her motherly attributes. Rather than being addressed as "Dr Plavšić", the correct title for someone with a PhD, Biljana Plavšić was instead referred to by the prosecution, defence and judges as "Mrs Plavšić" throughout the

⁷ *Prosecutor v Gbagbo*, Response on behalf of Simone Gbagbo to the "requête de la République de Côte d'Ivoire sur la recevabilité de l'affaire, le procureur c. Simone Gbagbo et demande de sursis à exécution en vertu des Articles 17, 19 et 95 du Statut de Rome", ICC-02/11-01/12-39, paras. 39–40.

⁸ *Prosecutor v Plavšić*, Statement by Biljana Plavšić in support of her motion for a change of plea pursuant to Rule 62 bis, IT-00-39&40-PT D6523-D6517, 1.

⁹ *Prosecutor v Plavšić*, Sentencing Hearing, Transcript, 17 December 2002, 610.

legal proceedings. Thus, incongruent passages of text exist where Madeline Albright, a defence witness, was afforded her proper title but Biljana Plavšić was denied hers: “*Dr Madeline Albright* said that her first impression of *Mrs Plavšić* was as spokesperson for policies which came out of Banja Luka” (emphasis added).¹⁰ The use of this incorrect title demonstrates that Biljana Plavšić was perceived by these court actors, not as a woman who had violated traditional gender roles by getting a PhD, becoming President of her country and indeed, by becoming involved in conflict, but rather as an older, respectable woman: a “Mrs”.

The link between motherhood and peacefulness similarly featured in Im Chaem’s case. The defence argued that Im Chaem’s authority over security matters was limited “due to the prevailing gender based system where it was highly unlikely that a female cadre could have played any significant role in affairs related to security.”¹¹ This argument demonstrates an attempt to use stereotypes about women’s peacefulness and subordination to men to argue against Im Chaem’s criminal liability. However, this submission was not accepted; the Co-Investigating Judges noted witness testimony to the contrary. Accordingly, in addition to demonstrating how women’s perceived peacefulness is articulated in court narratives, Im Chaem’s case also demonstrates how gender narratives may be contested and resisted by court actors.

These female defendants were viewed through the lens of motherhood regardless of whether they had young (dependent) children, older (independent) children, children involved in their criminal activities, or no children at all. This indicates that motherhood themes did not appear in these legal discourses because of the defendant’s status as a caregiver, or the involvement of her children in her case. Rather, they were present because of social views about appropriate behaviour for women. The mother narrative was not an assessment of the factual or legal issues in the case, but instead, a way of understanding the extent to which the defendant embodied feminine attributes and thus adhered to her gender role. Thus, this narrative reinforced the connection of femininity with domesticity and peacefulness.

“Something that is Inhuman: A Woman Who is a Perpetrator of Genocide”¹²: Monster Narratives

Monster narratives featured in the cases of two defendants. In this narrative, the defendant was depicted as someone who violated her gender role, because her violent actions conflicted with her femininity. Consequently, this narrative perpetuated the idea that women who are violent are unnatural and abnormal, similar to Sjoberg and Gentry’s (2007) monster narrative. There are also similarities with Worrall’s (1990) theme of pathology, as the monster narrative similarly emphasises that sane women do not commit crimes (see also Smeulders 2015). There

¹⁰ *Prosecutor v Plavšić*, Sentencing Judgment, IT-00-39&40/I-S, para. 93. See also *Prosecutor v Plavšić*, Sentencing Hearing, Transcript, 16 December 2002.

¹¹ *Co-Prosecutors v Chaem*, Closing Order, 004/1/07-09-2009-ECCC-OCIJ, para. 176.

¹² *Prosecutor v Nyiramasuhuko, Ntahobali, Nsabimana, Nteziryayo, Kanyabashi and Ndayambaje*, Transcript, 31 January 2005, 16.

is some overlap between monster narratives and the mother narratives discussed above, as women may reject their femininity by behaving as a bad mother. However, the monster narrative also arises from other situations where women are perceived to act in an unfeminine manner or deviate from their expected gender role.

In Pauline Nyiramasuhuko's case, the prosecution used the monster narrative to demonstrate that Pauline Nyiramasuhuko did not behave like a 'real' or 'proper' woman. In their closing statement, the prosecution quoted the testimony of a witness who stated that Pauline Nyiramasuhuko "seemed to take pleasure in ordering the rapes."¹³ By choosing this testimony, the prosecution not only addressed the legal issue of Pauline Nyiramasuhuko's involvement in the commission of the offences, but also passed judgment on her motive; she was "tak[ing] pleasure" from ordering the crimes. The sexual connotations associated with the term "pleasure" heighten the monstrousness of Pauline Nyiramasuhuko's conduct: while it may be understandable for a man to "take pleasure" in ordering rapes, it is unfathomable for a woman to do so. Thus, by strategically selecting this testimony to be quoted, the prosecution made their legal argument while also portraying Pauline Nyiramasuhuko as someone who was not a woman, but a monster.

The prosecution asserted that Pauline Nyiramasuhuko:

uttered some of the most frightening words that could come out of the mouth of *a woman, a mother*, and the person who was in charge of the department that had the protection of family and women as its key mandate (emphasis added).¹⁴

This statement demonstrates that Pauline Nyiramasuhuko's behaviour was scrutinised through a gendered lens. While the crimes would still have been awful if they were committed by a man, they were particularly abhorrent in Pauline Nyiramasuhuko's case because they were committed by "a woman [and] a mother". This appears to indicate a differential standard in the proceedings of international criminal tribunals—women and mothers are expected to be peaceful and non-violent, and thus when a woman commits a crime, her actions are worse than if a man had done the same thing.

The monster narrative also featured briefly in the case of Biljana Plavšić. In his testimony, prosecution witness Elie Wiesel emphasised that when a crime against humanity occurs, it is the attackers themselves who lose their humanity. While this statement is gender neutral, there are sections where Elie Wiesel's argument takes a gendered turn:

How could a woman like her, a renowned intellectual, undoubtedly intelligent and gifted, remain silent in the face of so many violations, so much humiliation, so many crimes, so much spilt blood and so many summary

¹³ *Prosecutor v Nyiramasuhuko, Ntahobali, Nsabimana, Nteziryayo, Kanyabashi and Ndayambaje*, supra n 4, 31.

¹⁴ *Ibid* 30.

executions ascribed to the servants of the government of which she was one of the leaders?¹⁵

The use of the word “woman” is significant. A few paragraphs earlier, Elie Wiesel emphasised his incredulity that Biljana Plavšić’s actions were those of someone with a university education. Hence, in this paragraph, the emphasis was not so much on the fact that she is “a renowned intellectual, undoubtedly intelligent and gifted,” a point which he has previously mentioned, but rather, that it was hard to believe that a “woman like her” could commit these crimes. The emphasis is on Biljana Plavšić’s gender as well as her academic achievements, with the implication being that Biljana Plavšić should have opposed the genocide both because she is an academic *and* because she is a woman. Because she did not, Elie Wiesel suggests that she has betrayed her femininity and lost her humanity, becoming a monster.

While international crimes may commonly evoke monster imagery, due to their particularly violent and widespread nature (Sjoberg and Gentry 2007, 141), the female defendants were not positioned as monsters because of the crimes they had committed, but rather because they were *women* committing crimes. Further, a significant part of the monster narrative in Pauline Nyiramasuhuko’s case revolved around the fact that she was a woman perpetrating sexual and gender based crimes against other women, suggesting that this type of violence is viewed as particularly monstrous when perpetrated by a woman against her own sex. Hence, through this narrative, courts discursively confirm gender stereotypes about femininity and peace, and reinforce the incompatibility of femininity with violence (Åhäll 2015).

“Threat to Her Husband’s Power”¹⁶: Wife Narratives

Wife narratives featured in the cases of five defendants. In this narrative, a defendant’s actions were viewed in the context of her relationship with her husband or partner, with these relationships being used to explain or justify why the defendant had become involved in the conflict or mass violence. Accordingly, the wife narrative echoes Worrall’s (1990) focal concern of sexuality, where a woman is assessed regarding the influence that her romantic relationships have had on her offending. The wife narrative is also similar to Sjoberg and Gentry’s (2007) whore narrative, because it depicts women acting under the control of men. However, compared to the whore narrative, the wife narrative focuses less on sexualising the defendant and her behaviour, and more on understanding the influence that the defendant’s romantic connections have had on her decision-making process.

The prosecution and Pre-Trial Chamber positioned Simone Gbagbo within the wife narrative as they discussed the motives behind her involvement in the mass violence. The centrality of her husband to this inquiry is evident in the language used throughout the decision granting an arrest warrant. Predominantly, Laurent Gbagbo was referred to as “Mr Gbagbo”. However, at five places in the decision, Laurent Gbagbo was referred to instead as Simone Gbagbo’s “husband”. In these

¹⁵ *Prosecutor v Plavšić*, Transcript, supra n 10, 459.

¹⁶ *Prosecutor v Gbagbo*, Decision on the Prosecutor’s application pursuant to Article 58 for a warrant of arrest against Simone Gbagbo, ICC-02/11-01/12-2-Red, para. 30.

instances, the choice of the word “husband” over “Mr Gbagbo” is significant, as “husband” emphasises the personal and familial connection between the two, and that they are not merely political associates or allies.

When the Pre-Trial Chamber discussed a motive for Simone Gbagbo’s offending, they asserted that she “instructed the pro-Gbagbo forces to commit crimes against those who posed a threat to *her husband’s power*” (emphasis added).¹⁷ Therefore, in contrast to Laurent Gbagbo’s inner circle, who were said to have participated in the violence “in order to retain power by all means,”¹⁸ Simone Gbagbo was described as committing crimes, not to retain her own political power or her political party’s power, but rather, “her husband’s power.” Thus, despite the Prosecution and Pre-Trial Chamber having acknowledged that Simone Gbagbo “was an influential figure in her husband’s government,” who “had her own cabinet within the structure of the Presidency... [and] her own staff” and “took state decisions,”¹⁹ and despite Simone Gbagbo having said (prior to the post-election violence and her court case) that “I owe my current [political] position to my own trajectory, not my husband’s position” (Oberti 2016), her offending was not attributed to her own political ambitions, but rather, her relationship with Laurent Gbagbo.

The Co-Investigating Judges positioned Ieng Thirith within the wife narrative to explain her participation in the mass violence. In the Closing Order for Case 002, a “background” section discussed the early life of each defendant and how they became involved with the Khmer Rouge. In Ieng Thirith’s background section, Ieng Sary is repeatedly referred to as Ieng Thirith’s “husband”; however, in Ieng Sary’s background section, Ieng Thirith is not once referred to as his “wife.”²⁰ Thus, while Ieng Thirith’s section commenced by stating that “she was initiated into politics by her fellow classmate and *future husband Ieng Sary*” (emphasis added),²¹ Ieng Sary’s section explained that he “became politically active in the 1940s as a student at Sisowath High School. It was during this time that he met *Ieng Thirith* and *Saloth Sar*” (emphasis added).²² This difference in language continues throughout the background section, with Ieng Sary having “travelled to Hanoi where he organized the ‘Voice of the FUNK’ radio station, then managed by Ieng Thirith,”²³ while Ieng Thirith returned “to Cambodia from Beijing with her husband 1 week after 17 April 1975.”²⁴ Further, when the connections of the defendants with other CPK leaders is discussed, the Co-Investigating Judges described Ieng Thirith as being “often seen with her husband Ieng Sary,”²⁵ while Ieng Sary only “associated” with Ieng Thirith:

¹⁷ Ibid.

¹⁸ Ibid para. 5.

¹⁹ Ibid para. 15.

²⁰ *Co-Prosecutors v Chea, Sary, Thirith and Samphan*, supra n 7, paras. 994–1017, 1201–1226.

²¹ Ibid para. 1202.

²² Ibid para. 994.

²³ Ibid para. 999.

²⁴ Ibid para. 1206.

²⁵ Ibid para. 1224.

Ieng Sary associated with the senior leaders of the regime in many different capacities, including at major Party gatherings with Pol Pot, Ieng Thirith, Khieu Samphan, and Nuon Chea; when preparing to travel to the zones; when assisting them to write speeches; or when receiving them at B-1.²⁶

Ieng Sary was not exclusively referred to in his capacity as Ieng Thirith's husband in Ieng Thirith's background section. For example, the Co-Investigating Judges noted that Ieng Thirith "shared responsibilities for Foreign Affairs with *Ieng Sary*" (emphasis added),²⁷ without mentioning their marital connection. However, it is noteworthy that Ieng Sary's marriage to Ieng Thirith was not once mentioned in his background section, but was raised multiple times in her background section. This difference in language demonstrates that the marriage between Ieng Thirith and Ieng Sary was seen to be relevant for understanding her background and involvement in the crimes, but not his.

In the "Character Information" section of the Closing Order, the Co-Investigating Judges referred to the marriage equivalently for both defendants.

Arriving in Phnom Penh in the early 1940s, Ieng Sary started studying at Sisowath High School (where he met his future wife, Ieng Thirith, a student in the same school). Before leaving Cambodia to go to France (he had obtained a scholarship to study there), he got engaged to Ieng Thirith and married her in Paris in 1953. They had four children (three daughters and one boy).²⁸

Ieng Thirith was married to Ieng Sary in 1953 and together they have four children, three girls and a boy. After having obtained her baccalaureat at the Lycée Sisowath de Phnom Penh (where Son Sen was then teaching, and where she met her future husband, Ieng Sary, who was educated at the same place), she received a scholarship to pursue her studies in Paris... Ieng Sary had already arrived there in 1951, and they were married in Paris.²⁹

That the Co-Investigating Judges referred to the relationship between Ieng Thirith and Ieng Sary equally when discussing their character, but asymmetrically when discussing their involvement in the commission of crimes, indicates the disproportionate focus given to Ieng Thirith's marital status when her involvement in the conflict is discussed. By viewing her through the lens of her marriage, the Co-Investigating Judges reduce Ieng Thirith's political agency, suggesting that her marital connection may have influenced her decision to become involved in the mass violence.

Rasema Handanović's lawyer positioned her within the wife narrative. At her sentencing hearing, the Chamber was told that Rasema Handanović's family members, including her partner, had been killed during the conflict.³⁰ While the Chamber noted that this "in no event justified the crimes she had committed," the

²⁶ Ibid para. 1017.

²⁷ Ibid para. 1222.

²⁸ Ibid para. 1587.

²⁹ Ibid paras. 1605–1606.

³⁰ *Prosecutor v Handanović*, First Instance Verdict, S 1 1 K 009162 12 Kro, para 15.

death of her partner and family members was taken into account in determining her sentence.³¹ By mentioning the death of her partner and other family members, Rasema Handanović's lawyer provided the Chamber with some basis for an explanation as to why Rasema Handanović became involved in the conflict. A need to gain justice or a longing for vengeance could explain why she made the decision to become a combatant. Thus, similarly to Simone Gbagbo and Ieng Thirith, Rasema Handanović's romantic relationship was used to provide some background to involvement in the mass violence.

The political career of Pauline Nyiramasuhuko's husband, Maurice Ntahobali, and its bearing on Pauline Nyiramasuhuko's own entry into politics, was the subject of a number of questions to Pauline Nyiramasuhuko on the first day of her examination-in-chief. Earlier in the trial, prosecution witness Andre Guichaoua suggested that Pauline Nyiramasuhuko was groomed by her husband to become involved in politics. Thus, Andre Guichaoua positioned Pauline Nyiramasuhuko within the wife narrative, asserting that her entry into politics was attributable to her husband. However, when Pauline Nyiramasuhuko was asked whether her husband's political ambitions were the reason behind her decision to return to university (which prepared her for a political career), she strongly denied it:

Q. Mrs. Nyiramasuhuko, could you be specific or state for the Court why your husband encouraged you to go back to school?

A. I don't know whether you have understood me clearly. I did not say that he encouraged me. I wanted to go back to school, and he did not object to that decision of mine. He was not the one who wanted it in the first place. On the whole, husbands would want their wives to stay at home.³²

In doing so, Pauline Nyiramasuhuko challenged the wife narrative, and asserted her own political agency. Rather than having her decisions attributed to her husband, Pauline Nyiramasuhuko insisted that she was the one who chose to attend university.

The wife narrative was similarly challenged in Im Chaem's closing order. One of the key issues for the Co-Investigating Judges was Im Chaem's position in the political hierarchy. The Closing Order quoted the testimony of one civil party applicant, who stated that "while [the Phnom Srok District] was headed by Nhen, Im Chaem's husband, Im Chaem exercised authority there."³³ Further, another witness testified to his impression that "Im Chaem was in charge of the Phnom Srok District."³⁴ Thus, this testimony similarly challenged the idea that wives are subordinate to their husbands, indicating that in this case, Im Chaem may have wielded more political power than her husband.

The wife narrative examined how the defendant's romantic relationship contributed to her decision to participate in the mass violence. This line of inquiry

³¹ Ibid para. 76.

³² *Prosecutor v Nyiramasuhuko, Ntahobali, Nsabimana, Nteyirayayo, Kanyabashi and Ndayambaje*, Transcript, 31 August 2005, 48.

³³ *Co-Prosecutors v Chaem*, supra n 12, para. 165.

³⁴ Ibid.

was particularly prominent in cases where the defendant's husband was involved in politics; however, it was also observed in cases where the defendant's husband or partner had less of an influence on her political decision-making. This indicates that similar to the mother narrative, the wife narrative does not arise because of the particular circumstances of the case, but rather exists because of social views about women's subordination to men and women's role in politics. Through the wife narrative, the majority of defendants were denied the agency to make political and military decisions, confirming the masculine nature of politics. However, this narrative was also contested in the cases of Pauline Nyiramasuhuko and Im Chaem.

Gardam and Charlesworth (2000, 159) observe that IHL provisions often "deal with women in their relationships with others, not as individuals in their own right." For example, in Article 27 of Geneva Convention IV 1949, rape is positioned as an offence against women's honour, not an offence against women's bodily integrity. The mother and wife narratives discussed above demonstrate similar discursive constructions for female defendants. These narratives examine women's behaviour as it is linked to their relationships with others: with their children and husbands. Thus, these narratives remove women's agency as they fail to view women "as individuals in their own right."

Gender Justice or Gendered Justice?

This article has found that female defendants' gender has been influential in shaping legal discourses about their offending. Rather than gender justice, these defendants have experienced gendered justice. Stereotypical views about the incompatibility of femininity with violence and women's agency in the political and military spheres largely dominated discussions of women's offending behaviour. However, while most cases saw these narratives being accepted and endorsed, there was also evidence of gendered discourses being resisted.

These findings must be considered in light of the data available for analysis. The cases analysed in this article were at various stages in the criminal justice process; some were finalised, while others were at a more preliminary stage. Only one trial had been held, and only three sentencing judgments were available. The number of documents available for analysis, their length, and the extent to which they discussed the defendant's offending behaviour varied from case to case. As such, it is unsurprising that not all of the gender narratives discussed above were present in every case. However, the consistency of these gender narratives across a number of cases, some of which were a very early stage, and used by a number of different actors in the criminal justice process, does suggest that female defendants in international criminal tribunals are being viewed through a gendered lens.

The three gender narratives identified by this article are shaped by the gender legacies of international criminal law. Underpinning these gender legacies are stereotypes and gendered behavioural norms that link femininity with domesticity, motherhood and peace, and deny the compatibility of womanhood with conflict and violence. These stereotypes are compounded by the small proportion of women in politics and the military, particularly political and military leadership positions, and

the small number of women who have been prosecuted in international criminal tribunals. Women's minority status in these spheres emphasises that conflict and mass violence are masculine domains, where the norm is a male warrior, a male perpetrator, and thus, a male defendant. Accordingly, when a female defendant is brought before an international criminal tribunal, she stands out as an anomaly because of her gender. Gender narratives are consequently used to reconcile the defendant's behaviour with traditional gender norms, by emphasising that the defendant is either womanly (and hence not violent), or violent (and hence not womanly), or violent because of the influence of a man (and hence not of her own volition). In doing so, these gender narratives not only reposition the defendant within her expected gender role, but they confirm these existing gender stereotypes, and emphasise that femininity is incompatible with violence.

As such, this gendered justice not only impacts the defendants themselves, but may have broader ramifications for gender justice in international criminal law. Gender justice has been defined as full citizenship for women, where women are treated as moral equals to men and are able to participate in social life to the same degree as men (Fraser 2009). Fraser (1997, 45) argues that a fundamental aspect of gender justice is the recognition of women's equality to men, and the ending of the devaluing of feminine traits. When the language used in relation to female defendants emphasises the dualistic and asymmetrical notion of gender identified by Otto (2013), patriarchal understandings of gender are reinforced, confirming the connection between femininity and peace and denying women's political agency, thus potentially undermining gender justice efforts. However, when stereotypical, patriarchal reasoning is resisted, as was partially seen in the cases of Pauline Nyiramasuhuko and Im Chaem, legal discourses gain the potential to emphasise women's agency. These representations of women challenge existing stereotypes of women's role in conflict, and thus have the potential to contribute to gender justice.

Gender justice in international criminal law has been predominantly analysed and understood from the perspective of the victim. Gender justice initiatives have sought to provide victims with the safety and space to tell their story in the courtroom, ensure that sexual and gender based violence is identified, prosecuted and punished, and draw attention to the need for reparations to be redistributive and transformative (see e.g. Chappell 2016). This article does not want to detract from what is important and much needed advocacy around the rights of female victims. However, as gender justice continues to be a key concern in international criminal law, it may be important to explore the concept of gender justice from multiple different perspectives. Given the potential for the discourses surrounding female defendants to undermine attempts to facilitate gender justice in international criminal tribunals, it is perhaps necessary for us to begin to consider what gender justice might mean in the cases of female defendants.

Conclusion

The experiences of the six women studied in this article suggest that in international criminal tribunals, a female defendant's gender is influential in shaping perceptions of her and her offending behaviour. Gender narratives were used to highlight the incompatibility of femininity with conflict. Thus, a woman could be portrayed as feminine or violent, but not both. Further, gender narratives emphasised that politics and the military are masculine domains. Women were denied the agency to make these decisions, and excluded from these realms. Accordingly, the actions of these defendants were understood and evaluated through the lens of their gender. Rather than gender justice, these defendants experienced gendered justice.

This gendered justice is fuelled by the gender legacies of international criminal law, and stereotypes surrounding femininity, conflict and peace. However, it also largely reconfirms and perpetuates these stereotypes. While there is significant potential for court actors to challenge these gendered discourses and stereotypes about women's role in conflict and instability, this potential has not yet been realised. Instead, the language surrounding female defendants has highlighted their difference to men and their incompatibility with conflict and mass violence, and thus is more likely to undermine gender justice than enhance it. Further discussion and debate are needed on how gender justice can be achieved in and through the cases of female defendants in international criminal law.

Much is still unknown about the influence of gender on the criminal justice process for female perpetrators of conflict and mass violence. It is not clear whether and to what extent gender influences prosecutorial decision-making. There is a significant amount of selectivity and discretion involved in determining who bears the greatest responsibility for mass violence, and thus gender stereotypes might subconsciously impact decisions regarding who should be selected for prosecution in an international criminal tribunal (Côté 2005). Further, it is unclear whether female perpetrators in mass violence who are tried by national courts experience the same gendered treatment as female defendants tried in international courts. While these women participate in conflict differently, they may nonetheless be viewed and assessed with reference to the same gender stereotypes as female defendants in international criminal tribunals. Accordingly, as increasing recognition is given to the roles that women play in situations of conflict and mass violence, including their participation as combatants and perpetrators, it becomes increasingly important to understand how female defendants are treated in the international criminal justice system.

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Female Perpetrators: Ordinary or Extra-ordinary Women?

Alette Smeulers

Universities of Groningen and Tilburg, The Netherlands

Abstract

Only a very small percentage of the perpetrators convicted by international criminal courts and tribunals are women. This raises the question as to whether women are less evil than men. Within the literature it is generally assumed that the genocide in Rwanda was unprecedented in relation to the role played by women, and that it is the first and only period of mass violence in which many women were involved. This explorative study however, shows that women have played a much larger role than we have generally assumed so far and that women can be just as evil as men – although it indeed seems true that generally far less women than men are involved in mass atrocities. There is a clear gender bias in the portrayal of female perpetrators as sadists, abnormal or lacking agency, but it can be questioned whether female perpetrators are less ordinary than male perpetrators.

Keywords

perpetrators – international crimes – women – gender

1 Introduction

On 24 June 2011 Pauline Nyiramasuhuko was found guilty and sentenced to life imprisonment by the International Criminal Tribunal for Rwanda (ICTR) for her leading role in the genocide and commission of widespread rape in Butare. She was the first woman ever to be convicted by an international criminal court or tribunal for genocide and sexual violence. The only other woman who has been convicted by an international criminal tribunal was the Serbian politician Biljana Plavsic – who pleaded guilty and was convicted for persecution as a crime against humanity by the International Criminal Tribunal for former

Yugoslavia (ICTY) on 27 February 2003. Over 280 men have been convicted by international criminal courts and tribunals and these two women thus represent less than one per cent of all people convicted by such courts and tribunals. This raises the question why so many male perpetrators and so few female perpetrators have been convicted. Are women less capable of committing mass atrocities than men as suggested by the stereotyped and gendered image of war in which men are portrayed as perpetrators and women as victims? Or are there other reasons that can explain why most perpetrators are male? In order to answer these questions an explorative literature survey on the role of women within periods of mass violence has been conducted. It has been assessed what kind of roles women have played so far and how significant and extensive their involvement has been (section 3). Next the relevance of gender roles and gender norms will be discussed (section 4). Specific attention will be given to the way in which female perpetrators are portrayed within literature and the media. Next the military will be discussed as it is an extremely gendered institution. The cases of *Plavsic* and *Nyiramasuhuko* will be discussed in more detail in section 5 while in section 6 the focus will be on the motives of the lower ranking women involved in mass atrocities. The overall aim of the article is to get an insight in the extent of the involvement of women in mass atrocities and to get a better understanding of their roles. We will however start in Section 2 with briefly presenting the very stereotyped and gendered image of war which has been prevalent within literature for such a long time.

2 The Gendered Portrayal of War and Mass Violence

In ancient history war could be adequately qualified as an armed conflict between two armies fighting each other in a far-away trench war. But warfare has changed over time: most wars are internal armed conflicts rather than international armed conflicts and usually many different militarised units are involved. There is no clear front line and battles are regularly fought in densely populated areas in which the distinction between combatants and non-combatants have become blurred and civilians are exposed to violence or even deliberately attacked. Contemporary wars have become 'a mixture of war, organised crime and massive violations of human rights' resulting in many civilian casualties.¹ War can thus no longer be considered a 'conflict between

¹ Kaldor notes that the nature of warfare has changed significantly and that most contemporary wars are so-called 'new wars' which are internal rather than international armed

men' and ever since a lot of attention has been focused on the suffering of women during warfare. Although this might have initially been a neglected area of interest this particular focus has gradually transformed into a very stereotyped portrayal of war in which men are pictured as the aggressors and women as the victims.² Behind this vision is the assumption that women are inherently more peaceful than men.³ Although it is absolutely true that many women are victimised and suffer as a consequence of war, so do many men. When studying war and genocide it becomes clear that violence is often gender based as it is not only directed against certain national, ethnical, racial or religious groups but also specifically directed against either the men or the women within that particular group.⁴ In general there seems to be a tendency to consider all males - even the unarmed ones - as combatants and the women as civilians.⁵ This classification has serious consequences as it transforms men into legitimate targets and thus exposes them to violence.⁶ In his classic book on genocide Kuper remarked: 'while unarmed men seem fair game, the killing of women and children arouses general revulsion'.⁷ In his work on gendercide Adam Jones concludes that these differing perceptions of women and men indeed result in differences in casualties: '...the most vulnerable and consistently targeted population group, throughout time and around the world today, is non-combatant men of battle age, roughly around fifteen to fifty-five years old'.⁸

conflicts. See M. Kaldor, *New & Old Wars – Organized Violence in a Global Era* (Polity Press, Cambridge, 2006).

- 2 C. Coulter, 'Female Fighters in the Sierra Leone War: Challenging the Assumptions?', *Feminist Review* (2008) 55–73, at p. 55; Maria Eriksson Baaz and Maria Stern, 'Fearless Fighters and Submissive Wives: Negotiating Identity among Women Soldiers in the Congo (DRC)', 39 *Armed Forces & Society* (2012) 711–739. See also J.A. Tickner and L. Sjöberg, 'Feminism', in T. Dunne, M. Kurki and S. Smith (eds.), *International Relations Theories – Discipline and Diversity* (Oxford University Press, Oxford, 2007), p. 193 who conclude: 'It is a widespread myth that men fight wars to protect vulnerable people usually defined as women and children'.
- 3 Coulter, *ibid.*, p. 55.
- 4 The Srebrenica massacre is one of the best documented examples thereof.
- 5 Jean Bethke Elshtain, 'Women and War Ten Years on', 24 *Review of International Studies* (1998) 447–460, at pp. 453–454.
- 6 R. Charli Carpenter, 'Women and Children First: Gender, Norms and Humanitarian Evacuation in the Balkans 1991–95', 57 *International Organization* (2003) 661–694.
- 7 L. Kuper, *Genocide – its Political Use in the Twentieth Century* (Yale University Press, New Haven, 1981), p. 204.
- 8 A. Jones, *Gender Inclusive – Essays on Violence, Men and Feminist International Relations* (Routledge, London, 2009), p. 153.

While many men are targeted because they are considered legitimate targets, women too suffer from gender based violence albeit in a different way. The most common form is sexual violence – many women in many wars over the years have suffered from various forms of sexual violence. In the war in former Yugoslavia and more particularly in Bosnia Herzegovina sexual violence even became a deliberate war tactic. Some scholars have argued that rape was deliberately used as a means to utterly humiliate male warriors for having failed to protect the ‘honor and purity’ of their women.⁹ It has to be noted however that not only women are the victims of gender based sexual violence. The horrific pictures of the sexual abuse and violence in the Abu Ghraib prison seem to indicate that in the War on Terror the sexual humiliation and abuse of men was an explicit war tactic. Devout Muslim men were humiliated ‘through the reversal of gender roles’.¹⁰ In this war American soldiers ‘exploited every gender and sexual taboo in the Arab world – men dominated by women, men posed in homosexual acts, men treated as dogs’.¹¹ The effect on the male victims was devastating: ‘It’s okay if they beat me. Beatings don’t hurt us, it’s just a blow. But no one would want their manhood to be shattered. They wanted us to feel as though we were women, the way women feel, and this is the worst insult, to feel like a woman’.¹² The fact that sexual violence was used against men rather than women was however not the only anomaly. May be even more remarkable was the fact the perpetrators were women who used their sexuality as a weapon. These examples show us that war and gender are two concepts which require particular attention when studying the causes of mass violence.¹³ They also show that men are not only perpetrators of mass violence within periods of war but also often the victims thereof and that women are not just victims of warfare and mass violence but can also be the perpetrators thereof. The best documented example of the involvement of women in mass violence is without doubt the genocide in Rwanda in which many women played a role. These facts were highlighted by African Rights which published a report on the involvement of women entitled ‘not so

9 N. Zabeida, ‘Not Making Excuses: Functions of Rape as a Tool in Ethno-nationalist Wars’, in R.M. Chandler, L. Wang and L.K. Fuller (eds.), *Women, War and Violence – Personal Perspectives and Global Activism* (Palgrave MacMillan, New York, 2010), p. 23.

10 F. D’Amico, ‘The Women of Abu Ghraib’, in T. McKelvey (ed.), *One of the Guys – Women as Aggressors and Torturers* (Seal Press, Emeryville, 2007), p. 45.

11 *Ibid*, p. 81.

12 T. Kaufman-Osborn, ‘Gender Trouble at Abu Ghraib’, in McKelvey, *supra* note 10, p. 158.

13 Coulter, *supra* note 2, p. 55 argues the ‘notion and discourse about war itself is gendered’.

innocent'.¹⁴ It is therefore time to counter this stereotyped and gendered image of war and mass violence. In this paper I aim to do that by focusing on the role of women within war – not as victims but rather as perpetrators.¹⁵ In the next section the focus will be on the different roles played by women in warfare and in relation to mass atrocities. The aim is to assess whether the involvement of women in the Rwandan genocide was indeed so exceptional as it is generally portrayed within literature or whether the involvement of women in mass atrocities is so much larger than we have assumed so far.

3 Roles Played by Women in Periods of Mass Violence

The most typical role played by women during a period of mass violence is as a silent bystander and supporter of the regime. Although such a supporting role falls short of entailing any criminal responsibility for the crimes committed the importance of such a role should not be underestimated either. Men like Hitler would never have gained so much power without the support of the masses which include both men and women. Research has furthermore shown that the role of bystanders is far more important than we tend to think. Perpetrators carefully look at the reaction of the bystander. If the bystander is inactive this is usually interpreted by the perpetrator as silent approval and support. By remaining passive bystanders – at least in the eyes of the perpetrators – seem to justify and legitimise the actions of the perpetrators and help them to maintain the social context in which they believe themselves to be entitled to commit their crimes. Women can also silently support genocide and other forms and manifestations of international crimes in the private sphere, namely as loyal wives to their husband who took up a more active role. In Nazi Germany for instance the ss-men could not marry without specific approval of the ss which tested whether the wives believed in the ss ideas as well and were worthy of marrying a member of the elite force. Some 240.000 women married ss-men thus supporting the existence of this elite force and providing legitimization for it.¹⁶ Many of these Nazi women were allowed to

14 African Rights, *Rwanda not so Innocent – When Women Become Killers* (African Rights, London, 1995).

15 See also Jamieson who concluded: 'It is absolutely and consistently the case that in war women are victims of all kinds of abuse, including sexual abuse, but the events in Rwanda suggest that this is not the whole story'. R. Jamieson, 'Genocide and the Social Production of Immorality', 3 *Theoretical Criminology* (1999) 131–146, at p. 142.

16 See K. Kompisch, *Täterinnen - Frauen im Nationalsozialismus* (Böhlau Verlag, 2008), p. 204; W. Lower, *Hitlers Furiën* (Spectrum, Antwerp, 2013); W. Lower, 'Male and Female Holocaust

live close to where their husbands worked (for instance a concentration or death camp) and thus became fully aware of what was going on.¹⁷ As such they contributed to the commission of these crimes by not criticizing their husbands and providing them with emotional support.¹⁸ Nazi Germany was not the only country in which loyal women and wives played an important role by supporting the regime and their involved husbands. This is the case in many countries in which international crimes are committed. These passive roles were, however, not the only way women were involved in periods of collective violence. In the following section the focus will be on the various and more active roles played by women.

3.1 *Women as Administrative and Supporting Personnel*

Probably by far the largest group of women involved in mass violence are those involved as administrative and supporting personnel. During the Holocaust in Nazi Germany many governmental organizations were somehow involved in progressively excluding Jews from taking part in ordinary life, in discriminating against them, rounding them up, sending them on transport, holding them prisoner in one of the many concentration camps, and finally killing them. The Nazi Holocaust has been qualified as a bureaucratic mass murder. Hilberg stated:

It must be kept in mind that most of the participants of genocide did not fire rifles at Jewish children or pour gas into gas chambers ... most bureaucrats composed memoranda, drew up blueprints, talked on the telephone and participated in conferences. They could destroy a whole people by sitting at their desks.¹⁹

Amongst these bureaucrats were many women.²⁰ During the Nazi period it is estimated that 12 million women were working in NS organizations, which was

Perpetrators and the East German Approach to Justice', 1949–1963, 24 *Holocaust and Genocide Studies* (2013), p. 70. See also for the Rwandan context, N. Hogg, 'Women's Participation in the Rwandan Genocide: Mothers or Monsters', 92 *International Review of the Red Cross* (2010) 69–102.

¹⁷ See Lower, *supra* note 16.

¹⁸ See C. Koonz, *Mothers in the Fatherland* (St Martin's Griffin, 1991). See also for the Rwandan situation, Hogg, *supra* note 16, p. 78.

¹⁹ Raul Hilberg, *The Destruction of the European Jews* (Holmes & Meier, New York, 1985 - originally published in 1961).

²⁰ Christina Herkommer, 'Women under National Socialism: Women's Scope for Action and the Issue of Gender', in Olaf Jensen and Claus-Christian Szejnmann (eds.), *Ordinary*

one third of the female population. Their involvement in these crimes as administrative and supportive personnel can without doubt be qualified as significant.²¹ Within the camps women often had administrative functions, and the infamous *Einsatzgruppen* for instance were accompanied by female secretaries.²² Women were also involved in the so-called Euthanasia program as administrative personnel and as nurses.²³ Even midwives played a role by assessing whether a pregnant woman would be sufficiently qualified to raise her child according to National-Socialistic standards, and if not, then an abortion was advised. Once children were born and turned out to be handicapped then the midwives had to report this so that measures within the Euthanasia program could be taken. Midwives received 2 German marks for every report and could receive a fine of 150 marks if they did not report on such occasions.²⁴

The genocide in Rwanda was an entirely different type of genocide as compared to the Holocaust. It was not a bureaucratised process which took years. The killings were well prepared but took place in a three-month period and were perpetrated by so-called killer groups consisting of ten to 100 people.²⁵ These groups set up road blocks, conducted house by house searches, apprehended, often raped and maltreated and finally killed all the Tutsis and moderate Hutus they could find. Usually only the most fanatic members of the group were physically involved in the actual killings – nevertheless the group as such which included men as well as women supported the killers in a number of ways. It is known that many women acted as a kind of cheerleaders who were singing songs while the men raped and killed the Tutsis.²⁶ Although no exact

People as Mass Murderers – Perpetrators in Comparative Perspectives, (Palgrave and MacMillan, 2008), pp. 99–119; Kompisch, *supra* note 16, p. 11. Kompisch, *supra* note 16, p. 84 notes that many women worked for the Gestapo as secretaries and administrators.

21 Kompisch, *ibid.*, p. 47.

22 D.P. Brown, *The Camp Women – the Female Auxiliaries Who Assisted the ss in Running the Nazi Concentration Camp System* (A Schiffer Military History Book, 2002); Lower, *supra* note 16; Kompisch, *ibid.*, pp. 12, 88.

23 See Herkommer, *supra* note 20; Manfred Mann, 'Were the Perpetrators of Genocide 'Ordinary Men' or Real Nazis'? Results from Fifteen Hundred Biographies', *Holocaust and Genocide Studies* (2000) 331–366. See also Kompisch, *ibid.*, pp. 12, 10; Lower, *supra* note 16.

24 Kompisch, *ibid.*, p. 137.

25 See Alette Smeulders and Lotte Hoex, 'Studying the Micro-dynamics of the Rwandan Genocide', 50 *British Journal of Criminology* (2010) 435–454.

26 African Rights, *supra* note 14, p. 45; R.V. Adler, C.E. Loyle and J. Globberman, 'A Calamity in the Neighborhood: Women's Participation in the Rwandan Genocide', 2 *Genocide Studies and Prevention* (2007) 209–233, at p. 222. African Rights, *supra* note 14, 72 quotes one of

figures are provided on how many women were involved in this way, the report by African Rights clearly describes their participation as extensive. The *Gacaca* courts tried close to two million suspects, just under ten per cent were women.

These are not the only examples, however. There are for instance also reports from Sudan indicating that women entertained the troops or acted as cheerleaders during the perpetration of crimes.²⁷ In many armies and especially rebel forces in other countries around the world women and girls are often given administrative or supporting roles as secretaries, cleaning ladies, cooks, porters or slaves.²⁸ In some cases this support was enforced, in other cases it was provided voluntarily but whatever the amount of force used it can be concluded that the contribution of these women and girls was crucial for especially rebel forces. One scholar who studied the Revolutionary Armed Front (RUF) during the Sierra Leone conflict concluded: 'the rebels would never have survived had it not been for the forced productive labor of women'.²⁹ Many girls were forced to support the armies and rebel forces in the abovementioned fashion and become child soldiers (a term which refers to all members of armed forces under the age of 18 not matter whether or not they are actively involved in fighting). The Global Report of the Coalition against the Use of Child Soldiers of 2008 concludes that: '...girl soldiers have been present in virtually every non-international conflict, since'.³⁰ Reports suggest that there are

these cheerleaders stated: "I am accused of being there when people were being killed and singing. I admit I did this. I was there when people were being killed. Many people. I joined the animation just as I would join any other choir".

27 Amnesty International, *Sudan: Darfur: Rape as a Weapon of War – Sexual Violence and its Consequences*, Amnesty International Report, 18 July 2004, AFR 54/076/2004. Another example from Angola: 'they were forced to dance, sing, respond to sexual demands and keep the men at a high level of excitement 24 hours a day'. See Yvonne E. Keairnes, *The Voices of Girl Child Soldiers – Summary* (Quaker United Nations Office, New York, 2002), at p. 7.

28 In many Africa countries like Sierra Leone women were abducted by the rebels and forced to work for them such as fetching water, doing the laundry, cooking and acting as sex slaves. C. Coulter, *Bush Wives and Girl Soldiers – Women's Lives through War and Peace in Sierra Leone* (Cornell University Press, Ithaca, NY, 2009), 103. See also J. Annan, C. Blattman, D. Mazurana and K. Carlson, 'Civil War, Reintegration, and Gender in Northern Uganda', 55 *Journal of Conflict Resolution* (2011) 877–908 at p. 883; S. McKay and D. Mazurana, *Where Are the Girls? Girls in Fighting Forces in Northern Uganda, Sierra Leone and Mozambique: Their Lives during and after War* (Montreal: International Centre for Human Rights and Democratic Development, Montreal, 2004), p. 17.

29 Coulter, *ibid.*, p. 117.

30 Child Soldiers Global Report 2008 (Coalition to Stop the Use of Child Soldiers, London, 2008), at 28 [See a list of government forces who use girl soldiers at p. 29].

300.000 child soldiers of whom 40 per cent are girls and thus there are allegedly 120.000 girl soldiers worldwide.³¹ Many of them (willingly or unwillingly) support the perpetration of genocide and other international crimes.

3.2 *Women as Profiteers, Thieves, Traitors and Spies*

During periods of mass violence many women took advantage of the position of their husbands or the misery of the victims. In Nazi Germany for instance the wives of concentration camp guards employed prisoners to do their households and often treated them very badly, making them work like slaves.³² Jews who were interned in concentration camps had to hand over all their valuables to the Nazis and people running the camp (both male and female) often took advantage thereof and used these goods (clothes, jewellery, money) themselves.³³ In Rwanda women searched the bodies of the people killed or searched their hiding places or houses in order to steal valuables.³⁴ Similar incidents are reported in other countries.³⁵

Another typical role played by women during both the Nazi Holocaust and the Rwandan genocide was as traitor. In Rwanda women in all different kind of sectors betrayed Tutsis.³⁶ This was not only the case for women in governmental organizations but also for teachers at schools who betrayed their pupils and handed them over to the extremists and killer groups; doctors and nurses handed over their patients and nuns handed over the Tutsis who had come to seek refuge at their church or monastery. In 2001 two Rwandan nuns (Sister Gertrude and Sister Kisito) stood trial in Belgium.³⁷ During the Rwandan genocide they chased all Tutsis who had sought refuge in their monastery out of the monastery and handed them over to the extremists knowing that these groups would immediately kill them. They even bought petrol which was used to set a

31 See Voice of America (2009), 120.000 Girls Believed to Be Child Soldiers, <www.voanews.com/content/a-13-2005-04-25-voa27/394897.html>, 7 June 2013.

32 See also Herkommer, *supra* note 20, p. 113.

33 Kompisch, *supra* note 16, p. 181.

34 African Rights, *supra* note 14, 81; Hogg, *supra* note 16, 78; Adler et al., *supra* note 26, p. 222.

35 Coulter, *supra* note 28, 112; Dara Cohen, 'The Role of Female Combatants in Armed Groups: Women and Wartime Rape in Sierra Leone (1991–2002)', 65 *World Politics* (2013) 383–415.

36 See African Rights, *supra* note 14, pp. 2, 12; but also Hogg, *supra* 16, 70; Adler et al., *supra* note 26, p. 212.

37 The two nuns had to stand trial together with two others, a university professor and a factory owner. They were known as the *Butare Four* and were the very first Rwandese to be convicted by a non-Rwandan court.

garage on fire in which 600 Tutsis had fled.³⁸ The Belgium case attracted a lot of media attention especially because the two accused were nuns but in Rwanda many others like them helped and supported the killer groups by betraying the Tutsis who tried to flee for their lives. Women who were not professionally involved showed the killer groups where the Tutsis were living or where they went into hiding.³⁹ In some cases women did not actively betray victims but refused to help the victims and thus contributed to their capture and death.⁴⁰ In some cases Tutsi women left their children under the protection of Hutu women but some of these women turned the children in to the killer groups.⁴¹

During the Nazi Holocaust many Jews all over Europe were betrayed (by both men and women).⁴² In some countries, like for instance in the Netherlands, people could earn money by betraying Jews. It was only a small fee, but some traitors became good at it and thus earned quite a lot of extra money. In other cases Jews who had been captured could save their life by starting to work for the Germans and betraying other Jews. Although most traitors were men – women too were involved. One of the most infamous trial cases in the Netherlands involved a Jewish woman, Ans van Dijk. After the Nazis took control over the Netherlands, Van Dijk never officially registered as a Jew and could thus live a fairly ordinary life despite the German occupation. She often helped other Jews to escape until she was betrayed and arrested by the Dutch police. After her arrest, she was given the choice of being sent off immediately to the death camps, or to save her own life by starting to work for the Dutch police by searching for and betraying other Jews. Van Dijk took the offer and unfortunately turned out to be extremely good at her job. Together with a few others, amongst whom were a number of women, she allegedly betrayed over 100 Jews.⁴³ After the war, Ans van Dijk was the only woman in the Netherlands who received the death penalty, and was publicly executed for her role in the Second World War.

In some countries women were used as spies, because they are often not seen as dangerous but rather as innocent victims and can thus easier manipulate people.⁴⁴ They were sent to villages and towns in order to make friends

38 See African Rights, *supra* note 14, pp. 156–191. The two nuns were convicted on 8 June 2001 to 12 and 15 years imprisonment.

39 Hogg, *supra* note 16, p. 78.

40 African Rights, *supra* note 14, p. 2; Hogg, *supra* note 16, p. 79.

41 L. Sharlach, 'Gender and Genocide in Rwanda: Women as Agents and Objects of Genocide', 1 *Journal of Genocide Research* (1999) 387–399, at p. 392.

42 Kompisch, *supra* note 16, p. 74 notes that betrayals by private persons was crucial.

43 Koos Groen, *Als Slachtoffers Daders worden – de Zaak van de Joodse Verraadster Ans van Dijk* (Ambo, Baarn, 1994).

44 See for an example, Coulter, *supra* note 28, p. 9.

and find themselves lovers amongst the soldiers and get information about the town.⁴⁵ This information was then used to attack the town in question.

3.3 *Women as Prison and Camp Guards*

An even more active role was played by women who were prison or camp guards. In many countries female guards are appointed to serve as guards of the prisons and camps in which women are held. In Nazi Germany over 3500 women served as concentration camp guards and had to guard the women, were responsible for maintaining order and discipline within the camp and conducted selections at the ramp. Round and about six per cent of all concentration camp guards were female.⁴⁶ Most of them received their training at Ravensbrück. Some of these women became known as extremely cruel and sadistic guards, as for instance Irma Grese, a camp guard at Ravensbrück, Auschwitz, and later, Bergen Belsen. She always carried around a whip in order to beat up prisoners and seemed to derive sadistic pleasure from the suffering of others. According to one witness at her trial she had killed about 30 prisoners a day.⁴⁷

Grese is however not the only infamous female guard known for her cruelty and sadism. Johanna Borman was known as the woman with the dog as she set off her dog to attack and kill exhausted prisoners. Austrian *ss-Helferin* Maria Mandel put together a Jewish orchestra at Auschwitz which was to play music during the selections at the ramp and the executions thereafter. Dorothea Binz continuously hit the prisoners. Ruth Neudeck took off the clothes of some inmates, poured cold water over them and made them stand in the cold for hours.⁴⁸ After the Second World War, about 60 female camp guards stood trial under the war crimes tribunals between 1945–1949. Many of them were described as more brutal than their male counterparts.⁴⁹ A total of 21 of these women were executed.⁵⁰

45 *Ibid.*, p.104.

46 Brown, *supra* note 22.

47 Daniel Patrick Brown, *The Beautiful Beast – the Life and Crimes of ss-Aufseherin Irma Grese* (Golden West Publications, Ventura, 1996). See however also the comments in section 4.1 of this article in relation to the biased portrayal of female perpetrators.

48 Kompisch, *supra* note 16, p. 186.

49 Ilse Koch, although not formally a camp guard but the wife of camp commander Karl Koch, also became known for her cruelty. It was alleged that she ordered lampshades and photo albums out of human skin and she ordered Jews with nice tattoos to be killed for this very reason. These allegations could however – despite desperate efforts – not be proven in two court cases and might very well be based on false rumours and lies. Ilse Koch was nevertheless convicted to life imprisonment.

50 See <www.capitalpunishmentuk.org/nazigirls.html>, 15 October 2014.

A more recent example of female prison guards committing atrocities was the abuse of Iraqi prisoners at the Abu Ghraib prison during the American war on terror. A number of women figured prominently in the pictures published by the American CBS '60 Minutes' television programme in which the Iraqi prisoners were humiliated, harassed and sexually abused. The pictures shocked the American public. President Bush was quick to call the perpetrators rotten apples but it later turned out that they were acting according to the broader guidelines as designed by the Pentagon.⁵¹ The American interrogators had asked the prison guards to soften up the prisoners in order to prepare them for the interrogations. In the night shift a group of guards amongst whom a number of women started to systematically abuse the Iraqi prisoners. The fact that they took pictures of the abuse seems to indicate that they were not aware of the fact that they were committing horrendous acts in clear violation of international law.

In former Yugoslavia too there are known cases of female camp guards committing international crimes. Indira Vrbanjac Kamberic was indicted for crimes committed while being one of the commanders of a detention camp. Monika Simonovic, the girlfriend of Goran Jelusic who was sentenced to 40 years imprisonment by the ICTY, has beaten and maltreated many prisoners together with Jelusic and was arrested in December 2011. A witness remembers: 'she wasn't a woman, she was a monster'.⁵² Another woman, Azra Basic was 'accused of killing a prisoner and torturing others by forcing them to drink human blood and gasoline and having them kneel on broken glass'.⁵³ Usually men and women are not detained in the same (ward of a) prison and in principle women only act as guards within women's prisons. It can thus be expected that the extent of involvement of women as prison and camp guards is much smaller than the role of men but nevertheless probably quite extensive.

3.4 *Women as Interrogators and Torturers*

As already noted above many women abused their role as camp and prison guards and many of them severely mistreated and abused the inmates. In some cases such abuse can be qualified as torture as is the case with the medical

51 See a.o. K.J. Greenberg and J.L. Dratel (eds.), *The Torture Papers – the Road to Abu Ghraib* (Cambridge University Press, Cambridge, 2005); P. Gourevitch and E. Morris, *Standard Operating Procedure* (Penguin Press, New York, 2008).

52 M. Husejnovic, *Bosnian War's Wicked Women Get Off Lightly*, balkaninsight.com: www.balkaninsight.com/en/article/bosnian-war-s-wicked-women-get-off-lightly, 25 May 2013.

53 See *Bosnian Police Arrest Female Monster*, <bosniagenocide.wordpress.com/2011/12/21/bosnian-police-arrests-serbian-female-monster-monika-simonovic-ilic/>, 25 May 2013.

experiments conducted in the Nazi concentration camps. The inmates of these camps were used as guinea pigs in medical experiments conducted by the Nazi doctors. Next to many men⁵⁴ women too were involved in these experiments.⁵⁵ Some as nurses others as doctors. At the *Nazi Medical* trial, which was conducted shortly after the war, one of the 23 defendants was a woman, Herta Oberheuser. She was sentenced to 20 years imprisonment.

A few women have acted as interrogators and torturers although there are not many known cases. One of the few known accounts of a female interrogator at work is by Erik Saar, an interpreter at Guantanamo Bay. He describes the interrogation of a Muslim terror suspect by an American female interrogator at which he was present. Saar describes how the female interrogator progressively tried to provoke the devote Muslim by using her sexuality. It is a chilling and saddening account of pure humiliation in which the woman ends up smearing a red substance on the prisoner's face while making him believe it is menstrual blood. The pious Muslim prisoner almost became hysterical and Saar chillingly describes how he shouted at the top of his lungs.⁵⁶

There are also a few reported cases of female torturers in Spain in the period in which the ETA was still considered a dangerous terrorist organization⁵⁷ and in South Africa under the Apartheid regime in which female torturers tortured others by pumping water into another woman's fallopian tubes and applying electric shocks to their victims.⁵⁸ Incidents with female torturers have also been reported from Uruguay and Brazil.⁵⁹

In February last year international news agencies reported that in Bahrain a princess was accused of torture.⁶⁰ But as there are very few other documented examples it seems fair to conclude that apparently only very few women so far

54 See the book by R.J. Lifton, *Nazi Doctors: Medical Killing and the Psychology of Genocide* (Basic Books, New York, 1988).

55 See Herkommer, *supra* note 20, p. 112 who quotes Schwarz.

56 E. Saar and V. Novak, *Inside the Wire – a Military Intelligence Soldier's Eyewitness Account of Life at Guantanamo* (The Penguin Press, New York, 2005), at p. 222.

57 Eileen McDonald, *Shoot the Women First* (Forth Estate, London, 1991), p. 50.

58 See B. Goldblatt and S. Meintjes, 'South African Women demand the Truth', in M. Turshen and C. Twagiramaria (eds.), *What Women do in Wartime - Gender and Conflict in Africa* (Zed Books, New York, 1998), pp. 27–61.

59 M.K. Huggins, M. Haritos-Fatouras and P.G. Zimbardo, *Violence Workers – Police Torturers and Murderers Reconstruct Brazilian Atrocities* (University of California Press, Berkeley, 2002).

60 Reuters (30-01-2013). Bahraini Princess on Trial for Torturing Detainees, <www.reuters.com/article/2013/01/30/us-bahrain-princess-trial-idUSBRE90ToUU20130130>, 13 March 2013.

have acted as interrogators and torturers and this is still generally a men's job.⁶¹ The only clear trend is the progressive use of women as interrogators in the war on terror.

3.5 *Women as Killers and Murderers*

Women have also been involved in genocide and other periods of mass violence as killers and murderers. Many of the female camp guards in Nazi Germany participated in the selections and thus had an active role in sending Jews to the gas chambers. Nurses who worked in the concentration and death camps took part in the selections too, deciding who was still fit enough to work and who was not. In some cases they personally gave the inmates lethal injections. Many women were - as nurses or doctors - also involved as killers and murderers in the Euthanasia programme in which about 100.000 people were deliberately killed because they were considered unfit to live.⁶² Lower notes that some of the worst perpetrators were women who did not have an official function but who accompanied their husbands to execution sites or concentration and death camps and took advantage of their situation and killed Jews, some without any reason: just for the fun of it.⁶³ Female camp guards in Nazi Germany and former Yugoslavia sometimes shot prisoners or beat them to death.⁶⁴ On 30 April 2012 the first woman was convicted by a Bosnian court for killing six men during an attack in April 1993. Rasema Handanovic had been raped herself during the war before she committed these crimes.⁶⁵ There are currently 40 other ongoing investigations against women who are suspected of their involvement in Bosnia.

In Rwanda women played a huge role in the genocide but it seems that only a few were 'directly engaged in the killings'.⁶⁶ This is probably due to the fact that 'there were few women, in the best known of the killing machines – the

⁶¹ See also Huggins et al., *supra* note 59 who came to a similar conclusion.

⁶² Kompisch, *supra* note 16, pp. 125–126. See also B.R. McFarland-Icke, *Nurses in Nazi Germany: Moral Choices in History* (Princeton University Press, Princeton, 1999).

⁶³ Lower, *supra* note 16 mentions this at several places in her book and provides examples of women who took a gun and shot Jews from their balcony.

⁶⁴ Husejnovic, *supra* note 52 provides an example from former Yugoslavia in which a woman who executed people because her father had been shot.

⁶⁵ See newspaper clipping, <uk.mobile.reuters.com/article/worldNews/idUKBRE83TokU20120430?irpc=979>, 23 June 2013.

⁶⁶ See for instance African Rights, *supra* note 14, p. 1; Hogg, *supra* note 16, pp. 70, and 77, at which she quotes a female genocide suspect who stated: 'The difference is that men killed, women didn't. I hear that some women called out to be killers, but I didn't see them do it'.

army, gendarmerie and trained militia, the Interahamwe'. But some were nevertheless actively involved. In a report by Human Rights Watch late genocide scholar Alison des Forges quotes an UNAMIR officer saying: 'I had seen war before but I had never seen a women carrying a baby on her back kill another woman carrying a baby on her back'.⁶⁷ It is furthermore known that after a group of Tutsis had been killed women not only searched the bodies but also often killed those who were still alive.⁶⁸ Nurses and doctors in Rwandan hospitals not only pointed out Tutsis to the killers but also killed Tutsi patients themselves.⁶⁹ In 2007 Adler et al. figured out that 3000 women representing over three per cent of the prison population were imprisoned for their role in the genocide. Those imprisoned can be considered to have played a larger role and possibly be directly involved in the killings.

In many other countries women were soldiers in regular governmental armies or irregular rebel forces⁷⁰ and as such killed others. Sometimes in a legitimate battle in other cases it was plain murder. Waller for instance notes that in Cambodia 'many Khmer Rouge women committed the same atrocities as men'.⁷¹ Kesic concluded that: 'there were women in all the militias and national armies throughout the former Yugoslavia', and some without doubt committed mass atrocities.⁷² Many girl soldiers fought in armies which committed mass atrocities. Although there are few direct reports of women committing international crimes in this way it is very likely that women too were actively involved in these crimes. In Sierra Leone for instance, there were small girls' units next to the infamous small boys' units.⁷³ Female fighters have been said to be active in countries such as Peru, Liberia, Sri Lanka, Eritrea, Ethiopia, Nicaragua, Vietnam, El Salvador, Columbia, Guatemala, Nicaragua, Sierra Leone, Sri Lanka and Uganda.⁷⁴ This is not a recent phenomenon: Waller

67 Alison des Forges, *Leave None to Tell the Story – Genocide in Rwanda* (Human Rights Watch, New York, 1999), p. 261.

68 African Rights, *supra* note 14, p. 81.

69 *Ibid*, p. 209.

70 Coulter, *supra* note 28, p. 18 concludes that with Sierra Leone: 'women fighters participated in the violence with their male counterparts on a widespread scale'. See also Cohen, *supra* note 35.

71 J. Waller, *Becoming Evil – How Ordinary People Commit Genocide and Mass Killings* (Oxford University Press, Oxford, 1997), p. 300, note 12.

72 Kesic as quoted by F. Wilmer, *The Social Construction of Man, the State and War – Identity, Conflict and Violence in the former Yugoslavia* (Routledge, New York, 2002), p. 215.

73 Coulter, *supra* note 28, p. 109.

74 See Coulter, *ibid.*, 137; African Rights, *supra* note 14, p. 7; Annan et al., *supra* note 28, p. 2.

provides some other historical examples, and states that in World War II more than one million women served in the Soviet army. Furthermore, it is known that many women fought alongside men in guerrilla and revolutionary wars.⁷⁵

It is also known that many female spies and female terrorists have been involved in terrorist attacks resulting in deaths. On 29 November 1987 for instance, a bomb exploded on Korean Airline 858, killing all 115 passengers. Kim Hyon Hui, a female North Korean agent, had planted the bomb. In terrorist organizations such as the Palestinian Liberation Organization (PLO), *Rote Armee Fraktion* (RAF), *Euskadi ta Askatasuna* (ETA), Front Liberation National (FLN), Irish Republican Army (IRA) and Red Brigades women were involved in many functions, including as the ones who planted bombs and killed innocent bystanders. Especially the so-called black widows in Chechnya became infamous.⁷⁶ They were for instance, involved in the Moscow hostage-taking in October 2002. Fifty Chechen rebels, amongst whom 20 women, held 800 visitors of the theatre hostage. In the failed rescue attempt 39 terrorists and 129 hostages died.

In the last few years women have also been involved in suicide attacks. Sana Mehaildli, a Syrian young woman, who blew herself up on 9 April 1985 killing two Israeli soldiers, is believed to be the first female suicide terrorist. Bloom notes that the use of female suicide bombers is a global trend.⁷⁷ According to Sjoberg and Gentry, 22 out of 27 suicide attacks (and thus 81 per cent) in Chechnya were perpetrated by women.⁷⁸ Another group infamous for female suicide attacks are the Tamil Tigers – allegedly 30 per cent of their suicide attacks are committed by women.⁷⁹ Wafra Idris was the first female suicide bomber in Palestine in January 2002. It is estimated that almost seven per cent of the suicide attacks in Palestine are committed by women and in Iraq less than one per cent.⁸⁰ Since 2005 Al-Qaeda also uses female suicide bombers.⁸¹ Women are however, still underrepresented in terrorist organizations, and it is alleged that about ten per cent are female although this percentage is as high as 30–40 per cent in organizations such as the revolutionary armed forces in

75 Waller, *supra* note 71, p. 300 note 12.

76 See S. Adler, *Ich sollte als Schwarze Witwe Sterben* (Deutsche Verlags-Anstalt, 2005).

77 M. Bloom, 'Female Suicide Bombers – a Global Trend', *Daedalus* (2007) 1–9.

78 Laura Sjoberg and Caron E. Gentry, *Mothers, Monsters, Whores – Women's Violence in Global Politics* (Zed Books, London, 2007), p. 98.

79 Human Security Report 2005- War and Peace in the 21 Century (Oxford University Press, New York, 2005) estimate that 30 per cent of suicides by women.

80 Sjoberg and Gentry, *supra* note 78, p. 112.

81 *Ibid.*, p. 127.

Colombia (FARC) and in Chechnya.⁸² The use of female suicide bombers might however increase as they draw much more media attention than the attacks by men: 'the image of women defying tradition to sacrifice their lives for the Palestinian cause has drawn more attention to the despair of the Palestinian people'.⁸³

3.6 *Women as Sex-offenders*

The probably most unexpected role of female perpetrators is as sex offenders. Yet women have also been involved in war related sexual violence. African Rights reports that during the Rwandan genocide women were involved in sexual violence.⁸⁴ A witness reports how a woman who had a hairdresser's shop in Kigali killed a wealthy Tutsi business woman:

Maman Aline demanded to kill the woman herself. There were some displaced women from Gisozi who had pointed sticks. They tried to penetrate her vagina with them. They opened her legs and Maman Aline penetrated her vagina with a stick. Then [a woman called] Pauline came along with a big masu and hit her on the head.⁸⁵

In the book *The Men Who Killed Me*, there is a story of a thirteen year old Tutsi boy who was held prison by a Hutu woman who sexually abused him for a number of weeks.⁸⁶ But these are not the only cases: other scholars studying mass atrocities in Africa have reported that women were involved in committing sexual violence.

Dara Cohen reports that within Sierra Leone committing a gang rape was considered a means of combat socialization and women as well as men participated in these gang rapes. According to some estimates women were involved in one out of four gang rapes in Sierra Leone.⁸⁷ Within this conflict

82 B. de Graaf, *Gevaarlijke Vrouwen – Tien Militante Vrouwen in het Vizier* (Boom, Amsterdam, 2012) at 319.

83 Bloom, *supra* note 77, p. 4.

84 African Rights, *supra* note 14, p. 83; Hogg, *supra* note 16.

85 African Rights, *ibid.*, p. 40.

86 A.M. de Brouwer and S.K. Hon Chu, *The Men Who Killed Me* (Douglas & McIntyre, Vancouver, 2009).

87 See Cohen, *supra* note 35; M. Humphreys and J. M. Weinstein, *What the Fighters Say: a Survey of Ex-combatants in Sierra Leone* (June-August 2003), Centre on Globalization and sustainable development, Columbia University, <www.columbia.edu/~mh2245/Report1_BW.pdf>, 19 June 2013.

the RUF was considered the group which was most responsible for sexual violence, and this was also the group which had most women in its ranks.⁸⁸ Women often picked the victims and held them down during the gang rape. In other cases women used bottles and other objects to rape the victims themselves.⁸⁹ A quantitative analysis by Lynn Lawry in DR Congo shows that in this conflict too women were actively involved in sexual violence. She concludes that '17 per cent of survivors of sexual based gender violence perpetrated by the Mai Mai name females as perpetrators.'⁹⁰ In general, 40 per cent of the female survivors and ten per cent of the male survivors of sexual violence report the perpetrator to be female.⁹¹

The pictures of the abuse at Abu Ghraib shows that in the War on Terror women were purposefully used to sexually abuse and humiliate devout Muslims: they were held naked in sexually humiliating positions in the presence of women. The policy was deliberate, structural and widespread. An American scholar and attorney concluded:

During the last year and a half, I learned that my clients - devout Muslim men - have been subject to sexual harassment and abuse both in and out of interrogation. They have been forced to strip naked in front of female guards; some have had their private parts touched and squeezed; some have been offered sex in exchange for cooperation; some have been threatened with rape.⁹²

In former Yugoslavia, sexual violence was also widespread. So far little is known about the role of women, but in some cases they were indeed involved. One female camp commander apparently took female prisoners to the front lines for the soldiers to rape them.⁹³ We can thus conclude that most sexual

88 Cohen, *supra* note 35.

89 See also examples reported by Human Rights Watch, *We'll Kill You if You Cry* (Human Rights Watch, New York, 2002); and Cohen, *ibid.*

90 L. Lawry, K. Johnson and J. Asher, 'Evidence-based Documentation of Gender-based Violence', in: A.L.M. Brouwer, C. de Ku, R. Römken, and L. van den Herik (eds.), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia, Cambridge, 2013) at p. 300.

91 *Ibid.*, pp. 300–301.

92 Kristine A. Huskey, 'The Sex Interrogators of Guantanamo', in Tara McKelvey (ed.), *One of the Guys – Women as Aggressors and Torturers* (Seal Press, Emeryville, 2007), at p. 176.

93 M. Husejnovic, Serb Women War Criminals: Monika Simonovic, 'She looked like a little girl', <bosniangenocide.wordpress.com/2011/12/20/female-serb-war-criminals-she-looked-like-a-little-girl/>, 19 June 2013.

violence is probably still committed by men but that the involvement of women in sexual violence is probably much larger than initially expected.

3.7 *Women as Political Leaders and Instigators*

Women can also come to play a crucial role during a period of mass atrocities as political leaders. So far the only two women who have been convicted by international criminal courts and tribunals were political leaders. Biljana Plavsic was Vice-President of the Republika Srpska and thus a leading Serbian political figure. She was indicted for persecution and pleaded guilty. The Trial Chamber of the ICTY concluded that she

embraced and supported the objective [...] and contributed to achieving it. She did not participate with Milosevic, Karadzic, Krajisnik and others in its conception and planning and had a lesser role in its execution than Karadzic, Krajisnik and others.⁹⁴

Her role was amongst others to encourage participation and publicly justifying the use of force.

Pauline Nyiramasuhuko was also a political leader. She was a Rwandan minister and one of the members of the inner circle of power holders who prepared the genocide and charged and convicted with genocide and sentenced to life by the ICTR.⁹⁵ Both women show that women too can instigate others to commit mass atrocities. Their cases will be discussed in more detail in section 5.

With a few notable exceptions very few women play an important role in politics in a period of mass violence. In Rwanda for instance women were underrepresented: there were 3 female government ministers and 12 out of 70 members of parliament were female, there were no female *bourgmestres* and only one per cent of the *conseillers* were women.⁹⁶ Yet besides Nyiramasuhuko, some other women played a leading role in the Rwandan genocide. Agathe Kanziga, the widow of President Habyarimana also played an important role. After her husband died she fled abroad and provided funding to Radio Milles Collines as well as to the extremist newspaper *Kangura* which were both infamous for instigating people to commit genocide.⁹⁷ Agnes Ntamabyaliro was Minister of Justice and received a life sentence in Rwanda

94 *Prosecutor v. Plavsic*, 3 February 2003, ICTY, IT-00-39&40/1-S.

95 *Prosecutor v. Pauline Nyiramasuhuko and Others*, 24 June, ICTR, Case No. ICTR -98-42-T.

96 Hogg, *supra* note 16, p. 74.

97 *Ibid.*, p. 90.

for her role in the genocide.⁹⁸ Other women participated in indoctrination meetings and as such participated in the preparation of genocide⁹⁹ or took the lead during the genocide. African Rights concluded that ‘some of the most cruel local government officials who organised the killings; especially in Kigali, were women’.¹⁰⁰ On a list published by the Rwandan government, 2202 suspects including 47 women were named because of their prominent and leading roles in the genocide.¹⁰¹

Ieng Thirith is a further prominent example. She was indicted by the Extraordinary Chambers of the Cambodian Courts (ECCC) for her role in the genocide in Cambodia under the Khmer Rouge regime of Pol Pot. She was Minister of Social Affairs and the wife of one of the other accused, Ieng Sary, who died in March 2013 before he could be tried. Thirith played an important role in the genocide. The Chamber however ordered a stay of the prosecution because she was unfit to stand trial.

Some women can gain power by the mere fact that their husbands are head of state. Some of these women do not interfere with their husband's job but some do, and are known to have played an important role by influencing their powerful husbands and taking up the role of ‘Madame President’. A prominent example thereof is Mira Markovic, the wife of the late Slobodan Milosevic, who is said to have been the driving force behind her husband. She spurred him on to gain more and more power – no matter the cost. Another example is Jiang Qing, the wife of Mao, who played an active role during the cultural revolution and after Mao's death. But there were others such as Eva Perron, Elena Ceausescu and Simone Gbagbo who is now indicted by the International Criminal Court.

3.8 *A Variety of Roles*

From the above enumeration it can be concluded that more men than women are involved in international crimes, but also that many more women than so far assumed have been involved in mass atrocities. The presented anecdotal evidence has furthermore proven that there seems to be no role women haven't played in the past. Most women are indirectly involved by supporting the regime and the criminal policies or behaviour of their husbands. Many women have an administrative or supporting role but still quite a few are physically

⁹⁸ *Ibid.*, p. 75. Another important Rwandese politician was Agathe Uwilingiyimana who had been prime minister of Rwanda and one of the first to be killed in the genocide.

⁹⁹ African Rights, *supra* note 14, p. 15.

¹⁰⁰ *Ibid.*, p. 3.

¹⁰¹ Hogg, *supra* note 16, p. 90.

involved as traitors, thieves, prison and camp guards or combatants. Women can even be involved in sexual violence – sometimes in a supporting capacity (holding the victim) but in some cases also as the main physical perpetrator. The role of women as hands-on perpetrators is limited compared to men but might very well be much larger than we have assumed so far.¹⁰² The gathered evidence shows that women too can commit horrendous crimes and physically or sexually abuse, maltreat or kill other people. Women in other words can be as evil as men.

4 The Gender Effect

The above overview shows that in history women have been found to play almost any possible role in relation to mass atrocities. Yet it is also true that many more men than women are involved in international crimes – especially in the physical perpetration thereof.¹⁰³ An interesting question is obviously how we can explain this. Within especially feminist discourses women have been assumed to be inherently more peaceful than men but are they really? What about the women described in the sections above who have been involved in mass atrocities? Are they all special and extra-ordinary (read: abnormal) women? Or are they ordinary women not very different from the ordinary men capable of mass atrocities and can the fact that so many more men than women are involved be explained by social factors alone? In the following subsections we will try to find answers to these questions. In doing so we will focus on the role of gender both in the portrayal of female perpetrators as in organizations such as the military and amongst political leaders. This is particularly relevant as most convicted perpetrators are either political leaders or members of militarised units.

4.1 *Portrayal of Female Perpetrators: A Clear Gender Bias*

Within literature and the media there is a remarkable difference between the portrayal of female perpetrators compared to male perpetrators. Female

¹⁰² Lower, *supra* note 16, p. 27 estimates that one third of the female population and thus over 4 million women were actively involved with the Nazis.

¹⁰³ A similar gender gap has been identified by criminologists studying ordinary and conventional crime in relation to violent and serious crimes. See J. Miller and Christopher Mullins, 'Feminist Theories of Girls' Delinquency' at 32; Robert Agnew, 'The Contribution of "Mainstream" Theories to the Explanation of Female Delinquency', both published in M. Zahn (ed.), *The Delinquent Girl* (Temple University Press, 2009), at p. 7.

perpetrators are often described as mentally insane sadists who are more cruel and sadistic than their male counterparts. It however, remains to be seen as to whether they really are more cruel or merely portrayed that way because people have trouble believing that women are capable of such extreme atrocities. In the portrayal of female perpetrators the overriding message seems to be that women who are involved must be either mentally disturbed, 'unnatural and abnormal' or must have been forced to commit such atrocities.¹⁰⁴ Sjoberg and Gentry studied the portrayal of female perpetrators and concluded that they are either portrayed as mothers, monsters or whores: 'The mother narrative describes women's violence as a need to belong, a need to nurture, and a way of taking care of and being loyal to men: motherhood gone awry. The monster narrative eliminates rational behaviour, ideological motivation, and culpability from women engaged in political violence. Instead, they describe violent women as insane, in denial of their femininity, no longer women or human. The whore narrative blames violence on the evils of female sexuality at its most intense or its most vulnerable'.¹⁰⁵ These narratives are all very stereotyped and: 'exclude the possibility that women can choose to be violent because violent women interrupt gender stereotypes. "Real" women are peaceful, conservative, virtuous and restrained; violent women ignore those boundaries of womanhood'.¹⁰⁶

Within the media coverage of cases of international crimes there are many illustrations of the 'mother, monster, whore' thesis forwarded by Sjoberg and Gentry. After the Second World War for instance, the press covered the trials of female Nazis in a sensationalistic manner that was very different from the coverage of trials in which the accused were male. The media described the female perpetrators as 'beasts, sadists and seductresses'.¹⁰⁷ In one of the first of these Nazi trials, Irma Grese, a former camp guard at Ravensbrück, Auschwitz and Bergen Belzen stood trial.¹⁰⁸ Initially the press and public talked more about

104 See e.g. Coulter, *supra* note 2, p. 63 and Lower, *supra* note 16, p. 287. See also Kompisch, *supra* note 16, p. 236 who notes that female perpetrators in Nazi Germany were portrayed as either being young and naïve, being seduced by men or beasts.

105 Sjoberg and Gentry, *supra* note 78, p. 13. See also the paper by Heschel entitled 'Feminist Theory and the Perpetrators' as quoted by Waller, *supra* note 71, p. 301, note 12; Lower, *supra* note 16, p. 290.

106 Sjoberg and Gentry, *supra* note 78, pp. 50–51. Similar trends can be seen within criminological studies in discussions and research on female delinquency. See Miller and Mullins, *supra* note 103, p. 32.

107 Lower, *supra* note 16, p. 70.

108 This was the trial against Josef Kramer and 44 others better known as the *Bergen Belzen* trial which took place in November 1945.

her appearance than about her crimes, but when the atrocious crimes she had committed became known, she quickly received the nickname of the 'beautiful beast'. She was however, not the only one given a nickname: many other women were given nicknames such as the 'witch of Buchenwald' and 'bloody Brigitte', and most of these women were depicted as sexually perverted women.¹⁰⁹ By demonizing female perpetrators, a distance between these "abnormal and unnatural" women and ordinary peaceful women was created. Just after the atrocities committed at Auschwitz and many other camps people did not want to believe that the perpetrators (whether male or female) were ordinary people, and preferred to see them as mentally disturbed, inherently violent and criminal human beings. Scholars such as Hilberg, Arendt and Browning have however, convincingly showed that most perpetrators were rather ordinary and that they can come to commit evil crimes for very banal reasons.¹¹⁰ Thanks to their scholarship, it is now generally accepted that most perpetrators are indeed just very ordinary people. This insight is however, limited to men: it seems that the assumption that female perpetrators cannot be ordinary women is still prevalent today. The underlying thought and assumption clearly is that 'real women do not commit such crimes'.¹¹¹ Women who fight transgress the female stereotypes more than men do and are therefore more often considered as 'deviant and unnatural'.¹¹² In most cultures men are considered to be more aggressive and women are supposed to be more caring – seeing a woman commit atrocities is thus often more shocking than seeing a man commit similar atrocities. Cunningham noted: 'Women's involvement in political violence continually shock us, no matter the context, challenging cross-cultural gendered normative assumptions about human behavior [...]'.¹¹³

109 See also Herkommer, *supra* note 20, p. 114. The same is true for the portrayal of ordinary female delinquents. They too are often portrayed as sexual deviant and a sexualised image of them is presented. See Miller and Mullins, *supra* note 103, p. 47.

110 H. Arendt, *Eichmann in Jerusalem – a Report on the Banality of Evil* (Penguin Books, New York, 1964); R. Hilberg *Perpetrators, Victims, Bystanders – the Jewish Catastrophe* (Harper Perennial, New York, 1992); Ch.R. Browning, *Ordinary Men - Reserve Police Battalion 101 and the Final Solution in Poland* (Aaron Asher Books, New York, 1992).

111 Hogg, *supra* note 16, p. 100. See also Sjoberg and Gentry, *supra* note 78, p. 2.

112 Coulter, *supra* note 28, p. 14. See also Gilani, 'Transforming the Perpetrator into Victim: the Effects of Gendering Violence on the Legal and Practical Responses to Women's Political Violence', *Australian Journal of Gender and Law* (2010) 1-40 at p. 9 who notes: 'these narratives imply that violence is an inevitable consequence of a woman failing to conform to her prescribed gender norms'.

113 K.J. Cunningham, 'Female Participation in the Iraqi Insurgency: Insights into Nationalist and Religious Warfare', in Chandler et al., *supra* note 9, p. 205.

It might thus be very well possible that women are portrayed as more evil without actually being more evil.¹¹⁴

Next to being portrayed as evil monsters, female perpetrators are also often portrayed as lacking agency.¹¹⁵ The assumption yet again being that ordinary women would not commit such atrocities so - if they are not insane - they must have been forced. Women themselves have in some cases supported these stereotyped gender images. Especially while defending themselves in front of a court many women tried to exploit these sentiments by declaring that they could not possibly have committed atrocious crimes out of their own accord.¹¹⁶ In some cases this worked and some judges trying female perpetrators were influenced by these same gender stereotypes.¹¹⁷ Outside of the courtroom most female soldiers do however not like to be considered as being different compared to their male counterparts, nor as lacking agency. The 'vast majority' of female soldiers interviewed by Eriksson Baaz and Stern '...described themselves as having equal propensity for and agency in the violence committed in comparison with their male colleagues'.¹¹⁸

These examples and the stereotyped portrayal of female perpetrators as either wicked and insane or as being forced by men clearly show us that within society there are clear gender norms which dictate what can be perceived as acceptable and unacceptable behavior for men and women respectively. Atrocities violate legal and moral norms no matter whether they are committed by men or women but women who are involved in mass atrocities violate gender norms in addition to that and that often becomes the central focus of attention when reporting these atrocities. This finding raises the question as to what gender is and how it affects the behaviour of men and women and to what extent it plays a role in the capacity of men and women to commit atrocities. These issues will be discussed in the next section in which we draw

¹¹⁴ See also Kompisch, *supra* note 16, p. 181.

¹¹⁵ See for instance in relation to Nazi crimes Kompisch, *ibid.*, p. 234. In some cases this lead to remarkable acquittals as in the *Euthanasia* trial in 1965, in which 14 nurses of the Meseritz-Obrwalde centre were acquitted. Anne-Marie de Brouwer and Etienne Ruvebana, 'The Legacy of the Gacaca Courts in Rwanda', 13 *International Criminal Law Review* (2013) 937-976. Gilani, *supra* note 112, at p. 6 states: 'when a woman commits an act of violence she is rarely regarded as an agent of violence, and more often considered a victim herself'.

¹¹⁶ Kompisch, *supra* note 16, pp. 196, 235; Herkommer, *supra* note 20, p. 107; Hogg, *supra* note 16, p. 82.

¹¹⁷ Lower, *supra* note 16, p. 257 especially the influence of their husbands was in many cases considered detrimental.

¹¹⁸ Eriksson Baaz and Stern, *supra* note 2, p. 713.

particular attention to the effect of gender roles and norms with two institutions which are particularly relevant to this study as most perpetrators are members of these two institutions: the political leadership of a country and the military.

4.2 *The Effect and Role of Gender Norms on Women in the Political Arena and in Militarised Units*

Gender roles and gender norms play an important role in each and every society. They reflect 'socially assigned, expected roles on the basis of perceived membership in implicitly natural sex groups'¹¹⁹ and tend to push women and men into these roles. Traditionally speaking men are expected to be the protectors of their families who provide money, food and shelter for their families while women are meant to look after the children and do work at home. Men may consequently be aggressive and violent while women are required to be sensitive and compassionate. Women are furthermore in many places still far from equal to men, have less education, and fewer means to get certain jobs and positions. Men are often considered natural leaders while women are supposed to follow their leadership. This explains why it is generally harder for women to make themselves a career than for men and explains why women are underrepresented within the political leadership of a country. Although some women defy these gender roles and became part of this leadership as we shall see in section 5, they often somehow do not seem to fully fit into this men's world: they do not belong to 'the old boys club' and are often merely tolerated rather than fully respected. Although there are some prominent exceptions very few women have arisen to a position of real power in patriarchal and oppressive societies which often strongly embrace these gender norms.

Gender roles and norms have equally stirred women away from the military. Throughout history the vast majority of all combatants are male. Women who served in the army were often nurses or aides who were not involved in actual combat. There were for instance 500.000 women in the Wehrmacht (compared to 18 million men) and 4.000 in the SS (compared to 900.000 men).¹²⁰ There were thus less than three per cent women in the Wehrmacht and less than one

119 Laura Sjoberg, 'Reconstructing Women in Post-conflict Rwanda', in Chandler et al., *supra* note 9, p. 181. See also Sjoberg and Gentry, *supra* note 78, p. 6 who concluded that: 'masculinities and femininities are made up of behaviour expectations, stereotypes, and rules which apply to persons because they are understood to be a member of particular sex categories'.

120 Kompisch, *supra* note 16, pp. 216, 234.

per cent women in the ss. In Rwanda less than ten per cent of the Interahamwe members were women.¹²¹ Women thus represented only a small minority of the members within these organizations. It is only since the last 40 years that this is gradually changing, although many women are still not allowed to actively engage in combat.¹²² In some conflicts women do play a more prominent role: in both Sierra Leone and Uganda's Lord Resistance Army (LRA) 30 per cent of the members are female. But even though these numbers are remarkable women are still clearly a minority group. As most hands-on perpetrators are members of militarised units such as the army, the police force or specialised units the underrepresentation of women can explain why so many more men than women are involved in mass atrocities. This however is not the only reason. Equally important is the very patriarchal nature of the military in which gender roles and norms are clearly enshrined.

Within the military being a good soldier is often linked to masculinity, and many armies promote the ideal male identity as being a heroic warrior.¹²³ In these stereotyped images, males are pictured as 'protectors of the civil population with a duty to protect women and children'¹²⁴ and as having courage and lacking fear, while women are portrayed as weak and fearful.¹²⁵ For many men, the army is the place to prove one's manhood, and being called a woman is an insult.¹²⁶ Making it through military training is often seen as a test of manhood, and those who fail are called ladies or girls. Women embody female values which are rejected in the army.¹²⁷ These stereotyped gender images affect both men and women. Coulter for instance states: 'Men who refuse to fight will often be ridiculed, jailed or even killed for their cowardice, or lack of manliness'.¹²⁸

Eriksson and Baaz who conducted research in the Democratic Republic of Congo (DRC) on female combatants stated that: 'Like in other military institutions globally, many men in the FARDC military hierarchy question women's

¹²¹ Adler et al., *supra* note 26, p. 223.

¹²² Human Security Report (HSR) of 2005, *supra* note 79, estimated that nowadays 5-15 per cent of government armed service personnel are female at p. 111.

¹²³ McKay and Mazurana, *supra* note 28, p. 14.

¹²⁴ Eriksson Baaz and Stern, *supra* note 2, p. 712.

¹²⁵ M. Eriksson Baaz and M. Stern, 'Whores, Men, and Other Misfits: Undoing Feminization in the Armed Forces in the DRC', *African Affairs* (2011), at p. 573.

¹²⁶ M. Eriksson Baaz and M. Stern, 'Making Sense of Violence: Voices of Soldiers in the Congo (DRC)', 46 *Journal of Modern African Studies* (2008) 57-86, at pp. 67-68, 74.

¹²⁷ See Eriksson Baaz and Stern, *supra* note 2, p. 722.

¹²⁸ Coulter, *supra* note 2, p. 57.

presence in the armed forces'.¹²⁹ It is argued that 'women's (supposed) physical and psychological weaknesses makes them unsuitable for combat and that women's presence erodes unit cohesion through fraternization and sexual distractions'.¹³⁰ In the macho world of the military, women are looked upon with contempt and are merely seen as objects to fulfil men's desire who are not suitable for combat, while combat is described as the function of the real (masculine) army.¹³¹ The underlying notion is that 'the military as a male sphere [is] not suited for "real women"'.¹³² As a consequence thereof women are often excluded from fighting.¹³³ Being excluded from fighting – the only "real" task of the army makes that women in many respects are, as D'Amico concluded, 'still seen as "outsiders" in what many perceived as a definitely masculine institution'.¹³⁴ Within the military, the *corps d'esprit* is cherished, but seems to include just men – a band of brothers.

In their research in Brazil on 'violence workers' Higgins, Haritos-Fatouros and Zimbardo also stress the important link between the military and masculinity. The military represents a gender based social dominance of masculinity and "real men". They define masculinism as 'an ideology that justifies and naturalises male domination'.¹³⁵ Higgins et al. do not claim that masculinity itself caused violence but note that masculinity played an important role in the socialization of these men: '... within such a secret, club-like atmosphere, norms of highly concentrated masculinity may empower and reward violence as the primary means of demonstrating one's over-the top maleness to others and to oneself'.¹³⁶

In many countries women are now accepted in the army, but often only in subordinate positions. In Nazi Germany for instance, the women who joined the SS were not accepted as full members but as so-called auxiliaries, and in the camp order it was stated that a woman could never outrank an SS man.¹³⁷

Having women in superior positions to men is a sensitive issue. An American soldier in a court-martial made this very explicit: "I don't take orders from women".¹³⁸ In some more revolutionary ideologies – women are sometimes

129 Eriksson Baaz and Stern, *supra* note 2, p. 715.

130 *Ibid.*, p. 718.

131 *Ibid.*, p. 725.

132 *Ibid.*, p. 730.

133 Charli Carpenter, *supra* note 6, p. 672.

134 D'Amico, *supra* note 10, p. 45.

135 Higgins et al., *supra* note 59, p. 86.

136 *Ibid.*, p. 250.

137 Brown, *supra* note 22, pp. 8–9.

138 D'Amico, *supra* note 10, p. 48.

placed on a more equal footing to men which might explain the relatively high percentages of women in rebel and guerrilla forces such as the Sandinista National Liberation Front in Nicaragua (est. 30 per cent women), the Shining Path in Peru, the FARC in Columbia and the Tamil Tigers in Sri Lanka.¹³⁹ Here too, it might very well be possible that women have to struggle and find their place within the very masculine culture – the female soldiers interviewed in general stress the fact that they are soldiers rather than the fact that they are female soldiers.¹⁴⁰

Taking this macho culture into account it is not hard to imagine that women who do become members of military organizations have a lot to cope with.¹⁴¹ They are often considered and treated as inferiors. It is characteristic that in some armies many of those who do not fit the ideal role model (both men and women) are physically or sexually abused. In a recent report of the Pentagon for instance it is estimated that there were 26.000 cases of sexual abuse in the US army in the last year.¹⁴² Although the majority of the reported cases (53 per cent) involved attacks on men, women 'are significantly more likely to be sexually assaulted in the military than men'.¹⁴³ All in all we can conclude that the military is a very patriarchal organization in which very stereotyped gender roles and gender norms are likely to strongly affect both men and women working within this environment. This can not only explain why so many more men than women are members of these militarised organizations but also why more men than women once recruited by these organizations get involved in mass atrocities. All in all we can conclude that there seems to be little evidence and proof that women are indeed inherently more peaceful than men but rather that other (social) factors account for the predominance of male rather than female perpetrators.¹⁴⁴

139 HSR 2005, *supra* note 79, p. 111.

140 See Eriksson Baaz and Stern, *supra* note 2; K. Holmstedt, *Band of Sisters – American Women at War in Iraq* (Stackpole Books, Mechanicsburg, 2007).

141 See for an insider story, J. Karpinsky with S. Strasser, *One Woman's Army – The Commanding General of Abu Ghraib Tells Her Story* (Miramax Books, New York, 2005).

142 See newspaper report, < www.voanews.com/content/senate-considers-changes-to-curb-sexual-assault-in-military/1674866.html >, 23 June 2013.

143 See newspaper clipping, < www.nytimes.com/2013/06/24/us/in-debate-over-military-sexual-assault-men-are-overlooked-victims.html?pagewanted=all >, 23 June 2013.

144 See also Bloom, *supra* note 77, p. 2 and Sjöberg who concludes that it is not accurate to consider women more peaceful than men, see Sjöberg, *supra* note 119, p. 182.

5 The Cases of *Biljana Plavsic* and *Pauline Nyiramasuhuko*

As already stated earlier, so far only two women have been convicted by an international criminal court and tribunal for their involvement in international crimes: Biljana Plavsic and Pauline Nyiramasuhuko. Both women were influential political leaders: one in Bosnia Herzegovina, the other in Rwanda – both thus defied gender inequality and made themselves a name in the political arena which is usually dominated by men. In this section we will focus on their cases and see what we can learn from their cases. How can we explain that these two women were singled out for prosecution? What made them stand out? How can we explain their rise to such powerful positions within a violent and oppressive regime and how can we explain their involvement in mass atrocities?

5.1 *The Case of Biljana Plavsic*

Biljana Plavsic was born on 7 July 1930 in Tuzla in Bosnia Herzegovina, which at the time was still part of the Socialist Federal Republic of Yugoslavia. Before entering politics, Plavsic was a Professor of Natural Sciences and the Dean of Faculty at the University of Sarajevo, and a highly accomplished scientist who published over 100 scholarly papers. In 1990 at the age of sixty, she co-founded the Serbian Democratic Party and became the first female member of the Socialist Republic of Bosnia Herzegovina. Two years later in 1992 when the Serbian Republic of Bosnia Herzegovina became independent under the name of Republika Srpska and Radovan Karadzic its first president, Plavsic became one of the two acting Vice Presidents and his deputy. Together with Karadzic and Momcilo Krasjnik, the other Vice President, she had *de facto* control and authority of the members of the Bosnian Serb armed forces led by Radko Mladic. Plavsic was thus at the centre of political power during the Bosnian wars in 1992–1995. She was known for her radical statements and hate speeches. She considered the Serbs superior to the Muslims, whom she described as genetically deformed. Plavsic used her background in biology to justify and rationalise the crimes: she for instance described ethnic cleansing as a form of natural selection and a matter of biology. She was considered a radical even by Karadzic and Milosevic, and was known as the ‘Serbian Empress’ and ‘Serbian Iron Lady’. She became a powerful, prominent and influential figure in politics. She invited militias to help the army with the ethnic cleansing. In an infamous televised broadcast she stepped over a dead body and kissed Zelkjo Raznjatovic, better known as Arkan and the infamous and very violent and cruel leader of

the Arkan Tigers¹⁴⁵ whom she considered to be a hero. At the end of the war she - unlike some of the other leaders - however, supported the Dayton Accords, and from 1996 -1998 she served as the 2nd president of the Republika Srpska, succeeding Karadzic who at that time was already indicted by the ICTY.

In April 2000, Plavsic was indicted by the ICTY together with Momcilo Krasjnik and charged with several counts of genocide, crimes against humanity and war crimes. Plavsic voluntarily surrendered in January 2001 and initially pleaded not guilty. On 16 December 2002 she however pled guilty to persecution as a crime against humanity, and in return the seven other charges including the genocide charges were dropped. She did plead guilty to ethnic cleansing in 37 communities in which approximately 50.000 non-Serbs were killed. Plavsic was the first high-ranking Bosnian Serbian politician to plead guilty, and according to the prosecutor thus contributed to reconciliation in Bosnia. Madeline Albright, Carl Bildt and Alex Boraine testified on her behalf. The ICTY judges noted that Plavsic participated in 'a crime of the utmost gravity' but that she was not as culpable as Karadzic and Krasjnik who exercised primary control.¹⁴⁶ Plavsic, however, nevertheless supported the ethnic cleansing, and invited Serbian paramilitaries to assist in the cleansing and was thus found guilty.¹⁴⁷ She was sentenced on 27 February 2003 to 11 years of imprisonment. The judges regarded the fact that she surrendered voluntarily, her age, post-conflict conduct and guilty plea as mitigating circumstances. They considered her guilty plea and remorse as genuine.¹⁴⁸ The fact that she refused to implicate others and refused to cooperate with the prosecution was not held against her. Many people criticised this very lenient sentence: questioning whether guilty pleas in relation to such extreme crimes should ever lead to leniency. After all, she had been one of the leading figures; Krasjnik, who was one of her confederates was given a 20-year sentence.¹⁴⁹ Her guilty plea helped - without

145 C.S. Stewart, *Hunting the Tiger – the Fast Life and Violent Death of the Balkans' Most Dangerous Man* (Thomas Dunne Books, New York, 2008).

146 *Prosecutor v. Plavsic*, 3 February 2003, ICTY, IT-00-39&40/1-S.

147 N.A. Combs, 'International Decisions: *Prosecutor v. Plavsic*', *American Journal of International Law* (2003) 292–937.

148 Subotic noted however that 'not everyone was impressed' by her statement. It was cold, superficial and lacking direct apologies. Del Ponte later reiterated in her memoirs: 'I listened to her admission in horror, knowing she was saying nothing', while a Srebrenica survivor noted: 'I feel like crying. There was nothing human in her words, not a note of apology. She didn't do it for me. She did it for the Serbian cause'. See J. Subotic, 'The Cruelty of False Remorse: Biljana Plavsic at the Hague', 36 *Southeastern Europe* (2012) 39–59.

149 See also P. Chifflet and G. Boas, 'Sentencing Coherence in International Criminal Law: the Cases of Biljana Plavsic and Miroslav Bralo', 23 *Criminal Law Forum* (2012) 135–159, who

doubt - but her gender and appearance might also have played a role: 'she seemed out of place among a group of ruthless men'.¹⁵⁰ Chifflet and Boas note that: 'The Judgment reflects a story of a well-educated, now delicate old lady, who, caught up in events, came to see the error of her ways'.¹⁵¹ Plavsic did not appeal the decision and was sent to Sweden to serve her sentence.

In prison, Plavsic wrote her lengthy two-volume memoirs which were published in 2005. In these memoirs she retracted her admissions and 'reiterated a particularly hard-line, nationalist worldview that showed little, if any, rehabilitation and political change'.¹⁵² She also distanced herself from Karadzic, whom she described as a criminal and a coward.¹⁵³ In 2009 she gave an interview in which she stated:

I have sacrificed myself. I have done nothing wrong. I pleaded guilty to crimes against humanity so I could bargain for the other charges. If I hadn't, the trial would have lasted three, three and a half years. Considering my age that wasn't an option.¹⁵⁴

It thus became crystal clear that the only reason why she had pled guilty was to get a lenient sentence – it was in other words a calculated manoeuvre. ICTY-President Patrick Robinson nevertheless granted her request for early release after she served two-thirds of her sentence. He reckoned that she had demonstrated substantial evidence of rehabilitation. Plavsic was released on 27 October 2009 and granted a hero's welcome in the Republic of Srpska.¹⁵⁵

The indictment and prosecution of Plavsic was not a surprise, as she had been one of the leading figures in the war in Bosnia and Herzegovina and her

discussed the difference in sentencing between Plavsic and Bralo, two indictees who both plead guilty. Plavsic, one of the leading figures was sentenced to 11 years, while Bralo, a foot soldier was sentenced to 20 years.

¹⁵⁰ Subotic, *supra* note 148, p. 41–42. See also Gilani *supra* note 112, p. 12 who notes: 'The narratives highlight Plavsic's femininity by portraying her as a pacifist who genuinely wanted to end the conflict in the Balkans.... These narratives succeeded in constructing an image of Plavsic that gave the impression that she was a woman who was unsuspectingly exploited by first her male colleagues, and later by the international criminal tribunal when she was indicted for crimes against humanity, genocide and war crimes'. See also pp. 18, 27. Chifflet and Boas, *supra* note 149.

¹⁵¹ *Ibid.*

¹⁵² Subotic, *supra* note 148, p. 40.

¹⁵³ *Ibid.*, p. 40.

¹⁵⁴ *The Local*, a Swedish newspaper, on 26 January 2009, available at: <http://www.thelocal.se/20090126/17162> (last visited 19 August 2014).

¹⁵⁵ Subotic, *supra* note 148.

virulent racism certainly helped to justify and legitimise the persecution and killing of non-Serbs. During the war her extreme statements seem to show that she was a fanatic, but it is also clear that Plavsic was a very ambitious woman who probably enjoyed the power and being in the limelight. After having been a very accomplished scholar, she started a political career at age 60 and progressed quickly to a high position. She is often described as cold and calculated. Drakulic describes her as calm, composed and dignified but also as arrogant with an air of superiority.¹⁵⁶ Her elitist attitude also showed when she started to complain about her prison in Sweden and showed disdain for her fellow inmates: 'None of the other prisoners have read a single book. And yet we are treated equally'.¹⁵⁷ Her guilty plea and the retraction thereof later in her memoirs seem to indeed indicate that she is a ruthlessly calculating opportunist who tries to make the best out of the situation. She pleaded guilty to avoid a long trial and harsh sentence, but showed no real remorse and wrote a book to justify herself, thus probably trying to win back her popular support. In the book she tried to rely on her gender as proving her innocence. She stated:

According to their [Momcilo Krasjnik and Radovan Karadzic] understanding and that is a traditional understanding, at such times just before the war, and especially during war, there is no role for a woman. Discussions, negotiations, that is a job for male heads [...]. Is it not unfair to recommend me for a high function and later take over all my responsibilities and leave me only with accountability?¹⁵⁸

5.2 *The Case of Pauline Nyiramasuhuko*

Pauline Nyiramasuhuko was born in 1946 in Butare, Rwanda. Pauline N., as she is commonly known, was born into a poor Hutu family but that did not stop her from being very ambitious and always wanting more. An old friend testified: 'from her childhood Pauline had political ambition. She always wanted to achieve high. If she saw someone build a house, she wanted a bigger house. If she saw someone do well, she wanted to do better'.¹⁵⁹ She attended the same high school as Agathe Kanziga, who was later to become the wife of President Habyarimana. Initially she was trained and worked as a social worker. Later – with the help of her powerful friend Agathe Habyarimana – she started to work for the ministry and in 1968 she married a successful man and had four children. Pauline however, wanted to forward her career even further, and in 1986

¹⁵⁶ S. Drakulic, *They Would Never Hurt a Fly* (Penguin Books, London, 2004), pp. 176–177.

¹⁵⁷ *The Local*, *supra* note 154.

¹⁵⁸ Plavsic in her memoirs as quoted by Subotic, *supra* note 148, p. 53.

¹⁵⁹ P. Landesman, 'A Woman's Work', *New York Times Magazine* (15 September 2002).

at age 40 she began to study law at the National University of Rwanda. After having been a local politician, in 1992 she became a minister in the Rwandan government. The people of Butare were proud of her – as she was a woman who had made herself a career. She was nicknamed ‘Butare’s favourite daughter’.¹⁶⁰ In the years prior to and during the genocide, Pauline was within the centre of power, and without doubt ‘one of the most powerful women in Rwanda’s government’.¹⁶¹

Nyiramasuhuko was named by Prime Minister Kambanda in his guilty plea at the ICTR as ‘among the five members of his inner sanctum ‘where the blueprint of the genocide was first drawn up’.¹⁶² She not only played an important role in the genocide, but was also the main instigator of the mass rapes and killings in Butare. She was present at the crime scene and gave direct orders to erect road blocks and rape and kill Tutsis, even ordering her own son, who was a leader of the Interahamwe, to rape women.¹⁶³ As Minister of Family and Women’s Affairs, she was supposed to promote the role of women and families in Rwandan society, but did the complete opposite. It is unclear to what extent Pauline really hated Tutsis, or whether it was a deliberate political move which – within a polarised society – would make her rise to a more powerful position. It has also been suggested that Pauline’s great-grandfather had in fact been a Tutsi, and that therefore she too, was a Tutsi – in that case her extremism could have been a means to hide her true identity.¹⁶⁴ Whatever the truth is, this does not change the fact that as of the start of the genocide, Pauline had become a very outspoken and virulent radical. In the narratives she is generally portrayed as ‘a sexually deviant and psychologically unbalanced woman’.¹⁶⁵ She for instance, ordered that Tutsi women be raped before they would be killed. Her violence is portrayed ‘as the work of someone who enjoyed degradation and torture. By casting her as a sadist, these narratives succeed in portraying brutality as an artefact of psychological pathology’.¹⁶⁶ It is sometimes alleged that she had ‘personal feelings of inadequacy and unnatural proclivity for sexual competition’ and that the violence against Tutsi women was a ‘personal vendetta’.¹⁶⁷

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² Mark Drumbl, ‘She Makes Me Ashamed to Be a Woman: the Genocide Conviction of Pauline Nyiramasuhuko, 2011’, *Michigan Journal of International Law* (2013) 559–603.

¹⁶³ Landesman, *supra* note 159.

¹⁶⁴ *Ibid.*

¹⁶⁵ Gilani, *supra* note 112, p. 14.

¹⁶⁶ *Ibid.*, p. 14.

¹⁶⁷ *Ibid.*, p. 15.

After the genocide she fled to the DRC but was arrested on 18 July 1997 in Nairobi, Kenya. The ICTR indicted her with 11 counts of genocide, crimes against humanity (including rape) and war crimes. She was tried together with 5 others including her son Ntahobali in a case which was generally referred to as the *Butare* case. She was mainly indicted for inciting the violence rather than physically committing the crimes herself – although she was reported to be seen at several crime scenes personally ordering and overseeing the perpetration of the rapes and killings. She was said to have distributed condoms amongst the soldiers in order to protect them from getting AIDS. In court Pauline and her defense team denied all charges, and tried to rely on her gender as a defense. They suggested that women are by nature peaceful, and that she therefore could not have been involved in the violence, rapes and genocide. Especially the fact that she was a mother was forwarded as a reason as to why she could not have been a murderer. She claimed to be ‘a scapegoat of men’s violence’.¹⁶⁸ In an interview in 1995 she had already told the BBC: ‘I cannot even kill a chicken. If there is a person who says that a woman – a mother – killed, then I’ll confront that person’. Her husband relied on similar sentiments when interviewed by the BBC and stated: ‘It is not culturally possible for a Rwandan woman to make her son rape other women. It just couldn’t have taken place’.

The trial in which she was the lead defendant drew a lot of media attention. While thousands of women had already been tried and convicted for genocide by national courts, Pauline was the first woman ever to be tried for genocide by an international court and tribunal and this was picked up by the media.¹⁶⁹ Sterling noted: ‘the press seems more fixated on her gender than the significance of her crimes and her prosecution’.¹⁷⁰ Mark Drumbl came to a similar conclusion: ‘her status as woman and mother to accentuate her personal culpability and individual deviance i.e. she is a worse perpetrator, a greater disappointment, and a more shocking offender because she is a woman, mother and grandmother’.¹⁷¹ Another particular feature which drew the attention of the media was the fact that one of the five other co-defendants was her son. The trial lasted ten years and was the longest trial ever conducted by an international criminal court or tribunal. On 24 June 2011 the ICTY finally rendered its judgment. Pauline was found guilty of 7 of the 11 charges. She was found guilty of conspiracy to commit genocide and genocide; of crimes against humanity

¹⁶⁸ *Ibid*, p. 19

¹⁶⁹ Drumbl, *supra* note 162, p. 563.

¹⁷⁰ C. Sperling, ‘Mother of Atrocities: Pauline Nyiramasuhuko’s Role in the Rwandan Genocide’, *Fordham Urb. L.J.* (2005–2006) 637.

¹⁷¹ Drumbl, *supra* note 162, p. 564.

(extermination, rape and persecution) and of war crimes (violence to life and outrages upon personal dignity). In relation to the crimes committed the judges noted that: 'the evidence ... paints a clear picture of unfathomable depravity and sadism'.¹⁷² Drumbl concludes that overall the 'trial judgment carefully pursues a neutral approach to the gender'.¹⁷³ Just like her son in the very same case Pauline N. was sentenced to life imprisonment. Both appealed the decision.

5.3 Conclusion

Biljana Plavsic and Pauline Nyiramasuhuko were rightfully singled out for prosecution due to their leading political roles in the periods of mass violence within their respective countries. Despite the biased media coverage, neither of the two women can be considered abnormal or mentally disturbed. Both were however, clearly very ambitious women who deliberately chose to embark on a political career, and both rose to very high and powerful positions mainly due to their calculating nature and extremist views. In both cases it is possible - even likely - that they became such fanatics in order to advance their political careers. The fact that they were women in a men's world might have caused them to become even more extreme – and show the men around them that they were equal partners. But even if this was the case and their extremism was indeed less a matter of hatred than a calculated manoeuvre – it was a position they took up deliberately and a choice they made consciously. In retrospect they both tried to rely on their gender as proof that they could not have been involved in such extreme crimes. Plavsic's lenient sentence might have been affected by her gender and appearance, but it did not make Pauline's judges more lenient – she received the maximum penalty. Both cases clearly show that women - very ambitious but otherwise very ordinary women - who rise to powerful positions are equally capable of committing and organizing mass atrocities as their male counterparts.

In the next section we will focus on the motives of the many other women who - often as low ranking perpetrators - have been involved in mass atrocities and how we can compare their motives to those of men.

6 Motives of Women Involved in Mass Violence

As concluded above many more men than women are involved in mass atrocities for the very simple reason that the organizations involved in the

¹⁷² *Prosecutor v. Pauline Nyiramasuhuko and Others*, 24 June, ICTR, Case No. ICTR -98-42-T.

¹⁷³ Drumbl, *supra* note 162, p. 580.

perpetration thereof are traditionally male dominated organizations. This raises three questions: first of all: why do some women nevertheless join such organizations? Secondly how do they get involved in committing international crimes and what motives do women have? And lastly: to what extent do the motives of these women differ from the motives men have? These questions are central to the following subsections.

6.1 *Why Women Join Militarised Units*

Women and girls can join military units in a number of different ways: they can be forced, recruited or join voluntarily. In some cases, women and girls are abducted and forced to join militarised units.¹⁷⁴ The overwhelming majority of girl soldiers in for instance many war-torn African or Asian countries are recruited in this way – some are as young as nine years old when abducted.¹⁷⁵ The phenomenon of abduction is widespread: according to McKay and Mazurana ‘in the period 1990–2003 armed groups abducted girl soldiers in twenty-eight countries’.¹⁷⁶ Girls can be abducted by rebels or government forces. Rebel forces like the RUF in Sierra Leone and the LRA in Uganda are infamous for using this recruitment method.¹⁷⁷ Abducted girls are often physically abused, regularly raped, used as slaves and many are subjected to forced marriage and thus become so-called Bush wives, while others are forced to fight.¹⁷⁸ One of these abductees recounts: ‘When I was captured we were put in one room. As we were in that room any man, whether small or big, comes to have sex with me, you can’t deny him. If you do, you will be killed’.¹⁷⁹ The reason why they didn’t escape was ‘fear of leaving and fear of returning home ... many were killed if they were caught escaping, and others had been forced to kill relatives and were afraid of reprisals if they returned home’.¹⁸⁰ Eriksson Baaz and Stern note that there is a forceful stigma attached to women in the armed forces: they are considered unfit for marriage and family life.¹⁸¹ Girls

174 93 per cent female RUF fighters say they were abducted compared to 85 per cent of the men. Cohen, *supra* note 35.

175 Coulter, *supra* note 28, p. 99 refers to R. Brett and I. Specht, *Young Soldiers – Why They Choose to Fight* (London, Boulder, CO, 2004), p. 85.

176 M. Wessels, *Child Soldiers – from Violence to Protection* (Harvard University Press, Cambridge, 2006) at 88.

177 In Angola and Mozambique many girl soldiers are abducted as well.

178 Coulter, *supra* note 28, p. 3 and p. 9.

179 *Ibid.*, p. 97.

180 *Ibid.*, p. 240.

181 Eriksson Baaz and Stern, *supra* note 125, p. 720.

who join the rebels transgress gender norms and even if the reason they do is because they were abducted, they suffer repercussions.¹⁸² Many girls and women who have been forcefully abducted by rebel movements were for instance, upon return, rejected by their own communities. It was already noted that: 'women who oppose female stereotypes in war will often be regarded as deviant or unnatural.'¹⁸³ When fighting and committing atrocities women are 'forced to violate taboos more fully than boys.'¹⁸⁴ In his research, Coulter concluded that in 'Sierra Leone, and also in Liberia, Peru, and Sri Lanka, female fighters have often been regarded by the civilian populations as monsters, barbarians and frequently as more cold blooded than male rebels.'¹⁸⁵ When women choose to use violence this seems to be the point of no return, more so than for men.¹⁸⁶ By taking part in violence women have to transgress stereotyped gender roles and their involvement is in that sense more costly which makes them more determined but also makes it more difficult for them to return home.¹⁸⁷

In some cases women are asked or required to join via a kind of military service.¹⁸⁸ In Israel, for instance both men and women have to serve in the military. During the war in Sierra Leone, rebel groups as well as government forces recruited women.¹⁸⁹ Some girls and women were not abducted nor recruited but participated voluntarily.¹⁹⁰ Reasons for women to join the ranks of militarised units can be manifold. Some women joined out of ideological

182 R.L. Riley, 'Women and War: Militarism, Bodies, and the Practice of Gender', *Sociology Compass* (2008) 1192–1208.

183 Coulter, *supra* note 2, p. 57.

184 *Ibid.*, p. 63.

185 *Ibid.*, p. 57. See also Coulter, *supra* note 28, pp. 22, 137; Cohen, *supra* note 35; Brown, *supra* note 22, p. 9. See also Husejnovic, *supra* note 93.

186 Unfortunately, girl soldiers returning home experience such a sentiment too. They are often not accepted back by their families (Coulter, *supra* note 28, p. 1) and experience disapproval, rejection and stigmatization. Often no one wants to marry a rebel woman and it is considered shameful to be one. The general sentiment is that 'by staying with the rebels for so many years had made them to become rebels too. See Coulter, *supra* note 28, p. 209. DDR programs do not focus on women and women are often not seen as real combatants. See Coulter, *supra* note 28, p. 157 and Annan et al. 2011.

187 See also McDonald, *supra* note 59, p. 366.

188 Kompisch, *supra* note 16, 163; I. Heike, "Female Concentration Camp Guards as Perpetrators: Three Case Studies", in O. Jensen and C.C.W. Szejnmann (eds.), *Ordinary People as Mass Murderers – Perpetrators in Comparative Perspectives* (Palgrave Macmillan 2008) at p. 120.

189 Coulter, *supra* note 28 p. 126.

190 *Ibid.*, p. 99 refers to Brett and Specht, *supra* note 175, p. 85.

conviction as was the case with female rebels in Mozambique, Zimbabwe and Eritrea.¹⁹¹ In some cases women were motivated to not only fight for political goals, but also for gender equality, and the movement of which they are part provides them with this opportunity.¹⁹² Others joined because of the opportunities provided to them by doing so:¹⁹³ they wanted a job, were in need for money,¹⁹⁴ wanted the education and training provided,¹⁹⁵ wanted to make themselves a career, wanted to gain status and become part of an elite,¹⁹⁶ wanted to exercise leadership, to be more independent, or wanted to be considered equal to boys and men.¹⁹⁷ Still others joined because they were attracted by the adventure or because they liked the uniforms.¹⁹⁸ For some the 'typical masculine ideal of a soldier became a role model'.¹⁹⁹ Coulter notes that:

girls who volunteered to fight were girls who possess strength, independence, courage persistence and character ... but these are not characteristics which are highly valued in women who have to be submissive, servile, and a willingness to endure, and accept their subordinate position.²⁰⁰

Joining could also be a means of escape or a 'matter of survival'²⁰¹ – girls or women who had lost their family members, looked for protection or felt that being a soldier and having a gun themselves would protect them against rape and other forms of abuse.²⁰² Some wanted to escape home and domestic exploitation and abuse, a planned marriage or a life as a slave.²⁰³ Female

191 *Ibid.*, p. 138.

192 McDonald, *supra* note 57, p. 367.

193 Keairnes, *supra* note 27, p. 3; McKay and Mazurana, *supra* note 28, p. 14.

194 In the Nazi death camps women could earn more money than in industry, Brown, *supra* note 22, p. 16.

195 Wessels, *supra* note 176, p. 90.

196 Eriksson Baaz and Stern, *supra* note 125, p. 68; Wessels, *ibid.*

197 Coulter, *supra* note 28, 99; Anna et al., p. 3 who refer to Alison and Mazurana.

198 See also Kompisch, *supra* note 16, p. 216; Keairnes, *supra* note 27, p. 3. 'I always wanted to join the army ... I liked that, and I decided that I also wanted to become a soldier. I wanted to become like that'. (Eriksson Baaz and Stern 2008, 69). See also Wessels, *supra* note 176, p. 90.

199 Eriksson Baaz and Stern, *supra* note 136, p. 68.

200 Coulter, *supra* note 2, p. 65.

201 Coulter, *supra* note 28, p. 151.

202 McKay and Mazurana, *supra* note 28, p. 14.

203 Brett and Specht, *supra* note 175, pp. 87–90; Global Report on Child Soldiers, p. 29; Keairnes, *supra* note 27, p. 3; McKay and Mazurana, *supra* note 28, p. 14; Wessels, *supra*

suicide terrorists have allegedly been drawn to terrorist movements simply because they felt that life had nothing left to offer them. In an interview one of the hostages of the Moscow hostage-taking in which many Chechen black widows were involved explained: 'They told me when a Chechen woman's husband is killed, she can't marry again ... She has to put on a black mourning dress for the rest of her life. But by dying she gets closer to her beloved. That's why the women were so scary. They had no reason to live'.²⁰⁴ Bloom, who focused her research on female suicide bombers concludes: 'it is telling that the women who participate in suicide bombings are usually among the most socially vulnerable: widows and rape victims'.²⁰⁵

The reasons why men join the military are probably very similar. Choosing to be part of the military is however, a far more obvious choice for a man than it is for a woman. One can consequently expect that women who chose to join the military must have thought very hard about their choice and thus are very determined. Next to that it seems likely that more women than men choose to be part of the military in order to flee the situation at home – hoping that being part of the military and holding a gun in their hands would empower them.²⁰⁶

6.2 *Why Women Commit Mass Atrocities: Socialization and Force*

Joining a militarised unit is obviously not the same as committing mass atrocities and the next important question is: how do women get involved in the perpetration of mass atrocities? From research on (mainly male) perpetrators it has become apparent that many perpetrators were socialised into violence and that they got progressively involved and are gradually transformed from ordinary men into perpetrators.²⁰⁷ Within a strict hierarchical organization many people feel a strong pressure to obey all orders from their superiors and few men or women have the guts to disregard such orders.²⁰⁸ Many of the men

note 176, p. 90. Criminologists have concluded that a girls early victimization can set the stage for future criminal acts, see Miller and Mullins, *supra* note 103, p. 38.

204 McDonald, as quoted by Sjoberg and Gentry, *supra* note 78, p. 101.

205 Bloom, *supra* note 77, p. 9.

206 See also Coulter, *supra* note 2, p. 60.

207 A. Smeulers, 'What Transforms Ordinary People into Gross Human Rights Violators?', in S. Carey and S. Poe (eds.), *Understanding Human Rights Violations: New Systematic Studies* (Ashgate Publishing Ltd, 2004), pp. 239–256.

208 Like their male counterparts, female leader Johanna Langefeld, who was known to be a decent guard (Brown, *supra* note 22, p. 18; Heike *supra* note 188, p. 131) was proud that she managed to organise the selection process in an ordinary fashion without 'screaming and

furthermore went through a tough and coercive training period in which they were taught to obey and conform to all orders from their superiors. Nevertheless research has shown that many recruits initially still have a hard time when ordered to commit an atrocity for the first time. But eventually most perpetrators get used to the system and the violence and are brutalised. They - as Staub noted - progressed on a continuum of destructiveness.²⁰⁹ The same appears to be true for female perpetrators.²¹⁰ The female camp guards in Nazi Germany were for instance trained in Ravensbrück in which they underwent a training which was similar to the one the male guards had at Dachau and which was described as a 'conditioning process that ... was grueling and demanding'.²¹¹ Inmates from Nazi concentration camps concluded that many inexperienced female guards still seemed to care about the prisoners but the longer they worked in the camps the more brutal they became.²¹² Women within militarised organizations seem to experience the same pressure as their male counterparts and seem to be socialised into violence in similar ways. In some cases as for instance in Sierra Leone soldiers (men and women; boys and girls) were forcefully injected with drugs.²¹³ Up to 34–35 per cent of men and women reported to have been given drugs while being in the RUF.²¹⁴ This too might be an explanation for their brutality.

As already discussed above, many of the militarised units are male dominated and within these institutions recruits are demanded to live up to the idealised male role model. It is a men's world and women are often stereotyped in a condescending manner and not considered as full members. In recent years more and more armies have accepted women in their ranks but often they cannot take part in the fighting and thus cannot make themselves a career. This might very well be the reason why many women have a hard time within these organizations and many as a consequence thereof are particularly eager to prove themselves and show what they are worth.²¹⁵ They are eager to show

shouting' (Herkommer, *supra* note 20, p. 113). She could apparently accept the ideological aim to kill Jews (she was considered to be anti-Semitic), but could not accept unnecessary cruelty.

209 E. Staub, *The Roots of Evil - the Origins of Genocide and other Group Violence* (Cambridge University Press, Cambridge, 1989).

210 See Lower, *supra* note 16, p. 131.

211 Brown, *supra* note 22, p. 17.

212 Kompisch, *supra* note 16, p. 162.

213 Coulter, *supra* note 28, p. 108.

214 Cohen, *supra* note 35.

215 See also Eriksson Baaz and Stern, *supra* note 125, p. 570; and Lower, *supra* note 16, p. 17 and p. 194 in which she notes that some women when being violent dressed like males.

that they are one of the guys and within such groups the use of violence is a means to raise one's status.²¹⁶

Within many organizations women (just like many men) were forced to commit atrocities. If they didn't obey they could be killed. Women could be forced via direct threats, i.e. by gunpoint to commit atrocities as reported by this Rwandan woman: 'When they told us to kill, many people refused. I was one of those who refused. They beat me up so badly with rifle butts that the baby I was carrying on my back, a two-month-old girl, died'.²¹⁷ Another female fighter in Sierra Leone recounts: 'The commander or group leader will just tell you to kill so-and-so person. If you refuse they will kill you. So you just have to do it'.²¹⁸ The violence is intimidating and even if there is no direct threat many recruits (male and female) are scared. From his research on Sierra Leone Coulter concluded: '... the choice between life and death was not really a choice: the will to live and the fear of death were too strong... It was a matter of bare survival'.²¹⁹ In some cases the women were forced by their husbands like this woman in Rwanda: 'Personally I never was on their side, but my husband once said to me 'If you don't take part, I will kill you myself''. So I agreed to participate'.²²⁰ Allegedly as many as 12 per cent of the abducted women in Uganda 'were forced to beat, cut or kill family members'.²²¹ This was done 'in order to bind them to the group, to reduce their fear of killing, and to discourage disobedience'²²² and to make a return home impossible. A Rwandan woman remembers:

They said I must kill my godmother. They began to insist and started beating me up. When I felt that the beating was too much, I gave in and hit my godmother with the machete. When I started, the others also joined in and began hitting her with their machetes. She did not die immediately. While this was happening, a young man jumped out of his hiding place. The whole group attackers began to chase him. I decided to chase him as well instead of killing my godmother. But three of the Interahamwe brought me back to make sure that I completed the job. They gave me a masu to finish her off and I did.²²³

216 A perpetrator of the Rwandan genocide told us in an interview: 'The more people you killed, the more respect you gained in the group. I killed a lot of people, four hundred and everyone was afraid of me', Smeulers and Hoex, *supra* note 25.

217 African Rights, *supra* note 14, p. 44.

218 Coulter, *supra* note 28, p. 135.

219 *Ibid.*, pp. 148, 150.

220 Adler et al., *supra* note 26, p. 223.

221 Annan et al. *supra* note 28, p. 884.

222 *Ibid.*, p. 9.

223 African Rights, *supra* note 14, p. 42.

In some cases in Rwanda women were ordered to kill their Tutsi husbands or their children and although many refused (and were killed) others obeyed the orders and thus hoped to protect themselves.²²⁴

Others were threatened and intimidated in a more indirect way.²²⁵ In Sierra Leone young women who had been abducted stated that commanders were chosen on the basis of their wickedness – the rules and regulations in the rebel movement were uncertain and arbitrary and the commanders were unpredictable²²⁶ leaving the rebels at the mercy of these commanders. In Sierra Leone it was best for the abducted women to be picked as a bush wife because that meant they were protected from further abuse by other men. The bush wives of the commanders were relatively powerful as they were in charge of the distribution of arms and ammunition and could decide who had to fight.²²⁷ But if they were not chosen as a bush wife the best way to survive was probably to join the fighters and be an extremely loyal soldier even if this involved committing mass atrocities.²²⁸

It is clear that men too suffered within this coercive environment, the forced socializations and the continuous threats. They too could be severely punished and killed for not obeying an order or for not be considered loyal or courageous enough. It is however very likely that women suffered more taking their generally subordinate position into account. Women within the military as well as rebel movements suffer in other words from more structural constraints. Coulter who studied female fighters in Sierra Leone clearly indicated that almost all the female combatants that he spoke to had been abducted and raped: 'Despite their bravery and toughness, however, the conditions of female combatants were very different from those of men or even boys for that matter. If a female combatant hesitated when ordered to kill, her own group could punish her often through rape, and if she fell into enemy hands, she would also be most likely raped before being killed'.²²⁹ Many of the women were victims and perpetrators at the same time. They suffered from regular physical and sexual abuse: they were forced to work and please the men. Their vulnerability was simply a result of them being a woman. Coulter concluded: 'One needs to make a distinction, between different kinds and degrees of power and agency.

²²⁴ *Ibid.*, pp. 53–58.

²²⁵ *Ibid.*, pp. 1, 41; and Hogg, *supra* note 16, p. 84.

²²⁶ Coulter *supra* note 28, p. 107.

²²⁷ *Ibid.*, p. 110.

²²⁸ See Coulter, *supra* note 28, p. 122 who states that many 'made it through the war as fighters' and that many of these women 'felt empowered by having a gun' (Coulter 2000, p. 139). See also Bloom, *supra* note 77, p. 4.

²²⁹ Coulter, *supra* note 2, p. 60.

Because even with a gun in hand, my informants choices were circumscribed - by convention, tradition, morality, religion, family, or fear - in ways that were different from men's'.²³⁰ Eriksson Baaz and Stern concluded that '[M]ilitary institutions reflect and reproduce gendered relations in the societies in which they operate'.²³¹ If this is indeed true, then the extent to which women suffer from their subordinate positions within militarised units will differ per society, but it might not be too farfetched to conclude that women within these units are much more vulnerable than men.²³²

6.3 *Why Women Commit Mass Atrocities: Ideology and Greed*

Next to the organizational pressure and group dynamics women can have personal motives to commit crimes. From research on perpetrators in general we know that many of them - when not driven by fear - are driven by ideology or personal motives such as for instance greed.²³³ From the literature it becomes clear that women too can be driven by these very same motives. Adler, for instance, concluded with respect to the Rwandan genocide: 'While many women attribute their involvement in the 1994 genocide to spontaneous or poorly considered behavior, some participated deliberately and with conviction'.²³⁴ Some women have been described as virulent extremist,²³⁵ vicious,²³⁶ or cruel even before the genocide²³⁷ and some apparently derived pleasure from hurting others and can be qualified as sadists.²³⁸ It is estimated that five per cent of the male perpetrators can be qualified as sadists – the percentage

²³⁰ *Ibid.*, p. 68.

²³¹ Eriksson Baaz and Stern, *supra* note 2, p. 713.

²³² See also B. Finlay, 'Pawn, Scapegoat or Collaborator? US Military Women and Detainee Abuse in Iraq', in McKelvey, *supra* note 92, p. 211: 'Just as men can become torturers given the "right" conditions, so can women. But women in the military are in a more powerless position, more vulnerable to pressures to conform, and more likely to suffer negative consequences if caught'.

²³³ Amongst others D.K. Gupta, *Path to Collective Madness - a Study in Social Order and Political Pathology* (Preager, Westport, 2001); and A. Smeulers, 'Perpetrators of International Crimes: Towards a Typology', in A. Smeulers and R. Haveman (eds.), *Supranational Criminology: Towards a Criminology of International Crimes* (Intersentia, Antwerp, 2008), pp. 233–266.

²³⁴ Adler et al. *supra* note 26, p. 221. See also African Rights, *supra* note 14, p. 27 for the Rwandan context, and McDonald, *supra* note 57, for terrorists.

²³⁵ African Rights, *supra* note 14, p. 149.

²³⁶ *Ibid.*, p. 70.

²³⁷ *Ibid.*, p. 140.

²³⁸ Female guards who were believed to be sadists were Irma Grese, Dorothea Binz, Maria Mandel, Margot Drechsel.

of female perpetrators who can be qualified as such might be slightly higher because of the self-selection bias. Choosing for a military career is less obvious for women than it is for men and this might cause that aggressive, violent and sadistic women are disproportionally attracted to the military and these women use their jobs as an outlet for the cruelty or sadistic impulses.²³⁹ Some were for instance already involved in criminal activities prior to a period of mass violence.²⁴⁰ Others were driven by a personal rage: 'When I was twelve, a cousin raped me. I was so mad, I wanted vengeance. I wanted to hurt everyone who had hurt me'.²⁴¹ In some cases women get involved after having suffered a personal tragedy.²⁴² Some were already racists²⁴³ or fanatics before the periods of mass violence.²⁴⁴ Others are ideologically driven or were convinced by propaganda.²⁴⁵ A female perpetrator states:

the leaders told us that the Tutsis had prepared graves to put the Hutus in and that we had to kill the Tutsis first before they killed us. We believed them because they were educated people ... I believed them, and that is why I killed that woman.²⁴⁶

Periods of mass violence usually result in a restructuring of society and has thereof often been equated with a form of social engineering. Especially if a privileged group within society is targeted, this opens up new opportunities for those who want to gain more wealth, power or status. This is true for men and women alike although periods of social reform might be particularly appealing to women and many women have joined rebel movements hoping that life in general and the position of women within society in particular, would improve.²⁴⁷ History

239 As far less women were involved and at least some of them participated on their own free will it might be true that this selection process in itself shows a bias towards women who were more prone to use violence than others which could explain that more than 5 per cent of the women involved can be qualified as sadists. Brown, *supra* note 22, p. 16 for instance noted that the women who applied for jobs in these camps were not the most sophisticated ones. Although he also stated that women with a criminal record were rejected – 'the vast majority were unskilled, undereducated, and decidedly limited in job perspectives'.

240 Lower, *supra* note 16, 42.

241 Wessels, *supra* note 176, p. 91.

242 Bloom, *supra* note 77, p. 4.

243 African Rights, *supra* note 14, p. 64.

244 *Ibid.*, p. 125.

245 Keairnes, *supra* note 27, p. 3. See also Kompisch, *supra* note 16, p. 134 notes that many nurses involved in the Euthanasia programme were convinced that they were doing the right thing.

246 Hogg, *supra* note 16, p. 87.

247 Bloom, *supra* note 77, p. 3.

has indeed shown that periods of mass violence and armed conflict opens up opportunities for women in various ways as men have to go to the army or are killed.²⁴⁸ The opportunity to gain power,²⁴⁹ sheer greed,²⁵⁰ the aim to acquire an equal status or pure ambition, like in the cases of Biljana Plavsic and Pauline Nyiramasuhuko,²⁵¹ could all be possible motives to get involved and commit mass atrocities.²⁵² Some women enjoyed the power they suddenly had, others outplayed their sadism, while still others were motivated by revenge.²⁵³

In general we can conclude that men and women can have many common motives but that gender roles and gender inequality have a strong impact on the life experience of girls and women and can account for some of the differences between the involvement of men and women and the roles they play.²⁵⁴ More research needs however to be done in order to study to what extent male and female perpetrators differ in their motives. In doing this research it is important that it is gender sensitive but not stereotyped.²⁵⁵ We, in other words, need to take the context and specifics of the context in which women operate into account. This context can constrain their choices (just like it does for men) but that does not mean that they lack agency. The examples above clearly shown that women just like men make their own choices and these choices can lead them to commit mass atrocities. In that sense women are after all not that different from men and share men's capacity for violence.²⁵⁶

7 Conclusion

Until the genocide in Rwanda in 1994 it was generally assumed that women tend to play a very limited role in periods of mass violence. Shortly after this

248 See for instance Kompisch, *supra* note 16, pp. 42, 241; and Lower, *supra* note 16, p. 164.

249 African Rights, *supra* note 14, p. 27.

250 Adler et al., *supra* note 26, p. 221; African Rights, *supra* note 14, p. 27; and Lower, *supra* note 16, p. 126.

251 See also Ewa Kozakiewicz, *Female Perpetrators of International Crimes*, unpublished master thesis in possession of the author.

252 Also female terrorists can strive for fame and heroism. See McDonald, *supra* note 57, p. 380.

253 See Lower, *supra* note 16; but also in relation to revenge, Bloom, *supra* note 77, p. 2; Sjöberg and Gentry, *supra* note 78, p. 100.

254 See also Miller and Mullins, *supra* note 103, p. 34; and Agnew, *supra* note 103, p. 7.

255 See also Gilani, *supra* note 112, p. 29 who concludes: 'imputing their violent behavior to culture, patriarchy, society and pathology, these reports and articles cast doubt on women's capacity for engaging in violence voluntarily and intentionally'.

256 *Ibid.*, p. 30.

genocide African Rights published a report on the role of women in the genocide with the telling title: 'Not so innocent – when women become killers'.²⁵⁷ Scholars have consequently concluded that the extent of the involvement of women in the Rwandan genocide is unprecedented.²⁵⁸ The above overview has however, shown that although it is clear that many more men than women have been involved in mass atrocities the role of women is much larger than has been assumed so far, not only in Nazi Germany²⁵⁹ but also in other more contemporary conflicts in Sierra Leone, Sudan, DRC, Uganda and Columbia to name just a few cases.

The overview has also shown that women have been involved in mass atrocities in a number of different ways. Most women act in a supporting capacity but others have a more active role as leaders and instigators or as the physical perpetrators and have been directly involved in torture, rape and murder. The literature review conducted clearly shows that women just like men are capable of terrible atrocities. How many women are and have been involved exactly is impossible to tell but it is clear that there are many more women involved than we would expect. Women who are involved are often seen as either lacking agency or being mentally disturbed sadists. The general perception is that real women do not commit mass atrocities while in fact they do. Some might have been forced and others might indeed have been disturbed sadists but the above overview shows that so many women have been involved in mass atrocities that it is simply impossible to qualify all of them as such. It is time to accept that many female perpetrators are ordinary women and that ordinary women just like ordinary men can become involved in mass atrocities for a number of reasons (personal or political) and under a number of different circumstances (involving extreme pressure or out of free will) and can be just as ruthless and cruel as ordinary men.²⁶⁰

²⁵⁷ African Rights, *supra* note 14.

²⁵⁸ A. Jones, 'Gender and Genocide in Rwanda', 4 *Journal of Genocide Research* (2002) 65.

²⁵⁹ See also Kompisch, *supra* note 16, p. 12; and M. Krauss (ed.), *Sie waren dabei. Mitläuferinnen, Nutznießerinnen, Täterinnen im Nationalsozialismus* (Wallstein Verlag, 2008).

²⁶⁰ See also Brown, *supra* note 22, p. 11 who concludes 'while there were clearly some SS auxiliaries who were attractive, cruel and perverse, the vast majority were colorless, unimaginable, plain or wretched in their physical appearance'. See also Hogg, *supra* note 16, p. 69 about Rwanda: 'Many ordinary women involved in the genocide but, overall, committed significantly fewer acts of overt violence than men'. See Sjöberg and Gentry, *supra* note 78, p. 4: 'Woman, like men commit violence for a variety of reasons, some rational and some irrational'. See also Adler et al., *supra* note 26, p. 212; and Lower, *supra* note 16, p. 167.

An important fact that we have to take into account when studying female perpetrators is that many societies within the world are still very patriarchal societies dominated by males and that still many women are as a consequence thereof more vulnerable and much more easily exploited than many of their male counterparts. Especially within the military many women are having a hard time to prove that they are 'one of the guys'. But many women try to make the best out of it and some have become very courageous and heroic fighters, others – especially those serving oppressive regime – have become involved in mass atrocities. This explorative study has shown that women are in many respects not that different from men, apart from the fact that indeed sometimes their choices are more constrained. Further research, in which the involvement of women is gender sensitive but not explained by stereotyped gender images (the mother, monster, whore narratives), is urgently needed to get a better insight in the roles men and women play and the possible difference between them.²⁶¹ But for now we can conclude that women are not inherently more peaceful than men, nor that those women who are involved in mass atrocities are by definition mentally disturbed monsters or completely lacking agency. Some are but most are just like the men, very ordinary women who within an often constrained environment (just like many men) somehow got involved in mass atrocities. The reason why so many more men are involved is not because they are more evil but simply because militarised units which are the main organizations responsible for the physical perpetration of international crimes are still male dominated. The reason why only one per cent of all the people convicted by international criminal courts and tribunals are female is because these tribunals focus on those in leadership positions and the physical executioners and women are underrepresented amongst these two groups. It can be expected, however, that the progressive emancipation of women and the fact that more and more women are accepted in militarised units and more and more women start to play an important role in politics, the percentage of women involved in international crimes will go up too.

261 See also Lower, *supra* note 16.

Prosecution of female supervisory Staff in Poland after WWII

by Andrea Rudorff

Wed., 23 June 2021, 10:30 – 11:30

Abstract:

After World War II, almost 100 German women had to stand trial before Polish courts for their work as guards in Nazi concentration camps - twelve of them received the death penalty. How had these women become female guards in concentration camps and what crimes had they been guilty of? What characterizes the Polish trials of female guards? How did the Polish justice system gain access to the perpetrators? How were witnesses found? What was the legal basis for the sentences and what judgments were made? What was the public response to the trials? In the end, an attempt will be made to approach the question on the basis of ego-documents, what the women and their relatives thought about their conviction.

Article:

Rudorff, Andrea (2013): Die Strafverfolgung von KZ-Aufseherinnen in der VR Polen.

Die Strafverfolgung von KZ-Aufseherinnen in Polen

In den letzten Jahren sind Fragen nach länderspezifischen, zeitlichen und politischen Kontexten der Strafverfolgung von NS-Verbrechen in den wissenschaftlichen Fokus gerückt. Beiträge, die sich damit beschäftigen, unter welchen Bedingungen, nach welchen Rechtsprinzipien und mit welcher öffentlichen Erwartungshaltung NS-Täterinnen und Täter in verschiedenen Ländern, unterschiedlichen Rechtsinstitutionen und zeitlichen Kontexten zur Verantwortung gezogen wurden, füllen inzwischen Regalreihen.¹ Parallel dazu machten Forschungen auf die Funktion und Wirkung der Kategorie Geschlecht in den juristischen und öffentlichen Diskursen im Rahmen von NS-Prozessen aufmerksam.²

Angesichts des gewaltigen Forschungsinteresses erstaunt es, dass die Strafverfolgungsbemühungen der polnischen Justiz bisher nicht tief greifend untersucht worden sind, obwohl Polen zu den Ländern gehörte, dessen Bürgerinnen und Bürger am stärksten von NS-Verbrechen betroffen waren. In deutscher Sprache sind nur wenige Artikel zu diesem Thema erschienen, die den Charakter von Überblicksdarstellungen haben.³

- 1 Zuletzt: Clemens Vollnhals/Jörg Osterloh (Hrsg.), NS-Prozesse und deutsche Öffentlichkeit. Besatzungszeit, frühe Bundesrepublik und DDR, Göttingen 2011; John Cramer, Belsen Trial 1945. Der Lüneburger Prozess gegen Wachpersonal der Konzentrationslager Auschwitz und Bergen-Belsen, Göttingen 2011; Claudia Kuretsidis-Haider/Winfried R. Garscha, Gerechtigkeit nach Krieg und Diktatur: „Transitional Justice“ 1945 bis heute. Strafverfahren und ihre Quellen, Graz 2010.
- 2 Siehe dazu vor allem Ulrike Weckel/Edgar Wolfrum, „Bestien“ und „Befehlsempfänger“. Frauen und Männer in NS-Prozessen nach 1945, Göttingen 2003; Anette Kretzer, NS-Täterschaft und Geschlecht: Der erste britische Ravensbrück-Prozess 1946/47 in Hamburg, Berlin 2009.
- 3 Włodzimierz Borodziej, „Hitleristische Verbrechen“. Die Ahndung deutscher Kriegs- und Besatzungsverbrechen in Polen, in: Norbert Frei (Hrsg.), Transnationale Vergangenheitspolitik. Der Umgang mit deutschen Kriegsverbrechen in Europa nach dem Zweiten Weltkrieg, Göttingen 2006, S. 399–433; Witold Kulesza, Völkermord vor Gericht in Polen. NS-Verbrechen im Reichsgau Danzig-Westpreußen im Lichte des Strafprozesses gegen Richard Hildebrandt, in: Heimo Halbrainer/Claudia Kuretsidis-Haider (Hrsg.), Kriegsverbrechen, NS-Gewaltverbrechen und die europäische Strafjustiz von Nürnberg bis Den Haag, Graz 2007, S. 201–211, Bogdan Musiał, NS-Kriegsverbrecher vor polnischen Gerichten, in: Vierteljahrshefte für Zeitgeschichte 47 (1999), S. 25–56.

In der Volksrepublik Polen war die Strafverfolgung von „hitleristischen Verbrechen“, wie die Sprachregelung lange Zeit lautete, vor allem in den 1950er- bis in die 1970er-Jahre Thema vielfältiger Untersuchungen, die sich entweder auf juristische Probleme der Beweisführung der bis dato beispiellosen Verbrechenskompexe konzentrierten oder deren Anliegen es war, nach ideologischen Vorgaben die vorbildliche Ahndung von NS-Verbrechen in Polen und den Ostblockländern – im Gegensatz zur Bundesrepublik – hervorzuheben.⁴ In den letzten Jahren hat das polnische Forschungsinteresse zu diesem Themenkomplex nachgelassen.

Der folgende Beitrag hat die strafrechtliche Verfolgung von ehemaligen KZ-Aufseherinnen in Polen zum Thema. Da es kaum Vorarbeiten gibt, stütze ich mich auf vorliegende Übersichten über Auslieferungen und Gerichtsurteile gegen NS-Verbrecher⁵ sowie meine eigenen Untersuchungen von 51 Verfahren gegen ehemalige Aufseherinnen von Frauenaußenlagern des Konzentrationslagers Groß-Rosen.⁶ Ein Aufsatz von Aleksander Lasik aus dem Jahr 2007 gibt das Ausmaß der polnischen Strafverfolgung gegen ehemalige KZ-Aufseherinnen stark verzerrt wieder, da er nur 24 Verfahren zur Kenntnis nahm.⁷ Insgesamt wurden jedoch mindestens 95 ehemaligen Aufseherinnen in Polen wegen ihrer Tätigkeit für die SS der Prozess gemacht.⁸ Damit gehört Polen zu den Ländern, in denen eine vergleichsweise große Zahl von Frauen aufgrund dieser Tätigkeit gerichtlich zur Verantwortung gezogen wurde. Dennoch erscheint die Zahl angesichts der etwa 3500 Aufseherinnen, die zum Ende des Krieges in Konzentrationslagern eingesetzt waren, gering.⁹

Wie in anderen Ländern wurden auch in Polen Aufseherinnen nur selektiv zur Verantwortung gezogen. Eine systematische Suche nach ehemaligen KZ-Aufsehe-

4 Übersicht über die ältere Literatur in Andreas Lawaty (Hrsg.), *Deutsch-polnische Beziehungen in Geschichte und Gegenwart: Bibliographie 1900–1998*, Wiesbaden 2000, Kap. 9.2.3: Dokumentation und Verfolgung von Kriegsverbrechen.

5 Elżbieta Kobierska-Motas, *Członkowie załóg i więźniowie funkcjni niemieckich obozów, więzień i gett skazani przez sądy polskie* [Durch polnische Gerichte verurteilte SS-Funktionäre und Funktionshäftlinge aus deutschen Lagern, Gefängnissen und Ghettos], Warszawa 1992, sowie dies., *Ekstradycja przestępców wojennych do Polski z czterech straf okupacyjnych Niemiec 1946–1950* [Die Auslieferung von Kriegsverbrechern aus den vier deutschen Besatzungszonen nach Polen 1946–1950], Teil 2, Warszawa 1992.

6 Vgl. Andrea Rudorff, *Frauen in den Außenlagern des Konzentrationslagers Groß-Rosen*, Diss. phil., TU Berlin 2012. Die Veröffentlichung erscheint im Herbst 2013.

7 Aleksander Lasik, *SS-Aufseherinnen vor polnischen Gerichten*, in: Simone Erpel (Hrsg.), *Im Gefolge der SS: Aufseherinnen des Frauen-KZ Ravensbrück*, Berlin 2007, S. 160–170.

8 Zahlen auf der Grundlage von Kobierska-Motas, *Członkowie*; dies., *Ekstradycja*.

9 Stärkemeldung des WVHA über SS-Wachmannschaften und Häftlinge in Konzentrationslagern, Stand 1. und 15. Januar 1945, Bundesarchiv (BArch) Berlin NS 3/439. Polnische Gerichte verurteilten außerdem auch etliche Aufseherinnen von Gefängnissen und anderen Formen von Zwangslagern, die an dieser Stelle nicht berücksichtigt werden.

rinnen war für die polnische Justiz aus Kapazitätsgründen nicht möglich, zumal sich die betreffenden Frauen in der Regel in den deutschen Besatzungszonen aufhielten, was den Zugriff der polnischen Justiz erschwerte. Hinzu kam, dass der polnische Justizapparat in den ersten Nachkriegsjahren aufgrund des Ausmaßes der zu ahndenden NS-Verbrechen stark überlastet und gleichzeitig aufgrund der Kriegsverluste massiv geschwächt war. Im Rahmen der Vernichtungskampagne gegen die polnische Intelligenz waren 57 % der Anwälte und 21,5 % der Richter umgebracht worden.¹⁰ Aufseherinnen, die in Polen vor Gericht standen, waren daher entweder im Rahmen von Lagerbefreiungen festgenommen oder im Laufe der folgenden Wochen und Monate angezeigt worden. Außerdem konzentrierte sich die polnische Justiz entsprechend alliierten Vereinbarungen vor allem auf die ca. 1150 Aufseherinnen, die auf polnischem Nachkriegsterritorium eingesetzt gewesen waren, also in den Lagerkomplexen Auschwitz, Majdanek, Płaszów, Stutthof und Groß-Rosen.¹¹ Deutlich seltener wurden ehemalige Aufseherinnen, die sich in Lagerkomplexen außerhalb des polnischen Territoriums der Misshandlung polnischer Staatsbürgerinnen schuldig gemacht hatten, nach Polen ausgeliefert.

Für eine quantitative Aufstellung der Verurteilungen nach Lagerkomplexen muss berücksichtigt werden, dass insbesondere zwischen den Lagern Ravensbrück, Auschwitz, Majdanek und Płaszów ein reger Austausch von Aufseherinnen stattfand und nicht wenige der betroffenen Aufseherinnen im Laufe des Krieges in mehreren Lagern Dienst taten. Für die im Folgenden angegebenen Zahlen wurden daher einige Aufseherinnen für mehrere Lagerkomplexe erfasst, wenn sie dort regulär eingesetzt waren. Die bis Sommer 1944 obligatorische mehrwöchige Schulung aller Aufseherinnen in Ravensbrück wird in der Aufstellung nicht als Ravensbrücker Dienstzeit berücksichtigt.

Auf diese Weise lässt sich feststellen, dass sich mit der Zahl von 51 die weitaus meisten Verfahren in Polen gegen ehemalige Aufseherinnen des Konzentrationslagers Groß-Rosen richteten. 24 weitere Verurteilte waren in Auschwitz und seinen Außenlagern tätig gewesen, 22 im Lagerkomplex Ravensbrück, acht in Stutthof, sieben in Majdanek und drei in Płaszów. Außerdem mussten sich in Einzelfällen Aufseherinnen aus den Lagerkomplexen Buchenwald (vier), Natzweiler (vier), Bergen-Belsen (zwei) sowie Dachau, Neuengamme, Kauen und Flossenbürg (jeweils eine) vor polnischen Gerichten verantworten.¹²

Die hohe Zahl an Groß-Rosener Aufseherinnen hat zwei Gründe: Erstens verfügte Groß-Rosen – obwohl es nicht zu den Lagern mit der größten Zahl an weiblichen Häftlingen gehörte – mit über 900 Aufseherinnen über die höchste Zahl an weiblichem

10 Czesław Madajczyk, *Polityka III Rzeszy w okupowanej Polsce* [Die Politik des Dritten Reichs im besetzten Polen], Bd. II, Warszawa 1970, S. 29.

11 Stärkemeldung des WVHA über SS-Wachmannschaften und Häftlinge in Konzentrationslagern, Stand 1. und 15. Januar 1945, BAArch Berlin NS 3/439.

12 Die Zuordnungen erfolgten nach Elżbieta Kobierska-Motas, Członkowie.

Bewachungspersonal.¹³ Ein zweiter Grund ergab sich aus der besonderen geografischen Lage vieler Groß-Rosener Außenlager in Niederschlesien, das nach Kriegsende Polen zugesprochen wurde. Die meisten Aufseherinnen in dieser Region waren aus der Belegschaft der Rüstungsbetriebe rekrutiert worden, auf deren Initiative die Außenlager entstanden waren. Anders als die kasernierten Aufseherinnen von Auschwitz, Majdanek oder Ravensbrück blieben die Groß-Rosener Aufseherinnen an ihren angestammten Wohnorten – auch in den entscheidenden Monaten nach Kriegsende, als die Orte bereits polnisch verwaltet wurden, aber die deutsche Bevölkerung noch nicht ausgewiesen worden war. Aus diesem Grund hatte die polnische Justiz einen besonders hohen Zugriff auf ehemalige Groß-Rosener Aufseherinnen.

Festnahmen am Heimatort

Insbesondere Aufseherinnen der auf polnischem Vorkriegsterritorium gelegenen Lager wie Auschwitz, Plaszów und Majdanek waren bereits vor Einmarsch der Roten Armee evakuiert und in westlich gelegene Konzentrationslager versetzt worden. Dass Soldaten der Roten Armee Aufseherinnen festnahmen, fand daher überwiegend in Gebieten statt, die nicht von der Front durchzogen und deren Lagerstandorte daher nicht evakuiert worden waren. Das betraf mehrere Groß-Rosener Außenlager in Niederschlesien, die bis zum 8. Mai 1945 existierten. Während der Befreiung der Häftlinge durch die Rote Armee befanden sich die Aufseherinnen zwar meist nicht mehr im Lager, aber in ihren Heimatorten, wo sie – insbesondere, wenn es sich um kleine Ortschaften handelte – leicht aufspürbar waren. Ein Teil von ihnen wurde aufgrund von Fürsprachen ehemaliger Häftlinge rasch entlassen, andere kamen nach mehrmonatiger sowjetischer Internierung frei und wurden zu einem späteren Zeitpunkt vom polnischen Sicherheitsdienst erneut festgenommen.¹⁴ Dass die Rote Armee Festgenommene dem polnischen Sicherheitsdienst zur weiteren juristischen Strafverfolgung direkt übergab, ist nur für zwei Groß-Rosener Aufseherinnen nachgewiesen.¹⁵ Andere blieben in sowjetischer Haft, obwohl ihren Kolleginnen zum gleichen Zeitpunkt vor den regulären polnischen Justizorganen der Prozess gemacht wurde.¹⁶ Welche Kriterien

13 Stärkemeldung des WVHA über SS-Wachmannschaften und Häftlinge in Konzentrationslagern, Stand 1. und 15. Januar 1945, BArch Berlin NS 3/439.

14 Aussage Elisabeth K., Archiwum Instytutu Pamięci Narodowej (AIPN) [Archiv des Instituts des Nationalen Gedenkens Warschau], SO Św 43; Aussage Maria A., 10. 5. 1946, AIPN, SO Kr 366; Aussage Helena P., 8. 1. 1976, Bundesarchiv Ludwigsburg (BArch Ludwigsburg) B 162/15842.

15 Begleitschreiben der Roten Armee bei Übergabe von Elsa Haim und Elfriede Z., 4. 10. 1945, AIPN, SSK Wr 233.

16 Aussage Gertrud S., 1946, AIPN, SO JG 50, Bl. 13; Aussagen Maria A. und Helena R., 10. 5. 1946, AIPN, SO Kr 366.

zu diesen unterschiedlichen Behandlungen führten und ob sie den ungeordneten Verhältnissen der unmittelbaren Nachkriegszeit geschuldet waren, ließ sich bisher nicht klären.

Einige Aufseherinnen waren im Zuge der Evakuierung der deutschen Bevölkerung aus ihren Heimatorten geflohen, kehrten aber nach Ende der Kampfhandlungen zurück. Viele rechneten nicht mit einer Strafverfolgung und sahen daher keinen Grund unterzutauchen. Wie unbekümmert einige die Strafwürdigkeit ihres Dienstes einschätzten, zeigt das Beispiel von Margarete W., die sich im Juli 1945 nach ihrer Rückkehr in das nun polnisch besetzte Polen polizeilich registrieren ließ und dabei ehrliche Auskunft über ihre Tätigkeit während des Krieges gab – offensichtlich nicht ahnend, dass dies zu ihrer sofortigen Festnahme führen würde.¹⁷ Eine große Zahl der Frauen wurde von ehemaligen Häftlingen angezeigt, die sich aufgrund fehlender Transport- und Ausreisemöglichkeiten bzw. ihres schlechten Gesundheitszustandes noch an den Orten ihrer Gefangenschaft befanden und die örtlichen Milizen informierten, wenn sie Aufseherinnen entdeckten, unter denen sie im Lager gelitten hatten. Aber auch die deutsche Bevölkerung, Nachbarn oder ehemalige Schulkameradinnen zeigten belastete Frauen bei der polnischen Miliz an.¹⁸

Auslieferung durch die Alliierten

Unter den 1817 Personen, die wegen des Verdachts auf Tätigkeiten in Konzentrations- und anderen Zwangslagern sowie in der Besatzungsverwaltung aus der amerikanischen, britischen und sowjetischen Besatzungszone nach Polen ausgeliefert wurden, befanden sich 33 ehemalige KZ-Aufseherinnen.¹⁹ Sie waren überwiegend in Auschwitz und/oder Ravensbrück eingesetzt gewesen. Lasiks Einschätzung, der Umfang der polnischen Rechtsprechung gegen Aufseherinnen sei von der Zahl der Auslieferungen abhängig gewesen, ist nicht aufrechtzuerhalten, da – entgegen seiner Angabe, es seien nur sieben Aufseherinnen auf polnischem Staatsgebiet verhaftet worden²⁰ – die Zahlen zeigen, dass zwei Drittel der 95 in Polen verurteilten Aufseherinnen nicht nach Polen ausgeliefert, sondern auf polnischem Territorium festgenommen wurden.

Welche Umstände zur Stellung von Auslieferungsanträgen führten und wie diese vonstatten gingen, ist kaum erforscht. Vieles weist darauf hin, dass Auslieferungsanträge immer dann gestellt wurden, wenn polnische ehemalige Häftlinge, die sich beispielsweise in DP-Camps in der amerikanischen Besatzungszone aufhielten, die

17 Aussage Margarete W., 12. 9. 1946, AIPN, SSK Wr 29, Bl. 10.

18 Zeugenvernehmung Herbert B., 12. 7. 1945, AIPN, GK 210/363, Bl. 20; Bericht Heinz G., 13. 9. 1945, AIPN, SSKWr 113.

19 Zahl nach Kobierska-Motas, *Ekstradycja*.

20 Lasik, *SS-Aufseherinnen vor polnischen Gerichten*, S. 169 (Fußnote), 170.

Frauen als ehemalige Peinigerinnen identifizierten und Anzeige erstatteten oder wenn ehemalige Aufseherinnen von Deutschen, die über ihre Kriegstätigkeit Bescheid wussten, angezeigt wurden.²¹

Zuständig für die Abwicklung der Auslieferungen waren die Polnischen Militärmissionen in den Besatzungszonen. Das Gesetz Nr. 10 des Alliierten Kontrollrats vom 20. Dezember 1945 hatte eine Rechtsgrundlage für die Auslieferung von Kriegsverbrechern an die Orte, an denen die Verbrechen begangen wurden, geschaffen.²² Wie Polen auf der einen und die Besatzungszonen auf der anderen Seite ihre Auslieferungspolitik betrieben, war jedoch stark von den politischen Verhältnissen abhängig. Nachdem die Warschauer Regierung Auslieferungen zunächst aus Kostengründen nur sehr zögerlich betrieben hatte und erst nach Aufforderung der westlichen Alliierten aktiv wurde, schränkten Letztere im Zusammenhang mit dem erstarkenden Kalten Krieg die Auslieferungen ab 1948 wieder ein. Spätestens 1949 waren die in der Bundesrepublik lebenden Kriegsverbrecher dem Zugriff der polnischen Justiz entzogen.²³

Die Mehrheit der ehemaligen Aufseherinnen (20) wurde in fünf Sammelüberstellungen zwischen Mai 1946 und Dezember 1947 aus der amerikanischen Zone ausgeliefert. Aus der britischen Zone kam es am 19. Dezember 1947 zu einer Sammelüberstellung von zehn Aufseherinnen. Zwei Aufseherinnen wurden noch 1948 aus der aus der sowjetischen, eine aus der französischen Zone ausgeliefert.²⁴

Rechtsgrundlagen der Strafverfolgung

Als sich polnische Behörden im August 1944 im bereits befreiten Osten des Landes mit den Grundlagen der Strafverfolgung von NS-Verbrechen befassten, war die nationalsozialistische Herrschaft im besetzten Teil Polens noch nicht gebrochen. Etliche der später verurteilten Aufseherinnen waren zu diesem Zeitpunkt noch nicht einmal in den KZ-Dienst eingetreten. Ein erster Prozess gegen KZ-Wachmannschaften fand in Lublin bereits vor Kriegsende, vom 27. November bis 2. Dezember 1944, statt. Der öffentlichen Hinrichtung von fünf der Verurteilten am 3. Dezember 1944 auf dem ehemaligen Lagergelände von Majdanek wohnten Tausende Bewohnerinnen und Bewohner von Lublin bei. Nach Diskussionen über die Zwiespältigkeit von öffentlichen Hinrichtungen wurde ab Herbst 1946 davon abgesehen.²⁵

21 Vgl. Verfahren gegen Philomena L., AIPN, SO Św 163. Siehe auch Heiner Lichtenstein, Majdanek – Reportage eines Prozesses, Frankfurt a. M. 1979, S. 40, 44.

22 Amtsblatt des Kontrollrates in Deutschland 3 (1946), S. 50–55.

23 Vgl. Kobierska-Motas, Ekstradycja, S. 5–27; Musiał, NS-Kriegsverbrecher vor polnischen Gerichten, S. 25–56.

24 Daten nach Kobierska-Motas, Ekstradycja.

25 Siehe dazu Edmund Dmitrów, Niemcy i okupacja w oczach Polaków [Die Deutschen und die Okkupation in den Augen der Polen], Warszawa 1987, S. 234–240.

Grundlage für die Strafverfolgung deutscher Kriegsverbrechen im Nachkriegspolen bildete das „Dekret über das Strafmaß für die hitlerfaschistischen Verbrecher, die der Tötung und Misshandlung von Zivilbevölkerung und Kriegsgefangenen schuldig sind, sowie für die Verräter der polnischen Nation“ vom 31. August 1944, das sogenannte Augustdekret.²⁶ Erlassen hatte es das „Polnische Komitee der nationalen Befreiung“ [Polski Komitet Wyzwolenia Narodowego, PKWN], das sich im Juli 1944 im gerade befreiten Lublin unter sowjetischer Ägide gegründet hatte und die Regierungsbefugnis für die bereits von der Roten Armee besetzten polnischen Gebiete beanspruchte. Das Augustdekret gehörte zu den ersten rechtlichen Bestimmungen des PKWN und sollte eine Rechtsgrundlage für die Verurteilung von deutschen NS-Funktionären, KZ-Personal aber auch polnischen Kollaborateuren schaffen, die auf den befreiten Gebieten in Gewahrsam genommen worden waren.

In seiner ersten Fassung verhiess das Augustdekret die Todesstrafe für diejenigen, die „a) an Tötung, Misshandlung und Verfolgung von Zivilbevölkerung und Kriegsgefangenen beteiligt waren bzw. b) Personen, die sich auf dem Gebiet des polnischen Staates aufhielten, Schaden zugefügt haben, insbesondere durch die Festnahme oder Auslieferung von verfolgten Personen“.²⁷ Artikel 2 sah einen 15-jährigen bis lebenslänglichen Freiheitsentzug für die Erpressung von Leistungen von Verfolgten oder deren Angehörigen vor. Für die in Art. 1 und 2 beschriebenen Verbrechen wurden Beschuldigte auch dann strafrechtlich verantwortlich gemacht, wenn sie diese im Dienste der feindlichen Besatzungsmacht, auf ihre Anordnung oder unter Zwang ausgeübt hatten (Art. 3). Das bedeutete, dass sich Aufseherinnen nicht darauf berufen konnten, zu ihrer Tätigkeit dienstverpflichtet worden zu sein. Art. 4 stellte auch den Versuch, die Anstiftung oder Beihilfe zu den Verbrechen unter Strafe.

Bevor die erste ehemalige KZ-Aufseherin im November 1945 auf Grundlage des Augustdekrets verurteilt wurde, war dieses bereits im Februar 1945 durch eine Novelle²⁸ entschärft worden. Die Todesstrafe für vergleichsweise kleine und unklar definierte Vergehen wurde aufgehoben und das Strafmaß für Verbrechen ohne tödliche Folge deutlich herabgesetzt. Eine weitere Novelle vom 10. Dezember 1946 blieb für die Urteilspraxis gegen Aufseherinnen folgenlos. Da Polen das Statut des Internationalen Militärgerichtshofes (IMT) mitunterzeichnet hatte, wurde das Dekret an die Bestimmungen des Nürnberger Gerichts vom 1. Oktober 1946 angepasst und in Bezug

26 Dekret Polskiego Komitetu Wyzwolenia Narodowego z dnia 31 sierpnia 1944 roku o wymiarze kary dla faszystowsko-hitlerowskich zbrodniarzy winnych zabójstw i znęcania się nad ludnością cywilną i jeńcami oraz dla zdrajców Narodu Polskiego, Dziennik Ustaw Nr. 4, Poz. 16. Der Textlaut dieses und weiterer relevanter Dekrete ist auf der Webseite <http://isip.sejm.gov.pl/prawo/index.html> abrufbar.

27 Ebenda. Alle Übersetzungen aus dem Polnischen von der Autorin.

28 Dekret z dnia 16 lutego 1945 r. o zmianie dekretu Polskiego Komitetu Wyzwolenia Narodowego o wymiarze kary dla faszystowsko-hitlerowskich zbrodniarzy winnych zabójstw i znęcania się nad ludnością cywilną i jeńcami oraz dla zdrajców Narodu Polskiego, Dziennik Ustaw Nr. 7, Poz. 28, 29.

auf Mitgliedschaften in verbrecherischen Organisationen ausdifferenziert. Der neu formulierte Art. 4 verhiess nun eine mindestens dreijährige Haftstrafe für Mitglieder von verbrecherischen Organisationen, zu denen die SS zählte.²⁹ Obwohl KZ-Aufseherinnen formal keine SS-Mitglieder waren, sondern sich lediglich vertraglich zum Dienst für die SS verpflichtet hatten, wurden sie von der Rechtsprechung (nicht nur der polnischen) als SS-Mitglieder definiert und konnten – ohne dass weitere Straftatbestände erfüllt waren – auf dieser Grundlage zu mindestens drei Jahren Haft verurteilt werden.

Politische Hintergründe der Anwendung des Augustdekrets

Die Anwendung des Augustdekrets war geprägt vom ungleichen Machtkampf zwischen den Anhängern der polnischen Exilregierung in London und dem PKWN, das die Gründung eines sozialistischen Staates Polen anstrebte und im Juni 1945 von den USA und Großbritannien als Provisorische Regierung anerkannt worden war. Da sich das Dekret nicht nur gegen deutsche Kriegsverbrecher, sondern auch gegen den weit auslegbaren Begriff „Verräter am polnischen Volk“ richtete, diente es den neuen Behörden zunehmend als Hilfsmittel, Anhänger der Exilregierung, der Heimatarmee (Armia Krajowa) und der bürgerlichen Opposition ins Abseits zu drängen. So wurden auf seiner Grundlage in großer Zahl polnische Staatsbürger (angebliche oder tatsächliche Kollaborateure, Denunzianten, Funktionshäftlinge in Konzentrationslagern, Hilfspolizisten und „Volksdeutsche“) verurteilt. Obwohl sich unter ihnen zum Teil auch tatsächliche Kollaborateure befanden, stand ihre Verantwortung für Verbrechen meist in keinem Verhältnis zu dem der deutschen Besatzungsfunktionäre oder des Lagerpersonals von Konzentrationslagern.

Der Missbrauch des Dekrets für den Machtaufbau der sozialistischen Regierung und der erschwerte Zugriff auf geflohene deutsche Täter führten zu einem Ungleichgewicht in der Strafverfolgung von NS-Verbrechern in Polen. So wird die Gesamtzahl der auf Grundlage des Augustdekrets zwischen 1944 und 1988 Verurteilten auf 18 000 bis 20 000 geschätzt; darunter waren jedoch nur 5000 bis 5500 Deutsche.³⁰ In Niederschlesien, wo aufgrund der beschriebenen Umstände ein Großteil der Pro-

29 Dekret z dnia 10 grudnia 1946 r. o zmianie dekretu z dnia 31. sierpnia 1944 r. o wymiarze kary dla faszystowsko-hitlerowskich zbrodniarzy winnych zabójstw i znęcania się nad ludnością cywilną i jeńcami oraz dla zdrajców Narodu Polskiego, Dziennik Ustaw Nr. 69, Poz. 376.

30 Włodzimierz Borodziej, „Hitleristische Verbrechen“. Die Ahndung deutscher Kriegs- und Besatzungsverbrechen in Polen, in: Frei (Hrsg.), Transnationale Vergangenheitspolitik, S. 399–433, hier S. 431; Kulesza, Völkermord vor Gericht in Polen, S. 201–211, hier S. 201, Kobierska-Motas, Ekstradycja, S. 18; Leszek Kubicki, Zbrodnie wojenne w świetle prawa polskiego [Die Kriegsverbrechen im Lichte des polnischen Rechts], Warszawa 1963, S. 180–184.

zesse gegen ehemalige KZ-Aufseherinnen stattfand, war die Situation etwas ausgewogener als im polnischen Kernland, da sich polnische Bevölkerung hier erst nach dem Krieg ansiedelte.³¹

Włodzimierz Borodziej machte darüber hinaus darauf aufmerksam, dass viele Deutsche in den ersten Nachkriegsjahren nicht von der polnischen Justiz angeklagt, sondern ohne konkrete Hinweise auf Straftatbestände in Lagern interniert wurden, in denen weitaus mehr Menschen durch Hunger, Misshandlungen und Epidemien starben als durch Todesurteile polnischer Gerichte.³² Ob und in welchem Ausmaß auch Aufseherinnen von der außerjuristischen Verfolgung betroffen waren, ist nicht bekannt. Bislang gibt es nur einzelne Hinweise. So behauptete die ehemalige Lagerführerin des Groß-Rosener Außenlagers Grünberg im Rahmen von Ermittlungen der Zentralen Stelle der Landesjustizverwaltung zur Aufklärung nationalsozialistischer Verbrechen im Jahr 1964, sie sei auf ihrer Flucht vor der Roten Armee bei Stangenheim/Görlitz in polnische Gefangenschaft geraten und habe bis 1947 auf einem Gut Zwangsarbeit verrichtet.³³ In den polnischen Justizunterlagen taucht ihr Name nicht auf.

Gerichtsbarkeit

Drei verschiedene Gerichtstypen waren mit der Durchführung von NS-Prozessen in Polen befasst. Für die Aburteilung der Hauptkriegsverbrecher war am 22. Januar 1946 ein Sondergerichtshof geschaffen worden – das Oberste Nationaltribunal (Najwyższy Trybunał Narodowy, NTN), das dem Obersten Gericht des Landes gleichgestellt war. Zwischen 1946 und 1948 kam es vor dem NTN zu sieben Prozessen gegen 49 Personen. Neben hochrangigen Angehörigen der Zivilverwaltung fanden drei spektakuläre Prozesse gegen KZ-Kommandanten (Amon Göth, Rudolf Höß, Arthur Liebehenschel) und 40 weitere Angehörige der Lagermannschaft von Auschwitz statt. In mehr als der Hälfte der vor dem NTN verhandelten Fälle wurde die Todesstrafe verhängt.³⁴ In einem der Prozesse gegen SS-Wachmannschaften von Auschwitz standen mit Therese Brandl, Luise Danz,³⁵ Hildegard Lächert, Maria Mandl³⁶ und Alice Orlowski auch fünf

31 Andrzej Pasek, *Przestępstwa okupacyjne w polskim prawie karnym z lat 1944–1956* [Besatzungsverbrechen im polnischen Strafrecht 1944–1956], Wrocław 2002, S. 183; Dmitrów, Niemcy, S. 174.

32 Borodziej, „Hitleristische Verbrechen“, S. 437.

33 Aussage Anna J., 27. 7. 1964, BACh Ludwigsburg B 162/15371.

34 Vgl. Übersicht bei Borodziej, „Hitleristische Verbrechen“, S. 420 f.

35 Vgl. Irith Dublon-Knebel, „Erinnern kann ich mich nur an eine Frau Danz ...“ Die Aufseherin Luise Danz in der Erinnerung ihrer Opfer, in: Gisela Bock (Hrsg.), *Genozid und Geschlecht. Jüdische Frauen im nationalsozialistischen Lagersystem*, Frankfurt a. M. 2005, S. 66–84.

36 Vgl. Monika Müller, Die Oberaufseherin Maria Mandl. Werdegang, Dienstpraxis und Selbstdarstellung nach Kriegsende, in: Erpel (Hrsg.), *Im Gefolge der SS*, S. 48–58.

ehemalige Aufseherinnen vor Gericht. Das NTN verurteilte Therese Brandl und Maria Mandl zum Tode; die übrigen drei erhielten lebenslange bzw. 15-jährige Haftstrafen, kamen jedoch aufgrund von Amnestien im Jahr 1956 (Luise Danz 1957) frei.

Alle anderen Verfahren gegen NS-Kriegsverbrecher fanden zunächst vor eigens zu diesem Zweck errichteten Sonderstrafrgerichten statt.³⁷ Sie waren für Schnellverfahren geschaffen worden, die die Deutschen in den noch nicht befreiten Gebieten von weiteren Verbrechen abhalten und die Erwartungen der polnischen Bevölkerung auf rasche Verurteilung der Täter erfüllen sollten.³⁸ Da jedoch die zeitnahe Abwicklung der Verfahren aufgrund des Mangels an Fachpersonal und der nachkriegsbedingten Ressourcenknappheit nicht vollzogen werden konnte und das Vorhandensein von nur einer Instanz in Friedenszeiten unangemessen erschien, wurden die Sondergerichte im Oktober 1946 wieder aufgelöst und die Fälle den zuständigen Staatsanwaltschaften der Bezirksgerichte übergeben, die Bestandteil der regulären Gerichtsbarkeit waren.³⁹ 3954 Urteile waren bis dahin von den Sonderstrafrgerichten ausgesprochen worden.⁴⁰ 23 von ihnen richteten sich gegen ehemalige KZ-Aufseherinnen: Sechs ehemalige Aufseherinnen aus Stutthof wurden vor dem Sonderstrafrgericht in Gdańsk, 16 ehemalige Aufseherinnen aus Groß-Rosen in Wrocław und eine ehemalige Auschwitz-Aufseherin in Katowice verurteilt.

Die Mehrzahl der Verfahren gegen ehemalige KZ-Aufseherinnen fand vor elf regionalen Bezirksgerichten statt. Wie sich die Zuständigkeit der Gerichte jeweils begründete, bleibt offen. Nicht immer korrelierte der Gerichtsort mit dem Einsatzort der Aufseherinnen. Möglicherweise wurde auf den Wohnort von Zeuginnen Rücksicht genommen. Darauf verweist zumindest die Tatsache, dass 1947 ein Prozess gegen eine ehemalige Groß-Rosener Aufseherin vor dem Bezirksgericht Jelenia Góra abgebrochen und an das Bezirksgericht Kraków übergeben wurde, da alle noch im Land befindlichen Zeuginnen in Kraków und Umgebung wohnten.⁴¹

Als 1950 das polnische Gerichtswesen reformiert und die Gerichtsbarkeit den Wojewodschaftsstrukturen angepasst wurde, war die Strafverfolgung von Aufseherinnen so gut wie abgeschlossen; lediglich zwei einschlägige Urteile sind 1951 und 1952 vor den Wojewodschaftsgerichten in Poznań und Szczecin gefällt worden.⁴²

37 Dekret über die Sonderstrafrgerichte für hitler-faschistische Verbrecher vom 12. September 1944, *Dziennik Ustaw* Nr. 4, S. 21.

38 Kubicki, *Zbrodnie wojenne*, S. 40.

39 Dekret vom 17. Oktober 1946 über die Abschaffung der Sonderstrafrgerichte, *Dziennik Ustaw* Nr. 59, S. 323 f.

40 Kobierska-Motas, *Ekstradycja*, S. 18.

41 Hauptverhandlung im Verfahren Maria A., 29. 8. 1947, AIPN, SO Kr 366.

42 Verfahren gegen Olga W., AIPN, SW Sz 5–6; Verfahren gegen Ursula Gebauer vgl. Kobierska-Motas, *Ekstradycja*, S. 78.

Die „Hauptkommission zur Untersuchung hitleristischer Verbrechen in Polen“

Zur Unterstützung der strafrechtlichen Verfolgung von NS-Tätern wurde 1945 mit der „Hauptkommission zur Untersuchung der deutschen Verbrechen in Polen“ [Główna Komisja Badania Zbrodni Niemieckich w Polsce] ein eigenständiges Ermittlungsorgan innerhalb des Justizministeriums ins Leben gerufen, dessen Aufgabe es war, möglichst umfangreiches Belastungs- und Beweismaterial über die in Polen während der Okkupationszeit von Deutschen begangenen Verbrechen zu sammeln und für den Internationalen Gerichtshof in Nürnberg, für Auslieferungsanträge sowie für die Anklagen vor dem NTN zu verwerten.⁴³ Zudem beschäftigte sich die Hauptkommission bereits früh mit der historischen Erforschung und Dokumentation von NS-Verbrechen auf polnischem Nachkriegsterritorium.

Nach Abschluss der NTN-Prozesse und der Auslieferungen bestand die Kommission in reduzierter Form weiter. Aus Rücksichtnahme auf die Gründung der DDR wurde sie umbenannt: statt Untersuchung der „deutschen Verbrechen“ hieß sie nun „Hauptkommission zur Untersuchung hitleristischer Verbrechen in Polen“. Erst aufgrund der ab den 1960er-Jahren zahlreich eingehenden Rechtshilfeersuchen der Zentralen Stelle in Ludwigsburg wurde die Arbeit der Hauptkommission Ende 1963 reaktiviert. Sie leitete nun Ermittlungsverfahren ein, vernahm in den Jahren 1965–1984 fast 138 841 Zeugen und entschied über die Abgabe von Informationen und Dokumenten an die bundesdeutschen Behörden.⁴⁴

Für die Ermittlungen der in dieser Studie untersuchten Prozesse gegen Groß-Rosener Aufseherinnen vor den Sonderstraf- und Bezirksgerichten hingegen wurden die Akten der Hauptkommission und ihrer regionalen Abteilungen, der Bezirkskommissionen, nicht herangezogen.

Ermittlungen und Zeuginnensuche

Die folgende Beschreibung des Ermittlungsverlaufes und der Zeuginnensuche bezieht sich ausschließlich auf die hier untersuchten Verfahren gegen Groß-Rosener Aufseherinnen. Es ist davon auszugehen, dass sich das Prozedere insbesondere bei den Verfahren vor dem NTN, der – da es sich um das Konzentrations- und Vernichtungslager Auschwitz handelte – gewichtigere Verbrechenskompexe verhandelte und stärker im

43 Stanisław Kaniewski, Die polnische Hauptkommission zur Erforschung von NS-Verbrechen, in: Claudia Kuretsidis-Haider/Winfried S. Garscha, Keine „Abrechnung“: NS-Verbrechen, Justiz und Gesellschaft in Europa nach 1945, Wien 1998, S. 203–206.

44 Ryszard Walczak, Die NS-Verbrechen im Spiegel der Ermittlungen der Hauptkommission, in: Tomasz Kranz (Hrsg.), Die Verbrechen des Nationalsozialismus im Geschichtsbewusstsein und in der historischen Bildung in Deutschland und Polen, Lublin 1998, S. 63–73, hier S. 71.

Blick der Öffentlichkeit stand, erheblich von den straffen und formalisierten Verfahren gegen Groß-Rosener Aufseherinnen unterschied.

Bei Bekanntwerden des Verdachts auf eine Aufseherinnentätigkeit wurden die Betroffenen zunächst von einem Ermittlungsoffizier der *Milicja Obywatelska* (Bürgermiliz) im Kreisamt für Öffentliche Sicherheit (*Powiatowy Urząd Bezpieczeństwa Publicznego*) vernommen. Bestätigte sich bei diesem Verhör der Verdacht, dass die Betroffene Aufseherin in einem Konzentrationslager gewesen war und damit Verbrechen nach dem Augustdekret begangen hatte, wurde die Angelegenheit an die Staatsanwaltschaft übergeben. Eine individuelle Schuld musste nicht weiter festgestellt werden, da sie bei ehemaligen Aufseherinnen durch die (konstruierte) Mitgliedschaft in der SS bereits gegeben war.

Die Sonderstrafgerichte führten keine eigenen Untersuchungen durch; notwendige weitere Vernehmungen übernahm das zuständige Stadtgericht. Das Dekret über die Sonderstrafgerichte sah vor, dass 14 Tage nach Festnahme eine Anklageschrift vorzulegen war; die Verhandlung sollte 48 Stunden später stattfinden. In der Praxis vergingen jedoch aufgrund von Personalknappheit oft Monate zwischen Festnahme und Anklageschrift und weitere Monate, bis es zur Gerichtsverhandlung kam.

Auch wenn der SS-Dienst für eine Verurteilung ausreichte, war die polnische Justiz bemüht, das individuelle Verhalten der Aufseherinnen aufgrund von Häftlingsausagen zu rekonstruieren. Waren keine ehemaligen Häftlinge zu ermitteln, befragten die Untersuchungsbehörden das Jüdische Komitee (*Komitet Żydowski*) in Wrocław über die betreffende Aufseherin, das aber meist keine Informationen liefern konnte.⁴⁵ Aufrufe in Zeitungen, in denen über die Ermittlungen berichtet und nach Zeuginnen gesucht wurde, waren in der Regel erfolgreicher.⁴⁶ Da Niederschlesien aufgrund der geopolitischen Besonderheiten in der unmittelbaren Nachkriegszeit zu einem bevorzugten temporären Ansiedlungsort der aus den Lagern befreiten und entwurzelten Juden und Jüdinnen wurde, war hier die Chance, Zeuginnen ausfindig zu machen, zunächst vergleichsweise gut.⁴⁷ Häufig trat jedoch der Fall ein, dass ehemalige Häftlinge zwar schriftliche Zeugenaussagen abgegeben hatten, aber am Termin der Hauptverhandlung bereits aus Polen ausgereist waren. Aus diesem Grund kam es mehrfach zu Unterbrechungen und Verschiebungen der Hauptverhandlungen, da weitere Zeuginnen ausfindig gemacht werden mussten.⁴⁸

45 So im Fall von Margarete S., Gertrud K., AIPN, SO Wr 70; SO Wr 15 a.

46 Wie zum Beispiel am 2. März 1947 im *Dziennik Zachodni* über die Ermittlungen gegen Else J. und Elfriede V.

47 Bożena Szaynok, *Ludność żydowska na Dolnym Śląsku 1945–50* [Die jüdische Bevölkerung in Niederschlesien 1945–50], Wrocław 2000. Siehe dazu auch Markus Nesselrodt, *Wiederaufbau einer Existenz? Die Darstellung der jüdischen Minderheit im niederschlesischen Dzierżoniów in den Akten des Urząd Bezpieczeństwa von 1949*, Masterarbeit an der Europa-Universität Viadrina, Frankfurt/Oder 2011.

48 Z. B. im Verfahren gegen Erna S. (Langenbielau I), AIPN, SO Św 106.

Verhörmethoden und Entlastungsstrategien

Vergleicht man die Aussagen der ehemaligen Aufseherinnen in den Kreisämtern für Öffentliche Sicherheit mit den später vor Gericht getätigten, fällt eine scharfe Diskrepanz auf. So bezichtigten sich die Beschuldigten in den ersten Verhören durch die *Milicja Obywatelska* häufig in einem unglaublichen, drastischen Wortlaut, Häftlinge geschlagen und misshandelt zu haben.⁴⁹ Elfriede Z., ehemalige Blockführerin im Groß-Rosener Frauenaußenlager Peterswaldau, sagte aus: „Als Lagerführerin gebe ich zu, dass ich jeden Tag zwei bis drei Polinnen bis zur Bewusstlosigkeit schlug. Meine Spezialität waren kranke und schwangere Frauen, sodass vier von ihnen in Folge der Schläge starben.“⁵⁰ Oder: „Ich habe versucht, durch Schläge, Zuteilung von schweren Arbeiten und Hunger möglichst viele Personen zu erledigen.“⁵¹ Meta Z. behauptete vor dem Kreisamt, sie sei Kommandantin im Lager Breslau-Hundsfeld gewesen, obwohl dies nachweisbar nicht der Fall war.⁵²

In vielen Fällen distanzierten sich die Beschuldigten in der Hauptverhandlung von ihren Geständnissen vor dem Kreisamt. Sie gaben an, dass diese Aussagen nicht von ihnen stammten bzw. das Protokoll nicht verlesen worden sei. Es habe sich um ein Kreuzverhör unter Schlägen und Drohungen gehandelt.⁵³

Die drastische Diktion und die zahlreichen Diskrepanzen in den Aussagen lassen die Vermutung zu, dass die Vernehmungen durch die Ermittlungsoffiziere der *Milicja Obywatelska* tatsächlich in einer Atmosphäre von Bedrohung und Einschüchterung durchgeführt wurden. Dies war vor allem der Situation des Sommers und Herbstes 1945 in den Kommissariaten vor Ort geschuldet, die einerseits vom starken Bedürfnis nach Vergeltung und einem harten Durchgreifen gegen deutsche Täter und andererseits von einem akuten Mangel an ausgebildetem Sicherheits- und Verwaltungspersonal in den neu eingegliederten Gebieten geprägt war.

Die Unterlagen enthalten keine Hinweise, dass die Beschuldigten im Vorfeld der Prozesse eine anwaltliche Unterstützung in Anspruch nehmen konnten. Zur Hauptverhandlung bekamen sie einen Pflichtverteidiger zugewiesen. Dass polnische Anwälte diese Arbeit nur ungern übernahmen, zeigt der Antrag eines Anwalts aus Wrocław auf Befreiung vom Amt des Pflichtverteidigers. Angesichts der Vorwürfe gegen die Beschuldigten und des vorliegenden Ermittlungsmaterials müsse er als Angehöriger

49 Ida O., 29. 6. 1945, AIPN, SSKWr 113; Ida H., 13. 9. 1945, AIPN, SO Św 25; Erika G., 23. 9. 1945, AIPN, SSK Wr 48.

50 Aussage Elfriede Z., 24. 10. 1945, AIPN, SSK Wr 233.

51 Aussage Elsa Haim, 24. 10. 1945, ebenda.

52 Aussage Meta Z., 18. 7. 1945, AIPN, GK 210/363.

53 Hauptverhandlung Erika G., 22. 3. 1946, AIPN, SSK Wr 48; Hauptverhandlung Lucja H., 14. 9. 1946, AIPN SSK Wr 259; Hauptverhandlung Martha L., 19. 9. 1946, AIPN, GK 210/198; Hauptverhandlung Elsa Haim, 3. 9. 1946, AIPN, SSK Wr 233.

der polnischen Gesellschaft, die so stark unter den Okkupanten zu leiden gehabt habe, bei der Verteidigung der beiden Frauen gegen seine eigenen Überzeugungen und im Widerspruch zum anwaltlichen Ethikbegriff agieren. Das Gericht lehnte seinen Antrag jedoch ab.⁵⁴

Aufgrund der fehlenden anwaltlichen Beratung im Vorfeld verfolgten die Beschuldigten keine juristisch ausgefeilte Aussagestrategie, sondern bemühten sich, ihr Verhalten nach eigenem Empfinden darzustellen und zu erklären. Die Entlastungsbemühungen konzentrierten sich darauf, die Unfreiwilligkeit der Tätigkeitsaufnahme zu betonen, obwohl dies laut Gesetzeslage nicht relevant war. Die meisten ehemaligen Aufseherinnen gestanden den Einsatz von Gewalt, vor allem Schlägen mit der Hand ins Gesicht, und legitimierten ihn als Teil ihrer Aufgabe, Häftlingsvergehen wie beispielsweise Diebstahl bestrafen zu müssen.

Die Zusammensetzung der Gerichte und die Rolle von Zeuginnen und Verteidigung

Während der in vielen Fällen nur 10- bis 30-minütigen Hauptverhandlung wurden die Beschuldigten und die Zeuginnen erneut gehört. Der Hauptverhandlung wohnten in der Regel der Vorsitzende Richter, zwei Schöffen, der Staatsanwalt, die Angeklagte, Zeuginnen, der Pflichtverteidiger und ein vereidigter Dolmetscher sowie ein Protokollant bei. Der überwiegende Teil der Richter, Staatsanwälte und Verteidiger war noch in der Zwischenkriegszeit ausgebildet worden und sah sich im Allgemeinen rechtsstaatlichen Grundsätzen verpflichtet.⁵⁵ Ausschließlich bei den Schöffen, die vom Landesnationalrat ernannt wurden, galten strenge politische Kriterien. Sie sollten am bewaffneten Kampf gegen die Besatzer oder am zivilen Widerstand teilgenommen haben und sich aktiv am Aufbau des sozialistischen Staats engagieren. Personen, auf denen der Vorwurf der Kollaboration mit den Besatzern oder der Teilnahme an der bürgerlichen Unabhängigkeitsbewegung lastete, waren von diesem Amt ausgeschlossen. Die Schöffen sollten den Eindruck gewährleisten, es sei das „polnische Volk“, das über die „faschistischen Verbrecher“ richte.⁵⁶

Wesentliche Urteilsgrundlage in allen Verfahren gegen Groß-Rosener Aufseherinnen waren „das Handeln zum Schaden von verfolgten Personen“ (Dekret vom 16. Februar 1945) bzw. die „Mitgliedschaft in einer verbrecherischen Organisation“ (Dekret

54 Antrag Bronisław W. an das Sonderstraßgericht Wrocław, 21. 8. 1946, in: Verfahren gegen Elfriede Z. und Else Haim, AIPN, SSK Wr 233, Bl. 19.

55 Dieter Pohl, Sowjetische und polnische Strafverfahren wegen NS-Verbrechen, in: Jürgen Finger/Sven Keller (Hrsg.), Vom Recht zur Geschichte. Akten aus NS-Prozessen als Quellen der Zeitgeschichte, Göttingen 2009, S. 139.

56 Pasek, *Przestępstwa*, S. 183; Dmitrów, *Niemcy*, S. 234.

vom 10. Dezember 1946), die die Mindeststrafe von drei Jahren begründeten. Konnte aufgrund von Zeuginnenaussagen oder Selbstbezeichnungen nachgewiesen werden, dass sich die Angeklagte Misshandlungen im weitesten Sinne (Denunziation, Essensentzug, Strafarbeit, Strafappelle, Peitschen) schuldig gemacht hat, summierte sich die Strafe um weitere Jahre. Todesstrafen ergingen auf Grundlage des Art. 1 des Augustdekrets, wenn individuelle Morde oder die Beteiligung der Frauen an der Durchführung von Selektionen durch Zeugen erwiesen waren.

Dass die Dienstausbübung der Aufseherinnen unter Zwang erfolgte, ließen die Gerichte in der Regel nicht als Entlastungsmoment gelten, da – wie es in einer Urteilsbegründung heißt – für den Aufseherinnendienst nur politisch vom Nationalsozialismus überzeugte Frauen ausgesucht worden seien und allein die Ausübung dieser Funktion bestraft werden müsse. Die Verantwortung für diese Tätigkeit würden alle Mitglieder der Lagerbelegschaft tragen, auch wenn sie zu dieser Arbeit verpflichtet worden seien.⁵⁷ Ausschließlich das Bezirksgericht von Jelenia Góra berücksichtigte den Dienstantritt unter Zwang sowie entlastende Zeugenaussagen so weit, dass es sogar die Mindeststrafe aufhob. Dies lässt sich auf das Engagement der Entlastungszeugin Helena R. zurückführen, die als polnische nichtjüdische Ärztin im Lager Liebau eingesetzt war und die das Gericht als besonders glaubwürdig ansah. Sie belastete nur zwei Liebauer Aufseherinnen schwer. Eine von ihnen erhielt eine Freiheitsstrafe von acht Jahren,⁵⁸ die andere war nicht auffindbar. Sechs weitere wurden freigesprochen, obwohl sie sich zum Teil selbst der Gewaltanwendung bezichtigt hatten oder von anderen belastet worden waren. Anna P. beispielsweise hatte zugegeben, Häftlinge bei der Essensausgabe geschlagen zu haben, wenn sie nicht in der Reihe standen und andere abdrängten. Außerdem sagte eine Zeugin aus, Frau P. habe ihr gegenüber eingeräumt, sich im Lager „nicht erstrangig“ verhalten zu haben; sie habe auf Befehl der Kommandantin Häftlinge gequält.⁵⁹ Helena R. hingegen lobte Anna P. als „menschlich und gut“. Sie habe geholfen, schwangere Frauen zu verstecken, ihnen von ihrer Essensration abgegeben und niemanden geschlagen und gequält. „Die Kommandantin vertraute ihr nicht und meinte, sie sei zu nachsichtig zu uns.“⁶⁰ Das Gericht bescheinigte Anna P. daraufhin, dass sie die faschistischen Verbrechen nicht gutgeheißen, sondern sie im Gegenteil im Rahmen ihrer Möglichkeiten verhindert und erschwert habe, obwohl sie sich damit in Gefahr gebracht habe. Sie sei eine moralisch und ethisch gesunde Person, die sich den Befehlen ihrer verbrecherischen Vorgesetzten widersetzt habe und einen Freispruch verdiene.⁶¹

57 Zum Beispiel Urteilsbegründung Martha K., 27. 6. 1946, AIPN, GK 210/181.

58 Protokoll der Hauptverhandlung gegen Maria A. am 29. 8. 1947, AIPN, SO Kr 366.

59 Aussage Anna P., 23. 8. 1946, Aussage Magda J., 21. 8. 1946, AIPN, SO JG 100.

60 Aussage Helena R., 22. 1. 1947, AIPN, SO JG 100.

61 Urteil Anna P., 21. 3. 1947, AIPN, SO JG 100.

Es ist zwar bekannt, dass Helena R. ihre Aussagen mit ehemaligen Häftlingen abstimmte, unter denen sie sich großer Beliebtheit erfreute.⁶² Allerdings war ihre Perspektive als nichtjüdische Häftlingsärztin, die durch ihre Stellung eine besondere Behandlung seitens der Aufseherinnen erfahren hatte, nicht exemplarisch für die Masse der Häftlinge. In ihrer ersten Aussage hatte sie sogar angegeben, die Revierbaracke nicht verlassen zu haben und daher nicht zu wissen, wie sich die Aufseherinnen außerhalb verhalten hatten.⁶³ Es steht demnach zu vermuten, dass sich die sechs freigesprochenen Aufseherinnen ebenso wie viele andere in einem Grenzbereich von Gewalt und Unterstützung einzelner Häftlinge bewegt hatten – nur profitierten sie von einer besonderen Entlastungszeugin. Der Fall Helena R. ist ein Hinweis darauf, dass Diskussionen über den grundsätzlichen Verzicht auf entlastende Aussagen zugunsten ehemaliger Aufseherinnen, wie sie beispielsweise ehemalige Häftlinge im deutschen und österreichischen Ravensbrück-Komitee führten,⁶⁴ in den polnischen Verfahren keine Rolle spielten.

Die Pflichtverteidiger beschränkten sich in der Regel darauf, um eine milde Strafe zu bitten, setzten sich allerdings nach der Urteilsverkündung mehrmals für Revisionen ein. So hatte das Bezirksgericht Wrocław eine ehemalige Aufseherin aus Breslau am 26. Februar 1947 aufgrund Art. 2 und 4 des Augustdekrets in der Fassung vom 10. Dezember 1946 zu sechs Jahren Haft verurteilt. Ihr Verteidiger beantragte daraufhin die Aufhebung des Urteils mit der Begründung, dass eine Verurteilung nach Art. 2 des Dekrets nicht gerechtfertigt sei, solange das Gericht nicht nachweisen könne, dass die Angeklagte Häftlingen auch tatsächlich Schaden zugefügt habe. Ehemalige Häftlinge, die über das Verhalten der Angeklagten im Lager hätten Auskunft geben können, waren auch nach einer Anfrage an das Jüdische Komitee in Wrocław nicht gefunden worden. Außerdem monierte der Rechtsanwalt, dass keinerlei Beweise für die Zugehörigkeit der Beschuldigten zur SS vorlägen. Das Oberste Gericht in Warschau (mit Sitz in Łódź) folgte der ersten Argumentation, der zweiten nicht, da die Aufseherin ihre SS-Zugehörigkeit in Vernehmungen selbst angegeben habe. Sie hatte formuliert, dass sie von der SS „eingezogen worden“⁶⁵ sei – der Unterschied zwischen SS-Mitgliedschaft und Dienst für die SS spielte für das Oberste Gericht keine Rolle. Es verlangte die Aufhebung des Urteils und eine erneute Verhandlung, die am 31. Oktober 1947 vor dem Bezirksgericht Wrocław stattfand. Nun wurde die Angeklagte ausschließlich aufgrund Art. 4 des Dekrets verurteilt und ihre Strafe auf drei Jahre reduziert.⁶⁶ Auch Ursula G.,

62 Siehe Aussage von Klara Pradelski, Interview 28 496, Visual History Archive des USC Shoah Foundation Institute. Dort ist auch ein Foto von Helena R. zu sehen.

63 Aussage Helena R., 10. 5. 1946, AIPN, SO Kr 366.

64 Siehe Jeanette Toussaint, Die Geschichte einer Fotosammlung, in: Erpel (Hrsg.), Im Gefolge der SS, S. 272–274.

65 Vernehmung Margarete S., 30. 12. 1945 vor dem Amt für Öffentliche Sicherheit, AIPN, GK 298/70–70a.

66 Akten in der Strafsache Margarete S., ebenda.

die in Ravensbrück und den Buchenwalder Außenlagern Elsnig und Kassel Dienst getan hatte, gelang es, im Revisionsverfahren die Herabsetzung ihrer lebenslangen Strafe auf drei Jahre Haft zu erreichen.⁶⁷ Olga W., Aufseherin im Buchenwalder Außenlager Leipzig-Schönefeld, wurde in der Revision vom Obersten Gericht statt zu lebenslänglicher Haft zu 15 Jahren verurteilt.⁶⁸

Gegen die Urteile der Sonderstrafgerichte waren keine Rechtsmittel zugelassen; jedoch war im Fall der Todesstrafe ein Gnadengesuch beim Präsidenten des Landeshochverwaltungsorgans (seit 1947 Staatspräsidenten) Bolesław Bierut möglich. So bat der Pflichtverteidiger für die vom Sonderstrafgericht Wrocław zum Tode verurteilten Elsa Haim und Elfriede Z. um die Umwandlung in eine Gefängnisstrafe. Er begründete dies mit der Sozialisation der Verurteilten im verbrecherischen Hitlerregime, das die Charaktere der deutschen Jugend verdorben und die Menschen zu Verbrechern erzogen habe.⁶⁹ Bierut folgte in seiner Entscheidung den beigefügten Empfehlungen des Sonderstrafgerichts, das Elsa Haim als der Begnadigung unwürdig eingestuft hatte, da sie direkt an den Deportationen von Häftlingen nach Auschwitz beteiligt gewesen sei und wissen musste, dass diese dort getötet würden. Sie habe Häftlinge hungern lassen und geschlagen, obwohl niemand das von ihr verlangt habe. Dass ein anderes Verhalten möglich gewesen wäre, zeige das Beispiel ihrer Vorgängerin, die nach Aussage einer Zeugin einen anständigeren Umgang mit den Häftlingen gepflegt habe.⁷⁰ Haim wurde außerdem angelastet, dass sie in der Hauptverhandlung keine Reue gezeigt habe. Die Verurteilte Z. hingegen sei weniger intelligent als Haim und habe sich von dieser leiten lassen. Auch sie habe sich der Misshandlung und Denunziation von Häftlingen schuldig gemacht, jedoch sei ihre Beteiligung an den Selektionen von Häftlingen nach Auschwitz nicht erwiesen. Sie sei deswegen begnadigungswürdig.⁷¹ Am 17. Oktober 1946 wurde das Urteil gegen Elsa Haim vollstreckt.⁷²

Urteilsbilanz

Zwischen November 1945 und März 1952, mit Schwerpunkt in den Jahren 1946 bis 1948, sind 95 ehemalige Aufseherinnen aus NS-Konzentrationslagern von polnischen Gerichten verurteilt worden. Die durchschnittliche Haftstrafe lag bei fünfeinhalb Jahren, wobei die Strafmaße der Bezirksgerichte und der Sonderstrafgerichte in der

67 Siehe Kobierska-Motas, *Ekstradycja*, S. 78.

68 Siehe Kobierska-Motas, *Członkowie*, S. 165.

69 Bronisław W. an den Präsidenten KRN, 4. 9. 1946, AIPN, SSK Wr 233, Bl. 30.

70 Urteil vom 3. 9. 1946, ebenda, Bl. 28 f.

71 Empfehlungen des Sonderstrafgerichts Wrocław zur Begnadigung von Elsa Haim und Elfriede Z., 3. 9. 1946, ebenda, Bl. 33.

72 Kobierska-Motas, *Członkowie*, S. 46.

Höhe keine wesentlichen Unterschiede aufwiesen. Die Urteile reichten von Freisprüchen bis hin zur Todesstrafe, die an zwölf Aufseherinnen vollstreckt wurde. Insgesamt sind wegen NS-Verbrechen in Polen 767 Personen hingerichtet worden.⁷³

Die ersten Todesurteile gegen ehemalige KZ-Aufseherinnen sprach das Sonderstrafgericht Gdańsk am 31. Mai 1946 im sogenannten ersten Stutthof-Prozess gegen 13 Angehörige der Lagermannschaft aus, zu der auch sechs Aufseherinnen gehörten. Fünf von ihnen wurden zum Tode verurteilt, die sechste erhielt eine Haftstrafe von fünf Jahren.⁷⁴ Die Todesurteile wurden am 4. Juli 1946 auf dem Danziger Hügel Biskupia Górka durch Erhängen öffentlich vollstreckt. Als Henker fungierten elf ehemalige Stutthof-Häftlinge – darunter eine Frau –, die für die Hinrichtung nochmals ihre Häftlingskleidung angelegt hatten.⁷⁵

Bis zur letzten Vollstreckung der Todesstrafe gegen eine ehemalige Aufseherin am 8. Januar 1949⁷⁶ waren sechs weitere Frauen wegen Verbrechen in Konzentrationslagern hingerichtet worden. Insgesamt sind vier Todesurteile durch Bezirksgerichte,⁷⁷ zwei durch den NTN⁷⁸ und sechs durch Sonderstrafgerichte⁷⁹ gefällt worden.

Gnadengesuche für in Polen verurteilte ehemalige Aufseherinnen

Ab den 1950er-Jahren gingen bei den polnischen Justizbehörden und dem polnischen Staatspräsidenten Bolesław Bierut zahlreiche Gnadengesuche für Aufseherinnen ein, die zu längeren Haftstrafen verurteilt worden waren. Die Gesuche wurden in der Regel von Angehörigen der Verurteilten aus beiden Teilen Deutschlands verfasst. Sie hatten sich nicht selten renommierte Institutionen als Unterstützer gesucht, um ihrem Anliegen Gewicht zu verleihen. Familie M. aus Mühlhausen (Thüringen) reichte das Gnadengesuch für ihre Tochter über das Internationale Komitee vom Roten Kreuz in Genf ein.⁸⁰ Der Vater einer Verurteilten, wohnhaft bei Oldenburg, schickte ein Gnadengesuch für seine Tochter über die Berliner Hauptvertretung der Caritas.⁸¹

73 Zahl nach Kulesza, Beitrag, S. 115.

74 Verfahren gegen Jenny Barkmann, Elisabeth Becker, Erna Beilhardt, Wanda Klaff, Eva Paradies, Gerda Steinhoff, AIPN, SSK Gd 417–423.

75 Die Zeitschrift *Przekrój* dokumentierte die Hinrichtung in einer ausführlichen Fotoreportage: Polska karze zbrodniarzy wojennych, in: *Przekrój*, Nr. 66, 14.–20. 7. 1946.

76 Kobierska-Motas, Członkowie, S. 92.

77 Zu Luise Buch, Else Ehrich, Elisabeth Lüpke siehe Kobierska-Motas, Członkowie, S. 16, 27, 92; Verfahren gegen Margarete Zapor, AIPN, SO Gl 90.

78 Maria Mandl und Therese Brandl, siehe Urteil gegen Liebehenschel und andere vom 22. 12. 1947, AIPN, GK 196/168 (NTN 168).

79 Stutthof-Prozess, siehe AIPN, SSKGd 417–423; Verfahren gegen Elsa Haim, ebenda, SSKWr 233.

80 Gnadengesuch für Margarete M., 15. 3. 1951, AIPN, SO Św 9.

81 Gnadengesuch für Hildegard L., 25. 4. 1951, ebenda, SSK Wr 29.

Auch hochrangige DDR-Kirchenvertreter wie der Propst zu Magdeburg stellten sich für Gnadengesuche zugunsten ehemaliger Aufseherinnen zur Verfügung.⁸²

Eine Auswertung der Schriftstücke macht deutlich, welche Argumente die Angehörigen für eine vorzeitige Freilassung der Inhaftierten als erfolgversprechend ansahen. Der am häufigsten genannte Grund war die Pflegebedürftigkeit oder die erdrückende soziale Lage der Eltern. Viele von ihnen hatten durch die Flucht aus Niederschlesien ihren Besitz verloren und mussten im fortgeschrittenen Alter ein neues Leben aufbauen; ihnen fehlte die Arbeitskraft ihrer Tochter, und mehrere gaben an, mit der dauerhaften Versorgung eines oder mehrerer Kinder ihrer Tochter überfordert zu sein.⁸³ Ein weiterer Argumentationsstrang betraf den Zwang, unter dem die Verurteilten Aufseherinnen geworden seien: Die jungen Frauen seien zu einer Zeit rekrutiert worden, so eine Mutter mit Bezug auf den 20. Juli 1944, da das NS-Regime jeglichen Widerstand mit den schärfsten Mitteln bekämpft habe: „Was blieb da einem 24jährigen Mädchen anderes übrig, als sich dem Befehl zu fügen?“⁸⁴ Ähnliche Begründungen – der Dienstantritt unter Zwang, die Befehlsbindung, das Wohlverhalten gegenüber Häftlingen unter hohem persönlichen Risiko sowie die durch die Inhaftierung bedingte materielle Notlage der Familie – finden sich auch in Gnadengesuchen von Kriegsverbrechern, die beispielsweise in der amerikanischen Besatzungszone verurteilt worden waren.⁸⁵

Viele Gnadengesuche kennzeichnete außerdem eine immanente Kritik an der Verhältnismäßigkeit der Strafe. So schrieb der Propst zu Magdeburg im Namen des Ehemanns einer Aufseherin: „Wenn sie in ihrem Dienst als Aufseherin gefehlt hat, so glaube ich, darauf hinweisen zu dürfen, daß drei Jahre Haft dafür genug Strafe sind.“⁸⁶ Eine Angehörige aus dem Kreis Wolmirstedt (DDR) hielt es angesichts der Freilassung der Kriegsgefangenen durch die Sowjetunion 1955 für unangemessen, dass sich ihre Schwester ein Jahr später immer noch in polnischer Haft befand: „Sollte das nicht möglich sein, was bei der Sowjetunion schon geschehen ist? Man hat dort alle Kriegsverbrecher begnadigt und entlassen. Wenn man bedenkt, dass da manche Menschenleben auf dem Gewissen haben, was doch bei meiner Schwester nicht zutrifft.“⁸⁷

Lebten die Angehörigen in der DDR, fehlte nicht selten ein Hinweis auf die Zusammengehörigkeit der beiden Länder im sozialistischen Staatenbund und die Bereitschaft, sich für den Sozialismus zu engagieren: „Die Befreundung unserer beiden Länder müsste doch zum Anlass genommen werden, um meiner schwergeprüften

82 Gnadengesuch für Frieda H., 20. 10. 1948, ebenda, SO Św 129.

83 Gnadengesuch für Helene S., 27. 4. 1949, ebenda.

84 Ebenda.

85 Vgl. Robert Sigel, Gnadengesuche und Gnadenerlasse. Kriegsverbrecher in der amerikanischen Besatzungszone, in: Dachauer Hefte 10 (1994), S. 214–224.

86 Gnadengesuch für Frieda H., 20. 10. 1948, AIPN, SO Św 9.

87 Schreiben Helene K. an Zawadzki, 12. 1. 1956, AIPN, SSK Wr 233.

Schwester die Freiheit zu schenken.“⁸⁸ Gertrud K schrieb in ihrem Gnadengesuch: „Ich weiß, dass das deutsche Volk genau wie das befreundete polnische Volk ein gemeinsames Ziel anstreben: den Aufbau unserer durch den Krieg zerstörten Länder, zur Sicherung des Friedens auf der ganzen Welt, zur Vertiefung der Freundschaft zwischen unseren Völkern auf der Grundlage des proletarischen Internationalismus. Daran möchte ich mich beteiligen. Während meines 7monatigen Aufenthalts im Gefängnis habe ich meinen Fehler eingesehen und fühle Reue und Bedauern. Ich möchte möglichst schnell in mein Land zurück, meine ganze Familie lebt in der DDR. Ich will in die Reihen einer fortschrittlichen Gesellschaft zurückkehren und mich mit ehrlicher Arbeit für die begangenen Verbrechen rehabilitieren.“⁸⁹

Ob die vorgebrachten Beteuerungen das tatsächliche Selbstbild der ehemaligen Aufseherinnen widerspiegeln, lässt sich nicht klären. Aufgrund fehlender Egodokumente gibt es kaum Erkenntnisse, wie die polnische Strafverfolgung von den Betroffenen und ihren in Ost- und Westdeutschland lebenden Angehörigen tatsächlich eingeschätzt wurde und wie die individuellen und familiären Auseinandersetzungen mit der polnischen Haft verliefen. Wurden ehemals Verurteilte im Rahmen von neuerlichen Ermittlungen in der Bundesrepublik befragt, erwähnten sie die polnische Haft nicht oder nur knapp.⁹⁰ Lediglich eine bewertete die damaligen Anklagepunkte als ungerechtfertigt.⁹¹

Mehrere Gnadengesuche deuten darauf, dass sich die Aufseherinnen selbst nicht als Täterinnen sahen, sondern als Opfer des Krieges und der politischen Verhältnisse. So schrieb Elfriede Zelinka: „Jeder Krieg verlangt Opfer, auch von solch kleinen Lichtern wie mir. Aber nun ist schon das 9. Friedensjahr, der polnische Staat ist zu Kräften gekommen, warum braucht der noch mein Opfer? Als ich verhaftet wurde, war ich 23 Jahre jung. Jetzt bin ich alt und krank und kriege die nackte Verzweiflung, wenn ich daran denke, wie viele Jahre noch vor mir liegen.“ Elisabeth K., die aufgrund schwerwiegender Belastungsaussagen von Überlebenden zu 15 Jahren Haft verurteilt wurde, fragte in ihrem Gnadengesuch an den polnischen Präsidenten, wie es denn sein könne, dass sie so eine harte Strafe für die Fehler der faschistischen Regierung absitzen müsse: „Ich muss das ausbaden, obwohl ich von Hause aus eine arme Arbeiterin bin.“⁹²

Die Aufseherinnen, zu einem Großteil aus den Betrieben zur Bewachung der Zwangsarbeit von KZ-Häftlingen rekrutiert, bewerteten ihre Tätigkeit als kriegsbedingt notwendig und gerechtfertigt, die im Rahmen der Aufgabenstellung unter Anwendung von Gewalt zu erledigen gewesen sei. Sie empfanden sich nun sowohl als

88 Ebenda.

89 Gnadengesuch von Gertrud K., 26. 3. 1954, AIPN, So Św 98.

90 Aussage Philomena F., 29. 1. 1976, BArch Ludwigsburg, B 162/15842, Aussage Meta Z., 19. und 20. 11. 1969, ebenda, B 162/20494, Ida G., Aussage 24. 3. 1971, ebenda, B 162/21083.

91 Helene P., 16. 12. 1975, ebenda, B 162/15842.

92 Gnadengesuch Elisabeth K., 28. 8. 1947, AIPN, SO Św 43.

Opfer der NS-Herrschaft als auch der Nachkriegssiegerjustiz. Immerhin, so Elfriede Zelinka in ihrem Gnadengesuch, habe sie drei Dinge in der polnischen Haft gelernt: „Überall gibt es Menschen. Ich habe polnisch gelernt und nähen gelernt. Dafür bin ich dankbar.“⁹³

Die ersten Aufseherinnen verließen 1949 die polnischen Gefängnisse, die letzten aktenkundigen Entlassungen fanden im Rahmen von Amnestien im Jahr 1957 statt.

Resümee

Um die polnische Strafverfolgung gegen ehemalige KZ-Aufseherinnen zu kontextualisieren, lohnt sich ein Vergleich mit der Rechtsprechung in anderen Ländern und Kontexten. Hier kann auf eine Vergleichsuntersuchung zur Strafverfolgung ehemaliger Groß-Rosener Aufseherinnen zurückgegriffen werden.⁹⁴ Dabei ist zunächst festzustellen, dass aufgrund der beschriebenen geopolitischen Besonderheiten drei Viertel der strafrechtlich verfolgten ehemaligen Groß-Rosener Aufseherinnen in Polen und der Tschechoslowakei vor Gericht standen. In beiden Ländern war die Übernahme der Lagerstandorte durch tschechische (im Sudetengebiet) und polnische Verwaltung (in Niederschlesien) ausschlaggebend für die hohen Zugriffsraten. Entsprechend weniger ehemalige Groß-Rosener Aufseherinnen mussten sich vor alliierten Gerichten, Spruchkammern oder der ost- bzw. westdeutschen Justiz verantworten. In der unmittelbaren Nachkriegszeit unterschieden sich die Rechtsgrundlagen in den Besatzungszonen (Kontrollratsgesetz Nr. 10 und Kontrollratsdirektive Nr. 38) nur wenig vom polnischen Augustdekret in der Fassung vom 16. Februar 1945. In beiden Fällen reichte ein Nachweis des KZ-Dienstes für eine Verurteilung aus. Die für den Aufseherinnendienst vorgesehenen Strafmaße waren in ihrer Höhe abhängig vom Nachweis individueller Grausamkeiten. Dennoch fielen die Urteile in den Spruchkammer- und regulären Gerichtsverfahren in den Besatzungszonen bzw. in den beiden deutschen Staaten deutlich milder aus als die polnischen Urteile, die sich in ihrer Höhe an die Urteile der Sowjetischen Militärtribunale und der Außerordentlichen Volksgerichtshöfe in der Tschechoslowakei anlehnten. Da sich die Taten und daher die Straftatbestände der Groß-Rosener Aufseherinnen in der Regel nicht stark unterschieden, erscheint es offensichtlich, dass der Verfolgungswille der ost- und westdeutschen Justizbehörden gegen ehemalige Aufseherinnen geringer war.⁹⁵ Hinzu kommt, dass sich an den ost-

93 Gnadengesuch Elfriede Z. an den Generalstaatsanwalt in Warschau, 16. 5. 1954, AIPN, SSK Wr 233.

94 Rudorff, Frauen in den Außenlagern des Konzentrationslagers Groß-Rosen, S. 353–388.

95 Dies zeigen auch andere Untersuchungen zur ost- und westdeutschen Strafverfolgung von Aufseherinnen, vgl. Insa Eschebach, NS-Prozesse in der sowjetischen Besatzungszone und der DDR. Einige Überlegungen zu den Strafverfahrensakten ehemaliger SS-Aufseherinnen des Frauenkonzentrationslagers Ravensbrück, in: Beiträge zur Geschichte der nationalsozialistischen Verfolgung in

und westdeutschen Gerichtsstandorten die Suche nach Zeuginnen wesentlich schwieriger gestaltete als bei den polnischen und tschechischen Verfahren, die sich örtlich und zeitlich näher am Geschehen befanden. Insgesamt hing es also stark vom Aufenthaltsort sowie dem Zeitpunkt und Ort der Festnahme und dem Vorhandensein von Zeuginnen ab, ob und wie Aufseherinnen für ihre Tätigkeit zur Rechenschaft gezogen wurden.

Um die polnische Rechtsprechung gegenüber Aufseherinnen in den größeren Kontext der polnischen NS-Strafverfolgung einordnen zu können, wären weitere Vergleichsuntersuchungen nötig. Hier besteht noch starker Forschungsbedarf sowohl in Bezug auf die Rechtsprechung gegenüber Aufseherinnen der anderen Lagerkomplexe als auch gegenüber männlichem Wachpersonal der Konzentrationslager. Mögliche Vergleichsmaßstäbe wären hierbei ebenfalls die Zugriffsformen, die Initiierung und Abwicklung von Auslieferungsverfahren, die Prozesse und Urteilspraxis sowie die Handhabung von Gnadengesuchen. Die besondere Bedeutung der Verfahren vor dem NTN ist ebenso wenig bearbeitet wie die Frage nach der Wirksamkeit der Kategorie Geschlecht in den polnischen Prozessen oder eine Analyse der öffentlichen Wahrnehmung der polnischen Prozesse in Polen und in den Besatzungszonen bzw. deutschen Staaten.

Neben der Beschäftigung mit Fragen der juristischen Aufarbeitung von NS-Verbrechen sind die Unterlagen der polnischen Strafverfolgung gegen KZ-Aufseherinnen auch für die Konzentrationslagerforschung von einigem Interesse, denn hier liegen zum Teil recht ausführliche und vor allem sehr zeitnahe Aussagen ehemaliger Häftlinge und Aufseherinnen zu ihren Lagererfahrungen und -wahrnehmungen vor, die bisher nicht ausreichend ausgewertet worden sind.

Women as victims of war crimes

by Wolfgang Form

Wed., 23 June 2021, 12:00 – 13:00

Abstract:

As long as there are armed conflicts, civilians in particular suffer from their effects. This applies in especially to sexualized violence against women. The international efforts to establish rules for dealing with combatants and civilians since the second half of the 19th century were already concerned with protecting women from rape, sexual humiliation and other forms of sexual violence. Already after the 1st World War, the foreboding of such crimes was demanded – but without practical success. This changed only hesitantly with the punishment programmes of the Allies after the end of World War 2. It is true that there were trials in which sexualized violence came before the courts. However, such trials were not to be found in all regions of the world and there can be no talk of comprehensive criminal prosecution yet. Since the 1990s, the prosecution of sexualized violence has been on the rise and is clearly more present in today's international criminal law.

Article:

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The Prosecution of Gender-based Sexualized Violence in War

International Humanitarian Law
Human Rights Law,
UN Ad hoc Tribunals,
and the
International Criminal Court

A Resource Manual

February 2009

This is the third revised and supplemented edition of medica mondiale's Resource Manual on the prosecution of sexualized violence in armed conflict. The first issue was finalized in autumn 2006, the second September 2007. The Manual intends to lay the foundation for a continuously growing documentation of international norms on and legal responses to sexualized war violence.

The manual intends to be a general source of information for women activists not specifically trained in law and can be used as a tool for training purposes.

It will be supplemented and updated on an annual basis. Proposals for supplementation of any kind are most welcome.

medica mondiale e.V.

Hülchrather Straße 4

D-50670 Köln (Cologne), Germany

Fon: #49.(0)221.931898-0

Fax: #40.(0)221.931898-1

info@medicamondiale.org

www.medicamondiale.org

Proposals for supplementation can be sent directly to:

Gabi Mischkowski: gmischkowski@medicamondiale.org

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Section I

Legitimate Woman-stealing in War

Ancient Times (Examples)

Rape was considered to be a property crime against men or family, and as legitimate booty in war.

Mosaic Law:

The Bible, Deuteronomy 20.13: “and when the LORD your God gives it into your hand you shall put all its males to the sword, 14: but the women and the little ones, the cattle, and everything else in the city, all its spoil, you shall take as booty for yourselves; and you shall enjoy the spoil of your enemies, which the LORD your God has given you.”

Homer's Iliad, Book 1 and 9:

During the Trojan War, the Spartan besiegers captured Trojan women dividing them among each other. The quarrel over two of them between King Agamemnon and the famous warrior Achilles nearly resulted in a defeat of the Spartans.

European Middle Ages (Example)

Trial of Sir Peter Hagenbach 1474:

The trial against Sir Peter Hagenbach, a knight serving Charles the Bold, Duke of Burgundy, is said to be the first known international military court. At the beginning of the Burgundian Wars, Hagenbach tried in vain to crush the rebellion of several independent cities against Burgundy. For the reign of terror he instituted in one of these cities he was tried and sentenced to death. The charges explicitly included rape committed by his soldiers. However, Hagenbach was not accused of the crimes as such but of having committed them in an *undeclared* war. Had he properly declared war all acts would have been proper according to contemporary law, including rape.

Sources:

The Holy Bible: <http://etext.virginia.edu/rsv.browse.html>

The Iliad: www.perseus.tufts.edu/cgi-bin/ptext?doc=Perseus%3Aabo%3Atlg%2C0012%2C001&query=1%3A1

Hagenbach: http://en.wikipedia.org/wiki/Charles_the_Bold

Section II

First Laws of War Prohibiting Rape

Examples:

European Middle Ages

Decree of Richard II of England (1385):

The 24 “Articles of War” by Richard II belong to the earliest documents on the regulation of war activities and the conduct of soldiers. One of them states:

“That none be so hardy as to ... **force any woman**, upon pain of being hanged.”

Bilateral Treaties

Treaty of “Amity and Commerce” between the United States and Prussia (1785):

The treaty stipulates:

“[i]f war should arise between the two contracting parties ... **all women and children** ... **shall not be molested** in their persons.”

The Mexican War

General Winfield Scott’s General Orders No 20 (1847):

Art. 2 provided for the punishment of:

“Assassination; murder; malicious stabbing or maiming; **rape**; malicious assault and battery; robbery; theft; the wanton desecration of churches, cemeteries of other religious edifices and fixtures; and the destruction, except by order of a superior officer, of public or private property....”

The America Civil War

Lieber Code (1863):

“Instructions for the Government of the United States in the Field by Order of the Secretary of War.” The Lieber Code is said to be the first codification of international customary laws of land warfare. It was drafted by Francis Lieber during the American Civil War (1861-65) and became the official U.S. Army regulation guide on the laws of land warfare.

Art. 37: The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; ... the persons of the inhabitants, especially those of women: and the **sacredness of domestic relations**. Offenses to the contrary shall be rigorously punished.

Art. 44: All wanton violence against persons in the invaded country, ...all **rape**, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.

Art. 47: Crimes punishable by all penal codes, such as arson, murder, maiming assaults, highway robbery, theft, burglary, fraud, forgery, and **rape**, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred.

The Lieber Code formed the basis of the Hague Conventions on Land Warfare 1899 and 1907.

Sources:

Kelly Askin, War Crimes Against Women. Prosecution in International War Crimes Tribunals, Kluwer Law International 1997, Chapter I

Lieber Codes: <http://www.civilwarhome.com/liebercode.htm>

Section III

Protection against War Rape in International Humanitarian and Human Rights Law

International Humanitarian Law and International Human Rights Law are complementary. Humanitarian Law applies in situations of armed conflict restricting war fare and imposing duties on all parties to a conflict. Human Rights Law is tailored primarily for peacetime and aims to protect individuals from arbitrary actions by their own governments. While the first aims to protect people who do not or are no longer taking part in hostilities, the latter applies to everyone without distinction between war and peace. However, some human rights treaties permit governments to derogate from certain rights in situations of public emergency. No such derogations are permitted under International Humanitarian Law because it was conceived for emergency situations, namely armed conflict.

International Humanitarian Law forms the basis of International Criminal Law. In practice, international criminal courts also refer to Human Rights Law where it was established through international recognition as customary law.

A. International Humanitarian Law

International Humanitarian Law (IHL) or the “Law of War” constitutes a set of international rules in times of armed conflict to restrict the means and methods of warfare and to protect civilians and soldiers who are no longer taking part in the hostilities. They do not restrict the right of sovereign states to go to war.

IHL is based on the Hague Conventions and the Geneva Conventions drawing their names from the cities where each was initially codified. Both form two of the major pillars of today’s International Criminal Law.

The Hague Conventions of 1899 and 1907:

The Hague Convention establishes the rights and obligations of belligerents in the conduct of military operations, and limits the means of harming the enemy. The Hague Conventions apply to *international* armed conflicts only.

Rape is not named explicitly. The protected goods are “family honor and rights”:

Art 46: “**family honor and rights**, the lives of persons, and private property, as well as religious convictions and practice must be respected”

The Four Geneva Conventions (1949)

The Geneva Convention of 1864 dealt exclusively with care for wounded soldiers. In 1949 the Convention was revised and expanded

- on wounded soldiers on the battlefield (1st Convention)
- on wounded and shipwrecked at sea (2nd Convention)
- on prisoners of war (3rd Convention)
- on civilians under enemy control (4th Convention)

With the exception of Common Art. 3 the Conventions apply to *international* armed conflicts (including wars of national liberation). Art. 3, common to all four Conventions, sets a minimum humanitarian standard in the treatment of civilians and non-combatants in *non-international* armed conflicts and prohibits:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Rape and forced prostitution are named explicitly only in the 4th Convention. The protected good is female honor.

Art 27 of 4th convention: “Women shall be especially protected against any **attack on their honor**, in particular against **rape, enforced prostitution**, or any form of **indecent assault**.”

The Geneva Conventions distinguish between “prohibited acts” and “grave breaches”. Only “**grave breaches**” fall under universal jurisdiction and individual responsibility. (art. 49f of 1st Conv., art. 50f of 2nd Conv., art. 129f of 3rd Conv., art. 146f of 4th Conv.), i.e.:

- Willful killing, torture or inhuman treatment
- Willfully causing great suffering or serious injury to body or health
- Extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly
- Compelling a prisoner of war or civilian to serve in the forces of the hostile power

- Willfully depriving a prisoner of war or protected civilian of the rights of a fair and regular trial
- Unlawful deportation or transfer of a protected civilian
- Unlawful confinement of a protected civilian

The Geneva Conventions have been acceded to by 194 States and enjoy universal acceptance. However, only **“grave breaches”** fall under the principle of universal jurisdiction, i.e. they **must be prosecuted in all times and all places** by States in their own courts, irrespective of the nationality of the perpetrator or the place where the offense was committed.

Art. 49., 1st Conv.: The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention (...).

Until the late 1990ties **rape was not considered as a “grave breach”** of the Geneva Conventions. The first conviction of rape as torture and thus as a “grave breach” took place in 1998 before the International Criminal Court for the Former Yugoslavia. (see Section VI, A. III.)

“Grave breaches” also constitute the core of **“war crimes”**, supplemented in 1977 by two Additional Protocols.

Additional Protocols of the Geneva Conventions (1977):

Rape and enforced prostitution are explicitly named in both Additional Protocols.

Art. 75, Prot. I prohibits for *international* armed conflicts

“outrages upon personal dignity, in particular humiliating and degrading treatment, **rape, enforced prostitution** and any form of indecent assault”

Art 4, Prot. II prohibits the same for *internal* armed conflicts

Chapter II stipulates special measures for women and children. Art. 76 calls for protection of women:

1. Women shall be the object of special respect and shall be protected in particular against **rape, forced prostitution** and any other form of indecent assault.
2. Pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority.
3. To the maximum extent feasible, the Parties to the conflict shall endeavour to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women.

B. International Human Rights Law

The following list is not exhausting. It intends to highlight provisions referring to gender and/or sexualized violence or to mark their absence.

I. Universal instruments

Universal Declaration of Human Rights (1948)

Art. 2 prohibits discrimination based on sex:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, **without distinction of any kind**, such as race, colour, **sex**, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Convention on the Prevention and Punishment of Genocide (1948):

Art. 2 defines Genocide as

“acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group”.

Art 3 enumerates the following “acts”:

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

Rape is not mentioned, and genocide on the basis of gender may not warrant protection within this definition.

Art. 6 limits prosecution of persons charged with genocide only to either states in the territory of which the act was committed or to international penal tribunals.

In practice, genocide falls under universal jurisdiction and must be prosecuted by any state.

Rape was the first time convicted as genocide in 1994 before the International Criminal Tribunal for Rwanda. (See Section VI, B.)

Slavery Convention (1927)

Art. 1 of the Convention defines slavery as

“the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”

Sexualized forms of enslavement are not mentioned.

Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery (1956)

Art. 1 of the Supplementary Convention expands the definition of slavery, among others, to

(c) Any institution or practice whereby:

(i) **A woman**, without the right to refuse, is **promised or given in marriage on payment** of a consideration in money or in kind to her parents, guardian, family or any other person or group; or

(ii) The husband of a woman, his family, or his clan, has the **right to transfer her to another person for value** received or otherwise; or

(iii) **A woman** on the death of her husband is **liable to be inherited by another person**;

(d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labor.

International Covenant on Civil and Political Rights (1966)

The Convention and protects the liberty and the security of persons

“without distinction of any kind, such as race, colour, **sex**, language, religion, political or other opinion, national or social origin, property, birth or other status.” (Art. 2)

Art. 7. and 8 prohibit torture, cruel, inhumane or degrading treatment or punishment as well as slavery. Rape is not mentioned.

Convention on the Elimination of all forms of Discrimination Against Women (1981)

The Convention aims to ensure women’s equal access to, and equal opportunities in, political and public life as well as education, health and employment.

Art. 1 defines discrimination against women as

“any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and

women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

Art. 6 requires States Parties to

“take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”

Neither rape nor any other form of sexualized violence against women are mentioned.

Art. 17 stipulated the establishment of the United Nations **Commission on the Elimination of Discrimination against Women (CEDAW)**

“for the purpose of considering the progress made in the implementation of the present Convention”.

In 1992 the Commission published a “General Recommendation” addressing for the first time the link between “discrimination against women, gender-based violence, and violations of human rights and fundamental freedoms”:

“Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.”

Art. 16 of the “Recommendations” stated that

“[w]ars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which require specific protective and punitive measures.”

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Art. 1 defines torture as

“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

The Convention does not specify the “acts” inflicting pain or suffering and does not mention rape or any other form of sexualized violence.

II. Regional Instruments

European Convention on Human Rights (1950)

Art.14 . prohibits discrimination:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured **without discrimination on any ground** such as **sex**, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other.

Art. 19 stipulates the establishment of the **European Commission of Human Rights** and the **European Court of Human Rights**. Until Protocol 11, which came into force in 1998, individuals did not have direct access to the European Court; they had to apply to the Commission, which then decided whether to launch a case in the Court. Protocol 11 abolished the Commission, enlarged the Court, and allowed individuals to take cases directly to it.

The Court has jurisdiction over breaches of the provisions of the European Convention on Human Rights and the protocols thereto. State Parties can refer cases to the Court, individuals, non-governmental organizations or group of individuals can bring in applications. However, the court may only deal with the matter after all domestic remedies have been exhausted.

American Convention on Human Rights (1969)

Art. 1 and 2 of the Convention read as follows:

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, **without any discrimination** for reasons of race, color, **sex**, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

2. For the purposes of this Convention, "person" means every human being.

Art. 6.1 prohibits slave trade and trafficking:

No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the **slave trade and traffic in women**.

Art 17.3 prohibits forced marriages:

No marriage shall be entered into without the free and full consent of the intending spouses.

The Convention was adopted by the nations of the Americas meeting in San Jose, Costa Rica, in 1969 and came into force in 1978. The bodies responsible for overseeing compliance with the Convention are the Inter-American

Commission on Human Rights and the Inter-American Court of Human Rights, both of which are organs of the Organization of American States (OAS).

The main task of the **Inter-American Commission of Human Rights** (IACHR) is to promote the observance and defence of human rights in the Americas, in particular by

- Receiving, analyzing, and investigating individual petitions alleging violations of the Convention
- Monitoring the human rights situation in OAS's member states and publishing country-specific reports
- Conduction on-site visits to investigate specific cases or general situation
- Raising awareness and issuing recommendations to member states
- Referring cases to the Inter-American Court of Human Rights, and litigating those cases before the court

The IACHR established three specialized monitoring mandates, among them the **Special Rapporteur on the Rights of Women**.

Cases to the **Inter-American Court of Human Rights** can be referred by either the Commission or a state party, but not directly by individuals.

African Charter of Human and Peoples' Rights (1981)

The Charter was adopted 1981 by the Organization of African Unity (OAU) and came into effect in 1986. Oversight and interpretation of the Charter is tasked to the African Commission on Human and Peoples' Rights, set up in 1987. In 1998 the creation of an African Court on Human and Peoples' Rights was decided in a protocol to the Charter. It's first judges were elected in 2006.

Art. 2 reads:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter **without distinction of any kind** such as race, ethnic group, colour, **sex**, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

Art 18.3 confirms:

The State shall ensure the **elimination of every discrimination against women** and also **ensure the protection of the rights of women** and the child as stipulated in international declarations and conventions.

The African Commission on Human and Peoples' Rights is tasked with the promotion and protection of human and peoples' rights as well as with the interpretation of the Charter and the preparation of cases for submission to the Court's jurisdiction.

The Commission has 6 specialized mechanisms, among them the **Special Rapporteur for the Rights of Women in Africa**.

Cairo Declaration of Human Rights

In 1990 the Islamic Conference of Foreign Ministers adopted the **Cairo Declaration of Human Rights** subjecting all rights and freedoms to the Islamic Shariah. The Declaration was officially endorsed by the Organization of the Islamic Conference in 2000.

Art. 1(a) prohibits discrimination based on sex:

All human beings form one family whose members are united by submission to God and descent from Adam. All men are equal in terms of basic human dignity and basic obligations and responsibilities, **without any discrimination** on the grounds of race, colour, language, **sex**, religious belief, political affiliation, social status or other considerations. True faith is the guarantee for enhancing such dignity along the path to human perfection.

Art. 6(a) stipulates:

(a) **Woman is equal to man in human dignity**, and has rights to enjoy as well as duties to perform; she has her own civil entity and financial independence, and the right to retain her name and lineage.

(b) The husband is responsible for the support and welfare of the family.

Arab Charter on Human Rights (1994)

In 1994 the League of Arab States adopted the **Arab Charter of Human Rights** while reaffirming the Charter of the United Nations, the Universal Declaration of Human Rights, the UN International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights and the Cairo Declaration on Human Rights in Islam.

Article 2 stipulates:

Each State Party to the present Charter undertakes to ensure to all individuals within its territory and subject to its Jurisdiction the right to enjoy all the rights and freedoms recognized herein, **without any distinction** on grounds of race, colour, **sex**, language, religion, political opinion, national or social origin, property, birth or other status and **without any discrimination between men and women**.

The revision of the Charter in 2004 is not yet in force. There is no English version available. The Charter now explicitly prohibits

- trafficking in human beings for the purposes of prostitution or sexual exploitation, exploitation of the prostitution of others (art. 10)
- all forms of violence or abuse within the family, in particular against women and children (art. 33)

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Section IV

UN Declarations on Women in Armed Conflict

Declaration on the Protection of Women and Children in Emergency in Armed Conflict (1974)

The declaration identifies women and children as “most vulnerable members of the population” during armed conflict. Art. 5 defined as a criminal act:

“[a]ll forms of repression and cruel and inhuman treatment of women and children, including imprisonment, torture, shooting, mass arrests, collective punishment, destruction of dwellings and forcible eviction, committed by belligerents in the course of military operations or in occupied territories shall be considered criminal.”

Rape is not expressly mentioned as a prohibited act.

Declaration on the Elimination of Violence against Women (1993)

The CEDAW Recommendations from 1992 (see above) formed the basis of the declaration adopted by the UN General Assembly end of 1993.

Art. 1 defined violence against women as

“Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such act, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.”

Art: 2 identified three main areas of gender-based violence, including rape, sexual harassment and abuse: the family, the community, and violence perpetrated or condoned by the State.

The declaration asserted that violence against women is a

“manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men”

The declaration recognized that women in conflict situations are especially vulnerable to violence.

No enforcement mechanisms or penal sanctions were established

Vienna Declaration and Action Program (1993)

The Vienna Declaration, following the World Conference on Human Rights in Vienna 1993 stated that

"violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law".

Art. 18 declared:

"The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community.

Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated. This can be achieved by legal measures and through national action and international cooperation in such fields as economic and social development, education, safe maternity and health care, and social support.

The human rights of women should form an integral part of the United Nations human rights activities, including the promotion of all human rights instruments relating to women."

With Art. 28 a UN body addressed for the first time systematic rape in war:

"The World Conference on Human Rights expresses its dismay at massive violations of human rights especially in the form of genocide, "ethnic cleansing" and systematic rape of women in war situations, creating mass exodus of refugees and displaced persons. While strongly condemning such abhorrent practices it reiterates the call that perpetrators of such crimes be punished and such practices immediately stopped."

Special Rapporteur on Violence Against Women

Following the Vienna Declaration the Human Rights Commission appointed a Special Rapporteur on Violence against Women to

(a) seek and receive information on violence against women, its causes and its consequences from Governments, treaty bodies, specialized agencies, other special rapporteurs responsible for various human rights questions and intergovernmental and non-governmental organizations, including women's organizations, and to respond effectively to such information;

(b) recommend measures, ways and means, at the national, regional and international levels, to eliminate violence against women and its causes, and to remedy its consequences;

Until 2006 the Special Rapporteur issued over 50 reports.

Special Rapporteur on Systematic Rape and Sexual Slavery and Slavery-like Practices during Wartime

In 1996, the Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed a Special Rapporteur in reaction to the increasing international recognition of the scope and character of the Japanese military “comfort stations” system. The Special Rapporteur identified three main purposes of the mandate:

- to reiterate the call for a response to the use of sexual violence and sexual slavery during armed conflict.
- to emphasize the true nature and extent of the harms suffered by women who are raped, sexually abused and enslaved by parties to an armed conflict.
- to examine prosecutorial strategies for penalizing and preventing international crimes committed against women during armed conflict. (Final Report 1998, § 9-11)

To date the Special Rapporteur has issued 3 reports.

Cairo Population Conference (1994)

The Action Program passed on the conference recognized the empowerment and autonomy of women as essential for the achievement of sustainable development and urged all states to eliminate all forms of discrimination against women, including all forms of violence against women.

Art. 4.10 urged States

“to identify and condemn the systematic practice of rape and other forms of inhuman and degrading treatment of women as a deliberate instrument of war and ethnic cleansing and take steps to assure that full assistance is provided to the victims of such abuse for their physical and mental rehabilitation.”

Fourth World Conference on Women, Beijing (1995)

Women in armed conflict became one of the four critical areas of the Beijing Plan of Action. The Platform

- addressed all forms of gender-based violence against women in wartime, including systematic rape, sexual slavery, forced pregnancy and forced abortion
- stated that women and girls are particularly affected by armed conflicts and terrorism “because of their status in society and their sex”
- stated the particular vulnerability of female refugees constituted 80 % of the world’s refugee population

- requests an increase of women's participation in conflict resolution at decision-making levels and promotion of women's contribution to fostering a culture of peace
- request protection and assistance to refugee and displaced women

Security Council Resolution 1325 (2000)

Resolution 1325 called for

- increased representation of women at all decision-making levels for the prevention, management, and resolution of conflict
- the integration of a gender perspective into peacekeeping operations
- training guidelines on the protection, rights and particular needs of women
- the integration of a gender perspective in peace negotiations in regard to special needs of women and girls, support of local women's peace initiatives, and the protection of and respect for human rights of women and girls
- to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse
- to put an end to impunity and to exclude these crimes, where feasible from amnesty provisions
- to consider different needs of female and male ex-combatant

Following resolution 1315 the Secretary-General carried out a study on the impact of armed conflict on women and girls, the role of women in peacebuilding and the gender dimensions of peace processes and conflict resolution

Security Council Resolution 1820 (2008)

Resolution 1820

- recognizes that women and girls are particularly targeted during war, and sexual violence is used as a weapon to instil fear and humiliation, dominate, disperse and/or forcibly relocate civilian members of a community or ethnic group,
- emphasizes that such violence could significantly exacerbate conflicts of armed conflict and impede peace processes - underlining that, as a security issue, it deserves a security response and therefore rightly belongs on the Council's agenda,
- notes the recognition of sexual violence in conflict as a war crime, crime against humanity and constituent act of genocide, and hence a matter that can be referred to the sanctions committee,
- reaffirms that all parties to armed conflict bear the primary responsibility and to immediately take appropriate measures to protect civilians, from all forms of sexual violence, which could include, inter alia, enforcing appropriate military disciplinary measures, and to train troops on the "categorical prohibition" of sexual violence,

- calls upon Member States to comply with their obligations for prosecuting persons responsible for such acts, and stresses the need for the exclusion of sexual violence crimes from amnesty provisions in the context of conflict resolution processes,
- states that it has a "zero-tolerance policy" for sexual violence perpetrated by UN Peacekeepers,
- asserts the importance/ necessity of including women's participation in all processes related to stopping sexual violence in conflict, including their participation in peace,
- request a report from the Secretary General on situations in which sexual violence is being widely or systematically employed against civilians and on strategies for ending the practice.

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Security Council Resolution 1325: www.un.org/events/res_1325e.pdf

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Section V

Prosecution of Sexualized War Violence in World War II

A. War Crime Trials of WW II in Germany

I. The Nuremberg Tribunal, Nov. 1945 – Okt. 1946:

No prosecution of rape

The Trial of the major war criminals was set up by the governments of the USA, the USSR, France and Great Britain.

The Tribunal had jurisdiction over

- CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- WAR CRIMES: namely, violations of the laws or customs of war. Such as murder, ill-treatment, deportation to slave labor, plunder of public or private property, wanton destruction of cities, devastation not justified by military necessity
- CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts 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 crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Rape or any form of sexualized violence was listed neither under war crimes nor under crimes against humanity.

Based on the Hague Conventions (violation of family honor, ill-treatment) and based on Crimes against Humanity (inhumane treatment), rape could have been prosecuted.

During trial, the French and the Soviet prosecutors presented evidence of wide spread rape but did not include these crimes in the charges.

- The French Prosecutor produced evidence of rape, including mass rape of 54 young women and girls by German soldiers in June 1944 in the small town of Saint Donat:

On 15 June 1944, attack by German troops at St. Donat. I quote, "The Maquis had evacuated the town several days earlier... 54 women or young girls from 13 to 50 years of age were raped by the maddened soldiers."

The losses caused by these bombings among the civilian population are rather high, for in most cases the inhabitants, caught by surprise, had no time to seek shelter... 2 women were raped at Crest ... 3 women were raped at Saillans....

A young girl of twelve, who was wounded and pinned down between beams, awaited death for 6 long days unable either to sit down or sleep, and without receiving any food, and that under the eyes of the Germans who were occupying the village."-A medical certificate from Doctor Nicolaides, who examined the women who were raped in this region. (IMT Docs, Vol. VI, pp 404)

- The Soviet Prosecutor, citing from official notes of V. M. Molotov, People's Commissar for Foreign Affairs in the U.S.S.R., produced evidence of widespread rape, including mass rapes in several cities and villages and forced prostitution in Smolensk by the German army:

The bestial acts of violence perpetrated against the women everywhere testify to the profound moral corruption of the criminals. I shall quote from that passage in the note which Your Honors will find on Page 4, Paragraph 4, of the document book:

Women and young girls are vilely outraged in all the occupied areas.

In the Ukrainian village of Borodayevka (...) the fascists violated every one of the women and girls.

In the village of Berezovka (...) drunken German soldiers assaulted and carried off all the women and girls between the ages of 16 and 30.

In the city of Smolensk the German Command opened a brothel for officers in one of the hotels into which hundreds of women and girls were driven; they were mercilessly dragged down the street by their arms and hair:

Everywhere the lust-maddened German gangsters break into the houses, they rape the women and girls under the very eyes of their kinfolk and children, jeer at the women they have violated, and then brutally murder their victims.

In the city of Lvov, 32 women working in a garment factory were first violated and then murdered by German storm troopers. Drunken German soldiers dragged the girls and young women of Lvov into Kesciuszko Park, where they savagely raped them. (...).

Near the town of Borissov in Bielorussia, 75 women and girls attempting to flee at the approach of the German troops, fell into their hands. The Germans first raped and then savagely murdered 36 of their number. By order of a German officer named Hummer, the soldiers marched L. I. Melchukova, a 16-year-old girl, into the forest, where they raped her. A little later some other women who had also been dragged into the forest saw some boards near the trees and the dying Melchukova nailed to the boards. The Germans had cut off her breasts in the presence of these women, among whom were V. I. Alperenko, and V. H. Bereznikova.

On retreating from the village of Borovka, in the Zvenigorod district of the Moscow region, the fascists forcibly abducted several women, tearing them away from their lithe children in spite of their protests and prayers.

In the town of Tikhvin in the Leningrad region, a 15-yearold girl named H. Koledetskaya, who had been wounded by shell splinters, was taken to a hospital (a former monastery) where there were wounded German soldiers. Despite her injuries the girl was raped by a group of German soldiers and died as a result of the assault."

(IMT Docs, Vol VII, pp 455; see also pp 454-456)

- Witness Claude Vaillant-Couturier, member of the French Résistance, imprisoned in Auschwitz and Ravensbrück mentioned forced abortions and sterilization on Jewish women in her testimony, as well as brothels in both camps:

"At Auschwitz there was a brothel for the SS and also one for the male internees of the staff, who were called "Kapo." Moreover, when the SS needed servants, they came accompanied by the Oberaufseherin, that is, the woman commandant of the camp, to make a choice during the process of disinfection. They would point to a young girl, whom the Oberaufseherin would take out of the ranks. They would look her over and make jokes about her physique; and if she was pretty and they liked her, they would hire her as a maid with the consent of the Oberaufseherin, who would tell her that she was to obey them absolutely no matter what they asked of her." (IMT Docs, Vol. VI, p 213)

There were no female judges or prosecutors at the Nuremberg Tribunal.

II. Control Council Law No 10 (1945-1950)

From 1945 until 1948 the Allied Control Council (composed of the Four Powers – United States, United Kingdom, Soviet Union and France) using its governmental powers issued several laws for Germany.

Control Council Law No 10 dealt with the prosecution of Crimes against Peace, War crimes and Crimes against Humanity. Art. 2 included rape in the list of acts constituting Crimes against Humanity:

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

Under Control Council Law 10 a total of 501 trials took place against 1,856 accused in the three Western Occupation Zones. To date, there is no gender-specific analysis of those trials.

III. Follow-up Trials in Western Germany (1950-2007)

Since 1950 German courts in the Federal Republic of Germany (West Germany) received full jurisdiction over crimes committed under the NS regime. Until 1952 5,678 accused were sentenced. Then number of trials decreased from 44 in 1954 to 20 in 1956, and to a handful afterwards.

The most prominent trials were:

- 1950/51: trial against Ilse Koch, wife of the commander of Buchenwald concentration camp: She received life sentence on appeal for instigating murder and ill-treatment of prisoners
- 1957: trial against chief of police in Memel and 10 members of Special Task Force troops. They were sentenced from 3 – 15 years for murder and aiding and abetting to murder in 4000 cases.
- 1963-65; 1. Auschwitz trial against 20 SS-members for mass murder in Auschwitz concentration camp. They were sentenced from 10 years to life.
- 1965/66, 2. Auschwitz trial against 3 SS-members for crimes committed in Auschwitz concentration camp. One was sentenced to life.
- 1975-81: Majdanek trial against 17 SS-members, among them 5 female guards, for mass murder and other crimes committed in Majdanek concentration Camp. Hermine Ryan, sub-commander of the women camp in Majdanek was sentenced to life, the others from 3 to 12 years, five were acquitted.

To date, there is no gender-specific analysis of these trials.

B. War Crime Trials of WW II in the Far East

I. The Trial against General Yamashita (1945)

A US military commission in Manila, Philippines, charged Yamashita was with commanding responsibility for mass atrocities committed by his troops against Philippine civilians, including murder and **rape**, as violations of the laws of war. He was sentenced to death.

The verdict is considered as milestone in prosecuting commanding responsibility.

II. The International Military Tribunal for the Far East in Tokyo (1946-48):

Rape prosecuted as “inhuman treatment”, “ill-treatment”, “Violation of the rights and honor of the family” (Hague Convention)

The trial was held by the Allied and took place in Tokyo from May 3, 1946, until November 4, 1948.

The Tribunal had jurisdiction over

- **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;
- **Conventional WAR CRIMES:** namely, violations of the laws or customs of war;
- **CRIMES AGAINST HUMANITY:** namely, murder, extermination, enslavement, deportation, and other inhumane acts 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 crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Summary of rape charges in indictment:

1. **Inhumane treatment**, contrary to Article 4 of the Annex to the Hague Convention IV of 1907 and the whole of the Geneva Convention of 1929 and the said assurances. (...) and **female prisoners were raped** by members of the Japanese forces.

5. **Mistreatment** of the sick and wounded, medical personnel and female nurses:
(c) **Female nurses were raped**, murdered and ill-treated;

12. **Failure to respect family honour and rights**, individual life, private property and religious convictions (...) Large numbers of the inhabitants of such territories were murdered, tortured, **raped** and otherwise ill-treated (...). (Askin 1997)

All charges referred to the crimes committed during the occupation of the Chinese city of Nanking. According to the indictment 20,000 women and girls were raped by Japanese Soldiers.

No female victim witness was heard. The main witnesses were two male eye-witnesses: a member of a charitable society and a church minister, both prominent in rescue actions.

The Verdict:

Out of 28 defendants 7 were sentenced to death, 2 of them were found guilty for command responsibility for the atrocities committed in Nanking, including rape: General Iwane Matsui and Foreign Minister Koki Hirota.

The trial did not deal with any other rapes or the “comfort station system”, i.e. the systematic enslavement of over 200.000 Asian women by the Japanese Army.

All judges were male, the prosecution counsel, however, included three female assistants.

III. The Batavia Military Tribunal (1948)

Rape and forced prostitution prosecuted as violation of the Hague Conventions

In 1948 a colonial Dutch court martial in Batavia, Indonesia, (today: Jakarta) charged 13 members of the Japanese Army for rape and forced prostitution of women in different sites in Semarang, Indonesia. In spring 1994, 35 Dutch women had been removed by force from various detention camps. They were kept captive and sexually enslaved in four Japanese officers' clubs in Semarang on Java. The verdict qualified these crimes as “war crimes, in defiance of the laws and customs of war”. Eleven defendants were sentenced, three of them to death.

To date the trial is the only official international criminal trial that has addressed the “comfort station system”. However, it took into account only crimes committed against Dutch women and ignored the fact that at least 100 Asian women had been forcibly recruited to the Semarang brothels as well.

The names of both accused and victims are under seal until 2025. The records of the trial were opened to the public in 1992.

IV. The Women's War Crimes Tribunal for the Trial of Japan' Military Sexual Slavery (2000)

In 2000 a network of Asian women's organizations organized a mock trial in Tokyo dealing exclusively with the "comfort station system". International lawyers and judges with high reputation from all countries concerned participated in the trial. The trial was held post mortem against ten high-ranking Japanese militaries and politicians, including Emperor Hirohito

The international Panel found in it's judgment that the evidence presented was sufficient for the conviction of the ten accused based on the international law applicable at the time when the crimes were committed. The accused were found guilty for rape and sexual slavery as crimes against humanity.

In the qualification of the crimes as "sexual slavery" rather than "forced prostitution", and based on the 1926 Slavery Convention the Panel defined sexual slavery as:

"the right of ownership over a person by exercising sexual control over a person or depriving a person of sexual autonomy. Thus, we consider that control over a person's sexuality or sexual autonomy may in and of itself constitute a power attaching to the right of ownership." (§ 620)

That control over sexuality is an indicium of slavery regardless of whether the enslavement encompasses the usage of a person as sexual property or for forced sexual labour. Otherwise, the definition of enslavement would erroneously exclude one of the most Common forms of servitude imposed upon women, sexual servitude. (§ 626)

The Judges also found that the present Japanese government is liable for the harm inflicted by the Japanese military sexual slavery system and obliged to reparations, including satisfaction, official acknowledgement, preservation of memory, judicial redress, restitution, compensation and rehabilitation.

See also Section IV, the appointment of a UN Special Rapporteur for on the Question of Systematic Rape and Sexual Slavery as a late reaction to the issue.

Sources:

Overview:

Askin, Kelly: War Crimes Against Women. Prosecution in International War Crimes Tribunals, Kluwer Law International 1997, Chapter II, IV, V

Batavia Trial:

Yoshiaki, Yoshimi, Comfort Women. Sexual Slavery in the Japanese Military During World War II, New York 2000

Hicks, George: The Comfort Women. Japan's Brutal Regime of Enforced Prostitution in the Second World War, New York, London 1997

Control Council Law No 10: <http://www.yale.edu/lawweb/avalon/imt/imt10.htm>

The Nuremberg Trials: <http://www.yale.edu/lawweb/avalon/imt/imt.htm#proc>

The Military Tribunal in Tokyo: <http://www.yale.edu/lawweb/avalon/imtfem.htm>

Women's Tribunal Tokyo: <http://www1.jca.apc.org/vaww-net-japan/english/womenstribunal2000/Judgement.pdf>

Section VI

United Nations Ad hoc-Tribunals

A. The International Tribunal for the former Yugoslavia (ICTY)

The ICTY was established in 1993 pursuant Resolution 827 by the Security Council to prosecute was crimes committed on the territory of the former Yugoslavia since 1991.

I. The Statute

The Tribunal has jurisdiction over

- Art. 2: Grave breaches of the Geneva Conventions of 1949
- Art. 3: Violations of the laws or customs of war (Hague Conventions)
- Art. 4: Genocide
- Art. 5: Crimes against humanity
 - o murder;
 - o extermination;
 - o enslavement;
 - o deportation;
 - o imprisonment;
 - o torture;
 - o **rape**;
 - o persecutions on political, racial and religious grounds;
 - o other inhumane acts

For the first time in history, rape is expressly mentioned in the statutes of an international criminal tribunal as a criminal act.

To date, rape and others forms of sexualized violence have been prosecuted successfully under Art. 5 as well as under Art. 2 and 3. For the latter it was necessary to prove that rape fulfills the same elements that constitute either torture, inhuman treatment, willfully causing great suffering or serious injury on body or health.

II. Rules of Procedure and Evidence:

Only two Rules deal specifically with rape cases:

Rule 96: Evidence in Cases of Sexual Assault

In cases of sexual assault:

- (i) **no corroboration** of the victim's testimony shall be required;
- (ii) **consent shall not be allowed as a defence** if the victim
 - (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
 - (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
- (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;
- (iv) **prior sexual conduct of the victim shall not be admitted** in evidence.

Rule 34: Victims and Witnesses Section

- (A) There shall be set up under the authority of the Registrar a Victims and Witnesses Section consisting of qualified staff to:
 - (i) recommend protective measures for victims and witnesses in accordance with Article 22 of the Statute; and
 - (ii) provide counselling and support for them, in particular in cases of rape and sexual assault.
- (B) Due consideration shall be given, in the appointment of staff, to the employment of qualified women.

III. Rape Cases before the ICTY

Landmark trials before the ICTY with rape charges:

1998/2001 (“Celebici”): First legal recognition for rape as a Grave Breach of the Geneva Conventions

CASE IT/96/21, Zravoro MUCIC Hazim DELIC, Esad LADZO, Zejnir DELALIC:
Rape as torture

All four accused worked as either commander, deputy commander or guards at the Celebici prison camp established by the Bosnian Muslim and Croat Forces. While the town of Konjic was surrounded and shelled by Bosnian Serb forces by mid- April 1992 Bosnian Muslim and Croat Forces took control of the town and surrounding villages. From May to November 1992 Bosnian Serb people were detained in the Celebici camp, a former Yugoslav National Army facility in the village of Celebici. The detainees were killed, tortured, sexually assaulted, beaten and otherwise subjected to cruel and inhuman treatment. At sometime beginning around 27 May 1992 and continuing until the beginning of August 1992, Delic and others **subjected two women to repeated rapes**. On one occasion, one of them was raped in front of other persons, and on another occasion she was raped by three different persons in one night.

The Chamber found that the rapes took place in the context of interrogations, to terrorize other camp detainees and to extract information of the husband of one of the rape victims. The rapes therefore fulfilled the elements of torture and thus constituted grave breaches of the Geneva Conventions.

In 1998 (confirmed on appeal in 2001) Mucic was sentenced to nine years’ and granted early release in 2003; Delic was sentenced to 18 years to be served in Finland; and Landzo was sentenced to 15 years to be served in Finland. Delalic was acquitted on all counts.

1998/2000 (“Furundzija”): First conviction for rape as War Crime in violation of the Hague Conventions

Case IT/95/17/1, Anto FURUNDZIJA: Rape as Torture and Outrage upon personal dignity

Furundzija was a local commander of the “Jokers”, a unit of the Croatian Defence Council (HVO) in Vitez municipality, central Bosnia and Herzegovina. Between 15 May 1993 and an unknown date in July 1993, a Bosniak woman was arrested and later confined in a house called “the bungalow”.

During the arrest she was interrogated by Furundzija and **raped in front of him** by Miroslav Bralo (see below) and by other members of the "Jokers" while her male friend was forced to watch.

The Chamber recognized the rape as an act of torture and outrage upon personal dignity constituting war crimes. In 1998 Furundzija was sentenced as co-perpetrator and aider and abettor to 10 years' imprisonment to be served in Finland. The sentence was confirmed 2000 in appeal. 2004 Furundzija was granted early release.

1999/2002 ("Foca"): First conviction for rape and enslavement as Crime against Humanity

Case IT/96-23 and 23/1: Dragoljub KUNARC, Radomir KOVAC, Zoran VUKOVIC: Rape and Enslavement as Crimes against Humanity

The "Foca Trial" was the first and to date the only trial dealing exclusively with widespread and systematic rape during the war in Bosnia and Herzegovina. It was also the first trial to deal with sexualized violence in the context of enslavement. "Sexual slavery" or "sexual enslavement" was not a crime under the Statute of the Tribunal; the acts had to be charged separately.

The original indictment named eight accused who participated in mass rape and enslavement of Bosnian Muslim women and girls in the municipality of Foca, Eastern Bosnia. Two were killed in attempts of arrest, three were tried later (see below: Stankovic, Jankovic, Zelenovic). Kunarac was leader of a reconnaissance unit of the Bosnian Serb Army at the time, Kovac and Vukovic were sub-commanders of the military police in Foca. All three had participated in the attack on the non-Serb population in the area.

Vukovic was charged with the rape of a 15-year old girl. Both Kovac and Kunarac were charged with rapes of several women and girls, in particular with continued rape of two women they claimed ownership over and held detained for the purpose of rape. Kunarac was sentenced to 28 years to be served in Germany, Kovac to 20 years to be served in Norway, and Vukovic to 12 years to be served in Norway. All three sentences were confirmed in appeal 2002.

Other trials before the ICTY with specific rape charges:

Case I/96-23/2, ("Foca"), Dragan ZELENOVIC: Rape as Crime against Humanity

Zelenovic was a Bosnian Serb soldier and military policeman, and one of the "Foca Eight" indicted together with Kunarac et al. He was arrested in 2005

and accused of personally raping and gang-raping several Muslim women and girls held in detention sites in the Foca municipality.

Plea agreement: In December 2006 Zelenovic pleaded guilty in seven counts of the indictment, i.e. in personally raping two women and in co-perpetrating in their rapes by others as torture and rape as crimes against humanity. He was sentenced to 15 years' imprisonment.

CASE IT/95/12, Ivica RAJIC: Rape as grave breach of Geneva Convention

Ivica Rajic was commander of units of the Croatian Defence Council (HVO) in Bosnia and Herzegovina. He was charged among others with wilful killing, inhumane treatment, and extensive destruction as grave breaches of the Geneva Convention.

On the morning of 23 October 1993, HVO forces under Rajic's command attacked the village of Stupni Do. After gaining control of various parts of the village, HVO soldiers forced the civilians out of their homes and hiding places, robbed them of their valuables and **sexually assaulted several Bosniak women** and wilfully killed at least thirty-one men, women and children. During and following the attack, almost the entire village was extensively and wantonly destroyed.

In plea agreement Rajic pleaded guilty to four out of 10 charges, including sexual assaults, and gave a statement of apology. On 8 May 2006, he was sentenced to 12 years' imprisonment to be served in Spain.

CASE IT/95/17, Miroslav BRALO: Rape as grave breach of Geneva Conventions and violation of the laws and customs of war

Bralo was a member of the "Jokers", a unit of the Croatian Defence Council (HVO) in Vitez municipality, central Bosnia and Herzegovina. He was indicted among others with murder in several cases, and with **imprisonment, rape and torture** of a Bosnian Muslim woman.

Plea agreement: Bralo pleaded guilty to all charges and gave a statement of apology. On 7 December 2005, he was sentenced to 20 years' imprisonment, confirmed in appeal on 2 April 2007.

Case IT/94/2, Dragan NIKOLIC: Rape as crime against humanity

Nikolic was commander of the Susica detention camp in Vlasenica. The indictment considers that from early June until about 15 September 1992 many female detainees at Susica camp were subjected to sexual assaults, including rapes and degrading physical and verbal abuse. The **sexual assaults were committed by camp guards, special forces, local soldiers and**

other men who were allowed to enter the camp frequently to take women out of the hangar at night. When the women returned, they were often in a traumatized state and other detainees observed that the women were distraught. He was sentenced to 23 years, on appeal 2005 to 20 years.

CASE IT/97/24 (“Prijedor”), Milomir STAKIC: Rape as persecution

M. Stakic, as President of the Prijedor Crisis Staff and head of the Prijedor Municipal Council for National Defence instigated the military attacks which began in May 1992 in the Prijedor Municipality, inhabited principally by Bosniak and Bosnian Croats. The indictment charged him with genocide, including being a co-perpetrator in rape. As leading political figure in the Prijedor municipality he was also responsible for the Omarska, Keraterm, and Trnopolje prisoner camps. In all three Bosnian Muslim and Bosnian Croat people were mistreated, tortured and murdered. Rapes and sexual assaults occurred there as well on a daily basis. In many instances, women and girls were taken from the camp and were raped, tortured, or sexually abused at other locations.

Stakic was acquitted of genocide but sentenced to 40 years for persecution and extermination as crimes against humanity and war crimes.

CASE IT/98/30/1 (“Omarska & Keraterm”), Miroslav KVOCKA, Draguljub PRCAC, Milojka KOS, Mlado RADIC and Zoran ZIGIC: Rape as a crime against humanity

Kvocka, Prcac, Kos, Radic and Zigic held positions of responsibility at the prisoner camps of Omarska, Keraterm and Trnopolje. All were held responsible for persecution, murder and torture, Radic in particular for rape and sexual intimidation.

Kvocka was sentenced to 7 years, Prcac to 5 years, Kos to 6 years, Radic to 20 years and Zigic to 25 years’ imprisonment. Prcac and Kos have served their sentences.

CASE IT99/36, (“Krajina”), Radoslav BRDJANIN: Rape as a crime against humanity

Radoslav Brdanin was President of the Krajina Crisis Staff and indicted with genocide. He was accused of genocide, i.e. of planning and ordering a campaign designed to destroy Bosnian Muslims and Croats in whole or in part, as national, ethnical, racial, or religious groups, including sexual assaults, rape, brutal beatings, and other forms of severe maltreatment in 13 differ-

ent municipalities. The rapes occurred during attacks on non-Serb towns or villages and in camps and other detention sites.

The Trial Chamber acquitted Brdjanin of genocide but sentenced him to 32 years for crimes against humanity, violations of the Hague Conventions and grave breaches of the Geneva Conventions. Upon appeal in 2004 the sentence was reduced to 30 years.

Case IT-05-87) (“Kosovo”), Milan MILUTINOVIC, Nikola SAINOVIC, Dragoljub OJDANIC, Nebojsa PAVKOVIC, Vladimir LAZAREVIC, Sreten Lukic: Rape as persecution and crime against humanity

Milutinovic (President of Serbia), Sainovic (Deputy Prime Minister of the FR Yugoslavia), Ojdanic (Chief of General Staff of the Yugoslav Army), Pavkovic (Commander of the 3rd Army), Lazarevic (Chief of Staff of the Pristina Corps) und Lukic (Head of Serbian Ministry of Internal Affairs) are accused of forming a joint criminal enterprise to modify the ethnic balance in Kosovo and to ensure continued Serbian control over the province. It is alleged that forces of the FR Yugoslavia and Serbia, in a deliberate and widespread or systematic manner, forcibly expelled and internally displaced hundreds of thousands of Kosovo Albanians from their homes across the entire province of Kosovo. In the course of this many rapes and sexual assaults took place.

The Trial Chamber Judgement is scheduled to be rendered on 26 February 2009.

Case IT-04-84, (“Kosovo”): Ramush HARADINAJ, Idriz BALAJ, Lahi BRAHIMAJ: Rape as a crime against humanity and a violation of the laws and customs of war

Haradinaj was one of the senior leaders of the Kosovo Liberation Army (KLA), Brahimaj was a deputy commander and Balaj a member of the KLA and commander of the special unit “Black Eagles”. The indictment charges them as co-perpetrators in a joint criminal enterprise to ensure total control of the KLA over the operational zone of Dukagijn by the unlawful removal and mistreatment of Serb civilians and of Kosovar Albanians, Kosovar Roma/Egyptian civilians and other civilians, who were perceived as collaborators with Serbian Forces. All three are charged with **rape as persecution** (crimes against humanity) and **rape as violation of the laws or customs of war**. However, only Balaj was accused of having personally raped one Roma woman.

On 3 April 2008 the Trial Chamber found Haradinaj and Balaj not guilty and sentenced Brahimaj to 6 years of prison for cruel treatment of two male victims. He, too, was acquitted of rape.

CASE IT/04/83, (“Kamenica Camp”) RASIM DELIC: Rape as Violation of the laws and customs of war

R. Delic was Commander of the Main Staff of the Army of Bosnia and Herzegovina and subsequently responsible for the Kamenica Camp run by the “El Mujahed” Detachment. According to the indictment three women from Vozuca were subjected to rape and cruel treatment in Kamenica Camp.

On 15 September 2008 the Trial Chamber sentenced Delic to 3 years of prison but acquitted him of all rape charges.

Case IT-04-74 (“Herceg-Bosna”), Jadranko PRLIC, Bruno STOJIC, Slobodan PRALJAK, Milivoj PETKOVIC, Valentin CORIC, Berislav PUSIC

Prlic (highest political official in the Croatian wartime entity “Herceg-Bosna”), Stojic (Head of Department of Defence of the Croatian Defence Council (HVO), Praljak (Senior Croatian Army officer), Petkovic (Military head of Herceg-Bosna/HVO forces), Coric (Deputy for Security and Commander of the HVO Military Police), and Pusic (HVO liaison officer to UNPROFOR) are accused of forming a joint criminal enterprise to politically and militarily subjugate, permanently remove and ethnically cleanse Bosnian Muslims and other non-Croats living in the territory of “Herceg-Bosna”. In the course of this widespread killing, inhuman treatment, unlawful deportations, destructions of villages and towns took place as well as systematic rapes and sexual assaults. All three are charged with persecution, including rape, as crimes against humanity.

The trial commenced 26 April 2006 and is ongoing.

Convictions for male sexual assault:

Case IT 94/1, (“Prijedor”), Dusko TADIC: First conviction for male sexual assault

The indictment accused the above persons of participating in the attack, destruction and plunder of Bosniak and Croat residential areas in Prijedor and Korac, the deportation and guard of camps located in Omarska, Keraterm and Trnopolje, between May 1992 and 31 December 1992. Inside and outside the camps a campaign of terror included **sexual assaults against women and men**. In one case a male prisoner was forced to lick the bottom and suck the penis of another male prisoner and to bite of his testicles.

The Prosecutor dropped the charges concerning the rape of one woman when the main witness withdrew her testimony. The charge with sexual assault on one man resulted in first conviction for male sexual assault under international law.

It was the only case to date for a witness to receive full anonymity: the male victim of sexual assault.

On 26 January 2000, Tadic was sentenced to twenty years' imprisonment.

Case IT/95/9/1-S, ("Bosanski Samac"), Stevan TODOROVIC: Male sexual assault

From April 1992 until December 1993 Todorovic was chief of police and member of the Serb crisis staff in Bosanski Samac in north-eastern Bosnia and Herzegovina. He was indicted for beating men in the police station, ordering torture, and of **ordering six men to perform fellatio on each other**.

In plea agreement he pleaded guilty on all charges. He was sentenced to 10 years, received early release in 2005, and died in 2006.

CASE IT/95/10/1, ("Brcko"), Ranko CESIC: Male sexual assault

Ranko Cesis was a member of the Bosnian Serb Territorial Defence in the municipality of Brcko in north-eastern Bosnia and Herzegovina. He was indicted with murder and "rape which includes other forms of sexual assault" as Crimes against humanity. On around 11 May 1992, at Luka camp, R. Cesis forced, at gunpoint, two brothers to beat each other and **perform sexual acts on each other** in the presence of others.

Plea agreement: Cesis pleaded guilty to all counts and agreed to testify in other proceedings before the Tribunal. On 11 March 2004 he was sentenced to 18 years imprisonment to be served in Denmark.

Case IT-98-33, ("Srebrenica"), Radilav Krstic: Rape in context of genocide

Krstic was Chief-of-Staff and Deputy Commander of the Bosnian Serb Army Drina Corps and played a leading role in the attack on Srebrenica. While most male prisoners were later killed women and children were first detained in Potocari, a nearby settlement of Srebrenica, and then deported. In Potocari they were subjected to rapes, sexual assaults and other mistreatments. The Trial Chamber found Krstic guilty of genocide, including rapes as cruel and inhuman treatment, and sentenced Krstic in 2001 to 46 years. However, the Appeal Chamber revised the judgement in 2004 and acquitted Krstic of genocide as a principal perpetrator, but found him guilty as aider and abettor to genocide.

Cases with rape charges enumerated:

Case IT/95/13, ("Vukovar"), Mile MRKSIC, Miroslav RADIC, Veselin SLJIVANCANIN

All three participated as members of the Yugoslav People's Army in the removal of about 400 non-Serbs from the Vukovar Hospital after the three-month siege of the town in 1991. The detainees were eventually transferred to a farm where at least 264 were killed. According to the indictment at least one female detainee was sexually assaulted. The three pleaded "not guilty" to all counts.

On 27 September 2007 Mrksic was sentenced to 20 years, Slivancanin to 5 years of imprisonment, and Radic was acquitted. All sexual assault allegations were dismissed because of lack of evidence.

Case IT02/65/1, ("Omarska & Keraterm"), Predrag BANOVIC

Banovic was a guard at the Keraterm camp and along with Meakic et al (see below) accused of persecution, murder, and ill-treatment of prisoners, including sexual assaults. Banovic pleaded guilty to count 1, persecution and was sentenced to 8 years to be served in France.

Radovan KARADZIC

Karadzic was the leading head of all Bosnian Serb organisations. He became President of the so-called Serbian Republic of BiH in March 1992. From 17 December 1992 he was sole President of the Republika Srpska and Supreme Commander of the armed forces. Until July 1996 he was President of the SDS. He was arrested in July 2008 and charged with Genocide, Crimes Against Humanity and War Crimes. Rape and sexual assault charges are enumerated under Genocide and Persecution. As of February 2009 the trial has not commenced.

Several other high-ranking politicians and military were accused and sentenced for participating in a joint criminal enterprise and for being responsible for the acts or omissions of subordinates, including rapes and sexual abuse:

Biljana PLAVCIC, member of the collective Presidency of Bosnia and Herzegovina, of the Presidency of the Serbian Republic and the Supreme Command of the armed forces of the Serbian Republic. She pleaded guilty and was sentenced in 2003 to 11 years of imprisonment to be served in Sweden.

Momcilo KRAJISNIK, member of the National Security Council, the Expanded Presidency of the “Serbian Republic of Bosnia and Herzegovina”, the Main Board of the Serbian Democratic Party and President of the Bosnian Serb Assembly. He was sentenced in 2006 to 27 years’ imprisonment. Appeal judgement is scheduled for March 2009.

Mico STANISIC, Serbian Minister of Internal Affairs in Bosnia and Herzegovina, and Stojan Zupljanin, Chief of the Regional Security Services Centre in Banja Luka. Main trial is pending.

Vojislav SESELJ, President of the Serbian Radical Party of Serbia and Montenegro. Main trial is pending.

Ratko MLADIC was from May 1992 onward appointed Commander of the Main Staff of the Bosnian Serb Army; charged with genocide and still at large.

Rape charges dropped:

Case IT/95/8, Dusko SIKIRICA, Damir DOSEN, Dragan KOLUNDZIJA: Rape as persecution

The above persons participated in the persecution of Bosniak, Bosnian Croats and other non-Serbs in the Prijedor area, and specifically in the Keraterm camp. Many of the women detained at the Trnopolje camp were raped, sexually assaulted, or otherwise tortured by camp personnel, who were both police and military personnel, and by others, including military units from the area who came to the camp for that specific purpose. In many instances, **the women and girls were taken from the camp and raped, tortured, or sexually abused** at other locations. The charges included **forced felatio** on one case.

In plea agreement all specific rape charges were dropped. Sikirica was sentenced to 15 years, Dosen to 5 years, Kolundzija to 3 years, and Pregrag Banovic to 8 years.

Cases referred to the State Court of Bosnia and Herzegovina

Pursuant to Rule 11*bis* of the Tribunal’s Rules of Procedure and Evidence the Referral Bench has to refer a case to the State Court of Bosnia and Herzegovina unless the level of responsibility of the accused or the gravity of the crimes alleged in the indictment would make a referral to national authorities inappropriate. The first referral cases focused or dealt with rape charges:

Case I/96-23/2, (“Foca”), Radovan STANKOVIC, Gojko JANKOVIC: Rape and Enslavement as Crimes against Humanity

Jankovic and Stankovic belong to the “Foca Eight” of the Kunarac et al indictment (see above). Jankovic was sub-commander of military police and one of the main Bosnian Serb paramilitary leaders in Foca. Stankovic was a member of a Bosnian Serb paramilitary unit in Foca. Both were accused of personally raping and gang-raping several Bosnian Muslim women and girls held in detention in Foca. Stankovic had been in charge of a house in which women and girls were constantly raped for months by many different soldiers. In addition, he was charged with enslavement

In 2006, both cases were referred to the State Court of Bosnia and Herzegovina. On 16 February 2007 Jankovic was sentenced to 34 years, on 28 March 2007 Stankovic was sentenced on appeal to 20 years.

Case IT/95/4, (“Omarska”), Zeljko MEAKIC, Momcilo GRUBAN, Dusko KNEZEVIC: Sexual assaults as Crimes against Humanity

Following the indictment, from about 25 May to about 30 August 1992, more than 3,000 Bosniak and Bosnian Croats from the municipality of Prijedor were taken, in inhumane conditions, under armed guard, to the Omarska camp, located in a former mining complex approximately fifteen kilometres from the town of Prijedor. **Female and male prisoners were beaten, tortured, raped, sexually assaulted, and humiliated.** In addition to regular beatings and abuse, there were incidents of multiple killings and special terror. Many, whose identities are known and unknown, did not survive the camp. The case was transferred to the Court of Bosnia and Herzegovina last 9 May 2006.

2007 the case was referred to the War Crime Chamber of the State Court of Bosnia and Herzegovina.

Sources:

ICTY cases: <http://www.un.org/icty/cases-e/index-e.htm>

Rules of Procedure and Evidence: www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev39e.pdf

Statute of the ICTY: <http://www.un.org/icty/legaldoc-e/index.htm>

State Court of Bosnia and Herzegovina: <http://www.sudbih.gov.ba/?jezik=e>

B. International Tribunal for Rwanda (ICTR)

The ICTY was established in 1994 pursuant Security Council Resolution 955 to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring States between 1 January and 31 December 1994.

I. The Statute

The Tribunal has jurisdiction over

- Art. 2: Genocide

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- o Killing members of the group;
- o Causing serious bodily or mental harm to members of the group;
- o Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- o Imposing measures intended to prevent births within the group;
- o Forcibly transferring children of the group to another group

- Art. 3: Crimes against humanity

- o murder;
- o extermination;
- o enslavement;
- o deportation;
- o imprisonment;
- o torture;
- o **rape**;
- o persecutions on political, racial and religious grounds;
- o other inhumane acts

- Art. 4: Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

- o violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- o collective punishments;
- o taking of hostages;
- o acts of terrorism;
- o outrages upon personal dignity, in particular humiliating and degrading treatment, **rape, enforced prostitution and any form of indecent assault**;
- o pillage;
- o the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
- o threats to commit any of the foregoing acts.

II. Rules of Procedure and Evidence

The ICTR adopted the same rules on sexualized violence cases as the ICTY with only slight changes:

Rule 96: Evidence in Cases of Sexual Assault

In cases of sexual assault:

- (i) Notwithstanding Rule 90 (C), **no corroboration** of the victim's testimony shall be required;
- (ii) **consent shall not be allowed as a defence** if the victim
 - (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
 - (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
- (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;
- (iv) **prior sexual conduct of the victim shall not be admitted** in evidence.

Rule 34: Victims and Witnesses Section

- (A) There shall be set up under the authority of the Registrar a Victims and Witnesses Section consisting of qualified staff to:
 - (i) recommend the adoption of protective measures for victims and witnesses in accordance with Article 21 of the Statute;
 - (ii) ensure that they receive relevant support, including physical and psychological rehabilitation, especially counselling in cases of rape and sexual assault;
 - (iii) develop short term and long term plans for the protection of witnesses who have testified before the Tribunal and who fear a threat to their life, property or family
- (B). A gender sensitive approach to victims and witnesses protective and support measures should be adopted and due consideration given, in the appointment of staff within this Unit, to the employment of qualified women

III. Rape Cases before the ICTR

(as of 2004)

Landmark trials before the ICTR with rape charges:

1998/2001(“Akayesu”): Rape as instrument of Genocide

ICTR-96-4-T Jean-Paul AKAYESU: Rape in Genocide

Akayesu was the bourgmestre (mayor) of Taby commune. He was charged with genocide, crimes against humanity, and war crimes for the murder, extermination, torture, and cruel treatment committed throughout Taba. The original Indictment did not contain and rape charges.

During trial, two witnesses spontaneously testified about rape and gang rape by Interahamwe soldiers. The indictment was amended with rape charges as crimes against humanity and war crimes, and a reference to these acts was added to the genocide counts.

The Trial Chamber found that rape and sexual violence

“constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. (...) In light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, (...). These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.” (§ 731)

Akayesu was sentenced to life imprisonment, confirmed by the Appeals Chamber in 2001.

Further Rape Cases before the ICTR

ICTR-97-20, Laurent SEMANZA: Rape as a crime against humanity

Semanza was Bourgmestre (mayor) of Bicumbi commune for over 20 years. He was accused of organizing and executing several massacres in different places. He was also accused of instigating, ordering and encouraging others to rape Tutsi women before they kill them.

In 2003, Semanza was sentenced to 25 years for genocide and for rape as a crime against humanity. The Appeal Chamber increased the sentence by 10 years for ordering the murder, torture and rape of Tutsi civilians in 2004.

ICTR-20012-64-T, Sylvestre GACUMBITSI: Rape as a crime against humanity

Gacumbitsi was Bourgmestre (mayor) in Rusumo commune and a member of the ruling party prior to the genocide. He played a major role in panning the genocide at a local level: participating in meetings with military leaders, distributing weapons, inciting the population to kill Tutsis and to rape Tutsi women.

The Trial Chamber found him guilty of genocide and of rape as a crime against humanity and sentenced him in 2004 for 30 years' imprisonment.

Acquittals for Rape:

ICRT-96-13, Alfred MUSEMA: Rape as part of Genocide and crime against humanity.

In 1994, Musema was the Director of a Tea Factory in Kibuye Prefecture. He was charged with killing, raping Tutsi women and ordering the rape of Tutsi women in different areas as acts of Genocide. The Trial Chamber found

that on the basis of the evidence presented, it emerges that acts of serious bodily and mental harm, including rape and other forms of sexual violence were often accompanied by humiliating utterances, which clearly indicated that the intention underlying each specific act was to destroy the Tutsi group as a whole. The Chamber notes, for example, that during the rape of Nyiramusugi Musema declared: "The pride of the Tutsis will end today". In this context, the acts of rape and sexual violence were an integral part of the plan conceived to destroy the Tutsi group. Such acts targeted Tutsi women, in particular, and specifically contributed to their destruction and therefore that of the Tutsi group as such. Witness N testified before the Chamber that Nyiramusugi, who was left for dead by those who raped her, had indeed been killed in a way. Indeed, the Witness specified that "what they did to her is worse than death".

Therefore, the Chamber is satisfied beyond a reasonable doubt that at the time of commission of the above-mentioned acts, which the Chamber considers to have been established, Musema had the intent to destroy the Tutsi ethnic group as such. (933f)

Musema was sentenced to life imprisonment. In 2001 the Appeals Chamber confirmed the genocide verdict but rejected Musema's conviction for rape as a crime against humanity "in the light of additional evidence admitted into the record".

ICTR-98-44A-T, Juvenal KAJELIJELI: Rape as a crime against humanity

Kajelijeli was Bourgmestre (major) of Mukingo commune. He was accused to have commanded, organized supervised and participated in the attacks where Tutsi men, women and children were abducted, raped and massacred

in their residences or at their places of shelter within the Mukingo commune. For these acts he was charged with Genocide and crimes against humanity. The Trial Chamber sentenced Kajelijeli for genocide but acquitted him for rape as a crime against humanity by majority with one (female) judge dissenting. The Prosecutor's appeal was filed too late and dismissed.

ICTR-96-14, Eliezer NIYITEGEKA: Rape as a crime against humanity

Niyitegeka, former Minister of Information of Rwanda's Interim Government in 1994, and member of the Mouvement Démocratique Républicain (MDR) political party played a major role in murder and extermination of Tutsi citizens in the Kibuye prefecture. He led several attacks against Tutsi refugees. The Trial Chamber found him guilty of genocide but acquitted him for rape as a crime against humanity. The rape charges were based on one incident of rape and the Chamber found the evidence in that case insufficient.

Niyitegeka was sentenced to life in 2003, confirmed on appeal in 2004.

ICTR-99-54, Jean de Dieu KAMUHANDA: Rape as a crime against humanity

Kamuhanda was a high-ranking member of Mouvement Révolutionnaire National pour le Développement (MRND) political party in Kigali-rural Prefecture. He played a major part in instigating and ordering Interahamwe militias, soldiers and policemen to kill Tutsis and to rape Tutsi women before killing them.

In 2004 the Trial Chamber sentenced him to life for genocide but acquitted him for rape as a crime against humanity because of insufficient evidence. The Appeals Chamber confirmed the judgement in 2005.

Sources:

Overview:

Binaifer Nowrojee: "Your Justice is Too Slow". Will the ICTR Fail Rwanda's Rape Victims? www.unrisd.org/publications/opgp10

ICTR Statute: <http://69.94.11.53/ENGLISH/basicdocs/statute.html>

ICTR Rules of Procedure: <http://69.94.11.53/ENGLISH/rules/060702/060702.pdf>

ICTR Judgements: <http://69.94.11.53/default.htm>

Section VII

The International Criminal Court

A. Basic Facts on the ICC

Chronology

June 1989	Trinidad and Tobago resurrects plans for an ICC to combat drug trafficking
1994	UN General Assembly establishes ad hoc committee to draft an ICC statute
1995	UN GA establishes a Preparatory Committee to finalize the draft statute
17 July 1998	Adoption of the Rome Statute of the ICC by 120 State Parties
1998 – 2000	Negotiations of Preparatory Committee on Elements of Crimes, Rules of Procedure and Evidence, [Crime of Aggression unresolved]
01 July 2000	Establishment of the ICC; Rome Statute enters into force with its ratification of the requisite 60 states
07 February 2003	Election of 18 judges (11 male, 7 female, serving 3, 6 and 9 years) by the Assembly of State Parties (ASP)
16 June 2003	Election of the Chief Prosecutor by the ASP
24 June 2003	Appointment of the Registrar
26 January 2006	Election of 3-year-term judges: now 8 female, 10 male in total
10 April 2006	The ICC and the EU conclude a cooperation and assistance agreement
25 Jan.-1 Feb. 2007	5 th session of Assembly of States Parties discussed Crime of Aggression

State Parties

As of February 2009:

139 Signatories, 107 Ratifications

62 signatures and 58 ratifications on Agreement on Privileges and Immunities (for ICC staff)

Opponents

Chief opponent:	USA
06 May 2002	US government withdraws signature under the ICC treaty
12 June 2002	UN Security Council Resolution 1422 grants immunity from ICC jurisdiction for UN peacekeepers; renewed as Res. 1487 in June 2003. In 2004 US efforts to renew resolution failed.
02 August 2002	American Servicemember's Protection Act becomes binding national law (authorization of use of military to free US citizen held by the ICC; restriction of US participation in UN peacekeeping unless immunity is guaranteed; withdrawal of military assistance to ICC State Parties – all provisions can be waived by the President)
23 June 2004	US withdraws request for renewal of SC Resolution 1487 exempting UN peacekeepers from the ICC jurisdiction
08 December 2004	US adopts amendment to Foreign Operations Appropriation Bill threatening allies to cut assistance under the Economic Support Fund (ESF) unless they have signed a BIA.
28 November 2006	President Bush waived ESF prohibitions to 14 State Parties

US Bilateral Immunity Agreements (BIA) as of December 2006:

102 Signatories (46 ICC State Parties)

54 countries refused publicly

24 State Parties lost US aid in 2005 after refusal, all regained aid after President Bush's waiver in November 2006 except Ireland, Brazil, and Venezuela

Other Non-Signatories Azerbaijan, Belarus, China, Cook Islands, Cuba,
Dem. People's Rep. of Korea, Equatorial Guinea,
Ethiopia, India, Irak, Israel, Kazakhstan, Kiribati,
Lebanon, Lybia, Mauritania, Micronesia, Nicaragua,
Niue, Pakistan, Palau, Papua New Guinea, Rwanda,
Saudi Arabia, Somalia, Swasiland, Suriname, Togo,
Tonga, Tunesia, Turkey, Turkmenistan, Tuvala,
Qatar, Vanuatu, Viet Nam

B. Jurisdiction

a) What?

- o Genocide
- o Crimes Against Humanity
- o War Crimes
- o [Crime of Aggression] not yet!

b) Since when?

- o Crimes committed since 1 July 2000

c) Where and Who?

- o Crimes committed on territory of State Parties
- o Alleged perpetrator is Citizen of State Parties (not victim!)
- o Referral by Non-State-Parties in specific cases
- o Referral by the UN Security Council (no limits)

d) Limitations

- o Principle of complementarity (national prosecution has priority: Prosecutor can only act on his own initiative if state in question is neither able nor willing to prosecute)
- o No jurisdiction over citizens of Non-State-Parties unless the later committed crimes on territory of State-Parties

C. Situations before the International Criminal Court

(as of September 2007)

Communications to the OTP (2003-2006)

- 1918 from 107 countries (63 % from Germany, France, USA) on crimes in 153 countries
- 80 % dismissed as outside the jurisdiction of the court
- 10 situations were subjected to intensive analysis:
 - o 2 cases (Irak, Venezuela) dismissed
 - o 3 cases in Pre-trial stage (DR Congo, Uganda, Sudan)
 - o 5 cases remain under analysis (among them Ivory Coast and Colombia)

Referrals

	referred	by	investigation opened
DR Congo	19.04.2004	state	23 June 2004
North. Uganda	29.01.2004	state	29 July 2004
Centr. Afr. Republic	06.01.2005	state	22 May 2007
Sudan	31.03.2005	UN SC	6 June 2005

Indictments, Arrest Warrants & Trials

As of January 2009

I. Democratic Republic of Congo

The Prosecutor vs. Thomas Lubanga Dyilo: (Case ICC 01/04-01/06)

Lubanga is the alleged founder of the Union des Patriotes Congolais (UPC) and the Forces patriotiques pour la liberation du Congo (FPLC), the alleged Commander-in-Chief of the FPLC and the alleged President of the UPC.

Current Status: on trial

Counts:

Lubanga is charged with War Crimes as co-perpetrator for:

- Enlisting and conscripting of children under the age of 15 years into the Forces patriotiques pour la libération du Congo [Patriotic Forces for the Liberation of Congo] (FPLC) and using them to participate actively in hostilities in the context of an international armed conflict from early September 2002 to 2 June 2003 (punishable under article 8(2)(b)(xxvi) of the Rome Statute);
- Enlisting and conscripting children under the age of 15 years into the FPLC and using them to participate actively in hostilities in the context of an armed conflict not of an international character from 2 June 2003 to 13 August 2003 (punishable under article 8(2)(e)(vii) of the Rome Statute).

The indictment contains **no rape charges**.

For the first time in history **victims participate** through legal representatives in proceedings.

Chronology:

Warrant of arrest issued under seal	10 February 2006
Unsealed	17 March 2006
Transferred to The Hague	17 March 2006
Confirmation of charges	20 January 2007
Commencement of Trial	26 January 2009

The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui (Case ICC-01/04-01/07)

Germain Katanga, also known as "Simba" is the alleged commander of the Force de résistance patriotique en Ituri (FRPI). **Mathieu Ngudjolo Chui** is the alleged former leader of the Front des nationalistes et intégrationnistes (FNI).

Current status: pre-trial

Counts:

Germain **KATANGA** and Mathieu **NGUDJOLO CHUI** jointly committed through other persons, within the meaning of article 25(3)(a) of the Statute:

War crimes:

- a. using children under the age of fifteen to take active part in the hostilities, under article 8(2)(b)(xxvi) of the Statute;
- b. directing an attack against a civilian population as such or against individual civilians not taking direct part in hostilities under article 8(2)(b)(i) of the Statute;
- c. wilful killings under article 8(2)(a)(i) of the Statute;
- d. destruction of property under article 8(2)(b)(xiii) of the Statute;
- e. pillaging under article 8(2)(b)(xvi) of the Statute;
- f. **sexual slavery and rape** under article 8(2)(b)(xxii) of the Statute.

Crimes against Humanity:

- a. murder under article 7(1)(a) of the Statute;
- b. rape and sexual slavery under article 7(1)(g) of the Statute

Chronology:

Germain KATANGA

Warrant of arrest issued under seal	2 July 2007
Unsealed	18 October 2007
Transferral to The Hague	17 October 2007
Confirmation of indictment	26 September 2008

Mathieu NGUDJOLO CHUI

Warrant of arrest issued under seal	6 July 2007

Unsealed
Transferral to The Hague
Confirmation of charges

7 February 2008
7 February 2008
26 September 2008

Case: The Prosecutor v. Bosco Ntaganda (ICC-01/04-02/06)

Bosco Ntaganda, also known as “the Terminator”, is alleged Deputy Chief of the General Staff of the Forces Patriotiques pour la Libération du Congo (FPLC) and alleged Chief of Staff of the Congrès national pour la défense du peuple (CNDP) armed group, active in North Kivu in the DRC.

Alleged to have committed war crimes of enlistment and conscription of children under the age of 15 and of using them to participate actively in hostilities in Ituri from July 2002 until December 2003.

Current status: at large, arrest warrant issued

Chronology:

Warrant of arrest issued under seal	22 August 2006
Unsealed	28 April 2008

II. Northern Uganda

The Prosecutor vs. Joseph Kony, Vincent Otti, Okot Odhiambo, and Dominic Ongwen (Case ICC 02/04-01/05)

Current status: all at large, arrest warrant issued

Joseph Kony is alleged Chairman and Commander-in-Chief of the Lord's Resistance Army (LRA). He is charged in 12 counts for crimes against humanity and in 21 counts for war crimes, including **rape** (2 counts), murder, enslavement, **sexual enslavement** (1 count), forced enlisting of children.

Vincent Otti is alleged Vice-Chairman and 2nd in Command of the LRA. He is named in 11 counts for crimes against humanity and in 21 counts for war crimes, including **rape** (1 count), murder, enslavement, **sexual enslavement** (1 count), forced enlisting of children.

Okot Odhiambo is alleged Deputy Army Commander in the LRA. He is named in 3 counts for crimes against humanity and in 7 counts for war crimes.

Dominic Ongwen is alleged Brigade Commander in the LRA. He is named in 3 counts for crimes against humanity and in 4 counts for war crimes.

Chronology:

Warrant of arrest issued under seal 8 July 2005

Unsealed

13 October 2005

III. Darfur/Sudan

The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman (ICC 02/05-01/07)

Current status: at large, arrest warrants issued

Ahmad Harun, former Minister of state for the Interior of the Government of Sudan and currently Minister of State for Humanitarian Affairs, was allegedly in charge of the management of the ‘Dafur Security desk’ and thereby coordinating the different bodies of the Government (Armed Forces, Police, National Security, Intelligence Service and the Militia/Janjaweed) involved in the counter-insurgency, including attacks on several towns in 2003 and 2004.

He is charged on the basis of individual criminal responsibility in 22 counts of crimes against humanity, including **rape**, murder, persecution, forcible transfer, inhumane acts, torture, and in 22 counts of war crime, including **rape**, murder, destruction, pillaging and outrage upon personal dignity.

Ali Kushayb is alleged to have been one of the most senior leaders in the Militia/Janjaweed and a member of the Popular Defence Force (PDF) and as such the “mediator” between the Janjaweed and the Government of Sudan.

He is charged on the basis of individual criminal responsibility with 22 counts of crimes against humanity, including murder, deportation, imprisonment, torture, persecution and inhuman acts, and with 28 counts of war crimes including **rape**, outrage upon personal dignity, attacks against a civilian population, pillaging, and destroying of property.

Chronology:

31 March 2005	UN Security Council (SC) refers situation of Dafur to ICC pursuant Res. 1593
06 June 2005	<u>Investigation</u> opened
29 June 2005	1 st Progress Report to SC: OTP received thousands of documents and list with 51 names of persons potentially responsible. Information “suggests a <u>pervasive pattern of rape and sexual violence</u> ... including .. gang rape”
13 December 2005	2 nd Progress Report to SC identifies grave events like mass killings and <u>mass rapes “and other forms of extremely serious gender violence”</u> and selected

	incidents for further investigation. Ongoing violence, problems of witness protection and security. Hundreds of witnesses screened in 17 countries
14 June 2006	3 rd Progress Report to SC mentions <u>hundreds of rape cases registered</u> , “a number” of rape victims interviewed, expert studies commissioned. No significant crimes before Special Courts, no investigations of Committee on Rape in Darfur. All national judicial mechanisms lack witness protection; harassment is reported “particularly prevalent in the context of rape allegations”
14 December 2006	4 th Progress Report to SC
02 May 2007	ICC issued arrest warrants for Ahmad Harun and Ali Kushayb
07 June 2007	5 th Progress Report to SC in which the Prosecutor refers, among others, to the involvement of Ali Kushayb in notorious episodes in Arawala with particular brutal <u>multiple rapes</u> under his command. The Prosecutor mentions monitoring <u>current reports of rape</u> against internally displaced women.
16 June 2007	Transmission of request to execute the arrest warrants to the Government of Sudan
05 December 2007	6 th Progress Report to SC: Government of Sudan does not comply with its legal obligations to execute the warrants; announcement of two new investigations: one focusing on forced displacement of 2.5 million people, the other on attacks against African Union Peacekeepers
05 June 2008	7 th Progress Report to SC emphasizing the overall involvement of the entire Sudanese state apparatus in the alleged crimes, and comparing the deliberate attack of the Sudanese Government on the civil population with the Nazi Regime
14 July 2008	Prosecutor requests arrest warrant against President Omar Al Bashir, on charges of genocide, crimes against humanity and war crimes. Decision of Pre-Trial Chamber I to be announced on 4 March 2009.
20 November 2008	Prosecutor requests arrest warrants against several (unnamed) rebel commanders. The charges include attacks against Peacekeeper including murder.

03 December 2008

8th Progress Report reiterates all complaints against the Government of Sudan

IV. Central African Republic (CAR)

Case: The Prosecutor v. Jean-Pierre Bemba Gombo (ICC-01/05 -01/08)

Current status: in detention in The Hague; Pre-trial

Jean-Pierre Bemba Gombo is a National of DR Congo and alleged President and Commander-in-chief of the Mouvement de libération du Congo (Movement for the Liberation of Congo) (MLC). He allegedly allied with a segment of the national armed forces of Patassé, at that time President of the CAR, during and armed conflict in the CAR from October 2002 to March 2003.

Bemba is held responsible for the crimes committed by members of MLC including **rape of women and men on a large scale**.

Counts:

- three counts of crimes against humanity: **rape** (article 7(1)(g)), torture (article 7(1)(f)), and murder (article 7(1)(a));
- five counts of war crimes: **rape** (article 8(2)(e)(vi)), torture (article 8(2)(c)(i)), committing outrages upon personal dignity, in particular humiliating and degrading treatment (article 8(2)(c)(ii)), pillaging a town or place (article 8(2)(e)(v)), and murder (article 8(2)(c)(i)).

Chronology;

23 May 2008	Arrest Warrant issued under seal
24 May 2008	Arrest Warrant unsealed
3 July 2008	Bemba surrenders and is transferred to the ICC
27 May 2008	ICC requests the Portugal to obtain the freeze and seizure of assets of Bemba
12 December 2008	54 victims have been granted to participate in proceedings.

D. Definitions of gender based crimes

I. Genocide

Article 6

- Killing
- Causing serious bodily or mental harm
- Deliberately inflicting conditions of life calculated to bring about physical destruction
- Imposing measures intended to prevent births
- Forcibly transferring children

Rape or any form of sexualized violence not explicitly mentioned as element.

Qualification for genocide:

- Perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such
- Conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

II. Crimes Against Humanity

Art. 7 of the Rome Statute:

1 (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

1 (h) **Persecution** against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, **gender** as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

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

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

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

Elements of Crime

Article 7 (1) (g): Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, Enforced Sterilization, Sexual Violence

Rape

1. The perpetrator invaded¹⁵ the body of a person by conduct resulting in **penetration, however slight, of any part** of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with **any object** or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.¹⁶
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

¹⁵ The concept of “invasion” is intended to be broad enough to be **gender-neutral**.

¹⁶ It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This footnote also applies to the corresponding elements of article 7 (1) (g)-3, 5 and 6.

Sexual slavery¹⁷

1. The perpetrator exercised any or all of the powers attaching to the right of **ownership** over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.¹⁸
2. The perpetrator caused such person or persons **to engage in one or more acts of a sexual nature**.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

¹⁷ Given the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as a part of a common criminal purpose.

¹⁸ It is understood that such deprivation of liberty **may**, in some circumstances, **include exacting forced labour** or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element **includes trafficking in persons, in particular women and children**.

Enforced prostitution

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. The perpetrator or another person **obtained or expected to obtain pecuniary or other advantage** in exchange for or in connection with the acts of a sexual nature.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Forced pregnancy

1. The perpetrator **confined one or more women forcibly made pregnant**, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Enforced sterilization

1. The perpetrator deprived one or more persons of biological reproductive capacity.¹⁹
2. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.²⁰
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

¹⁹ The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice.

²⁰ It is understood that “genuine consent” does not include consent obtained through deception.

Sexual violence

1. The perpetrator committed an **act of a sexual nature** against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.
2. Such conduct was of a **gravity** comparable to the other offences in article 7, paragraph 1 (g), of the Statute.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

General Definition of Crimes against Humanity in the

a) Statute (Art. 7):

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

b) Elements (Art. 7 Introduction):

3. "Attack directed against a civilian population" in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that "policy to commit such attack" requires that the State or organization **actively promote or encourage** such an attack against a civilian population.

III. War Crimes - Elements

Art. 8 of the Rome Statute

International conflicts:

2 b (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

Non-international conflicts:

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

Qualification as war crime:

Conduct took place in context of and was associated with an international or non-international armed conflict

Perpetrator was aware of factual circumstances that established the existence of an armed conflict.

E. Gender Provisions of the ICC

I. Statute:

Antidiscrimination:

Art. 21 Applicable Law

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as **gender** as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Staff with expertise for sexual and gender violence:

Art. 42 Office of the Prosecutor

9. The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, **sexual and gender violence** and violence against children.

Art. 54 Duties and powers of the Prosecutor with respect to investigations

(b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, **respect the interests and personal circumstances of victims and witnesses**, including age, **gender** as defined in article 7, paragraph 3, and health, and take into account the **nature of the crime**, in particular where it involves **sexual violence, gender violence** or violence against children;

Art. 43 The Registry

6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include **staff with expertise in trauma, including trauma related to crimes of sexual violence**.

Protection in cases of sexual violence

Art. 68 Protection of the victim and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the **Court shall have regard to** all relevant factors, including age, **gender** as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves **sexual or gender violence** or violence against children. **The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes.** These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an **exception** to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the **proceedings in camera** or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a **victim of sexual violence** or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

3. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counseling and assistance as referred to in article 43, paragraph 6.

II. Rules of Procedure and Evidence

Protection:

Rule 88: Special Measures

1. Upon the motion of the Prosecutor or the defense, or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, (...) a Chamber may (...) order special measures such as, but not limited to, measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence (...). **The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the special measure is sought prior to ordering that measure.**
2. A Chamber may hold a hearing on a motion or a request under subrule 1, if necessary *in camera* or *ex parte*, to determine whether to order any such special measure, including but not limited to an order that **a counsel, a legal representative, a psychologist or a family member be permitted to attend during the testimony of the victim or the witness.**
5. Taking into consideration that violations of the privacy of witness or victim may create risk to his or her security, a Chamber shall be vigilant in controlling the manner of questioning a witness or victim so as to **avoid any harassment** or intimidation, **paying particular attention to attacks on victims of crimes of sexual violence.**

Evidence:

Rule 70: Principles of evidence in cases of sexual violence

In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles:

- (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
- (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
- (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;
- (d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.

Rule 71: Evidence of other sexual conduct

In the light of the definition and nature of the crimes within the jurisdiction of the Court, (...), a Chamber shall not admit evidence of the prior or subsequent sexual conduct of a victim or witness.

Rule 72: *In camera* procedure to consider relevance or admissibility of evidence

1. Where there is an intention to introduce or elicit, including by means of the questioning of a victim or witness, evidence that the victim consented to an alleged crime of sexual violence, or evidence of the words, conduct, silence or lack or resistance of a victim or witness as referred to in principles (a) through (d) of rule 70, notification shall be provided to the Court which shall describe the substance of the evidence intended to be introduced or elicited and the relevance of the evidence to the issues in the case.
2. In deciding whether the evidence (...) is relevant or admissible, a Chamber shall hear *in camera* the views of the Prosecutor, the defence, the witness and the victim or his or her legal representative, if any, and shall take into account whether that evidence has a sufficient degree of probative value to an issue in the case and the prejudice that such evidence may cause, (...).
3. Where the Chamber determines that the evidence (...) is admissible in the proceedings, the Chamber shall state on the record the specific purpose for which the evidence is admissible. (...)

F. Gender Reality at the ICC

Source:

Women Initiatives for Gender Justice, Gender Charts 2005 and 2006

Women Initiative for Gender Justice: Advance Preliminary Report (October 2008)

	Proportion of Women		
	2005	2006	2008
Overall Staff	47%	46%	48%
Professional posts	42%	44%	48
General services	52%		

Office of the Prosecutor:

	2005	2006	2008
Overall staff	45%	39%	42%
Chief Prosecutor	0	0	0
Heads of Division	67%	67%	67%
	2 out of 3	2 out of 3	
Executive Committee	50%	50%	50%
	2 out of 4	2 out of 4	
Head of Sections	0%	20%	21%
	0 out of 5	1 out of 5	

There is no Gender Legal Adviser on a senior position.

Chambers:

	2005	2006	2008
Judges	39%	44%	
	7 out of 18	8 out of 18	
Overall staff	50%	48%	

Registry:

	2005	2006	2008
Registrar	0%	0%	0%
Heads of Division	0%	0%	0%
Heads of Sections:	44%	37%	47%

List of Legal Councils

	2005	2006	2008
Overall	16%	16%	19%
Western European/others	9%	15%	19%
Africa	29%	17,9%	16%
Eastern Europe	43%	43%	43%
Latinamerica/Caribik	0%	0%	0%
Asia	0%	0%	0%

G. Victim and Witness Rights

Participation, Protection, Reparations

I. Definition

Rule 85: Definition of Victims

- (a) “Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court
- (b) Victims may include organizations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

II. Participation

When?

- opening of investigation of a situation
- jurisdiction
- admissibility
- pre-trial
- trial
- appeal
- reparations

Who?

- All victims during general investigation stage
- Victims personally and closely linked to the case of accused

How?

- by application (written, audio, video)
- through a legal representative
- information and notification through the Court
- make observations
- apply to question witnesses, experts, accused
- opening and closing statements

Limits

- no right to file motions
- no full right of legal representative

- Chamber rules on the way of participation (attendance of legal representative in court, questioning, opening and closing statements) on case by case basis
- prosecutor and defense can make observations to any form of participation, can appeal the Chamber's decision

Statute:

Art. 15: Prosecutor

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. **Victims may make representations to the Pre-Trial Chamber**, in accordance with the Rules of Procedure and Evidence.

Art. 19: Challenges to the jurisdiction of the Court or the admissibility of a case

3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as **victims, may also submit observations to the Court.**

Art. 68: Protection of the victims and witnesses and their participation in the proceedings

(3) Where the **personal interests** of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims **where the Court considers it appropriate**, in accordance with the Rules of Procedure and Evidence.

Subsection 3 of Rules of Procedures and Evidence:

Participation of Victims in the Proceedings

Rule 89: Application for Participation of Victims in the Proceedings

1. In order to present their views and concerns, victims shall make written applications to the Registrar

Rule 102: Communications other than in writing

Where a person is unable, due to a disability or illiteracy, to make a written request, application, observation or other communication to the Court, the person may make such request, application, observation or communication in audio, video or other electronic form.

2. (...) A victim whose application has been rejected may file a new application later in the proceedings.

3. An application ... may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child or, when necessary, a victim who is disabled.

4. Where there are a number of applications, the Chamber may consider the applications in such a manner as to ensure the effectiveness of the proceedings and may issue one decision.

Rule 90: Legal Representatives of Victims

1. A victim shall be free to choose a legal representative.

2. Where there are a number of victims, the Chamber may (...) request the victims (...) to choose a common legal representative or representatives. (...)

3. If the victims are unable to choose a common legal representative or representatives within a time limit (...), the chamber may request the Registrar to choose one or more common legal representatives.

5. A victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court **may receive** assistance from the Registry, including, as appropriate, **financial assistance**.

Rule 91: Participation of Legal Representatives in the Proceedings

2. A legal representative of a victim shall be entitled to **attend and participate** in the proceedings in accordance with the terms of the ruling of the Chamber and any modification 2 thereof given under rules 89 and 90. This shall include participation in hearings unless (...) the Chamber concerned is of the view that the representative's intervention should be confined to written observations or submissions. The Prosecutor and the defence shall be allowed to reply to any oral or written observation by the legal representative for victims.

3 (a) When a legal representatives (...) wishes to question a witness, (...) an expert or the accused, the legal representataive must make application to the Chamber. The Chambe rmay require the legal representative to provide a written note of the questions and in that case the questionis shall be communicated to the prosecutor and, if appropriate, the defence, who shall be allowed to make observations within a time limit set by the Chamber.

3 (b) The Chamber shall then issue a ruling on the request (...) The Chamber may (...) put the question to the witness, expert or accused on behalf of the victim's legal representative.

Rule 92: Notification to Victims and their Legal Representatives

1. This rule on notification to victims and their legal representatives shall apply to all proceedings before the Court, except in proceedings provided for in Part 2. [jurisdiction, admissibility, applicable law]

2. (...) the Court shall notify victims concerning the decisions of the Prosecutor not to initiative an investigation or not to prosecute (...) Such a notification shall be given to victims or their legal representatives who have already participated in the proceedings or, as far as possible, to those who have communicated with the Court in respect of the situation or case in question. (...)

3. In order to allow victims to apply for participation in the proceedings (...) the Court shall notify victims regarding its decision to hold a hearing to confirm charges (...).

4. When a notification for participation (...) has been given, any subsequent notification (...) shall only be provided to victims or their legal representatives who may participate in the proceedings (...).

5. (...) victims or their legal representatives (...) shall (...) be notified by the Registrar in a timely manner of:

- (a) Proceedings before the Court, including the date of hearings and any postponements thereof, and the date of delivery of the decision;

(b) Requests, submissions, motions and other documents relating to such requests, submissions or motions.

6. Notification as referred to in sub-rules 5 and 6 [trial participation] shall be in writing or, where written notification is not possible, in any other form as appropriate. (...)

7. For notification as referred to in sub-rule 3 [all victims] (...) the Registrar shall take necessary measures to give **adequate publicity** to the proceedings. In doing so, the Registrar may seek (...) the cooperation of relevant States Parties, and seek the assistance of intergovernmental organizations.

III. Protection

Statute:

Art. 43 Registry

(6) The Registrar shall set up a Victims and Witnesses Unit (s. above).

Art. 68 Protection of the victim and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the **Court shall have regard to** all relevant factors, including age, **gender** as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves **sexual or gender violence** or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an **exception** to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the **proceedings in camera** or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a **victim of sexual violence** or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

Rules of Procedure and Evidence:

Rule 87: Protective measures

1. Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness (...). The Chamber shall seek to obtain, whenever possible, the consent of the person in respect to whom the protective measure is sought prior to ordering the protective measure.
2. (...)

3. A Chamber may (...) hold a hearing, which shall be conducted in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, inter alia:
 - a. That the name of the victim, witness or other person at risk on account of testimony given by a witness or any information which could lead to his or her identification, be expunged from the public records of the Chamber;
 - b. That the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party;
 - c. That testimony be presented by electronic or other special means, including the use of technical means enabling the alternation of pictures or voice, the use of audio-visual technology, in particular videoconferencing and closed-circuit television, and the exclusive use of the sound media;
 - d. That a pseudonym be used for a victim, a witness or other person at risk on account of testimony given by a witness; or
 - e. That a Chamber conduct part of its proceedings *in camera*.

Rule 88: Special measures

See above, F. Gender Provisions in the Rules of Procedure and Evidence, p 70

Rule 73: Privileged communications and information

2. (...), communications made in the context of a class of **professional or other confidential relationships** shall be regarded as privileged, and consequently not subject to disclosure, (...) if a Chamber decides in respect of that class that:

- (a) Communications occurring within that class of relationship are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure;
- (b) Confidentiality is essential to the nature and type of relationship between the person and the confidant; and
- (c) Recognition of the privilege would further the objectives of the Statute and the Rules.

3. (...) the Court shall give particular regard to recognizing as privileged those communications made in the context of the professional relationship between a person and his or her **medical doctor, psychiatrist, psychologist or counsellor**, in particular those related to or involving victims, or between a person and a member of a religious clergy; and in the latter case, the Court shall recognize as privileged those communications made in the context of a sacred confession where it is an integral part of the practice of that religion.

IV. Reparations

Statute:

Art. 75: Reparation to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, (...) the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including **restitution, compensation and rehabilitation**.

Where appropriate, the Court may order that the award for reparations be made through the **Trust Fund** (...).

3. (...) the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. (...) the Court may (...) seek measures under article 93, paragraph 1 [assistance of States in tracing, freezing or seizing property etc.]

Art. 79: Trust Fund

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

Rules of Procedure and Evidence:

Rule 91: Participation of legal representatives in the proceedings

4. For a hearing limited to reparations (...), the restrictions on questioning by the legal representative (...) shall not apply. ... the legal representative may, with the permission of the Chamber concerned, question witnesses, experts and the person concerned.

2. 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.
3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

Board of Directors

- Queen Rania Al-Abdullah of Jordan
- Simone Veil, France
- Tadeusz Mazowiecki, Poland
- Archbishop Desmond Tuto, South-Africa
- Arthur Raymond Robinson, Trinidad and Tobago

Sources of funds

- Fines, forfeitures, awards of reparations ordered by the Court
- Contributions by governments, international organizations or individuals

As of 26 April 2006: 1.310.237.20 Euro received, 275.000.00 Euro pledged

Functions

- Seek voluntary contributions
- Establish transparent procedures for receipt and managements of funds
- Implement reparation orders from the Court
- Determine appropriate uses for voluntary contributions for victims and their families
- Outreach to victims groups as possible beneficiaries of the Trust Fund

Beneficiaries

- Individuals or collectives
- Victims/witnesses participating in Court's proceedings following Court's orders (fines, forfeiture, awards for reparations)

- Victims of crimes within the jurisdiction of the Court (other resources of the Trust Fund)

Policy

- Is predominantly active in countries with ICC cases
- Funds innovative projects on income-generating activities, medical treatment for victims, psychological healing, memorials, counseling for families to accept abducted children or raped women and girls
- Supports projects which target the most vulnerable and marginalized survivors
- Favors reparations activities which are directed to groups of survivors
- Funds projects with outreach components to ensure understanding of community and sustainability
- Implements projects for the benefit of victims, as and when requested by the Court

Sources:

ICC: <http://www.icc-cpi.int/>

Coalition for the ICC: <http://www.iccnw.org/>

Women's Initiatives for Gender Justice: <http://www.iccwomen.org/>

State Crime and Memorials in Berlin

by Thomas Lutz & Kirstin Drenkhahn

Wed., 23 June 2021, 14:30 – 15:30

Abstract:

Berlin is a city rich with Prussian and German history and with reminders of this history. A lot of the memorials relate to the Drittes Reich and its history of genocide and persecution. In this class, we'd like to talk with audience about experiences with and perceptions of memorials and the process of memorialization of the Nazi atrocities in Germany. Participants are invited to prepare by checking out some of the websites (or the memorials) relating to memorials in Berlin:

Mahnmal Levetzowstraße (Standort der Synagoge Levetzowstraße), Gedenkort Güterbahnhof Moabit

<https://www.ihrletzterweg.de/>

Adresse: Levetzowstr. 7-8, 10555 Berlin; Ellen-Epstein-Straße (zwischen Lidl und Hellweg), 10559 Berlin; U Hansaplatz, U Turmstraße, S Tiergarten; S/U Westhafen

Denkmal für die ermordeten Sinti und Roma

<https://www.stiftung-denkmal.de/>

Adresse: Simsonweg, 10117 Berlin; S/U Brandenburger Tor, U Bundestag

Gedenktafel Aktion T4

<https://www.gedenkort-t4.eu/de> oder <https://www.stiftung-denkmal.de/>

Adresse: Tiergartenstraße 4, 10785 Berlin; S/U Potsdamer Platz

Topographie des Terrors

<https://www.topographie.de/>

Adresse: Niederkirchnerstraße 8, 10963 Berlin; U/S Potsdamer Platz

Denkzeichen zur Erinnerung an die Ermordeten der NS-Militärjustiz am Murellenberg, Berlin-Charlottenburg

http://www.denkzeichen-am-murellenberg.de/deserteure_denkzeichen.html;

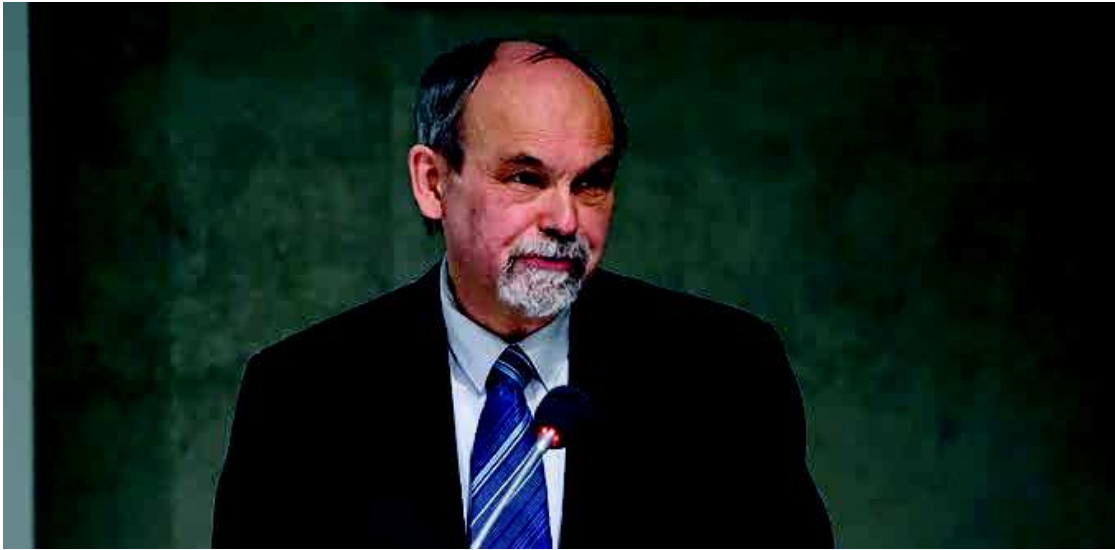
<https://www.berlin.de/ba-charlottenburg-wilmersdorf/ueber-den-bezirk/geschichte/gedenkstaetten/artikel.177394.php>

Adresse: Zugang über Glockenturmstraße zwischen Waldbühne und Eissporthalle, 14053 Berlin; S Pichelsberg, S/U Olympiastadion, U Ruhleben

Article:

Garbe, Detlef: The Development of Memorial Museums in Germany and their Network. Review and Perspectives.

The Development of Memorial Museums in Germany and their Network. Review and Perspectives



Detlef Garbe

The 25-year jubilee of the Memorial Museums Department of the Topography of Terror Foundation provides a good opportunity to review the development of the memorial sites that commemorate the crimes of Nazism in Germany, and to take a timely look ahead. This is all the more necessary today because many things that seemed certain have become fragile, and the memorial museums are facing major challenges. On the one hand, politicians and the public increasingly expect these museums to achieve important goals in areas like educating for democracy, promoting integration and preventing anti-Semitism. On the other hand, they are encountering political challenges and fundamental questioning of a kind that has not occurred since the reunification of Germany in 1990.

For a full review we have to go back beyond the year 1993. The Memorial Museums Department has a prehistory that dates back at least as far as the beginning of the 1980s, when a new phase of the process in Germany called “coming to terms with the past” began as part of a generational change. This concept, which was current at that time, implied that one day it would be possible to finish with the criminal legacies of Nazism, finally to “overcome” them at some future date. At the same time, interest turned towards the actual sites and the victims of Nazi crimes, breaking with the cover-up attitude that had defined the postwar decades and moving towards revelation and exposure. Examples of the rupture in consciousness from 1979 to 1984 include the shock caused by the screening of the American TV series “Holocaust” in 1979 about the persecution and fate of the Weiss family, who were Jewish, contrasted with the German perpetrators, the Dorf family; the school competitions for the prize sponsored by the Federal German president; and the emergence of history workshops. The historian Detlef Siegfried has characterised these five years as the period with the highest level of popular mobilisation in the history of the Federal Republic of Germany.

In many places, initiatives organised by youth federations and church and trade union groups began putting up commemorative signs at former Nazi prison camp sites or in similarly significant places. The documentation that emerged in such contexts, which described forgotten camps on people's doorsteps, first reawakened people to the fact that during the war Germany was covered in a network of concentration camps and forced labour camps. At the actual sites it was important back then to overcome fierce resistance among the local population and engage in conflicts, often for years, with local community and government bodies.

As individual memorial centre initiatives began to express the wish to exchange information and coordinate their activities throughout Germany, the association Aktion Sühnezeichen Friedensdienste e.V. (Action Reconciliation Service for Peace – ARSP), which had worked with volunteers in Auschwitz and other memorial sites outside Germany assumed responsibility for this. On the weekend of 17–18 October 1981 in Hamburg, at the sidelines of the opening of the documentation centre at Neuengamme, there was an initial meeting of activists from Berlin, Dachau, the Emsland area, Essen, Moringen, Ulm, and the Wewelsburg area. The meeting came up with the idea of producing a book about the “forgotten concentration camps”,¹ about repressing the past and the resistance in society against the memorial centre work that was gradually developing. It also arranged for regular meetings in the future.

The memorial centres and their objectives increasingly drew public attention. The second meeting of the memorial centre initiatives that took place in Dachau from 21 to 23 May 1982 had already gained the support of the Federal Agency for Civic Education. The following year, the mayor of Hanover, Herbert Schmalstieg, was present to greet the participants arriving at Hanover Town Hall from all parts of West Germany – a sign of the growing importance of memorial centre work.

A crucially important moment for the networking of the memorial centres was the establishment of a central coordination post at ARSP. The first incumbent, from the beginning of 1983, was the vicar Thomas Vogel, who was succeeded in 1983 by the teacher Thomas Lutz, then aged 27. After studying history, politics and sport in Marburg, Lutz had chosen civilian service for the ARSP as an alternative to military service, and had hosted visitor groups in Auschwitz Memorial Centre. After his second state examination he set to work in the Berlin ARSP office, building up the Memorial Museums Department. He has now coordinated the cooperation between the Federal German memorial centres for over 33 years, organising conferences and advanced education programmes for them, supporting their projects and increasingly representing them abroad, in neighbouring European countries, in Israel and the USA, and worldwide.

This was all completely unforeseeable in the mid-1980s. Although there is no space here to present the varied history of the memorial centres, we shall briefly outline how the former sites of persecution were dealt with in the previous decades. By the 1950s there was hardly any continuing public interest in the numerous memorials, which had usually been created on the initiative of former victims of persecution under the auspices of the Allied military forces at locations of camps and sites of imprisonment and murder, and the memorials created in many cities to commemorate the victims of the Nazi terror regime. Remembrance from the 1950s onwards was dominated by memorials for the victims of aerial bombing, the returnees from the war and the people expelled from central and Eastern Europe. The original sites were forgotten,



The audience listening to Detlef Garbe's lecture. Front row, from left to right: Andreas Nachama, Maria Bering, Klaus Lederer, Thomas Lutz, Uwe Bergmeier

often because they were later used for other purposes. It is commonly known that not only the People's Commissariat for Internal Affairs of the Soviet Union (NKVD) used the former Nazi concentration camps at Buchenwald and Sachsenhausen as special camps, but also that the Western allies used the former concentrations camps of Dachau, Esterwegen and Neuengamme as internment camps. To begin with, after the war the grounds of former sites of Nazi terror in the Federal Republic were often used for accommodating refugees and expellees before being converted for use as prisons, police academies and military institutions.

From 1958 to 1961 the German Democratic Republic (East Germany – GDR) established national memorial centres in Buchenwald, Ravensbrück and Sachsenhausen– not least for reasons of self-legitimation as shrines of “the anti-fascist legacy”. It was only then that West Germany also created memorial centres with exhibitions at concentration camps, for example in Dachau in 1965 and in Bergen-Belsen in 1966.

The above-mentioned change that began in the early 1980s in the discussion of how to deal with the sites of Nazi crimes led during that decade to the opening of a whole series of memorial sites complete with exhibitions and accompanying educational programmes. This was further reinforced in reunified Germany in the 1990s, contradicting the initial worries of the victims' associations both within and outside Germany that the memorial centres would now be disbanded. In the unification process the question arose of the continued maintenance of the central memorial sites that had been ideologically co-opted in the GDR. Political interest started to focus on this at the beginning of the 1990s due to media reports on the use of Buchenwald and Sachsenhausen as Soviet special camps after the war, and the discovery in the camps of the graves of prisoners who had starved to death there after 1945 under the jurisdiction of the Soviet secret service, the NKVD.

From that time on, as new concepts were developed and new memorial centres were established to commemorate the injustices of the East German regime led by the Socialist Unity Party (SED), there was growing awareness that the German nation as a whole should bear responsibility for the memorial centres that commemorated the

Nazi crimes. For the first time these centres, provided they were recognised as being important for the entire nation, were co-funded by the German government. Memorial centres with exhibitions and permanent information programmes were set up in many regions and municipalities with support from federal German states. All these foundations were accompanied by strong civic participation.

At the same time, questions about the self-image of united Germany and the lessons from the experience of two different dictatorships reinforced interest in the memorial centres. The increased social consensus, the rising visitor numbers and the support from public funds led to a professionalisation of the memorial centres which were now gradually able to begin developing into museums of contemporary history and modern educational centres. In barely more than a decade they moved from the periphery into the centre of policy about history.²

During this period of conflicts over interpretation in relation to identity politics and the development of a memorial culture for Germany as a whole, in March 1993 the Topography of Terror Foundation took over the management of the Memorial Museums Department from the ARSP. After ten years and the strain of unifying the East and West German sections of the organisation, the ARSP could no longer cope financially with this additional task.

According to the then director of the Foundation, this decision “was linked to considerable expansion in the range of assignments of the Topography of Terror Foundation.”³ The vacant post of a research assistant for press and public relations work was filled by Thomas Lutz. For the Memorial Museums Department, which has been reinforced over the years with a position for a specialist worker, a budget for fees and the input of volunteers from the FSJ, the voluntary social service year in the field of culture, being part of the Foundation meant a share in its scholarly expertise and a big boost to its professionalism.

The Topography of Terror is a documentation centre that provides information about the SS terror that originated at that location and spread throughout Germany and the parts of Europe occupied by the Wehrmacht. The institutionalisation of the memorial centre coordination and the related public impact clearly brought great benefits for this documentation centre. In my opinion, there can be no argument about an institution that is jointly funded by the central government and the federal state of Berlin assuming responsibility for an overlapping task that benefits all of the memorial centres and memorial museum initiatives in Germany.

The Memorial Museum Department has long been a universally recognised port of call for advice and information for memorial centres and initiatives, municipalities and the Federal states, and for the media, politics and research. The department fulfils its coordinating function very efficiently in a variety of ways. Thomas Lutz inherited a newsletter that was introduced by his predecessor in 1983 as a collection of duplicated pages. Meanwhile Lutz has developed the Memorial Centre Newsletter into a widely distributed specialist journal that is well respected beyond the memorial centres. Originally published every two months, later quarterly, the journal's issues have been professionally designed since 1997 and provide more topical input than the specialist periodicals for historical sciences and historical education in this thematic field, most of which appear annually. At the same time the size of the issues allows scope for specialist contributions and practical information on new exhibitions and



Tour of the site of the T4 clinic in Brandenburg, a site of Nazi euthanasia killings, during the conference "Archaeology and Memory. Sites of Nazi camps. Research-Preserve-Educate", 2015

publications, events and conferences. In May 2001 the 100th edition of the Memorial Centre Newsletter appeared as a jubilee issue with highly controversial articles on specification of memorial centre locations. Now it is almost time for the 200th edition.

In 1999 the Memorial Centre Forum began as an interactive platform with a practical and topical press review, notices of events and literature, information on research projects, and contributions to discussion, although the latter are regrettably not as strong as may be desired on this platform.

The conferences organised through the Department, and often held in cooperation with other educational organisations, are a core element for exchanging experiences and for further education. The memorial centre seminars are still held today at different venues and with different approaches to various topics. Specialist conferences for specific groups and international seminars and symposia are also part of this picture.

The annual memorial centre conferences held since 2012 are mainly for the delegates who represent the FORUM of the German federal states' working groups of memorial centres, memorial sites and initiatives, the head offices of the Federal Agency for Civic Education and the Working Group of Concentration Camp Memorials in Germany in the different federal states. Their purpose is to serve the debate about the future development of commemorative sites in the context of present-day challenges. The FORUM of the Federal States' Working Groups presently comprises 265 memorial centres and sites of remembrance maintained by full-time staff and volunteers.⁴

The Memorial Centre Conference is consequently particularly important because in some respects it substitutes for the joint organisation of all the memorial centres for the victims of Nazism in Germany, which is still lacking today.

When the Working Group of Concentration Camp Memorials in Germany was founded twenty years ago, Thomas Lutz assumed the role of its managing director. The group covers the eight memorial centres Bergen-Belsen, Buchenwald, Dachau, Flossenbürg, Mittelbau-Dora, Neuengamme, Ravensbrück and Sachsenhausen, which are jointly funded by the federal state where they are situated and by the German government. The Working Group brings together their management representatives,

who have formed a close cooperative network, organise common projects on occasions, and promote exchange between working groups in the field of memorial centre archives, libraries and educational work. With its numerous initiatives and contacts in the political sphere, the Working Group is involved in developing the memorial centre landscape in Germany. In doing so, however, it does not see itself as a lobby group for its own interests but as an advocate for strengthening the smaller institutions and initiatives that are essential for the decentralised structure.

The great esteem awarded to the work of the Memorial Museum Department is shown by the fact that the German parliament, the Bundestag, stipulated in its resolution of November 2008 for continuation of the memorial centre conception that a representative of the Memorial Museum Department should be part of the expert body that gives recommendations on the suitability of projects for funding to the Federal Government commissioner for culture and the media. Above and beyond this function, Dr. Lutz occupies numerous positions in expert commissions and on advisory boards. He is also the long-serving chairman of the International Advisory Committee of the Brandenburg Memorials Foundation.

In addition, the expertise of the Memorial Museums Department is increasingly in demand internationally. Aside from lectures and expert reports or statements, this includes, for example, collaboration on competitions for the design of exhibitions, monuments and memorial centres. The Department is a co-founder of the specialist section on memorials in the International Council of Museums (Icom) and held the post of vice-president for six years at the head of the International Committee of Memorial Museums in Remembrance of the Victims of Public Crimes (IC Memo), which includes museums concerned with different crimes of regimes around the world. Since 2000 the Department has been appointed as a delegate of the German Foreign Ministry in the organisation known today as the International Holocaust Remembrance Alliance (Ihra), in which over 30 nations now cooperate.

For many international partners, the Memorial Museums Department of the Topography of Terror Foundation is something like an ambassador of Germany's memorial centres. At the Department's tenth anniversary, Wesley A. Fisher, a long-serving member of the United States Holocaust Memorial Museum in Washington DC acknowledged his appreciation by saying that in the quest for a key contact partner only the Memorial Museums Department had fulfilled the qualifications for a central professional organisation for Holocaust matters in Germany.⁵ This was the American view. It reveals another advantage of the allocation of the Memorial Museums Department to the Topography of Terror Foundation: it demonstrated in an international context that after the dominance of the Holocaust, the Shoah, the other mass crimes committed by the Nazis should not be marginalised.

The catalogue of activities underlines the key importance of networked coordination, particularly in Germany with its highly differentiated and valuable decentralised structure of educational sites that are usually located directly at the historical sites of the Nazi crimes. Unlike in other countries such as the USA, Israel, Poland and France, there is no central national institution in Germany that prescribes the narrative of remembrance and the historical picture.

In Germany a largely pluralistic and cosmopolitan society has evolved through civic commitment, the unification process, immigration and international networks. In



Tour of the permanent exhibition of the Topography of Terror Foundation during the 57th nationwide memorial centre seminar, "Don't Forget and Don't Repeat – Present-Day Relevance in Memorial Centre Work", 2012

particular, the self-critical approach to the Nazi past testifies to a mature democratic fabric and a new kind of sincerity. As the then president of Germany, Joachim Gauck, said in a speech on 27 January 2015, "there is no German identity without Auschwitz."⁶ There is no doubt that acknowledging the guilt of Nazi Germany has become an established part of Germany's self-conception, because it is the only way the nation can live self-confidently with its historical crimes from its own perspective and on the world stage. The former Bundestag president Norbert Lammert summed this up in a speech in 2013: "This memorial culture is an indispensable precondition for re-establishing Germany's reputation in the world. It is a condition for a defeated, politically lost and morally discredited nation ... to be able to walk tall again."⁷

Given the increasingly urgent challenges facing us today, there is a need to reinforce the memorial centre network that has now developed, not least as a result of the German government's concept for memorial centres. The guidelines it developed in the 1990s, with their emphasis on the shared responsibility of central government, the different federal states and local authorities, on scholarly expertise and on defining the relationship between the Nazi genocide and the crimes of the German Democratic Republic (GDR), together with the creation of international advisory committees for the victims, support the decentralisation and independence of the memorial centres.

The development of memorial centres in the years following the reunification of Germany seems like a success story. Meanwhile more than 300 memorial centres in all the big cities and almost everywhere across the country provide information about the crimes of the Nazi regime. The number of visitors to memorial centres is growing, and has reached over five million annually. Nonetheless, the memorial centres are facing difficult times.

It is precisely the real or presumed success in relation to Germany's troubled historical legacy that has fostered the conclusion that everything has been done in this area that needed to be done. Regardless of concrete problems such as the physical preservation of buildings, the memorial centres for the victims of Nazism are seen as being at saturation point, and the history as thoroughly researched. It is thanks only to

parliamentary criticism of the cancellation of group visits due to resource shortfalls for visitor facilities that funds were finally increased for educational work in the memorial centres in the last two years.

Nowadays there are scarcely any remaining witnesses who can describe the Nazi crimes from their own personal experience. This increases the responsibility of the memorial centres as visible testimonies for preserving the memory of the injustices committed in the Nazi era. Just because the survivors will fall silent, the memorial centres should not become silent edifices reserved for remembrance only on particular occasions. In fact, they should remain exceptionable, they should encourage people to speak out rather than keep silent, and they should raise important questions.

Other major challenges include:

- the growing distance in time since the Nazi period
- the fading out of the generation that examined the Nazi crimes in a way that was often motivated by a sense of shame about their parents' silence, and its replacement by more uninhibited, less biographically influenced approaches
- the rapidly changing possibilities of access to audiences – not just young people – in the digital world
- the challenges of an increasingly multi-ethnic society with different background experiences and refugee narratives that are not influenced by the events of the Second World War
- the growth of anti-Semitism emanating from the midst of society as well as through refugees who flee to Germany from civil war and persecution, many of whom have grown up in surroundings characterised by hatred of Israel and the Jews.

In this situation the memorial centres are being confronted with the expectation of making greater contributions to integration and stabilising the culture of democratic values.

In relation to the expectations placed on memorial centres, I would like to take this opportunity briefly to discuss the issue of compulsory school visits to concentration camp memorials. In my opinion this is a pseudo-debate because visits by school classes as part of the appropriate curricula are naturally desirable and educationally necessary. However, relevant recommendations for excursions outside school that are embedded in the teaching already exist in the timetables and curricula in many federal states in Germany. It makes sense educationally, of course, not to run crash courses but to organise project days with qualified guidance in which school students are not just lectured on guided tours but offered an integrated approach, wherever possible incorporating interactive elements, participation with the students doing their own enquiries in tasks designed for their particular interests, and above all, discussion phases. It is obviously necessary to create the preconditions for this both in the school context and in the memorial centres. Today, many memorial centres, especially the ones with large visitor numbers, are already unable to meet the present demand. To give just one example: at Neuengamme concentration camp memorial we offer a variety of programmes depending on age, type of school or training scheme, and languages, to over 2,000 accompanied groups annually. We have now reached the limits of our present staff capacity. We simply lack the resources to do more.

The pedagogical criticism voiced in the debate, including from memorial centre circles, concentrated on the fixed idea of compulsory visits that are credited with

achieving a near-cathartic effect by showing the Nazi crimes clearly and vividly. Particularly because school by its very nature has the character of a duty, there is no point in forcing anyone. We can see this from the experience of the GDR, where prescribed anti-fascism actually had the opposite effect. When school students and teachers have the impression that a certain attitude is required of them, they close up and develop internal resistance. Yet for learning experiences and emotional accessibility we need students with open minds and hearts who are not afraid to ask questions of anyone.

Changes in the political field of reference that always have a bearing on the work in the memorial centres are also conditioned by the increasingly threatening situations in recent years, military conflicts and global crises that affect us directly in the form of social distortions or terrorist threats. In periods when autocrats propagate the self-interest of nation states and isolation and rearmament in both domestic and foreign affairs, many people ask themselves whether the social roots of democratic achievements, the institutional safety mechanisms of the constitutional state and the international blueprint for lasting peace are strong enough. The memorial centres are increasingly hearing from survivors of Nazi terror, who are now very old, and their relatives, asking how far the lessons from the historical experience of Nazism can apply now.

The past decades have seen a difficult process of establishing memorial culture across Germany on a firm basis and gaining social understanding for this. Today, in a situation of growing uncertainty, these achievements are being fundamentally challenged by the growth and strengthening of right-wing populism. Once again we are hearing declarations that “we no longer have to be reproached for those twelve years”, and there are public calls for “an about-turn in memorial policy”. The speech of Federal President Richard von Weizsäcker on 8 May 1985 on the liberation from Nazism is stigmatised as “a speech against his own nation” and the Memorial to the Murdered Jews of Europe is lambasted as a “symbol of shame”. These were not momentary lapses. They were intentional moves to prepare the way for a new type of nationalism and the return of denial, deliberate offsetting and relativisation. We must continually be prepared for attacks on memorial culture that will assume a new character. In fact, this concerns the issue of national identity and our country’s conception of itself.

Conflicts about the political interpretation of history have their impact on the memorial centres which became part of the state’s political philosophy in the newly formed Federal Republic of Germany after the country’s reunification following the two different experiences of dictatorship. Now the memorial centres are no longer so sure of themselves, either. The critique of rituals of remembrance expressed in research circles as “uneasiness about memorial culture”⁸ and the affirmation that has come to replace the earlier offensive attitude in the memorial centres is currently being voiced from a different side and motivated by completely different reasons. The memorial centres are discovering how far their success mobilises opposing forces and how relevant the discussion about the past still is, and that, contrary to some assessments published in recent years, it is still a matter of “hot history”.

There is no question that right wing extremists have always hated the memorial centres which bear witness to the crimes of the Nazis, and therefore to German crimes. As far back as thirty years ago, the nationalist German journalist Armin Mohler specifically mentioned overcoming “the fuss about coming to terms with the past” as a

precondition for a liberated sense of national self-confidence. This demand was clearly formulated in 1985 in the “Deutschen Monatsheften” (“German Monthly Bulletins”) published by a far right organisation, the “Deutschen Kulturwerk Europäischen Geistes” (“German Cultural Factory of the European Spirit”): “The road to self-liberation of the Germans runs over the rubble of the concentration camp memorial centres.” Liberation from what they call “the guilt cult” in order to pave the way for a new type of nationalism was, and still is, a key concern of not a few masterminds of the New Right. There are grounds for fearing that, from now on, this kind of thinking will be vociferously advocated in parliament and will probably also be expressed in broadcasting councils or supervisory bodies of centres for political education, and maybe even in memorial centres. Now it will depend on how strong the opposition and resistance in our society proves to be. As yet there is still broad and gratifying political unanimity among all democratic forces and parties in this country to confront the demon in a decisive way.

Right-wing extremism is undoubtedly the biggest challenge we are facing today, in Germany as well as in many other countries where large sections of the population are economically insecure and feel anxious, which makes them receptive to rabble-rousing against alleged culprits. The problem involves not only the populist right wing parties but also the dangers of erosion in the middle of society. We could say that political weight has shifted across the whole spectrum. What we need here is a clear bulwark against ideology that is hostile to human rights. The challenges of the significant rise in right-wing extremism confront the memorial centres for commemoration of Nazi crimes with a substantial task. They now have to prove themselves and contribute to strengthening democratic counter-forces and demystifying the new prophets of doom.

Under the influence of changing social challenges, rising visitor numbers and expanding tasks, last year the Working Group of Concentration Camp Memorials and the FORUM of Working Groups in the Federal German states addressed a joint declaration to the public and to politicians.⁹ They demanded greater efforts for researching into and analysing the past and for the work of communication, and an end to the imbalances in this field. The following points should be prioritised in the further development of the German government’s memorial centre conception:

- support for innovative pedagogical projects, especially the development of integrative formats for migrants,
- ways of financially supporting individual projects and smaller memorial centres for the field of work on Nazi history along the lines of existing government budget allocations for the Federal Foundation for the Reappraisal of the SED Dictatorship,
- preservation of old buildings and remains that are under acute threat of collapse in the former concentration camps and at comparable sites,
- securing and cataloguing of collections and archives to safeguard knowledge transfer for the next generation.

Given the particular need for networking among the decentralised memorial scene in Germany, the permanent security and significant reinforcement of the Memorial Museums Department is a core feature of this declaration. Especially with regard to the generation change that is due here in the coming period, a structure is urgently required to save the accumulated knowledge and experience of the past decades. As early as the tenth anniversary, Reinhard Rürup pointed out the indispensability of the Department for the work of memorial centres in Germany.¹⁰ On that occasion, in 2003,

Knut Nevermann, who was then head of the office of the minister of state for culture and the media, declared that the Memorial Museums Department would have to be expanded on a long-term basis but that “through the Department’s efficiency and the collegial contact between memorial centres” a professional level had already been reached that was unmatched elsewhere in the world. He added, “It would be absurd to cast doubt on a structure that is so meaningful and productive.”¹¹

Although I assume there can be no possible threat to the continuation of such a successful project, the planned expansion – and the fifteen years that have elapsed since then should have been time enough for it – has largely failed to occur. The Topography of Terror has had no scope for this within the framework of its budget.

In this light, we sincerely hope that in Thomas Lutz’s remaining years in office the basis will be laid for increased resources for this indispensable mission to tackle the growing demands on it. Perhaps then our colleague Thomas Lutz will be able to realise a project that he mentioned in an interview when he was asked about his great professional dream: “To have enough time one day to write a record of the development of the research and communication of the history of the Nazi period in memorial centres.”¹²

Dr. Detlef Garbe is the director of Neuengamme Concentration Camp Memorial and spokesman for the Working Group of Concentration Camp Memorials in Germany.

- 1 The book appeared a year later: Detlef Garbe, ed. *Die vergessenen KZs? Gedenkstätten für die Opfer des NS-Terrors in der Bundesrepublik*. Bornheim-Merten 1983.
- 2 See Detlef Garbe. “Von der Peripherie in das Zentrum der Geschichtskultur. Tendenzen der Gedenkstättenentwicklung.” In Bernd Faulenbach and Franz-Josef Jelich, eds. “Asymmetrisch verflochtene Parallelgeschichte?” *Die Geschichte der Bundesrepublik und der DDR in Ausstellungen, Museen und Gedenkstätten*. Essen 2005, p. 59–84.
- 3 *Netzwerk der Erinnerung. 10 Jahre Memorial Museums Department der Stiftung Topographie des Terrors*. A publication of the Stiftung Topographie des Terrors, Berlin, edited by Reinhard Rürup. Berlin 2003, p. 8.
- 4 See Thomas Lutz with Marie Schulze. “Gedenkstätten für die Opfer nationalsozialistischer Gewalt in Deutschland.” In *Gedenkstättenrundbrief* Nr. 187 (9/2017: 3–17).
- 5 Cited from: *Netzwerk der Erinnerung* (see Note 3), p. 47.
- 6 Speech by German President Joachim Gauck on Holocaust Memorial Day, 27 January 2015, https://www.bundestag.de/dokumente/textarchiv/2015/kw05_gedenkstunde/357044 (accessed on 8. 2. 2018).
- 7 Speech of the President of the German Bundestag, Prof. Norbert Lammert, in “Gedenkstunde der Hamburgischen Bürgerschaft zur Erinnerung an das gewaltsame Ende der ersten parlamentarischen Demokratie in Deutschland im März 1933 und an die Opfer des Nationalsozialismus im Plenarsaal des Hamburger Rathauses” on 11 April 2013. Published by Bürgerschaft der Freien und Hansestadt Hamburg, Hamburg 2013, p. 14–33, esp. p. 31.
- 8 See Aleida Assmann, *Das neue Unbehagen an der Erinnerungskultur. Eine Intervention*. Munich 2013.
- 9 Arbeitsgemeinschaft der KZ-Gedenkstätten/FORUM der Landesarbeitsgemeinschaften in der Bundesrepublik Deutschland der Gedenkstätten, Erinnerungsorte und -initiativen in Deutschland, Erklärung “Erinnerungskultur und historisch-politische Bildung stärken – Gedenkstätten an den Orten des NS-Terrors fordern größere Anstrengungen für Aufarbeitung und Vermittlung und ein Ende der Ungleichgewichte”, Berlin, 5 May 2017
- 10 *Netzwerk der Erinnerung* (see Note 3), p. 9.
- 11 Cited from *ibid.* p. 47.
- 12 Cited from *ibid.* p. 19.

Japanese counter-insurgency Operations in occupied Southeast Asia (WWII)

by Sandra Wilson & Robert Cribb

Thu., 24 June 2021; 09:00 – 10:00

Abstract:

By 1942 Japanese forces had conquered most of Southeast Asia and part of the Western Pacific. In seeking to maintain its control of this huge empire, the Japanese military faced varying degrees of resistance from guerrilla insurgencies, as well as more or less regular battles with formal armies along the shifting front lines. The scale of Japan's counter-insurgency war is difficult to determine; the nature of the war means that evidence is sparse. From the start, however, Japanese authorities took the view, common to all colonial powers, that insurgencies could and should be suppressed brutally. Their counter-insurgency strategy focussed on the destruction of rural infrastructure that supported guerrillas and on the capture of insurgents, who were then either turned or executed.

In the war crimes trials that followed Japan's surrender, there were two important Allied trials for counter-insurgency-related atrocities: the trial of Lt USUKI Kishio and nine others for the massacre of civilians in the village of Kalagon in Burma in 1945 and the trial of Colonel FUJISHIGE Masatoshi, who commanded troops that committed several massacres in the Manila region in late 1944. Each man was accused of command responsibility for hundreds of deaths of men, women and children. Both Usuki and Fujishige were found guilty and executed. Most of the Allied powers that conducted war crimes trials of Japanese after the end of the war were themselves engaged in counter-insurgency wars, either colonial or against communist oppositions. They were relatively understanding of the harsh measures used in the fight against guerrillas. The scale of the atrocities attributed to Usuki and Fujishige, however, and the fact that they could not be justified in narrow counter-insurgency terms, led to guilty verdicts. In both cases, the guilty verdict and the severe sentence appear to have been based on the court's view that the commanders had ordered the massacres as an example to the broader population, rather than as a harsh but justified counter-insurgency measure in those specific places.

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JUSTICE IN ASIA AND THE PACIFIC REGION,

1945-1952

Allied War Crimes Prosecutions

YUMA TOTANI

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Justice in Asia and the Pacific
Region, 1945–1952

Allied War Crimes Prosecutions

YUMA TOTANI
University of Hawai'i

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To my parents, sisters, and brothers

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knowledge on account of *negligence*. As for the judge advocate's recommendation to draw lessons from Justice Murphy's dissenting opinion, there is no indication that the court did so or, for that matter, gave any weight to the recommendation of adopting the due-diligence standard. The path the Rabaul court chose rather seems to fix the guilt of accused on the basis of "unqualified responsibility, merely by reason of the fact of his appointment" (to quote from Brock's summation at the Hirota Trial) or, to put it differently, the same stringent standard of strict liability as the one applied at the Yamashita Trial. If this assessment correctly captures the court's position, the trials of Hirota, Adachi, and Imamura may be understood as leaving for posterity another set of troubling historical precedents on command responsibility.

Kalagon and Singapore¹

"There is just one thing that I am certain of about war crimes trials, that is, they are 'uncertain things' [*futashika na koto*],"² so Capt. Sumi Toyosaburō wrote as he reminisced over his experience of the British war crimes proceedings at Singapore. He had been a midlevel officer of the Japanese army-navy joint occupation forces on a remote island of Car Nicobar in the Indian Ocean. Formerly British-controlled penal colonies, the Andaman and Nicobar Islands came under Japanese military control during the Pacific War with the view to provide air and naval support in the CBI theater.³ In March 1946, Sumi and fifteen others were brought to the U.K. Singapore courtroom on charges that in July and August 1945 they arrested, tortured, or otherwise mistreated a number of Nicobarese civilians in connection with spy allegations. The chief accused was Lt. Gen. Itsuki Toshio, formerly commanding officer of the Japanese occupation forces at Car Nicobar. He and two others also stood accused on allegations that they conducted illegal trials and executed eighty-three Nicobar islanders.⁴ The Singapore court found all but one guilty. Lt. Col. Saitō Kaizō, Itsuki's chief of staff, was acquitted while the rest were convicted and received varying sentences: Itsuki was sentenced to death by shooting, five were sentenced to death by hanging, and the remaining nine received different terms of imprisonment ranging between three and fifteen years.⁵

Sumi was confounded by the outcomes of the trial and had an especially hard time reconciling himself to Saitō's acquittal. He remembered Saitō as a bully who ordered the arrest and summary execution of Nicobarese in his zealous pursuit of spy suspects. Nevertheless, he was let off scot-free, while Itsuki – a mild-mannered army commander who had little material part in orchestrating the spy hunt – was condemned to death. The *sanbō* (staff officers) theoretically had no power to command the armed forces, but according to Sumi, they were also "*sanbō*" – by which he meant "three brute forces" in the sense of *ranbō* (violent), *mubō* (reckless), and *ōbō* (arrogant) – who

exercised de facto command authority to the point of eclipsing the de jure commander. This type of lopsided relationship between a commander and a staff officer was not uncommon, Sumi remarked, since a *sambō* was the kind of person who rose to a high military post by merit while the position to command could be attained by sheer seniority. Sumi suspected the U.K. Singapore court failed to appreciate the theory and practice of staff officers in the Japanese military, presumably because of the prevailing notion in Western military organizations that staff officers were no more than functionaries of the commander of an army.⁶

Sumi deeply regretted Itsuki's guilty verdict and capital punishment in another respect. Although it was established at the U.K. Singapore trial that Itsuki served as presiding judge over unlawful trials of spy suspects and that he approved the imposition of the death sentences, truth be told, and according to Sumi's account, no such trials ever took place. The accused invariably attested to the occurrence of fictive judicial proceedings only to give the summary execution of the eighty-three Nicobarese an appearance of legality, and *the accused jointly told the false story upon Sumi's urging*. Sumi gained a smattering knowledge of international law when assisting the demobilization process at the war's end, and he later persuaded Itsuki, Saitō, and other fellow soldiers into subscribing to the idea that proof of judicial proceedings could absolve them of criminal liability for the summary executions.⁷ The fabricated story only lead to Itsuki's death sentence, and other misjudgments and wrongful sentences resulted, too. Would it have been better if they had not concealed the facts and told nothing but the truth? Sumi was unable to judge. He felt that the guilty verdict and a penalty of ten-year imprisonment he himself received were unwarranted but, here again, he could not say that he would have received a lighter penalty or perhaps an acquittal had he told the whole truth. Unintended consequences of the Singapore trial continued to rankle him after his subsequent repatriation to Japan.⁸

The foregoing episode brings home a major challenge that the judges at the Allied trials commonly faced in the handling of war crimes suspects: how to determine beyond a reasonable doubt the guilt of an individual accused of the commission of alleged offenses. Eyewitnesses and survivors of war crimes may have helped establish the occurrence of alleged offenses, and they may even have helped identify some of those Japanese who were present at the crime scenes. But determining the share of responsibility of individual accused – and especially those who held positions of authority and who were not necessarily present at the actual crime scenes – was an entirely different problem. A paper trail of criminal orders was hard to come by, and the prosecution often had to rely on oral evidence of the accused themselves to establish the sequence of events leading up to the occurrence of offenses. The accused, for their part, may have readily provided pertinent information or may have gone so far as to admit personal guilt. However, their primary concern may have been less

to assist the court with its fact-finding mission than to shift blame and protect someone from criminal accusations. False testimony made it difficult for the court to determine the guilt of individual suspects.

This chapter explores two case studies from the British war crimes trials in which the courts' decisions were based almost entirely on accused's testimony, including confessional statements. The 1929 Geneva Prisoner-of-War Convention stipulated that "no prisoner may be obliged to admit himself guilty of the act of which he is accused"⁹ but it was not uncommon for confessions by accused to be admitted in evidence at the Allied war crimes trials. The purpose of this chapter is not so much to question the admission of such evidence, however, as to probe into the ways in which the courts handled it in their effort to tackle the elusiveness of truth. It will be explored how the courts sifted through conflicting evidence, weighed veracity of one testimony against another, and reached the final decisions. Put it differently, this chapter inquires into the "oral history" methods that the courts employed in their quest to establish the nature of alleged offenses and to resolve the issues of guilt or innocence of accused persons.

One of the two cases to come under scrutiny is the trial of Maj. Ichikawa Seigi (Figure 4) and thirteen others, held at the U.K. war crimes courtroom at Rangoon, Burma, between March 22 and April 10, 1946. This trial was the first of a series of forty trials that the British authorities hosted in the CBI theater between March 1946 and November 1947.¹⁰ The Ichikawa group was charged with the massacre of more than 600 inhabitants of Kalagon in the region of Moulmein on July 8, 1945, over the course of military expeditions the Ichikawa battalion led with the mission to decimate British paratroopers and local guerrilla fighters. Kalagon was the only ethnic Indian village community in the Karen-dominated region in the border areas between Burma and Thailand.¹¹ The Japanese military authorities in the last months of the war suspected that the village was serving as a logistical base for the British and Karen guerrillas, and was possibly protecting deserters from the INA. Victims of massacre at Kalagon consisted solely of noncombatant civilians, however, including infants. The prosecution held all fourteen accused accountable for the mass killing as well as instances of beating, torture, and other forms of mistreatment of the villagers. The major task for the U.K. Rangoon court in this case was to resolve conflicting accounts about the nature of military orders Ichikawa is believed to have received from the regimental commander, Col. Tsukada Misao, concerning the attacks on Kalagon. In the absence of documentary evidence of orders, much of the court time was spent on examining and cross-examining Japanese witnesses including Col. Tsukada (who was called to the stand as a defense witness) so that the court could decide whether the killing of the entire village population was what Tsukada ordered, or if the operational mission he had given Ichikawa did not require mass, indiscriminate killing of the village people.¹²

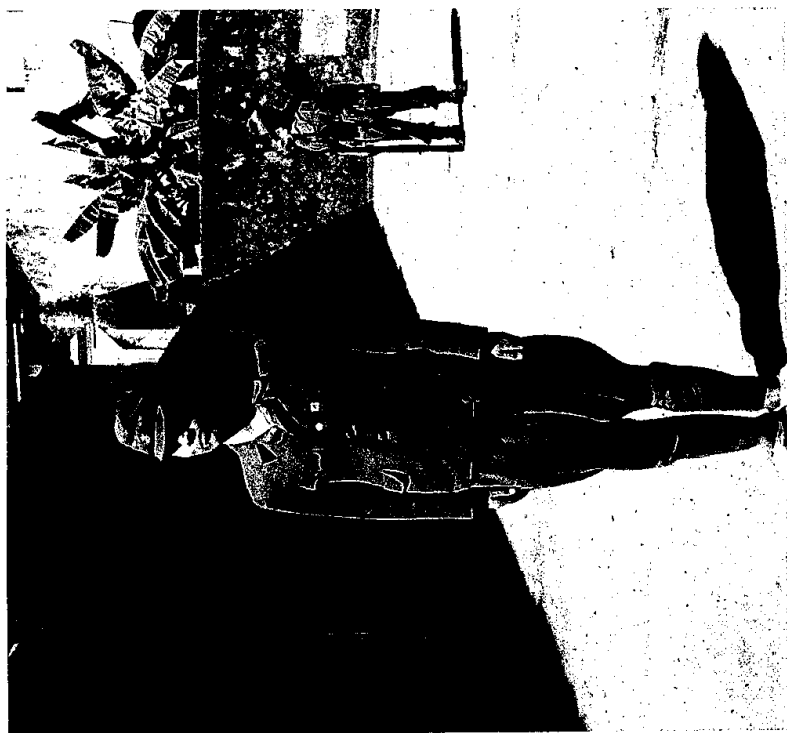


FIGURE 4. Major Ichikawa Seigi, the first of the war crimes suspects to be tried at the U.K. war crimes court at Rangoon. © Imperial War Museums (SE 6880).

The other case to come under scrutiny is the trial of Lt. Gen. Nishimura Takuma and six others, held at Singapore between March 10 and April 2, 1947. This case pertains to a massacre of several thousand Chinese men, carried out by army units subordinate to the 25th Army in the first few weeks following the British surrender, between February 18 and March 3, 1942. Lt. Gen. Yamashita Tomoyuki, then general officer commanding the 25th Army directing the Malayan operation, is believed to have issued orders that those Chinese who posed a security threat be eliminated.¹³ Just like the Ichikawa Trial, the main task of the court in this case was to determine what exactly was in Yamashita's orders regarding the handling of ethnic Chinese in occupied

Singapore. Yamashita would have made an excellent witness at this trial, but he had already been executed by American authorities in the faraway land of the Philippines in February 1946. The former chief of staff of the 25th Army, Lt. Gen. Suzuki Sōsaku, could not be brought over to Singapore either, since he was killed in action in the Philippines.¹⁴ The court similarly could not reach two other key witnesses – Lt. Col. Tsuji Masanobu and Maj. Hayashi Tadahiko, formerly staff members of the 25th Army Headquarters – whom the Japanese witnesses at the Nishimura Trial repeatedly named as the ones who drew up the actual plan of massacre and oversaw its implementation. Tsuji eluded the Allied war crimes investigation by fleeing in Burma in the disguise of a monk, while Hayashi had been dead since a plane crash in 1944.¹⁵ In the absence thus not only of documentary evidence of Yamashita's orders but also of key witnesses, the U.K. Singapore court had tremendous difficulty determining who issued what orders, and how they were transmitted for implementation down the military chain of command.

THE ICHIKAWA TRIAL

The Ichikawa Trial kick-started with the appearance in the courtroom in Rangoon of Havildar Saw Kaw Ku, 30, the first prosecution witness. Biographical information in the trial record indicates that this witness was an individual of Karen ethnicity and a former member of the 4th Battalion of the Burma Rifles, the British Burma Army. He ceased to be on active duty early in the war as a result of the British being driven out of Burma. He returned to civilian life but had a brief stint as an interpreter for the Japanese military police, the *kenpeitai*, in the last three months of the war. He became witness to the massacre in Kalagon as he was attached to a small *kenpeitai* contingent that accompanied the Ichikawa battalion at the time of the raid.¹⁶

The choice of this particular individual as the first prosecution witness is interesting, since court testimony by this witness and others revealed that Saw Kaw Ku was not only an invaluable eyewitness of the massacre but also a famous freedom fighter.¹⁷ He began guerrilla activism in the second half of 1944, and in mid-1945 came to assist British parachutists, under command of a "Maj. Abbey," based in the area between Moulmein and the Dali Forest. According to the witness testimony, Abbey "wanted back all soldiers who were serving in the British Army before the war."¹⁸ Saw Kaw Ku joined the *kenpeitai* specifically to gather intelligence information for the British and local guerrilla fighters behind the enemy lines. The Japanese military, for its part, was on high alert about Saw Kaw Ku's guerrilla activities but somehow failed to realize his presence from within. In all likelihood, the British authorities at Rangoon decided to proceed first with the Kalagon case to pay tribute to the sacrifice and heroism of the people of Burma, and to do so especially by giving due recognition to Saw Kaw Ku. It is worth noting that Saw Kaw Ku received at the war's end a "certificate of gratitude" personally from Abbey.

This matter was brought out during the court testimony, and the actual certificate - which the witness had on him - was shown to the court.¹⁹

The gist of Saw Kaw Ku's testimony can be summarized as follows. The battalion under command of Maj. Ichikawa carried out a sweep of Kalagon in June 1945 to search for the British parachutists that were known to have landed in the region. Saw Kaw Ku accompanied the sweep, serving as an interpreter for two *kenpeitai* members then assigned to the Ichikawa battalion. The *kenpeitai* interrogated some villagers, but without successfully locating parachutists, the battalion withdrew. The same battalion with a slightly larger contingent of about four or five *kenpeitai* members made a second sweep of Kalagon after a lapse of a few weeks, the witness again accompanying it as an interpreter. The exact purpose of the second raid was not disclosed to the witness, but he is said to have overheard Capt. Higashi Nobuo, officer commanding the Moulmein Kenpeitai Detachment (also an accused at the Ichikawa Trial), remarking on Kalagon assisting the British parachutists by "giving them rice, salt, and giving huts to live in" and the villagers having "joined the parachutists."²⁰

The Ichikawa battalion reached Kalagon in the midmorning of July 7, 1945, thereupon W.O. Fujiwara Ryōzō (another accused at the Ichikawa Trial), a subordinate of Capt. Higashi and the officer in charge of the *kenpeitai* contingent in this raid, ordered that all villagers assemble or otherwise face death. The village headman being nowhere to be found, the next senior person of the village community made a round to summon everyone. The Japanese troops themselves went about to search and accost the villagers. Saw Kaw Ku personally witnessed these occurrences as he was "in front of the crowd of people that had assembled."²¹ All adult males above the age of 15 were then put into the village mosque, while women and children were placed inside the structure next to the mosque.²² The villagers remained in confinement throughout the night except eight men and one woman, whom the *kenpeitai* took out for questioning concerning the whereabouts of, and the village aid to, the British parachutists. Saw Kaw Ku served as an interpreter for all interrogation sessions and witnessed instances of mistreatment, such as slapping, beating with a stick, and hanging from the beam at the ceiling while the hands of the interrogated person were tied behind the person's back.²³

The killing began in the late afternoon of the following day, on July 8. Saw Kaw Ku acquired partial knowledge of the massacre while crisscrossing the village. He first saw villagers being taken out of confinement in small groups, "their hands tied at the back with one long rope" and "about 25 to 30 villagers were tied together in one bunch."²⁴ Some were screaming while others tried to run away but were prevented by the Japanese soldiers. Men on the one hand and women and children on the other were taken in separate groups. "Some were about three years, and some were carried by their mothers,"²⁵ according to the witness testimony. Saw Kaw Ku sensed that something awful was afoot, as he himself accompanied a group of women and small children being taken

to a village well. Once at the well, the Japanese soldiers began blindfolding the weeping and screaming women and children with pieces of rags. "I felt like going back," the witness testified, meaning that he wanted to leave the site and return to the temporary quarter that the *kenpeitai* had set up within the village of Kalagon. As interpretation was not needed on the spot, "I asked permission to go back, then I went back."²⁶ Consequently, the witness had no conclusive knowledge as to what happened to this particular group subsequent to his departure.

As he headed back, however, he encountered a scene of carnage in progress with a separate group of women and children by another village well, about 20 yards away from where the *kenpeitai* contingent was based. "I saw a Japanese soldier throwing down the children," he said, "he had a rod with him, and I heard a woman's screaming coming from inside the well."²⁷ The witness approached the well after the Japanese soldier finished pounding with the bamboo pole and left the area, and the witness saw stains of blood by the well. He conceded that he "dared not look down the well" to ascertain if there was indeed a woman inside or not, because "I was afraid to look down, as if that person had not actually died, she might ask for help. I was afraid what will happen to me. So I did not look down."²⁸

Saw Kaw Ku's personal encounter with scenes of massacre was limited to these discrete episodes, but the extent of the massacre became known to the court from additional prosecution evidence (as will be discussed shortly). The following morning, on July 9, the Ichikawa battalion and the *kenpeitai* contingent headed off to Dali-kyowaing, the Dali reserved forest area, in search of British parachutists, but came back once again to Kalagon two days later on July 11. "The next morning they had breakfast early, and went out to the village, and set the village on fire," according to Saw Kaw Ku. Large-scale looting preceded the razing of the village, such as looting clothes, poultry, and about "70 cows and four horses." The Ichikawa battalion took away about eight village women, too, but Saw Kaw Ku did not know what became of the women afterwards.²⁹

Nine residents of Kalagon took the witness stand after Saw Kaw Ku, testifying on their personal knowledge and experiences of mass atrocity. Some of the witnesses were directed to identify the accused in the dock by sight as well. Tara Bibi, 10, was a survivor of the massacre and one of the nine to testify at the Raagoon courtroom. With her father standing beside her, this witness attested to being taken to one of the village wells along with some 60 women, bayoneted in the head, and thrown into the well. The bayonet wounds were not fatal, however. She testified that she was able to climb out on her own, because the well was "almost filled with the human bodies and I was at the top."³⁰

Mohd Eusof, 37, village headman, was not present at the time of the massacre - he and several other villagers fled upon information of the imminent Japanese raid - but he provided the court with the data of the dead and the missing resulting from the raid. The original population of Kalagon was "over

900 or may be [maybe] 1000," he testified, of which a total of 637 could not be accounted for at the war's end. They were either confirmed dead or believed to have been killed during the raid. The breakdown of the number was "about 195 women, about 175 or 176 men, and 266 or 267 children."³¹ When cross-examined, Mohd Eusof confirmed that Kalagon under village elders' leadership provided nonmilitary aid to British parachutists, such as collecting provisions and providing labor for building huts for the British parachutists in the Dali Forest. He denied offering any military support, however, testifying that no firearms were ever stored in Kalagon and that he never carried firearms himself.³² Regarding the abduction of women, Mohd Eusof testified that "12 women were taken away by the Japanese," two of whom managed to escape and returned home. One of the escapees, Akinabi, was brought before the court, although not to testify herself but merely for Mohd Eusof to identify her to be one of the two escapees.³³ The other one, Ulfa Bi, could not make it to the courtroom due to a recent childbirth, but her brother, Sulaiman, took the witness stand to testify on his own knowledge about the abduction and other matters related to the Kalagon raids.³⁴

Evidence on massacre and abduction aside, one prosecution witness, Haki-jan (also referred in the court record as "Akijan"), 18, took the stand to testify that she was raped.³⁵ 2nd Lt. Usui Kiichirō, a medical officer of the Ichikawa battalion and an accused, was identified by sight as the perpetrator. The defense counsel objected to admission of this witness's testimony on grounds that the charge sheet contained no specific allegation of rape. It is true that the charge of "beating, torture, and other maltreatment" was made against the accused, but "it is quite clear that when the charges were framed, there was no intention of accusing anyone of rape," the defense argued. "Rape is always considered a distinct and serious offence," the defense pointed out, and it was thus imperative for the prosecution to develop a separate charge if any evidence of rape was to be introduced.³⁶ After hearing the arguments from both sides, the court dismissed the defense objection and ruled that evidence of rape was admissible. The court also ruled that the press and spectators should be cleared of the courtroom so as to protect the witness from public exposure.³⁷ This witness's testimony turned out to lack credibility, however, and the court in the end acquitted Usui of the rape charge. The prosecution failed to prove the guilt of the accused "beyond reasonable doubt," as the court put it.³⁸

The prosecution's case against the Ichikawa group concluded with the introduction of statements that the British war crimes investigators had taken from individual accused prior to the trial. The statements were largely confirmatory of the general sequence of events as already established by Saw Kaw Ku and the villagers. They nevertheless offered important details about the origins and the substance of military orders. For instance, Capt. Sakamaki Saburō, who served as an intelligence officer in the Ichikawa battalion and who had taken part in some of the interrogations on the eve of the massacre, explained in his statement that the first sweep of Kalagon came about on June 25 by the

order of the regimental commander, Col. Tsukada, "in the nature of a reconnaissance, information having been received from the Kempei Tai [*kenpeitai*] that the Karen followers of SAW KU [Saw Kaw Ku] and British paratroops were constructing barracks and training the villagers as guerrilla forces." But the battalion "obtained very little information and returned to HQ."³⁹

Concerning the second raid, the battalion commander Ichikawa explained in his statement that the order of the raid originated in the divisional headquarters. The order was passed on to him from the regimental commander on about July 2 or 3, during a meeting at a place called Chaungnakwa. Ichikawa was "to go KALAGON and DALI" and attack the enemy, based on intelligence information that Kalagon was supplying the British parachutists with weapons, provisions, labor, and guerrilla fighters. Moreover, "INA desert-ers were passing through KALAGON to liaise with BRITISH paratroops." Ichikawa is said to have inquired at the time "how far I could go," to which Tsukada allegedly replied that he "burn the village and kill the inhabitants." Ichikawa explained in his statement that, accordingly, he took his battalion of five companies at a paltry strength of just about 140 troops, plus four *ken-peitai* members. Three companies consisting of ninety troops took part in the actual killing, while two others were posted at the northeastern and eastern sides of the village "to prevent the paratroops from moving out of the area." The four *kenpeitai* officers, meanwhile, set up their field headquarters about 100 yards from the battalion headquarters inside the village of Kalagon and had no part in the actual killing.⁴⁰ He confirmed in the same statement that when leaving Kalagon, "we took away ten INDIAN women" and handed them over to the regimental headquarters except three, who escaped.⁴¹

Capt. Midorikawa Hisashi, an accused and an officer who formerly commanded one of the three companies that took part in the massacre, explained in his statement that on July 8 he received the orders for the massacre. Specific instructions were "the villagers were to be divided out among the various coys [companies], and the coys were to kill them." He implemented the killing orders by taking the following steps:

I sent a squad to collect the villagers for our coy; the first batch of villagers I got was 25 or 26 people. I divided the villagers into three groups, and gave them to three squads, and told the soldiers to take them away. I warned the soldiers that the villagers were to be killed one by one: (they were to be blindfolded [.] taken away and killed by one thrust of the bayonet; there was to be no firing lest our positions be given away to the guerrillas) . . . This was in the orders I received.⁴²

Midorikawa had his company repeat this process as fresh batches of men, women, and children were allotted until no one was left in the mosque or in the adjacent structure. The two other companies presumably followed the same procedure. The killing continued well into the night of July 8.

When the defense case began, none of the accused contradicted their pre-trial statements insofar as the general sequence of events was concerned.

However, they invariably disputed that they were individually or criminally liable for the killing. Each of them asserted that their acts were entirely justified on one or more of the following grounds: (1) that they were merely following superior orders; (2) that the destruction of the Kalagon village was a military necessity; (3) that killing of small children was justifiable from the standpoints of mercy killing and of military expediency; (4) that the massacre was a reprisal measure against Kalagon, which gave aid to British paratroops and guerrillas; and (5) that some of the accused did not take direct part in the actual killing.

All of the foregoing lines of defense figured prominently in the testimony of chief-accused Ichikawa. He testified that he received from regimental commander Tsukada the orders to carry out the wholesale destruction of villagers. Ichikawa was allegedly told in the wake of the failed first raid that he would have to carry out another raid and that in the next one, he "must annihilate the villagers of Kalagon."⁴³ At the subsequent meeting at Chaungnakwa where the order for the next raid was issued, the regimental commander is said to have reiterated that he "must kill the villagers and burn the houses of Kalagon village."⁴⁴ The accused personally had nothing to gain by carrying out the massacre, so he informed the court, but he had a bona fide belief that the killing was a necessary part of the broader operational mission in the Burma theater. Children were not spared because if they were left to survive, "they would be orphans, and as such they could not have a living." It was also for the sake of "sav[ing] time and carry[ing] out my duties" that Ichikawa "could not help but killing them."⁴⁵ When cross-examined by the prosecution, he conceded that Japan as an occupying power might have had "some duties" in relation to the people of occupied territory. Nonetheless, he maintained that the massacre was entirely justified because "if the inhabitants [under control] of occupying power were acting in a hostile manner towards the occupying power[,] we should take retaliatory measure."⁴⁶

As regards the charge of abduction of women, Ichikawa again admitted to having taken away some ten women and turning them over to the regimental headquarters except for a few who escaped. He defended this action, asserting that "I had orders from the Regiment to bring the women so that they could be used as spies."⁴⁷ When asked by the prosecution whether it was "customary with the Japanese Army to recruit local women for serve [sic] with the Japanese force as what is commonly known as 'Comfort Girls,'" Ichikawa attested to no knowledge of his superior's intention. He also denied entertaining any ideas of doing so himself. He stated: "In the Japanese army, unless the orders were received from the Division, we cannot employ girls in the service at brothels."⁴⁸ This part of the court testimony is interesting, as it constituted indirect admission of the army practice of sponsoring military brothels. That said, the court made no finding on this matter since the *purpose* of abduction was not required proof for the charge.⁴⁹

When regimental commander Tsukada took the stand as the key defense witness, he readily accepted personal responsibility for the raids and resultant deaths of many civilians. He admitted that he was the one to order Ichikawa to carry out the first raid, based on intelligence information that "SAW KU and his dacoits were present in the neighbourhood of DALI Forest and these dacoits attacked the Japanese soldiers and lines of communications of the Japanese army."⁵⁰ He was also the one to order the second raid on the information that Kalagon was likely to be assisting Saw Kaw Ku, Abbey, and INA deserters with provision of supplies, labor, shelter, and intelligence. He passed on to Ichikawa a written order to blockade Kalagon and a neighboring village so as to decimate the enemy in the area. Furthermore, he gave Ichikawa verbal instructions during the meeting at Chaungnakwa that "in consideration of the lack of time and manpower this expedition should be thoroughly conducted even if they were to kill the KALAGON villagers." These words were meant to be "instructions," but Ichikawa may well have construed them as orders. If so, "Major ICHIGAWA [Ichikawa] had faithfully carried out his order."⁵¹ The only point Tsukada disagreed with the chief accused's testimony concerned the allegation of abduction of village women. He confirmed that he gave approval to the idea of bringing back women for their possible use as spies, but not orders. What he gave was "not an order at all," he testified.⁵²

As Tsukada publicly accepted personal responsibility for the causes and consequences of the Kalagon raids, cross-examination of this particular witness centered not so much on disputing his testimony as on clarifying the finer points of the substance of his orders. The prosecution was especially interested in eliciting whether Ichikawa was given any discretionary power in the implementation of orders. Was he vested with any authority to determine how extensively to mete out killing against the villagers? Did Ichikawa receive a "kill-all policy" as the accused himself appeared to argue, or was it a policy that did not make the wholesale killing of villagers the goal of the raid?

The court itself was greatly interested in this question and initiated the following dialogue with witness Tsukada:

Q [THE COURT]. IF ICHIGAWA [Ichikawa] had returned and reported that he had executed a number of villagers who were definitely collaborating with the enemy and had burnt down the village of KALAGON would you have been satisfied with that.
A [TSUKADA]. Yes.⁵³

This exchange is significant, as it indicates that Ichikawa may have in fact had discretionary power as to how he was to implement the orders in the actual raid. Tsukada at least seems to suggest that the destruction of active supporters of the enemy and their base was the operational mission, and not indiscriminate killing of the entire village population. The prosecution's further questions, shown below, brought out from the same witness that the killing of villagers was not the goal but rather a means toward the fulfillment of the

larger operational mission, viz., the destruction of guerrillas in the Dali Forest area:

Q [PROSECUTION]. Did you at any time issue any order that the villagers will be killed.
A [TSUKADA]. On the 4th of July I gave verbal order at CHAUNGNAKWA to that effect.

Q. That the villagers will be killed.

A. Yes, that they may be killed.

Q. I want to make perfectly clear, "will be killed."

A. Those who are hostile "may be killed."⁵⁴

The repeated questioning by the prosecution reveals that Tsukada tolerated civilian deaths in pursuit of the operational mission, but not the killing of the entire village population as an end in itself.

This part of Tsukada's testimony proved contentious, as it conflicted with the accounts offered by the chief accused. Moreover, Capt. Katayama Toru, Tsukada's former subordinate and staff officer at the regimental headquarters, took the witness stand to dispute its validity. He asserted that, as a matter of fact, Tsukada's orders were to kill all villagers and that Ichikawa had no discretionary power on the matter.⁵⁵ Contradictory testimony among defense witnesses was troubling enough to compel the court to have Tsukada recalled so that he would set the record straight. After making some equivocal statements, Tsukada finally requested that the key part of his previous testimony be withdrawn and substituted with the following: "I gave verbal orders that all the villagers of KALAGON *will* be killed."⁵⁶ This statement was supposed to put to rest any controversy over the substance of his military orders, but the court appeared to give no credence to it. The judgment read that Tsukada impressed the judges to be "a man of intellect and an ordinary honesty," whom they could not believe to have taken the witness stand at the first instance to "tell a lie to the Court in order to implicate Major ICHIGAWA further." The court concluded that the actual orders given to Ichikawa must have allowed him to "have some discretion as to what was to be done at KALAGON."⁵⁷

THE FINDINGS OF THE RANGOON COURT

The U.K. war crimes courts produced no judgments by rule, but the Rangoon court for this case took an unusual step of writing a decision that articulated in some detail its legal and factual findings. In all likelihood, the court did so in recognition of the singular political importance of the Kalagon case from the standpoint of U.K.-Burma relations. This trial, after all, was the very first British war crimes trial to be held in the Burma theater. It would be fair to say that, by way of holding the Ichikawa Trial, the British authorities desired to impress the people of the recovered territory with the British commitment to justice and also to give due credit to contributions and sacrifices made by these people in the war against Japan.

The court's decision starts with the discussion of the Japanese rights of reprisal, one of the core arguments the accused had advanced during the trial. The court appeared quite sympathetic to this particular argumentation, as it concluded that the Japanese were indeed entitled to take a reprisal measure when confronted with hostile actions by the people in occupied territory. The court sought the legal basis of this ruling in *Manual of Military Law* of the British armed forces, which partly read:

Although collective punishment of the population is forbidden for the acts of individuals for which it cannot be regarded as collectively responsible, it may be necessary to resort to reprisal against a locality or community, for some acts committed by its inhabitants, or members which cannot be identified.⁵⁸

The question for the court was what form of reprisal, then, should be considered justifiable. The *Manual* stipulated that "acts done by way of reprisal must not be excessive and must not exceed the degree of violation committed by the enemy." It further read that the kinds of reprisal measures that were historically recognized were "the burning down of buildings in a town, the burning down of an entire village, or heavy collective fines." The court ruled that when assessed against these standards, indiscriminate killing of more than 600 innocent civilians was "far in excess of what was reasonable and greatly exceeded the degree of violation committed by the villagers of KALAGON."⁵⁹

The court went on to point out that the Kalagon Massacre was an excessive form of reprisal even by the Japanese own standard rules of engagement. Specifically, it had been brought out during the court's questioning of Tsukada that other regiments in the Burma theater resorted to razing the villages surrounding the Dali Forest in 1944 "because SAW KU's dacoit gang had their base nearby," but that none of these accompanied wholesale killing of the village population. "I did not hear that they were killed," so Tsukada testified. In this light, the Ichikawa battalion can be understood as having deviated from the standard practice of reprisal when it attempted to destroy the whole village population.

As regards the plea of superior orders as a defense, the court rejected it on grounds of "manifest criminality" of the killing.⁶¹ To clarify the meaning of manifest criminality, the court referred to the legal opinion of Lord Wright—a recognized authority of international law in those years, who served as chairman of the United Nations War Crimes Commission between August 1945 and April 1946—as expressed in an article he had contributed to *The Law Quarterly Review* of January 1946. A segment of Lord Wright's opinion appears in the court's decision as follows:

The true view is, in my opinion, that if what he ordered is a crime which is or ought to be a crime manifest to the subordinate soldier or Government agent, he cannot justify his obedience. It might be different if the criminality of the order is not reasonably obvious to the man; the order for instance might appear to him justifiable on the grounds of reprisal, or the nature and effects of the order might not be apparent, but even then

the plea would not be a defence though it might go to extenuation. But an order such as to burn the women and children of a village in the village church or to machine gun a crowd of hostages, or to murder a number of airmen who had attempted to escape and being [sic] recaptured, or to inflict heaviest torture to extract information all instances are manifest criminality.⁶²

In the quote above, Lord Wright held that a plea of reprisal may be considered in mitigation when the criminality of an order was not obvious. He did not believe the same logic applicable, however, in the case of the order to kill women and children en masse.

The Rangoon court followed Lord Wright's legal opinion and further pointed out that there was "some definite doubt in the minds of the [sic] number of the accused as to the propriety of this order for the wholesale massacre at KALAGON." However, "they stifled any doubts or misgivings with the idea that they were only carrying out the order of their superior officer which must be right and must be obeyed."⁶³ This part of the court's decision referred to certain segments in the trial, during which the court questioned individual accused to explore the latter's mind-set about the orders for indiscriminate killing.

For instance, Yanagisawa Izumi, a company commander and an accused, testified that, at the time of the Kalagon raid, he found the orders of massacre "slightly unusual" because until then "I received orders to attack directly the enemy and to deal with the enemy, but that was the first time when we had orders to destroy the village."⁶⁴ He admitted that some targeted for killing were children as young as "at the ages of 5 and 6."⁶⁵ The accused's seeming qualm over the killing of children prompted the court to initiate the following dialogue:

Q [THE COURT]. Have you ever heard of a principle known as to The Spirit of Bushido.

A [YANAGISAWA]. I do know.

Q. Is it a fact that officers in the Japanese army are trained in that code and trained to observe that code.

A. Yes.

Q. Is it a fact that one of the terms or part of the code of Bushido is to protect the weak and helpless.

A. Yes.

Q. Do you consider young children of 5 or 6 or little older as being weak and helpless.

A. Yes.

Q. So to massacre young children of that age of any addition is not against the spirit of Bushido.

A. I shall explain it.

Q. Is it against Bushido to kill the weak and helpless.

A. There are time[s] in the spirit of Bushido one has got to perform certain duties though he is quite unwilling to do.

Q. In other words you must perform the duty [if] you are ordered to even if you think that it is wrong.

A. Yes.

Q. In other words, military necessity may over-ride this moral code, the moral code of the army.

A. There are circumstances where such thing is done.⁶⁶

In this dialogue, Yanagisawa took pains to explain that the Kalagon Massacre could be justified under the *bushido* code, the putative Japanese martial ethos, in the name of military duty and military necessity. But what the court was inquiring on this occasion was not exactly whether the killing of children could be justified under *bushido*. Rather, the court was interested in determining whether the accused thought the killing was morally wrong or, put it differently, manifestly criminal.

Capt. Midorikawa Hisashi, another accused and a former company commander that took part in the massacre, similarly attested to finding the order to kill villagers unusual. "This is the 1st time that I ever received an order to kill all the women and children and old people," he testified. This accused felt the killing to be "very pitiful" and he "cannot say whether it was a lawful order" either.⁶⁷ He conceded that the victims included small children "about 2 or 3 years old."⁶⁸ Regardless, he carried it out on the belief that it was the "right" thing to do given the "military necessity and force of circumstances."⁶⁹ Having thus admitted that he personally had qualms, Midorikawa tried deflecting criminal accusations against him and other co-accused by comparing the Kalagon Massacre with the destruction of Hiroshima by the atomic bomb. In both instances, innocent women and children were killed in the name of military necessity.⁷⁰ If so, and if no one was being held criminally liable for the dropping of atomic bombs, Midorikawa suggested that the same standard should apply to the members of the Ichikawa battalion.

The Rangoon court considered the accused's argument on atomic bombing, but dismissed it as being immaterial on the following three grounds. First, the defense argument struck the court as "an ingeniously worded plea against the jurisdiction of the court on purely moral grounds" although the court did not necessarily assume that the defense did so intentionally. The court declined to take issue with it in any event, for the reason that the Royal Warrant of 1945 was binding and that the court had no power or authority to inquire into validity of its own jurisdiction.⁷¹ Second, the court deemed the defense argument on the atomic bombing immaterial if it was raised in connection with the doctrine of reprisal. The Ichikawa battalion carried out the Kalagon Massacre presumably to retaliate against the villagers for helping the British parachutists, and not in reprisal for the atomic-bomb attack on Hiroshima. The Kalagon Massacre preceded the bombing of Hiroshima by one month after all.⁷² Midorikawa himself admitted that the two instances of mass killing had no connections:

Q [THE COURT]. At the time of those happenings in KALAGON did you hear about the atomic bomb being dropped anywhere?

A [MIDORI KAWA]. No, I did not hear.

Q. The order asking you to kill children had nothing to do with the atomic bomb.

A. It had no relation.⁷³

Third and finally, the court acknowledged the implicit defense criticism about the gap between the humanitarian principles of international law on the one hand and, on the other, palpable disregard of such principles in the actual war. However, the court held that "a law does not cease to exist even though it is widely broken." It may be that the phrase "acts which outrage the general sentiment of humanity" lost much of its moral weight due to the unprecedented scale of destruction that the Allies and Axis Powers alike had wrought during this war. If so, the court still would hold that there would be "all the more reason to clarify and enforce" the laws of war rather than falling into cynicism about their efficacy.⁷⁴

The final verdicts of the court were guilty for all except one. The medical officer attached to the Ichikawa battalion, Usui Kichirō, was acquitted of all charges. Ichikawa and three company commanders who oversaw the massacre were sentenced to death by hanging, and the rest received varying terms of imprisonment.⁷⁵

THE NISHIMURA TRIAL

"Shortly after the arrival of the Japanese Army in Singapore, do you remember certain security measures being laid down by General Yamashita's HQs?"⁷⁶ This question was posed to Col. Sugita Ichiji, the first of several Japanese to provide evidence for the prosecution on the massacre of ethnic Chinese that Yamashita's Army is known to have carried out in February 1942. Sugita was a key prosecution witness on account of having personal knowledge of the alleged instance of massacre as former chief intelligence officer of the 25th Army. What was more, he served in the aftermath of the war as head of the No. 4 Subcommittee of the Commission of Inquiry Relative to Prisoners of War, a government-sponsored committee that investigated the massacre at the war's end.⁷⁷ Sugita was by all accounts a reluctant witness; he attempted to kill himself by slashing his neck shortly after being brought over to Singapore. He left a note saying, "As I cannot bring myself to attest to the guilt of superior officers, I have chosen to commit suicide with good grace rather than presenting myself at the witness stand."⁷⁸ Having survived the suicide attempt, Sugita found himself taking the stand in the Singapore courtroom after all.

He responded to the foregoing question affirmatively, and revealed to the court the following sequence of events. The *kenpeitai* was first ordered to take up the guard duty of the occupied city on the night of the British surrender. "I think it was the next day," Sugita testified, "when there was an operational order issued to Gen. Kawamura [Saburō] stating that the city must be cleansed and in that order it stated that all the Anti-Japanese Chinese must

be rounded up."⁷⁹ Lt. Gen. Kawamura (an accused) took the command of a freshly formed Singapore Guard Unit and was given control over the No. 2 Field Kenpeitai under command of Lt. Col. Ōishi Masayuki (another accused) and two auxiliary *kenpeitai* forces as well. Kawamura put to use the Guard Unit troops to implement the order in the town area of Singapore. The Guard Unit aside, two other formations took part in the implementation of the order in the outer flanks of Singapore: the Imperial Guards Division under command of Lt. Gen. Nishimura Takuma (chief accused) in the eastern flank of Singapore Island, and the 18th Division (not concerned in this trial) in the west. The ones to be targeted in the sweep of anti-Japanese Chinese persons "included the Communists, the Volunteer Force and any Chinese that were against the Japanese Army."⁸⁰ The purge took place in two waves. The first occurred on February 21 and 22 when the Guard Unit rounded up suspected individuals, screened them, and killed a total of "about 5,000." The second purge occurred in the "latter part of February" in the area under control of the Imperial Guards Division, and it resulted in the death of "about 300." They were all shot, Sugita testified, and "I have heard that they were buried at the sea shore."⁸¹ The witness added that he had "never seen this order" himself, and "the information we got during the investigation in Tokyo was that this order was a general order." Specifics about the implementation of the order were said to have been determined when the order was passed down the chain of command.⁸²

Some more details were provided in the statement of Col. Hashizume Isamu, a former member of the Second Section of the 25th Army in charge of the line of communication and a member of Sugita's postwar investigation committee. He confirmed that "no formal written order passed from the Army Commander [Yamashita] to the Defense Force Commander [Kawamura] regarding this operation." But according to the wartime diary (which the investigation committee received) of Kawamura, Yamashita visited the Guard Unit headquarters and said, "Naimen shido [*shido*] dewa nai, tettei shite yare" ("This is not a private instruction, make a thorough job of it"). The detailed plan of the purge was thereafter developed at the Guard Unit headquarters, two officers from the First Section of the 25th Army Headquarters – Lt. Col. Tsuji Masanobu and Maj. Hayashi Tadahiko – taking charge of the actual planning. Hashizume's statement read that "in the opinion of the Investigation Committee[,] Lieutenant Colonel TSUJI's manner gave an impression of even greater strength of determination than General YAMASHITA's own (KOKORO TSUYOI)," thus suggesting that Tsuji may have been the driving force behind the actual planning and implementation of the massacre.⁸³ Meanwhile, Hayashi is said to have indicated to the *kenpeitai* chief Ōishi "roughly the number (GAISU [*gaisū*]) of Chinese who should be dealt." Ōishi at first allegedly protested against fixing a quota on grounds of impracticality, but he eventually relented. Ōishi's own estimate of the total number of the killed, as provided to the investigation committee, was about 5,000.⁸⁴

112. "Report of Court of Inquiry, Rabaul, September 23, 1947," and "Letter Addressed to Maj. Upson," in "War Crimes - Trial of Lt. Gen. Adachi Hatazo," series no. MP742/1, control symbol 336/1/1264. National Archives of Australia. The translation of Adachi's letter to Upson is included in the Report of Court of Inquiry, which made a report on the circumstances of Adachi's death. For Adachi's much longer versions of farewell notes, addressed to Gen. Imamura and other members of the 18th Army, see Bōei kenshijō senshishitsū, *Senshi sōsho: Minami Taiheiyō rikugun sakusen*. (5) *Aitape, Puriaaka, Rabauru*, pp. 451-4. *Senshi sōsho* indicates that the Imperial General Headquarters sanctioned the "MO" Operation on Adachi's insistence, despite awareness of its inadvisability.
113. "Record of Military Court" (summary of the case), Katō Trial, R3.
114. "Exhibit A: Exhibit G of the Trial of Haranaka and Katagiri," Katō Trial, R3.
115. "Exhibit 2: Statement of Gen. Imamura Hitoshi," p. 1, Katō Trial, R29.
116. "Exhibit 6: Excerpt from Japanese Army Regulations, Volume 1," Katō Trial, R29. The Japanese original can be found in the same exhibit.
117. Katō Trial, R48.
118. These numbers are based on Japanese sources. Tōkyō saiban handobukku henshū iinkai, *Tōkyō saiban handobukku*, p. 222.
119. For accounts of hellships, see Michno, *Death on the Hellships*, and Lamont-Brown, *Ships from Hell*.
120. U.S. Yokohama Trial Docket No. 346 (United States of America vs. Katō Rinpei and 8 others). The full trial record can be found in "Rimpei Kato, Okikatsu Arao, Goro Isoya, Choho Mononobe, Hiroshi Nukata, Bunro Saheki, Mitsuo Tomita, Yahei Toyama, Tadakatsu Wakamatsu," entry UD 1221, RG 331, SCAP, Records of the SCAP Legal Section, Prosecution Division: US vs. Japanese War Criminal Case Files, Boxes 1637-8, NARA. For a study of the British Singapore trials concerning the hellship cases, see Cheah, "Post-World War II British 'Hell-Ship' Trials in Singapore."
121. "The Opening Address by the Defense," Imamura Trial, R36.
122. Imamura Trial, R147.
123. Ibid., R145.
124. Ibid.
125. "Record of Military Court" (summary of the case), Imamura Trial.
126. Imamura Trial, R136.
127. Ibid., R148.
128. "War Crimes Trial, Rabaul" (June 11, 1947), in "War Crimes - Miscellaneous Correspondence re Criminals, Suspects and Trials (1) MISC 18 part 1 - War Crimes - Miscellaneous Correspondence re Criminals, Suspects and Trials (2) War Crimes (American Court) - Adm. TOYODA Soemu," series no. MP742/1, control symbol 336/1/1865, National Archives of Australia.

CHAPTER 5

1. The records of two trials analyzed in this chapter are obtained from the U.K. National Archives. The record group is known as "WO 235 - Judge Advocate General's Office: War Crimes Case Files, Second World War." The full citation information of the cases is as follows: "WO 235/961 - Defendant Ichikawa Seigi, Place of Trial Rangoon"; and "WO 235/1004 - Defendant Nishimura

- Takoma [Takuma], Place of Trial Singapore." The two trials will be referred to hereafter as the "Ichikawa Trial" and the "Nishimura Trial." The transcripts of the court proceedings for the Ichikawa Trial start with page 1 for each of the prosecution's case and the defense case. To avoid confusion, the page numbers in the transcripts relative to the prosecution's case will follow the usual format ("Ichikawa Trial, R#") while the page numbers relative to the defense case will be marked as "Ichikawa Trial (defense case), R#."
2. "BC-kyū (Igitrisu saiban kankai) Shingapōru saiban dai-12-gō jiken" [Class BC (relative to British trials) Singapore trial, case no. 12], p. 77. Hōmu-Hei-11-4A-17-4359, National Archives of Japan.
3. Ibid., p. 36. For the general history of these islands leading up to the Pacific War, see L. P. Mathur, *History of the Andaman and Nicobar Islands, 1756-1966* (Delhi: Sterling Publishers, 1968).
4. The full record of this trial can be found at the U.K. National Archives. "Defendant Itzuki [Itzuki] Toshio, Place of Trial Singapore." The reference number is WO 235/894.
5. The Itzuki Trial is discussed in the following publications: Kimura Koichirō, *Wasurerareta sensō sekimin: Kānikobaru-tōjiken to Taiwanjin gunzoku* [Forgotten war responsibility: The Car Nicobar Incident and Taiwanese auxiliary forces] (Tokyo: Aoki shoten, 2007); and Iwakawa Takashi, *Kami o shinzezu: BC-kyū senpan no bokime* [I do not believe in God: The epitaph of Class BC war criminals] (Tokyo: Chūō kōronsha, 1978), pp. 225-36.
6. "BC-kyū (Igitrisu saiban kankai) Shingapōru saiban dai-12-gō jiken" [Class BC (relative to British trials) Singapore trial, case no. 12], pp. 46-7. Hōmu-Hei-11-4A-17-4359, National Archives of Japan.
7. Ibid., p. 61.
8. Ibid., p. 63.
9. Article 61 of the Geneva Prisoner-of-War Convention. Friedman, *Law of War*, vol. 1, p. 508.
10. Tōkyō saiban handobukku henshū iinkai, *Tōkyō saiban handobukku*, p. 221.
11. "Testimony of Timothy Tun Nyein," Ichikawa Trial, R221.
12. The Kalagon Massacre has been explored at some length in Hayashi, *Sabakareta sensō hanzai*, pp. 253-62.
13. The Singapore Massacre has been explored in the following publications: Hayashi Hirofumi, *Shingapōru kakyō shukusei: Nihongun wa Shingapōru de nani o shitanoka* [The purge of Chinese in Singapore: What did the Japanese military do in Singapore?] (Tokyo: Kōbunken, 2007); Ralph P. Modder, *The Singapore Chinese Massacre: 18 February to 4 March 1942* (Singapore: Horizon Books, 2004); and Nakajima Masato, *Bōatsu no kōeki: Shingapōru kakyō gyaokusatsu jiken* [Traces of premeditated murder: The Singapore Chinese Massacre] (Tokyo: Kōdansha, 1985). For an analysis of the Nishimura Trial relative to the Singapore Massacre, see Hayashi, *Sabakareta Sensō hanzai*, pp. 209-27.
14. Fukukawa, *Nihon rikugun shokan jiten*, p. 397.
15. Hayashi, *Sabakareta sensō hanzai*, p. 225. For Tsuji's own account of his life as a fugitive, see Tsuji Masanobu, *Senkō sanzenri* [Going underground for three thousand miles] (Tokyo: Mainichi shinbunsha, 1950).
16. "Testimony of Saw Kaw Ku," Ichikawa Trial, R1-46.

17. For Saw Kaw Ku's background, see, "Testimony of Supe-An," Ichikawa Trial, R94; and "Testimony of Timothy Tun Nyein," Ichikawa Trial, R217-8.
18. "Testimony of Saw Kaw Ku," Ichikawa Trial, R37.
19. Ibid., R38. According to the study by Hayashi Hirofumi, Abbey belonged to the British special operation force known as Unit 136, which engaged in propaganda and unconventional warfare in the Pacific theater. Hayashi, *Sabakareta senso hanzai*, pp. 178-87, 253.
20. "Testimony of Saw Kaw Ku," Ichikawa Trial, R4-5.
21. Ibid., R6.
22. Ibid., R7.
23. Ibid., R8-18.
24. Ibid., R24.
25. Ibid., R25.
26. Ibid., R27.
27. Ibid., R28.
28. Ibid., R30.
29. Ibid., R33.
30. "Testimony of Tara Bibi," Ichikawa Trial, R150.
31. "Testimony of Mohd Eusof," Ichikawa Trial, R114-5. The same witness also testified the number of missing as "about 174 men, 195 or 196 women, and 266 or 267 children." Ichikawa Trial, R121.
32. Ibid., R128.
33. Ibid., R122.
34. "Testimony of Sulaiman," Ichikawa Trial, R153.
35. "Testimony of Hakijan," Ichikawa Trial, R155-47, 162-5.
36. Ichikawa Trial, R162. Emphasis added.
37. "Testimony of Hakijan," Ichikawa Trial, R155. There is a notation in the trial transcripts that this witness "did not appear to speak any particular language" and that her father was to serve as an interpreter. After a defense objection, witness Sulaiman was brought in "to assist the interpretation." Hakijan's father was "allowed to stay in court." This presumably means that this witness's father no longer served as her interpreter.
38. "Judgment," p. 5, Ichikawa Trial. The judgment appears at SP541-550 (10 pages). There is no pagination in the original.
39. "Exhibit E: Statement of Sakamaki Saburo," p. 1, Ichikawa Trial, R168.
40. "Exhibit D: Statement of Ichikawa Seigi," p. 1, Ichikawa Trial, R168.
41. Ibid., p. 2.
42. "Exhibit G: Statement of Midorikawa Hisashi," p. 1, Ichikawa Trial, R168.
43. "Testimony of Ichikawa Seigi," Ichikawa Trial (defense case), R2.
44. Ibid., R3. This part of the testimony was initially translated as "I received orders to the effect that I was to kill the villagers or Kalagon and to burn the whole village." In the retranslated version, the word "orders" is replaced by "instructions," and "I was to kill" was changed to read, "I must kill."
45. Ibid., R9.
46. Ibid., R20.
47. Ibid., R9.
48. Ibid., R30.
49. "Judgment," p. 7, Ichikawa Trial.

50. "Testimony of Tsukada Misao," Ichikawa Trial (defense case), R116.
51. Ibid., R118-9.
52. Ibid., R128.
53. Ibid., R125. This particular dialogue is hand-written in the trial record.
54. Ibid.
55. "Testimony of Katayama Toru," Ichikawa Trial (defense case), R144-6, 148-57.
56. "Testimony of Tsukada Misao," Ichikawa Trial (defense case), R149. Emphasis added.
57. "Judgment," pp. 3-4, Ichikawa Trial. After the trial, Tsukada filed a petition on behalf of the convicted, pleading once again that he was the one responsible for ordering the killing of villagers as well as the abduction of women. The reviewing authority was critical of Tsukada's petition, however, commenting that "it is not . . . necessary to consider who issued the order, although it can be said that the equivocations of Col. TSUKADA when giving evidence contrast unfavourably with the definite statements in his petition." This quote appears in the review report, p. 5, prepared by the Department of Judge Advocate General, Allied Land Forces, S.E.A. The first page is missing in the file. Ichikawa Trial, SP16.
58. "Judgment," p. 1, Ichikawa Trial. Emphasis added. The original of the quoted passage can be found in Great Britain War Office, *Manual of Military Law 1929 Amendments* (No. 12): Chapter XIV. *The Laws and Usages of War on Land* (London, UK: His Majesty's Stationery Office, 1942), pp. 85-6. This chapter was removed from the *Manual* for revision and reissued separately in 1936 as Amendments No. 12. For the rest of the *Manual*, see Great Britain War Office, *Manual of Military Law 1929*. Reprinted December 1939 (London, UK: His Majesty's Stationery Office, 1949). This version does not include Amendments No. 12. The verbatim stipulation of the quoted passage can be found also in the Australia Military Board, *Australian Edition of Manual of Military Law 1941*, p. 291.
59. "Judgment," p. 1, Ichikawa Trial. *Manual of Military Law 1929 Amendments* (No. 12) includes the following stipulation: "459. What kinds of acts should be resorted to as reprisals is a matter for the consideration of the injured party. Acts done by way of reprisals must not, however, be excessive, and must not exceed the degree of violation committed by the enemy" (p. 86). A note to this stipulation provides some examples of legitimate forms of reprisals from the time of the Franco-German War (1870-1871) and during World War I.
60. "Testimony of Tsukada Misao," Ichikawa Trial (defense case), R130.
61. "Judgment," p. 2, Ichikawa Trial.
62. Ibid. Emphasis added. For the original text, see Lord Wright, "War Crimes under International Law," *The Law Quarterly Review*, vol. 62, no. 1 (January 1946), p. 45.
63. "Judgment," p. 3, Ichikawa Trial.
64. "Testimony of Yanagisawa Izumi," Ichikawa Trial (defense case), R58.
65. Ibid., R61.
66. Ibid., R62-3. Emphasis added.
67. "Testimony of Midorikawa Hisashi," Ichikawa Trial (defense case), R67.
68. Ibid., R70.
69. Ibid., R67.
70. Ibid., R66.

71. "Judgment," p. 4, Ichikawa Trial. Paragraph 6 of the Royal Warrant read as follows: "The accused shall not be entitled to object to the President or any member of the Court or the Judge Advocate or to offer any special plea to the jurisdiction of the Court." Hōmu daijin kanbō shihō hōsei chōsabu, *Sensō hanzai saiban kankai horeishi*, vol. 1, p. 89.
72. "Judgment," p. 4, Ichikawa Trial.
73. "Testimony of Midorikawa Hisashi," Ichikawa Trial (defense case), R72.
74. "Judgment," p. 4, Ichikawa Trial.
75. "Military Court for the Trial of War Criminals" (summary of the case), Ichikawa Trial, SP4.
76. "Testimony of Sugita Ichiji," Nishimura Trial, R8.
77. Ibid., R10; "Exhibit Q: Statement of Hashizume Isamu," p. 2, Nishimura Trial, R121. A copy of the original report in Japanese can be found as "Shingapōru ni okeru kakyōshodan jōkyō chōsho" [Report on circumstances of the disposition of ethnic Chinese in Singapore], in Nagai, *Sensō hanzai chōsa shiryō*, pp. 87-149. The same report can be found also in "BC-kyū (Igrisu kankai) Shingapōru saiban dai-118-gō" [Class BC (relative to British trials) Singapore trial, case no. 118], Hōmu-Hei-11-4B-35-4465.
78. Shinozaki Mamoru, *Shingapōru senryō hiroku* [A secret record of the occupation of Singapore] (Tokyo: Hara shobō, 1976), p. 175.
79. "Testimony of Sugita Ichiji," Nishimura Trial, R8.
80. Ibid. Prior to the Japanese invasion of British Malaya, local residents formed several armed volunteer forces to defend their territories. The main ones are the Straits Settlements Volunteer Forces (SSVF), which consisted of two battalions (based in Singapore), one in Penang, and another in Malacca in Malay Peninsula. There were also: (1) a separate Malayan regiment, headquartered at Port Dickson, and (2) the so-called Dalforce, the Singapore Overseas Chinese Volunteer Army. According to Hayashi Hirofumi, the Japanese army did not appear to have accurate information about these various volunteer forces in British Malaya, and was unable to distinguish one from the other. Hayashi, *Shingapōru kakyō shukusei*, pp. 40-1.
81. "Testimony of Sugita Ichiji," Nishimura Trial, R9.
82. Ibid., R17.
83. Exhibit Q, p. 3, Nishimura Trial.
84. Ibid., pp. 3-4.
85. "Exhibit S: Statement of Hishikari Takafumi," p. 2, Nishimura Trial, R121.
86. "Exhibit R: Statement of Ichikawa Tadashi," p. 1, Nishimura Trial, R121.
87. Ibid., pp. 1-2.
88. "Testimony of Shinozaki Mamoru," Nishimura Trial, R19.
89. Ibid., R20-1.
90. Ibid., R24.
91. Ibid., R25.
92. Ibid., R32.
93. In addition to court testimony by witnesses, the prosecution presented in evidence eight statements by British prisoners of war.
94. "Testimony of Khoo Ah Lim," Nishimura Trial, R57-9.
95. "Testimony of Lee Keng Jin," Nishimura Trial, R62.
96. Ibid., R63-4.
97. Ibid., R67.

98. "Testimony of Lim Peng Keoi," Nishimura Trial, R73-4.
99. "Testimony of Chua Choon Guan," Nishimura Trial, R82-3.
100. "Testimony of Cheng Kwang Yu," Nishimura Trial, R84-7.
101. "Testimony of Low Sze Thang," Nishimura Trial, R35-7.
102. "Testimony of Ng Kim Song," Nishimura Trial, R39-41.
103. "Testimony of Puay Ah Boh," Nishimura Trial, R42.
104. "Testimony of Yeo Hung Chung," Nishimura Trial, R47.
105. Ibid., R48.
106. "Testimony of Tan Hai Suat," Nishimura Trial, R52.
107. "Testimony of Nishimura Takuma," Nishimura Trial, R141. For Obata's biographical information, see Fukukawa, *Nihon rikugun shōkan jiten*, p. 196.
108. "Testimony of Nishimura Takuma," Nishimura Trial, R142.
109. Ibid., R143.
110. Ibid., R141. This Kobayashi is probably Kobayashi Takashi, who served as commander of the infantry of the Imperial Guards Division at the time of the Malayan invasion. Fukukawa, *Nihon rikugun shōkan jiten*, p. 312.
111. "Testimony of Nishimura Takuma," Nishimura Trial, R145.
112. Ibid., R146.
113. Ibid., R147.
114. "Testimony of Kawamura Saburo," Nishimura Trial, R162. Kawamura served as commander of the Singapore Guard Unit only briefly, between February 18 and March 18 of 1942. "Testimony of Kawamura Saburo," Nishimura Trial, R151, 160.
115. Ibid., R152-3.
116. Ibid., R154-5.
117. Ibid., R159.
118. Ibid., R160.
119. "Testimony of Oishi Masayuki," Nishimura Trial, R172.
120. Ibid., R180.
121. Ibid., R183.
122. "Testimony of Yokota Yoshitaka," Nishimura Trial, R190.
123. Ibid., R193.
124. Ibid.
125. "Ei-Shingapōru saiban jiken bangō dai-117-gō kakyō shukusei kēsu shiryō" [British Singapore trial, case no. 117: Sources relative to the case of the Chinese purge], in Hōmu-Hei-11-4A-20-4465, National Archives of Japan, p. 378.
126. Ibid.
127. Ibid., p. 379.
128. Ibid.
129. Ibid., p. 383.
130. Zenkoku ken'yūkai rengōkai hensan inkai, *Nihon kenpei seishi*, p. 1299.
131. Ibid., pp. 1299-1300.
132. Ibid., p. 1300.
133. "Military Court for the Trial of War Criminals" (summary of the case), Nishimura Trial, SP12.
134. "War Crimes Trial" (review report, prepared by Brigadier F. G. T. Davis, Department of Judge Advocate General, South East Asia Land Forces, dated May 5, 1947), Nishimura Trial, SP21-4.
135. Ibid., p. 2.

Columbian Peace Agreement

by Beatriz Mayans-Hermida

Thu., 24 June 2021, 10:30 – 11:30

Abstract:

After four years of intense negotiations, the Colombian Government and the *Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo* (FARC-EP) –the biggest and strongest guerilla group in the country– signed in 2016 the *Final Peace Agreement to End the Conflict and Establish a Stable and Long-lasting Peace* (FPA), seeking to end five decades of internal armed conflict. This Agreement is one among several previous attempts to end the longest-running war in Latin America, which has involved numerous armed state and non-state actors and resulted in millions of victims. Before the FPA, there were several preceding efforts to appease the violence in the country. However, in contrast to the previous attempts, the FPA has been considered by several stakeholders, in and outside Colombia, as a ‘historic’ agreement and as ‘an inspiration for all those striving to end deadly conflict around the world through negotiations.’¹ The reasons for this are several. For instance, the Agreement was signed while the conflict was still ongoing, without warring parties achieving military victory. Furthermore, the result of the negotiations was a comprehensive Agreement that includes six interconnected points, addressing central issues such as rural reform, ceasefire, reintegration of former combatants, victims’ rights, among others.

This session will look into what was established in this ‘historic’ Agreement, especially in point five, which provides for an Integrated System of Truth, Justice, Reparation and Non-Repetition. Particular focus will be given to its unique sentencing scheme, which, based on a *restorative* approach, allows for the imposition of non-custodial/alternative sanctions. These sanctions are known as *special sanctions* (*sanciones propias*) and consist of restriction of liberty in specified geographical areas, coupled with other activities, work and actions with “reparative-restorative” content. The sentencing scheme has been controversial since *special sanctions* will be imposed on the most responsible perpetrators of international crimes, as long as they comply with certain conditions. Finally, the session will address some preliminary results from an empirical study, consisting of semi-structured interviews with victims and former FARC combatants on their perceptions of the *special sanctions* and their views on justice, truth and reconciliation.

Article:

Hillebrecht, Courtney; Huneus, Alexandra; and Borda, Sandra (2018): The Judicialization of Peace. Olasolo, H.; Ramirez Mendoza, J. M. (2017): The colombian integrated system of truth, justice, reparation and non-repetition.

Mayans-Hermida, Beatriz E. and Holá, Barbora (2021): Balancing ‘the International’ and ‘the Domestic’: Sanctions under the ICC Principle of Complementarity.

¹ See statement of the United Nations Secretary-General, António Guterres. Press Release: ‘Secretary-General Congratulates Colombia on Second Anniversary of Peace Agreement Launch, Says Hard Work Ahead to Consolidate Early Gains’, 23 November 2018, available online at: <https://www.un.org/press/en/2018/sgsm19362.doc.htm> (visited 29 April 2020). In addition, in 2021 the Members of the Security Council reiterated their full and unanimous support for the peace process in Colombia, including the Comprehensive System for Truth, Justice, Reparation and Non-Repetition. See: Security Council Press Statement on Colombia, SC/1425, 28 January 2021, available at: <https://www.un.org/press/en/2021/sc14425.doc.htm> (visited 5 February 2021).

2018

The Judicialization of Peace

Courtney Hillebrecht

University of Nebraska - Lincoln, chillebrecht2@unl.edu

Alexandra Huneeus

University of Wisconsin Law School

Sandra Borda

Los Andes University

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The Judicialization of Peace

Courtney Hillebrecht* & Alexandra Huneus,** with Sandra Borda***

As international courts gain in influence, many worry that they will impoverish domestic politics—that they will limit democratic deliberation, undermine domestic institutions, or even thwart crucial political initiatives such as efforts to make peace. Indeed, many states are in the midst of withdrawing, or actively considering withdrawal, from international commitments presided over by international courts. The Article focuses on the currently unfolding Colombian peace process, the first to be negotiated under the watch of not one but two international courts, to show that these concerns misconstrue the way international courts actually work.

Throughout four years of peace talks, many predicted that the International Criminal Court and the Inter-American Court of Human Rights would impede peace by demanding prosecution of war criminals. Instead, the 2016 Colombian peace accord opens the way to a far less punitive peace than many of those familiar with the courts and underlying treaties would have deemed possible. The effect of the engagement of the international courts in Colombia has not been to impose rigid conditions from afar, but rather to allow domestic players to reinterpret the content of Colombia's international legal obligations: the terms of Colombia's peace were produced through—not despite—the international courts' ongoing deliberative engagement with the peace process.

The Article draws on original empirical data to reveal precisely how the international courts enabled the construction of Colombia's sui generis peace. The Article thus speaks directly to those voicing concern over the increased involvement of international courts in national politics in general, and in peace and reconciliation in particular. It also contributes to our knowledge about how, precisely, international law comes to influence domestic politics, and how, in turn, domestic politics shape international law.

INTRODUCTION

How did one of the world's most internationalized peace talks—convened under the shadow of not one but two international courts focused on atrocity crimes—lead to an accord that *prima facie* allows war criminals to avoid prison?¹ In January 2017, Colombia began to implement its historic peace

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** Associate Professor, University of Wisconsin Law School. This paper draws on research funded by NSF Grant 1323966.

*** Associate Professor, Political Science Department, Los Andes University.

1. See, e.g., José Miguel Vivanco, *Letter to President Santos on the New Peace Agreement with the FARC*, HUMAN RIGHTS WATCH (2016), <https://www.hrw.org/news/2016/11/23/letter-president-santos-new-peace-agreement-farc> (expressing concern that war criminals will not undergo punishment). See generally Sandra Borda & Mateo Morales, *Colombia: La Internacionalización de la Paz* [Colombia: The Internationalization of the Peace], in ANUARIO INTERNACIONAL CIDOB 2016–2017 239 (2016) (showing how Colombian peace has been internationalized).

deal with the Revolutionary Armed Forces of Colombia (“FARC”), bringing a 55-year-old armed conflict to a close. It has been, by any measure, a highly judicialized peace process.² Not only is Colombia under the jurisdiction of both the International Criminal Court (“ICC”) and the Inter-American Court of Human Rights (“Inter-American Court”), but over the past three decades it has ratified nearly every human rights treaty to emerge from the United Nations and the Organization of American States.³ If there were one place where international law and courts should have an impact, Colombia would be it. Yet the resulting accord, signed with pomp as international judges looked on and applauded,⁴ advances an understanding of transitional justice less punitive than most knowledgeable observers would have deemed allowable.

This Article conducts an empirically informed analysis of the Colombian peace process in order to reveal whether and how the involvement of international courts in the peace negotiation altered the form and the substance of the resulting accord. The analysis reveals that international courts did, indeed, influence the peace, but not in the ways conventional wisdom would suggest. Many predicted that the international courts’ rigid demands for prosecution of atrocity crimes would either impede the peace talks or, alternatively, lead to a peace accord with a greater measure of criminal accountability. Both predictions were wrong. In Colombia, the international courts acted neither as a spoiler of the peace, nor as a *deus ex machina* that imposes justice on a reluctant body politic.

Instead, the international courts became deeply engaged in the domestic debate and, through their engagement, gave the government and FARC a platform on which to forge a new understanding of the terms of peace possible under international law. Colombia’s 2016 Final Accord (“Final Accord”) is, compared to previous Colombian agreements, longer, more procedurally detailed, and more legally intricate, particularly in its treatment of international law and criminal process. But it is also less punitive. The Colombian solution to the peace/justice dilemma is to offer lighter punishment for the most heinous crimes, in exchange for greater involvement by the wrongdoer in legal processes aimed at repairing the harm and restoring social bonds. Indeed, the Final Accord may allow someone who committed international crimes to be tried, sentenced, and punished, but not imprisoned. That possi-

2. Judicialization refers to the involvement of courts in important political questions, such as the debates over the peace process in Colombia. See generally C. NEAL TATE & TORBJÖRN VALLINDER, *THE GLOBAL EXPANSION OF JUDICIAL POWER* 13 (1995). In this Article, the term will be used to refer to the involvement of *international* courts as well as domestic.

3. For a list of the UN treaties Colombia has ratified, see *Status of Ratification Interactive Dashboard*, U.N. OFF. OF THE HIGH COMM’R, <http://indicators.ohchr.org/> (last visited July 27, 2017). For a list of the OAS treaties Colombia has ratified, see *Multilateral Treaties*, Org. Am. States, http://www.oas.org/dil/treaties_central_authorities_colombia.htm (last visited July 27, 2017).

4. *La Corte Interamericana de Derechos Humanos está de testigo en un momento histórico en Colombia* [The Inter-American Court of Human Rights is Witness to Historic Moment in Colombia], Caracol Radio (Sept. 26, 2016), http://caracol.com.co/radio/2016/09/26/nacional/1474922100_935377.html.

bility embodies a new understanding of accountability not yet tested before the international courts. The courts' impact, counterintuitively, has been to enable Colombian actors to specify and reinterpret the content of Colombia's international obligations, and thereby potentially usher in a new transnational regime of transitional justice.

These findings have implications for our understanding of peacemaking beyond Colombia, and for our understanding of how international courts influence politics. Colombia is arguably more enmeshed in the international legal and judicial realm than many states, and thus something of an outlier. But it can also be viewed as the best-case scenario for international courts, helping us discern what international law and courts can achieve, and cannot achieve, under the most favorable conditions. This knowledge matters because international law and courts are playing a growing role in conflict resolution in contexts as varied as Georgia, Mexico, Sri Lanka, and Uganda. Moreover, judicialization is not limited to peacemaking. Many areas of political and social life are increasingly falling under the purview of a sophisticated blend of international and domestic courts and rules. At the same time, there is a growing backlash against these institutions, with many states in the midst of withdrawal, or considering withdrawal, from the ICC and the Inter-American Court. Critics worry that these courts will increasingly interfere with democratic deliberation or otherwise undermine domestic institutions. Understanding how the courts have worked in this case of extremely contentious politics will allow us to achieve a more realistic approach to the question of the courts' influence more broadly.⁵

The Article proceeds in four parts after the Introduction. Part I sets the inquiry in context by reviewing current theories about the role of international courts in peacemaking. Part II provides a brief history of the Colombian conflict and peacemaking efforts, and explains the methods used in this study. Part III draws on court documents, legislative records, press reports, and executive announcements to show the varied but important roles that the international courts and their underlying treaties came to play in the peace-making process. This Part underscores how the international courts signaled their intentions regarding justice in Colombia, how domestic actors used that signaling in their maneuvering with each other and, ultimately, how the Colombian government pushed back against the courts' interpretations of the relevant treaties. Part IV uses a comparative case study and process tracing to document how judicialization made possible a less punitive and more procedural settlement. It juxtaposes Colombian peace accords negotiated over the past four decades to throw into relief the imprint of the international courts on the current accord. Part V concludes by considering the implications of this case study for international law, and for our understanding of legal globalization more generally.

5. See generally Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. POL. SCI. 93 (2008).

I. COURTS AND THE PEACE/JUSTICE DILEMMA

A. Courts as Crusaders

Since the 1990s, the international community has forged a formidable set of mechanisms to step in and prosecute atrocity crimes when states fail to do so. The idea is that international courts will foster criminal accountability either by directly prosecuting, as in the case of the international criminal courts and hybrid courts; or by creating pressure for states to prosecute, as in the case of the human rights courts (or the ICC when it pressures states to prosecute without yet opening its own international prosecution).⁶ The International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda, as well the international-hybrid tribunals in Sierra Leone and Cambodia all opened their doors in the 1990s.⁷ In 2002, the Rome Statute entered into force, creating the ICC, a permanent international criminal court which today enjoys the participation of 123 state parties. These institutions were created to back up the new norm that states could no longer choose to forego prosecution of certain atrocities.

Meanwhile, regional human rights courts also became engaged in accountability politics. In 2001, the Inter-American Court handed down its influential ruling in *Barrios Altos v. Peru*, which seemingly “outlawed” the use of amnesties for atrocity crimes.⁸ The judgment also further developed the doctrine that states violate the American Convention on Human Rights not only when they directly commit atrocity crimes, but also when they fail to prosecute atrocity crimes. The remedy, of course, is state prosecution. The Inter-American Court has since issued four other judgments in which it declares an amnesty to be in violation of the American Convention on Human Rights, and in a majority of its judgments it has called on states to prosecute fundamental human rights violations.⁹

6. Many argue that the International Criminal Court (“ICC”) should try to foster domestic prosecution, a practice called positive or proactive complementarity. See, e.g., William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT’L L.J. 53, 54 (2008). Others note that the creation of these courts is also a function of states’ geopolitical interests, which have long-enduring effects on the functioning of the courts. See also CHRISTOPHER RUDOLPH, *POWER AND PRINCIPLE: THE POLITICS OF INTERNATIONAL CRIMINAL COURTS* 6 (2017).

7. See generally GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* (2000); MARLIES GLASIUS, *THE INTERNATIONAL CRIMINAL COURT: A GLOBAL CIVIL SOCIETY ACHIEVEMENT* (2006); Mirjan Damaška, *What Is The Point of International Criminal Justice*, 83 CHI.-KENT. L. REV. 329 (2008); Laurel E. Fletcher, *From Indifference to Engagement: Bystanders and International Criminal Justice*, 26 MICH. J. INT’L L. 1013, 1014–15 (2004); Theodor Meron, *From Nuremberg to The Hague*, 149 MIL. L. REV. 107 (1995).

8. See, e.g., Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 GER. L.J. 1203, 1208–09 (2011); Lisa J. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. INT’L L. 915 (2009).

9. Alexandra Huneus, *Courts Resisting Courts: Lessons from the Inter-American Court’s Struggle to Enforce Human Rights*, 44 CORNELL INT’L L. J. 493, 502–03 (2011).

Both modes of working have their advocates. The ICTY in particular has been held up as a successful experiment in international criminal justice, having successfully prosecuted 104 suspects before handing over its work to more localized special courts.¹⁰ But there is perhaps even more support for the idea that international courts should foster domestic judicial process. Many scholars support the ICC on the grounds of its principle of complementarity, which means that the ICC only has jurisdiction in cases when domestic courts cannot or will not adequately try suspected perpetrators.¹¹ The complementarity principle, they argue, not only encourages domestic prosecution, it also encourages domestic actors to incorporate international accountability norms into domestic processes in general, thereby having impact beyond a particular case. For its part, the Inter-American Court has been heralded for creating a strong accountability norm through its jurisprudence, and for fostering domestic prosecution through its supervision of domestic systems.¹² It has also been an innovative force in the development of victim-centered remedial responses to atrocity crimes.¹³

B. Courts as Spoilers or Bumpers

In the realm of peace and political transition, however, the ICC and the Inter-American Court have frequently come under fire, both for not making a difference, and for making a difference in the wrong way. A skeptical line of criticism views the courts as weak and ineffective. The first exhibit might be states' poor record of compliance with the Inter-American Court's orders to prosecute atrocity crimes.¹⁴ The ICC in particular has been attacked for moving too slowly at too great a cost due to the political challenges of

10. *The Cases*, INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/action/cases/4> (last visited Aug. 8, 2017).

11. Burke-White, *supra* note 6, at 54; Geoff Dancy & Florencia Montal, *Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions*, 111 AM. J. INT'L L. 689, 729–33 (2017); Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. of Int'l Crim. Just. 86, 86–88 (2003); Michael A. Newton, *The Quest for Constructive Complementarity in INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE* (Carsten Stahn & Mohamed El Zeidy, eds., 2010); Frans Viljoen, *Human Rights in Africa: Normative, Institutional and Functional Complementarity and Distinctiveness*, 18 S. Afr. J. of Int'l Aff. 191, 192–93 (2011). See generally INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE (Carsten Stahn & Mohamed El Zeidy eds., 2010).

12. Alexandra Huneus, *International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts*, 107 AM. J. INT'L L. 1, 2–4 (2013).

13. Thomas M. Antkowiak, *An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice*, 47 STAN. J. INT'L L. 279, 279 (2011); Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNATIONAL L. 351, 363 (2008).

14. See, e.g., COURTNEY HILLEBRECHT, DOMESTIC POLITICS AND INTERNATIONAL HUMAN RIGHTS TRIBUNALS: THE PROBLEM OF COMPLIANCE 41–42 (2014) (finding that compliance is à la carte); Darren Hawkins and Wade Jacoby, *Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights*, 6 J. INT'L L. & INT'L REL. 35, 55–65 (2010) (finding compliance to the Inter-American Court's non-compensatory orders to be lower than its compensatory orders); Huneus, *supra* note 9, at 494–95 (finding that compliance with orders to investigate and punish is almost null).

prosecuting atrocity crimes from afar.¹⁵ Taken together, these criticisms highlight the paradox that these courts rely on cooperation from national justice systems, meaning that they are ultimately beholden to the same political dynamics that impeded domestic justice in the first place.¹⁶ Sarah Nouwen finds through her analysis of the ICC in Uganda and Sudan, for example, that even the complementarity principle does little to affect domestic processes, either toward or away from international accountability norms.¹⁷

A second set of skeptics accept that the courts have an impact but worry that it is the wrong one: the courts emphasize criminal accountability at too great a cost. Institutionalizing the accountability norm through international courts impedes states' ability to reach political settlements on their own terms, or to pursue other, at times more urgent or valuable, ends, including peace itself.¹⁸ Indeed, as Mark Kersten has suggested, the establishment of the ICC has made the tension between peace and justice more visible and intractable.¹⁹ Critics argue that the ICC has prolonged and exacerbated ongoing conflicts. Scholars have shown, for example that the growing push for international criminal accountability for perpetrators has removed leaders' exit-through-exile option, leaving them to fight longer and harder in a bid to avoid prosecution.²⁰ Others argue that the involvement of

15. See, e.g., Kai Ambos, *Slow Wheels of Justice: The ICC's Disappointing Track Record*, DER SPIEGEL ONLINE (Dec. 14, 2011), <http://www.spiegel.de/international/world/slow-wheels-of-justice-the-icc-s-disappointing-track-record-a-803796.html>; David Davenport, *International Criminal Court: 12 Years, \$1 Billion, 2 Convictions*, FORBES (Mar. 12, 2014), <https://www.forbes.com/sites/daviddavenport/2014/03/12/international-criminal-court-12-years-1-billion-2-convictions-2/#50f96c772405>; Jon Silverman, *Ten Years, \$900m, One Verdict: Does the ICC Cost Too Much?*, BBC NEWS (Mar. 14, 2012), <http://www.bbc.com/news/magazine-17351946>.

16. See generally CHRISTOPHER K. LAMONT, *INTERNATIONAL CRIMINAL JUSTICE AND THE POLITICS OF COMPLIANCE* (2010); VICTOR PESKIN, *INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS: VIRTUAL TRIALS AND THE STRUGGLE FOR STATE COOPERATION* (2008).

17. SARAH M.H. NOUWEN, *COMPLEMENTARITY IN THE LINE OF FIRE: THE CATALYSING EFFECT OF THE INTERNATIONAL CRIMINAL COURT IN UGANDA AND SUDAN* (2013); see also James Meernik, *Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia*, 42 J. PEACE RES. 271 (2005) (arguing International Criminal Tribunal for the former Yugoslavia had no detectable effect on peace and reconciliation in Bosnia).

18. Indeed, this argument is increasingly being leveled against not only the international courts, but the anti-impunity movement and transitional justice regime as a whole. See Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. 1069 (2015). See generally DANIEL R. PASTOR & CRISTIAN G. CACACE, *NEOPUNITIVISMO Y NEOINQUISICIÓN: UN ANÁLISIS DE POLÍTICAS Y PRÁCTICAS PENALES VIOLATORIAS DE LOS DERECHOS FUNDAMENTALES DEL IMPUTADO* [Neo-punitivism and neo-inquisition: an analysis of the penal politics and practices violative of the fundamental rights of the accused] (2008).

19. MARK KERSTEN, *JUSTICE IN CONFLICT: THE EFFECTS OF THE INTERNATIONAL CRIMINAL COURT'S INTERVENTIONS ON ENDING WARS AND BUILDING PEACE* 4 (2016).

20. See generally Abel Escribà-Folch & Daniel Krcmaric, *Dictators in Exile: Explaining the Destinations of Ex-Rulers*, 79 J. OF POL. 560, 565, 571 (2017). See generally Kasaija Phillip Apulli, *Peace Over Justice: The Acholi Religious Leaders Peace Initiative (ARLPI) vs. The International Criminal Court (ICC) in Northern Uganda*, 11 STUD. ETHNICITY & NATIONALISM 116 (2011); Jack Snyder & Leslie Vinjamuri, *Advocacy and Scholarship in the Study of International War Crimes Tribunals and Transitional Justice*, 7 ANN. REV. POL. SCI. 345 (2004); Kirsten Ainley, *The Great Escape? The Role of the International Criminal Court in the Colombian Peace Process*, Just. in Conflict (Oct. 13, 2016), <https://justiceinconflict.org/2016/10/13/the->

the ICC in a peace process makes government negotiators less credible, undermining negotiations. Christine Bell, for example, argues that “[p]eace agreement amnesties could even less clearly be guaranteed by negotiators where the state had acceded to the ICC. Technically speaking, they were no longer worth the paper they were written on.”²¹

The Inter-American Court has also come under fire for demanding criminal accountability at too high a cost. Despite its mandate to adjudicate matters of *state* responsibility, which is a type of civil rather than criminal responsibility, the Inter-American Court has made criminal prosecution of atrocity crimes a central focus of its work.²² Since 2001, the Court has issued orders striking down amnesty laws in five different Latin American states and has issued orders demanding prosecution of atrocity crimes in a majority of its judgments overall. In one famous case, *Gelman v. Uruguay*, it struck down an amnesty that had been passed by a democratic legislature and approved by two subsequent plebiscites held over a decade apart.²³ Critics contend that the Court’s demand for prosecution and punishment despite democratic decision-making at the domestic level makes it “not sufficiently respectful to democracy.”²⁴ In particular, Latin American scholars have pushed back on the Court’s emphasis on use of criminal justice tools to resolve complex political and social problems,²⁵ arguing that it is “neo-

great-escape-the-role-of-the-international-criminal-court-in-the-colombian-peace-process/; Jackson Diehl, Opinion, *After the dictators fall . . .*, WASH. POST (June 5, 2011), https://www.washingtonpost.com/opinions/after-the-dictators-fall-2011/06/02/AG57AmJH_story.html?tid=a_inl&utm_term=.302bb623f84d; Phillipe Sands, *The ICC Arrest Warrants Will Make Colonel Gaddafi Dig in His Heels*, THE GUARDIAN (May 4, 2011), <https://www.theguardian.com/commentisfree/2011/may/04/icc-arrest-war-rants-libya-gaddafi>; Rodrigo Uprimny & Nelson Camilo Sánchez, *The ICC and Negotiated Peace: Reflections from Colombia*, OPEN DEMOCRACY (Feb. 11, 2015), <https://www.opendemocracy.net/openglobalrights/rodrigo-uprimny-nelson-camilo-s-25C3%25A1nchez/icc-and-negotiated-peace-reflections-from-col>; Barbara F. Walter, *Why Assad Will Fight to the Death*, POL. VIOLENCE AT A GLANCE (June 18, 2012), <http://politicalviolenceataglance.org/2012/06/18/why-assad-will-fight-to-the-death/>.

21. CHRISTINE BELL, ON THE LAW OF PEACE: PEACE AGREEMENTS AND THE LEX PACIFICATORIA 249 (2008).

22. Huneeus, *supra* note 12. The Inter-American Court is not a criminal court. It is a human rights court that oversees state compliance to the American Convention on Human Rights. Individuals and states can bring cases to the Court claiming that a state has violated its obligation to uphold rights listed in the American Convention on Human Rights, which includes a long list of mostly civil and political rights. If it finds a violation, the Court orders the state to repair the harm. For a reflection on the role of state responsibility in atrocity crimes, see Laurel Fletcher, *A Wolf in Sheep’s Clothing? Transitional Justice and the Effacement of State Accountability for International Crimes*, 39 FORDHAM INT’L L.J. 447 (2016).

23. *Gelman v. Uruguay*, Merits and Reparation, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶¶ 232, 240, 246 (Feb. 24, 2011).

24. Roberto Gargarella, *Democracy and Rights in Gelman v. Uruguay*, 109 AJIL UNBOUND 115, 119 (2016). See also Roberto Gargarella, *Justicia Penal Internacional y Violaciones Masivas de Derechos Humanos* [International Penal Justice and Massive Violations of Human Rights], in DE LA INJUSTICIA PENAL A LA JUSTICIA SOCIAL [From Penal Injustice to Social Justice] 105–47 (Siglo del Hombre Editores eds., 2008) [hereinafter Gargarella, *Justicia Penal*]. See also Jorge Contesse, *The Final Word? Constitutional Dialogue and the Inter-American Court of Human Rights*, 15 INT’L J. CONST. L. 414 (2017); Ariel E. Dulitzky, *An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights*, 50 TEX. INT’L L.J. 45 (2015) (arguing the Inter-American Court needs to be more deferential to national actors).

25. See generally Engle, *supra* note 18.

punitivist,”²⁶ and even “illiberal” in its emphasis on prosecution at all costs (including, the argument goes, at the cost of procedural safeguards).²⁷ The Inter-American Court has had the opportunity to rule on a peace accord only once, and only years after its implementation.²⁸ As the Colombian peace process began to unfold, however, some grew concerned that the Inter-American Court’s hard stance on amnesties would stymie negotiation.²⁹

C. A More Nuanced Approach

Recent scholarship suggests, however, that the view of international courts as constraining national policy-making in a top down manner is too simplistic. In the realm of transitional justice, the reality is that international courts sometimes hinder peace, sometimes foster a better peace, and are sometimes indifferent.³⁰ The Article builds on recent scholarship that re-conceptualizes the way international courts actually work on the ground in order to yield a more realistic understanding of the value and risk they pose.³¹ In particular, it joins recent studies that adopt a symbolic-interactive perspective, “shifting attention away from compliance with court orders to the processes of group interaction in which court actions may play various contributing roles.”³² Mark Kersten, for example, argues that one of the key roles that the ICC plays in peacemaking is that of altering the narratives of

26. See Ezequiel Malarino, *Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights*, 12 INT’L CRIM. L. REV. 665 (2012) (arguing that the Inter-American Court over-emphasizes punishment).

27. For arguments that the Inter-American Court overemphasizes penal responses, see *id.*; see also Gargarella, *Justicia Penal*, *supra* note 24, at 105–47; Fernando Felipe Basch, *The Doctrine of the Inter-American Court of Human Rights Regarding States’ Duty to Punish Human Rights Violations and Its Dangers*, 23 AM. U. INT’L L. REV. 195 (2007); Daniel R. Pastor, *La deriva neopunitivista de organismos y activistas como causa del desprestigio actual de los derechos humanos* [The Neo-Punitivist Drift of Organizations and Activists as a Cause of the Current Discrediting of Human Rights], 1 NUEVA DOCTRINA PENAL [New Penal Doctrine] 73 (2005).

28. *Massacres of El Mozote and Nearby Places v. El Salvador*, Preliminary Exceptions, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 292 (Oct. 25, 2012).

29. Indeed, former President and Senator Álvaro Uribe submitted a petition against the peace process to the Inter-American Commission of Human Rights, which acts as a first step in litigation before the Inter-American Court, claiming that the terms of the peace were in violation of Inter-American human rights standards. See *Uribe llevó a la CIDH críticas al proceso de paz colombiano* [Uribe brought critiques of the Colombian peace process to the Inter-American Commission on Human Rights], EL UNIVERSAL (Feb. 25, 2016), <http://www.eluniversal.com.co/colombia/uribe-llevo-la-cidh-criticas-al-proceso-de-paz-colombiano-220149>.

30. See, e.g., CHANDRA LEKHA SRIRIAM, *GLOBALIZING JUSTICE FOR MASS ATROCITIES: A REVOLUTION IN ACCOUNTABILITY* 5 (2005); KERSTEN, *supra* note 19, at 19. See generally Courtney Hillebrecht, *The Deterrent Effects of the International Criminal Court: Evidence from Libya*, 42 INT’L INTERACTIONS 616 (2014).

31. See, e.g., Alyssa K. Prorok, *The (In)compatibility of Peace and Justice? The International Criminal Court and Civil Conflict Termination*, 71 INT’L ORG. 213–43 (2017) (finding that ICC involvement prolongs the conflict in those places where domestic punishment probability is low). See also KAREN J. ALTER, LAURENCE HELFER & MIKAEL RASK MADSEN, *INTERNATIONAL COURT AUTHORITY* (forthcoming) (presenting a view of international courts as constrained political actors whose authority varies by political contextual factors).

32. Michael McCann, *Reform Litigation on Trial*, 17 L. & SOC. INQUIRY 715, 734 (1992).

the warring parties and shaping the discourse of the conflict, peace, and accountability.³³ Nouwen makes a similar argument, suggesting that a conditional effect of the ICC has been that of shaping the narrative of who among the conflicting parties are the “friends and enemies” of the international community.³⁴ Wegner adds that local perceptions and attitudes toward the ICC can alter, in turn, if and how the ICC affects peacemaking processes.³⁵

What this more recent research shares is a reluctance to make general statements about the effects of international justice mechanisms on peacemaking, cutting back to seek specific effects on specific aspects of the peace processes. This Article takes as its point of departure the recent turn toward a more nuanced mapping of when and how international accountability courts can affect peacemaking processes. In Colombia, the ICC and the Inter-American Court exert influence through “the shadow of the law.”³⁶ neither international court has an active case, yet both loom large in the domestic debate over peace. Few studies have focused on this “shadow effect” of international courts in the peace context.³⁷ Yet it may be that “shadow effects” are the most important way courts exert influence. The threat of future litigation as well as the imprint of prior litigation that has already shaped institutional processes and normative understandings mean that courts exert power over domestic decision-making even without issuing a judgment or opening a case.³⁸ The ICC’s role in the preliminary examination stage, and even before that, may be as significant as its prosecutorial role. In the Inter-American context, the Court’s prior jurisprudence has become an important tool for domestic actors seeking to shape policy and domestic litigation, without their ever having to file an international claim. The Article also maps new terrain by reversing the usual direction of causal

33. Mark Kersten, *Trials and Tribulations at the Special Tribunal for Lebanon Justice in Conflict*, JUST. IN CONFLICT (Jan. 28, 2014), <https://justiceinconflict.org/2014/01/28/trials-and-tribulations-at-the-special-tribunal-for-lebanon/>.

34. Sarah M. H. Nouwen & Wouter G. Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, 21 EUR. J. INT’L L. 941, 945 (2010).

35. PATRICK S. WEGNER, THE INTERNATIONAL CRIMINAL COURT IN ONGOING INTRASTATE CONFLICTS: NAVIGATING THE PEACE-JUSTICE DIVIDE 308–10 (2015).

36. See generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (introducing the concept of the “shadow of the law”).

37. Most ICC case studies have focused on active cases, stressing, for example, how the manner in which a case arrives at the ICC shapes the politics of its prosecution of that case. See, e.g., Kersten, *supra* note 19, at 5; WEGNER, *supra* note 35, at 1–13; David Bosco, *Palestine in The Hague: Justice, Geopolitics, and the International Criminal Court*, 22 GLOB. GOVERNANCE: REV. MULTILATERALISM & INT’L ORG. 155 (2016); Nouwen & Werner, *supra* note 34, at 942; Prorok, *supra* note 31, at 222–23. Similarly, most Inter-American Court studies focus on litigation, judgments, or their aftermath. But see René Uruña, *Prosecutorial Politics: The ICC’s Influence in Colombian Peace Processes, 2003–2017*, 111 AM. J. INT’L L. 104 (2017) (arguing that the impact the ICC may have through a preliminary examination diminishes over time).

38. See generally Karen Alter, Laurence Helfer, & Mikael Rask Madsen, *How Context Shapes the Authority of International Courts*, 79 L. & CONTEMP. PROBS. 1, 2–3 (2016) (describing the different types of authority that courts can have, even outside the scope of a particular case).

inquiry to ask how the courts and international law itself may be changed by the courts' engagement in a particular context.

II. HISTORY AND METHOD

Several features of the Colombia peace process make it a significant case for the study of the role of international law in politics.³⁹ This Part reviews the half-century history of the Colombian conflict, examines the features that distinguish Colombia from other cases, and explains the methods used in the remainder of the Article.

A. A Brief History of the Colombian Conflict

Until the Peace Treaty was signed in 2016, Colombia's civil conflict was the longest-running war in the Western hemisphere. It had many stages over its five-decade span, evolving from a conflict between two dominant political parties in the late 1940s, into a conflict that was fragmented among many parties, including actors engaged in organized crime and narco-trafficking.

The conflict had its roots in partisan violence between members of what were then Colombia's two main political parties, the Liberals and Conservatives. *La Violencia*, as the fighting was known, began after the 1946 elections and reached its highest point following the assassination of Liberal candidate Jorge Eliecer Gaitán on April 9, 1948. A decade later, in 1958, the two parties forged a power-sharing agreement known as the *Frente Nacional* (National Front), which brought an end to the violence but with unanticipated consequences. The National Front's agreement closed the political system for other actors. In doing so, the National Front set the stage for Colombia's

39. It has already received much scholarly treatment. Although this Article is not the first to examine the ICC's intervention in Colombia, it is the first to analyze three distinct paths by which the two courts engaged the peace process, and to compare the 2016 peace to prior peace efforts in order to discern the specific imprint of this engagement on the Final Accord. See generally KAI AMBOS, *THE COLOMBIAN PEACE PROCESS AND THE PRINCIPLE OF COMPLEMENTARITY OF THE INTERNATIONAL CRIMINAL COURT: AN INDUCTIVE, SITUATION-BASED APPROACH* (2010); Ainley, *supra* note 20; D. Acosta Arcaraz, R.J. Buchan & R. Urueña, *Beyond Justice, Beyond Peace? Colombia, the Interests of Justice, and the Limits of International Criminal Law*, 26 CRIM. L. FORUM 291 (2015); Nicolás Henry Buckley Martín, Pierluigi Antonio Allegretti, & Iñigo Mejuto Hidalgo, *La acción de la Corte Penal Internacional en Colombia: entre legalismo y perspectiva histórica* [The International Criminal Court in Colombia: Between Legalism and Historical Perspective], 50 NÓMADAS: REVISTA CRÍTICA DE CIENCIAS SOCIALES Y JURÍDICAS [Nómadas: Critical J. Soc. & Juridicial Sci.] 187 (2017); Eleanor Gordon, *Crimes of the Powerful in Conflict-Affected Environments: False Positives, Transitional Justice and the Prospects for Peace in Colombia*, 6 ST. CRIME J. 132 (2017); Lisa J. Laplante & Kimberly Theidon, *Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz*, 28 MICH. J. INT'L L. 49 (2006); Jamie Rowen, "We Don't Believe in Transitional Justice:" *Peace and the Politics of Legal Ideas in Colombia*, 42 L. & SOC. INQUIRY 622 (2017); Urueña, *supra* note 37; Allen Weiner, *Ending Wars, Doing Justice: Colombia, Transitional Justice, and the International Criminal Court*, 52 STAN. J. INT'L L. 212 (2016). Further, two online symposia have focused on the peace talks: Alexandra Huneus & Rene Urueña, *Introduction to Symposium on the Colombian Peace Talks and International Law*, 110 AJIL UNBOUND 161 (2016); *Peace and Justice in Colombia—A Jic Symposium*, JUST. IN CONFLICT (2017), <https://justiceinconflict.org/2016/10/10/peace-and-justice-in-colombia-a-jic-symposium>.

current civil conflict, which began in the mid-1960s when the Revolutionary Armed Forces of Colombia (FARC) first organized as an armed force. The Government of Colombia has been fighting the FARC ever since.

During the 1980s the Colombian conflict grew not only more violent but also more complex. In addition to the FARC, drug traffickers and paramilitary groups entered the fray. Drug trafficking fueled the conflict and major trafficking organizations developed love-hate relationships with the rebel groups, the government, and the paramilitary forces. The paramilitaries, in turn, allied with the state in order to combat the rebel groups and their presumed supporters. The cost of this fighting has been paid in human lives. According to a 2013 report from the National Centre of Historical Memory, after four decades of fighting, the Colombian conflict left over 220,000 Colombians dead and 5.7 million civilians forcibly displaced.⁴⁰

The most recent peace process is one in a long line of attempts by domestic and international actors to bring an end to Colombia's devastating conflict. Nearly 35 years ago, in 1982, as part of the so-called *Acuerdos de la Uribe*, the Colombian government looked to address the armed conflict by providing political, economic and social reforms, and generous amnesty for armed insurgents.⁴¹ The *Acuerdos de la Uribe* failed to bring the conflict to an end, however, and the rest of the 1980s were some of the bloodiest years in the conflict.

The violence of the 1980s led to political reform in the early 1990s. In 1991, Colombia adopted a new constitution, which updated and institutionalized international human rights legal protections.⁴² In 1993, the Colombian government also established Law 104, which provided the legal framework for the accord between the Colombian Government and the *Frente Francisco Garnica*, a small faction of the Popular Liberation Army (EPL).⁴³ These advances, however, did little to address the two main sources of violence: the FARC and the paramilitaries.

In the mid-2000s the Colombian government undertook yet another initiative to quell the violence, this time focusing on the paramilitaries.⁴⁴ Be-

40. *Colombian Conflict Has Killed 220,000 in 55 Years, Commission Finds*, THE GUARDIAN (July 25, 2013), <https://www.theguardian.com/world/2013/jul/25/colombia-conflict-death-toll-commission>.

41. See *Acuerdos del cese al fuego entre 1984 y 1986 con las FARC, el M-19, el EPL y la ADO* [Ceasefire Agreements between 1984 and 1986 with the FARC, M-19, EPL, and ADO], VERDAD ABIERTA [Open Truth] (Nov. 18, 2012), <http://www.verdadabierta.com/procesos-de-paz/farc/4292-acuerdos-del-cese-al-fuego-entre-1984-y-1986-con-las-farc-el-m-19-el-epl-y-la-ado>.

42. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 93.

43. See *Acuerdo entre el Gobierno Nacional y el Frente Francisco Garnica de la Coordinadora Guerrillera* [Accord between the National Government and the Francisco Garnica Front of the Guerilla Coordinator], signed June 30, 1994, UN PEACEMAKER, <http://peacemaker.un.org/colombia-acuerdogarnica94>; *Bitácora, con el Frente Francisco Garnica* [Log, with the Francisco Garnica Front], CENTRO DE DOCUMENTACIÓN DE LOS MOVIMIENTOS ARMADOS [Documentation Center of Armed Movements] (July 1, 1995), <http://www.cedema.org/ver.php?id=1820>.

44. See generally Human Rights Watch, *BREAKING THE GRIP? OBSTACLES TO JUSTICE FOR PARAMILITARY MAFIAS IN COLOMBIA* (2008), <https://www.hrw.org/reports/2008/colombia1008/colombia1008web.pdf>.

tween 2002 and 2006, then-president Álvaro Uribe held negotiations with paramilitary groups that ended in the demobilization of most of their fronts.⁴⁵ The main vehicle for the demobilization of the paramilitaries was Law 975 of 2005, known as the Justice and Peace Law (*Ley de Justicia y Paz*, “JPL”).⁴⁶ Unlike previous demobilization efforts in Colombia, which had promised amnesty in exchange for peace, this law allowed perpetrators who confessed their crimes to receive alternative or reduced sentences.⁴⁷ The success of the JPL has been mixed. Between 2003 and 2006, 30,000 paramilitaries were demobilized, although many of the demobilized later took up arms again under a different name.⁴⁸

Around the same time as the passage of the Justice and Peace Law, both the Inter-American Court and the ICC stepped up their involvement in Colombia. Colombia accepted the jurisdiction of the Inter-American Court in 1985⁴⁹ and the Inter-American Court issued its first judgment against Colombia in 1997.⁵⁰ The early 2000s and the JPL, however, spawned a new era of activity related to Colombia at the Inter-American Court. To date, the Court has ruled on 18 cases related to Colombia, over half of which focus on massacres and other atrocity crimes committed by the paramilitary with the acquiescence or active involvement of state actors. Some of the Inter-American Court’s most important cases related to Colombia, such as *Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis)*, reviewed the way the Justice and Peace Law was being implemented.⁵¹

With respect to the ICC, the Government of Colombia ratified the Rome Statute in 2002. In the seven months following Colombia’s ratification, the Office of the Prosecutor (“OTP”) received 141 communications regarding potential violations. Of those, 20 petitions fell far outside the ICC’s jurisdiction, but 94 of the petitions consisted of enough evidence to indicate that the atrocity crimes outlined in the Rome Statute might have taken place. As a result, the OTP informed Colombia on March 2, 2005 that it would be

45. *Id.* at 6.

46. See L. 975, julio 25, 2005, 45.980 DIARIO OFICIAL [D.O.] (Colom.) [hereinafter *Justice and Peace Law*]. See also Gaceta del Congreso [G. Cong.] t. 390.

47. See Laplante & Theidon, *supra* note 39, at 60.

48. See generally Human Rights Watch, PARAMILITARIES HEIRS: THE NEW FACE OF VIOLENCE IN COLOMBIA (2010), <https://www.hrw.org/report/2010/02/03/paramilitaries-heirs/new-face-violence-colombia>.

49. Colombia has belonged to the Organization of American States since it ratified the OAS Charter in 1951. It was one of the early states to deepen its commitment to protecting human rights through the OAS by ratifying the American Convention on Human Rights in 1973. However, it did not accept the jurisdiction of the Inter-American Court until 1985, six years after the Convention came into effect and the first slate of judges took office. *American Convention on Human Rights, Signatories and Ratifications*, OAS, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (last visited Mar. 30, 2018).

50. Caballero-Delgado & Santana v. Colombia, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 31 (Jan. 29, 1997).

51. *Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 270 (Nov. 20, 2013).

opening a preliminary examination.⁵² The preliminary examination covers the crimes that fall within the ICC's jurisdiction and the status of domestic proceedings.⁵³ Twelve years on, Colombia remains under preliminary examination.

In addition to the increased oversight of the ICC, the 2010s ushered in a new approach to forging peace in Colombia. Even though Juan Manuel Santos won the 2010 presidential election with the promise of continuing Uribe's security policy, as soon as he assumed office he started to initiate a peace process with the FARC.⁵⁴ By July 2012, Congress approved the Legal Framework for Peace (Marco Jurídico para la Paz, "MJP"), a law that would facilitate the demobilization of the guerrilla groups in a peace process.⁵⁵

After multiple rounds of negotiations, the Government and the FARC finally arrived at an agreement, which they signed in Havana, Cuba, on August 25, 2016. While the agreement was widely lauded as being able to bring the long-running Colombian conflict to an end, the Colombian public was more skeptical. In a plebiscite on October 2, 2016, the public narrowly rejected the peace deal.⁵⁶ The reasons the plebiscite failed are manifold, including, but not limited to, concerns that the agreement did not sufficiently address narco-trafficking, critiques that the deal would increase taxes, allegations that the deal put the government in the position of negotiating and aligning with terrorists, concerns about the overreach of international actors, and the possibility of human rights perpetrators going unpunished.⁵⁷

After a long list of revisions—reportedly numbering around 500—the Colombian Senate approved a revised version of the agreement in a 75-0 vote. Former president Uribe's *Centro Democrático* party abstained in the vot-

52. See OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT, SITUATION IN COLOMBIA 2 (2012), <https://www.icc-cpi.int/NR/rdonlyres/3D3055BD-16E2-4C83-BA85-35BCFD2A7922/285102/OTPCOLOMBIAPublicInterimReportNovember2012.pdf>.

53. *Id.* at 2–4.

54. See *Así se llegó al acercamiento con las Farc* [This is how the rapprochement with the Farc took place], *El Tiempo* (Sept. 1, 2012), <http://www.eltiempo.com/archivo/documento/CMS-12186341>.

55. See *Congreso de Colombia aprueba reforma para eventual diálogo con guerrilleros* [Colombian Congress Approves Reform for Eventual Dialogue with Guerrillas], NOTICIAS24 (June 14, 2012), <http://www.noticias24.com/internacionales/noticia/38963/colombia-aprueba-reforma-para-eventual-proceso-de-paz-con-la-guerrilla/>.

56. See Jorge Humberto Botero, Juan Carlos Henao, María Victoria Llorente, Diego Martínez Castillo & Marta Ruíz, *¿Qué cambios presenta este nuevo acuerdo de paz?* [What Changes Does the New Peace Agreement Present?], PUBLICACIONES SEMANA S.A. (Nov. 16, 2016), <http://www.semana.com/nacion/multimedia/nuevo-acuerdo-de-paz-con-las-farc-que-representa/505649>.

57. See María Fernanda González, *La «posverdad» en el plebiscito por la paz en Colombia* [The “post-truth” in the plebiscite for peace in Colombia], 269 NUEVA SOCIEDAD [New Society] 114 (2017); Carmen Magallón, *La paz en Colombia: decepción, controversia y esperanza* [Peace in Colombia: disappointment, controversy and hope], 70 CULTURA DE PAZ 4 (2016); Luis Alberto Restrepo & Socorro Ramírez, *Colombia: sorpresas y sobresaltos de la paz* [Colombia: Surprises and Fears of Peace], 266 NUEVA SOCIEDAD [New Society] 129 (2016); *Por qué ganó el No* [Why ‘No’ Won], LA SEMANA (Oct. 3, 2016), <http://www.semana.com/nacion/articulo/por-que-gano-el-no-en-el-plebiscito-por-la-paz-2016/496636>; *¿Por qué ganó el NO en el plebiscito?* [Why did NO Win the Plebiscite?], EL ESPECTADOR (Oct. 12, 2016), <http://colombia2020.elespectador.com/opinion/por-que-gano-el-no-en-el-plebiscito>.

ing.⁵⁸ The final accord is the product of four years of negotiations.⁵⁹ By the time of congressional approval, Colombians had lived for five decades under the shadow of the conflict. The government had negotiated three prior significant peace agreements and both the ICC and the Inter-American Court have maintained formal jurisdiction in Colombia for many years. The hope, of course, is that this most recent agreement, forged in a highly legalized and judicialized world, will be the one that—finally—brings the conflict to an end.

B. *Salient Features of the Colombian Case*

The Colombia peace process serves as a significant case study for the study of international courts for several reasons. In particular, Colombia could be considered a best-case scenario for international law. It is the first state to forge peace under the shadow of two active international courts focused on criminal accountability. Further, Colombia has more stable institutions and a stronger domestic judiciary than any other situation before the ICC.⁶⁰ It is a highly judicialized society, where political disputes are often resolved using the language and institutions of law.⁶¹ This means that the locus of decision-making about rights happens in the courts, as well as the legislature or executive and, accordingly, legislative and political actors have started to adopt the judiciary's way of thinking. Finally, Colombia's legal system is uniquely open to international law, even by Latin American standards: human rights treaties and jurisprudence are self-executing and often carry constitutional rank.⁶² The case thus shows international law at its most influential, making all the more significant the finding that the courts worked in a nuanced manner and adapted their positions in light of arguments made at the domestic level.

58. See Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera [Final Accord for the Termination of the Conflict and the Construction of a Stable and Lasting Peace], signed Nov. 24, 2016, Alto Comisionado Para La Paz, <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>; Tomás Betín, *Senado vota sí a la refrendación del nuevo Acuerdo de Paz con las Farc* [Senate Votes 'Yes' to Ratification of New Peace Agreement with the Farc], EL HERALDO (Nov. 29, 2016), <https://www.elheraldo.co/colombia/senado-vota-si-la-refrendacion-del-nuevo-acuerdo-de-paz-con-las-farc-306959>; Brillith Obregón Rollón, *Farc y Gobierno llegan a nuevo acuerdo de paz con ajustes* [FARC and Government reach new Peace Agreement with Revisions], EL HERALDO (Nov. 13, 2016), <https://www.elheraldo.co/colombia/farc-y-gobierno-llegan-nuevo-acuerdo-de-paz-con-ajustes-301681>.

59. Obregón Rollón, *supra* note 58.

60. Most of the ICC's active cases are in African states experiencing mass violence. *Situations Under Review*, INT'L CRIM. CT., <https://www.icc-cpi.int/pages/situations.aspx> (last visited Mar. 3, 2018) (listing all the ICC's cases and situations).

61. Torbjörn Vallinder, *When the Courts Go Marching In*, in THE GLOBAL EXPANSION OF JUDICIAL POWER 13, 13 (C. NEAL TATE & TORBJÖRN VALLINDER EDS., 1995) (explaining the concept of judicialization).

62. Rodrigo Uprimny, *El Bloque de Constitucionalidad en Colombia: un análisis jurisprudencial y un ensayo de sistematización doctrinal* [The Constitutional Block in Colombia: a Jurisprudential Analysis and an Essay on Doctrinal Systematization], DEJUSTICIA (2005), https://www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_46.pdf.

The case is also significant because in Colombia the ICC and the Inter-American Court exert influence through what the aforementioned call “the shadow of the law”: neither has an active case regarding the peace process, yet both loom large in the domestic debate over peace.⁶³ Few studies have focused on this “shadow effect” of international courts in the peace context. Yet it may be that “shadow effects” are the most important way courts exert influence. The threat of future litigation as well as the imprint of prior litigation that has already shaped institutional processes and normative understandings mean that courts exert power over domestic decision-making even without issuing a judgment.⁶⁴ Indeed, the number of situations under preliminary examination by the ICC is equal to the number of cases with active investigations.⁶⁵ In the Inter-American context, the Court’s prior jurisprudence has become an important tool for domestic actors seeking to shape government policy and domestic litigation, without their ever having to file an international claim.

C. *Methods*

This Article leverages a range of data to gain insight on how international judicialization has affected both the process of peacemaking (Part III) as well as the outcomes of these peacemaking processes (Part IV). In Part III, we conducted a content analysis of a wide range of primary source documents, including the Colombian Constitutional Court (“CCC”) rulings regarding the JPL and the MJP; all of the Colombian congressional gazettes for both the JPL and MJP; all statements and interventions coming from the Higher Commissioner for Peace; all of the joint Government/FARC-EP statements coming from the current negotiation roundtable, known as *La Mesa de Conversaciones*; and all FARC statements about the Mesa. For each of these documents, we searched for the terms (in Spanish) “International Criminal Court,” “Inter-American Court of Human Rights,” “Inter-American Commission on Human Rights,” “Inter-American Human Rights System,” “The Constitutional Court of Colombia” and “accountability.”⁶⁶ Through

63. See generally Mnookin & Kornhauser, *supra* note 36 (introducing the concept of the “shadow of the law”). ICC case studies have focused on active cases, stressing, for example, how the manner in which a case arrives at the ICC shapes the politics of its prosecution of that case. See, e.g., WEGNER, *supra* note 35, at 1–13; Bosco, *supra* note 37; KERSTEN, *supra* note 19, at 5; Nouwen & Werner, *supra* note 34, at 942. Similarly, most Inter-American Court studies focus on litigation, judgments, or their aftermath.

64. See Karen J. Alter, Laurence R. Helfer, & Mikael Rask Madsen, *How Context Shapes the Authority of International Courts*, 79 L. & Contemp. Probs. 1, 36 (2016) (describing the different types of authority that courts can have, even outside the scope of a particular case).

65. *Situations Under Review*, INT’L CRIM. CT., <https://www.icc-cpi.int/pages/situations.aspx> (last visited Mar. 3, 2018) (listing all the ICC’s cases and situations).

66. As “accountability” does not have a direct translation in Spanish, we searched for “responsibilidad” and related iterations. For the FARC-EP and Mesa de Conversaciones data, we conducted our keyword search through a simple search-and-find within the PDF. For the Congressional and High Commissioner for Peace data, we conducted the search and subsequent content analysis by hand. This data will be made available on one of the author’s webpages.

this analysis, we examined how international judicialization shaped domestic actors' understanding of accountability as an international norm and as a firm legal obligation and how they leveraged that understanding in their domestic political and judicial debates.

In Part IV, we use content analysis of four peace accords in order to discern the effects of international judicialization on peace agreements over time. Specifically, we juxtapose the terms of the current peace with those of three peace accords or peace laws that were passed in the three decades prior, engaging in a structured, over-time comparison.⁶⁷ While the prior peace accords were similar in terms of the actors and issues involved, an important difference across time is the substance of international law as well as the growing involvement of international institutions in the Colombian conflict, starting with the Inter-American Commission and Court. We are particularly attentive to the ways in which state actors respond to the different tribunals and look for "smoking guns," or pieces of evidence that corroborate or challenge our arguments about the role of the tribunals' mechanisms of influence across different actors.⁶⁸

III. THE WORLD'S MOST JUDICIALIZED PEACE TALKS

Colombia is the first state to resolve an armed conflict while under the jurisdiction of two active international courts concerned with the terms of the peace. This Part reveals how deeply the courts penetrated each aspect of the process. The legal norms these courts protect and the prospect of their eventual judgment on the peace accord have been debated by actors from across the political spectrum, in many different arenas, throughout the peace negotiation.

There are three main paths by which the courts engaged with, and were engaged by, domestic actors. The first path is top-down: international courts sent signals to domestic audiences about their expectations regarding the peace process and the peace accords. The second path, shadow effects, refers to how state and non-state actors bargained "in the shadow of the law," using treaties and jurisprudence to provide political cover and legitimate their policy preferences, while deploying the threat of litigation to diminish those of their opponents. The third path is bottom-up: domestic actors responded to—and pushed back against—the courts, often curbing or re-channeling the courts' influence over the peace process. Domestic actors used diplomatic channels and public statements to persuade the courts to their view and to test how far they could go before they triggered additional intervention by the courts. Through these three paths, the peace debate became thoroughly judicialized. The language, concepts, and institutions of

67. The methods for the comparison and selection of peace processes is explained further in Part IV.

68. See generally James Mahoney, *The Logic of Process Tracing Tests in the Social Sciences*, 41 SOC. METHODS & RES. 570 (2012).

international law have been constant referents, shaping how options are framed and discussed, and what is emphasized as well as what is left unsaid.

A. *The Courts Signal their Positions*

Neither the Inter-American Court nor the ICC have adjudicated a case directly arising from the current Colombian peace process. But that has not stopped either court from engaging in a top-down manner by signaling its position on particular issues. In the case of the ICC, it is important to recall that the ICC is not only a court. It is also a prosecutor, and it has interpreted its mandate to allow the OTP to pressure states to impose criminal accountability for Rome Statute crimes through proactive or positive complementarity. Thus, the ICC has acted not only as a court that casts a shadow through its settled jurisprudence, but also as an actor directly engaged in trying to influence the peace bargaining process. By contrast, the Inter-American Court has acted in a more court-like manner; it cannot simply proffer its opinions on Colombian debates and policies outside an active case. The Inter-American Court did, however, have the opportunity to pronounce itself in a case against El Salvador in 2013 with facts and issues comparable to those unfolding in Colombia.⁶⁹ Further, since the peace process began, it has issued 17 judgments and compliance reports on cases having to do with Colombia's internal conflict, providing powerful signals on how it might adjudicate issues arising under the peace accord.

1. *The ICC Prosecutor's Direct Interventions*

The ICC has mainly signaled its intent regarding Colombia via the Prosecutor's direct interventions, site visits, communiqués and reports. Colombia ratified the Rome Statute in 2002 and on March 2, 2005, ICC Chief Prosecutor Luis Moreno Ocampo, informed Colombia that his office would be conducting a preliminary examination of the ongoing conflict.⁷⁰ Technically speaking, this refers to a first stage in ICC process, during which the OTP analyzes whether or not the ICC has jurisdiction (a crime listed in the Rome Statute appears to have been committed by a national of a State Party or on the territory of a State Party, after July 1, 2002); whether an investigation would be admissible (a national court is not already dealing with it); and whether or not an investigation would be in the interests of justice and of the victims (there is some good reason not to take on this situation).⁷¹ In Colombia, however, the ICC has transformed the preliminary examination from a threshold decision into a platform for pressuring the state to comply

69. *Massacres of El Mozote and Nearby Places v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 264 (Aug. 19, 2013).

70. *Colombia Preliminary Examination*, INT'L CRIM. CT., <https://www.icc-cpi.int/colombia> (last visited Mar. 30, 2018).

71. See POLICY PAPER ON PRELIMINARY EXAMINATIONS, Int'l Crim. Ct., Off. of the Prosecutor (2013).

with its obligations to hold actors criminally accountable. Despite its name, the Colombian preliminary examination has lasted over a decade and shows no sign of ending. It has provided a stage for the ICC to exert influence without having an actual open criminal investigation. The OTP acts by issuing reports on the status of the preliminary examinations, by sending communiqués to the government, and by *in situ* visits through which it meets with different actors within the state and in civil society.⁷² Meanwhile, so long as Colombia and the ICC maintain a good working relationship, these visits are an opportunity for the Government of Colombia to continue to delay any deeper ICC involvement.

After announcing the preliminary examination in 2005, the OTP's first important intervention was an in-country visit in 2007. Prosecutor Ocampo met with government officials, officials in the Prosecutor's Office and Supreme Court of Justice, and members of Colombian civil society. Of particular interest to Ocampo was the Justice and Peace Law, the 2005 Colombian law that offered paramilitary actors reduced sentences in exchange for arms and truth-telling. During his visit, Ocampo announced that "[w]ith the International Criminal Court, there is a new law under which impunity is no longer an option. Either the national courts must [conduct trials] or we will."⁷³ Ocampo's call for individual accountability established the basic parameters of the ICC's influence in Colombia, highlighting the demand for individual accountability and seemingly removing amnesty from the government's arsenal of negotiating tools.

Ocampo returned to Colombia in 2008 for more interviews and site visits, including attending an exhumation. This time he focused on what was known as the "parapolitics" scandal, a series of revelations regarding the financial and political ties between political elites, including members of Congress and paramilitary groups. Ocampo also focused on the extradition of 15 paramilitary members to the United States, where they would be tried on drug charges but might otherwise escape accountability for any atrocity crimes.⁷⁴ Both cases spoke to the core issues of the government's willingness to prosecute Rome Statute crimes: the former because it brought into question the government's commitment to prosecuting responsible perpetrators

72. *The Office of the Prosecutor*, Int'l Crim. Ct., <https://www.icc-cpi.int/about/otp> (last visited Feb. 17, 2018). See also Urueña, *supra* note 37 (providing a nuanced account of the preliminary examination).

73. Press Release, Office of the Prosecutor, International Criminal Court, ICC Prosecutor Visits Colombia (Aug. 21, 2008), <https://www.icc-cpi.int/Pages/item.aspx?name=icc%20prosecutor%20visits%20colombia>.

74. Ocampo wrote a letter expressing concern about this issue to Colombia's ambassador in The Hague. Luis Moreno Ocampo, Carta del Fiscal de la CPI, Luis Moreno Ocampo, dirigida al Embajador colombiano acreditado ante la CPI, Francisco José Llereda [Letter from the ICC Prosecutor, Luis Moreno Ocampo to the Colombian Ambassador to the ICC, Francisco José Llereda] (*quoted in Carta enviada por el fiscal Moreno de la CPI*, [Letter sent by Prosecutor Ocampo of the ICC], LA SEMANA Aug. 16, 2008, <https://www.elspectador.com/impreso/politica/articuloimpreso-carta-enviada-el-fiscal-moreno-de-cpi> (last visited Apr. 6, 2018)). See also *Corte Penal Internacional ya indaga sobre 'falsos positivos', 'parapolítica' y financiación a Farc*, EL TIEMPO, Oct. 10, 2009, <http://www.eltiempo.com/archivo/documento/CMS-6325649> (discussing extradition of paramilitary leaders to the United States).

from across the political landscape, and the latter because it challenged the government's commitment to denying immunity, both *de jure* and *de facto*.⁷⁵

In 2012, just as the peace process with the FARC began to unfold, the OTP issued its first interim report on the situation in Colombia.⁷⁶ The extensive report contained both good and bad news for the Colombian government. It commended Colombia for complying with all of the OTP's requests for information with respect to both national proceedings and crimes under the ICC's jurisdiction.⁷⁷ At the same time, the report noted that there was sufficient information to suggest that atrocity crimes had taken place. The report also indicated that a wide range of actors, including the FARC and the ELN and the Colombia armed forces had perpetrated these violations.⁷⁸ The implications were two-fold. On the one hand, it meant that the government forces must face justice alongside the guerrilla fighters. The ICC's calls for criminal accountability also meant, however, that the guerrillas would have little incentive to negotiate, as doing so would likely mean individual accountability for their leadership.

The report became an important intervention in the peace process. The report's timing thrust the ICC in the limelight, and helped it become a major part of the 2012 negotiations of the MJP.⁷⁹ By identifying five areas of particular interest as the preliminary examinations moved ahead, the interim report helped to shape the public debate about the peace process.⁸⁰ Those opposed to criminal prosecution began to paint the ICC as a major spoiler to the formulation and implementation of a peace process, while those opposed to the peace process used the ICC to criticize and constrain the Santos initiative, as we discuss below. The OTP thereafter became more active in its engagement in Colombia. In April 2013, the OTP traveled to Bogotá for a five-day visit, which included meetings with officials across all branches of government, as well as members of civil society. The OTP team focused on the five areas outlined in the 2012 report and gathered additional information on the Attorney General's plans for prioritizing cases. The OTP publicly noted that the government facilitated the visit, and cooperated fully with the ICC's requests, suggesting that Colombia was committed to a strategy of cooperation, even as the ICC's involvement moved closer to the core issues of a peace settlement.⁸¹

75. See generally AMANDA LYONS & MICHAEL REED-HURTADO, INT'L CTR. FOR TRANSITIONAL JUST., COLOMBIA: IMPACT OF THE ROME STATUTE AND THE INTERNATIONAL CRIMINAL COURT (2010).

76. See generally *id.*

77. *Id.* at 4–5, 7.

78. *Id.* at 2–5.

79. See Urueña, *supra* note 37, at 104.

80. The five areas of interest include: 1) the Legal Framework for Peace; 2) the emergence of new illegal armed groups; 3) proceedings related to forced displacement; 4) proceedings related to sexual crimes; and 5) the false positive cases. INT'L CRIM. CT., OFF. OF THE PROSECUTOR, *supra* note 71.

81. Press Release, Office of the Prosecutor, International Criminal Court, ICC Office of the Prosecutor Concludes Visit to Colombia (Apr. 19, 2013), <https://www.icc-cpi.int/Pages/item.aspx?name=pr900&ln=en>.

Not long after, the OTP experimented with yet a new form of intervention which quickly backfired. In July and August of 2013, ICC chief prosecutor Fatou Bensouda sent two confidential letters to the president of the Colombian Constitutional Court, which was in the midst of reviewing Santos' Framework for Peace Law.⁸² In her letters, Bensouda expressed the OTP's position on the very matters that were before the Colombian Constitutional Court (CCC): whether the government could forego punishment after a genuine process, and whether it could prioritize cases. The letters made clear that while some inconsistencies with the judicial process were understandable, any moves that would indicate that the peace process would include amnesties for those most responsible for the worst violations would be reason for the ICC to intervene. The letters were leaked to the media, creating a public uproar and heightening apprehension about the ICC's role in the Colombia peace process.⁸³ The letters prompted Bensouda and President Santos to meet in New York in September 2013, and that November, in a mission organized by the Colombian Attorney General's Office and the news magazine, *Semana*, the OTP participated in a conference on the theme of "Strengthening the Attorney General's Office on Transitional Justice."⁸⁴ In 2014, the OTP conducted another four-day visit to Colombia, meeting with a wide range of stakeholders from the government, international organizations, and civil society.⁸⁵

In early March 2015, the OTP conducted yet another visit to Colombia, meeting with members of the executive, judiciary, civil society, and international organizations.⁸⁶ The OTP team also met with members of Congress and the Inspector General of the Nation, notably at their request. During this visit, the vice director issued a statement that revealed that the OTP had changed its position on the questions of prioritization of cases as expressed in the letters to the CCC.⁸⁷ Indeed, his statements seemingly shaped the drafting of the final accord (see below). The OTP's public statement on the final accord in September commended the Colombian government for its

82. Letter from Fatou Bensouda, ICC Prosecutor, to Jorge Iván Palacio Palacio, President of the Colombian Constitutional Court, Ref. 2013/025/FB/JCCD-evdu (July 26, 2013); Letter from Fatou Bensouda, ICC Prosecutor, to Jorge Iván Palacio Palacio, President of the Colombian Constitutional Court, Ref. 2013/028/FB/JCCD-pmdu (Aug. 7, 2013). *See also* Una 'Carta Bomba' [A 'Letter Bomb'], SEMANA (Aug. 17, 2013, 7:00 AM), www.semana.com/nacion/articulo/una-carta-bomba/354430-3 (summarizing both letters).

83. Cf. Rodrigo Uprimny, ¿Cartas bombas? [Letter Bombs?], EL ESPECTADOR (Aug. 24, 2013, 11:00 PM), <http://www.elespectador.com/opinion/cartas-bombas-columna-442193>.

84. *Se desarrolla primer Congreso Internacional de Fortalecimiento de la Fiscalía en Justicia Transicional* [The First International Congress on the Strengthening of the Attorney General's Office on Transitional Justice Begins], FISCALIA GENERAL DE LA REPUBLICA (Nov. 2013), <https://www.fiscalia.gob.ec/se-desarrolla-primer-congreso-internacional-de-fortalecimiento-de-la-fiscalia-en-justicia-transicional/>

85. INT'L CRIM. CT., OFF. OF THE PROSECUTOR, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2014 ¶ 128 (Dec. 2, 2014), <https://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf>.

86. Press Release, Office of the Prosecutor, International Criminal Court, The Office of the Prosecutor Concludes Mission to Colombia (Mar. 2, 2015), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1090>.

87. *Id.*

achievement. As Prosecutor Bensouda wrote: “I have supported Colombia’s efforts to bring an end to the decades-long armed conflict in line with its obligations under the Rome Statute since the beginning of the negotiations. I will continue to do so during the implementation phase in the same spirit.”⁸⁸

Indeed, the OTP has been less sanguine in its post Peace Accord statements. In an opinion piece in January of 2017, Fatou Bensouda “noted with some concern” that the final articulation of command control in the Peace Accord omitted a reference to the Rome Statute definition.⁸⁹ In October, the ICC submitted a brief to the CCC in which it made several arguments against the two congressional laws that implement the Peace Accord.⁹⁰ The preliminary examination, in other words, continues, and the OTP will continue to opine, ever signaling its position on matters of liability.

2. *The Inter-American Court’s Signals*

The Inter-American Court has not had the opportunity to adjudicate a case related to the peace process. Indeed, it probably will not do so for many years.⁹¹ There is no direct individual petition to the Inter-American Court, and thus cases must begin at the Inter-American Commission, which first attempts to reach a friendly settlement between the state and the victims. Because of this, the court lags almost ten years behind current events.

Nonetheless, courts have ways of staying relevant. In 2013, the Inter-American Court issued a judgment on El Salvador’s 1987 amnesty decree, as Colombia was in the midst of its amnesty debates.⁹² Many viewed this as a test case for the Colombian peace accord, and also, perhaps, for the Inter-American Court.⁹³ The Inter-American Court has issued a series of cases

88. Statement, Fatou Bensouda, ICC Prosecutor, On the Conclusion of the Peace Negotiations Between the Government of Colombia and the Revolutionary Armed Forces of Colombia – People’s Army (Sept. 1, 2016), <https://www.icc-cpi.int/legalAidConsultations?name=160901-otp-stat-colombia>.

89. See Fatou Bensouda, *El acuerdo de paz de Colombia demanda respeto, pero también responsabilidad* [Colombia’s Peace Agreement Demands Respect, but also Responsibility], SEMANA (Jan. 21, 2017, 12:00 AM), <http://www.semana.com/nacion/articulo/deseo-corte-penal-internacional-justicia-transicional-en-colombia/512820> (translated by authors).

90. See *Escrito De Amicus Curiae De La Fiscal De La Corte Penal Internacional Sobre La Jurisdicción Especial Para La Paz* [Writ of Amicus Curiae of the Prosecutor of the ICC on the Special Jurisdiction for Peace], RPZ-000000 and RPZ-003 (Oct. 18, 2017), <http://cr00.epimg.net/descargables/2017/10/21/17135b6061c7a5066ea86fe7e37ce26a.pdf?int=masinfo>.

91. See Sierra Porto, *La Corte no es competente para hacer observaciones sobre el proceso de paz: Humberto Sierra* [The Court is Not Able to Comment on the Peace Process: Humberto Sierra], EL COLOMBIANO (Aug. 17, 2015), <http://www.elcolombiano.com/colombia/paz-y-derechos-humanos/cidh-no-se-meterá-en-el-proceso-de-paz-por-ahora-h-sierra-porto-BX2550377> (interview in which President of Court explains that the Court cannot step in until the State Party has tried to resolve an issue on its own).

92. *The Massacres of El Mozote and Nearby Places v. El Salvador*, Preliminary Exceptions, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 264 (Aug. 19, 2013). For a discussion of the Inter-American System’s engagement prior to 2013, and the differences that at first arose with the ICC’s engagement, see Urueña, *supra* note 37, at 111–19.

93. See, e.g., Daniel Salgar Antolínez, *¿Cómo evitar la impunidad? Lecciones de El Salvador para Colombia sobre las amnistías* [How can one avoid impunity? Lessons on Amnesty from El Salvador for Colombia], EL

delineating the scope of the state's duty to prosecute fundamental human rights violations. Starting in 2001, with the *Barrios Altos v. Peru* judgment, the Inter-American Court developed a hardline stance through five judgments that many argued "outlawed" amnesty decrees.⁹⁴ Indeed, a group of scholars began to criticize the Inter-American Court's amnesty jurisprudence as "punitivist" and lacking sensitivity to variation in domestic politics underlying amnesty decrees.⁹⁵ The Inter-American Court seemingly was listening. Even as the ICC prosecutor was citing the Inter-American Court's jurisprudence as demanding punishment in every situation,⁹⁶ the Inter-American Court had the opportunity to adjudicate peace forged in the midst of an internal armed conflict in El Salvador. The President of the Court, Diego Garcia Sayan, joined by four of the six other judges, issued a concurring opinion that seemed custom-built for the Colombian peace initiative:

Thus, in certain transitional situations between armed conflicts and peace, it can happen that a State is not in a position to implement fully and simultaneously, the various international rights and obligations it has assumed.⁹⁷

Garcia Sayan's concurrence is the only international court judgment which the Final Accord cites.

The Inter-American Court has also sent signals through its Colombia jurisprudence in cases that arise from the internal conflict, although not directly related to the current peace process. Since the most recent peace negotiation started in 2012, the Court has entered seven judgments against Colombia that address the internal conflict,⁹⁸ and it has issued ten compliance reports that review Colombia's implementation of judgments on issues

ESPECTADOR (July 5, 2016), <http://colombia2020.elespectador.com/justicia/lecciones-de-el-salvador-para-colombia-sobre-las-amnistias>.

94. *Barrios Altos v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001).

95. See *Acuerdos del cese al fuego entre 1984 y 1986 con las FARC, el M-19, el EPL y la ADO* [Ceasefire Agreements between 1984 and 1986 with the FARC, M-19, EPL, and ADO], VERDAD ABIERTA (Nov. 18, 2012), <http://www.verdadabierta.com/procesos-de-paz/farc/4292-acuerdos-del-cese-al-fuego-entre-1984-y-1986-con-las-farc-el-m-19-el-epl-y-la-ado>.

96. See Letter from Fatou Bensouda, ICC Prosecutor, to Jorge Iván Palacio Palacio, President of the Colombian Constitutional Court, Ref. 2013/025/FB/JCCD-evdu (July 26, 2013).

97. *Massacres of El Mozote and Nearby Places v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶ 38 (Oct. 25, 2012).

98. *Vereda La Esperanza v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 341 (Aug. 31, 2017); *Yarce et al. v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 325 (Nov. 22, 2016); *Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 287 (Nov. 14, 2014); *Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 270 (Nov. 20, 2013); *Massacre of Santo Domingo v. Colombia*, Preliminary Objections, Merits, and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 259 (Nov. 30, 2012); *Vélez Restrepo and Family v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 248 (Sept. 3, 2012).

arising from the internal conflict.⁹⁹ A 2013 judgment carefully evaluates the work of the Justice and Peace jurisdictions in response to forced displacement and other organized attacks against civilians that took place in an Afro-descendant community in the department of Choco in 1997.¹⁰⁰ While it concedes that the Justice and Peace law itself is not in violation of the Convention, the Court asserts its power to monitor the prosecutions that fall under its jurisdiction until they reach conclusion. In August of 2017, just as the government is trying to implement the Peace Accord and create the new Jurisdiction for the Peace, the Inter-American Court issued a judgment which discusses the relationship of Peace and Justice courts and the regular judiciary, signaling problems that may recur in relation between new peace jurisdiction and regular judiciary.¹⁰¹

Through the ten Colombia compliance reports, the Court has also signaled to Colombia the priority that it places on victims' reparations. In one compliance report, for example, it calls for a private hearing with the government of Colombia to review its implementation of orders to provide victims with medical and psychological care in nine separate cases.¹⁰²

It might be argued that these were not "signals," in the sense that the Inter-American Court was not ruling with the Colombian peace accord in sight, but rather only the facts of the case before it. Intended or not, how-

99. Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Feb. 10, 2017), http://www.corteidh.or.cr/docs/supervisiones/escue_22_11_16.pdf; Escué Zapata v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 22, 2016), http://www.corteidh.or.cr/docs/supervisiones/escue_22_11_16.pdf; Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Oct. 20, 2016), http://www.corteidh.or.cr/docs/supervisiones/operaciongenesis_20_10_16.pdf; 19 Tradesmen v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. June 23, 2016), http://www.corteidh.or.cr/docs/supervisiones/19comerciantes_23_06_16.pdf; Rochela Massacre v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Aug. 31, 2015), http://www.corteidh.or.cr/docs/supervisiones/rochela_31_08_15.pdf; Ituango Massacres v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. May 21, 2013), http://www.corteidh.or.cr/docs/supervisiones/ituango_21_05_13_ing.pdf; Mapiripán Massacre v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 23, 2012), http://www.corteidh.or.cr/docs/supervisiones/mapiripan_23_11_12.pdf; 19 Tradesmen v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. June 26, 2012), http://www.corteidh.or.cr/docs/supervisiones/comerciantes_26_06_12_ing.pdf; Caballero Delgado & Santana v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Feb. 27, 2012), http://www.corteidh.or.cr/docs/supervisiones/caballero_27_02_12%20ing.pdf; Monitoring Compliance with the Measure of Reparation Concerning the Medical and Psychological Attention Ordered in Nine Colombian Cases, Notice of a Private Hearing, Order of the President (Inter-Am. Ct. H.R. Feb. 8, 2012), http://www.corteidh.or.cr/docs/supervisiones/comerciantes_08_02_12_ing.pdf.

100. Afro-descendant Communities Displaced from the Cacarica River Basin, Inter-Am. Ct. H.R. (ser. C) No. 270.

101. Vereda Esperanza, Inter-Am. Ct. H.R. (ser. C) No. 341.

102. Monitoring Compliance with the Measure of Reparation Concerning the Medical and Psychological Attention Ordered in Nine Colombian Cases, Notice of a Private Hearing, Order of the President (Inter-Am. Ct. H.R. Feb. 8, 2012), http://www.corteidh.or.cr/docs/supervisiones/comerciantes_08_02_12_ing.pdf.

ever, these reports were a timely indication of the Court's position that domestic actors then used to advance their own positions in domestic politics.

Finally, it should be emphasized that even though the Inter-American Court is a more constrained actor than the ICC's OTP and has not had the opportunity to directly review the peace process, it has arguably played a constitutive role in the way the discussion has unfolded. The Inter-American Court issued its first judgment against Colombia in 1997, and has since issued 17 more contentious judgments. Almost all of these have examined violations that took place in the context of the internal conflict. In all but the first judgment, the Court demanded that the state conduct a criminal investigation for the crimes, investigating all those responsible and, where criminal liability is found, imposing punishment. Further the Court has developed a victim-centered reparation regime which Colombia has adopted in its own domestic practice. It will be argued below that the Inter-American Court's jurisprudence and the American Convention have been frequently cited to in domestic debates. The Court has also played an important role over the years by shaping the practice and approach Colombians take to reparations, investigation and truth-finding. In this way, the Inter-American Court's hand is not visible in the debates or through active interventions but rather has already shaped the approach. The Inter-American Court's interventions have shaped the way Colombia issues reparations and deals with the violence of the conflict. In this way, it might be said that the effect of the Inter-American Court was always already in place, shaping the way Colombians and their institutions deal with and discuss these questions.

B. Domestic Actors Bargain "in the Shadow of the Law"

The influence of courts is not limited to their direct intervention in particular cases. At times, an even more powerful way in which they work is by providing discursive resources for political actors to frame and advance their political agendas. Such was the case in Colombia. International law and the courts' intentions were used—and usurped—within the domestic political and judicial debate over peace, imbuing those debates within the narrative of law and judicialization. Moreover, the courts identified a set of options, particularly amnesties, as unacceptable, meaning that those options could result in international adjudication. This externally imposed notion of acceptability becomes an important tool in domestic negotiations, as actors deploy the threat of international adjudication to shape and limit the policy options available to their opponents.

This section illustrates how Colombian domestic actors used the courts' authority to advance their own agendas as they debated the terms of peace. Ostensibly, international adjudicative commitments are a way for political elites to bind their hands and make credible commitments about their actions. At the same time, international judicialization and international courts' jurisprudence can provide political cover and legitimation for a di-

verse array of actors' domestic policy preferences as they bargain in the shadow of the international courts.¹⁰³ The section begins with political actors, showing how both congressional debates and executive discourse frequently refer to international law and courts as a way of self-legitimation, as well as of constraining their opponents. It then turns to the judicial sphere. Many peace-related laws have come before the CCC. The debates that took place before the Court, as well its judgments, are also rife with citations to international law and courts, showing that overall, these international courts were viewed domestically as important and legitimate authorities.

1. *Domestic Actors in the Political Arena: Invoking International Law to Restrain Political Opponents*

The Colombian Congress understood and leveraged international law and international judicialization in legislative debates, rendering international law an important tool in their arsenal for shaping peace.¹⁰⁴ Content analysis of the Congressional Gazette, the official record-keeping of debates and floor speeches in the Colombian Congress, reveals that international law and adjudication were regularly referenced on the floor of Congress, with 36 references during the 2005 debates over the Justice and Peace Law of 2005 (JPL) and 56 references during the debates over the Marco Jurídico de la Paz (MJP).¹⁰⁵ Congresspersons used the language of law and the constraints imposed by Colombia's international legal and judicial commitments to shape the contours of both the JPL, and the MJP.

The ICC was still in its infancy when Colombia drafted and later passed the JPL in 2005. As the law was debated in congress, legislators noted that international law has been modernized and globalized since previous peace talks, and that Colombia must abide by the new international legal landscape. Despite the general consensus for upholding Colombia's international commitments, however, there was significant and sustained debate about the implications of international law and adjudication for the JPL. Individual members of Congress used Colombia's international legal commitments as a way to define the limits of the JPL and to cast doubt on specific pieces of the JPL.

One such debate pertained to disagreement over which kinds of acts constituted crimes against humanity, and how those definitions related to the different parts of the JPL. In discussing the relationship between different categories of crimes and the JPL, Senator Oswaldo Darío Martínez

103. See generally Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339 (2002).

104. The data used for this section are the archives of the Colombian Congress. The archives, and particularly, the *Congressional Gazette*, chronicle each and every floor speech and debate comment made during debate in both Houses and thus provide a rich well of nuanced information as to which members of Congress referenced international law and courts in their comments and the tenor of those references.

105. Content analysis is an evaluation of texts for particular key words and concepts.

Betancourt used the ICC as the differentiating factor in determining which alternative penalties might be acceptable.¹⁰⁶ The ICC, and not the legislature or executive, in other words, held ultimate authority to identify which acts constituted crimes against humanity—as well as how those acts falling outside of the ICC’s jurisdiction should be punished.

Senator Betancourt was not alone in using the ICC to limit the scope of what Congress could or could not determine with respect to the peace negotiations. In a speech on the Senate floor, Senator Jimmy Chamorro Cruz noted the range of the Rome Statute’s requirements for identifying and trying crimes against humanity. He warned his fellow senators that the JPL law would violate at least three articles of the Rome Statute. He argued, “we are making it so [the ICC] can come and judge us, since we are not inclined to do it.”¹⁰⁷

This threat was a way to encourage other legislators to act and to push the executive on the issue of accountability, even if the threat of adjudication was not clearly outlined. Senator Héctor Helí Rojas Jiménez summed up the debate about what counted as crimes against humanity, and Congress’s authority and responsibility to decide as such:

[I]f [Congress] is not capable of making a political decision, and pardons the whole world and falls in the hands of the ICC, then do transitional justice, but don’t forget that within this transitional justice there needs to be a minimum of justice . . . [there are] things that we are not going to pardon, nor the international community or the international court.¹⁰⁸

It was not just the ICC that figured in Congressional debates. Members of Congress also referenced the Inter-American Court and the consequence of running afoul of its jurisprudence. Senator Rafael Pardo Rueda noted in his discussion of the ICC and transitional justice processes in Colombia, “. . . the other component, which it is important that you take into account, which we are part of, is the Inter-American System for the Protection of Human Rights.”¹⁰⁹ In discussing the Inter-American System, Senator Pardo Rueda asked, “What can these organs do? They can issue decisions that have jurisdiction over Colombian justice.”¹¹⁰ While the threats of international justice are not particularly specific or well developed, the underlying logic is clear: if Congress cannot agree to accountability in some form, Colombia becomes vulnerable to international judicial interference.

106. Acta De Comisión 10 Del 11 De Abril De 2005, June 27, 2005, GACETA DEL CONGRESO [G. Cong.] t. 408, pp. 14–15.

107. G. Cong., t. 521, p. 31 (translation by authors).

108. *Id.* (translation by authors).

109. *Id.* at 29 (translation by authors).

110. *Id.* at 16 (translation by authors).

The debates over the Framework for Peace Law (MJP, or *Marco Jurídico para la Paz*) in 2012 similarly showcased the ways in which members of Congress were using international courts to limit each other's policy options, particularly in the context of partisan battles between the supporters of president Santos, and the opposition led by former President Uribe. The MJP debates also demonstrated members' growing sophistication in their knowledge of international courts. When the discussion about the MJP took place in Congress, the opposition bloc argued that the government and its majority in Congress were trying to impose a legal framework for impunity. Some argued that the Constitution provided a legal framework for peace and that it was not necessary to create another.¹¹¹ The opposition, comprised of a bevy of parties, largely, but not exclusively, aligned with supporters of former President Uribe, also insisted that there the MJP was incompatible with Colombia's commitments with international law.

Members of Congress from across the political spectrum also displayed a growing knowledge of international law and jurisdiction and showcased a willingness to walk right up to the line that would prompt international judicial intervention but never a willingness to cross it. The ammunition in these domestic debates were the disaggregated details of the MJP. For example, during the MJP debates, one key issue was the sentencing and imprisonment of perpetrators. According to the MJP, Congress—following the Executive's initiative—could authorize the suspension of criminal prosecution or the execution of sentences. According to Senators Rivera, Avellaneda and Gómez, the first from the Liberal Party, the second and third from the *Polo Democrático*, and the last from the Conservative Party, this was openly incompatible with the Rome Statute.¹¹² Along the same lines, critics of the MJP aligned with the position of Human Rights Watch and its director, José Miguel Vivanco. They both suggested that this feature (among others) of the MJP violated Colombia's constitutionality bloc and would leave the country exposed to the risk of an ICC intervention.¹¹³

Members of Congress, thus, used international adjudication to shape the debate around the peace process and to constrain each other. They were not, however, the only actors to do so. The High Commissioner for Peace, the executive actor charged with leading the peace negotiation, used the threat of international adjudication as a way to remove certain policy options from the table and to legitimate his proposals by noting precedent in international jurisprudence. The baseline argument from the High Commissioner's office was perhaps best summarized by the government's chief negotiator in Havana, Humberto de la Calle, who wrote, "we are in agreement that there

111. G. Cong., t. 910, p. 10.

112. G. Cong., t. 45, pp. 31–34; G. Cong., t. 11, pp. 48–49.

113. G. Cong., t. 455, p. 13.

can't be peace above impunity."¹¹⁴ In discussing the design of the MJP with respect to crimes against humanity, de la Calle said there will be no place for amnesties for those crimes that fall under the Rome Statute.¹¹⁵ Similarly, in an interview with foreign correspondents, de la Calle answered a question about Colombia's international commitments:

Let me reiterate that the Government is fully aware of its commitments to the international community. Colombia participates in international organizations and has signed treaties that regulate these circumstances. . . We will find inspiration in the transitional justice process and. . . we will examine solutions. We will do it in a rigorous manner and in full compliance with our international obligations.¹¹⁶

While many of the statements about international law and jurisprudence coming from the Office of the High Commissioner of Peace were broadly in response to questions about and attacks on the MJP, the High Commissioner's Office also referenced Colombia's international legal commitments to shape its negotiating position with the FARC. For instance, when the FARC negotiating team advanced an idea for alternative sentencing and particular restricted movements, de la Calle responded: "We insist that there are interpretations from the FARC lawyer about the characteristics of the restriction of liberty that are unacceptable and below the minimums that the national and international community demand."¹¹⁷ On the other hand, when the FARC agreed to turn over the names of others whom they killed, de la Calle also framed this in terms of international obligations. Turning over the names, he said, "is a humanitarian gesture, an important gesture that refers to their obligations under international humanitarian law."¹¹⁸ By

114. Oficia del Alto Comisionado Para la Paz, *Declaración del Jefe del Equipo Negociador del Gobierno, Humberto de la Calle Lombana*, [Office of the High Commission for Peace, Statement from the Chief of the Government Negotiation Team, Humberto de la Calle Lombana] (Mar. 13, 2015), <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/pronunciamentos-jefe-de-la-nacion/Paginas/2015/Octubre/Declaracion-del-Jefe-del-Equipo-Negociador-del-Gobierno-Nacional-Humberto-de-la-Calle-Lombana%E2%80%8B8-de-octubre-2015.aspx>.

115. *Declaración del Jefe de la Delegación del Gobierno Nacional Humberto de la Calle*, [Statement from Humberto de la Calle, Head of the National Government's Delegation], Corporación Nuevo Arco Iris (Dec. 15, 2015), <http://www.arcoiris.com.co/wp-content/uploads/2015/12/15-12-15-Declaraci%C3%B3n-del-Jefe-de-la-Delegaci%C3%B3n-del-Gobierno-Nacional-Humberto-de-la-Calle.pdf>.

116. *Rueda de prensa luego de la instalación de la segunda fase del proceso de Conversaciones entre el Gobierno Nacional y las Farc* [Press Briefing following the Inception of the Second Phase of the Conversations between the National Government and the FARC], http://wsp.presidencia.gov.co/Prensa/2012/Octubre/Paginas/20121018_10.aspx p. 5.

117. Oficia del Alto Comisionado Para la Paz, *Declaración del Jefe del Equipo Negociador del Gobierno, Humberto de la Calle Lombana*, [Office of the High Commission for Peace, Statement from the Chief of the Government Negotiation Team, Humberto de la Calle Lombana] (Oct. 8, 2015), <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/pronunciamentos-jefe-de-la-nacion/Paginas/2015/Octubre/Declaracion-del-Jefe-del-Equipo-Negociador-del-Gobierno-Nacional-Humberto-de-la-Calle-Lombana%E2%80%8B8-de-octubre-2015.aspx>.

118. Oficia del Alto Comisionado Para la Paz, *Declaración del Jefe del Equipo Negociador del Gobierno, Humberto de la Calle Lombana*, [Office of the High Commission for Peace, Statement from the Chief of the

leveraging his mastery of international law—and the consequences of failing to abide by it—de la Calle was using the indirect influence of judicialization to legitimize the government's position on the peace negotiations.

The shadow of the ICC and the Inter-American Court shaped the politics of the peace agreement, both in Congress and in the executive branch. It is, of course, perhaps of little surprise that the executive branch, and particularly the Office of the High Commissioner for Peace, had a deep knowledge of international human rights and humanitarian law. The same cannot be said for members of the Colombian Congress. Indeed, the fact that politicians from a range of political parties and positions not only demonstrated a working knowledge of international human rights and criminal law, but also illustrated a keen interest in using that knowledge to define the limits of the peace process, shows how significant a shadow the ICC and Inter-American Court cast over peace negotiations. The judicialization of peace, in other words, extended well beyond the signals sent by the ICC and Inter-American Court and into the political deals carved out in Congress and in the executive branch.

2. *Domestic Actors in the Judicial Arena*

The executive and legislative branches of government were not the only ones to use the indirect influence of international judicialization to advance their position relative to other domestic actors. Domestic courts have also, perhaps unsurprisingly, been a key conduit for this type of debate. The Colombian Constitutional Court (CCC) in particular has been called upon to review most pieces of legislation passed both regarding the Justice and Peace negotiation and the current peace process.¹¹⁹ In its review, the CCC has relied heavily on international law generally, and on the international courts in particular.

One of the CCC's first forays into reviewing peacemaking efforts came about in judgment C-370 of 2006, the second of three JPL rulings that year.¹²⁰ The complaint was filed by Gustavo Gallon, a well-known activist

Government Negotiation Team, Humberto de la Calle Lombana} (Oct. 18, 2015) <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/pronunciamientos-jefe-de-la-nacion/Paginas/2015/Octubre/Declaracion-del-Jefe-de-la-Delegacion-del-Gobierno-Nacional,-Humberto-de-la-Calle-18-de-octubre-2015.aspx>.

119. The JPL law, passed over a decade ago, had been the focus of five rulings by the Constitutional Tribunal by 2010. The MJP has been challenged twice. The JPL law, passed over a decade ago, has also been reviewed directly by the Inter-American Court in contentious judgments, and by the ICC prosecutor in its interim reports on the Colombia Preliminary Investigation. Its interpretation has also been relevant to at least ten rulings before the Supreme Court of Colombia. *See* COMPILACIÓN NORMATIVA Y JURISPRUDENCIA DE LA LEY DE JUSTICIA Y PAZ, [Normative Compilation and Jurisprudence of the Law of Justice and Peace], Fiscalía General de la Nación (2010).

120. Corte Constitucional [C.C.] [Constitutional Court], mayo 18, 2006, Sentencia C-370/06, *Gaceta de la Corte Constitucional* [G.C.C.] (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2006/C-370-06.htm>. The first challenge, C.C., abr. 25, 2006, Sentencia C-319/06, G.C.C. (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2006/C-319-06.htm>, had argued that the JPL should have been passed under a distinct and more stringent procedure than an ordinary law, which would require a supra-

lawyer and frequent litigator before the Inter-American System, along with other lawyers from the *Comisión Colombiana de Juristas*. They raised 23 different challenges to the JPL law. Many of the challenges broached topics that are relevant to the American Convention and Rome Statute. In particular, the petitioners argued that the JPL was a de facto amnesty or pardon, that it did not vindicate the rights of victims, and that it did not adequately define which perpetrators would be allowed to accede to alternative sentences and under what circumstances. The opinion, which was widely viewed as a definitive statement on the JPL, runs roughly 400 pages. It includes amicus briefs from several of Colombia's main universities, as well as domestic and international NGOs, and several state agencies, including the Minister of Interior in favor of the law, and the *Procurador de la Nación*, in favor of some aspects and arguing for revision of others. The ruling also summarizes the oral arguments of the parties and interveners at oral hearings held before the CCC.

The CCC considered both the Inter-American Court and the ICC in its judgment on the JPL. Under the Colombian Constitution, Colombia's international human rights treaty obligations are treated as part of the "constitutional block."¹²¹ In other words, they are understood to form part of constitutional law, and thus to be directly justiciable by domestic courts. Therefore, when the CCC is asked to review the JPL and MJP laws under the constitution, it also reviews them under the Inter-American Convention on Human Rights and Rome Statute, which form part of Colombia's constitutional obligations. Further, the CCC has ruled that the Inter-American Court's interpretations of the American Convention can be binding on Colombia.¹²² In reviewing the JPL, the CCC drew heavily on both courts, and on the Inter-American Court in particular. In C-370, it refers to the Inter-American Court ninety-four times and to the ICC thirty-two times. Before embarking on its own analysis of the case, for example, the CCC lists and describes all of laws that are relevant to the case, including all relevant treaty law (Section 4.3). The list includes the Rome Statute, which the Court refers to as "probably the main international instrument for the protection of human rights and international humanitarian law."¹²³ It also discusses the Inter-American Court's jurisprudence in depth in order to set the stage for its own analysis. Once the CCC moves on to undertake its own analysis of the JPL, it again draws directly from several of the Inter-American Court's

majority and abstract review prior to promulgation by the CCC. There is only one mention of the American Convention and the ICC Statute in this ruling.

121. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 93.

122. C.C., oct. 28, 1992, Sentencia C-574/92, G.C.C. (Colom.), <http://www.corteconstitucional.gov.co/relatoria/1992/c-574-92.htm>; see Mónica Orango Olaya, *El Bloque de Constitucionalidad en la Jurisprudencia de la Corte Constitucional Colombiana*, [The Constitutionality Block in the Jurisprudence of the Colombian Constitutional Court], PRECEDENTE 79, 81 (2004).

123. C.C., mayo 18, 2006, Sentencia C-370/06, G.C.C. (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2006/C-370-06.htm>.

judgments on questions of right to justice, rights of victims to participate in the judicial process, and reparations.

Seven years later, the CCC confronted many similar questions when called upon to review the Legal Framework for Peace. Like its predecessor, the MPJ judgment, C-579/13 was over 300 pages long, in part because the procedure was designed to be as inclusive and deliberative as a political hearing: the judgment includes sixteen amicus briefs, five invited interventions, including Human Rights Watch and Amnesty International, and the transcripts of twenty-nine interventions in the oral hearings, including arguments made by the President of Colombia, Juan Manuel Santos, the President of Congress, the President of the Supreme Court, and the national ombudsmen, the *Procurador*¹²⁴ and the *Fiscal General de la Nación* (General Prosecutor), as well as individual citizens, universities, think-tanks and other NGOs.¹²⁵

International courts again constituted an important part of the CCC's reasoning. This time, however, the citation count is reversed: the ICC is referenced seventy-six times, and the Inter-American Court forty-five times. By 2013, the Colombian preliminary examination was in its seventh year, and the ICC was thus a familiar actor. Further, the ICC had reached conviction in a child soldier case.¹²⁶ The CCC cites to this jurisprudence as it tries to interpret what "systematic" means in the definition of crimes against humanity.¹²⁷ The CCC also cites to the Policy Paper on Preliminary Examinations and 2012 Interim Report on Colombia.¹²⁸ These are not judgments, but rather documents created by the OTP to clarify its policies and priorities. The CCC also refers to two letters the Chief Prosecutor of the ICC submitted to the President of the CCC while the CCC was deliberating on this case. The letters appear in this judgment in the form of amicus briefs. The ICC, then, played a number of roles in the CCC's judgment: as a court that authoritatively interprets the Rome Statute, as an international body that has been monitoring the Colombia case, and as a 'friend of the court.' Further, the ICC is also referred to as a threat: if Colombia does not prosecute certain cases, we are reminded, the ICC has jurisdiction.¹²⁹

The CCC also gives special emphasis to the case law of the Inter-American Court, particularly on questions of victim's rights, right to truth, and the duty to prosecute. There is one case in particular that is frequently mentioned throughout the ruling, raised by many of the amici and declarations

124. An autonomous body charged with investigating state actors and institutions for irregularities.

125. C.C., agosto 28, 2013, Sentencia C-579/13, G.C.C. (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2013/C-579-13.htm>.

126. Prosecutor v. Dyilo, ICC-01/04-01/06, Judgement pursuant to Art. 74 of the Statute (Apr. 4, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_03942.pdf.

127. C.C., agosto 28, 2013, Sentencia C-579/13, G.C.C. (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2013/C-579-13.htm>.

128. *Id.*; *Situation in Colombia – Interim Report*, INT'L CRIM. CT., OFF. OF THE PROSECUTOR (Nov. 2012).

129. C.C., agosto 28, 2013, Sentencia C-579/13, G.C.C. (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2013/C-579-13.htm>.

before the CCC: *Mozote Massacre v. El Salvador* (2011).¹³⁰ As discussed above, this is the first case in which the Inter-American Court notes that the obligations of the state to prosecute may be different in the context of peace-making and civil war, as humanitarian law also applies.

Overall, the CCC review of peace-related legislation clearly shows that the international courts are highly visible players in this debate. This is particularly the case given that the hearings before the CCC included the oral arguments of so many different state and non-state actors and amicus briefs presented, all of which also frequently refer to the international courts and to international law more generally. As with the executive and legislative branches, international courts cast a shadow on the proceedings before the domestic judiciary.

3. *Other Actors*

As the record of the oral hearings before the CCC make clear, it is not only government actors that relied on the jurisprudence of the international courts to advance their positions. Civil society actors, including think tanks, universities, and activist lawyer groups, also made statements before the CCC and dressed their claims in the language of the international courts and their underlying treaties. Indeed, while our data is focused on government actors, it is important to note that the media and other civil society actors consistently invoked the international courts throughout the years in which peace was being negotiated. International NGOs, and, in particular, Human Rights Watch, similarly relied on the international courts in their public statements and reports on the Colombian peace process—further raising their profile in the domestic debate.¹³¹

C. *The Government Pushes Back*

The dynamics described above show that a large set of domestic actors, including the Colombian government, have mastered the nuances of the Rome Statute and the American Convention on Human Rights, as well as the jurisprudence of the Inter-American Court, including concurring judgments. But to know the law is not to slavishly comply with, or even to correctly cite, the law. Domestic actors are not simply recipients of international law. In addition to being constrained by international courts and using international judicialization to try to constrain their domestic opposition, domestic actors are also trying to reign in those very same adjudicative bodies. They do this in two main ways. The first is by proactively re-reading the law to arrive at an interpretation that is colorable even as it is

130. *Id.* (the *Mozote* case receives 19 distinct mentions); *The Massacres of El Mozote and Nearby Places v. El Salvador*, Preliminary Exceptions, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 264 (Aug. 19, 2013).

131. See Rowen, *supra* note 39 (analyzing the rhetorical strategies of civil society activists focused on transitional justice).

more favorable to their interests. Second, the Colombian government and other actors involved in debating the peace have directly engaged the international courts, and especially the ICC's Office of the Prosecutor, through letters, closed meetings, invitations to participate in events, and other diplomatic overtures.

1. *Engaging the international courts through legal interpretation*

International law and international courts possess a highly specialized vocabulary and language. Further, the courts have a strategic advantage in that they possess insider knowledge of their own workings, and the extent of their resources and capacity. To engage with international courts effectively, actors must gain knowledge of this language and institutional structure. In its interactions with the ICC's OTP and the Inter-American Court, the Government of Colombia has demonstrated a growing command of the particular language of international criminal law and human rights law, as well as the institutional features and constraints of each court. Through this knowledge, the government has been able to offer its own legally grounded interpretations of that law, at times challenging the Courts.¹³²

Perhaps the most salient examples of this lawyerly engagement came from the Office of the High Commissioner for Peace. Throughout the peace process, the High Commissioner for Peace stressed the importance of keeping Colombia's international commitments, and repeatedly asserted that Colombia was doing everything that it needed to do in order to meet its international obligations. Even in pushing back against attacks that raised the question of the compatibility of the MJP with international law, Commissioner Jaramillo framed his answers within the context of international jurisprudence. For example, although the High Commissioner's Office acknowledged Colombia's responsibilities under the Rome Statute and other international instruments, Commissioner Jaramillo and de la Calle have also been clear that the situation in Colombia is exceptional. Jaramillo has argued that Colombia's peace must not be viewed from the perspective of a "normal" justice system, but rather the specific framework of transitional justice following an armed conflict.¹³³ When referencing the opposition's argument that the MPJ contravened the Constitution, for example, Commissioner Jaramillo argued that the MJP did not contravene the Constitu-

132. René Urueña, *Prosecutorial Politics: The ICC's Influence in Colombian Peace Processes, 2003–2017*, 111 AM. J. INT'L L. 104, 104 (2017) (noting that "Colombian actors' increased fluency with international criminal law concepts permitted them to play a more active role, pushing back against some of the OTP's strategies of influence").

133. Speech, Sergio Jaramillo, Alto Comisionado Para la Paz, Intervención Del Alto Comisionado Para La Paz, Sergio Jaramillo en la Audiencia Pública Sobre el Marco Jurídico Para la Paz en la Corte Constitucional [Intervention of the High Commission for Peace, Sergio Jaramillo to the Public on the Legal Framework for Peace in the Constitutional Court] 2–3 (July 25, 2013). http://www.altocomisionadopalapaz.gov.co/desarrollos-legislativos-paz/marco-juridico-para-la-paz/Documentos%20compartidos/discurso_gobierno_y_jefe_delegacion.pdf.

tion or international law because neither constitutional nor human rights law took grave humanitarian law violations into account when facing an integrated strategy for transitions from an armed conflict.¹³⁴ Even in stressing the extraordinary nature of the Colombian case, the Commissioner embedded his arguments within the context of international law and adjudication.

Another sophisticated strategy was to highlight differences between the Rome Statute and other international legal regimes, and in particular, as argued by René Urueña, presenting the norms of the Inter-American System as a “competing narrative.”¹³⁵ The High Commissioner noted, for example, that as of 2012 the Inter-American Court had not ruled in any case that analyzed a transition from an armed conflict, and had only recently, in the case of *El Mozote Massacre v. El Salvador*, considered an amnesty within the context of an armed conflict. The Court’s previous analyses, he remarked, had been with respect to post-dictatorial contexts and thus any consideration of their applicability to the MJP should be taken with that context in mind.¹³⁶ The Commissioner thus implicitly drew a distinction between what the Rome Statute and the American Convention demand. Similarly, in response to critiques about the proposed truth commission and alternative mechanisms of justice, the High Commissioner said, “Although the Inter-American Court has recognized the right to truth, as legalized through penal justice and the state’s obligations to prosecute those responsible, the exposition of the truth, as an end in and of itself, can neither depend nor derive exclusively from the penal system.”¹³⁷ In other words, the Inter-American Court’s right to truth is distinct from and goes beyond the facts generated by a criminal investigation. By drawing distinctions between human rights law and international criminal law, the government creates a space of legal uncertainty, and greater discretion.

Similarly, the Office’s statements about the primacy of peace have been couched in terms of general international law and human rights law, as opposed to criminal law. Peace, the High Commissioner has noted, is an important principle of the Colombian Constitution. He frequently makes reference to sources of international law that also privilege peace, including the Charter of the UN, the Preamble of the UDHR and the preamble of the OAS Charter, among other documents.¹³⁸ In a concise summary of the Office’s approach to peace and international justice, the High Commissioner noted that the work they were doing in Havana, is constructed “based on the state of the art of international doctrine and—much more importantly—based on what the victims of the conflict were saying in different

134. *Id.* at 5.

135. See Urueña, *supra* note 39, at 113.

136. *Id.*

137. *Id.* at 4.

138. *Id.*

forums and participation spaces.”¹³⁹ In effect, the High Commissioner is telling domestic and international audiences alike that the government’s international legal obligations are broader than just criminal accountability, and includes the prioritization of victims’ needs.

The government also used the ICC’s own prosecutorial practice to argue against the ICC’s preferred reading of the Rome Statute. One feature of the MPJ that sparked substantial debate was its provisions for the prioritization of cases. The MJP stated that the president could, with Congressional authorization, create mechanisms to prioritize and select the most serious cases, the most responsible perpetrators and therefore avoid a collapse of transitional justice mechanisms.¹⁴⁰ The opposition argued that this was a form of impunity and that international law requires that all violators of Rome Statute crimes be tried. The High Commissioner defended the MJP on the ground that international law has come to accept that we need to prioritize those most responsible for the worst crimes: “The experience of the national and international tribunals that have been established to address international crimes has led the judicial community to accept the necessity of focusing the investigations on a selection [of cases], concentrating on the prosecution of those most responsible for the gravest crimes.”¹⁴¹ The discussion proceeded to outline how the ICC, ICTY and the Extraordinary Chambers in the Courts of Cambodia have decided to *not* prosecute particular cases because they fell below the limit of what the courts perceived to be the worst perpetrators of the worst crimes.¹⁴² The government responded to these accusations by showing how at the international level, it has been impossible to achieve peace without prioritizing cases.¹⁴³ Moreover, in his statements before the Constitutional Court, the High Commissioner goes on to suggest that the MJP policy mirrors ICC practice: “This is precisely the recommendation the ICC prosecutor has insisted upon in the Colombian case” and thus could not be used as an argument to start an intervention from that tribunal if Colombia decided to employ it.¹⁴⁴ Indeed, the ICC would have a hard time reviewing such a decision, since the cases that were not investigated would, by definition, be of a lower gravity.

139. Press Release, Alto Comisionado para la Paz, Declaración Del Jefe Del Equipo Negociador Del Gobierno Nacional Humberto de la Calle [Declaration of the Chief Negotiator for the National Government Humberto de la Calle] (June 7, 2014), <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/pronunciamientos-jefe-de-la-nacion/Documentos%20compartidos/2014/20140607declaracion-del-Jefe-de-la-Delegaci%C3%B3n-del-Gobierno-Nacional.pdf>.

140. G. Cong., t. 27, p. 28.

141. Public Document, Alto Comisionado para la Paz, *Intervención en el proceso de constitucionalidad del Acto Legislativo 1 de 2012 Expediente D-9499* [Intervention in the Process of Constitutionality of Legislative Act 1 of 2012, D-9499] (Mar. 4, 2013), 8.

142. *Id.* at 9.

143. G. Cong., t. 27, pp. 33–34.

144. *Supra* note 125, at 10.

2. *Engaging the International Courts through Diplomacy*

The government has sought to shape and constrain the international courts' influence not only by publicly voicing legal counter-arguments, as argued above, but also through diplomatic contacts with court officials, including in-person meetings, private letters, and invitations to participate in high-level peace-related events. The government, in other words, devised a strategy of a judicial diplomacy to further persuade and pressure the courts.

Such a strategy is particularly available vis a vis the ICC. As noted above, the ICC works in Colombia not in its capacity as a court, but rather through the OTP as an international body monitoring domestic prosecutorial policy. That means it is not constrained by the rituals of litigation. Different actors within the Colombian state have seized on this flexibility to engage directly with the ICC. As noted above, President Santos and Prosecutor Bensouda met in New York in September 2013, and that November, in a mission organized by the Colombian Attorney General's Office and the news magazine, *Semana*, the OTP was invited to participate in a conference on the theme of "Strengthening the Attorney General's Office on Transitional Justice." More generally, the executive has made a point of being compliant with ICC demands for information, cooperating with all requests, and meeting with the OTP when it conducts field visits. In 2009, Colombia formally adopted the Rules of Evidence and Procedure of the ICC and also ratified the Agreement on the Privileges and Immunities of the Court.¹⁴⁵ In ratifying these agreements, the Colombian government sent a clear signal to the ICC, as well as to domestic and international audiences, that it was committed to complying with the ICC's demands. These steps toward cooperation form part of the government's strategy to be set apart from the other situations under the ICC's purview. Cooperation with the ICC on procedural matters was a way for the government to deflect deeper ICC involvement.

Other actors in the government were not always on board with the Santos peace and sought to undermine it through their own direct contact with the OTP. When frustrated with Santos' peace deal, for example, the *Procurador* sent the ICC a list of fifteen reasons why it should reject the Peace Accord.¹⁴⁶ Civil society actors also regularly met with the ICC OTP during visits, and used the ICC to advance their agenda by directly getting in touch with the OTP and urging it to act on certain issues.¹⁴⁷

145. Letter from Embassy of Colombia to Secretariat of the Assembly of State Parties of the Rome Statute, INT'L CRIM. CT., https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP11-POA-2012-COL-ENG.pdf (Aug. 8, 2012).

146. 'Acuerdo con Farc es un pacto de impunidad': Procurador a la CPI [Agreement with FARC is a Pact of Impunity: Attorney General of the ICC], EL TIEMPO, Jan. 19, 2016, <http://www.eltiempo.com/archivo/documento/CMS-16485333>.

147. For example, civil society actors urged the OTP to respond when President Uribe extradited drug lords who were also implicated in human rights violations, prompting the OTP to send a letter to Colombia. See Carta del Fiscal de la CPI, Luis Moreno Ocampo, dirigida al Embajador colombiano acreditado ante la CPI [Letter from Prosecutor of the ICC to the Colombian Ambassador accredited before

By contrast, the Colombian state's relationship with the Inter-American Court is more constrained, hemmed in by the rules of litigation. But that did not stop the Santos government from actively engaging the Court as it forged the peace deal. The Santos government was the first to host the Inter-American Court's extraordinary hearings, and it has done so not once but twice.¹⁴⁸ Further, Santos was able to seat Humberto Serra Porto, a former CCC judge, on the Inter-American Court in 2013. Serra then served as the Court's President in 2014-2015. That meant that when Colombia hosted the Court for a second time in Cartagena in April 2015—at the height of the peace negotiation—the Court was under the leadership of a former CCC judge. Serra opened the Cartagena session by lauding Colombia's "genuine respect for the international legal order and the values and principles that sustain it."¹⁴⁹ The 2015 event was timed to coincide with a conference on transitional justice and the Inter-American System, inaugurated by President Santos himself. On that occasion, Santos delivered a 50-minute speech, before an audience that included the judges and staff of the Inter-American Court, on the importance of balancing the demands for justice with the demand for peace.¹⁵⁰ The following year, the Inter-American Court judges and secretary were invited to witness the signing of the peace treaty in September of 2016.¹⁵¹ Finally, Santos's diplomacy was not limited to the Court. He also met with the President of the Inter-American Commission, James Cavallaro.¹⁵² In these ways, the Colombian government complemented its

the ICC], Francisco José Lloreda, *quoted in Carta enviada por el fiscal Moreno de la CPI*, [Letter sent by Prosecutor Ocampo of the ICC], LA SEMANA (Aug. 16, 2008), <https://www.elespectador.com/impreso/politica/articuloimpreso-carta-enviada-el-fiscal-moreno-de-cpi>. See also Universidad del Rosario, *Eventos 13 May: Foro: La Justicia Transicional en Colombia y el Papel de la Corte Penal Internacional*, <http://www.urosario.edu.co/Home/Principal/Eventos/La-Justicia-Transicional-en-Colombia-y-el-Rol-de-l/#eventosTab2> (last visited Apr. 9, 2018) (illustrating one example of a meeting between members of civil society and representatives of the ICC).

148. Twice a year, the Inter-American Court holds extraordinary sessions in which it sits not in its San Jose home but rather in the territory of a State party. Press Release, Corte Interamericana de Derechos Humanos, La Corte Interamericana Celebrará su 47 período Extraordinario de Sesiones en la Ciudad de Medellín, Colombia [Inter-American Court of Human Rights Will Celebrate its 47th Term of Extraordinary Sessions in Medellín, Colombia] (Mar. 13, 2013), http://corteidh.or.cr/docs/comunicados/cp_04_13_esp.pdf (announcing the Court's visit to Medellín, Colombia).

149. Press Release, Corte Interamericana de Derechos Humanos, Corte Interamericana Finalizó El 52 Período Extraordinario De Sesiones En Cartagena De Indias, Colombia [Inter-American Court of Human Rights Ends the 52nd Term of Extraordinary Sessions in Cartagena de las Indias, Colombia] (Apr. 27, 2015), http://corteidh.or.cr/docs/comunicados/cp_14_15.pdf (translation by authors).

150. Corte Interamericana De Derechos Humanos, INAUGURACIÓN. SEMINARIO INTERNACIONAL JUSTICIA TRANSICIONAL Y CORTE INTERAMERICANA DE DERECHOS HUMANOS, PALABRAS DEL PRESIDENTE DE LA REPÚBLICA DE COLOMBIA, DOCTOR JUAN MANUEL SANTOS CALDERÓN [Opening. International Seminar on Transitional Justice and the Inter-American Court of Human Rights, Remarks from the President of the Republic of Colombia, Juan Manuel Santos Calderón], <https://vimeopro.com/corteidh/justicia-transicional-y-corte-interamericana-de-derechos-humanos/video/126543769> (Apr. 20, 2015).

151. *La Corte Interamericana de Derechos Humanos está de testigo en un momento histórico en Colombia* [The Inter-American Court of Human Rights is Witness to Historic Moment in Colombia], *supra* note 4.

152. The Commission is the other main organ of the Inter-American Human Rights System. It acts as a first instance of sorts, receiving individual petitions before referring them to the Inter-American Court.

legal arguments with a diplomatic strategy of pointed engagement with the Inter-American System.

D. Judicialization as Deliberation

This Part has demonstrated that the Colombian peace was highly judicialized. Throughout the process, key players in Colombia were keenly aware of the international law, international norms, and judicial politics surrounding the issues of accountability and transitional justice. While the ICC and Inter-American Court clearly signaled their intentions regarding Colombia via public communiqués, site visits, reports, and relevant jurisprudence, domestic actors both appropriated and pushed back against the courts' messaging. Whether in Congress, in the Executive's Office, or in the judiciary, domestic actors leveraged international law and international courts' jurisprudence to restrain their domestic opponents and shape the narrative of peace.¹⁵³ Moreover, the government reached out to the international courts through invitations to public events and other diplomatic overtures, even as it pushed back against the courts' interpretation of the law. Thus, the international courts, while constraining the state, were also, in turn, courted, persuaded, and constrained.

These multiple modes of interaction were an important part of the four-year process that resulted in the 2016 peace agreement. They remind us that the impact of international courts does not happen in a top-down directive manner alone. Judicialization, by this telling, took the form of deliberation. The impact of the courts' jurisdiction was to make the ongoing peace debate more infused with references to the guidance and constraints provided by international law, to make more actors at the domestic level aware of the international courts and laws, and, ultimately, to allow the manner in which these international norms were debated and understood to shift.

IV. THE OUTCOME: A JUDICIALIZED PEACE ACCORD

This Part turns from examining the judicialization of the peace process to examination of its impact: how did the engagement of international courts alter the terms of the final peace accord? To bring into view the effects of international judicialization, we compare the current peace accord with three other agreements negotiated by the Colombian government over the prior three decades. In other words, we engage in a structured, over-time comparison. The 2016 peace accord follows and builds upon a long succession of ceasefires, talks and peace initiatives through which the Colombian government has attempted to pacify the different irregular armed groups that oc-

153. Although not focused on the international courts, Jamie Rowen's study shows a similar dynamic whereby different actors deploy transitional justice terms to advance their particular agendas. *See* Rowen, *supra* note 39.

cupy its territory, and in particular the FARC, since the 1960s. The current process, therefore, has deep roots in the past, and in many ways enlists the same cast of institutional players as prior efforts in the push towards disarmament, peaceful political participation, and political reform. A difference across time, however, is the rapid and pronounced judicialization of Colombian politics, through the creation of a powerful new constitutional court in 1991, and through accepting the jurisdiction of two international accountability courts. Comparison of the current peace accord to prior peace accords, therefore, throws into relief some of the changes wrought by judicialization.

Specifically, we ask how judicialization has changed the shape of justice and accountability as inscribed in four of the main agreements the Colombian government has negotiated over the past four decades: the Uribe Pact (*Pactos de la Uribe* 1984, 1986); the Francisco Gárnica Front accord (*Frente Francisco Gárnica* (1992); the Justice and Peace agreements demobilizing the paramilitary (2003-2006); and the 2016 agreement that emerged from the peace process in Havana (2012-2016).¹⁵⁴ Each was chosen because it marked a different moment in the ongoing judicialization of the conflict, thus providing a unique comparison of four peace negotiations against a backdrop of growing judicialization. Further, we trace the evolution of the debates that were most prominent in the negotiation phase and examine the outcome reached in the final accord.

The analysis reveals that the effects of the international courts are not necessarily what those who backed the courts as a way to advance criminal

154. Further methodological explanation of the selection of cases is due here. Each of the four negotiations chosen follows a development in the Colombian legal system with regards to international law and courts. The *Acuerdos de la Uribe*, and its accompanying Law 35 of 1982, mark one of the Colombian government's first efforts to establish peace with the FARC guerrilla. This accord took place before Colombia had submitted to the jurisdiction of the Inter-American Court, and before said court had developed its jurisprudence on amnesty. However, Colombia had been part of the Inter-American System more generally, and the Commission had published a country report on Colombia in 1982. Nonetheless, the Treaty makes no mention of these international bodies, and sought to address the armed conflict by providing generous amnesties. Ten years later, the Colombian government passed a law providing for a peace accord between the government and Frente Francisco Gárnica, a small faction of the Popular Liberation Army (EPL). This peace accord law took place after Colombia had accepted the jurisdiction of the Inter-American Court, and under a new constitution and the establishment of a new constitutional court. In the early 2000s, the government again began negotiations to quell the armed conflict. This time, it began by negotiating with the paramilitary. President Uribe passed the Justice and Peace law in 2005. Significantly, this was after the ICC had ratified the Rome Statute giving jurisdiction to the ICC. The law passed in the legislature just as the ICC opened its preliminary investigation. The final text is the 2016 Final Accord, negotiated, of course, under the watch of both international courts. Note also that the comparison begins with the first official peace negotiations between the FARC and the Colombian government and ends with the *Acuerdo Final*, the result of the most recent peace negotiations. This analysis was unable to include agreements from the two other peace negotiations with the FARC as both failed before an agreement was reached. These negotiations occurred in the early 1990s and early-mid 2000 and as such cases around those points in time were chosen. Further, the four selected cases begin with the first negotiated peace accord developed through a policy of "diplomacia por la paz," in which the government involved international relationships to address the armed conflict. Of the four chosen agreements, some are peace accords and others are laws providing framework for peace. However, they are comparable because what we seek to understand is how the Colombian government engages with questions of amnesty, across time.

accountability would have hoped, but neither are they what court skeptics most feared. Colombia's peace accord shows signs of judicialization through its unparalleled reliance on international law to define terms and bolster its legitimacy; through construction of a process-heavy and lawyerly post-conflict mechanism; and by leaving resolution of particularly difficult accountability trade-offs to the future, so as to defer court review. Significantly, however, this emphasis on process at the formal level comes coupled with an innovative approach at the substantive level: Colombia's peace negotiation yielded an accord less focused on punishment than the international courts would have required, at least as their position was understood when the negotiations began. Dressed in procedure, rife with reference to pre-existing treaties, and clearly in dialogue with the international courts, Colombia's 2016 peace accord nonetheless hazards a transitional justice regime that is innovative in important ways.

The following sections each highlight a distinct dimension of comparison across the four accords, with special emphasis on the topics that played a prominent role during the peace negotiation: punishment, the prioritization and selection of cases, and command responsibility. The analysis thus reveals how the Final Accord differs from its predecessors due in part to its engagement with international courts and law.

A. *A Peace that Speaks International Law*

Christine Bell has noted that international law is playing a growing role in the resolution of intra-state conflict.¹⁵⁵ Comparison of the current Accord to its predecessors indeed reveals a marked increase in direct references to international law, and particularly to the treaties over which the international courts have jurisdiction. The comparison also suggests another significant trend: it is the aspects of international law that are subject to international judicial review that play a greater role. International human rights law and international criminal law pre-exist the two international courts, but really only begin to receive mention in the accords once there is an international court in place to enforce them. Further, while humanitarian law regulates many different aspects of the use of force, it is the war crimes provisions, which are the only ones enforced by the ICC, that receive most frequent mention.

The trend toward greater citation over the four decades is not subtle: the *Acuerdos de la Uribe* (1982) and the Accord with Frente Francisco Gárnica (1990) make no direct mention of international law or organizations. It is only with the JPL that international law makes its appearance in this important domestic instrument. But even here, the mentions are few. The JPL refers to international law only two times. The first is a general framing statement at the beginning of the law stating that it should be realized in a

155. BELL, *supra* note 21.

manner that conforms “to constitutional norms and the international treaties ratified by Colombia.”¹⁵⁶ The second is a reference to the United Nations Convention against Illicit Traffic in Narcotic Drugs, to which Colombia is a party.¹⁵⁷ International law here, then, is viewed only as a distant interpretive guide, and the international courts receive no direct mention. This is despite the fact that the negotiation of this law took place as Colombia came under ICC review through the preliminary examination, and the Office of the Prosecutor and the government were in direct dialogue about the law.

The 2016 Peace Accord, by contrast, has many more cites to general international law, to specific international treaties to which Colombia is party, and to the Rome Statute and Inter-American Court in particular. The Accord makes mention of the Rome Statute twelve times. Overall these cites refer to the Rome Statute in three different ways. First, as in the Justice and Peace Law, there is a framing paragraph at the beginning that proclaims the entire accord to be subject to international law in general, and to certain treaties, including the Rome Statute, in particular.¹⁵⁸ Second, at eight different points, the Accord cites to the Rome Statute as authority for the list of crimes that cannot be amnestied: it prohibits amnesties for “crimes against humanity, nor other crimes defined by the Rome Statute.”¹⁵⁹ Finally, the Accord specifically commits the government to rely on the Rome Statute in matters of evidentiary practices regarding sexual violence (Art. 67).¹⁶⁰ The ICC itself and its judgments are not mentioned; only the Rome Statute.

The Inter-American Court, by contrast, is directly mentioned two times. First, the general framing statement notes that the agreement is subject not only to international law in general and to particular international treaties of relevance, but also to “the judgments issued by the Inter-American Court.”¹⁶¹ The second mention is also significant: it quotes at length the concurrent vote of Judge Garcia Sayan in the *Mozote Massacre Case*, which was decided when the Colombian peace process was underway, and which many viewed as written with the Colombian process in mind. The quote speaks of peace as a human right, and of the duty of the state to create peace; indeed, it says that the states’ duty to make peace is “of equal intensity” as its duty to attend to victims’ rights.¹⁶² The Inter-American Court’s concurrent vote is thus used to provide the government greater flexibility in its

156. L. 975, julio 25, 2005, 45.980 DIARIO OFICIAL [D.O.] art. 2 (Colom.), <http://www.secretariassenado.gov.co/leyes/L0975005.htm> (translation by authors).

157. *Id.* art. 71.

158. L. 975, julio 25, 2005, D.O. 45.980 art. 2 (Colom.), <http://www.secretariassenado.gov.co/leyes/L0975005.htm> (“always and in each moment hewed to the spirit and reach for the norms of the National Constitution, the principles of international law . . . the demands of the Rome Statute”) (translation by authors).

159. L. 975, julio 25, 2005, D.O. 45.980 art. 40 (Colom.) (translation by authors).

160. Acuerdo Final, *supra* note 58, art. 67.

161. *Id.* at 2.

162. *Id.* at 143.

negotiation across rights (for once you have two rights that are in tension but of equal importance, we are back in the realm of balancing and, ultimately, politics). The Accord also makes direct mention of the Inter-American Commission: through the Accord, the state recommits itself to resolving a case that has been mediated by the Commission and has to do with atrocities that took place in the 1980s, indirectly involving the FARC.¹⁶³ The American Convention is not mentioned; however, it is implied both in the many mentions of “international human rights treaties to which Colombia is party,” as well as in the mentions of the Inter-American Court, whose primary role is interpreting and applying the American Convention.¹⁶⁴

International law as such, and humanitarian law and international human rights law as branches thereof, also receive mention throughout the document. Humanitarian law, or the laws of war, receives no less than thirty-one mentions. It is used mostly to make reference to war crimes.¹⁶⁵ This suggests that the parts of the Geneva Conventions that are also part of the Rome Statute become more prominent. International human rights law is referred to twenty-six times. Of these, seventeen are references to “grave violations” of human rights law, which the Inter-American Court has said must be investigated and punished, and likely fall under the purview of the ICC as well as the Inter-American Court.¹⁶⁶

Overall, the Accord affirms itself through direct mention of international law with more frequency than its predecessors in Colombia, and engages in particular with law over which international courts have jurisdiction. This use of international law mirrors that of the debates leading up to the Accord analyzed in Part III: it is a further example of how domestic actors use the international law and courts to add legitimacy to their claims, reflecting, in turn, the growing relevance of the courts.

B. *A Less Punitive Peace*

Analysis of the four accords also reveals that there are significant differences in how the government and its negotiating partners resolve the questions of criminal accountability across time. Indeed, the progression of accountability across the four accords has a surprising arc: if the norm of accountability has grown stronger, the imposition of punishment, understood as years spent in prison, is weaker, at least on paper.

In the first two accords, criminal accountability is treated as a dichotomous variable—either the state prosecutes or it does not. If the latter, liability is erased and there is no criminal proceeding. The 1982 law is brief but grants a broad amnesty: any crime connected to the rebellion is covered

163. *Id.* at 181.

164. *Id.* at 2, 146, 164, 214.

165. *Id.*

166. *Id.*

without exception. Further, amnesty here means that there is no investigation or trial; the law does not differentiate among the different stages of criminal process. The grant of amnesty erases liability, and those who benefit do not really have to do anything to qualify.¹⁶⁷

The 1993 peace is very different from the 1982 peace, and displays many features of the contemporary transitional justice norms. It is lengthier, and entire sections are devoted to the rights of victims, including provision of assistance in housing, health, education and work. It also differs from the earlier peace in that international crimes (genocide and war crimes) are exempt from amnesty. Shifting international norms have already had an important impact.¹⁶⁸ However, the question of criminal liability is still treated as a yes/no variable. Whereas in 1982, atrocity crimes are amnestied and their perpetrators exempt from criminal liability, in 1993, atrocity crimes are entirely excluded from amnesty, and the accused are simply subject to regular criminal process. Surprisingly, it is the 1993 Accord that is thus the most punitive of the four here examined, as it imposes regular criminal process and punishment on those who commit atrocity crimes, with no possibility of abatement.

In the later accords, criminal accountability is disaggregated into two main component pieces: investigation, trial, and judgment on the one hand; and sentencing and punishment on the other. These component pieces are then leveraged against each other, and against the rights of victims. Under the JPL, there is no amnesty for international crimes. However, there is a possibility of reduced sentences: punishment moves from being a dichotomous variable to one with gradations. Further, the way to accede to a reduced sentence is by cooperating with the investigation and other aspects of the transitional legal scheme. So overall the trend is to trade in a bit of punishment in return for fuller participation in other aspects of the legal process, and for contributions to the reparation of the harm suffered by the victims. Demobilized paramilitaries have to contribute what they know in all cases of which they have knowledge; they must compensate, if they can; and they are urged to make statements of apology and commit to not repeating the harms.

The 2016 Accord introduces yet another twist on criminal accountability. The emphasis on investigation and repair remains and in some ways grows. Here too, the *guerrilleros* who aspire to amnesty must participate in process, share knowledge they have about criminal acts, and apologize for harm suffered by the victims of their crimes.¹⁶⁹ But drawing on restorative justice

167. L. 35, nov. 1982, D.O. 128. N. 36133 BIS. 20 art. 4 (Colom.) at 1, <http://www.suin-juriscol.gov.co/viewDocument.asp?id=1591525> (last visited Mar. 30, 2018) (a law that implements the Acuerdos de la Uribe).

168. See Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449 (1990) (arguing in 1990 that states have a duty under international law to prosecute grave human rights violations).

169. Acuerdo Final, *supra* note 58, art. 27.

theories, the new peace accord introduces an idea that had been mostly absent from international criminal law: punishment is no longer conceptualized only through the lens of moral desert, but is recast as (also) about rehabilitation and the restoration of social bonds.¹⁷⁰ Like the JPL, the peace accord gives those who committed atrocities the opportunity to participate in truth-telling and to cooperate with criminal investigations, and to provide reparation and to participate in community building activities.¹⁷¹ But in this agreement those who cooperate in this way are able to escape incarceration, understood as time in a prison. Punishment instead entails a still to be defined restriction of liberties, including the liberty of movement and liberty of domicile.¹⁷² Further, the punishment will in no case last over eight years.¹⁷³ Ultimately, then, it is possible that someone who commits international crimes will be tried and sentenced but not imprisoned. That is a new understanding of accountability, and one not yet tested before the international courts.

The trend in transitional justice in general has been towards imposing less punitive measures in exchange for greater involvement by the perpetrator in the investigation and in other legal processes aimed at repairing the victim's harm.¹⁷⁴ What distinguishes the 2016 Accord is that the most heinous crimes are also subject to this regime. Indeed, the peace accord overall makes little mention of punishment. While it pronounces accountability (*rendición de cuentas*) to be a main principle of the terms of the peace. Retribution as such is rarely mentioned. In the Accord's own words, "the Integral System for Truth, Justice Reparation and Non-Repetition shall have as its primordial goals the consolidation of peace, and the guarantee of the rights of the victims."¹⁷⁵

It is important to note that this move away from incarceration is not an escape from the confines of criminal law; rather, the move re-purposes criminal procedure to a different end.¹⁷⁶ The solution to the peace/justice dilemma is quite technical and deeply embedded in criminal procedure: it breaks accountability down into two distinct pieces—investigation and punishment—and enhances one at the expense of the other. Note, further, that this is not pure legalism or sleight of hand. The approach has the potential to offer very real benefits for the victims. By thus disaggregating criminal accountability, the government can choose to offer the accused a

170. *Id.* art. 60.

171. *Id.* § 5.

172. *Id.* art. 60.

173. *Id.*

174. See generally AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY: COMPARATIVE AND INTERNATIONAL PERSPECTIVES (Francesca Lessa & Leigh A. Payne eds., 2012); RENÉE JEFFERY, AMNESTIES, ACCOUNTABILITY, AND HUMAN RIGHTS (2014).

175. Acuerdo Final, *supra* note 58, at 147 (translation by authors).

176. Karen Engle argues against overreliance on criminal law as a form of response to human rights violations. See Engle, *supra* note 18. Here, by contrast, there is a push against "neo-punitivism" even while using the framework and vocabulary of criminal procedure.

reduced sentence in return for cooperation in truth-telling, apology, repair, and other aspects of accountability that may be of great value to victims.

The move away from incarceration is also undeniably a strategy that seems tailored to deflect international court review. Although the Rome Statute provides that the ICC should impose imprisonment as the form of punishment,¹⁷⁷ it is silent on the question of what sort of penalties *states* should impose for international crimes that fall within the statute.¹⁷⁸ Under Article 17, the Court can open its own investigation only if it finds the state unable or unwilling to prosecute, or if the prosecution is undertaken only with “the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court.”¹⁷⁹ The statute itself does not differentiate among the different pieces of a criminal prosecution. The ICC has not yet considered whether a reduced or alternative sentence could trigger an investigation.

The Inter-American Court’s jurisprudence, by contrast, has addressed the different aspects of criminal accountability over dozens of cases.¹⁸⁰ Overall, its jurisprudence has been understood to demand criminal prosecution, and arguably punishment, in all cases where there have been violations of fundamental human rights without exception.¹⁸¹ In its first judgments, it always ordered states to “investigate *and* punish,” seemingly without distinction between the two. In more recent cases, it speaks of the obligation to “investigate and prosecute and punish, as appropriate.”¹⁸² This method of listing different stages of accountability would seem to imply that each is a distinct obligation of the state. In this sense, the Inter-American regime may pose a more difficult hurdle. But it is important to note that the Inter-American Court and Commission have been path breaking in promoting and prioritizing the rights of victims. Indeed, the Peace Accord’s emphasis on the rights of victims, the right to truth, and on holistic reparations is one that Colombia has drawn in part from the extensive and unique jurisprudence of the Inter-American System on this matter.¹⁸³ At times, the Court has even cast

177. Rome Statute of the International Criminal Court, art. 77, July 1, 2002, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

178. *Id.* art. 80.

179. *Id.* art. 17.

180. For a nuanced discussion, see Oscar Parra, *La Jurisprudencia de la Corte Interamericana respecto de la lucha contra la impunidad* [The Jurisprudence of the Inter-American Court regarding the Fight Against Impunity], 13 REVISTA JURÍDICA DE LA UNIVERSIDAD DE PALERMO 5, 32–33 (2012).

181. This is how Fatou Bensouda interpreted the Inter-American Court’s jurisprudence in her letter to the Constitutional Court. See Bensouda, *supra* note 82.

182. See, e.g., Tenorio Roca et al. v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 314 (June 22, 2016).

183. See Enrique Gil Botero, *El principio de reparación integral en Colombia a la luz del Sistema Interamericano de Derechos*, in PERSPECTIVA IBEROAMERICANA SOBRE LA JUSTICIA PENAL INTERNACIONAL 319 (Héctor Olásolo Alonso & Salvador Cuenca Curbello eds., 2012) (showing how the Inter-American System has helped shaped Colombia’s approach to reparations). It can also be argued that the Court drew, in turn, from Colombia’s *Consejo Superior*, and that the reparations regime is mutually constructed by these two.

criminal prosecution of the wrongdoer as an aspect of the victim's rights, so that criminal prosecution becomes subsumed within victim's rights. This move seemingly allows Colombia to more easily make trade-offs between truth and punishment, while still arguing that it is protecting victims' rights overall—for it is only playing one right of the victim against the other. Finally, the *Mozote Massacre* case seems to open up the possibility that the Court's prior amnesty cases, focused almost entirely not on peace accords but other types of political transitions from authoritarian to democratic government, are not necessarily applicable to the peacemaking scenario.¹⁸⁴

Overall, the progression of the accords suggests that international courts have made negotiators much more focused on the questions of criminal responsibility. However, the progression has not been toward more punishment. Rather, negotiators have given new meaning to the concept of accountability, while further distancing it from retribution. The Accord repeatedly affirms that those who committed international crimes will not receive amnesty. That means they will undergo criminal investigation and trial, and a sentence will be imposed. However, exactly what the sentence is will be shaped by the defendant's level of cooperation with trial and with reparatory measures. This concession to the politics of peacemaking represents a significant shift in transitional justice practice.

C. A More Procedural Peace

Comparison of the four accords reveals another, related trend: the most recent peace accord is the longest, most procedurally detailed and in many ways legally ambitious deal to emerge from decades of peacemaking in Colombia. This is a trend that has been noted in the evolution of peace accords overall, judicialized or not.¹⁸⁵ Even compared against these trends, however, the 2016 Colombian accord is a standout—the final accord “at nearly three hundred pages long (297)—is the longest peace agreement produced in intrastate conflict.”¹⁸⁶ Perhaps, then, judicialization has led to ever greater process, more lawyers, and more complex understanding of criminal responsibility, even as it de-emphasizes punishment as measured out in years of imprisonment.

One explanation for this procedural complexity is the disaggregation of criminal accountability discussed above. The first two agreements relied on the existing criminal legal system: the question was only whether or not some actors could be exempt from that system. However, once accountability is to be broken down, and punishment is to be played off against truth and other reparatory projects, the regular criminal courts are no longer suffi-

184. *The Massacres of El Mozote and Nearby Places v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 264 (Aug. 19, 2013).

185. BELL, *supra* note 21, at 249.

186. Christine Bell, *Lex Pacificatoria Colombiana: Colombia's Peace Accord in Comparative Perspective*, 110 AJIL UNBOUND 165, 166 (2016).

cient. The JPL provided for the creation of special prosecutors and special courts devoted to the paramilitary cases. In part this was a way to get more resources to support the regular judicial system as it takes on many new, complicated cases. But it was also a way to allow certain actors within the criminal justice system to specialize in the line of cases governed by the JPL law. Thus, the National Prosecutor created special teams devoted to transitional justice cases, and within the judiciary, certain judges had their courtrooms devoted to trying cases having do with demobilization of the paramilitary under the JPL.¹⁸⁷

The 2016 Accord takes this differentiation even further. It creates a special jurisdiction for peace that is distinct from the regular judiciary, and whose judges are not part of the regular judiciary.¹⁸⁸ In this way, the nuanced balance the peace accord strikes between the FARC's demands for political participation and reform, on the one hand, and the requirements for accountability dictated by international law and courts, on the other, will ensure the involvement of lawyers, judges, and legal activists for years to come. Tellingly, the Final Accord's section on victims, which encompasses criminal accountability, is the longest one by far. The other four pieces of the agreement, while detailed relative to other agreements, are much thinner. This is not because they were uncontested. Some aspects, such as the drug trade, were as controversial as the question of punishment for atrocity crimes. But the issue of accountability is the only one negotiated in the shadow of two international courts.¹⁸⁹

D. A Peace That Plays for Time

Another strategy by which the 2016 Accord resolves the trade-offs between the demand for accountability as defined by the international courts, on the one hand, and the demands of the FARC and military, on the other, is using the ambiguities and loopholes of the relevant treaties to defer important decisions to a later time. Beyond incarceration, two of the issues most debated prior to the Peace Accord were whether the government would have discretion to prioritize cases, and how to define the contours of command responsibility. In the end, the Accord eludes resolution of these issues. Further, the accord's definition of war crimes differs slightly from that of the Rome Statute and the Geneva Conventions, creating a potentially narrower category. Some argue that with these stratagems, the Colombian

187. For a description of the Justice and Peace Courts, see *Justicia y Paz* [Justice and Peace Law], MINISTERIO DE JUSTICIA Y DEL DERECHO. <http://www.justiciatransicional.gov.co/Normatividad/Justicia-y-Paz> (last visited Mar. 3, 2018). For a description of the division of the National Prosecutor, see <https://www.fiscalia.gov.co/colombia/la-entidad/>.

188. Acuerdo Final, *supra* note 58, art. 9.

189. One might consider the adage that subjection to criminal process is itself a form of punishment. See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979).

government is “playing with fire” and risking an ICC case.¹⁹⁰ This section suggests instead that the stratagems are rather a sign of the government learning to exploit the institutional limits of the courts and make itself more impermeable to court review.

1. *Prioritization of cases*

As noted in Part III, at times the government has claimed that it should have the same level of discretion to choose among cases as the ICC and other international criminal courts. The government proposed creating a mechanism to prioritize and select the most serious cases.¹⁹¹ In its letter to the CCC, the OTP countered that the state could not use the ICC as a model: Unlike the ICC, the state had a duty, as stated in many of the judgments of the Inter-American Court, to prosecute every grave violation, and not only the most serious crimes.¹⁹² Eventually, however, both sides shifted. The OTP, through an important intervention by Deputy Prosecutor James Stewart in 2015, capitulated that even though the state had such a duty, the ICC was constrained in its mandate to review the admissibility of only cases that it could itself investigate.¹⁹³ The Final Accord itself punts on this question. It leaves the details of the mechanisms for selection, prioritization and decongestion of cases to be decided later.¹⁹⁴ It thus defers the decision, and the possibility of an adverse judgment on that decision, to a later time.

2. *Narrowing the scope of war crimes*

There is one phrase in particular introduced into the final version of the Accord that seems to pose a direct challenge to the ICC. The Final Accord states that “grave” war crimes will not be granted amnesty, and it then defines grave war crimes as “any violation of international humanitarian law committed in a systematic way.”¹⁹⁵ The provision thus introduces two innovations. First, it proclaims that only “grave” war crimes will not receive amnesty. International Criminal Law defines war crimes as “grave breaches of the Geneva Convention.” These are listed in the Geneva Convention. Here, the Accord seems to be claiming only a subset of those will be prosecuted—the *grave* grave breaches, leaving open the possibility that some war crimes will receive amnesty.¹⁹⁶

190. Rene Urueña, *Playing with Fire: International Criminal Law, Transitional Justice, and the Implementation of the Colombian Peace Agreement*, 110 AJIL UNBOUND 364, 366 (2016).

191. G. Cong., t. 27, p. 28.

192. See Rome Statute, *supra* note 177, art. 77.

193. James Stewart, Deputy Prosecutor, Int'l Criminal Court, Keynote Address at the Transitional Justice in Colombia and the Role of the International Criminal Court Conference (May 13, 2015), <https://www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf>.

194. Acuerdo Final, *supra* note 58, art. 46.

195. *Id.* art. 40.

196. Urueña, *supra* note 190, at 364–68.

Second, the Accord goes on to explain that by “grave,” it is referring to violations of humanitarian law committed in a systematic way, or as part of a plan or policy. It is true that the Rome Statute itself provides: “The Court shall have jurisdiction in respect of war crimes *in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes*” (emphasis added).¹⁹⁷ But the Accord seems to be saying Colombia will *only* prosecute breaches of the Geneva Conventions that are committed systematically. Note that as an evidentiary matter, it is likely more challenging to prove that a crime was committed “systematically” than that is merely part of a “large-scale commission” of that crime.

In other words, the Accord’s framers, at the last minute, threw in one word, “grave,” seemingly borrowed from the Geneva Conventions, but used in a way that could lead to an overly narrow category of what counts as war crimes. Or, perhaps not. The Constitutional Court announced in March of 2018 that in its still to be issued judgment reviewing the Amnesty Law that implements the Peace Accord, it would strike down as unconstitutional both the use of the adjective “grave” to modify war crimes, as well as the definition of war crimes as violations of humanitarian law that were “committed systematically.”¹⁹⁸

3. *Limiting command responsibility*

The doctrine of command responsibility is one area where the ICC, as well as the ad hoc tribunals, have had several opportunities to develop the law, providing us with interpretations in particular cases. The Final Accord, however, seemed to try to loosen the hold of this precedent. The Accord as signed in September defined “effective control” —the standard needed to prove command responsibility for both FARC and military commanders— as:

The real possibility that the superior had to have exercised appropriate control over his subordinates, in relation with the execution of the criminal conduct, as indicated by Article 28 of the Rome Statute.¹⁹⁹

But the Final Accord omits the reference to the Rome Statute. In describing the burden of proof for effective control for the FARC, the reference is replaced by “as established in international law,”²⁰⁰ thus diluting the role of the Rome Statute and the ICC cases. Further, the entire sentence is omitted from the section on military responsibility.²⁰¹

197. Rome Statute, *supra* note 177, art. 8.

198. Colombian Constitutional Court, *Comunicado No. 8*, Mar. 1, 2018 at 3–4.

199. Acuerdo Final, *supra* note 58, arts. 44, 59 (translation by authors).

200. *Id.* art. 59.

201. *Id.* art. 44.

More broadly, while the section on the FARC's command responsibility self-consciously grounds itself in "International Humanitarian Law, International Human Rights Law and International Criminal Law," the section on the military's command responsibility commits to referring only to a treatment that is "special, simultaneous, balanced, equitable, and based on International Humanitarian Law." It thus singles out only humanitarian law. Then, it subjects humanitarian law to domestic law: "Said differentiated treatment will uphold what is established in the operational rules of the public force in relation to International Humanitarian Law."²⁰²

These changes to article 44 were introduced at the twelfth hour as the government sought to submit the Accord to the Congress. It is possible that this definition could allow some military commanders who would be deemed to have responsibility for war crimes under the ICC's reading of the Rome Statute to escape liability domestically. However, the difference is subtle, and it is too early to know how this will play out. Again, it is a resolution that defers judicial review to a later time.

Each of these three resolutions to contested accountability issues could lead to impunity for crimes covered by the Rome Statute and could thereby trigger an ICC investigation or a challenge before the Inter-American System. Yet, it is also possible that the government will implement them in such a way that they are fully and clearly compliant with the demands of international law. A third alternative is that the government will implement the Accord in a way that seizes on gray areas to push against and stretch international law, making it politically costly for the ICC to open its own investigation, and perhaps even for the Inter-American Court to find Colombia in breach of the American Convention. Another way to understand the Accord's resolutions is that the peace negotiators are playing with time. They are able to move the peace process forward, leaving the thorny details—and potential adverse court judgments—for later.

Interestingly, the OTP seems to be in agreement with this strategy. In writing about the Colombian peace talks, and in particular the question of alternative punishment, James Stewart, Deputy Prosecutor wrote that the OTP could not judge whether the alternative sentences satisfied the Rome Statute "Without knowing the details of the specific sanctions that are being contemplated . . . the Prosecutor will be obliged to take into consideration a series of factors in order to determine if the sanctions are compatible with the interest in bringing persons who have been convicted to justice."²⁰³

If this strategy ensures that the international courts will remain involved indefinitely, it is also a way to buy time for political change. As referenced above, Bensouda's statement on the peace accord has made it clear that the

202. A later constitutional amendment furthers this distinction, removing the military from the ambit of contemporary criminal law. See Urueña, *supra* note 187 (translation by authors).

203. Stewart, *supra* note 193, at 14 (translation by authors).

ICC's preliminary examination of the Colombian case will continue.²⁰⁴ So too, will the Colombian conflict and peace process continue to be of interest to the Inter-American System. But the delay in implementation means that any eventual judicial review would take place under a new political constellation.

Colombia's judicialized peace accord, then, both advances a new, less punitive understanding of transitional justice in international law, and dresses it in a procedural armor that the international courts will find hard to pierce for the time being. The result is a peace that is less punitive, more fluent in international law, more procedurally complex, and more focused on restorative justice.

V. WILL COLOMBIA'S PEACE CHANGE INTERNATIONAL LAW?

Throughout the peace negotiation, many had wondered whether the international courts would derail any possible peace accord or, alternatively, provide greater criminal accountability. But, the analysis has shown that judicialization was not just a top-down process by which international courts enforce pre-set constraints on peace-making states with blueprints for peace, which states then either follow or discard. Instead, judicialization took the form of a series of dialogues—between the courts and government; among different actors within the state, such as courts, executive agencies, and the prosecutors; and among non-state actors such as NGOs, the media, and the universities—that emphasized the international law and norms of criminal accountability.

Throughout this process, the Colombian government was able to construct, propose and find reception for a less punitive understanding of transitional justice. In other words, the Colombian government neither followed nor discarded a pre-made blueprint for accountability, but instead fashioned its own legally sophisticated solution in consultation with different sets of actors.²⁰⁵ The Final Accord stays within the bounds of reasonable if untried interpretations of the existing law and norms, but also, at times, seizes on the institutional limits of the international courts to defer their scrutiny. The argument here, however, is not only that that Colombian actors' growing fluency in international law allowed them to push back against ICC influence.²⁰⁶ It is also that the terms of Colombia's peace were produced *through*—not *despite*—the international courts' ongoing deliberative engagement with the peace process. Without the courts' participation and apparent acquiescence, the Final Accord would not enjoy the same level of international or domestic legitimacy, and it would not show the same level of legal

204. See *supra* note 88.

205. To use the concept forwarded by Christine Bell, the international courts enabled Colombia to participate in the construction of the *Lex Pacificatoria*. See BELL, *supra* note 21.

206. Urueña, *supra* note 39, at 104.

sophistication.²⁰⁷ In this sense, it is possible that time's passage does not diminish the impact of an ICC preliminary examination, as argued by Urueña, so much as it changes the kind of impact the court has. Domestic actors now anticipate the ICC and Inter-American Courts' responses, and shape their arguments and actions around them *ex ante*.

The Colombian case also sheds light on the role of international courts in legal globalization more generally. Halliday and Carruthers have argued that legal globalization processes are recursive and can be understood "as sets of cycles that integrate global norm making and national lawmaking."²⁰⁸ Specifically, they point to cycles of lawmaking and implementation at the national level, and, secondly, norm-making at the international level. But they also point, thirdly, to the cycle of "intersection of the two where national experiences influence global norm making and global norms constrain national lawmaking, in an asymmetric but mutual fashion."²⁰⁹ The judicialized Colombian peace process described above falls into this third category. Indeed, international courts seem to have been the main site for the intersection: it is primarily through the incidence of the courts that national peace-making processes were put in conversation with international law. Further, as a result of this intersection, the international courts seem to have changed and refined their own understanding of the norms they interpret. Both courts have been depicted by critics as unyielding, as too punitive, and as spoilers of peace and democracy. But their engagement with Colombia seems to have facilitated and hastened a change in the settled norms around transitional justice. Perhaps one significant effect of judicialization more generally, therefore, is to hasten the pace of development of transnational legal orders in response to national processes, and to narrow the gap between the two.²¹⁰

207. In this sense, our account differs from the trajectory of the Andean Tribunal of Justice (ATCJ). Karen Alter and Laurence Helfer argue that the ATJ issues narrow, legalistic rulings in order to ensure its survival in a complex political field. Here, the international courts are playing a more prominent role, even as they at time seem to defer to the state. *See generally* Karen J. Alter & Laurence Helfer, *TRANSPLANTING INTERNATIONAL COURTS: THE LAW AND POLITICS OF THE ANDEAN TRIBUNAL OF JUSTICE* (2017).

208. *See* Terence C. Halliday & Bruce G. Carruthers, *The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes*, 112(4) *AM. J. SOCIOLOGY* 1135, 1138 (2007).

209. *Id.*

210. *See* *TRANSNATIONAL LEGAL ORDERS* 504–06 (Terrence C. Halliday & Gregory Schaffer eds., 2007) (posing the different institutional forms that transnational legal orders have, and their effects, as a topic that should be further investigated).

The Colombian Integrated System of Truth, Justice, Reparation and Non-Repetition

Hector Olasolo* and Joel M.F. Ramirez Mendoza**

Abstract

The peace negotiations carried out between the government of Colombia and the Colombian Revolutionary Armed Forces-Popular Army (FARC) were finalized with the Final Agreement to End the Conflict and Establish a Stable and Long-lasting Peace, dated 24 November 2016. This Agreement is constituted by a complex set of documents consisting of six interconnected agreements on rural reform, political participation, ceasefire and disarmament, illicit drugs, victims and implementation mechanisms, all of which must be read together as an indissoluble whole. The Agreement sets up an Integrated System of Truth, Justice, Reparation and Non-Repetition, which establishes the following judicial and non-judicial mechanisms: (i) amnesty and pardon for FARC members and special treatment for state officials; (ii) a Truth Commission; (iii) a Special Jurisdiction for Peace; (iv) measures to provide comprehensive reparation for victims; and (v) other measures, including a Special Unit for Finding Missing Persons as well as non-repetition guarantees. None of these mechanisms can be assessed in isolation. Each element forms part of an

* Law Degree, University of Salamanca; LL.M. in Law, Columbia University; Ph.D. in Law, University of Salamanca. Prof. Olasolo holds the Chair in International Law at Universidad del Rosario, Bogotá, Colombia and is chairman of the Ibero-American Institute of The Hague for Peace, Human Rights and International Justice (The Netherlands) and director of the *Anuario Iberoamericano de Derecho Internacional Penal* (Ibero-American Yearbook of International Criminal Law). This article is part of two research projects funded by El Rosario University, Bogotá, Colombia. The first is entitled, 'The Role of International Judicial and Arbitration Bodies in the execution of an Eventual Peace Agreement in Colombia as a result of the Renegotiation brought forward by the Result of the Referendum of October 2, 2016' and the second, 'Principles of Harmonization between the Function and Scope of Justice and the Demands Arising in Transitional Processes' [hectorolasolo@gmail.com]

** Law Degree, University of Rosario (Colombia); LL.M. in Human Rights and Transitional Justice, Ulster University (Northern Ireland). [morismr@gmail.com]

attempt to provide a comprehensive response to victims of the armed conflict in Colombia. At the time that this system is beginning to be set in motion, this article primarily aims at describing its multiple elements and their links.

1. Introduction

The armed conflict in Colombia, spanning several decades, has involved numerous armed actors.¹ Armed forces and groups include the Colombian Armed Forces, the Colombian Revolutionary Armed Forces-Popular Army (FARC), the National Liberation Army (ELN) and a number of paramilitary groups.² To encourage the demobilization of these armed groups, various systems of transitional justice have been implemented over time in Colombia.³ Falling among these is the system of transitional justice laid down by Law Number 975 of 2005 on Justice and Peace (Justice and Peace Law), which applies to armed groups falling outside the law, defined as mainly, but not exclusively, paramilitary groups. The Justice and Peace Law, inter alia, governs judicial proceedings concerning: first, establishing truth, as complemented by the forum of the National Commission for Reparation and Reconciliation; second, the determination of civil and criminal responsibilities; and finally, reparation awarded to victims. Furthermore, the Justice and Peace Law provides for a special criminal procedure for demobilized individuals based on acknowledgment of responsibility. The Justice and Peace Law lays down a system of imprisonment penalties ranging from five to eight years, together with four additional years of parole, for those convicted individuals complying with its requirements.⁴ Subsequent decrees issued by the government of Colombia,⁵ and Law Number 1424 of 2010 on the criminal liability of low-level and mid-level members of paramilitary groups,⁶ introduced a significant administrative component into this system.⁷

1 See Comisión sobre la historia del conflicto y las víctimas, *Contribución al entendimiento del conflicto armado en Colombia*, February 2015, available online at <http://www.altocomisionadoparalapaz.gov.co/mesadeconversaciones/PDF/Informe%20Comisin%20Historica%20del%20Conflicto%20y%20sus%20Victimas.%20La%20Habana,%20Febrero%20de%202015.pdf> (visited 19 July 2017).

2 ICC OTP, *Situation in Colombia: Interim Report*, 12 November 2012, §§ 5–10 (hereinafter ‘ICC Interim Report’).

3 H. Olasolo, *Derecho Internacional Penal, Justicia Transicional y Delitos Transnacionales* (Tirant lo Blanch, 2017), at 285, 286.

4 The said requirements include, inter alia, acknowledgment of responsibility, asking for forgiveness to victims, identification and demobilization of child soldiers recruited by the relevant armed group, cooperation with justice and handing over goods for the purposes of reparation for the victims. See Arts 10, 11, 29 Law No. 975 (2005) (hereinafter ‘Justice and Peace Law’).

5 See Decrees Nos 690 (2006), 315 (2008), 1290 (2008), 3570 (2007), 3011 (2013).

6 Law No. 1424 (2010).

7 In turn, Law No. 1448 (2011) establishes an administrative programme of reparation and a land restitution programme with administrative and judicial components, which is not *stricto sensu* part of the transitional justice system on justice and peace. Nevertheless, the application of Law No. 1448 (2011) and the case law that it generated highlighted several overlapping areas within this system, which were subsequently regulated by Law No. 1592 (2012) and Decree No. 3011 (2013).

A second system for transitional justice was established in Colombia by the so-called 'Legal Framework for Peace', approved by Legislative Act Number 01 of 2012 (Legislative Act 01), which amended the Constitution of Colombia to introduce Transitory Article 66 and Transitory Article 67.⁸ This second system applies to both state officials and members of armed groups falling outside the law. It provides for a comprehensive strategy on transitional justice, which held an essentially administrative nature with limited judicial involvement. The core elements of this second system are outlined as follows. It creates a truth commission as well as an administrative reparation regime. In addition, the system establishes a set of criteria for the selection of cases, which empowered Congress to prevent the Attorney-General from prosecuting individuals who cannot be classified as the most responsible for 'grave' acts of genocide, crimes against humanity and war crimes 'committed in a systematic manner'. Legislative Act 01 sets up a system of alternative penalties to imprisonment, which do not carry a specified length. In addition, a special regime for the enforcement of penalties initially provided for the suspension of penalties until the Constitutional Court declared this option as unconstitutional.⁹ Finally, Legislative Act 01 lays down a system of non-judicial sanctions for those cases that have not been selected for prosecution.¹⁰ Despite forming part of the Constitution of Colombia,¹¹ this second system is yet to be implemented due to rejection by the FARC given their lack of involvement in the negotiation process.¹²

In light of this situation, and considering that the FARC also rejected the application of the transitional justice system established under Law 975 due to alleged harshness of its alternative penalties,¹³ the Final Agreement to End the Conflict and Establish a Stable and Long-lasting Peace (Agreement), dated 24 November 2016, was signed by the government and the FARC.¹⁴ The Agreement provides for a third system of transitional justice, entitled the 'Integrated System of Truth, Justice, Reparation and Non-Repetition' (Integrated System).¹⁵

The Integrated System is a mixed transitional justice system. It combines the creation of the Special Jurisdiction for Peace, with the establishment of a number of administrative institutions and measures, including a Truth

8 Legislative Act No. 01 (2012).

9 Constitutional Court, Judgment (C-579/13), 28 August 2013.

10 Transitory Art. 66 Legislative Act No. 01 (2012).

11 Transitory Art. 67 Constitution of Colombia on offences which cannot be related to crimes of a political nature was recently derogated by Legislative Act No. 01 (2017). Nevertheless, Transitory Art. 66 Constitution of Colombia, which contains the bulk of the regulation introduced by the Legal Framework for Peace, remains applicable.

12 'Las FARC rechazan el Marco Jurídico para la Paz', *Semana*, 6 August 2013.

13 'Ley de Justicia y Paz para las Farc, un camino inviable', *El Espectador*, 6 October 2016.

14 Government of Colombia and FARC, *Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera*, signed on 24 November 2016, available online at <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf> (visited 19 July 2017) (hereinafter 'Agreement'). At present, this Agreement has not officially been translated into the English language. Translations of excerpts from the text of the Agreement are the authors' own.

15 *Ibid.*, at 8, 127.

Commission, Special Unit for Finding Missing Persons and a set of measures designed to provide reparation for victims.¹⁶ The Integrated System lays down a regime of alternative penalties to imprisonment, including mandatory community work and restrictions prohibiting movement outside a specified geographical area for a period of time between five to eight years. Furthermore, while serving alternative penalties, convicted individuals are not prevented from carrying out political activities or being members of representative bodies, including Congress or the Senate.¹⁷ In contrast to previous systems of transitional justice, the Integrated System excludes the penalty of imprisonment for convicted individuals complying with the requirements laid down by the Agreement, including those determined as the most responsible for genocide, crimes against humanity and war crimes.¹⁸

This article analyses the different judicial and non-judicial mechanisms of the Integrated System and holds the understanding that these elements constitute one system, which in turn, is part of an Agreement composed of six interconnected agreements that must be examined as an indissoluble whole.¹⁹ On account of the complexity of the Agreement and Integrated System, this article does not provide a detailed assessment of the strengths and weaknesses of each of the mechanisms. On the contrary, at the time that the implementation of the Integrated System is beginning, this article aims primarily at describing its multiple elements and their close links.

To facilitate understanding of the Integrated System, relevant comparisons are drawn to systems of transitional justice implemented in East Timor, Peru, Sierra Leone and South Africa as they contain elements resembling those of the Integrated System. References are also made to the Statute of the International Criminal Court (ICC). Specific provisions of the ICC Statute may impose certain limitations on the application of certain mechanisms, such as the system of alternative penalties.

2. Negotiation Process and the Structure of the Agreement

The Agreement is the result of a negotiation process between the government of Colombia and the FARC spanning five years. Several countries were involved in this process, with Cuba and Norway playing leading roles as mediators,²⁰

16 *Ibid.*, at 129, 130.

17 *Ibid.*, at 164, 165, 172, 173, 174.

18 *Ibid.*, at 164, 165, 172, 173, 174. The said requirements will be discussed below when analysing the Chamber on the Acceptance of Truth and Responsibility and Establishment of Facts of the Special Jurisdiction for Peace. See also J. Loyo Cabezudo, 'La justicia transicional en Colombia: 'Un instrumento creado para erradicar la impunidad?' 5 *Anuario Iberoamericano de Derecho Internacional Penal* (2017) 32–61, at 43–45.

19 *Ibid.*, at 6.

20 'Primer informe conjunto de la mesa de conversaciones entre el Gobierno de la república de Colombia y las Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo,

Chile and Venezuela subsequently joining as second chairs.²¹ In addition, in 2015, the United States appointed a special representative for negotiations.²²

A first version of the Agreement was signed by the parties on 26 September 2016.²³ This version underwent a national vote in the referendum held on 2 October 2016. Coming as an unexpected development, 50.2 percent of Colombian voters rejected its contents.²⁴ Standing out from the enunciated reasons for this rejection was the perceived impunity created by the system of alternative penalties for FARC leaders.²⁵

In view of the situation of legal uncertainty generated by the result of the referendum, the government summoned the main political forces that rejected the first version of the Agreement to obtain their feedback and, to the extent possible, amend its contents.²⁶ Consultations between so-called 'no-supporters' and the government, on the one hand, and the government and the FARC, on the other hand, were held for a month.²⁷ These consultations resulted in the signing of the Agreement on 24 November 2016.

However, despite these consultations and the resulting amendments to the Agreement, the majority of 'no-supporters' continued to reject its provisions on the basis that their main concerns were not addressed.²⁸ As a result, the government decided to rely on its parliamentary majority to obtain approval by Congress of the Agreement.²⁹ In light of this decision, members of the main opposition party in Congress, the so-called 'Democratic Centre', displayed their dissent by leaving Congress before the last vote was held on 30 November 2016.³⁰

On 13 December 2016, the Constitutional Court issued a statement declaring that the implementing legislation for the Agreement could be approved through a fast track procedure, which had been settled between the government and the FARC on presidential decrees, laws and legislation amending the

FARC.-EP', *Mesa de Conversaciones*, 21 June 2013, at 12; 'El rol que cumplieron los países garantes y acompañantes en el proceso de paz', *Caracol Radio*, 24 August 2016.

21 *Ibid.*

22 'EE. UU. nombra enviado especial para el proceso de paz', *El Tiempo*, 20 February 2015.

23 Government of Colombia and FARC, *Acuerdo Final para la Terminación del Conflicto de una Paz Estable y Duradera*, signed on 26 September 2016 (hereinafter 'First Version Agreement'). The first draft of the Agreement is available online at <http://www.urnadecristal.gov.co/sites/default/files/acuerdo-final-habana.pdf> (visited 19 July 2017).

24 Colombia, 'Registraduría Nacional del Estado Civil, Boletín Nacional 53', 2 October 2016, available online at <http://plebiscito.registraduria.gov.co/99PL/DPLZZZZZZZZZZZZZZZZZZL1.htm> (visited 19 July 2017).

25 First Version Agreement, at 147, 148. See also, BBC News, 'Colombia Referendum: Voters reject Farc Peace Deal', 3 October 2016.

26 'Colombia: gobierno y oposición designan a representantes para dialogar tras el "No" del plebiscito sobre acuerdo de paz con las FARC', *BBC Mundo*, 3 October 2016.

27 Mesa de Conversaciones, *Joint Communiqué No. 3*, 28 October 2016.

28 'El uribismo, insatisfecho con la "reforma cosmética" de Santos', *La Razón*, 15 November 2016.

29 'Congreso es legítimo para refrendar acuerdo de paz: Gobierno', *El Espectador*, 29 November 2016.

30 'Vía libre a la implementación: Congreso refrendó nuevo acuerdo de paz con FARC', *Noticias Caracol*, 1 December 2016; 'Colombian peace deal passed by Congress, ending 52-year war', *Reuters*, 30 November 2016.

Constitution.³¹ This procedure limits debate of proposals before Congress to a bare minimum. Two weeks later, following this fast track procedure, Law Number 1820 of 2016 (Law 1820) on amnesty, pardon and special treatment was approved.³² Subsequently, on 4 April 2017, the same procedure was used for the approval of Legislative Act 01 governing several mechanisms under the Integrated System, including the Truth Commission, Special Unit for Finding Missing Persons, the Special Jurisdiction for Peace, and measures concerning reparation for victims.³³

The Agreement, which entered into force after its approval by Congress on 30 November 2016, is complex. It has over 300 pages and contains six interconnected agreements.³⁴ The first constitutive agreement, entitled ‘Towards a New Colombian Countryside: Comprehensive Rural Reform’, aims at ‘the structural transformation of rural areas in order to close the gap with urban areas, eradicate poverty, promote equality and improve living conditions for the rural population’.³⁵ The second constitutive agreement is entitled ‘Political Participation: Democratic Openness to Build Peace’,³⁶ and holds that the abandonment of violence as a way of political action by the FARC would contribute to establishing a democratic setting with broader political participation and full guarantees for those participating in politics.³⁷ A democratic setting is essential for peace-building as it ‘allows new forces to emerge on the political scene to enrich the debate on the main national problems’ and ‘strengthens pluralism and political inclusion, ensuring the representation of the different visions and interests that coexist in society’.³⁸

The third constitutive agreement, entitled the ‘End of the Conflict’, is divided into four parts.³⁹ The first part concerns the definitive termination of hostilities between the government and the FARC by addressing the ceasefire, bilateral truce, and also, disarmament procedures.⁴⁰ The second part deals with return to civilian life by members of the FARC. The underlying assumption is that in order to build an enduring peace in Colombia, FARC members must make an effective return to Colombian society and participate in its social, economic and political dimensions.⁴¹ This also shows ‘FARC’s commitment to: (i)

31 Constitutional Court, *Communiqué No. 52*, 13 December 2016.

32 Law No. 1820 (2016).

33 Legislative Act No. 01 (2017). The Constitutional Court, on 17 May 2017, after the replacement of selected members, issued a new statement requesting the establishment of a fast track procedure to provide for a wider debate of future governmental proposals in Congress. See Constitutional Court, *Communiqué No. 28*, 17 May 2017, at 4–9.

34 Agreement, at 6.

35 *Ibid.*, at 7, 10ff. The title of the first agreement is *Hacia un Nuevo Campo Colombiano: Reforma Rural Integral*.

36 *Ibid.*, at 7, 35ff. The title of the second agreement is *Participación Política: Apertura Democrática para Construir la Paz*.

37 *Ibid.*, at 7.

38 *Ibid.*, at 7.

39 *Ibid.*, at 7, 57ff. The title of the third agreement is *Fin del Conflicto*.

40 *Ibid.*, at 7, 57ff.

41 *Ibid.*, at 8, 68ff.

end the internal armed conflict; (ii) become a legitimate democratic actor; and (iii) contribute decisively to the consolidation of peaceful coexistence and the transformation of the socio-economic and political conditions that brought about long-lasting violence'.⁴² The third part creates an obligation on FARC commanders to found a political party.⁴³ Finally, the fourth part emphasizes the struggle to eliminate those criminal organizations designated as successors of paramilitary groups and the prosecution of criminal conduct that threatens the implementation of the Agreement and efforts towards peace-building.⁴⁴ To this end, numerous measures are established, including '(i) a national political alliance; (ii) a national commission for security safeguards; (iii) a special investigation unit; (iv) a national police elite unit; (v) a comprehensive system of security for political participation; (vi) a comprehensive programme on security and protection for communities and organizations in the territories (where they are located); and (vii) measures on prevention and the fight against corruption'.⁴⁵

The fourth constitutive agreement is entitled 'Solution to the Illicit Drugs Problem' and creates various measures designed to address 'drugs consumption, illicit use of crops and organized crime associated with drug trafficking'.⁴⁶ The sixth constitutive agreement, entitled 'Mechanisms for Implementation and Verification', creates a 'Commission to follow-up, promote and verify the implementation of the final agreement', which is composed of representatives of the government and the FARC.⁴⁷ This Commission holds the competence to settle differences over the implementation of the Agreement.⁴⁸ In addition, a monitoring mechanism has been set up to ensure that the international community — in particular, those states involved in the negotiation process since its early stages — are able to verify and foster the implementation of the Agreement.⁴⁹

Closely connected with the above-mentioned agreements, the fifth agreement, known as the 'Agreement on Victims',⁵⁰ lays down the goals of the Integrated System with respect to victims and Colombian society as a whole. These objectives are as follows. First, the fulfilment of victim rights through judicial and non-judicial mechanisms. Second, accountability for individuals who directly or indirectly participated in the armed conflict and committed gross human rights violations or grave breaches of international humanitarian law. Third, guaranteeing the non-repetition of violence by preventing

42 *Ibid.*, at 8, 77.

43 *Ibid.*, at 8.

44 *Ibid.*, at 8, 77ff.

45 *Ibid.*, at 8.

46 *Ibid.*, at 8 and 98ff. The title of the fourth agreement is *Solución al Problema de las Drogas Ilícitas*.

47 *Ibid.*, at 9, 193ff. The title of the sixth agreement is *Implementación, Verificación y Refrendación*.

48 *Ibid.*, at 10.

49 *Ibid.*, at 10.

50 *Ibid.*, at 8, 124ff. The title of the fifth agreement is *Acuerdo sobre las Víctimas del Conflicto: 'Sistema Integral de Verdad, Justicia, Reparación y No Repetición', incluyendo la Jurisdicción Especial para la Paz; y Compromiso sobre Derechos Humanos*.

re-victimization, promoting the rejection by society of armed conflict and its effects, consolidating the end of the armed conflict as well as prevention of new forms of violence. Fourth, the adoption of a territorial, group-based and gender-based approach by treating territories, vulnerable groups and populations as well as women according to their needs and in light of the specific ways in which violence has affected them. Fifth, guaranteeing legal certainty for those individuals who directly or indirectly participated in the armed conflict. The guarantee of legal certainty, however, carries the prerequisite of compliance with the conditions laid down by the Integrated System, in particular, those falling under the Special Jurisdiction for Peace. Sixth, strengthening co-existence and reconciliation by building trust on the basis of those positive transformations in Colombian society generated by the Agreement and the opportunity to build a better future based on social justice, respect and tolerance. Finally, achieving legitimacy through fulfilment of victims' and Colombian society's expectations as well as compliance with those obligations held by Colombia at both the national and international levels.⁵¹

To achieve these goals, the Integrated System provides for the following judicial and non-judicial mechanisms. First, amnesty and pardon for FARC members and special treatment for state officials. Second, the establishment of the Commission for the Identification of Truth, Coexistence and Non-Repetition as well as the Special Jurisdiction for Peace. In addition, measures designed to provide comprehensive reparation for victims and other measures have been established, including the Special Unit for Finding Missing Persons and non-repetition guarantees.⁵² Finally, other judicial mechanisms in the Attorney-General's Office have been created by the Agreement on Victims, which do not *stricto sensu* form part of the Integrated System.⁵³ In particular, the Special Unit for the Investigation and Dismantling of Criminal Organizations deals with those organizations and their support networks continuing the activities of former paramilitary groups.

The multiple mechanisms of the Integrated System cannot be assessed in isolation. The elements detailed above form part of one transitional justice system, which seeks to provide a comprehensive response to victims.⁵⁴ As a result of this interconnection, according to the Agreement, a number of conditions on disclosure of truth and acceptance of responsibility must be met prior to accessing amnesty, pardon or special treatment under the Integrated System.⁵⁵ The Special Jurisdiction for Peace verifies compliance with such conditions.⁵⁶ Furthermore, no mechanism can override another one. Hence, each mechanism must fulfil its own functions in the most effective manner,

51 *Ibid.*, at 128, 129.

52 *Ibid.*, at 129, 130.

53 *Ibid.*, at 127.

54 *Ibid.*, at 130.

55 *Ibid.*, at 130.

56 *Ibid.*, at 130.

avoiding duplications with other mechanisms and setting up cooperation protocols.⁵⁷

3. The Law on Amnesty, Pardon and Special Treatment

Law 1820, passed on 30 December 2016, contains provisions on amnesty, pardon and special treatment in furtherance of the Agreement. The temporal scope of application covers crimes committed prior to the entry into force of the Agreement on 30 November 2016.⁵⁸ Nevertheless, a precise starting date for the jurisdiction of this Law has not been laid down due to differing interpretations over the date of commencement of the armed conflict.⁵⁹

The territorial scope of application of Law 1820 is not explicitly limited to crimes committed inside the territory of Colombia. Analogous to the 1995 Promotion of National Unity and Reconciliation Amendment Act (Promotion of National Unity Act) in South Africa, crimes committed outside Colombian territory may also be covered as long as there is a link to the armed conflict.⁶⁰

With respect to the personal scope of application, Law 1820 applies to three main groups. First, members and collaborators of the FARC — and those accused of being so — with the preconditions that these individuals have demobilized and surrendered their weapons, or are in prison, and that they have expressed, in writing, their commitment against using weapons to attack the existing constitutional and legal order.⁶¹ According to Law 1820, this first group includes three categories. First, individuals that have been convicted, or against whom there is a judicial order to investigate or prosecute, on the basis of their membership or collaboration with the FARC. Second, those individuals listed as FARC members in a register delivered by the FARC to the government after the demobilization process. Third, individuals convicted for political offences or related crimes and whose membership in, or collaboration with, the FARC can be inferred from final judgments, interlocutory decisions or evidence introduced in criminal or disciplinary proceedings.⁶² The second group concerns individuals convicted for crimes related to political

⁵⁷ *Ibid.*, at 130.

⁵⁸ *Ibid.*, at 144.

⁵⁹ See Comisión sobre la Historia del Conflicto Armado y las Víctimas, *supra* note 1. While some commentators argue the conflict commenced as early as the 1930s, the other extreme is as late as the 1980s. The middle ground places the start of the conflict within the late 1940s or early 1960s.

⁶⁰ The South African amnesty law did not establish any limitation to its territorial scope of application. As a result, amnesty was granted for crimes committed outside South African territory, such as the killing of Albert Sachs in Maputo, Mozambique, by South African Special Forces in 1988. See South Africa, Promotion of National Unity and Reconciliation Act No. 34 (1995) (hereinafter 'Promotion of National Unity and Reconciliation Act'). See also A. Sachs, *Soft Vengeance of a Freedom Fighter* (University of California Press, 2000), at 227, 228.

⁶¹ Art. 18 Law No. 1820 (2016).

⁶² Arts 17, 22 Law No. 1820 (2016).

offences in the context of illegal social protests or public disturbances.⁶³ Finally, the third group consists of state officials who have been convicted, prosecuted or identified as responsible for crimes committed in direct or indirect relation to the armed conflict.⁶⁴ Akin to the South African Promotion of National Unity Act, Law 1820 does not limit its personal scope of application to Colombian nationals.⁶⁵

Law 1820 does not specifically mention third parties responsible for indirect participation in the armed conflict, notably individuals who unlawfully supported the military efforts of the government of Colombia. Nevertheless, Article 29 of Law 1820 makes general reference to the Agreement. In addition, the Agreement and Legislative Act Number 01 of 2017 specifically mention this fourth group of individuals.⁶⁶ There is an ongoing debate whether legal persons, particularly companies, could be included within the definition of responsible third parties. The Attorney-General has denied this possibility.⁶⁷ However, this position is not binding on the Special Jurisdiction for Peace. The Agreement and Legislative Act 01 do not contain an explicit limitation to natural persons in defining responsible third parties.⁶⁸ It follows that this issue requires clarification in the forthcoming Law on the Special Jurisdiction for Peace or resulting jurisprudence.

The material scope of Law 1820 is complex. In relation to FARC members and collaborators, the Special Jurisdiction for Peace covers the following categories of crimes. The first category concerns so-called ‘political offences’, composed of conduct aimed at harming the Colombian state and constitutional order without gaining any economic profit.⁶⁹ This category includes the crimes under Colombian law of rebellion, sedition, rioting, conspiracy, usurpation and illegal retention of command.⁷⁰ The second category concerns crimes considered by Law 1820 as related, by definition, to a political offence.⁷¹ Finally,

63 Art. 24 Law No. 1820 (2016).

64 Art. 45 Law No. 1820 (2016).

65 The South African amnesty law did not establish any limitation to its personal and territorial scope of application. As a result, not only supporters of the Apartheid regime were granted amnesty. See Promotion of National Unity and Reconciliation Act.

66 See Agreement, at 149; Transitory Art. 16 Legislative Act No. 4 (2017).

67 ‘La Fiscalía Aclara Situación de Empresas que Hayan Financiado Grupos Ilegales’, *Semana*, 2 September 2016.

68 Agreement, at 149. See also Transitory Art. 16 Legislative Act No. 4 (2017).

69 Art. 8 Law No. 1820 (2016).

70 Art. 15 Law No. 1820 (2016).

71 Art. 16 Law No. 1820 (2016) considers the following crimes as related to political offences: seizure of aircrafts, ships or means of collective transportation without kidnapping; coercion to commit a crime; interference with communications; solicitation, sale or purchase of instruments capable of wiretapping private communications; interception of official correspondence; illicit use of communications; infringement on the freedom to work; outrage and calumny; indirect outrage and calumny; damage to the private property; forgery; forgery of official documents; use of forged documents; conspiracy; illegal use of uniforms and insignias; threats; instigation to commit a crime; poisoning; public transportation disturbances; manufacturing and possession of dangerous objects and substances; illegal possession of weapons and ammunition; manufacturing and possession of restricted weapons or explosives; coercion of political

there are other crimes that, depending on the specific circumstances of the case, may also be related to a political offence. This last group of crimes is only covered by Law 1820 when one of the following three conditions is met: first, the crime was specifically linked to the development of the uprising and was committed during the armed conflict; second, the crime harmed the state or constitutional regime of Colombia; and finally, the crime was intended to facilitate, support, finance or conceal the uprising.⁷² With respect to those accused convicted for crimes related to political offences committed in the context of illegal social protests or public disturbances,⁷³ Law 1820 would apply where one of the three aforementioned conditions is met.⁷⁴

Finally, with respect to the prosecution of state officials, Law 1820 applies to those crimes committed with a direct or indirect connection to the armed conflict.⁷⁵ Certain conditions must be fulfilled for Law 1820 to cover state officials. First, the conflict caused the crime or played a substantial role in the accused's decision to commit the crime, his or her capacity to carry it out or the manner under which the crime was committed. Second, the armed conflict represented a substantial factor underpinning the objective of the crime.⁷⁶ Finally, offences under the Colombian Military Code that harm the service, discipline, interest, honour or security of the Armed Forces are excluded from Law 1820's material scope of application over crimes committed by state officials.⁷⁷

Law 1820 lists two categories of crimes for which amnesty, pardon or special treatment are rejected. First, 'ordinary crimes' which do not have the required link to political offences committed by FARC members/collaborators or the armed conflict. Second, gross human rights violations or grave breaches of international humanitarian law amounting to genocide, crimes against humanity, serious war crimes — defined as systematic breaches of humanitarian law — kidnapping or other severe deprivations of physical liberty, torture, extrajudicial executions, enforced disappearance of persons, rape and other forms of sexual violence, abduction of minors, forcible displacement and the recruitment of children.⁷⁸ Unlike the South African Promotion of National Unity

activities; bribery; false registration of information; vote rigging; threat to injure public officials; flight; and espionage.

72 Art. 23 Law No. 1820 (2016).

73 According to Law No. 599 (2000), Decree No. 100 (1980) and Law No. 95 (1936), the following crimes may take place during illicit public protests or public disturbances: inflicting grievous bodily harm leading to less than thirty days of incapacitation; causing harm to private property; disturbing public transportation; obstructing public roads; firearms shooting; using dangerous weapons; injuring public officials; uprising; and disturbing official acts. See Art. 34 Law No. 1820 (2016). As the conflict predates 2000 and Law No. 1820 (2016) makes no explicit reference to Law No. 599 (2000), it appears that Law No. 1820 (2016) is also applicable to crimes committed under Decree No. 100 (1980) and Law No. 95 (1936).

74 Art. 45 Law No. 1820 (2016).

75 Art. 45 Law No. 1820 (2016).

76 Agreement, at 145.

77 Art. 46 No. Law 1820 (2016).

78 *Ibid.*, at 151. See also Arts 23, 30, 45 Law No. 1820 (2016).

Act,⁷⁹ the Agreement,⁸⁰ and Law 1820,⁸¹ highlight the role of international law and the ICC Statute in the prosecution of these crimes.

Law 1820 carries differential treatment for FARC members/collaborators and state officials. On the one hand, FARC members and collaborators are only able to access amnesty, while on the other, special treatment is solely applicable to state officials.⁸² Pardon is available to individuals convicted of crimes related to political offences carried out in the context of illegal social protests or public disturbances. Nevertheless, amnesty, pardon and special treatment equally entail the non-applicability of criminal and administrative liabilities. In addition, depending on the circumstances of the case, the state can waive initiating criminal proceedings or terminate ongoing proceedings, including the enforcement of sentences, against the accused. In the case of state officials, any waiver of criminal prosecution also includes the prohibition of opening new cases for relevant conduct and the elimination of any criminal record and labour, tax, disciplinary or administrative consequences.⁸³

There are, however, critical differences in the procedure for granting amnesty, pardon and special treatment. FARC members and collaborators are granted *de jure* amnesty for political offences as well as crimes considered by Law 1820 as linked to such offences.⁸⁴ Domestic judicial and administrative bodies, which carry out proceedings against a potential beneficiary of an amnesty, are competent to grant *de jure* amnesty *ex officio* or upon application once notification is received of the accused's disarmament and undertaking not to resort to violence again.⁸⁵

In turn, the Special Jurisdiction for Peace is competent to grant non-*de jure* amnesty for crimes whose connection to political offences depends on the specific circumstances of the case.⁸⁶ In addition, the Special Jurisdiction for Peace is able to grant pardon or special treatment under the personal scope of application of Law 1820.⁸⁷

Similar to the South African Promotion of National Unity Act,⁸⁸ Law 1820 requires that potential beneficiaries participate in proceedings of the Truth Commission or investigations made by the Special Unit for Finding Missing

79 The Promotion of National Unity and Reconciliation Act covered crimes under South African law committed in relation to a 'political goal' and between 1 March 1960 and 10 May 1994, including the crime of 'anti-apartheid propaganda', which could not constitute a crime in any democratic society. Art. 20 Promotion of National Unity and Reconciliation Act. See also A. du Bois-Pedain, *Transitional Amnesty in South Africa* (Cambridge University Press, 2007), at 19–21.

80 Agreement, at 143.

81 Art. 10 No. Law 1820 (2016).

82 Arts 17, 24, 44 No. Law 1820 (2016). See also Agreement, at 149.

83 Art. 48 Law No. 1820 (2016).

84 Art. 19 Law No. 1820 (2016).

85 Art. 19 Law No. 1820 (2016).

86 Art. 19 Law No. 1820 (2016). [*De jure* amnesties are those specifically provided for in Law 1820 for certain categories of crimes. Non-*de jure* Amnesties are those provided for other crimes which are connected to political offences in light of the specific circumstances of the case].

87 Arts 24, 29, 47 Law No. 1820 (2016).

88 Art. 38 Promotion of National Unity and Reconciliation Act.

Persons and provide full disclosure on crimes.⁸⁹ Otherwise, amnesty, pardon and special treatment cannot be granted or maintained under Law 1820.⁹⁰ Furthermore, amnesty, pardon and special treatment does not relieve the state from the obligation to provide reparation to victims pursuant to national and international law.⁹¹

4. The Special Jurisdiction for Peace

A. First Approach

The role of criminal prosecution in the transitional justice system in South Africa was to promote participation in the Truth and Reconciliation Commission by state officials, apartheid supporters and anti-apartheid activists.⁹² However, the Agreement takes a different approach, which draws upon the experience of criminal proceedings conducted since 2005 in the jurisdiction on justice and peace against demobilized members of paramilitary groups.⁹³ The Agreement fosters full disclosure and acceptance of liability for crimes amounting to gross human rights violations and grave breaches of humanitarian law, such as genocide, crimes against humanity and serious war crimes. In cases of denial of liability, the Agreement provides for investigation and prosecution of these crimes. For other crimes linked to the armed conflict,

89 Arts 13, 32 Law No. 1820 (2016). Agreement, at 147, 148, 151.

90 Agreement, at 147. Arts 12, 32 Law No. 1820 (2016).

91 Arts 41, 42 Law No. 1820 (2016). See also Law No. 1448 (2011), the Agreement, and Legislative Act No. 01 (2017).

92 After the Final Report, the main discussion of the South African Truth and Reconciliation Commission concerned the investigation and prosecution of those who did not participate or who were not granted amnesty. Indeed, Desmond Tutu argued in his speech at the presentation of the Final Report in 1999, that it was necessary to establish an appropriate prosecution policy to ensure the credibility of the South African transitional process after the Commission. See, du Bois Pedain, *supra* note 79, at 54. Moreover, the Truth and Reconciliation Commission recommended the investigation and prosecution by the South African Prosecution Service of gross violations of human rights for which amnesty was not granted or sought. As the Truth and Reconciliation Commission stated: 'Attorneys-general must pay rigorous attention to the prosecution of members of the South African Police Service, who are found to have assaulted, tortured and/or killed persons in their care. To avoid a culture of impunity and to entrench the rule of law, the granting of general amnesty in whatever guise should be resisted'. See Truth and Reconciliation Commission, *Report*, Vol. 5, at 309, available online at <http://www.justice.gov.za/Trc/report/index.htm> (visited 19 July 2017) (hereinafter 'Truth Commission Report'). Nevertheless, with the exception of former Minister of Law and Order, Adriaan Vlok, who was convicted with other four individuals after entering a plea agreement in 2007 for the attempted murder of Reverend Frank Chikane, the post-Truth and Reconciliation Commission prosecution system has not been efficient. See V. Nerlich, 'The Contribution of Criminal Justice', in F. Du Bois, A. Du Bois-Pedain (eds), *Justice and Reconciliation in Post-Apartheid South Africa* (Cambridge University Press) 114. See also du Bois-Pedain, *supra* note 79, at 36, 59.

93 For an analysis on the results of the application of the Justice and Peace Law, See, ICC Interim Report, §§ 11ff, and at 48, 130, 162ff.

the Agreement grants amnesty, pardon and special treatment. Finally, the Agreement creates a Special Jurisdiction for Peace. This jurisdiction receives full disclosure and acceptance of liability by accused, conducts criminal investigations and prosecutions and is competent to grant non-*de jure* amnesty, pardon and special treatment.⁹⁴

The Agreement and Legislative Act 01 address some gaps identified in the previous transitional justice system on justice and peace. For instance, during hearings before the jurisdiction on justice and peace, some demobilized paramilitary leaders were extradited for drug offences to the United States. As a consequence, proceedings were suspended. Resumption of hearings via video link with the United States occurred only after a cooperation agreement was signed with the US government.⁹⁵ Subsequently, some of these paramilitary leaders were released and granted immigration permits to stay in the United States.⁹⁶ To date, Colombia has been unable to facilitate their return from the United States. To avoid similar situations, the Agreement,⁹⁷ and Legislative Act 01,⁹⁸ prohibit extradition requests with respect to crimes falling under the Special Jurisdiction for Peace.

However, lessons learned from the experience of the transitional justice system on justice and peace have not been systematically taken into consideration. Difficulties were experienced in accessing public documents in the jurisdiction on justice and peace as victims' names were contained therein, including testimonies of demobilized members of paramilitary groups.⁹⁹ Neither Colombian law nor the legislation establishing the jurisdiction on justice and peace established a system of redactions. As a result, it was only victims, individuals granted special authorization from victims and parties to the proceedings who could access to such documents.¹⁰⁰ The Agreement and Legislative Act 01 fail to ensure public access to information generated by the Special Jurisdiction for Peace through redaction of documents. The forthcoming Law and Rules of Procedure and Evidence should address this critical issue.

B. Jurisdictional Reach, Nature and Structure

The material jurisdiction of the Special Jurisdiction for Peace covers two main groups of crimes. First, those crimes for which special treatment and non-*de jure* amnesty and pardon can be granted according to Law 1820. Second,

94 Agreement, at 128, 129, 148–152, 157, 159.

95 See, the film entitled 'Impunity', Icarus Films 2010, at 1:06:20, available online at <https://vimeo.com/56608567> (visited 19 July 2017).

96 D. Sontag, 'The Secret History of Colombia's Paramilitaries and the U.S. War on Drugs', *New York Times*, 10 September 2016. See also O. Sheldon, *Former Drug Lord Avoids Deportation Back to Colombia*, Colombia Reports, 14 May 2014.

97 Agreement, at 170.

98 Transitory Art. 19 Legislative Act No. 4 (2017).

99 C. Navarro Susino et al., *Participación de las Víctimas en el Proceso de Justicia y Paz* (Ideaborn/GIZ GmbH, 2013).

100 'Qué pasa con los archivos de Justicia y Paz?' *Verdad Abierta*, 14 January 2017.

crimes amounting to gross human rights violations and grave breaches of international humanitarian law,¹⁰¹ committed occasionally, on account of, or in direct or indirect relation to, the armed conflict.¹⁰²

The temporal and territorial jurisdiction of the Special Jurisdiction for Peace applies to crimes committed prior to 30 November 2016 within or outside the country. Moreover, in the absence of an explicit start date of the temporal jurisdiction — and taking into account the different views presented in the Report issued by the Commission on the History of the Conflict and Victims on when armed conflict commenced — ¹⁰³ this issue must be clarified by the forthcoming Law, the Rules of Procedure and Evidence and resulting case law under the Special Jurisdiction for Peace.

Personal jurisdiction distinguishes between accused eligible to benefit from amnesty, pardon and special treatment under Law 1820, on the one hand, and those liable for gross human rights violations and grave breaches of international humanitarian law, on the other. The second group is broader. In addition to FARC members/collaborators and state officials, this group includes individuals incurring criminal liability resulting from direct or indirect participation in the armed conflict.¹⁰⁴ This could include demobilized members of paramilitary and other groups falling outside the law, including FARC members, currently involved in proceedings before the jurisdiction on justice and peace. As a result, there may be overlap in these two jurisdictions regarding such individuals. Potential jurisdictional overlaps are not addressed by the Agreement.

This scenario is foreseen by Transitory Article 6 of Legislative Act 01 and Article 63 of the Justice and Peace Law. According to Article 6, the Special Jurisdiction for Peace holds exclusive jurisdiction over occasional crimes due to, or in direct or indirect relation with, the armed conflict. This provision may encompass those crimes falling under the jurisdiction on justice and peace. In turn, Article 63 establishes that '[i]f, after the promulgation of this law, other laws are passed that grant members of armed groups outside the law more favourable benefits than those established in this law, persons who have been subject to the alternative mechanism, will be able to avail themselves of the conditions established in those subsequent laws'. The forthcoming Law, the Rules of Procedure and Evidence and resulting case law under the

101 As seen above, according to Agreement, at 147, 151, and Arts 23, 30, 45 Law No. 1820 (2016) this second group of crimes is composed of genocide, crimes against humanity, serious war crimes (understood as all systematic breaches of international humanitarian law), kidnapping or other severe deprivation of physical liberty, torture, extrajudicial executions, enforced disappearance of persons, rape and other forms of sexual violence, abduction of minors, forcible displacement and recruitment of children.

Agreement, at 145.

102 *Ibid.*, at 145.

103 While it is argued that the armed conflict started as early as in the 1930s, the contrary position holds that it commenced as late as the 1980s. Falling in between these two extremes, intermediate positions place the start of the armed conflict in the late 1940s or the early 1960s. See Commission on the History of the Conflict and the Victims, *supra* note 1.

104 Agreement, at 144, 149, 167.

Special Jurisdiction for Peace must develop principles and establish a detailed regulation addressing this potential overlap.

The Agreement and Legislative Act 01 do not establish a limitation on personal jurisdiction based on nationality for the Special Jurisdiction for Peace. Therefore, in principle, jurisdiction could be exercised in relation to non-Colombian nationals. In this context, whether Colombia could secure the presence of non-Colombian nationals residing outside Colombia remains an open question. Neither the Agreement nor Legislative Act 01 provide a remedial mechanism for challenges faced in the extradition process of alleged paramilitary trainer who is an Israeli national, Yair Klein. In this case, the European Court of Human Rights issued a non-extradition order on the basis ‘that the evidence before it demonstrates that problems still persist in Colombia in connection with the ill-treatment of detainees’.¹⁰⁵

There are two additional issues closely related to personal jurisdiction. First, the Special Jurisdiction for Peace can only exercise personal jurisdiction over heads of state with the consent of the Accusations Commission of Congress.¹⁰⁶ Over the previous 25 years, the Commission has only once permitted criminal proceedings against a high-level state official, namely former President of the Constitutional Court, Jorge Pretelt, in 2015.¹⁰⁷ It follows that the Special Jurisdiction for Peace may never exercise personal jurisdiction over any Colombian head of state.¹⁰⁸ Second, the Agreement and Legislative Act 01 contain restrictive definitions of superior responsibility in relation to state officials, which does not include any reference to Article 28 of the ICC Statute.¹⁰⁹ According to this definition, superiors, in addition to having effective control over their subordinates, must also have effective control over the specific criminal conduct of their subordinates. This requirement is characteristic of principal liability theories.¹¹⁰ As a result, and as highlighted by the Inter-American Commission on Human Rights,¹¹¹ it is unclear whether the Special Jurisdiction for Peace holds personal jurisdiction over a high-level state official removed from the scene of his or her subordinates’ crimes.¹¹²

The amendments introduced after the referendum held on 2 October 2016 raise questions over the internationalized nature of the Special Jurisdiction for Peace. According to the first version of the Agreement, the Special Jurisdiction for Peace represented an internationalized hybrid jurisdiction. Decisions taken by bodies of the Special Jurisdiction for Peace could not be

105 *Klein v. Russia*, Appl. No. 24268/08, ECtHR judgment of 1 April 2010, § 53. See also ‘Yair Klein no será extraditado a Colombia’, *Verdad Abierta*, 9 November 2010.

106 Agreement, at 149.

107 ‘Pretelt, suspendido de la Corte Constitucional’, *Semana*, 24 August 2016.

108 Olasolo, *supra* note 3, at 309.

109 Agreement, at 151, 152. The Agreement only makes reference to Art. 28 ICCSt., in relation to the application of superior responsibility to FARC commanders. See Agreement, at 162.

110 Agreement, at 152, 162. See also Transitory Art. 24 Legislative Act No. 01 (2017).

111 *El Espectador*, ‘CIDH tiene dudas sobre la Justicia para la Paz’, 21 March 2017.

112 See Olasolo, *supra* note 3, at 311, 312. See also ‘Human Rights Watch, preocupada por participación política y JEP’, *El Colombiano*, 18 July 2017.

reviewed by any Colombian high court.¹¹³ Chambers and relevant sections of the Tribunal for Peace of the Special Jurisdiction for Peace would have had a combination of national and international judges selected by a Selection Committee composed of five delegates appointed by the United Nations Secretary-General, the President of the European Court of Human Rights, the International Center for Transitional Justice, the Criminal Chamber of the Colombian Supreme Court and the Council of Colombian Public Universities.¹¹⁴

The final text of the Agreement does not contain any of these features. First, according to the Agreement and Legislative Act 01, the Constitutional Court is competent to take a final decision on any protection request (*acción de tutela*) filed with the Review Section of the Special Jurisdiction for Peace against any action or omission violating or threatening to violate fundamental rights by any of its bodies.¹¹⁵ In practice, the Constitutional Court deals with *tutela* requests under the *via de hecho* doctrine by remanding the case to the body which took the initial decision to rectify the breach of fundamental rights.¹¹⁶ In this regard, the review power given to the Constitutional Court in the Agreement and Legislative Act 01 forms relevant *indicium* in support of the domestic nature of the Special Jurisdiction for Peace. Second, judges of the Special Jurisdiction for Peace are Colombian and international jurists can appear only as *amicus curiae*.¹¹⁷ As a result, despite that some of its features remain characteristic of internationalized hybrid jurisdictions, such as the Selection Committee's mixed national and international composition,¹¹⁸ the Special Jurisdiction for Peace may no longer represent an internationalized hybrid jurisdiction.

Finally, the structure of the Special Jurisdiction for Peace is composed of the following bodies. There are three Chambers, namely: the Chamber for the Acceptance of Truth and Responsibility and Establishment of the Facts; the Chamber for Amnesty and Pardon; and the Chamber for the Definition of Legal Situations. In addition, a Tribunal for Peace has been established with four sections: the First Instance Section, addressing cases in which there is acceptance of facts and responsibility; the First Instance Section for cases in which there is no acceptance of facts and responsibility (the Trial Section); an Appeals Section; and a Review Section. Finally, there is an Investigation and

113 See Colombia, Oficina del Alto Comisionado para la Paz, *Notas sobre los Cambios, Ajustes y Precisiones del Nuevo Acuerdo Final para la Terminación del Conflicto y la Construcción de la Paz Estable y Duradera*, 13 November 2016, at 7, available online at <http://equipopazgobierno.presidencia.gov.co/Documents/NOTAS-SOBRE-LOS-CAMBIOS-AJUSTES-PRECISIONES-NUEVO-ACUERDO-FINAL.pdf> (visited 19 July 2017).

114 First Version Agreement, at 148, 170.

115 Agreement, at 160. See also Transitory Art. 8 Legislative Act No. 01 (2017).

116 M. Quinche Ramirez, *Vías de hecho: acción de tutela contra sentencias* (8th edn., Temis, 2013).

117 Agreement, at 167, 168, 191.

118 Agreement, at 168, 191. See International Center for Transitional Justice Press Release, 'ICTJ Names Human Rights Leader Juan E. Méndez to Colombia Justice Committee', 2 March 2017, available online at <https://www.ictj.org/news/ictj-human-rights-juan-m%C3%A9ndez-colombia-justice> (visited 19 July 2017).

Prosecution Unit and an Executive Secretariat.¹¹⁹ Chambers and sections of the Tribunal for Peace must carry out their functions within a time period of 15 years. However, according to the Agreement and Legislative Act 01, this period of time can be extended.¹²⁰ Requests issued by the prosecution for gross human rights violations and grave breaches of international humanitarian law must be filed with the Trial Section by the Investigation and Prosecution Unit within ten years.¹²¹

C. The Three Chambers of the Special Jurisdiction for Peace

1. The Chamber on the Acceptance of Truth and Responsibility and Establishment of Facts

Proceedings before the Special Jurisdiction for Peace commence at the Chamber for the Acceptance of Truth and Responsibility and Establishment of the Facts. As opposed to the application-based system of the South African Truth and Reconciliation Commission,¹²² this Chamber receives and requests *ex officio* information on the armed conflict from the Attorney-General's Office, the Accusations Commission of Congress, the *Procurador* General's Office and the General Inspector's Office.¹²³ The Chamber receives any judgment issued by ordinary and specialized jurisdictions addressing crimes related to the armed conflict, including the Colombian military jurisdiction and the jurisdiction on justice and peace. In addition, the Chamber receives any order issued by the latter in relation to criminal investigations conducted against non-demobilized members of paramilitary groups with respect to the criminal activities of such groups.¹²⁴ Victims and human rights organizations can also provide information on crimes linked to the armed conflict to this Chamber.¹²⁵

Upon the reception and organization of the information, the Chamber for the Acceptance of Truth and Responsibility and Establishment of the Facts provides the opportunity *ex officio* to individuals named therein to disclose the facts and accept responsibility;¹²⁶ or negate them and put forward a defence against the accusation.¹²⁷ Subsequently, the Chamber verifies whether the facts took place and the individuals concerned participated in the commission of the crimes. In addition, the Chamber checks whether the facts *prima facie*

119 Agreement, at 146, 152, 169.

120 *Ibid.*, at 145. See also Transitory Art. 15 Legislative Act No. 01 (2017).

121 *Ibid.*, at 145. See also Transitory Art. 15 Legislative Act No. 01 (2017).

122 See Promotion of National Unity and Reconciliation Act. Although the South African Truth and Reconciliation Commission also had investigative power, it rarely used them. See also du Bois-Pedain, *supra* note 79, at 181.

123 Agreement, at 154.

124 *Ibid.*, at 154.

125 *Ibid.*, at 154.

126 Although information concerning the crimes may be provided collectively, acknowledgment of liability must be made on an individual basis. Agreement, at 153.

127 Agreement, at 153.

amount to crimes for which amnesty, pardon or special treatment may be granted according to Law 1820.¹²⁸

After taking the above-mentioned steps, the Chamber may reach one of the following decisions. First, if amnesty, pardon or special treatment can be granted there are two options open to the Chamber: sending those cases concerning FARC members or collaborators to the Chamber on Amnesty and Pardon, and submitting those cases concerning state officials and others provided for by Law 1820 to the Chamber for the Definition of Legal Situations.¹²⁹ Second, in cases where amnesty, pardon or special treatment cannot be granted, but the alleged crimes are not within the jurisdiction of the Tribunal for Peace because they do not amount to gross human rights violations or graves breaches of humanitarian law, the Chamber would defer the proceedings to the Chamber for the Definition of Legal Situations.¹³⁰ Finally, in cases where the alleged crimes are within the jurisdiction of the Tribunal for Peace there are two options available. If the individual named in the information provided to the Chamber has accepted the facts and his/her responsibility, the Chamber may send the proceedings with a sanction proposal to the First Instance Section of the Tribunal for Peace addressing cases in which there is acceptance of facts and responsibility.¹³¹ In this scenario, the relevant First Instance Section publishes a resolution in which it sets out: (i) the facts accepted by the individual named in the information; (ii) the sanctions imposed upon him or her in previous criminal proceedings; and (iii) a new sanction proposal.¹³² If the individual named in the information has not accepted the facts and his or her responsibility, has not provided a full disclosure of the facts or the Chamber considers that the accepted facts did not actually take place, the Chamber may defer the proceedings to the Investigation and Prosecution Unit.¹³³

2. *The Chamber on Amnesty and Pardon*

The Chamber on Amnesty and Pardon is in charge of granting, under the conditions provided for in Law 1820: (i) non-*de jure* amnesty to FARC members and collaborators;¹³⁴ and (ii) pardon to those convicted of crimes carried out in the context of illegal social protests or public disturbances.¹³⁵

The Chamber starts its proceedings in four situations. First, upon request of the Chamber for the Acceptance of Truth and Responsibility and Establishment of the Facts with respect to amnesty cases for FARC members

128 *Ibid.*, at 154.

129 *Ibid.*, at 156.

130 *Ibid.*, at 156.

131 *Ibid.*, at 156.

132 *Ibid.*, at 156.

133 *Ibid.*, at 156.

134 Arts 17, 22, 23 Law No. 1820 (2016). See also, Agreement, at 157.

135 Art. 24 Law No. 1820 (2016). See also, Agreement, at 157.

and collaborators. Second, upon the request of the Chamber for the Definition of Legal Situations with respect to pardon cases for persons convicted of crimes committed in the context of illegal social protests or public disturbances. Third, *ex officio*, whenever the Chamber on Amnesty and Pardon is aware of individuals whom are being investigated, or have been convicted, for crimes for which amnesty or pardon can be granted according to Law 1820. Finally, upon application by those who are eligible to benefit from amnesty or pardon.¹³⁶ When the Chamber on Amnesty and Pardon finds that the relevant facts amount to a crime for which is not possible to grant amnesty or pardon under Law 1820, it sends the case to the Chamber for the Acceptance of Truth and Responsibility and Establishment of the Facts.¹³⁷

3. *The Chamber on the Definition of Legal Situations*

The main function of the Chamber on the Definition of Legal Situations is to decide any special treatment to be granted to state officials and others provided for in Law 1820. The Chamber is competent to commence its proceedings in three situations. First, upon the request of the Chamber for the Acceptance of Truth and Responsibility and Establishment of the Facts. Second, *ex officio*, whenever it becomes aware of individuals entitled to special treatment according to Law 1820. Finally, upon application by state officials and others that according to Law 1820 can benefit from special treatment.¹³⁸

Where special treatment is denied, the Chamber on the Definition of Legal Situations decides on the legal situation of the individual concerned, unless the alleged crimes fall within the jurisdiction of the Tribunal for Peace because they consist of gross human rights violations or grave breaches of international humanitarian law linked to the armed conflict. In this last scenario, the Chamber sends the case to the Chamber for the Acceptance of Truth and Responsibility and Establishment of the Facts.

The Chamber on the Definition of Legal Situations takes also a preliminary decision on whether those convicted of crimes committed in the context of illegal social protests or public disturbances can be granted pardon according to Law 1820. For this purpose, the Chamber may receive information from social organizations, trade unions, human rights organizations and other entities forming part of the Agrarian, Ethnic and Popular Summit.¹³⁹ If the decision of the Chamber is on the affirmative, it sends the case to the Chamber on Amnesty and Pardon. Otherwise, the Chamber decides on the legal situation of the individuals concerned.¹⁴⁰

The Chamber on the Definition of Legal Situations can establish criteria for the selection and prioritization of cases to avoid that serious and representative

136 Agreement, at 157. See also Arts 17, 22, 23, 24, 26 Law No. 1820 (2016).

137 Agreement, at 156.

138 *Ibid.*, at 158.

139 Art. 28(7) Law No. 1820 (2016).

140 Art. 24 Law No. 1820 (2016).

crimes go unpunished and prevent the Tribunal for Peace from becoming blocked as a result of a large amount of cases.¹⁴¹

D. The Investigation and Prosecution Unit

The Investigation and Prosecution Unit carries out its investigative functions at the request of the Chamber for the Acceptance of Truth and Responsibility and Establishment of the Facts when one of the following three situations takes place. First, the individual concerned does not accept the facts and his or her liability. Second, the individual concerned does not provide full disclosure of the facts. Finally, the Chamber for the Acceptance of Truth and Responsibility and Establishment of the Facts considers that the accepted facts did not take place.¹⁴²

The Agreement, Legislative Act 01 and Law 1820 do not address the fundamental question of the extent of the investigative powers granted to the Investigation and Prosecution Unit. Furthermore, the Investigation and Prosecution Unit will have to conclude an agreement with the Attorney-General's Office to set up a joint cooperation protocol.¹⁴³

If after concluding its investigation, the Investigation and Prosecution Unit considers that the individual concerned is not responsible for a crime within the jurisdiction of the Tribunal for Peace, the Unit sends the case to the Chamber on the Definition of Legal Situations or the Chamber on Amnesty and Pardon.¹⁴⁴ When the Investigation and Prosecution Unit considers that the individual concerned is responsible for a crime within the jurisdiction of the Tribunal for Peace, it prosecutes him or her before its Trial Section.¹⁴⁵ The Investigation and Prosecution Unit has ten years to file all its prosecution requests.¹⁴⁶ The Investigation and Prosecution Unit is competent to grant protective measures for victims, witnesses and other participants in the proceedings.¹⁴⁷ It can also request the Trial Section to take provisional measures against the individual concerned.¹⁴⁸

The Investigation and Prosecution Unit is empowered to join connected cases and define the order of its investigations and prosecutions to avoid serious and representative crimes to go unpunished and prevent the Tribunal for Peace from becoming blocked as a result of a large amount of cases.¹⁴⁹

141 Agreement, at 159.

142 *Ibid.*, at 156, 159.

143 *Ibid.*, at 169.

144 *Ibid.*, at 159.

145 *Ibid.*, at 159.

146 *Ibid.*, at 145.

147 *Ibid.*, at 159.

148 *Ibid.*, at 159.

149 *Ibid.*, at 159.

E. The Tribunal for Peace

The personal, temporal and territorial jurisdiction of the Tribunal for Peace is the same described above for the Special Jurisdiction for Peace. Nevertheless, it only has material jurisdiction over those crimes amounting to gross human rights violations and grave breaches of international humanitarian law,¹⁵⁰ committed on occasion, because of, or in direct or indirect relation to, the armed conflict.¹⁵¹ With regard to its structure, the Tribunal for Peace has, as seen above, four sections: the First Instance Section addressing cases in which there is acceptance of facts and responsibility, the First Instance Section for cases in which there is no acceptance of facts and responsibility (the Trial Section), the Appeals Section and the Review Section.¹⁵² Any final judgment issued by the Tribunal for Peace will be sent immediately to the Truth Commission.¹⁵³

1. The First Instance Section for Cases Involving the Acceptance of Facts and Responsibility

This First Instance Section addressing cases involving the acceptance of facts and responsibility by the concerned individual receives the proceedings after the Chamber for the Acceptance of Truth and Responsibility and Establishment of the Facts has issued a resolution indicating: (i) the facts accepted by the individual concerned; (ii) the legal qualification of such facts on the type of crime and mode of liability agreed by the individual concerned; and (iii) the sanctions proposed by the Chamber for the Acceptance of Truth and Responsibility and Establishment of the Facts.¹⁵⁴

The Section verifies the correctness of the legal qualification of the facts accepted by the individual concerned. If such legal qualification is incorrect, it hears the reasons given by the Chamber for the Acceptance of Truth and Responsibility and Establishment of the Facts and the individual concerned before deciding on the appropriate legal qualification.¹⁵⁵ Subsequently, the Section verifies that the crimes occurred are not covered by the amnesty, pardon and special treatment provisions of Law 1820. If it considers that amnesty, pardon or special treatment can be granted for the relevant crimes, it

150 According to Agreement, at 147, 151, and Arts 23, 30, 45 Law No. 1820 (2016) this group of crimes is composed of genocide, crimes against humanity, serious war crimes (understood as all systematic breaches of international humanitarian law), kidnapping or other severe deprivation of physical liberty, torture, extrajudicial executions, enforced disappearance of persons, rape and other forms of sexual violence, abduction of minors, forcible displacement and recruitment of children.

151 Agreement, at 145.

152 *Ibid.*, at 159, 160.

153 *Ibid.*, at 162.

154 *Ibid.*, at 161.

155 *Ibid.*, at 161.

sends the proceedings back to the Chamber for the Acceptance of Truth and Responsibility and Establishment of the Facts.¹⁵⁶

Subsequently, the Section examines and decides upon the sanction programme proposed by the Chamber for the Acceptance of Truth and Responsibility and Establishment of the Facts. However, the Section is not bound by the sanction proposal made by this Chamber. Nevertheless, the Section must impose one or several of the sanctions for gross human rights violations and grave breaches of humanitarian law included in the list of sanctions applicable to those who disclose fully, exhaustively, and in detail, the truth before the Chamber for the Acceptance of Truth and Responsibility and Establishment of the Facts.¹⁵⁷

The sanctions included in the list aim at the reparation and restoration of the victims. Some of them are related to some of the undertakings contained in the agreements on rural reform, political participation and solutions to the problem of illegal drugs. The list also incorporates sanctions for damages caused to minors, women and other victims. Furthermore, whenever it is necessary for the execution of the sanctions, the Section may also order the restriction of the freedom of the individual concerned by, for instance, imposing a place of residence next to the area where the sanctions are to be implemented.¹⁵⁸

In relation to rural areas, the sanctions list includes the participation in the implementation of programmes of: (i) effective reparation for displaced *campesinos*; (ii) environmental protection in natural reserve areas; (iii) building and reparation of infrastructure in rural areas, such as schools, roads, housing, health centres, community centres and communication networks; (iv) electrification; (v) rural development; (vi) waste disposal; (vii) substitution of illicit crops; (viii) environmental recovery in areas affected by illicit crops; and (ix) building of infrastructure to improve access to markets of agricultural products from areas in which illegal crops have been replaced by legal crops.¹⁵⁹

In relation to urban areas, the sanctions list includes the participation in the implementation of programmes which aim to: (i) build and repair urban infrastructures, such as schools, roads, housing, health centres and community centres; (ii) promote urban development; (iii) increase access to drinking water; and (iv) build sanitation systems.¹⁶⁰ Furthermore, the sanctions list also includes the participation in the implementation of programmes to clean and eradicate explosive remnants of war, unexploded ammunitions and anti-personnel mines.¹⁶¹

Sanctions programme adopted by this Section may not be incompatible with the public policies of the Colombian government or the ethnic and cultural traditions and customs of the communities in which the programme will be

156 *Ibid.*, at 161.

157 *Ibid.*, at 161.

158 *Ibid.*, at 172.

159 *Ibid.*, at 173.

160 *Ibid.*, at 173.

161 *Ibid.*, at 174.

implemented.¹⁶² Furthermore, those sanctions imposed on FARC members must be compatible with the agreement on disarmament and return to civilian life.¹⁶³

In addition, the Section decides whether the sanctions imposed on the individual concerned are to be implemented during a specified period of time or until a project is finalized,¹⁶⁴ and the place in which the individual must reside while he or she complies with the sanctions. While such place may be located in either a rural or urban area, it must have appropriate living conditions.¹⁶⁵

The representatives of the victims of those urban or rural areas in which the sanctions programme is to be implemented must be consulted. The Chamber for the Acceptance of Truth and Responsibility and Establishment of the Facts is in charge of supervising the consultation process. Victims' representatives can subsequently bring their views and concerns to the Section before a decision is taken on the content of the sanctions programme.¹⁶⁶

In deciding the specific sanctions to be imposed, the Section takes into account the following elements. First, the degree of disclosure of truth by the individual concerned. Second, the gravity of the crimes and the degree of participation in the crimes of the person concerned. Third, the existence of aggravating or mitigating circumstances as well as any undertakings made by the individual concerned to provide reparation to victims and implement non-repetition guarantees. Finally, any work carried out by the individual concerned in the implementation of the agreement on cleaning and decontamination of unexploded ammunitions, explosive remnants of war and anti-personnel mines, as long as such work has had a restorative effect on victims.¹⁶⁷

The Section is competent to supervise and certify the effective compliance of the person concerned with the sanctions programme.¹⁶⁸ For this purpose, the Section is supported by those national and international monitoring mechanisms agreed upon by the Colombian government and the FARC.¹⁶⁹ In the event of collective acceptance of facts and responsibility, the organization to which the individual concerned belongs, in particular, the FARC, is responsible for ensuring compliance with the sanctions programme under the supervision of the Section.¹⁷⁰

162 *Ibid.*, at 173.

163 *Ibid.*, at 173.

164 *Ibid.*, at 172.

165 *Ibid.*, at 172.

166 *Ibid.*, at 172.

167 *Ibid.*, at 171.

168 *Ibid.*, at 161.

169 *Ibid.*, at 161.

170 *Ibid.*, at 172.

2. The Trial Section

The Trial Section is competent to receive prosecution requests made by the Investigation and Prosecution Unit against individuals not accepting facts amounting to crimes within the jurisdiction of the Tribunal for Peace or denying their liability for such crimes. In addition, the Section may decide on requests made by the Investigation and Prosecution Unit for provisional measures. Finally, the Section conducts adversarial trials.¹⁷¹ Only if the Trial Section so decides, the trials will take place in public hearings with the presence of victims' organizations.¹⁷²

When the accused discloses the truth and accepts his or her liability during trial and prior to the issuance of the judgment, he or she is entitled to an alternative penalty of five to eight years of imprisonment.¹⁷³ In deciding on the length of the alternative penalty, the Trial Section will take into account the following factors: (i) the reasons for the accused's late acceptance of liability; (ii) the gravity of the crimes and the level of accused's involvement; and (iii) the degree of accused's cooperation to shed light on the crimes.¹⁷⁴ The length of the alternative penalty cannot be reduced.¹⁷⁵

To be entitled to an alternative penalty, the accused must make a commitment to contribute to his or her resocialization through work, training or study during the time the accused is deprived of freedom.¹⁷⁶ Upon completion of the alternative penalty and any additional condition provided for in the judgement of the Trial Section, the accused will be released.¹⁷⁷

When the accused is convicted after denying the crimes or his or her liability during trial, the Trial Section will impose the ordinary penalty provided for in the Colombian Penal Code.¹⁷⁸ Nevertheless, the Agreement makes clear that the imprisonment of any convicted individual will last between 15 and 20 years.¹⁷⁹ Additional benefits may be applied to the convicted individual who is serving an ordinary penalty provided that he or she undertakes to contribute to his or her resocialization through work, training or study during the time deprived of freedom and promote activities that aim to ensure that, once released, the individual will not resort again to violence.¹⁸⁰

No penalty imposed by the Trial Section, or by any other body of the Special Jurisdiction for Peace, can prevent the convicted individual from political participation and representation.¹⁸¹ Furthermore, the Trial Section may also impose on the Colombian state and organizations such as the FARC, the

171 *Ibid.*, at 162.

172 *Ibid.*, at 162.

173 *Ibid.*, at 162, 174.

174 *Ibid.*, at 174.

175 *Ibid.*, at 174.

176 *Ibid.*, at 174.

177 *Ibid.*, at 174.

178 *Ibid.*, at 162.

179 *Ibid.*, at 175.

180 *Ibid.*, at 175.

181 *Ibid.*, at 150.

obligation to provide for symbolic reparation to victims.¹⁸² The Trial Section will only do so after finding that the state or the relevant organization failed to take effective measures to prevent the crimes.¹⁸³ The Trial Section may also include in its final judgment non-repetition guarantees as provided for in the Agreement.¹⁸⁴

3. *The Appeals Section*

The Appeals Section is competent to decide on the appeals filed by individuals concerned against any resolution issued by the three Chambers of the Special Jurisdiction for Peace. Nevertheless, before filing an appeal, the individual must file a reconsideration request with the Chamber that issued the relevant resolution.¹⁸⁵

The Appeals Section also decides on the appeals filed by the individual concerned against interlocutory resolutions and judgements of the First Instance Section for cases involving the acceptance of facts and responsibility,¹⁸⁶ or filed by the accused or the Investigation and Prosecution Unit against interlocutory resolutions and judgements of the Trial Section. Before filing an interlocutory appeal, a reconsideration request must be filed with the First Instance or Trial Sections, as the case may be.¹⁸⁷ With regard to appeals against judgements of the First Instance or Trial Sections, the Appeals Section cannot increase the sanctions imposed if the individual concerned is the only appellant.¹⁸⁸

Finally, the Appeals Section is also competent to receive and decide on any request made by victims with a direct and legitimate interest against any judgement of the First Instance and Trial Sections that allegedly violate their fundamental rights.¹⁸⁹

4. *The Review Section*

The Review Section, *inter alia*, holds the following competencies. First, review any order to appear before the Special Jurisdiction for Peace.¹⁹⁰ Second, settle conflicts of competence among the Chambers of the Special Jurisdiction for Peace and the Tribunal for Peace Sections.¹⁹¹ Finally, review judgments, decisions, resolutions and directions issued by any of the bodies of the Special

182 *Ibid.*, at 162.

183 *Ibid.*, at 162.

184 *Ibid.*, at 162.

185 *Ibid.*, at 160.

186 *Ibid.*, at 160.

187 *Ibid.*, at 160.

188 *Ibid.*, at 160.

189 *Ibid.*, at 160.

190 Agreement, at 163, 164.

191 *Ibid.*, at 163, 164.

Jurisdiction for Peace under the grounds provided for by the Agreement.¹⁹² As a result, the Review Section is intended to be the last judicial instance of the Special Jurisdiction for Peace.¹⁹³ Nevertheless, this position has been undermined as a result of the amendments made to the first version of the Agreement in relation to *tutela* requests.¹⁹⁴

According to the Agreement and Legislative Act 01, *tutela* requests may only be filed with the Review Section after all other available remedies in the Special Jurisdiction for Peace have been exhausted.¹⁹⁵ The Review Section may take a first decision on any *tutela* request.¹⁹⁶ Such decisions may be subsequently appealed before the Appeals Section of the Tribunal for Peace.¹⁹⁷ Finally, the Appeals Section decisions are sent automatically to the Constitutional Court, which will review them if two judges of the Special Jurisdiction for Peace and two Constitutional Court judges reach a unanimous agreement to proceed in this manner.¹⁹⁸

Although this last requirement is likely to make rather difficult in practice for a *tutela* request to be reviewed by the Constitutional Court, there are two aspects of this regulation that must be noted. First, the intended role of the Review Section as the last judicial instance of the Special Jurisdiction for Peace has been undermined because of the competence given to the Appeals Section of the Tribunal for Peace to decide on any appeal against its *tutela* decisions. Second, the Constitutional Court has been given the power to eventually take a final decision on any *tutela* request filed against any action or omission of any of the bodies forming the Special Jurisdiction for Peace.¹⁹⁹

E. A Final Issue: The System of Alternative Penalties of the Special Jurisdiction for Peace vis-à-vis the Practice of International and Hybrid Criminal Tribunals

One of the most controversial aspects of the Agreement, which is not addressed by Legislative Act 01, is the exclusion — where the requirements set out by the Agreement are met — of imprisonment as an alternative penalty. As a

192 Agreement, at 163, 164. The Review Section has several other functions, including: (i) revisiting, whenever new facts are discovered, judgments already issued by other Colombian courts concerning crimes committed on occasion, because of or in direct or indirect relation to the armed conflict, and deciding on the penalty to be imposed; (ii) determining whether the funding of illegal armed groups was linked to crimes subject to amnesty, pardon or special treatment; and (iii) reviewing the decisions taken by any other domestic judicial and non-judicial authorities in which granted amnesty, pardon or special treatment is ignored. See Agreement, at 163, 164.

193 *Ibid.*, at 163.

194 Agreement, at 161. See also Transitory Art. 8 Legislative Act No. 01 (2017).

195 Agreement, at 160. See Transitory Art. 8 Legislative Act No. 01 (2017).

196 Agreement, at 161. See Transitory Art. 8 Legislative Act No. 01 (2017).

197 Agreement, at 161. See Transitory Art. 8 Legislative Act No. 01 (2017).

198 Agreement, at 161. See Transitory Art. 8 Legislative Act No. 01 (2017).

199 Agreement, at 161. See Transitory Art. 8 Legislative Act No. 01 (2017).

result, as seen above, the available alternative penalties in these cases are limited to restrictions of rights other than those relating to political participation and representation, and restrictions on freedom of movement for a time period ranging from five to eight years.²⁰⁰

Although crimes against humanity and war crimes found to have been committed in Colombia by the ICC Prosecutor do not have a substantial different nature from the atrocity crimes under the jurisdiction of international and hybrid criminal tribunals,²⁰¹ the system of alternative penalties provided for in the Agreement does not appear to be consistent with these tribunals' constant and uniform practice of relying on imprisonment as the appropriate penalty for such international crimes.²⁰²

In this regard, it must be noted that imprisonment and death were the main penalties imposed by the Nuremberg and Tokyo Tribunals after the Second World War.²⁰³ Subsequently, imprisonment for a number of years proportional to the seriousness of the crimes and the degree of involvement of the convicted individual, has become the main penalty imposed by the international and hybrid criminal tribunals created since 1990, such as the International Criminal Tribunal the former Yugoslavia,²⁰⁴ the International Criminal Tribunal for Rwanda,²⁰⁵ Special Court for Sierra Leone,²⁰⁶ Special Panels for Serious Crimes in East Timor,²⁰⁷ Regulation 64 Panels in Kosovo,²⁰⁸ Extraordinary Chambers in the Courts of Cambodia,²⁰⁹ Extraordinary African Chambers,²¹⁰ Special Tribunal for Lebanon and the Special Court for Kosovo.²¹¹

Likewise, Article 77 of the ICC Statute establishes an imprisonment penalty for a maximum of 30 years, with the possibility of extending it to reviewable life imprisonment if two or more aggravating circumstances take place. Under this provision, fines and confiscation may be complementary, but not alternative, penalties to imprisonment.

200 Agreement, at 164, 165, 172, 173, 174.

201 ICC OTP, *supra* note 2.

202 See Olasolo, *supra* note 3, at 310.

203 Art. 27 Charter of the International Military Tribunal of Nuremberg; Art. 16 Charter of the International Military Tribunal for the Far East.

204 Art. 24 ICTYSt.

205 Art. 23 ICTRSt.

206 Art. 19 SCSLSt.

207 United Nations Transitional Administration in East Timor, *On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, UN Doc. UNTAET/REG/2000/15, 6 June 2000, at section 10.

208 United Nations Interim Administration Mission in Kosovo, *Regulation No. 2000/64 On Assignment of International Judges/Prosecutors and/or Change of Venue*, UN Doc. UNMIK/REG/2000/64, 15 December 2000.

209 See Arts 38, 39, ECCC, Law to Amend the 2001 Law on the Establishment of the Extraordinary Chambers, 27 October 2004.

210 Art. 24 Statute of the Extraordinary African Chambers in the Courts of Senegal.

211 In this regard, the comprehensive work by S. D'Ascoli, *Sentencing in International Criminal Law: The Approach of the Two UN ad hoc Tribunals and Future Perspectives for the International Criminal Court* (Hart Publishing, 2011).

In light of the above-mentioned, and considering that the system of alternative penalties provided for in the Agreement is the result of one of the main political demands made by the FARC leadership during the negotiation process,²¹² the ICC Prosecutor must determine whether the ICC Statute imposes any limitation on the Colombian government to accept the FARC's position on this issue. If so, the ICC Prosecutor will also have to assess whether complementarity must be deemed exhausted with regard to those cases in which the alternative penalties do not satisfy the goals of punishment under the ICC Statute.²¹³

5. The Commission for the Identification of the Truth, Coexistence and Non-Repetition

According to the Agreement, the Integrated System also includes a Truth Commission, entitled the 'Commission for the Identification of the Truth, Coexistence and Non-Repetition', which holds three main goals. First, the Commission aims to contribute to clarify events and provide a comprehensive view of the complexity of the armed conflict to foster a shared understanding in society of its lesser-known aspects, such as the impact of the armed conflict in children, teenagers and women.²¹⁴ To achieve this goal, the Truth Commission ensures that individuals participating in its proceedings receive a just, dignifying and non-discriminatory treatment and have their rights respected.²¹⁵ Moreover, the Truth Commission will take the necessary measures to ensure the highest possible level of objectivity and impartiality in the development of its activities. Furthermore, it will adopt a methodology, which shall be made public, including procedures to verify the quality of the information, including its reliability, and to identify any false information that may be given in bad faith.²¹⁶

Second, the Truth Commission aims to promote and contribute to victims' recognition as citizens who saw their rights violated and political actors who are important for the transformation of Colombia. This also means acceptance of individual and collective responsibility by those who directly or indirectly participated in the conflict, and acknowledgment by the whole society of this legacy of violence as deserving permanent rejection.²¹⁷

The third goal of the Truth Commission is to foster coexistence in the regions, understood as the establishment of a transformative environment for the peaceful resolution of the conflicts and the development of a culture of respect and tolerance in democracy. To achieve this goal, the Commission: (i)

212 'Los detalles del pacto de justicia con las Farc', *El Espectador*, 31 October 2015.

213 The analysis of these two issues are beyond the scope of this article.

214 Agreement, at 131.

215 *Ibid.*, at 133.

216 *Ibid.*, at 133.

217 *Ibid.*, at 131.

fosters dialogue among the actors involved; (ii) promotes a culture of respect, tolerance, trust, cooperation, solidarity, social justice and equal opportunities for men and women; and (iii) contributes to build a peace based on truth and acceptance of a cruel past that must be overcome.²¹⁸

To achieve these goals, participation in the Truth Commission to provide full disclosure of the crimes is required to obtain and maintain amnesty, pardon or special treatment provided for in Law 1820.²¹⁹ Moreover, the Commission also makes efforts to promote the participation of former members of paramilitary groups who, in the last ten years, have benefited from measures of transitional justice outside the Agreement and the Integrated System, in particular, under the Justice and Peace Law.²²⁰

The Truth Commission conducts its work according to a territorial approach, with a view to achieving a better understanding of the regional dynamics of the conflict.²²¹ It shows the various ways in which violence affected different groups in Colombia, because awareness of the specific ways in which the conflict reproduced historical mechanisms of discrimination is a fundamental first step towards a more just and inclusive society. Particular attention is placed on specific forms of violence against women, children, teenagers, elderly, persons with disabilities, indigenous peoples, communities of *campesinos*, religious groups, political groups, opinion groups, afro-Colombians, Roma population, gay, lesbian and transgender individuals, displaced individuals and refugees, human rights defenders, trade unionists, journalists, farmers, cattle breeders, traders and entrepreneurs, among others.²²²

Given the various goals assigned by the Agreement to the Truth Commission, and the territorial and group perspectives that must enlighten its work, the mandate of three years appears a short period of time to adequately fulfil its task in relation to a decades-long conflict that spread out over almost all 32 Colombian departments and victimized around 15 percent of the Colombian population.

Moreover, in light of the several goals held by the Truth Commission, as it happened with the South African Truth and Reconciliation Commission, it is likely the Commission will have to address whether its main goal is to provide a forensic truth of the general pattern of atrocities suffered by different groups in Colombian society during the armed conflict, on the one hand or to promote reconciliation by listening to victims' narratives, which is also considered to be a form of reparation by the Agreement, on the other.²²³

218 *Ibid.*, at 131.

219 Agreement, at 147, 148, 151. Arts 13, 32 Law No. 1820 (2016).

220 Agreement, at 170. These measures are contained in the Justice and Peace Law, and Law No. 1424 (2010).

221 Agreement, at 132.

222 *Ibid.*, at 132.

223 *Ibid.*, at 182. A.R. Chapman and P. Ball, 'Levels of Truth: Macro-Truth and the TRC', in A.R. Chapman and H. Van der Merwe (eds), *Truth and Reconciliation Commission in South Africa: Did the TRC Deliver?* (University of Pennsylvania Press, 2008) 143–169; D. Tutu, *No Future without Forgiveness* (Rider, 1999), at 209–226; and A. du Toit, 'The Moral Foundations of the

There are, however, two aspects in which the Colombian Truth Commission significantly differs from the South African Commission. First, the Truth Commission does not have the power to receive, nor to decide on, applications for amnesty, pardon and special treatment. The Agreement gives this power to the Chamber on Amnesty and Pardon and the Chamber on the Definition of Legal Situation within the Special Jurisdiction for Peace. As a result, the Truth Commission may be less focused on the specific acts or omissions included in amnesty applications, which was a criticism commonly made against the hearings held by the South African Truth and Reconciliation Commission.²²⁴ The Commission, therefore, may be in a better position to portray a general pattern of atrocities, including those relating to discrimination on any ground prohibited by international law, and identify the indirect perpetrators with control over the crimes.

Second, the Agreement highlights the extrajudicial nature of the Truth Commission and its activities, which do not consist of the prosecution of the individuals implicated. Moreover, the information received or produced by the Truth Commission cannot be sent to, nor requested by, judicial authorities, including the bodies of the Special Jurisdiction for Peace.²²⁵ Furthermore, such information cannot be used as evidence in civil or criminal proceedings.²²⁶ Nevertheless, the Agreement and Legislative Act 01 do not explicitly prevent the Investigation and Prosecution Unit from using the Final Report issued by the Truth Commission for the purpose of generating new evidence. Hence, the lawfulness of this practice remains to be clarified in the forthcoming Law or in the Rules of Procedure and Evidence of the Special Jurisdiction for Peace.

This strict separation between the Truth Commission and the Special Jurisdiction for Peace differs significantly from the South African transitional justice system. There was no limitation to the information, which was gathered by the South African Truth and Reconciliation Commission, to be used subsequently in civil and criminal proceedings. The Final Report of this Commission recommended the investigation and prosecution of gross human rights violations for which amnesty was not granted or sought.²²⁷ The Peruvian system also shows that truth commissions and criminal proceedings may be articulated in a way that truth commissions collect documentation that can later be used in criminal proceedings.²²⁸

South African TRC: Truth as Acknowledgement and Justice and Recognition', in R.I. Rotberg and D. Thompson (eds), *Truth v. Justice: The Morality of Truth Commissions* (Princeton University Press, 2000) at 122.

224 Chapman and Ball, *supra* note 224, at 158–167.

225 Agreement, at 133.

226 *Ibid.*, at 133–134.

227 Truth Commission Report, at 309.

228 E. Cueva, 'The Peruvian Truth and Reconciliation Commission and the Challenge of Impunity', in N. Roht-Arriaza and J. Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (Cambridge University Press, 2006) 70–93, at 85–89.

In this regard, it is important to highlight that the Sierra Leone and East Timor systems show that truth commissions and judicial proceedings may also take place simultaneously in a coordinated manner. In Sierra Leone, such coordination was based on the limitation of criminal proceedings to those most responsible for genocide, crimes against humanity and war crimes.²²⁹ In turn, in East Timor, there was a clear distinction between the goals of criminal proceedings, namely, declaring criminal liability and enforcing sentences, and the goals of truth commissions, namely, furthering the restoration of victims' dignity and fostering reconciliation through a deeper understanding of the social, political, economic and cultural causes of international crimes.²³⁰

6. Measures for Victims' Comprehensive Reparation

The Agreement provides for numerous measures for victims' comprehensive reparation, which can be divided in seven groups.²³¹ Except for individual restitution of land and emotional recovery, most reparation measures are of a collective nature.²³² Notably, individual compensation to victims is not specifically referred to in any of these measures.²³³ Moreover, although reparation measures should not be confused with the sanctions programmes approved by the Special Jurisdiction for Peace, they may overlap as both are partially related to some of the undertakings contained in the agreements on rural reform, political participation and solution to the problem of illegal drugs.²³⁴

The first group of reparation measures consists of acts of forgiveness that took place before the Agreement was signed.²³⁵ The second group is composed of reparation programmes to be established by the Colombian government, and to be implemented by state officials responsible for gross human rights violations or grave breaches of international humanitarian law.²³⁶ Likewise, the FARC have undertaken to provide reparations to victims as part of their members' return to civilian life. However, at this stage, the specific content of FARC's reparation measures remains unclear.²³⁷

The third group entails measures of collective reparation, including the so-called 'Rural Development Plans with Territorial Approach',²³⁸ 'Collective

229 S. Horowitz, 'Transitional Criminal Justice in Sierra Leone', in *ibid.*, 43–69, at 54–55.

230 A. Burgess, 'A New Approach to Restorative Justice—East Timor's Community Reconciliation Process', in *ibid.*, 176–205, at 200–201.

231 Agreement, at 178.

232 *Ibid.*, at 178.

233 *Ibid.*, at 178.

234 *Ibid.*, at 172, 178.

235 *Ibid.*, at 178.

236 *Ibid.*, at 179.

237 *Ibid.*, at 179.

238 *Planes de Desarrollo Rural con Enfoque Territorial* in the Spanish language. See also *ibid.*, at 179.

Reparation Plans with Territorial Approach'²³⁹ and 'National Plans for Collective Reparation'.²⁴⁰ The fourth group consists of measures for social rehabilitation, which are divided in two subgroups: (i) those measures aiming at emotional recovery at the individual level; and (ii) the implementation of psycho-social rehabilitation plans to further coexistence and non-repetition.²⁴¹

The fifth group includes the implementation of processes of collective return to their land of forcibly displaced victims (in particular, *campesinos*), and other measures of reparation for victims living outside Colombia. The sixth group entails land restitution measures. Finally, the seventh group consists of measures for the strengthening of a policy of victims' comprehensive care and material reparation.²⁴²

7. The Other Components of the Integrated System and the Special Unit for the Investigation and Dismantling of Criminal Organizations

In South Africa, the transitional justice system was composed only of the mechanisms of the amnesty law, its application by the Truth and Reconciliation Commission, the Final Report of the Commission, and the few criminal prosecutions and limited reparations carried out by the South African National Prosecutor Service and the South African government, which only partially took into account of the recommendations given by the Truth and Reconciliation Commission.²⁴³ The provisions of the Agreement differ. In addition to an amnesty law, the Special Jurisdiction for Peace, the Truth Commission and reparation measures, the Integrated System also includes: (i) a Special Unit for Finding Missing Persons;²⁴⁴ and (ii) non-repetition guarantees.²⁴⁵ Moreover, the Agreement sets up, in the Attorney-General's Office, the Special Unit for the Investigation and Dismantling of Criminal Organizations.²⁴⁶

A. The Special Unit for Finding Missing Persons

The Special Unit for Finding Missing Persons is an extrajudicial mechanism, whose main purpose is to coordinate humanitarian efforts to search and locate missing persons who are still alive and find and identify the remnants

239 *Planes de Reparación Colectiva con Enfoque Territorial* in the Spanish language. See also *ibid.*, at 179, 180.

240 *Planes nacionales de reparación colectiva* in the Spanish language. See also *ibid.*, at 180, 181.

241 *Ibid.*, at 181, 182.

242 *Ibid.*, at 184.

243 Nerlich, *supra* note 93.

244 Agreement, at 139.

245 *Ibid.*, at 187.

246 *Ibid.*, at 77, 83, 170, 187.

of missing persons who are dead, and deliver their remains to their families. In both scenarios, the Special Unit provides a report on the information that has been gathered to the missing persons' family members.²⁴⁷

As in the case of the Truth Commission, the information received or produced by the Special Unit for Finding Missing Persons cannot be shared with, nor requested by, judicial authorities, including the different bodies of the Special Jurisdiction for Peace.²⁴⁸ Moreover, such information cannot be used in civil or criminal proceedings.²⁴⁹ The only exception to this rule refers to forensic reports and material elements associated with the corpses, which can be requested by judicial authorities, including the Special Jurisdiction for Peace, and used in civil and criminal proceedings.²⁵⁰

B. Non-Repetition Guarantees

In light of previous peace processes in Colombia, non-repetition guarantees represent an element of the Integrated System that is particularly relevant for the effective implementation of the Agreement. For instance, in the 1980s a political party, Patriotic Union (*Unión Patriótica*), was created as a result of the negotiation process between the Colombian government and the FARC. Several thousand of its leaders and supporters were exterminated for apparently being FARC sympathizers.²⁵¹ Subsequently, in the early 1990s hundreds of violent attacks were carried out against a social movement called Hope, Peace and Freedom (*Esperanza, Paz y Libertad*) that was established during the demobilization process of the Liberation Popular Army (*Ejército Popular de Liberación*).²⁵² A decade later, thousands of members of paramilitary groups that had demobilized under the Justice and Peace Law were assassinated.²⁵³

At present, demobilized FARC members and FARC sympathizers also face a threat to their lives and physical integrity. The United Nations High Commissioner for Human Rights expressed concerns in March 2017 with regard to the killings of social and human rights leaders in areas previously held by the FARC. The information provided by the leadership of the new political movement, Patriotic March (*Marcha Patriótica*), to the Attorney-General mentioned the assassination of more than a hundred of its members since its establishment in 2012.²⁵⁴

In light of this situation, the Agreement highlights that non-repetition guarantees consist of measures that aim at: (i) ending impunity;²⁵⁵ and (ii) ensuring that

247 *Ibid.*, at 139.

248 *Ibid.*, at 141.

249 *Ibid.*, at 141.

250 *Ibid.*, at 141.

251 Inter-American Court of Human Rights, *Vargas v. Colombia*, Judgment of 26 May 2010, Series C No. 213 (2010), § 82. See also, High Tribunal of Bogotá, Justice and Peace Chamber, *Herbert Veloza García* Case, Judgment of 30 October 2013.

252 'La guerra que mató la esperanza en Urabá', *Verdad Abierta*, 26 January 2016.

253 'Justicia y Paz: la experiencia de los postulados (II)', *Verdad Abierta*, 12 November 2015.

254 'Asesinados 124 miembros de Marcha Patriótica en 4 años', *La Opinión*, 21 November 2016.

255 Agreement, at 187.

no political party or movement is victimized again.²⁵⁶ Furthermore, the Agreement notes that an adequate implementation of the mechanisms of the Integrated System, notably the Truth Commission and the Special Unit for Finding Missing Persons, will strengthen trust among Colombian population. This means that the successful implementation of the Agreement is considered in itself a guarantee of non-repetition.²⁵⁷ An additional measure to achieve this purpose is the establishment in the Agreement of the Special Unit for the Investigation and Dismantling of Criminal Organizations, which is analysed in the next section.²⁵⁸

C. The Special Unit for the Investigation and Dismantling of Criminal Organizations

The Agreement establishes the Special Unit for the Investigation and Dismantling of Criminal Organizations under the Attorney-General.²⁵⁹ This Special Unit, which is not part of the Integrated System, focuses its investigations and prosecutions on two types of criminal organizations: those that can be considered as successors of paramilitary groups and are responsible for murders and massacres committed against human rights activists and members of social and political movements, and those that are responsible for acts that threaten the implementation of the Agreement.²⁶⁰

The Special Unit conducts investigations and prosecutions under the ordinary criminal justice system and the jurisdiction on justice and peace. It can define criteria for joining cases and establishing the order in which investigations and prosecutions will be conducted.²⁶¹ The Special Unit is entitled to rely on documents gathered by the Special Jurisdiction for Peace and resort to the same mechanisms used by this jurisdiction to access information.²⁶² It can also rely on any information within the Attorney-General's Office, notably in its justice and peace unit.²⁶³

8. Conclusion

The Agreement is a complex text composed of six interconnected agreements, inclusive of the agreement on victims, which must be read as an indissoluble

256 *Ibid.*, at 187.

257 *Ibid.*, at 187.

258 *Ibid.*, at 77, 83, 170, 187.

259 *Ibid.*, at 77, 83, 170, 187.

260 *Ibid.*, at 83. See M. Rocha Herrera, 'Actores no estatales: grupos armados, milicias, señores de la guerra, grupos criminales organizados y paramilitares. Pueden acaso estos grupos cometer crímenes internacionales conforme al Derecho penal internacional?' 4 *Anuario Iberoamericano de Derecho Internacional Penal* (2016) 13–38, at 16–18.

261 Agreement, at 83, 84.

262 *Ibid.*, at 85.

263 *Ibid.*, at 85.

whole. This article has detailed the judicial and non-judicial mechanisms falling under the Integrated System.

Various controversial elements have been identified. This article has addressed the domestic or hybrid nature of the Special Jurisdiction for Peace, as well as the uncertainty over the entitlement of responsible third parties, such as legal persons, to special treatment under Law 1820. In addition, this article has overviewed the lack of clarity over the date of commencement of the armed conflict and its consequences for the temporal jurisdiction under the Special Jurisdiction for Peace and the temporal scope of application of Law 1820. The unlikelihood that the Special Jurisdiction for Peace may ever be able to exercise its personal jurisdiction over Colombian heads of state, and the restrictive definition of the notion of superior responsibility to be applied by the Special Jurisdiction for Peace to high level state officials removed from the scene of their subordinates' crimes were also addressed.

Furthermore, the absence of an effective system of redactions to secure public access to the documents filed with the Special Jurisdiction for Peace as well as obstacles to secure the extradition of foreigners, overlaps between the personal jurisdiction of the Special Jurisdiction for Peace and the jurisdiction on justice and peace were detailed. The article, moreover, examined the Tribunal for Peace Review Section undermined role as last judicial instance under the Special Jurisdiction for Peace, and the partial overlap between sanctions programmes under the Special Jurisdiction for Peace and the reparation measures provided for in the Agreement. Finally, challenges in providing security to FARC members and sympathizers as a key guarantee of non-repetition, multiple goals and limited temporal scope of the Truth Commission, and the strict separation between the works of the Truth Commission and the Special Unit for Finding Missing Persons, on the one hand, and the activities of the Special Jurisdiction for Peace and other ordinary and specialized Colombian jurisdictions, on the other hand, were detailed.

The alleged inconsistency between the system of alternative penalties provided for in the Agreement and the international and hybrid criminal tribunals' constant and uniform practice of relying on imprisonment as the appropriate penalty for genocide, crimes against humanity and war crimes deserves particular attention. In the absence of any substantial difference between the nature of these crimes in Colombia and the nature of the atrocity crimes under the jurisdiction of the said tribunals, the ICC Prosecutor may have to determine whether the ICC Statute impose any limitation on the Colombian government to accept the FARC's demands on this issue. If so, the ICC Prosecutor will have to assess whether complementarity must be deemed exhausted with regard to those cases that do not satisfy the goals of punishment under the ICC Statute.

Complementarity assessments carried out by the ICC Prosecutor may be also necessary in relation to other cases, such as those against high level state officials, in which some of the controversial issues referred to above are

particularly relevant.²⁶⁴ Nevertheless, the main challenge that the Agreement and its Integrated System face in a polarized political environment in Colombia, is to set into motion, in a harmonious way, its several judicial and non-judicial mechanisms, and to coordinate their work with the activities of domestic judicial and administrative bodies, in particular those in charge of implementing the transitional justice system of justice and peace.

264 'ICC Chief Prosecutor Bensouda Threatens With Intervention in Colombia', *NSNBC International*, 27 January 2017; See also '29 generales y coroneles, en la mira de la CPI por ejecuciones extrajudiciales', *El Espectador*, 9 July 2017.

Balancing ‘the International’ and ‘the Domestic’

Sanctions under the ICC Principle of Complementarity

Beatriz E. Mayans-Hermida* and Barbora Holá**

Abstract

As the cornerstone of the International Criminal Court (ICC), the principle of complementarity provides that states have the primary responsibility to investigate and prosecute international crimes, and only when they are inactive, unwilling or unable to genuinely investigate and prosecute the ICC may exercise its jurisdiction. However, the relevance of sentences and sanctions, their severity and modalities in the complementarity assessment (CA) is still ambiguous. Some scholars argue for sentences to play a role in the CA but do not elaborate on what an inadequate sanction is and how it can justify the ICC pre-empting a national prosecution. Others mainly focus on pardons or blanket amnesties, without addressing reduced or alternative sentences developed in the framework of peace negotiations. The existing gap may stall or complicate peace processes in post-conflict situations under the jurisdiction of the ICC where alternative sanctions can be the only viable way to reach an agreement between the warring parties. This article focuses on the role that sentences can play in the CA according to the Rome Statute, on what are the standards on adequacy of sentences/sanctions for international crimes, and analyses how alternative sanctions designed in transitional contexts can play out in such an assessment.

* Beatriz E. Mayans-Hermida is a Ph.D. Candidate at Vrije University Amsterdam and the Netherlands Institute for the Study of Crime and Law Enforcement (NSCR), ORCID ID: <https://orcid.org/0000-0002-4241-0038>. [b.e.mayanshermida@vu.nl];

** Barbora Holá is a Senior Researcher at the Netherlands Institute for the Study of Crime and Law Enforcement (NSCR) and Associate Professor at Vrije University Amsterdam, ORCID ID: <https://orcid.org/0000-0003-2371-7031>. [bhola@nscr.nl]

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1. Introduction

Complementarity is a fundamental principle of the Rome Statute, which regulates the role of the International Criminal Court (ICC) in relation to domestic courts by recognizing states' primary responsibility to investigate and prosecute international crimes. Accordingly, under the ICC Statute, state parties have the duty and the right to exercise their criminal jurisdiction when core crimes are committed on their territory or by their nationals.¹ Hence, the ICC may only investigate and prosecute when states fail to do so.

Article 17 of the Rome Statute establishes the framework for determining when a case should be inadmissible before the ICC. Thus, the decision on whether it is the ICC or a national judicial system which should investigate and prosecute a specific case depends on the outcome of the admissibility assessment done by the Court. The admissibility criteria 'establish the "critical bulwark" that protects states' sovereign rights'² to deal with international crimes before their domestic courts.

Despite developments in judicial interpretations of the principle of complementarity over the past years, normative uncertainty remains regarding the complementarity assessment (CA).³ Literature concerning the role of sanctioning in the CA, for example, is scarce.⁴ How is the ICC to evaluate national punishment laws and practices in its CA in situation and case stages? What leeway under the Rome Statute and international law do states have in designing and implementing punishment for international crimes?

The core argument for assessing sentences within the CA is the potential mismatch between the punishment imposed at the national level and the seriousness of international crimes, thus rendering sentences inadequate. The preamble of the Rome Statute affirms that the crimes under the jurisdiction of the ICC are the most serious crimes of international concern and as such — according to international jurisprudence and a number of scholars — they should be punished with severe penalties reflecting their gravity.⁵ Amnesties, pardons and short sentences are often discussed as examples of (inacceptable) leniency towards the perpetrator. Blanket amnesties and pardons for serious

1 Paragraph 6 of the Preamble and Art. 1 ICCSt.

2 M.M. El Zeidy, *The Principle of Complementarity in International Criminal Law* (Nijhoff, 2008), at 159.

3 C. Stahn, 'Taking complementarity seriously', in C. Stahn and M.M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press, 2014) 233–282, at 235.

4 The analysis has mainly focused on the first stage of the two-stage inquiry under Art. 17(1)(a) and (b) ICCSt. The first stage consists of two *initial questions*: '(1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past and the state having jurisdiction has decided not to prosecute the person concerned.' The second relates to the issue of unwillingness and inability, which can only be analysed once the *initial questions* are answered in the affirmative. Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, *Katanga et al.* (ICC-01/04-01/07-1497 OA 8), Appeals Chamber, 25 September 2009, § 78.

5 M.M. DeGuzman, 'Harsh Justice for International Crimes?' 39 *Yale Journal of International Law* (2014) 1–36.

crimes are clearer cases of measures going against the duties under the ICC Statute and treaties proscribing violations to *jus cogens* norms.⁶ Blanket amnesties pre-investigation pre-empt the prosecution of international crimes, whereas blanket amnesties post-conviction and pardons annul the results of a conviction.⁷ This is not the case for alternative sanctions,⁸ which, if determined in a judicial decision after a genuine investigation and trial, constitute criminal punishment. Though, in a strictly retributive sense, such alternatives to imprisonment can be seen as inadequate considering the seriousness of international crimes.

Scholars argue that *lenient* or *inadequate* sentences may indicate unwillingness or inability of a state to comply with its duty to *genuinely* hold perpetrators accountable and thus contravene the ultimate purpose of the Rome Statute: to put an end to impunity and prevent the commission of future crimes. Therefore, sentences play a role in the CA.⁹ However, scholars cannot find consensus on the exact role of sentences in such an assessment, on what an inadequate sanction is, and whether alternative sanctions can be imposed under the ICC Statute.

This article tries to address these issues. The following section analyses the role of sanctions in the CA looking at the Rome Statute's *travaux préparatoires* and current case law and doctrine. The third part turns to the question of what an (in)adequate sanction for international crimes is in international

- 6 Decision on the admissibility Challenge by Dr. Al- Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute, *Gaddafi* (ICC-01/11-01/11-662), Pre-Trial Chamber I, 5 April 2019, §§ 61, 77. The Chamber found that there is a growing, universal tendency that grave and systematic human rights violations, amounting to crimes against humanity, are not subject to amnesties or pardons under international law. The Appeals Chamber, in *obiter dicta*, however, adopted a less strong position, stating that 'international law is still in developmental stage on the question of acceptability of amnesties'. Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled 'Decision on the admissibility Challenge by Dr. Al- Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute', *Gaddafi* (ICC-01/11-01/11-695 OA8), Appeals Chamber, 9 March 2020, § 96.
- 7 Scholars and practitioners have widely discussed whether there is an absolute prohibition of amnesties and pardons for international crimes under international law. There seems to be consensus on the fact that the prohibition of blanket or self-amnesties has crystallized under customary international law. However, this is not the case for conditional amnesties and pardons. See: L.N. Sadat, 'Exile, Amnesty and International Law', 81 *Notre Dame Law Review* (2006) 995–1036, at 1021–1022; *The Belfast Guidelines on Amnesty and Accountability*, Transitional Justice Institute at the University of Ulster (2013).
- 8 Following N. Morris and M. Tonry, this article understands alternative (intermediate) sanctions as punishment which falls between probation and prison terms, including community service, house arrest, intensive supervision programmes, and electronic monitoring. N. Morris and M. Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* (Oxford University Press, 1990), at 4.
- 9 K.J. Heller, 'A Sentence-Based Theory of Complementarity', 53 *Harvard International Law Journal (HILJ)* (2012) 85–133; C. Stahn, 'One Step Forward, Two Steps Back? Second Thoughts on a "Sentenced-Based" Theory of Complementarity', 53 *HILJ* (2012) 183–196; D. Robinson, 'Three Theories of Complementarity: Is it About the Charge, the Sentence or the Process?' 53 *HILJ* (2012) 165–182; H. Olásolo, 'Complementarity Analysis of National Sentencing', in R. Haveman and O. Olusanya (eds), *Sentencing and Sanctioning in Supranational Criminal Law* (Intersentia, 2006) 37–66, at 37.

criminal law (ICL) practices (beyond the ICC), international human rights law (IHRL), and international humanitarian law (IHL). This section concludes that there are no rigid standards. However, specialized courts and bodies dealing with international crimes or serious human rights violations have identified criminal penalties consisting in prison sentences proportional to the gravity of the crime and culpability of the accused as a standard to determine adequacy. Furthermore, under the Rome Statute and these regimes, states parties have great deference in determining the ranges of prison sentences and thus proportionality. Therefore, the fourth section argues that the adequacy of sentences in the CA needs to be determined according to the laws of the national jurisdiction under the ICC's scrutiny. This section also addresses the issue of reduced or alternative sanctions and argues that, in transitional contexts, adequacy of sentences and their proportionality is to be assessed flexibly, making alternatives to imprisonment an adequate punishment. In other words, in such contexts, proportionality of punishment to a crime should be assessed differently than based on the usual 'just deserts' calculation used in ordinary contexts. Evaluation of adequacy of sentences should take into account much broader socio-political goals of transitional contexts and role of prosecutions in these circumstances.

2. The Role of Sentences in the Complementarity Assessment under the Rome Statute

There are two different approaches to the role of sentencing in the CA. On the one hand, Kevin Jon Heller argues that the ICC should focus *exclusively* on the severity of sentences imposed by national courts.¹⁰ He holds that the *charge-based* approach to complementarity and the *same conduct* test adopted by the ICC is inappropriate and should be replaced by a *sentence-based* approach. According to Heller, the ICC should consider a case inadmissible as long as the domestic prosecution '... results in a sentence equal to, or longer than, the sentence that the perpetrator would receive from the ICC'.¹¹ In contrast, Darryl Robinson and Carsten Stahn recognize that sentencing, in certain cases, can play a significant role in the CA but that it *cannot be the only factor* to take into consideration when determining whether a case is admissible at the ICC. For Robinson, the focus should be on the *process*, which '... can refer to charges and sentences as *indicia*, insofar as they shed light on the genuineness of the process'.¹² For Stahn, a sentence-based theory of complementarity '... is neither desirable nor manageable in all cases'. He concludes that the CA is a 'nuanced system of checks and balances' that requires a case-by-case assessment.¹³ Similarly, Héctor Olásolo argues that the role of national sentencing in the CA is not a primary one.¹⁴

10 Heller, *supra* note 9, at 86.

11 *Ibid.*

12 Robinson, *supra* note 9, at 166. (Italic emphasis in the original).

13 Stahn, *supra* note 9, at 184.

14 Olásolo, *supra* note 9, at 41.

Therefore, scholars have not settled on what the focus of the CA should be: charges, process, sentences, or a combination thereof. In this section we further disentangle the potential role of sentences in the CA.

Although Heller's proposal has the aim of leading to a 'more state-centric approach',¹⁵ to avoid 'the "command-and-control, top-down view" of complementarity',¹⁶ at the end, his theory seems to impose what it seeks to avoid: a top-down view of complementarity on sentencing and punishment,¹⁷ leading to homogeneity in the nature and length of punishment that national processes should impose.¹⁸ Moreover, focusing only on the punitiveness of domestic criminal justice systems is inconsistent with the complementarity regime, which goes beyond sentencing, as well as with the more benevolent penalty regime provided in the Statute. As further discussed in this section, the *travaux préparatoires* and Article 80 of the Rome Statute stipulate that the ICC's penalties regime was not meant to be a standard setting for national jurisdictions, and that under the Statute states have deference in determining the sanctions for international crimes. The principle of complementarity was designed to respect the principles and values at the core of national criminal justice systems and, thus, their penalty regimes — including those systems that are less punitive than the ICC Statute.

The modes and severity of punishment in domestic contexts are influenced by normative purposes and other interests that a certain community seeks to protect and wants to accomplish by sentencing.¹⁹ This is true not only for consolidated judicial systems in stable democracies, but also for societies that are transiting from armed conflicts or autocracies, where oftentimes international crimes are committed.²⁰ It is especially in such transitional contexts where the specific social necessities and the normative expectations of a certain community determine what norms and (judicial) instruments are necessary to confront the legacies of mass violence and to fostering other pressing interests of that particular historic moment.²¹ This may imply a departure from

15 Heller, *supra* note 9, at 113.

16 *Ibid.*, at 99. (Original footnote omitted).

17 For instance, in relation to modes of liability, some domestic jurisdictions differentiate between the role that individuals played in the commission of the crime as principal offenders and accessories, aiders and abettors or instigators, providing different degrees of seriousness depending on their role — usually lower sentences are assigned for the latter modes of liability.

18 Robinson, *supra* note 9, at 172. On the use of the CA as a homogenization tool in terms of process and modes and severity of punishment see e.g. M. Drumbl, 'Policy through Complementarity: The Atrocity Trial as Justice', in Stahn and El Zeidy (eds), *supra* note 3, 197–232.

19 M. Tonry, 'Purposes and Functions of Sentencing', 34 *Crime & Justice* (2006) 1–52.

20 R. Gargarella, 'No Place for Popular Sovereignty? Democracy, Rights, and Punishment in Gelman v. Uruguay', *Seminario en Latinoamérica de Teoría Constitucional y Política Papers* (2013) 124, available online at https://digitalcommons.law.yale.edu/yls_sela/124 (visited September 2020).

21 M. Polaino-Orts, 'Orígenes de la Política Criminal y Abolicionismo (A Propósito del Marqués de Beccaria)', in C. Roxin, M. Polaino Navarrete, and M. Polaino-Orts (eds), *Dogmática Penal y Política Criminal Cuestiones Fundamentales para el Nuevo Sistema de Justicia Penal* (Flores Editor y Distribuidor, 2015) 231–266, at 255.

previous norms, values, and institutions provided in the ordinary criminal justice system. Hence, it is essential for the ICC to have a nuanced regime that takes into consideration national normative preferences, particularly in those complex cases in which the domestic jurisdictions will be more suitable to deal with proceedings although they might lead to lower sentences.²²

As discussed in this section, there is no rigid solution on how to integrate sentences and sanctions in the CA since there is no a priori in *absracto* punishment that should be considered as (too) lenient. Nevertheless, this does not prevent certain elements from being put forward.

A. Proceedings as the Main Focus of the Complementarity Assessment

With the aim of allowing the ICC to pre-empt national prosecutions exceptionally, the negotiating parties designed the principle of complementarity to address mainly outstanding failures of national judicial systems.²³ The drafting history of the principle of complementarity, and thus of Articles 17 and 20(3) of the Rome Statute, shows that sentences and sanctions were one of the many factors in the discussions on the admissibility criteria and that, although sentencing was considered relevant, it was not the only factor.²⁴ In fact, there was a proposal to include those cases where the sentence imposed at the national level was *manifestly inadequate for the offence* as an exception to the *ne bis in idem* principle. According to one of the Reports of the Preparatory Committee, a view was expressed suggesting the following:

... [the *ne bis in idem* provision] should include cases where the *sentence imposed by the national jurisdiction was manifestly inadequate* for the offence as an exception to *non bis in idem*. It was, however, noted that a possible solution would be to provide for the court to try a person already tried in another court, *only if the proceedings in the other court manifestly intended to shield the accused from his/her international criminal responsibility*.²⁵

Given that the proposed provision was not included in the final draft, and that Article 20(3) (*ne bis in idem*) explicitly refers to the proceedings²⁶ and not to sentences, it can be concluded that a broader approach was considered as more suitable for the issue of lenient sentences.

Contrary to the idea of giving primacy to sentences, the drafters decided to focus on the proceedings, in particular on the way they were carried out by states,

22 Stahn, *supra* note 9, at 187, 195.

23 Summary of the Proceedings of the Preparatory Committee during the period 25 March–12 April 1996, UN Doc. A/AC.249/1, 7 May 1996, § 110. See also: J.T. Holmes, 'The principle of Complementarity', in R. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (Kluwer Law International, 1999) 41–78, at 47–56.

24 Report of the Preparatory Committee on the Establishment of an International Criminal Court: Volume I (Proceedings of the Preparatory Committee during March–April and August 1996), UN Doc. A/51/22, 51st Sess., Supp. No. 22, (1996).

25 UN Doc. A/AC.249/1, *supra* note 23, § 127. (Emphasis added).

26 Art. 20(1)(3) ICCSt. establishes that: 'No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court'

leaving the inadequacy of sentences as possible *indicia* of shielding the accused from criminal responsibility. The latter is concluded from the *travaux préparatoires* and from the wording of Article 17 and the interpretation that the Court and certain scholars have given to it.²⁷ The text of Article 17(1)(a) and (b) stipulates that a case that is being investigated or prosecuted, or has been investigated but where there was a decision not to prosecute, should be inadmissible unless the state is *unwilling or unable genuinely to carry out the proceedings* or the decision resulted from the *unwillingness or inability of the state genuinely to prosecute*.

The word *genuinely* in Article 17 is of utmost importance since it limits the Court, authorizing its interference only when national proceedings are non-genuine (or inactive).²⁸ Pre-Trial Chamber I considered that ‘... an evidentiary debate on the state’s unwillingness or inability will be meaningful only when doubts arise with regard to the genuineness of the domestic investigations or prosecutions’.²⁹ The term *genuinely* under Article 17(1)(a) and (b) ‘... requires a showing that the investigative and prosecutorial efforts are sincere and that there exist the means to bring them to completion’.³⁰ According to the Office of the Prosecutor (OTP) ‘[t]he assessment embraces all of the relevant stages of the particular proceedings, from investigation to trial and appeal [and] [i]t considers the totality of the facts and circumstances bearing on an intent by national authorities to bring perpetrators to justice’.³¹

In order to evaluate genuineness the Court needs to assess the domestic judicial proceedings in relation to a specific case as a *whole* from the moment it started until the moment the Court initiates its assessment on admissibility.³² Assessing the proceedings as a whole allows the ICC to look at the facts of a case, which is essential to determine the state’s genuineness given that different factual circumstances of each case have an impact on the sentence imposed.³³ Furthermore, a person charged with international crimes may be acquitted, which does not mean the proceedings’ non-genuineness.³⁴ Consequently, in order to reach a conclusion

27 El Zeidy, *supra* note 2, at 166; Robinson, *supra* note 9, at 174; J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions* (Nijhoff-Brill, 2008), at 216–217.

28 Stigen, *supra* note 27, at 215.

29 Decision on the admissibility of the case of Saif Al-Islam Gaddafi, *Gaddafi and Al-Senussi* (ICC-01/11-01/11-344-Red), Pre-Trial Chamber I, 31 May 2013, § 53. (original footnote omitted).

30 The Chamber citing the OTP in Decision on the admissibility of the case of Abdullah Al-Senussi, *Gaddafi and Al-Senussi* (ICC-01/11-01/11-466-Red), Pre-Trial Chamber I, 11 October 2013, § 185.

31 Office of the Prosecutor of the ICC, *The Role of the ICC in the Transitional Justice Process in Colombia*, May 2018, §§ 81–82 (hereafter: OTP 2018); See also D. Robinson, ‘The ‘Inaction’ Controversy: Neglected Words and New Opportunities’, in Stahn and El Zeidy (eds), *supra* note 3, 460–502, at 470–471; Stigen, *supra* note 27, at 216.

32 El Zeidy, *supra* note 2, at 166. El Zeidy argues that those cases where the criminal proceedings led to an acquittal or to ‘light sentences’ require the ICC to examine e.g. the police reports, prosecution evidence and trial records to ensure that they comply with the required standards.

33 Robinson, *supra* note 9, at 171.

34 Judgment of the appeal of Mr. Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 ‘Decision on the admissibility of the case against Abdullah Al-Senussi’, *Gaddafi and Al-Senussi* (ICC-01/11-01/11-565 OA 6), Appeals Chamber, 24 July 2014, § 200 (hereafter: *Gaddafi and Al-Senussi* appeal judgement).

on whether the proceedings in a case are genuine or not, it is necessary to analyse the specific facts of that particular case as a whole. Based on this premise, the Expert Group on complementarity (hereafter Expert Group) held that the CA should focus on *procedural* and *institutional* factors, rather than on the *substantive* outcome of the national proceedings.³⁵

Having said that, however, sentences are an important factor of the overall proceedings. The OTP has stated that where the proceedings end up with a conviction, the genuineness assessment also includes the sentence.³⁶ This does not mean that a lenient sentence alone indicates non-genuineness. The Expert Group, for example, lists *inadequate sentences* as one of the indicators that, despite *not being sufficient proof of unwillingness on their own*, may be a relevant factor along with other considerations.³⁷ Similarly, Robinson notes that ‘... *lenient* sentences may be only a modest indicator, useful only in conjunction with other indicators, because lenient sentences are not per se evidence of non-genuineness’.³⁸

Accordingly, sentences may be an indicator to assess the unwillingness of a state to carry out its proceedings genuinely. As such, they cannot have a primary role and be assessed in isolation. Sentence severity/leniency alone cannot render a case admissible before the ICC, as Heller proposes.³⁹ Otherwise, the Court would be able to pre-empt national jurisdictions just because it subjectively considers a sanction as inadequate, which was certainly not the intention of the drafters of the Rome Statute.⁴⁰

Additionally, since the finding of inadequate sentences at both the situation⁴¹ and the case stage of the CA can be seen as indicia of the *unwillingness* of a State to genuinely prosecute⁴² the ICC must also establish that there is an

35 Office of the Prosecutor of the ICC, *Informal Expert Paper: The principle of complementarity in practice* (2006), at 14 (hereafter: Expert Paper).

36 Office of the Prosecutor of the ICC, *Transitional Justice in Colombia and the role of the International Criminal Court*, 13 May 2015, at 9 (hereafter: OTP 2015).

37 Expert Paper, *supra* note 35, at 30–31.

38 Robinson, *supra* note 9, at 174. (Italic emphasis in the original).

39 For similar conclusions: Robinson, *supra* note 9, at 174; Stigen, *supra* note 27, at 217; J.K. Kleffner, ‘The Impact of Complementarity on National Implementation of Substantive International Criminal Law’, 1 *Journal of International Criminal Justice* (2003) 86–113, at 97.

40 For other reasons indicating why sentences cannot have a primary role see: Robinson, *supra* note 9; Stahn, *supra* note 9.

41 H. Olásolo and E. Carnero-Rojo, ‘The Application of the Principle of Complementarity to the Decision of where to Open an Investigation: The Admissibility of Situation’, in Stahn and El Zeidy (eds), *supra* note 3, 393–420, at 406–408.

42 A retrial by the ICC of a person already tried by another court is only possible pursuant Articles 17(1)(c) and 20(3) read in conjunction. Art. 20(3) explicitly provides for exceptions to the *ne bis in idem* principle, which resemble indicators of unwillingness under the CA. See: M. Benzing, ‘The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity’, in A. von Bogdandy and R. Wolfrum (eds), 7 *Max Planck Yearbook of United Nations Law* (Koninklijke Brill, 2003) 591–632, at 619; L.E. Carter, ‘The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem’, 8 *Santa Clara Journal of International Law* (2010) 165–198, at 177, note 38, citing Tallgren & Coracini; B. Broomhall, ‘The International Criminal Court: A Checklist for National Implementation’, 13 *quarter NOUVELLES ETUDES PENALES* (1999) 113–159, at 146.

intent or purpose to either obstruct justice or allow the suspect to evade justice.⁴³ This threshold has been set by both Trial⁴⁴ and Appeals Chambers.⁴⁵ To prove such intent, one, however, might need to extend the analysis beyond procedures in a particular case and include contextual information relating to the state in question as well. For example, assessment of broader considerations such as whether there is separation of power; the independence of the judicial, prosecuting and investigating agencies; and the amount of resources, can be relevant.⁴⁶ Contextual information is important since there could be different degrees of unwillingness. Additionally, this type of information can show the existence of *selective willingness*, meaning that the state may want to initiate proceedings against a certain group, e.g. rebel groups, but not against members of the military or the government.⁴⁷

In sum, sentences cannot have a primary role in the CA and be assessed in isolation, since the focus of the CA is on the process. Furthermore, it can be concluded that sentences considered lenient/inadequate, at both the situation and case stages, may be *indicia* of unwillingness. As such, the ICC would need to establish in its CA that those sentences were imposed with the purpose of obstructing justice or allowing the perpetrator to evade justice. Sentences considered inadequate, with no evidence of *mala fide* cannot render a case admissible before the Court.

B. Between the International and the Domestic: Sentences under the Rome Statute

During the Rome negotiations numerous delegations shared the idea that perpetrators of international crimes should be punished with severe penalties reflecting the gravity of the crimes committed.⁴⁸ Nevertheless, according to the chair of the Working Group on Penalties at the Rome Conference, Rolf Einar Fife, agreeing on the penalties and the applicable laws for sentencing was one of the most controversial issues in Part 7 of the Statute⁴⁹ given that '[w]idely

43 For a similar view see: K. Ambos, 'The Colombian peace process (Law 975 of 2005) and the ICC's principle of complementarity', in Stahn and El Zeidy (eds), *supra* note 3, 1071-1096, at 1089; Kleffner, *supra* note 39, at 97; C.J. Tams et al., *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (C.H. Beck, 2014), at 228-232.

44 Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), *Katanga and Ngudjolo Chui* (ICC- 01/04-01/07-1213-tENG), Trial Chamber II, 16 June 2009, § 76. For the Chamber, the three sub-paragraphs of Art 17(2) describing unwillingness refer to the '... absence of intent on the part of the State concerned to bring the person concerned to justice'.

45 *Gaddafi and Al-Senussi* appeal judgement, *supra* note 34, § 218.

46 Expert Paper, *supra* note 35, at 28-30.

47 *Ibid.* See also: P. Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge University Press, 2018).

48 R.E. Fife, 'Penalties', in R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (Kluwer Law International, 1999) 319-343, at 321-322 (hereafter: Penalties).

49 *Ibid.*

differing views as to the actual purposes and functions of the penal sanctions to be imposed by the Court were compounded by marked differences in national values, norms, standards and judicial practices'.⁵⁰

Although there was consensus on having imprisonment as the basic form of punishment under the Statute, delegations could not agree on the maximum and minimum number of years that a person would receive for committing crimes under the Court's jurisdiction.⁵¹ Furthermore, there was disagreement on the inclusion of the death penalty and life imprisonment in the Statute.⁵² Several delegations opposed their incorporation arguing that both types of penalties go against human rights standards. To reach a consensus on excluding capital punishment, many states had to accept more rigorous penalties than the ones that they would have liked initially.⁵³ Ultimately, the agreement consisted on the exclusion of the death penalty and on the inclusion of life imprisonment under the condition that it would be applied only when justified by 'extreme gravity of the crime and the individual circumstances of the convicted person'.⁵⁴ Additionally, it was decided to provide for a maximum term of imprisonment of 30 years, instead of a definitive term of imprisonment between 20 and 40 years.⁵⁵ In order to meet concerns of a number of delegations in relation to the severity of a life sentence or long prison sentences, a mandatory mechanism to review the sentences imposed by the Court and to determine the possibility of early release of the convicted was incorporated.⁵⁶ The aforementioned clearly shows, that even though the understanding of the drafters of the Rome Statute was that the crimes under the jurisdiction of the ICC should be punished with severe penalties, they opted for a *more benevolent* penalty regime, providing life imprisonment in *exceptional* cases, a maximum penalty of 30 years, and a mandatory mechanism to determine early release. Fines and forfeiture were provided as penalties only in addition to imprisonment.

An essential part of this agreement, however, also was 'the understanding that the inclusion of specific penalties and the non-inclusion of other penalties would not in any way prejudice the national application of penalties nor national laws'.⁵⁷ Such agreement was based on the principle of complementarity⁵⁸ and was expressed in Article 80 of the Rome Statute, which establishes

50 R.E. Fife, 'Article 77 Applicable Penalties', in O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court A Commentary* (3rd edn., C.H. Beck, Hart, Nomos, 2016) 1877–1890, at 1881 (hereafter: *Article 77*).

51 *Report of the Preparatory Committee*, *supra* note 24, at §§ 303–309.

52 *Ibid.*

53 W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn., Oxford Public International Law, 2016), at 1157–1158.

54 Art. 77 ICCSt.

55 Preparatory Committee on the Establishment of an International Criminal Court, *Decisions Taken by the Preparatory Committee at its Session held from 1 to 12 December 1997*, UN Doc. A/AC.249/1997/L.Rev.1 (18 December 1997), at 67.

56 *Ibid.* See: Art. 110 ICCSt.

57 Fife, *Penalties*, *supra* note 48, at 336.

58 *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Rome, 15 June–17 July 1998, Official Records, Vol. II, A/CONF.183/13(Vol.II), at 124–125, § 53.

that: 'Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part'. Accordingly, based on the principle of complementarity, the penalties and sentencing regime in the ICC Statute only apply to the Court, without influencing national laws.⁵⁹

The relevance of Article 80 also lies in the fact that, unlike the majority of national legal frameworks, Article 77 of the Rome Statute does not establish in *abstracto* minimum periods of imprisonment.⁶⁰ The lack of an *a priori* minimum sentences reflects the intention of the drafters to give more flexibility to the judges and leave the issue of minimum periods of imprisonment to their discretion.⁶¹ There is an implicit acknowledgement in the Statute of the need for flexibility when punishing international crimes given the nature and the circumstances in which they take place. Thus, it is reasonable to conclude that lenient sentences are not per se contrary to the Rome Statute and hence should not be seen *a priori* as inadequate punishment.⁶²

Lastly, the presumption of a strong complementarity principle in favour of national jurisdictions is also supported by the fact that parole, pardon, or commutation of sentences imposed by domestic courts may be also possible.⁶³ During the Rome negotiations, there was a view expressing that a person subsequently paroled, pardoned, or had her sentence commuted should also be an exception to the *ne bis in idem* principle. Nevertheless, many delegations, including those in favour of giving greater discretion to the ICC, expressed their concern of allowing the ICC to intervene with administrative or political decision-making.⁶⁴ Thus, it seems that even bona fide parole, commutation of prison sentence or pardons are possible in certain cases.⁶⁵

To conclude, the *travaux préparatoires* and Article 80 show that, although the basic form of punishment under the RS is imprisonment, state parties do not have the duty to adopt the same modes of punishment and range of penalties as part of their national legal frameworks. Pursuant to Article 80, they may apply other punishment modalities that are not provided in the Statute.⁶⁶ Arguably, alternative sanctions — as criminal punishment — may be also possible under the Statute in certain cases. However, the Rome Statute is unclear what an adequate sanction or sentence for international crimes should be when imposed by domestic courts. To assess adequacy of sanctions

59 *Ibid.*, A/CONF.183/13 (Vol. III), at 314.

60 Art. 77 ICCSt.

61 Fife, *Penalties*, *supra* note 48, at 333.

62 Fife, *Article 77*, *supra* note 50, at 1886. For Fife, '... [it is] reasonable to assume that the Court might in particular cases also impose imprisonment for less than one year'.

63 El Zeidy, *supra* note 2, at 298.

64 Holmes, *supra* note 23.

65 *Ibid.* Holmes considers that there is this possibility since the matter was discussed but not included in the final draft of the Statute. However, he thinks that the fact that someone is pardoned or paroled shortly after conviction may indicate that the proceedings were not genuine. For a different conclusion see: El Zeidy, *supra* note 2, at 296–298; Olásolo, *supra* note 9.

66 Olásolo, *supra* note 9, at 48–49.

at the national level, therefore, it is first opportune to look whether there are any existing international standards in this respect.

3. Finding Adequacy in International Law and Practices

Sanctions for core crimes are generally criminal in nature.⁶⁷ In national settings, criminal sanctions for ordinary crimes range from imprisonment to alternative sanctions, which can include community service, house arrest, or electronic monitoring, among others.⁶⁸ This is not the case for international crimes, for which sanctions stipulated in domestic criminal codes are usually limited to imprisonment.⁶⁹ Although it is acknowledged that the commission of these crimes must be punished with severe sentences, in practice this is often not the case.⁷⁰ In fact, sentences vary considerably within and across international criminal tribunals (ICTs), as well as in domestic jurisdictions. Despite this variation, is it possible to derive any standards in international law indicating what adequate sanction for international crimes is?

A. Sanctions and Sentencing by Other International Criminal Tribunals

Similar to the ICC Statute, the Statutes of the other ICTs establish imprisonment as the basic form of punishment.⁷¹ Nevertheless, their case law and practices show that over time no fixed standards developed regarding the sentencing practices and penal regimes for core crimes. As the gravest crimes of international concern, one would expect that they receive lengthier sentences than ordinary crimes punished in domestic jurisdictions. However, in fact, sentences at the international level have often been lower than the ones imposed for common criminality in many states.⁷²

Furthermore, different ICTs vary in their approaches and outcomes of sentencing international crimes. For instance, Smeulers, Holá and Van den Berg found that the Special Court for Sierra Leone (SCSL) handed down an average sentence of 38 years and the International Criminal Tribunal for Rwanda (ICTR) of 22.6 years, while the average sentences at International Military Tribunal (IMT), International Military Tribunal for the Far East (IMTFE) and International Criminal Tribunal for the former Yugoslavia (ICTY) were 15–16

67 C. Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press, 2019), at 388.

68 Morris, *supra* note 8, at 4.

69 U. Sieber (ed.), *The Punishment of Serious Crimes: A Comparative Analysis of Sentencing Law and Practice, Vol. I and II* (edition iuscrim, 2004).

70 M.A. Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press, 2007), at 154.

71 S. D'Ascoli, *Sentencing in International Criminal Law: The Approach of the two UN ad hoc Tribunals and Future Perspectives for the International Criminal Court* (Hart Publishing, 2011), at 111–112.

72 Drumbl, *supra* note 70, at 154.

years.⁷³ Furthermore as of 2012, out of 281 defendants convicted by these courts 217 received a prison sentence ranging from 11 months to 52 years.⁷⁴ Therefore, sentences handed out at ICTs vary largely and they are not legally pre-set standards when it comes to their severity. Judges in case law emphasize that sentences must be proportional to the gravity of the offence and the culpability of the offender.⁷⁵ Empirical studies have shown that the principle of gravity, together with the principles of proportionality, gradation, and totality are principles emphasized by judges in sentencing determination.⁷⁶

Consequently, under ICL adequate sanctions seem to be those proportional to the gravity of the offense and the culpability of the convicted person as determined by judges in a particular case. However, Holá's study demonstrates that, what *proportionate* means widely varies and that there are discrepancies between cases on how gravity and proportionality are conceived and interpreted.⁷⁷ There are a number of reasons explaining these differences. First, judges have considerable discretion when determining sentences. Second, there is no uniformity on the justifications and objectives of international punishment. Neither the positive law nor the ICT's case law establish conclusively the goals of punishment for international crimes; different judges have emphasized different sentencing goals.⁷⁸ However, the case law of the various ICTs, including the ICC, show that retribution and deterrence have been considered as the most relevant rationales.⁷⁹ Third, there is no clarity on what the assessment of the gravity of the crime entails and how crimes of certain gravity are linked to sentences of certain severity. In the ICTY and ICTR practice, for instance, gravity assessment varied depending on the crime and on whether the sentences were imposed to high-ranking or lower-ranking perpetrators.⁸⁰ Finally, the relevance and weight of aggravating and mitigating factors also differ across cases.⁸¹

As a result, there is no clarity in the international case law on what actually proportionality assessment with respect to international crimes entails. Also in

73 A.L. Smeulers, B. Holá, and T. van den Berg, 'Sixty-five Years of International Criminal Justice: The Facts and Figures', 13 *International Criminal Law Review* (2013) 7–41, at 24.

74 *Ibid.* The rest of those convicted were sentenced either to death or life imprisonment. The authors note that these differences in sentencing among tribunals can be explained by sentencing options, case compositions and prosecutorial strategy.

75 B. Holá, *International Sentencing: 'A Game of Russian Roulette or Consistent Practice?'* (Uitgeverij BOXPress, 2012), at 38.

76 *Ibid.*, at 73. See also: S. Vasiliev, 'Punishment Rationales in International Criminal Jurisprudence: Two Readings of a Non-question', in F. Jeßberger and J. Geneuss (eds), *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal Law* (Cambridge University Press, 2020) 45–80.

77 Holá, *supra* note 75, at 38–40, 220–224.

78 Vasiliev, *supra* note 76, at 76–77.

79 *Ibid.*, at 75–76; Drumbl, *supra* note 70, at 60.

80 Holá, *supra* note 75, at 47–51. Although the courts have established that there is no hierarchy among individual categories of core crimes, Holá showed that there are *indicia* of an empirical ordering in terms of the length of the sentence, having genocide with the lengthiest, followed by crimes against humanity and war crimes with the shorter.

81 *Ibid.*, at 220–221.

the scholarship, this question is not settled, and largely neglected.⁸² For ordinary crimes, Andrew von Hirsch introduced a theory on proportionality according to which sentence severity must be proportionate to the seriousness of the crime, in order that punishment conveys the appropriate degree of censure. His theory distinguishes between two sets of considerations: first, crimes of similar gravity should be punished with a sanction of similar severity (ordinal proportionality); second, punishment should be in accordance to its intrinsic seriousness (cardinal proportionality).⁸³ Ordinal and cardinal proportionality have become standard terms of reference on how to link crime and punishment scales.⁸⁴ Furthermore, von Hirsch and Jareborg developed a framework to determine the seriousness of criminal conducts. They came up with a scale to gauge seriousness of common interpersonal offences (murder, theft or assault), focusing on their *standard* harm or threat to specific *generic-interests*, such as physical integrity, material support, freedom from humiliation and/or privacy/autonomy.⁸⁵

Notwithstanding, this framework is difficult to transfer to international crimes, since — as one of the authors recognized — it was mainly designed to address common crimes directly affecting individuals, rather than complex crimes affecting collective interests.⁸⁶ Although there have been recent efforts from criminologists to come up with ways on how to measure harms impacting collective interests, including those that can have potential ‘systemic consequences’,⁸⁷ these efforts presuppose the existence of a strong state, which continues holding the monopoly over violence.⁸⁸ However, this is often not the case in contexts of mass violence, which are usually characterized by a partial

82 See e.g. J.D. Ohlin, ‘Proportional Sentences at the ICTY’, in B. Swart, G. Sluiter and A. Zahar (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, 2011), 322–341; M.M. DeGuzman, ‘Proportionate Sentencing at the International Criminal Court’, in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford University Press, 2014 Forthcoming) 32, Temple University Legal Studies Research Paper No. 2014-15, available online at <https://ssrn.com/abstract=2423501> (visited on February 2020).

83 A. von Hirsch, *Censure and Sanctions* (Clarendon Press, 1993) chapter 2.

84 Cardinal proportionality has been rejected by modern retributivists, since they believe that there is no inherent seriousness of each crime. See: DeGuzman, *supra* note 82, at 20.

85 A. von Hirsch and N. Jareborg, ‘Gauging Criminal Harm: A Living Standard Analysis’, 11 *Oxford Journal of Legal Studies* (1991) 1–38, at 14–15.

85 A. von Hirsch and N. Jareborg, ‘Gauging Criminal Harm: A Living Standard Analysis’, 11 *Oxford Journal of Legal Studies* (1991) 1–38, at 14–15.

86 A. von Hirsch and A. Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005), at 146.

87 V.A. Greenfield and L. Paoli, ‘A Framework to Assess the Harms of Crimes’, 53 *British Journal of Criminology* (2013) 864–885; N. Dorn, and H. van de Bunt, *Bad thoughts: Towards an Organised Crime Harm Assessment and Prioritisation System*, Erasmus University of Rotterdam, available online at https://www.wodc.nl/binaries/volledige-tekst_tcm28-70328.pdf (visited 21 October 2020).

88 Examples of systemic harms or damages are those consequences of organized crime that are structural rather than individual or group-related, including major damage to market stability, political systems, international cooperation. Some of the consequences are penetration of the licit economy, collapse of the state’s monopoly over violence, breakdown of the social order. See: Dorn, *supra* note 87, at 7, 17–19.

or total breakdown of the social order.⁸⁹ Moreover, as Drumbl correctly notes, ‘... [t]he gravity of atrocity crimes can quickly become overwhelming—so much so that, from a retributive perspective, gravity becomes unintelligible and immeasurable.’⁹⁰

Given the difficulties international crimes pose in this respect, due to their large scale, collective character and multifaceted harms they entail, some authors have called for a redefinition of the principle of proportionality for international crimes.⁹¹ Determining proportionality of punishment for mass atrocities in purely retributivist terms and applying the same standards as for ordinary crimes is theoretically problematic and practically challenging.⁹² That is even more so, when international crimes are prosecuted in domestic courts operating in transitional contexts. As argued in Section 4, assessing adequacy of punishment for international crimes delivered in such contexts requires even a more flexible approach. Not only because imposing proportional sentences in a retributivist sense is neither desirable nor possible, but also because there are other pressing interests that come into play when punishing perpetrators of international crimes within transitional contexts.⁹³

B. Sanctioning Serious Human Rights Violations according to Human Rights Courts

According to the jurisprudence of the Inter-American Court of Human Rights (IACtHR) and the European Court of Human Rights (ECtHR), in light of the general duty to respect and ensure the rights and freedoms defined in their respective Conventions, states parties are required to investigate, prosecute, and punish serious human rights violations under their jurisdiction.⁹⁴ Both

89 R.D. Solane, ‘The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law’, 43 *Sanford Journal of International Law* (2007) 39–94, at 81.

90 Drumbl, *supra* note 70, at 156.

91 D. Scalia, ‘Flexibilités/Inflexibilité de la sanction pénale internationale: Une redéfinition des principes de légalité, d’égalité et de proportionnalité?’ in D. Kaminski (ed.), *Les Flexibilités des Sanctions: XXI^{es} Journées Juridiques Jean Dabin* (Editions Bruylant, 2013) 225–244, at 233–239; Solane, *supra* note 89.

92 D’Ascoli, *supra* note 71, at 27.

93 Cf. J. Reyberg, ‘Mass Atrocities, Retributivism, and the Threshold Challenge’, UC Berkeley, ISUS-X Tenth Conference of the International Society for Utilitarian Studies (2008).

94 According to the Geneva Academy of International Humanitarian Law and Human Rights, ‘serious’ human rights violations cover violations amounting to international crimes, but its scope is broader; they do not need to be widespread or systematic in order to be serious. International crimes have a higher threshold. See: Geneva Academy, *What amount to ‘a serious violation of international human rights law?’*, Academy Briefing No 6 (2014), available online at https://www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Academy%20Briefings/Briefing%206%20What%20is%20a%20serious%20violation%20of%20human%20rights%20law_Academy%20Briefing%20No%206.pdf (visited October 2019). Cf. J.P. Pérez-León, ‘The Close Relationship between Serious Human Rights Violations and Crimes Against Humanity: International Criminalization of Serious Abuses’, XVII *Anuario Mexicano de Derecho Internacional* (2017) 145–186.

courts have noted that said duty also derives from customary law and treaty-based law, such as the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), the Geneva Conventions, and the UN Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (UNCAT). Similar to ICTs, the IACtHR and the ECtHR have expressed that the obligation to investigate, prosecute, and punish is an obligation of means and not of results.⁹⁵

These courts have gone beyond, noting that this obligation includes the sentence as well as its enforcement.⁹⁶ Thus, it is under this obligation that the human rights courts have addressed the adequacy of sentences for grave human rights violations. Both courts have held that punishment should be proportional to the gravity of the violations.⁹⁷ In some cases, it has been stated that, under the principle of proportionality, states must take into consideration the characteristics of the crime and the offender's participation and culpability to ensure that the sentences imposed are not a de facto form of impunity.⁹⁸ Moreover, according to the IACtHR, there is an international legal framework establishing that punishment for serious human rights violations must be appropriate to their gravity.⁹⁹

Nonetheless, the IACtHR and the ECtHR have constantly held that determining the adequacy of sanctions is a task of the national courts rather than of international tribunals. Both courts provide domestic authorities with substantial deference in choosing appropriate sanctions, including the determination of minimum sentences in their national legislation as well as the quantum of penalties in individual cases.¹⁰⁰ The IACtHR has emphasized that proportionality functions as a

95 *Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Judgment of 14 November 2014.

96 *Rodríguez Vera v. Colombia*, *supra* note 95, § 460; *Enukidze and Girgvliani v. Georgia*, ECtHR (2011) No. 25091/07, §§ 269, 273 (hereafter: *Enukidze v. Georgia*); *Uğur v. Turkey*, ECtHR (2015) No. 37308/05, § 99 (hereafter: *Uğur v. Turkey*). For instance, in the *Enukidze and Girgvliani* case, regarding disproportionate sentence for ill-treatment and homicide, the ECtHR considered that the core problem was not the initial sentence imposed but their subsequent implementation. The Court considered that reducing offenders' remaining sentences by half and a subsequent release on parole was inadequate.

97 *Rochela Massacre v. Colombia*, IACtHR, Merits, Reparations and Costs, Judgment of 11 May 2007, Series C, No. 163, § 196; *Cepeda Vargas v. Colombia*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Judgment of 26 May 2010, Series C, No. 213, § 150 (hereinafter: *Cepeda Vargas v. Colombia*); *Nikolova and Velichkova v. Bulgaria*, ECtHR (2007) No. 7888/03, §§ 61–63 (hereafter: *Nikolova v. Bulgaria*); *Leparskienė v. Lithuania*, ECtHR (2009) No. 4860/02, § 52 (hereafter: *Leparskienė v. Lithuania*); *Bektaş and Özalp v. Turkey*, ECtHR (2010) No. 10036/03, §§ 51–52.

98 *Cepeda Vargas v. Colombia*, *supra* note 97, § 150; *Heliodoro Portugal v. Panama*, IACtHR, Preliminary Objections, Merits, Reparations, and Costs, Judgment of 12 August 2008, Series C, No. 186, § 203.

99 *Cepeda Vargas v. Colombia*, *supra* note 97, § 150.

100 *Hacienda Brasil Verde Workers v. Brazil*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Judgment of 20 October 2016, Series C, No. 337, § 462 (hereafter: *Hacienda Brasil v. Brazil*); *Coc Max et al. (Massacre of Xamán) v. Guatemala*, IACtHR, Merits, Reparations and Costs, Judgment of 22 August 2018, Series C, No. 356, § 86; *Vargas Areco v. Paraguay*, IACtHR, Merits, Reparations and Costs, Judgment of 26 September 2006, Series C, No.

guide for states to avoid not only lenient sentences, but also excessive punishment.¹⁰¹ Thus, an (arbitrary) inadequate sentence is one that, not reflecting the specificities of the case, is too lenient or too harsh.¹⁰² In relation to lenient sentences, for example, the ECtHR has found that sentences for ill-treatment and homicide are disproportionate when they impose the minimum penalty available and, additionally, have been reduced, suspended, or/and pardoned.¹⁰³ For its part, the IACtHR has noted that although domestic courts should hand out penalties proportional to the gravity offence, it is up to the states to establish a minimum sentence for the crime in their penal legislation. In the *Hacienda Brasil Verde Workers v. Brazil* case, for example, the Court did not find a law providing a penalty range of 2–8 years for slavery in breach of the Convention.¹⁰⁴

It is important to note that there has been a tendency in international law to consider blanket amnesties and pardons for grave human rights violations incompatible with the obligation to investigate, prosecute and punish these crimes under both the American and European Conventions on Human Rights.¹⁰⁵ However, simultaneously the courts have recognized difficulties that countries undergoing transitional justice processes face in complying with international standards in such contexts, and thus seem to be moving to a more flexible approach regarding amnesties and other judicial measures seeking accountability (see Section 4).

In sum, under the jurisprudence of the human rights courts, states have a large margin of appreciation in determining the adequacy of sentences for grave human rights violations. The imposition of sentences, however, must be guided by the principle of proportionality reflecting the gravity of the crimes and culpability of the offender.

C. Treaty Law Obligations

The duty to punish certain acts amounting to international crimes is expressly provided in several international conventions. For example, the Genocide Convention; the UNCAT; the Geneva Conventions and its additional

155, § 108; *Nikolova v. Bulgaria*, *supra* note 97, §§ 61–63; *Uğur v. Turkey*, *supra* note 96, § 97; *Enukidze v. Georgia*, *supra* note 96, § 268; *Leparskienė v. Lithuania*, *supra* note 97, § 52.

101 *Rodriguez Vera v. Colombia*, *supra* note 95, § 459.

102 For an analysis on long-term sentences see: D. Scalia, ‘Long-Term Sentences in International Criminal Law: Do they Meet the Standards Set Out by the European Court of Human Rights?’, 9 *JICJ* (2011) 669–687, at 671–673.

103 In several cases, the initial sentence imposed was between 7 and 8 years of imprisonment, and later on was reduced to 2 or lesser number of years or months.

104 *Hacienda Brasil v. Brazil*, *supra* note 100, § 462.

105 *Barrios Altos v. Perú*, IACtHR, Merits, Judgment of 14 March 2001, Series C, No. 75, §§ 41–44; *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, IACtHR, Preliminary Objections, Merits, Reparations, and Costs, Judgment of 24 November 2010, Series C, No. 219, § 148; *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*, IACtHR, Merits, Reparations and Costs, Judgment of 25 October 2012, Serie C, No. 252, § 283; *Marguš v. Croatia*, ECtHR (2014) No. 4455/10, § 139 (hereafter: *Marguš v. Croatia*); *Okkāl v. Turkey*, ECtHR (2006) No. 52067/99, § 76. See also: Communication 431/12, *Thomas Kwoyelo v. Uganda* (ACHPR/COMM/431/12/UG/1512/18) 24 August 2018, § 293.

Protocols; the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED); and the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.

These conventions establish that states parties must punish these crimes with either effective¹⁰⁶ or appropriate¹⁰⁷ penalties. Neither, however, define these concepts nor provide for the type of penalties or their severity. Commentators agree that the treaties give discretion to states parties with regards to the penalties.¹⁰⁸ Yet, states are bound by the principles of international (customary) law, which establish i.e. that national laws must provide measures guaranteeing the recognition of certain forms of superior responsibility, the non-applicability of statutes of limitations, the inadmissibility of defences of superior orders, among others.¹⁰⁹ Therefore, contrary to the Rome Statute, states have an obligation to enact legislation necessary to provide appropriate criminal penalties for the breaches of these conventions; the ratification of the ICC's Statute does not appear to be a substitute for compliance with these treaties.¹¹⁰

Anne Marie La Rosa provides one of the most comprehensive explanations of what an effective sanction means in relation to IHL violations. There are several elements that determine the effectiveness of sanctions: (i) certainty, that is, that they will be imposed regardless of the offender; (ii) immediacy, meaning that the sanctions will be imposed shortly after the commission of the crime; (iii) applicability to all the perpetrators without distinction of the group to which they belong; (iv) publicity, that is, that people should be aware of the consequences of the crime; (v) proximity in form and substance to the place where the crimes were committed, this means that delocalization should be the exception, and only when in situ justice is not possible; (vi) context-dependency, meaning that to have greater impact sanctions must be designed within a framework that takes into consideration cultural factors and includes other forms of traditional justice; and (vii) proportionality to the gravity of the crime and to the responsibility of the perpetrator.¹¹¹

106 Art. 5 of the Genocide Convention; Arts 49 and 50 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Arts 146 and 147 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War; and Preamble to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.

107 Art. 4 UNCAT; Art. 7 ICPPED.

108 Tams, *supra* note 43, at 228–232.

109 ICRC Advisory Service on International Humanitarian Law, *Preventing and Repressing International Crimes: Towards and 'Integrated' Approach based on Domestic Practice*, Report of the Third Universal meeting of National Committees for the Implementation of International Humanitarian Law, Vol. I (2014), at 93–94, available online at <https://www.cervenykriz.eu/cz/nsmhp/setkaniNKMHP.pdf> (visited 18 August 2019) (hereafter: ICRC Vol. I).

110 Tams, *supra* note 43.

111 A.M. La Rosa, 'Sanctions as a Means of Obtaining Greater Respect for Humanitarian Law: A Review of their Effectiveness', 90 *International Review of the Red Cross* (2008) 221–247, at 226–228.

La Rosa, similar to other experts, recognizes that extraordinary crimes cannot be addressed solely from a penal perspective given that criminal sanctions, taken in isolation, are by nature insufficient and ineffective.¹¹² While there is recognition on the necessity of adopting a broader and holistic approach to sanctioning extraordinary crimes, particularly in transitional justice (TJ) processes, it is generally agreed that criminal sanctions remain essential as a response to the violations of *jus cogens* norms and serious violations of IHL and ICL, and that imprisonment represents a central element in sanctioning these crimes.¹¹³ For instance, the UN Working Group on Enforced Disappearances has stated that ‘... appropriate penalties ... in principle means prison sentences’.¹¹⁴ Furthermore, some of the holders of the UN Special Procedures Mandates, UNCAT Committee and other commentators seem to agree that sentences for international crimes must carry severe penalties proportional to the gravity of the offences.¹¹⁵ Similar to the approach of the human rights courts, these bodies advocate for using the range of penalties for similar crimes in each national criminal law system as a guideline to determine proportionality of sanctions for international crimes in specific cases.¹¹⁶

The UNCAT Committee, for example, has found that light penalties and pardons granted to enforcement officers that had committed torture are contrary to the Convention.¹¹⁷ It has also expressed its concern with regards to the imposition of reduced or suspended sentences for those who have committed torture and war crimes.¹¹⁸

112 *Ibid.*, at 222–223; ICRC Vol. I, *supra* note 109, at 64; P. Seils, *Squaring Colombia's Circle: The Objectives of Punishment and the Pursuit of Peace*, International Center for Transitional Justice (2015), available online at <https://www.ictj.org/publication/squaring-colombia-circle-objectives-punishment-peace> (visited 25 October 2019).

113 ICRC Preventing International Crimes Vol. II, at 136–137, available at <https://www.icrc.org/en/doc/assets/files/publications/icrc-002-4138-2.pdf> (visited 18 August 2019).

114 Working Group on Enforced or Involuntary Disappearances, *Compilation of general Comments on the Declaration on the Protection of All Persons from Enforced Disappearances*, § 57, available online at https://www.ohchr.org/Documents/Issues/Disappearances/GeneralCommentsDisappearances_en.pdf (visited 10 August 2019) (hereinafter: WG Enforced Disappearances).

115 *Interim Report, UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN GA A/65/273, 10 August 2010, § 50 (hereinafter: SR Torture); WG Enforced Disappearances, *supra* note 114, § 57; ICRC, *Treaties, States Parties and Commentaries, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary of 2016: Article 49: Penal Sanctions* (2016) available online at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=3ED0B7D33BF425F3C1257F7D00589C84> (visited 10 August 2019).

116 WG Enforced Disappearances, *supra* note 114, § 57; SR Torture, *supra* note 115, § 50; Tams, *supra* note 43, at 228–232.

117 In *Urra Guridi v. Spain*, the Committee found that a prison sentence of 4.2 years, which was later reduced to one-year prison sentence, was contrary to the Convention. See: UNCAT, *Decision Urra Guridi v. Spain*, CAT/C/34/D/212/2002, 24 May 2005, § 6.6–6.8; *Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 654/2015*, CAT/C/61/D/654/2015, 3 October 2017, § 7.7.

118 UNCAT, *Consideration of reports submitted by States parties under article 19 of the Convention: Concluding observations of the Committee against Torture, Colombia*, CAT/C/COL/CO/4, 4 May 2010, § 14.

Taken together all the laws, case law and commentaries briefly outlined above, there are no *fixed* international standards on sentencing practices and penal regimes indicating what an adequate sentence for international crimes should be. Nevertheless, there are a few guiding principles and practices that must be taken into consideration.

First, under international law states generally have a duty to investigate, prosecute and punish.¹¹⁹ This duty is one of means and not of results, meaning that proceedings matter and must be genuine. Thus, focusing exclusively on the penalty imposed in a particular case is inconsistent with the Rome Statute and with international standards. Secondly, regarding the nature and form of punishment, specialized courts and bodies, through the examination of the relevant treaties and conventions, have consistently held that sanctions must be criminal, and that imprisonment remains the basic form of punishment. This does not mean, however, that other forms of criminal punishment are not allowed in certain circumstances (as explained in Section 4).¹²⁰ Thirdly, gravity and proportionality are considered the most important principles for sentencing despite the lack of agreement on what these principles mean and how they should be applied. The emphasis on proportionality — understood in retributive terms as ‘just desert’ — is certainly part of a shared rhetoric among the tribunals and specialized bodies.¹²¹ The international sentencing practices suggest, however, a departure from strictly conceived retributivism and its principle of proportionality. Finally, due to the lack of prescribed minima and maxima of periods of imprisonment, states have broad discretion when determining them at the national level.

Therefore, the assessment of adequacy of sentences imposed by domestic jurisdictions needs to be embedded in the particular national context.¹²² Ordinarily, the penalties provided for and handed out for extraordinary crimes and grave human rights violations should be, at least, similar to those for ordinary crimes of similar gravity. The following section therefore touches upon what such assessment of adequacy — zooming in on and comparing the criminal laws and proceedings of a particular state — entails. Such approach, however, needs to be adjusted in cases when penalties for international crimes are stipulated in laws adopted and implemented in transitional contexts.

119 Several commentators argue that this duty is not an absolute obligation and that it is rather a *prima facie* rule of international law that should be balanced against other values in conflict. See, e.g. N.C. Sánchez and R. Uprimny, ‘The Challenges of Negotiated Transitions in the Era of International Criminal Law’, in *Beyond the Binary Securing Peace and Promoting Justice After Conflict* (DeJusticia, 2019) 18–71, at 28–37, available online at <https://www.dejusticia.org/en/publication/beyond-the-binary-securing-peace-and-promoting-justice-after-conflict/> (visited 29 December 2019) (hereafter: *Beyond the Binary*). For a contrary view see: T. Rincón-Covelli, ‘International Human Rights Standards in the Context of Transitional Justice’, in *Beyond the Binary*, 92–107.

120 For a similar conclusion see: C. Nash, ‘Transitional Justice and the Limits of the Punishable: Reflections from a Latin-American Perspective’, in *Beyond the Binary*, *supra* note 119, 109–129, at 125–126.

121 In relation the rhetoric of ICTs, see: Vasiliev, *supra* note 76, at 76.

122 This approach is also consistent with the principle of legality of sentences.

4. Finding Adequacy at the National Level — Need for Flexibility in Transitional Contexts

In order to answer the question of what an (in-)adequate sentence is for the purpose of complementarity, the ICC therefore needs to look into the state's internal laws and practices in the particular case. A sentencing analysis looking at domestic laws would entail doing a comparison between the penalties provided for ordinary crimes of similar gravity and the penalties provided at the national level for the crimes under the ICC jurisdiction.

Héctor Olásolo has proposed an '*intra-systemic analysis*' of complementarity as a way to assess adequacy of national sentencing within the CA. Under his theory, the object of the CA of national sentencing is '... confined to the examination of the national process of determining the appropriate penalty (*individualización de la pena*)', both at the situation and case stage.¹²³ Such process comprises the *a priori* determination by the legislative of the kind of penalty and the penalty range, as well as the judicial and executive determination of penalties. Consequently, the analysis encompasses both an *in abstracto* (in terms of the penalty ranges provided in laws for both ordinary and international crimes) and *in concreto* (particular circumstances of the case at hand) assessments of penalties.

The *in abstracto* analysis compares the type of penalty and penalty ranges of ordinary crimes of similar gravity and international crimes stipulated in the national legislation, as well as the sentencing rules for both categories of offenses. If there is a considerable difference between these, and the variation *only differs for international crimes*, then such finding will be relevant for admissibility purposes.¹²⁴ The *in concreto* assessment of the judicial individualization of the penalty looks at whether the judge did a correct determination or whether she departs without justification not only from the parameters and rules established by the legislator when individualizing the penalty, but also from the principles that are expressed in the positive law. The executive determination of penalties will only be relevant when the ICC finds that the criteria in Article 20(3) are met. Lastly, Olásolo explains that in the situation stage, the Court would have to assess the process of determining the appropriate penalty in relation to the crimes that may fall under its jurisdiction and to the individuals who may be the most responsible persons.

Assessing the adequacy of sentences intra-systemically — zooming in on domestic criminal laws and practices — is an approach in accordance with Article 80 of the Rome Statute and the principle of complementarity given that it uses as a benchmark the principles and values of the national criminal justice system and, thus, of the penalties provided in domestic laws. Nevertheless, it can fit uneasily with complexities that transitioning states

123 Olásolo, *supra* note 9, at 48. (Italics in the original).

124 Olásolo addresses those variations of penalty ranges on the basis of the modes of liability, the subjective element, on the lack of completion of the *actus reus*, and the case of *concurso delictorum*.

are facing in their pursue of accountability following armed conflict or repression. In such complex and challenging contexts, assessment of adequacy of sentences and proportionality of punishment requires a more flexible approach. The reason for this is that traditional justifications and principles of a certain criminal justice system may be less relevant or different in such contexts. The social and normative expectations of a society in transition will determine the norms and legal instruments that should be implemented or established in that particular moment, and the ones should have a marginal role or be excluded.¹²⁵ Hence, evaluation of adequacy of sentences should take into account these other interests and much broader socio-political goals of transitional societies, which largely determine and shape prosecutions and punishments of international crimes and their role in the overall transitional processes.¹²⁶

Oftentimes, systematic and large-scale human rights abuses and serious crimes are committed in countries that are immersed in lengthy violent conflicts or have authoritarian regimes. Countries in these circumstances face many challenges to put an end to the conflict or to transit away from autocracy. Such contexts of political transitions are characterized by weak institutions, traumatized population, widespread insecurity, and diminished resources.¹²⁷ Hence, transiting from war to peace, or from autocracy to more democratic forms of governance, and re-establishing the rule of law requires a careful calculation of the objectives that in-conflict or post-conflict societies want to pursue and how to pursue them.¹²⁸

Such calculations cannot be done in the abstract; rather they are context-dependent and take into consideration the political, economic, social, and legal limitations in a particular society.¹²⁹ Among the calculations that transitional communities are confronted with is whether it is necessary and feasible to punish all perpetrators of mass crimes, and if so, what are the purposes of punishment, e.g. to give the perpetrator what they deserve, to deter future crimes, or to contribute to achieve broader social and political goals, such as reconciliation, democratization and prosperity.¹³⁰ Therefore, in such contexts, punishment (even for those most responsible of serious international crimes) can — for pragmatic or principled reasons — deviate from the traditional principles and aims of the criminal justice systems and, hence, from the ‘normal’ penalty regimes.¹³¹

125 Polaino-Orts, *supra* note 21, at 255.

126 Gargarella, *supra* note 20, at 27–36.

127 *The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General*, UN SC Doc. S/2004/616, 23 August 2004, § 3.

128 P. Clark, ‘Establishing a Conceptual Framework Six Key Transitional Justice Themes’, in K. McEvoy and L. Mallinder (eds), *Transitional Justice*, Vol. I (Routledge, 2017) 45–57, at 46.

129 C. Murphy, ‘Transitional Justice, Retributive Justice and Accountability for Wrongdoing’, in C. Corradetti, N. Eisekovic and J. Rotondi (eds), *Theorizing Transitional Justice* (Ashgate Publishing, 2015) 59–68.

130 Clark, *supra* note 128, at 45–46.

131 R. Teitel, ‘The Global Jurist as Pedagogue? Ronald Dworkin in post-Junta Argentina’, 5 *London Review of International Law* (2017) 269–287, at 276. Teitel concludes that ‘... the deontological view of punishment is delimited, or ... relativised, to respond to the urgency and priority of the broader political goals of democratic transition.’; See also Drumbl, *supra* note 70.

As H.L.A. Hart has wisely noted, the institution of criminal punishment is ‘... a compromise between radically distinct and partly conflicting principles’ that are less or more relevant at different points.¹³² In transitional contexts the principle of proportionality understood in a strict retributive sense, for example, becomes less relevant since there are other pressing interests and values that a certain society seeks to protect.¹³³ Insisting on punishing perpetrators with nothing less than ‘proportional’ imprisonment sentences or equally to ordinary crimes of similar seriousness may stall peace processes in post-conflict situations, cause dictators or macro-criminal structures to hold on to power, or obstruct the efforts to achieve long-term peace, causing more harm and human suffering.¹³⁴

In such situations, the character of the past violence, the context of transitions and the aims of transitioning societies (e.g. ending the conflict, democratization, reconciliation, and reparation to the victims) will inform the design of punishment, its goals, modalities and severity. Thus, ‘[p]unishment is ... no longer an end in and of itself, or the reaction of a society to a criminal offence or an ethical response to the crimes. Instead, it is an instrument to achieve broader social goals’.¹³⁵ Therefore, regardless of the traditional aims of punishment within a given state, stipulated sentence ranges, and existing practices for ordinary crimes, assessing adequacy of punishment in transitional contexts requires a flexible approach, what we call, a *contextualized principle of proportionality*. It implies reconceptualizing proportionality assessment by zooming out of traditional criminal justice principles and goals to include other various considerations specific to the particular transitional society.¹³⁶

The circumstances of transitional contexts necessarily require such a *contextualized principle of proportionality* where specific (forward-looking) interests of the transition are incorporated in the assessment of adequacy of sentences.

132 H.L.A. Hart, ‘The Presidential Address Prolegomenon to the Principles of Punishment’, 60 *Proceedings of the Aristotelian Society*, New Series (1959–1960) 1–26, at A.

133 For an overview of the proportionality principle in different punishment theories see: J. Reyberg, *The Ethics of Proportionate Punishment A Critical Investigation* (Kluwer Academic Publishers, 2004).

134 C. Nino, ‘The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina’ 100 *YLJ* (1999) 2619–2640, at 2620; J. Zalaquett, ‘Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations’, in K. McEvoy and L. Mallinder (eds), *Transitional Justice: Critical Concepts in Law*, Vol. II (Routledge, 2017) 130–141.

135 Cf. L. Rueds Guzman and B. Holá, ‘Punishment in Negotiated Transitions: The Case of the Colombian Peace Agreement with the FARC-EP’, 19 *International Criminal Law Review* (2019) 127–159, at 135.

136 Cf. Antony Duff identifies three possible versions of the principle of proportionality in determining the severity of sentences. While using a conventional understanding of proportionality in an ideal situation, he acknowledges a possibility of extraneous considerations (beyond ‘measuring’ harm and culpability) on sentence severity. See R.A. Duff, *Punishment, Communication and Community* (Oxford University Press, 2001), at 139–140. Duff discussing trials and punishment in transitional contexts: R.A. Duff, ‘Process, not Punishment: The Importance of Criminal Trials for Transitional and Transitional Justice’, University of Minnesota Law School, Legal Studies Research Paper Series, Research Paper No. 14-03, at 8.

Such broader interests include, for instance, the need for demobilizing combatants, guaranteeing the transition, repairing the damage caused to victims, and/or the need for measures to address existing structural violence and inequalities. All these interests must be balanced and weighed according to their bearing on the transitional goals. Consequently, in such challenging and fluid contexts the imposition of reduced or non-custodial sentences — which are also criminal punishment censuring the crimes — could be justified when they contribute to protecting other pressing interests such as: (i) avoiding future (but almost certain) killings, torture, enforced displacements, among others, by allowing either the demobilization of combatants, reaching a peace agreement between warring parties, or the transition to democracy without endangering it;¹³⁷ (ii) the recognition of victims as such by the perpetrators and third parties, as well as the satisfaction of their rights, in particular their right to the truth and reparation of the harms resulting from the crimes; (iii) avoiding or minimizing secondary or future harms suffered by direct or indirect victims caused by certain crimes;¹³⁸ (iv) initiating measures of non-repetition seeking ‘positive peace’, which is not only the absence of direct personal violence, but also structural violence.¹³⁹ Therefore, these diverse goals and interests will necessarily shape and form what is desirable and possible in terms of transitional criminal processes and sanctions, and as such should also be weighed in when assessing their adequacy and proportionality.

With regards to reduced or alternative sanctions for those most responsible for international crimes, the case of Colombia comes to mind as a foremost example. In 2016, after 50 years of a violent internal armed conflict, the Colombian government signed a peace agreement with the *Fuerzas Armadas Revolucionarias de Colombia- Ejército del Pueblo* (FARC-EP), one of the main guerrilla groups in the country. The agreement provides for the creation of a Comprehensive System to Satisfy Victims’ rights to Truth, Justice, Reparation and Non-repetition, including the Special Jurisdiction for Peace which is a judicial mechanism in charge of determining criminal responsibility of the crimes related to the conflict. The sanctions under the peace agreement are restorative in nature. They consist of custodial and non-custodial measures, involving different levels of *effective restriction of liberty* and other intermediate sanctions, such as community service.¹⁴⁰

If the regular intra-systemic analysis was applied to the Colombian TJ’s sentencing and penalties regime, one could expect Colombia not to pass the CA as the sanctions would seem largely inadequate given the retributive and punitive orientation of the Colombian Criminal Code. Although the OTP has

137 Nino, *supra* note 134, at 2620.

138 On the harms suffered by family members of people forcibly disappeared, the location of the bodies, and reduced sentences, see: J. Espíndola, ‘Beneficios penales y desapariciones en México: Entre la inmunidad y la verdad’ (draft chapter).

139 D.N. Sharp, *Rethinking Transitional Justice for the Twenty-First Century: beyond the End of History* (Cambridge University Press, 2018), at 89.

140 Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera, 24 November 2016.

expressed concerns regarding the sentencing regime, it has stated that ‘... [d]espite the ... very low range of sentences, [it] has not found that the proceedings violated complementarity norms in the Rome Statue.’¹⁴¹ In fact, the Deputy Prosecutor of the ICC, on behalf of the OTP, has recognized that penal sanctions may take different forms and achieve their objectives in different ways, including reduced sentences and alternative sentences, as long as they have appropriate sentencing objectives, fulfil certain measures, and are consistent with a genuine intent to bring the person convicted to justice.¹⁴²

The OTP’s position clearly recognizes that there are cases that may fall outside the general standard of punishing extraordinary international crimes with retributively proportional prison sentences, evaluated against practices ordinarily applied within a state. Similarly, judges from human rights courts have issued judicial opinions that argue along these lines. For instance, former judge Diego Garcia-Sayán, in his concurring opinion in the judgment of the *Massacres of El Mozote v. El Salvador*, stated that:

... armed conflict and negotiated solutions give rise to various issues and introduce enormous legal and ethical requirements in the search to harmonize criminal justice and negotiated peace. *This harmonization must be carried out by weighing these rights in the context of transitional justice itself.* Thus, particularities and specificities may admittedly arise when processing these obligations in the context of a negotiated peace. *Therefore, in these circumstances, States must weigh the effect of criminal justice both on the rights of the victims and on the need to end the conflict ... Thus, for example, in the difficult exercise of weighing and the complex search for this equilibrium, routes towards alternative or suspended sentences could be designed and implemented ...*¹⁴³

In the *Marguš v. Croatia* case, several judges from the ECtHR issued joint concurring opinions where they recognized that there may be cases where states, trying to put an end to a conflict or to an authoritarian regime, might need to use other measures, such as amnesties, allowing them to find solutions and prevent future human rights violations.¹⁴⁴

Neither the IACtHR nor the ECtHR have defined their position with regards to reduced sentences and alternatives sanctions for serious human rights violations. In fact, the IACtHR has been very cautious in assessing the Colombian TJ models, including the 2005 Justice and Peace Law that also provided for reduced sentences.¹⁴⁵ These judicial and policy developments nonetheless

141 OTP 2015, *supra* note 36, at 12.

142 OTP 2018, *supra* note 31, at 14–16.

143 Concurring Opinion of judge D. Garcia-Sayán Judgment of the Inter-American Court of Human Rights case of *The Massacres of El Mozote v. El Salvador*, *supra* note 105, at §§ 26, 27, 30, 31. Judges L.A. Franco, M.M. Macaulay, R.A. Blondet and A. Pérez Pérez adhered to this Opinion. (Emphasis added).

144 Joint concurring opinion of I. Ziemele, I. Berro-Lefèvre and I. Karakaş and joint concurring opinion of judges J. Šikuta, K. Wojtyczek and F. Vehabović. *Marguš v. Croatia*, *supra* note 105.

145 L.M. Gutiérrez Ramírez, ‘La obligación internacional de investigar, juzgar y sancionar graves violaciones a los derechos humanos en contextos de justicia transicional’, 16 *Estudios Socio-Jurídicos* (2014) 23–60.

reflect that there may be an openness to assessing adequacy of criminal punishment in TJ contexts in a more flexible way.¹⁴⁶

This, however, also does not mean that ‘anything goes’. In order to be considered ‘adequate’, reduced or alternative sanctions for international crimes need to be accompanied with certain conditions and mechanisms guaranteeing victims’ rights. Offenders should not only depose arms and demobilize, but also acknowledge their responsibility, contribute with complete truth, and repair the damage to the victims.¹⁴⁷ In addition, such measures must be accompanied with mechanisms for their effective implementation and other measures of non-repetition, otherwise the satisfaction of victims’ rights will only be dead letter and the legitimacy of the transitional project questioned.¹⁴⁸ Thus, alternative/reduced sanctions need to be part of a comprehensive transitional legal framework designed to uncover the underlying reasons of the conflict, addressing the structural injustice and wrongdoings, and including victims as an essential part of the processes.¹⁴⁹

Of course, the ICC is not in the position to (and should not) evaluate or double guess the parameters of transitional justice process itself nor its goals. However, within the given transitional context, an analysis of adequacy of sanctions for international crimes necessarily need to ‘zoom out’ beyond traditional criminal justice system. Such flexible approach requires the Court to evaluate the genuineness of the proceedings as a whole, including alternative sanctions, while giving an appropriate deference to bona fide choices and preferences of domestic authorities. A CA of these sanctions would look at the process of determination of the sentence (in *abstracto* and in *concreto*) within a given context at both the situation and the case stage. An analysis in *abstracto* would entail assessing for instance whether the framework providing for the imposition of those sanctions for international crimes include specific conditions in line with other TJ goals, such as the ones mentioned above, as well as the necessary mechanisms to fulfil them. An in *concreto* analysis would look at the particular case and assess whether the perpetrator complied fully with such conditions. Furthermore, the Court should assess whether or not there are elements indicating possible unwillingness to bring the offender to justice, which includes the correct implementation of the conditions for imposing such sentences.

146 This may also be concluded from the recent decision of the ICC’s Appeals Chamber. See footnote *supra* note 6. Although the Chamber only made reference to amnesties, it is reasonable to conclude that, in certain cases, there could also be flexibility regarding alternative sanctions. Flexibility is also seen by the African Commission on Human and Peoples Rights, see *supra* note 105.

147 M.P. Saffon and R. Uprimny, *Uses and Abuses of Transitional Justice in Colombia* (DeJusticia, 2008), available at https://www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_59.pdf (visited 11 January 2020). For similar conditions see: OTP 2018, *supra* note 31, at 15.

148 There is an important precedent from the Constitutional Court in Colombia, ruling on the reduction of punishment without having adequate mechanisms to sufficiently protect victims’ rights. See: Constitutional Court ruling C-370 of 2006.

149 Sánchez, *supra* note 119, at 46.

It would be hard to argue that, under the principle of complementarity, alternative/reduced sanctions designed and imposed in these scenarios are not genuine and have the purpose of shielding perpetrators. Therefore, in transitional contexts, even more so than in stable circumstances, the criminal justice component and sanctions cannot be assessed in isolation during the CA, but should be assessed in a holistic way, considering the wider context of the TJ process. A reconceptualization of the principle of proportionality as suggested here also requires rethinking the aims and justifications of punishment for international crimes in transitional contexts and their fit with the normative demands of criminal justice theory. This is something that we aim to develop further in our future research. It is clear, however, that international crimes and transitional contexts, in which these crimes are oftentimes prosecuted and punished, do not square easily with the adopted conventional criminal punishment theories, and require new theoretical approaches and more flexible practices.

5. Conclusion

Under the Rome Statute and international law, there is a duty to investigate and prosecute the gravest crimes of international concern. State parties to the ICC must comply with such duty pursuant the principle of complementarity. As one of the cornerstones of the ICC, the principle of complementarity ‘... is not only a concession of justice to sovereignty, but the basis of a system of justice with domestic responsibility as a starting point’.¹⁵⁰

Punishment and sentences are relevant in the fulfilment of the said duty, playing an important role in the CA. Notwithstanding, their role is not a primary or exclusive one. On the contrary, sentences are relevant for complementarity purposes only when there are concerns about their genuineness if they seem inadequate in relation to the gravity of the crime committed and the culpability of the offender.

Determining the adequacy of penalties for international crimes, however, is a big challenge. Not only due to the nature of the crimes, but also because of the lack of clear standards in international law. The Rome Statute, the statutes of the different ICTs, and other international conventions are silent on the range of penalties and the principles that judges should apply when sentencing perpetrators of international crimes. In addition, the principle of complementarity and Article 80 of the Rome Statute ensures that the ICC would not determine nor influence national penal policies. State parties are given great deference in determining the modes and range of penalties. Consequently, the ICC must evaluate the adequacy of sentences for international crimes for the purposes of the CA at the national level. In practice, specialized courts and bodies of different international treaties and conventions dealing with international crimes or serious human rights violations have identified prison

150 Stahn, *supra* note 67, at 222.

sentences proportional to the gravity of the crimes and culpability of the offender, determined in comparison to existing criminal laws and practices of a given state, as a standard to assess adequacy of sentences.

Nevertheless, using the norms and principles of the ordinary national criminal justice as a benchmark and insisting on retributively proportional prison sentences fits uneasily with other competing interests that transitional societies want to protect. In such contexts, criminal trials and punishments are just a part and parcel of broader TJ processes. The penal rationales differ from those in ordinary times. A CA of adequacy of sentences stipulated and handed out in transitional times, therefore, must be done from a holistic perspective, going beyond criminal law or the respective criminal justice system, encompassing also the TJ system (being) set up and its broader functions and goals. A *contextualized principle of proportionality* would allow the ICC to assess such transitional punishments in their pursuit of broader transitional goals. That could also encompass reduced or non-custodial sanctions — even for those most responsible — if proceedings and sanctioning is determined as genuine.

Reduced/alternative sanctions seem a viable option to comply with the duty to investigate, prosecute and punish in TJ contexts and, at the same time, gives space to the warring parties that are trying to end up a conflict and reach peace. Future research on the type, goals, and scope of these sanctions can shed further light on how they can contribute to achieving the rationales and objectives of both the Rome Statute and the TJ processes — this necessarily requires rethinking dominant punishment theories in transitional contexts.

Execution of sentences for war criminals after the Nuremberg trials

by Viktoria Piekarska & Sophie Straßer

Thu., 24 June 2021; 12:00 – 13:00

Abstract:

Straßer and Piekarska both deal in their doctoral studies with the imprisonment of criminals of ICL after a conviction by international courts. One thesis examines the historical imprisonment of convicts of the subsequent Nuremberg trials at Landsberg, Bavaria. The other research analyzes the present third-party prison model of the ICC. By means of a biographical approach they contrast the two forms of imprisonment of criminals of ICL

Article:

Smeulers, Alette (2008): Perpetrators of International Crimes: Towards a Typology.

X. PERPETRATORS OF INTERNATIONAL CRIMES: TOWARDS A TYPOLOGY

Alette SMEULERS¹

1. INTRODUCTION

International crimes such as war crimes, crimes against humanity and genocide are extreme forms of collective violence. Lawyers tend to refer to these crimes as structural criminality or system criminality. Criminologists would qualify this type of criminality as state crime, organisational crime or political crime. These types of crime are usually committed in a context of mass violence, on behalf of the state, within a group or by members of a specific governmental or militarised unit or organisation. In some cases thousands of ordinary people get involved. How can this be explained? How can it be explained that large numbers of otherwise ordinary and law-abiding citizens become involved in genocide or other international crimes? The central focus of this chapter will be on the perpetrator of international crimes, not merely on the physical perpetrators but on all those who somehow become involved in the crimes. Perpetrators differ in their motives, the roles they play and the situation within which they operate. The main aim of this chapter is to create a typology of perpetrators in order to better understand the specific role individual perpetrators play in bringing about and preserving a period of collective violence. Telford Taylor, the Public Prosecutor at the Nuremberg trials after the Second World War, said that crimes are committed by individuals, not by abstract entities. By creating a typology of perpetrators this paper aims to give the individuals functioning within these abstract (and destructive) entities a 'human face' and thus provide a tool to enhance the understanding of the interpersonal relationships, the group dynamics and other underlying psycho-sociological mechanisms which can help us comprehend the root causes of international crimes. Such knowledge is a prerequisite to developing effective preventative measures and crucial to administering justice fairly. A typology of perpetrators can furthermore be used as a theoretical framework to attribute individual criminal responsibility and impose fair and just sentences

¹ This research was conducted with a research grant from the Netherlands Organisation for Scientific Research (NWO – Vernieuwingsimpuls).

which match the actual blameworthiness of the individual perpetrators and which do justice to their individual responsibilities within the collective.

2. ORDINARY PEOPLE WITHIN EXTRAORDINARY CIRCUMSTANCES: SETTING THE CONTEXT

When taking the often cruel, savage and extremely violent nature of most international crimes into account, it is difficult to grasp that the perpetrators are ordinary people rather than psychopaths, sadists or mentally deranged people. Yet, the almost universal outcome of case studies on individual perpetrators or perpetrator groups² and general studies on perpetrators of international crimes³ is that these perpetrators are indeed ordinary people who are not mentally deranged or otherwise disturbed. They are people who do not differ from the very normal and average people who under ordinary circumstances would be law-abiding citizens. There is just one crucial difference: the perpetrators are ordinary people within extraordinary circumstances. Desperate attempts to prove perpetrators of international crimes are mentally deranged, sadistic or psychopathic have failed (see for an overview, Waller (2002, 55–87)). No matter how many people would wish to do so, the behaviour of torturers and ‘*génocidaires*’ cannot be explained by merely pointing to possible deficiencies within the individual perpetrators. The fact is that there are simply too many perpetrators: they cannot all be insane. Waller (2002, 69) notes: ‘(...) not only does the claim of widespread psychopathology among perpetrators contradict the available evidence, but it also contradicts all diagnostic and statistical logic.’ The number of violent acts such as murder, torture, mistreatment and rape, committed in a period of collective violence greatly exceeds the crime rates under ordinary circumstances. From this we can conclude that many people, who under ordinary circumstances would not have been involved in this type of violent criminal behaviour, do get involved in committing international crimes. But why and how do these ordinary and otherwise law-abiding people get involved in international crimes?

In order to better understand this phenomenon of the ‘law-abiding criminal’, first of all, the political, ideological and organisational context in which these

² See amongst others Arendt (1964), Sereny (1974, 1995), Steiner (1980), Lifton (1986), Segev (1987), Hilberg (1992), Browning (1992), Heinz (1993), Katz (1993), Crelinsten (1993), Smeulers (1996), Huggins et al. (2002), Haritos-Fatouras (2003), Drakulic (2004), Thys (2004), Hinton (2005) and Hatzfeld (2005).

³ See amongst others Kelman and Hamilton (1989), Staub (1989), Bandura (1999), Conroy (2001), Alvarez (2001), Cohen (2001), Waller (2002/2007), Smeulers (2004) and Welzer (2005).

people operate must be analysed: the context of collective violence.⁴ On a macro perspective we need to understand what brings about such a period of collective violence. Many scholars have studied the circumstances and preconditions of periods in which international crimes such as war crimes, crimes against humanity and genocide have been committed.⁵ It has been shown that periods of political turmoil, rapid changes or difficult living conditions often precede a period of collective violence (Harff 2003). Both revolutions (Melson 1992) and civil wars are often precursor events to genocide (Harff 2003) and other international crimes. A (military) *coup d'état*, a dictatorial regime, a civil war or a war on terror are situations which are often characterised by manifestations of structural or mass violence and international crimes. Although questions on how such periods come about and what the differences between the various situations are, are interesting, these questions are outside the scope of this work. Consequently, the focus will be on the effects such periods mentioned above have on individuals while asking: why do they go along with a situation?

2.1. CONSEQUENCES AND EFFECTS OF A PERIOD OF COLLECTIVE VIOLENCE

Periods of collective violence are often characterised by the mass involvement of people, the progressive use of violence usually towards one specific group who is blamed for the misfortune of the masses and an alleged legitimacy of the violence which is provided by an ideology. Extreme violence and genocide do not start out of the blue. They are the final outcome of a period of escalation in which people get caught up in what Staub (1989) called a continuum of destructiveness. Periods of collective violence often occur in periods of political turmoil or during or after a revolution in which people strive for a better world. Collective violence almost inevitably results in social engineering. The masses aim to get rid of the alleged privileged classes or minorities whom they blame for their misfortune. Ideologies usually serve as motivating forces which at the same time incite and instigate the masses while justifying the violence (see the contribution of Alvarez in this book). Similar mechanisms like the neutralisation techniques as identified by Sykes and Matza (1957) in their work on youth delinquency are used in political discourse in order to rationalise and justify terror and violence. Such ideologies thus function as institutionalised neutralisation techniques. The groups of people

⁴ Cf. Kauzlarich and Kramer (1998, 143) who conclude that organisational crime cannot be explained by relying on psycho-social theories alone.

⁵ See amongst others Stohl and Lopez (1984), Gupta (2001), Kuper (1981), Fein (1984, 1993), Bauman (1989), Chalk and Jonnasohn (1990), Melson (1992), Horowitz (2002) and Harff (2003).

targeted are often the rich and powerful upper class, the intellectuals, the privileged minorities or those who represent the regime which is about to be or has been overthrown. Especially in cases when masses of people get involved, social resentment is usually a strong driving force. The masses tend to perceive their struggle as a justified war against injustice, unfairness, totalitarian and oppressive regimes and corruption. Perhaps the most remarkable finding is that people who get involved in these types of crime actually seem to believe that what they are doing is the right thing or at least necessary and justified. Waller (2007) for example quotes a perpetrator saying that he did not believe that killing people was right but rather that not doing so was wrong.

When the use of violence is structural and widespread, by definition many civilians get involved. In some cases the violence is institutionalised and the whole state apparatus or even the whole population seems to be involved. If the latter situation is the case, the violence is usually extremely well organised and bureaucratised. Bureaucratisation naturally results in a functional division of labour and is otherwise characterised by a strict chain of command. The result is that within such a malicious system state functionaries and bureaucrats can get involved in genocide by merely sitting behind their desks and filling out forms (Hilberg 1992). Ordinary state functionaries and bureaucrats become 'lethal cogs' (Alvarez 2001, 86). Many others get involved in a more physical manner such as policemen conducting *razzia's*, camp guards, torturers and executioners.

Looking more closely at the perpetrators who get involved or physically commit international crimes within a state in which these crimes are institutionalised, it becomes apparent that first and foremost, the reason that they commit these crimes is because they think that they have to and that it is for the better good of society. These perpetrators in other words commit crimes of obedience. Crimes of obedience can be defined as acts 'performed in response to orders from authority that are considered illegal or immoral by the international community' (Kelman and Hamilton 1989, 46). For a crime to be qualified as a crime of obedience it is not necessary that the actual crime is committed after a direct order. What is crucial is that the perpetrators believe that the crime is authorised or condoned by the authorities. In other words, a crime qualifies as a crime of obedience when it is supported by the authority structure. It is a crime of obedience when 'perpetrators believe and have reason to believe that the action is authorised, expected, at least tolerated and probably approved by the authorities – that it conforms with official policy and reflects what their superiors would want them to do' (Kelman 2005, 126). This very fact turns the whole analytical framework which underlies criminological theory upside down because mainstream criminology studies people who break the law, people who *do not* live by the rules and people who are *deviant*. But within such a malignant governmental system, military organisation or police unit, it is those who do not break the rules

but those who *abide by* the rules who become the perpetrators. When studying perpetrators of international crimes we have to focus on the question why they are *obedient*, why they followed the group, why they *do* live by the (deviant and immoral) rules.

Periods of collective violence usually result in a restructuring of society or social engineering. People however differ in what is at stake for them and in order to make this difference more explicit I have made three categories. The first category consists of the law-abiding citizens who are well adapted, relatively successful and literally law-abiding in the period preceding the period of collective violence. They are not involved in any serious criminal activity and do not have a specific inclination to be involved in crime or violence. This group has a lot to lose with any upcoming changes or the social restructuring of society. They were relatively successful, had good careers, enough wealth and a secure life. A period of collective violence challenges this and not going along with it might result in huge losses.

A second group of people can be qualified as borderliners. They are not involved in any crime but they are less well adapted and not as successful as the first group. To some extent they might feel misfits, unhappy and resentful although this will not always be visible to outsiders nor will it actually materialise in the absence of extraordinary circumstances. In contrast to the first group this group has not much to lose but has much to win: a restructuring of society as a result of a period of collective violence will give them new opportunities and new chances. If they felt lost and unhappy before, they can use the opportunity of the upheaval to feel part of something. Totalitarian mass movements are particularly attractive to individuals from the second group who might fall prey to the political manipulators and become the true believers, the forerunners of the new revolution, the new elite (Hoffer 1951). But also on a very practical level the changes will give these people the chance to achieve wealth, status and make themselves a career: things which had been previously out of reach for them. Thanks to these new opportunities the new situation is appealing to them.

A third group could be described as criminals. These people are for whatever reason already involved in crime under ordinary circumstances and already have a criminal record or are very close to getting one. Some are ordinary criminals; others are sadists and engage in violent behaviour because they enjoy the pain and suffering of others. Some might have sexual or mental deficiencies or are psychopaths and sociopaths. People within this group are often outcasts within society. They however suddenly see new chances to legitimise what they have been doing all along. As long as they stick to a certain ideology and only target a specific group within society they can come to be seen as heroes rather than criminals. The new order can even give them a special status. They can still conduct their activities but now with a legitimate aim.

In conclusion we can say that within a period of collective violence all individuals have to make a choice: they either go along with or they set themselves apart from it.

People are social animals and are naturally influenced by authority, by significant others, by groups and by official state rhetoric. We are raised to obey authorities, raised to behave in conformity to social norms and values, and it appears that we even have a natural tendency to do so. We search for the company of others but at a price: we need to conform to the standards of others and general social norms. It consequently takes guts to set oneself apart and to resist authority or distance oneself from the group. People usually feel very uncomfortable doing so and social-psychological research has shown that people sometimes even change their opinions merely because they seemed to hold opinions which differed from that of the majority of the group. To set oneself apart is difficult and even more difficult when the group starts to use violence and is backed by or even ordered to do so by the state. Probably without being fully aware of the consequences people within the period prior to the collective violence, are confronted with all kinds of small and seemingly insignificant decisions that make them go along with the situation. These same decisions however compromise them into going along with it further and further, and step by step they get more and more deeply involved. Within a period of collective violence, many people slowly progress on a continuum of destructiveness, often without being really aware of it. This process can also be described as a pattern of escalating commitment. People get caught up by it – slowly, but inevitably.

Apart from external pressure there is something else at work here. People generally want to feel good about themselves and when they start to act in a way which is not in line with their own norms and values they feel bad and guilty about themselves. This feeling is called cognitive dissonance (Festinger 1957). A natural reaction to cognitive dissonance is to reduce this nagging feeling by rationalising and justifying their own behaviour. This natural tendency to justify oneself is a crucial defence mechanism which prevents people from turning insane and, if it works efficiently, it ensures that people stay psychologically healthy. This very same natural defence mechanism can however turn into a psychological trap in a period of collective violence. Perpetrators can get caught up and feel imprisoned in their own defence mechanisms. A slow, gradual and progressive hands-on involvement in combination with these natural defence mechanisms make it more and more difficult to stop and get out once people have made the first step. The further the individual progresses on this continuum of destructiveness the more difficult it becomes to escape. This can be illustrated by the Milgram experiment (Milgram 1974). In this experiment Milgram not only showed that people have a natural tendency to obey an authority even if this authority asks them to perform acts which are in clear violation of other norms

and values within society, he also showed the danger of getting progressively involved in something. The set up of Milgram's experiment mirrored a continuum of destructiveness. The subjects were to give a slight and acceptable shock to another individual (unknown to them the *victim* was fictitious). In the beginning of the experiment a low 15-volt shock was administered by the subjects, but with each repeated shock the voltage was upgraded by 15 volts. Step by step the subject came closer to absolutely unacceptable shock levels ultimately ending with a shock of 450 volts. This in my view was crucial. Milgram would have never found the same results if he had asked subjects to give the victim a shock of 450 volts right from the start. The reason why the subjects in this experiment did end up giving shock levels of 450 volts was that they got caught up in their own psychological trap. The further they went along with it, the more nervous they got and the more cognitive dissonance they felt. What happened is that the subjects compromised themselves in going along with it. Going along with it in itself was justification for their involvement so far.⁶ Reducing the cognitive dissonance by terminating the experiment would have a downside: it would, namely also mean to admit that one had been wrong for quite some time before they took the decision to stop. This for many people is apparently too much. The Milgram experiment illustrates how a continuum of destructiveness works when real crimes are committed. The more people get involved, the more difficult it is to step out to face their own conscience and accept their own mistakes. They get psychologically entrapped. Many people do not start to kill and torture because they hate their victims or perceive killing and torturing them as justifiable but they start to hate their victims and start to believe in the ideology because it justifies the killing and torture in which they have become involved.

During a period of collective violence, ordinary people who adapt to the circumstances by submitting themselves to the social construction of reality in which torturing and killing is turned into something necessary and good, will be transformed into perpetrators (Smeulers 2004). These individuals become entrapped and slowly and gradually change: they start to believe in their own justifications and rationalisations; they start to believe in their own separate reality (Crelinsten 1993, 2003) or escape in what Lifton (1986) called doubling. Doubling is a psychological mechanism which explains how people sometimes adapt to extreme situations by psychologically separating one world, the concentration camp in which they work, from the ordinary world, their home. By means of doubling, perpetrators furthermore separate the role they play in one world from the role they play in the other and can thus be executioner during office hours and a loving father and husband once back at home. Whatever means

⁶ This is a well known phenomenon within social-psychology, the foot in the door effect and the escalating commitment. See Baron and Kerr (2003).

are used, people who adapt to a period of collective violence and try to cope with their own roles will be slowly but gradually transformed into perpetrators.

2.2. TOWARDS A TYPOLOGY

Perpetrators of international crimes cannot be understood outside the context in which they operate. This context, a period of collective violence is the foremost reason why they are transformed into perpetrators. Reading hundreds of ego documents (letters, diaries, trial statements, autobiographies and interviews) and biographies of people involved in international crimes made me conclude that there are certain mechanisms and social-psychological processes which cause ordinary and otherwise law-abiding people to be gradually and progressively transformed into perpetrators but I also concluded that the people differ in the way they get involved and the reasons for which they get involved. Some really believe in what they are doing and will use violence in a rational and functional manner whereas others merely seem to take advantage on the situation and use excessive violence. I thus discovered both striking similarities between perpetrators as well as striking differences and realised that those involved in international crimes could be grouped into different types of perpetrators.

In my research I used the same documents used by other scholars and I used their analysis. It turned out however that most studies on perpetrators focus on perpetrators within a specific situation (for example the Rwandan genocide), a specific period (for example the Second World War) or focus on a specific type of perpetrators (for example torturers). In my study I have not restricted myself to a specific situation or period of time; I have not restricted myself to a specific type of perpetrator or group of perpetrators. My aim was to furthermore study all people involved in committing international crimes, no matter whether as leaders, policy makers, bureaucrats or physical perpetrators. My aim was to develop an overarching typology.

In reading the ego documents, biographies and the case law I discovered that people differ in their personal background and why they go along with a situation when a period of collective violence restructures society and seems to set all the norms and values upside down. I discovered that some had a lot to lose and others a lot to win. I discovered that some perpetrators are driven by greed, others by ideology and others by fear. Those driven by fear are not all driven by the same type of fear: some people have been forced to participate by real and actual threats whereas others are driven by fear of rejection of being considered a misfit. I furthermore discovered that the type of role individuals played made a big difference: it is much easier for a bureaucrat to rationalise and justify what he is

doing than it will be for a physical perpetrator. The pressure to start to believe in what they are doing is far more extreme for the latter than for the first.

Table 1. Typologies

Gupta (2001)	Smeulers	Mann (2005)	Crelinsten (1993)	Hilberg (1992)	Others
<i>Collective violence</i>	<i>International crimes</i>	<i>ethnic cleansing killer</i>	<i>torturer</i>	<i>Nazi-Germany</i>	<i>case studies</i>
	Criminal mastermind				Fromm (1973), Post (2004)
Mercenaries (greed)	Profiteer Careerist Criminal/Sadist	materialistic careerist violent	sadist	careerist vulgarians	
True believer (ideology)	Devoted warrior Fanatic	ideological bigoted	zealot	zealots	Hoffer (1951)
Captive participant (fear)	Conformist Follower Compromised Professional	comradely bureaucratic threatened disciplined	 professional	bearers of burdens	Fromm (1942) Fromm (1942) Haritos-Fatouras (2003)

In developing my typology I used the work of other scholars who stressed differences between perpetrators. In his study on perpetrators within the Nazi regime, Hilberg (1992) for example concluded that one could distinguish various types of perpetrators and distinguished the careerist, zealots, vulgarians and bearers of burdens. Hilberg clearly did not only take the physical perpetrators into account but also looked at the bureaucrats. Thys (2004) studied perpetrators in international armed conflicts and distinguished the organisers, the specialists and the executors. He focused more on roles rather than on motives to distinguish the types of perpetrators. Post (2004) focused on the leaders and presented full psychological profiles. Several scholars focused on the physical perpetrators like Crelinsten (1993), Kressel (2002) and Huggins et al. (2002) and took the motives and personality of the perpetrators into account. Kressel (2002) distinguished the obedient personality, the uneducated killer and the aggressive killer. Crelinsten (1993) focused on torturers and distinguished the zealot, the professional and the sadist. Huggins et al. (2002) focused their research on Brazilian torturers and murderers under the Brazilian military dictatorship (1964–1985). They found a clear relation between masculinity and the violence used. Huggins et al. distinguish three types of perpetrators: the personalistic cop, the blended personality and the

Table 2. Perpetrator scheme

Types before the period of violence	Consequences and effects of collective violence	Adaptation and transformation process	Types (main motive they are driven by)
Law-abiding citizens			
Well adapted citizens, who would generally not be involved in crime. They are relatively well adjusted and happy.	Collective violence results in a lot of changes and a re-stratification of society. There is enormous pressure to obey and conform. If they do not go along with the situation, passively or actively they might lose everything, become outcasts, make less profit.	They accept the situation and go along with the situation and learn to rationalise and justify what they are doing by redefining certain conventional values. They feel a strong cognitive dissonance and restructure their world and make use of the institutionalised neutralisation techniques.	Careerist (career) Conformist (fear of rejection) Follower (authoritarian) Devoted warrior (devotion) Compromised (direct threat) Professional (internalised threat)
Borderline types			
Less well adapted people who do not feel fully adapted in society, unhappy and resentful – they might be deviant but not real criminals.	A period of collective violence is also a period of social engineering which brings new opportunities and chances. Some suddenly feel part of something important and big.	They have less difficulty in rejecting conventional norms and values because they didn't feel completely happy with them. Some can easily become intoxicated by a charismatic and manipulative political entrepreneur and become true believers	Profiteer (opportunism/profit) Fanatics (dogmatic ideology)
Criminals/sadists			
Type 1: They are already involved in crime under ordinary circumstances and/or enjoy pain and suffering from others.	Within a period of structural and systematic violence, violence seems suddenly to be legitimised. What has been criminalised before this period now seems to bring these people honour and glory.	The threshold to commit physical violence is already low and is even lower in this period.	Criminal mastermind (evil) Criminal (personal gain) Sadist (Sexual satisfaction) Fanatics (hatred, resentment)
Type 2: latent type: it would have been likely that they would have got involved ultimately.	Within a period of violence and lack of effective control they get caught up and lose the protective layer of socialisation	The period of collective violence makes them lose their layer of civilisation and act on their so far hidden tendencies	

institutional functionary. Mann (2005, 27–29) focused on the physical perpetrators within periods of ethnic cleansing and distinguished nine types of killers. Gupta (2001) had a broader focus and focused on people who get caught up in a period of collective violence. He distinguished three types of perpetrators: the true believers, the mercenaries and the captive participants. The first type is driven by ideology, the second by greed and the third by fear. Ideology, greed and fear can, according to Gupta (2001), be seen as the three prime motivators which draw people into collective violence. All typologies have been developed on the basis of reading biographies and ego-documents or conducting interviews. All described typologies limit themselves to a specific group of perpetrators and have not been empirically tested yet.

My aim was to create an overarching typology which would be generally applicable and which would emphasise the various roles individuals play and would stress that some types of perpetrators who share a certain psychological make-up take the lead whereas others who share a different psychological make-up just follow the leader or the group. In my overarching typology I have used the other typologies and discovered that they do not contradict each other (see table 1) and that they can be related to the three types of people described in paragraph 2.1, the law-abiding citizens, borderline types and criminals (see table 2). By creating a typology of perpetrators which includes those at the top, the bureaucrats who execute the policies as well as the physical perpetrators, I aimed to point out the differences between the individual perpetrators and to enhance our understanding of how a group of ordinary people turns into a murderous collective. The presented typology can in future research be used as a theoretical framework and tool to study the various roles individuals play within a period of collective violence, to understand the interpersonal relationships and the interaction between the individuals and to analyse group processes and group dynamics.

3. THE TYPES

In the following subparagraphs all the proposed types will be briefly described and the following questions will be answered: what is their role? Why and how did they get involved? What are their main character traits? How predominant is this type? How do they deal with their own involvement? Would this type of perpetrator be likely to get involved in criminality under ordinary circumstances?

3.1. THE CRIMINAL MASTERMIND

In all forms of collective violence there usually is one central leader, the main initiating figure in the criminal conduct who commits or initiates the crimes by his own accord and holds a position of power. This leader is usually the head of state but can also be the head of a specific organisation such as the army or police or a powerful department like the secret service or a terrorist organisation. He is the undisputed powerful leader. These perpetrators are almost exclusively male with strong leadership capabilities, a very manipulative character and often, albeit not always, a hypnotic or charismatic appeal. They are very authoritarian, anti-democratic, extremely vain and arrogant, accept no criticism, believe themselves to be infallible and ultimately come to feel that they have a divine right to rule. They are ruthless, harsh, cruel and merciless and do whatever they deem fit to stay in control. They strive for absolute power and complete control. The stronger their influence the more self-confident they become and the more they believe in their own ideas. These perpetrators can be considered the criminal masterminds.

For some leaders the use of violence is purely instrumental: they are power hungry and rely on force in order to stay in power. Other leaders, however, clearly have an evil and destructive nature: it is their aim to destroy and exterminate. We can consequently distinguish several subtypes of leaders: the strict authoritarian (like Augusto Pinochet), the power hungry careerist (like Slobodan Milosevic), the ruthless dictator (like Saddam Hussein and Josef Stalin), or the charismatic almost divine but utterly destructive leader (like Adolf Hitler) depending on the nature of the regime and the character of the leader.⁷ Those who have a strong charismatic or hypnotic appeal might be able to take advantage of a period of political turmoil and social dissatisfaction or resentment by creating a mass movement. Leaders are created and live by the amount of followers they manage to attract. The relationship between the charismatic leader and the follower is often, according to Post (2004, 187–199), essentially a relationship between a *mirror-hungry* leader and *ideal-hungry* followers. The leaders come to the ‘psychological rescue’ of their followers (Post 2004, 187),⁸ although they themselves are sometimes extremely suspicious and paranoid.

Some charismatic leaders deliberately induce receptive states in their followers and thus masterfully manipulate them. In times of extreme hardship otherwise psychologically healthy personalities feel vulnerable and might fall prey to a manipulative leader. Successful leaders can have thousands or even millions of

⁷ See for a psychological profile of some leaders Post (2004). Jerrold Post worked for many years for the CIA and developed political personality profiles of political leaders to guide the American government when dealing with these leaders.

⁸ The charismatic leader attracts individuals who become fanatical followers, see Hoffer (1951) and Fromm (1942) and the following paragraph on the fanatic.

followers who admire them. They can brilliantly attract the attention of the masses and use or even create an ideology which is very attractive and gives the masses all the answers to all the questions. Such leaders are usually narcissists who suffer from megalomania and have an evil and destructive nature (Fromm 1973) which they mask behind their manipulative and sometimes charming appearance. While the criminal mastermind deems himself superior, they need to be worshipped by the (inferior) masses. In some cases a personality cult is created (e.g. in Mao's China). In most cases obedience and loyalty is demanded from the followers and a personal vow to the leader is not uncommon (e.g. in Nazi-Germany). Criminal masterminds fanatically promote a certain ideology but they opportunistically pick and choose the ideology which will bring them to power (e.g. Milosevic, who switched from communism to nationalism). The ideology they ultimately pick is often extreme, nationalistic, undemocratic, intolerant and exclusive but appealing and thus successful. There is always at least one group within society which is excluded: the enemy, the scapegoat. Criminal masterminds know that a common enemy binds people. The enemy can be blamed for all failures and their presence justifies continuous use of violence and ultimate extermination. Criminal masterminds are often driven by hatred and social resentment. They strive for power and control or in some cases for material gain or heroism. As most criminal masterminds are political opportunists they are also skilled survivors and try to escape in time, and only in exceptional cases do they kill themselves (Hitler). When they are caught and brought to trial: they usually reject the legitimacy of the court. They keep seeing themselves as divine and above the law.

Hitler and Stalin are two of the most well documented examples of criminal masterminds in history (Fest 1980; Bullock 1991; Kershaw 1991; Overy 2004). Obviously there are many more criminal masterminds, as for instance Saddam Hussein (Post 2004, 210–238), Pol Pot (Short 2004), Robert Mugabe (Meredith 2002) and Slobodan Milosevic (Post 2004, 172–186) who have been profiled or documented. Compared to all other perpetrators the criminal mastermind stands apart because he will never submit himself to any authority as he perceives himself to be the only and ultimate authority. Criminal masterminds do not commit crimes of obedience; they conspire and initiate these crimes. They plan and order the crimes; they incite and inflame the masses. They are in the true sense of the word criminal masterminds. From a criminological perspective it would be interesting to compare criminal masterminds who commit international crimes with sect leaders like Jim Jones, the self-proclaimed leader of the infamous sect People's Temple and David Koresh, the sect leader of the Branch Davidians. These leaders will very probably have the same characteristics and use the same mechanisms albeit on a smaller scale. Arguably, had the criminal masterminds not have gained political power they would have ended up leading a religious sect or weird organisation, like the one led by Charles Manson.

3.2. THE FANATIC

Some perpetrators are driven by very strong emotions like hatred, contempt and resentment and usually project and direct these feelings onto a particular group which they blame for their misfortune. They look down on the members of this group whom they consider inferior, sometimes even subhuman, not worthy of life. People who turn into this type of perpetrator often will feel resentful to the ruling society or the norms within society and it is likely that they felt themselves to be misfits, not because they believed themselves to have shortcomings but because they deemed society to be unfair or imperfect. Such people can come to commit hate crimes by their own initiative or come to devote themselves absolutely and unconditionally to a fundamentalist ideology or a specific leader who successfully channels their feelings into a fanatical and dogmatic ideology. These people will not easily submit to just anyone. But once they submit themselves to a cause they do everything to achieve their goals and aims. They have an extreme and rigid view. They have no doubts whatsoever and are absolutely convinced of the righteousness of their cause. Whenever they are confronted with proof which would undermine their ideas, they will simply ignore it, convinced that the evidence must have been fabricated. Such people are extremely dedicated to their cause. In extreme cases they are prepared to kill their enemies or are often even prepared to die for their cause. Their fanatical belief resembles a religious zeal and they sometimes feel that they have a mission larger than life. They can come to see the destruction of a certain group or belief system which differs from their own as a holy mission and they will never give up or give in. They would rather die than admit that they might have been wrong. These perpetrators whom I will call fanatics are often very emotional about their cause and therefore difficult to control.

These perpetrators absolutely and fully believe in what they are doing. They are often the instigators who incite others to commit crimes. They can for example become the party demagogue and send hate messages; they can co-conspire with the criminal mastermind and get extremely high positions within the hierarchy. In those cases however they need to be able to show some self-control. Fanatics can also be closely involved in the physical perpetration of the crimes and with their fanatical zeal and hatred take the lead in committing violent and brutal crimes. Violence is not just functional to them, it is more ritualistic and they will often use excessive violence. The followers of a charismatic leader are generally considered the new elite. The forerunners within these new elites are usually fanatics who sincerely believe that they will bring about a better world and they take everything they are told by their leader for granted. Under ordinary circumstances many, albeit not all of these perpetrators, would have been likely to

be involved in crimes. The so-called borderliners who suddenly have come to 'see the light' might have become members of a religious sect, turned to religious fanaticism or become involved in terrorism but they would not necessarily have turned to crime. Those driven by strong hate might under ordinary circumstances be involved in hate crimes.

3.3. THE CRIMINAL/SADIST

Many people who are already involved in committing crimes under ordinary circumstances will also get involved in committing international crimes during a period of collective violence. Others might not yet be involved in crimes but have a so far hidden tendency to commit crimes or behave violently and sadistically. What these perpetrators have in common with the criminal mastermind and the fanatic is that the environment in which international crimes are usually committed is not the main or only explanation for their behaviour. These perpetrators would under ordinary circumstances also have been inclined to use violent or illegal methods. They often have a criminal record. These perpetrators take deliberate advantage of the context of mass violence or are deliberately used by others because they will feel fewer inhibitions to use violence and come in handy for the political leaders. It is known that in some cases convicted criminals are deliberately recruited or released from prison in order to do the dirty work, like for example in Darfur (Prunier 2005, 97) or the convicted criminals in Nazi-Germany's concentration camps, the *Kapos*, who although prisoners themselves would be put in charge of the prisoners and as such committed many atrocities.⁹ Many criminal organisations operated in the war in the former Yugoslavia. The leader of the infamous Tiger Force, Arkan is an infamous example of a criminal who was already heavily involved in crime before the war and took advantage of the war to go on with his activities (Alvarez 2006, 8).

This type of perpetrator which I call the criminal or sadist is, however, only of limited use to organisations in which obedience, loyalty and discipline are considered important virtues. Criminals and sadists usually lack these characteristics. They are motivated by their own drives rather than by obedience or conformity. It is particularly difficult to control the pathological sadists who derive sexual satisfaction from inflicting pain. Sadists even have difficulty controlling themselves and they will merely go along with the system as long as it is to their advantage. They are never fully committed to a cause, group or leader and will betray the cause whenever it is profitable for them to do so. There are

⁹ States sometimes deliberately use criminals in order to be able to put the blame on these individuals in case the atrocities get revealed. Jamieson (2005) reported on this phenomenon as judicial 'othering'.

consequently rather few sadists or otherwise mentally disturbed individuals among the perpetrators.¹⁰ These perpetrators distinguish themselves by using far more violence than requested or necessary to fulfil their task. Almost all case studies show that there are always some perpetrators who go further than others and are clearly driven by violent, sadistic or other sexual impulses (see, e.g. Amnesty International 1977, 32) but this group is always a minority. Todorov (1999, 122) who based his finding on writings of camp survivors concludes that even camp survivors in Nazi-Germany seem to agree that only 5–10% could be called sadists. Although the tendency to commit crime or behave sadistically is already present, the consequences of being in an environment in which violence seems legitimised or at least unchecked can be extreme. See the chilling description of how during the Vietnam War several members of an American unit called ‘Tiger Force’ committed atrocious crimes by killing innocent people viciously and by collecting their ears as trophies (Sallah and Weiss 2006).

The likelihood that this type of perpetrator would be involved in crime under ordinary circumstances is rather high but it is important to note that the types of crime they would commit under ordinary circumstances might very well be far less extreme than in a context of mass violence. It can also happen that someone is well adapted, showing no signs of any criminal or sadistic tendency but that the brutalisation and lack of control in, for instance, a situation of war results in the emergence of such unknown hidden tendencies. An example thereof was documented by Drakulic (2004) who describes a young Serbian man who had been convicted for minor transgressions before the war. During the war he committed horrendous crimes during an eight-day period killing many people revealing hidden sadistic tendencies.¹¹ It is however unlikely that without the war he would have become a mass murderer or serial killer. Professionally trained soldiers or policemen can turn out to be sadists while their sadism did not materialize prior to recruitment. War inevitably brutalises people and might thus activate desires which would otherwise have stayed hidden under a layer of socialisation. Some perpetrators are known to have been surprised by the fact that they derived pleasure or even sexual satisfaction from inflicting pain (see, e.g. Arendt 1973, 454).¹²

¹⁰ See also Crelinsten (1993: 68), Waller (2002, 69–71), Thyss (2004), Kren and Rappoport (1980, 70), Steiner (1980) and Todorov (1999, 122).

¹¹ See the case of Jelusic at the ICTY, *Prosecutor vs. Jelusic*, A.Ch. 5 July 2001, case nr. IT-95–10-A in which he was convicted for 13 proven killings but he probably killed maybe even more than one hundred people in an eight-day period.

¹² It is important to note however that many perpetrators are classified as criminals or sadists because they seem to derive pleasure from the pain and humiliation they cause. In many cases nervous laughter and a tough posture are often mistaken for real pleasure.

3.4. THE PROFITEER

Many people are driven by self-interest, opportunism and greed and take advantage of the situation for material gain or other advantages and thus get involved in international crimes in a period of collective violence. These perpetrators do not necessarily strongly believe in the propagated ideology but they embrace it as an efficient tool for gaining power, status or material gain. They use the opportunities that suddenly arise and during a period of collective violence will go further than they would have gone under ordinary circumstances because suddenly everything seems to be allowed and this situation offers them exceptional opportunities. These people are often rather selfish and feel that they have little influence in what happens around them and do not want to take any responsibility for it. They sometimes do have to go through a transformation phase but ultimately accept the different norms and values and come to see torture, rape, murder and even genocide as a fact of life. They might feel briefly horrified when confronted with actual human suffering for the first time but they are opportunists and rationalise and justify what they are doing. These perpetrators resemble the criminal but differ from him in that they under ordinary circumstances would probably not have crossed certain boundaries and commit certain crimes or cruelties whereas the criminals and sadists are far more likely to engage in criminality even under ordinary circumstances. These perpetrators can take up any role. A period of war or mass violence usually opens new possibilities. They can take advantage of the fact that one specific group within society is targeted, for example by taking over their houses or companies, by stealing from them, by blackmailing and extorting them or by making a career which they would otherwise not have been able to do. They might also denounce and betray others for material gain or plunder their homes once the inhabitants have left. These perpetrators can be described as profiteers.

Profiteers need not necessarily be involved in the crimes as such but they support the crimes by keeping quiet and taking advantage. If they are already a part of the system they might, for example, use the situation for an aggressive or sexual outlet and beat or rape their victims or they might start to experiment on their victims who are about to die soon anyway. The profiteer reasons as follows: 'Since these people will die anyway what is wrong with raping, torturing, killing and/or performing medical experiments on them first? What is wrong in taking their property if the victims have been expelled from their homes and will not return?' Some profiteers will commit atrocious crimes out of sheer curiosity and start to conduct experiments which under normal conditions they would not do because these experiments would be considered immoral and criminal. These perpetrators take advantage of the circumstances by crossing borders, which under ordinary circumstances they would probably have never tried to cross.

Others take advantage simply because the opportunity arises and everyone else is doing it, so why shouldn't they?

All periods of mass violence and genocide are marked by the presence of many profiteers. The targeted group is usually an alleged privileged minority and many people will benefit from the elimination of such a group. It is not uncommon that profiteers even kill in order to gain their profit like for example in Rwanda where the alleged privileged Tutsis were targeted. According to Prunier (1995, 231) the Rwandan *Interahamwe* were drafted from the poor and unemployed who could take revenge, do whatever they wanted for free. Hatzfeld (2005) interviewed a group of Rwandan *génocidaires* to whom material gain seemed to be the most important drive to maim and kill the rich Tutsis they resented. Many Nazi doctors who conducted cruel experiments on living people who were to die anyway can also be classified as typical profiteers (Lifton 1986). Three Dutch studies on traitors during the Second World War paint the picture of Dutch citizens who took advantage of the German occupation by denouncing Jews or by betraying people within the resistance in order to gain a small fee of money or a better position within society (Hofman 1981; Meershoek 1999; Van Liempt 2002). Profiteers are furthermore often accomplices and accessories to the actual physical perpetrators. They literally want to make profit and for example do business with cruel and violent regimes by selling weapons or other natural resources to oppressive regimes. Such was the case with two Dutch businessmen, Gus K. and Frans van A. (Karskens 2006) whom were recently convicted by Dutch criminal courts of arms trade and complicity in committing war crimes.¹³

3.5. THE CAREERIST

Many ordinary people are ambitious and driven by an aim to advance their careers and gain power, prestige, a good salary and status. They are usually well adapted and law-abiding citizens who often work hard and do whatever it takes to achieve their goals and aims and to fulfil their dreams: often at great costs to themselves but in many cases also at the expense of others. The re-stratification of society which is usually the aim and the result of a period of collective violence, gives many people an opportunity to advance their career. Particularly to those who did not have a career prior to this period; the events suddenly bring them new and unexpected opportunities. Many people take their chances and use these opportunities to promote themselves, gain a better position, power, influence, prestige or fame and thus get involved in international crimes. Others who were successful prior to the period of collective violence, might have had the choice of either closing their eyes and going along with it or losing everything. Faced with

¹³ See the contribution of Wim Huisman in this book.

this choice many people will decide not to 'stick out their necks' for those who are treated unfairly or badly. They will look away and continue with their jobs as if nothing has happened.¹⁴ These people often do not show hatred or contempt but are merely focused on their own jobs and careers and do not want to endanger these. I will call them the careerists.

Careerists are particularly common when an entire state becomes involved in committing the crimes. Under ordinary circumstances it is extremely unlikely that this type of person gets involved in crime out of their own accord as this might endanger and damage their career.¹⁵ Prior to the rise of a specific leader or a period of collective violence these careerists are often law-abiding citizens but become progressively involved in crimes often because either they are already about to make themselves a career, and simply are not prepared to risk losing their jobs or because they have taken advantage of new opportunities. Ambitious, vain or arrogant people will feel flattered by the ideology which has categorised them as a superior group or elite force. Making themselves a career, having power or ruling over others will give them a sense of power and mastery which flatters their ego. Within an oppressive regime many careerists will rapidly advance to the higher ranks in which they are very useful co-conspirators to the criminal masterminds. They seldom do the dirty work themselves: they plan, organise and delegate in order to keep their own hands clean.

The careerist is related to the profiteer: they both take advantage of the situation and are opportunistic in their way of achieving this aim. The difference between the two is that a careerist is extremely well adapted to the system and consequently rises to a specific position within the regime. Their careers are sometimes closely intertwined with the rise of the criminal system. Whenever careerists realise that it is no longer to their advantage to support a specific regime they will turn their backs on it. The profiteer is usually less well adapted and more individualistic. They do not fully identify themselves with the regime. The phenomenon of people going along with and getting involved in committing crimes in order to further their careers is well known and there are several well documented examples of careerists who rose to important positions within malignant regimes (Sereny 1974; Fest 1987; Knopp 1996; Padfield 2001; Breitman 2004; Drakulic 2004).

¹⁴ See for example the situation in Nazi-Germany before and during the Second World War as described by Hilberg (1992, 26). According to Hilberg, the old functionaries had to adopt new policies but otherwise continued their work and just stayed in place, not prepared to give up their position. He characterises them as careerists: for some the change of regime meant they had to adapt themselves and for many others who had embarked on a false start it meant new chances.

¹⁵ These types of people might however get involved in crime under ordinary circumstances when the organisation or cooperation they are working for gets involved in organisational crime. They would be the typical white collar criminals.

3.6. THE DEVOTED WARRIOR

Most people are law-abiding citizens who under ordinary circumstances obediently do as they are told. Yet in a period of collective violence when the authorities turn criminal, law-abiding citizens can get involved in crimes. Research has shown that many perpetrators of international crimes turn out to be very obedient, loyal and dutiful followers who completely submit themselves to an authority, a leader or an ideology in which they strongly believe. Many people do not feel themselves in a position to make their own judgment and consequently fully devote themselves to an authority they trust. They never question the leader or ideology they follow. This is even more so when they are members of a militarised unit and have gone through a training period¹⁶ – they can easily get involved in international crimes and become perpetrators. They consider obedience, discipline, loyalty and conformity as the most important virtues of a man. Their loyalty and obedience is absolute and unconditional. They have internalised the soldier's code of honour reflecting these virtues in their daily life. They strive for a better and safer world and completely rely on others to tell them how to create such a perfect society. They consider it their job to serve their country, their leader or their superior. They do as they are told and are very eager to do their job well. They have a very strong sense of duty and are very authoritarian. In accomplishing their tasks they often go beyond the call of duty even if this costs them dearly. They are wholeheartedly and uncritically committed and are even prepared to sacrifice themselves for the greater good. To them honour and loyalty are more important than justice. They are the devoted warriors.

These perpetrators are extremely useful functionaries in all organisations. They are the ideal bureaucrats and soldiers: dutiful, law-abiding and reliable. They will not make a fuss: they are decent people, often extremely well adapted to the ruling social context and sometimes even very sophisticated. These are people who will always and absolutely live by the rules. Devoted warriors have a very strong sense of duty and responsibility but they also easily submit themselves to an authority. Under ordinary circumstances this type would never commit crime but their loyalty can be easily abused by malignant authorities. In case of an order which violates their moral code, they will probably push their own feelings aside and focus on their job as they feel bound by their duty to submit themselves to their superiors and do not take responsibility for the overall outcome. Within a malicious system or under the guidance of an evil leader such law-abiding citizens and soldiers can consequently be easily transformed into perpetrators. Devoted warriors do not have an evil character or destructive nature but they can genuinely

¹⁶ See on the characteristics of a military organisation and the kind and effects of military training, Dyer (1985), Grossman (1995), Finer (1988), Haritos-Fatouras (1993, 2003), Winslow (1999) and Nadelson (2005).

come to believe that they are doing what is best for their country even if this involves the killing of fellow human beings and children. Devoted warriors are decent men and women who are following the wrong cause. They can accept that torture, murder and even genocide are necessary but they will usually not tolerate corruption or excessive or unnecessary cruelty.

Several examples of devoted warriors have been documented in which it became apparent that they accepted killing human beings but would not accept theft, sexual harassment or unnecessary maltreatment. Kressel (2002) reports that Hoess, camp commander at Auschwitz who can be considered a devoted warrior, shot a guard for abusing a prisoner and Arendt (1964, 109) described how Eichmann who had accepted genocide as a fact of life and even coordinated the extermination of the Jews during the Nazi-Germany era, was horrified when he heard about unnecessary cruelty. To the devoted warrior violence must be functional (Hilberg 1992, 53). The devoted warrior will generally dislike the sadists and fanatics whom they will most likely consider barbarians and they will probably also despise the profiteers whom they will consider unethical. Devoted warriors are driven by ideology and in that sense resemble the fanatic. However, unlike the fanatic, the devoted warrior is a very dutiful person and usually well adapted to the system and thus easy to control. Unlike the fanatic they will totally submit themselves to authority. Within an oppressive system, devoted warriors can be involved as planners and organisers of crimes, supervise these crimes or be otherwise involved in the perpetration of crimes.

The devoted warriors fill the ranks of mass movements and each state apparatus. Their participation in atrocities and international crimes is so intriguing precisely because they are so law-abiding and decent but dedicate themselves to the wrong cause. Due to the fact that they sincerely believe their actions are just and legitimate they will often go beyond the call of duty for their cause and therefore play a crucial role in the perpetration of international crimes. Hannah Arendt's (1964) thesis on the banality of evil is applicable to this type of perpetrator. Adolf Eichmann, the prototype of a devoted bureaucrat committed himself fully and completely to authority and unconditionally accepted both means and cause. He did not give it much thought. This thoughtlessness is a striking yet common and horrifying feature of this type of perpetrator. They are 'terribly and terrifyingly normal' as Arendt (1964, 276) concluded.¹⁷ The devoted warrior has a very typical and intriguing mindset. Many Nazis can be considered devoted warriors (Hoess 1959; Sereny 1974; Welzer 2005) but there are many

¹⁷ The psychologist who examined him at his trial in Jerusalem realised that Eichmann whom everyone considered a monster was 'terribly and terrifyingly' normal and exclaimed: 'more normal, at any rate, than I am after having examined him' (Arendt 1964, 25). See also many others on Eichmann (Mulish 1961; Malkin and Stein 1990; von Lang 1991; Lozowick 2000; Wojak 2001; Cesarani 2004).

other documented examples of devoted warriors in other regimes as well (Rosenberg 1991; Osiel 2001; Payne 2003; Verbitsky 1996; Gobodo-Madikizela 2003). Their psychological make-up is remarkably similar despite the fact that they became involved in the crimes of very different regimes in a very different time period.

3.7. FOLLOWERS AND CONFORMISTS

Many perpetrators have no specific reasons to commit crime, no hatred or resentment no insatiable urge to gain profit but still get involved in crime within a period of collective violence merely because they go along with and follow the current. They don't really think for themselves; they often do not have very strong personalities and certainly do not want to lead or take responsibility. This is especially the case when taking responsibility would mean standing up against the majority and to thus risk exclusion. They are not prepared to 'stick out their necks' and to take such risks. Some of these perpetrators follow a leader or person in command or just follow the hierarchical chain of command: they are very authoritarian. Others are less influenced by authority but are strongly influenced by a group and submit to peer pressure. Both types will seldom act on their own initiative and the groups of which they become a member will determine the path of life they take. It is very likely that they are not always aware of the full consequences of becoming a member of a specific group or blindly following a leader and when they feel entrapped, saying no is simply too late. In this way, they can easily get embroiled in crime. Such perpetrators, who can be called followers and conformists, will do almost anything in their urge not be considered misfits.

Within this type we can distinguish several subtypes: the obedient follower, the naïve follower and the admirer. The naïve follower is not aware of the consequences nor is the admirer. These two subtypes are under the spell of someone they admire strongly or look up to. As a consequence of their idolatry they simply go along with whatever this person says. They feel attracted to a specific person who can, for example, be a member of their group, their platoon leader or the criminal mastermind. They do not realise that their admiration makes them lose their ability to judge the person in an objective manner. They can become involved in physically committing crimes, but they can also play rather minor roles so that they can easily close their eyes to reality and disregard any information as untrustworthy which contradicts what they want to believe. The obedient followers feel comfortable when just following orders and doing as they are told with nobody really bothering them. The obedient follower who works within an organisation simply does as he is told. He does not want to take any responsibility. He accepts things as they are: his position in the hierarchy and

the demands for obedience and loyalty. Many obedient followers are rather disciplined and want to perform a good job. The obedient follower is often authoritarian: he accepts orders from someone in a superior position and demands obedience and loyalty from someone in a subordinate position. He does not ask questions on what is right or wrong but simply expects that his superiors know this and expects them to take responsibility for this. An obedient follower is usually very passive and in that sense he can be distinguished from the devoted warrior who usually occupies a higher position on the hierarchical ladder and takes far more initiative. A devoted warrior will go beyond the call of duty, an obedient follower would not. He only takes any action or initiative if he is specifically asked to do so. Obedient followers might feel some empathy for the victims but they take the righteousness of the decision of their superiors for granted. A final point is that in times of crisis, psychologically healthy personalities can feel vulnerable and fall prey to a charismatic leader to whom they submit; they are simply overwhelmed by uncertainty and the security of a group or mass movement with a directive leader makes them feel secure again and is therefore considered psychologically attractive (Post 2004, 195–196).

The conformist does not take any initiative either but simply follows the group and behaves in conformity to the norms dictated within the group. He will never stand up and raise his voice in deviance to what is the general opinion. He submits himself to normative social influence and simply accepts the given social definition of reality. He does not particularly like to be at the centre of attention nor does he aim to take over the role of leader but he follows and goes along with the situation. He does not take any responsibility because the responsibility rests with the leader or the group. He does not feel responsible for his own deeds. The conformist will always seek to express the opinions that are prevalent within the group and if he has other opinions he will not reveal them or will change them. He easily adapts to different situations and can thus be dragged easily into violence and violations. He is afraid of being rejected from the group or to be seen as a coward or an outcast. Sometimes their entire identity depends a lot on their membership of the group. They sometimes feel a strong comradeship and can be very loyal towards their fellow group members. Conformists can play all types of roles. Their role can be rather small and limited but they will often join in the rape, torture or killing of members of the targeted group. It all depends on the groups of which they are a member.

Within the ranks of the accessories there will be a considerable number of followers and conformists. Many of them will have played very small roles, as for example Hitler's secretary who took notes and typed Hitler's speeches. She herself did not commit any crimes nor had any strong feelings about what was going on around her but she was an accessory to the crimes as she played her own yet indispensable role by serving Hitler. She was thrilled by the fact that he had picked

her to be his secretary and secretly admired him. She enjoyed being close to so much power and wealth and enjoyed a good life (Junge and Müller 2002).¹⁸ Many functionaries within destructive and oppressive regimes will have had similar small roles and simply went along with the situation. Destructive regimes are built on the silent co-operation of thousands, maybe even millions.

These types of perpetrators can however also become physical perpetrators, especially when they are members of a militarised unit. In his study on Reserve Police Battalion 101, Browning (1992) showed that the reason why many members of this unit accepted the order to kill and execute Jews was that they were afraid of disappointing the others and being considered outcasts, weaklings or cowards, so they went along with it. Many American soldiers of Company C – Charley’s Company – which was responsible for the massacre at My Lai during the Vietnam War in which up to five hundred unarmed civilians were killed can be classified as conformists. These trained soldiers were tired and nerve-wracked by the ongoing war. They were sent to My Lai for a ‘kill and destroy’-mission of the alleged Viet Cong stronghold there. Upon arrival they only encountered old men, women and children, all unarmed. Yet the order to ‘finish them off’ was given and almost the whole platoon obeyed this order. They just obeyed, just went along with it, thereby becoming responsible for one of the most atrocious war crimes ever committed by the American army (Bilton and Sim 1992; Kelman and Hamilton 1989).¹⁹ In some cases conformists are outraged by a specific order or policy and yet they do not dare to stand up or defect. In those cases they will go along but try to save some people, try to be a ‘good and kind’ perpetrator (Lifton 1986; Los 1976). It is known that one soldier at My Lai deliberately shot himself in his foot in order to be able to get out without getting a court martial or probably more importantly, losing face.

Whether followers and conformists will get involved in crime under ordinary circumstances depends very much on the circumstances and the groups they become a member of. Under ordinary circumstances however there are often many more options and alternatives. These people might switch groups in time and are thus less likely to get involved with the wrong groups. However, in an oppressive state or military unit it is much more difficult to defect and the followers and conformists are much more likely to get involved in committing crimes.

¹⁸ Junge realised how naïve she was after the war when she saw the statue of Sophie Scholl who was precisely her age but had opposed Hitler’s regime. At that moment she realised that she too should have known better.

¹⁹ Life magazine revealed the atrocities in an article in 1970.

3.8. THE COMPROMISED PERPETRATOR

Some perpetrators do not commit the crimes out of their own initiative or accord but because they are pressured, forced, coerced or tricked into doing so. They definitely do not agree with the policy and more particularly the crimes but are forced to co-operate. They are usually vulnerable to pressure because they are for example members of or related to members of the targeted groups or because they have a socially underprivileged or vulnerable position, like the unemployed or children. These people co-operate merely because they feel they have no choice or in order to save their lives or the lives of their loved ones. In some cases they co-operate with their persecutors because they are under the impression that if they co-operate they can, to some extent at least, undermine the perpetrators and thus limit the damage and keep the situation in control. In many cases this type of perpetrator plays a minor role as accomplice or accessory but sometimes they become physical perpetrators. In Rwanda during the genocide in 1994 for example, many Hutus who were married to Tutsis were forced to prove their loyalty to the cause by killing other Tutsis. Many did so out of fear that either they themselves or their Tutsi wives would be killed. There are many similar well documented examples from the Second World War. The Jewish Councils for example were forced to co-operate with the Germans in selecting Jews to be sent to the camps. The Councils complied hoping to thus be able to save many lives but by doing so they helped to make the destruction process run smoothly and thus became an unwilling and reluctant accessory to the genocide on their own people (Arendt 1964). These perpetrators can be considered compromised perpetrators.

Many child soldiers can be classified as compromised perpetrators. This is especially obvious when they are abducted and forced but also those who are picked up from the streets where they live in extreme poverty can be considered to be compromised. These children are given shelter, clothes, food, a salary and a better position within society if and only if they join the army or the specific group. They have no means to resist the often armed adults who recruit them. Besides, the alternative is to be shot on the spot or to continue to live in extreme poverty. Most children will take their chances and simply force themselves to adapt and do as they are told. Some child soldiers volunteer but it depends very much on the situation whether the application is really voluntary or whether their vulnerability is abused and they are lured into recruitment (Brett and Specht 2004; Singer 2006; Honwana 2006; Wessells 2006). It is for example known that in Africa many girls are taken as child soldiers and used as sexual slaves for the men. Some of these girls try to become fierce fighters and capture other girls in order to protect themselves from being abused sexually (HRW 2004b, 29–31).

If the story of one of the first defendants who was tried by the Yugoslavian tribunal is genuine he can also be considered a compromised perpetrator. This

person was half Croatian half Serb and a reluctant participant in the war (Drakulic 2004, 106–120). When he received the order to execute Muslims from Srebrenica who had been brought to the execution site he complained and initially refused to carry it out. He was however told to either obey the order or to stand in line with the prisoners and be executed himself. Scared and with his wife and young child in mind he reluctantly obeyed the order. He had reason to believe that he would indeed be shot on the spot if he did not comply so he took part in the executions that day and was thus responsible for the killing of about seventy people.²⁰

The compromised perpetrator becomes involved in international crimes because coercion, force or threats are used, either explicitly or implicitly. But an initially compromised perpetrator can sadly enough be transformed into a far less reluctant participant. This happened for example to a Dutch Jewish woman who was about to be deported during the Second World War when she was given the opportunity to save her own life by revealing the whereabouts of other Jews. She accepted the offer and got herself into a seemingly never-ending spiral of betrayal. Hundreds of fellow Jews were sent to the concentration camps and certain death as a result of her betrayal (Groen 1994).

3.9. THE PROFESSIONAL

Some perpetrators are trained torturers or killers. They are members of the military, police, secret service or any other specialised and militarised unit and usually have gone through a specifically designed and sometimes extremely coercive training programme in which recruits are disciplined and learn to accept a very strict hierarchy and are taught to obey all orders unquestioningly.²¹ Such training programmes are extremely harsh: the recruits are not only physically exhausted to the point of collapse but are often deprived of primary facilities, continuously humiliated, beaten or otherwise maltreated. During the first months of such a training period they are at the mercy of their superiors and often feel utterly deserted and lost. In the meantime they get desensitised and brutalised. The purpose of the training is to break the recruit's personality and to de-individualise and depersonalise them. Recruits are drilled in order to make them act instinctively, without thinking. They have learned to focus on their jobs and to push all feelings which can obstruct their work aside. Within such extreme, coercive and deliberately designed training programmes recruits are trained to

²⁰ See the Erdemovic case, ICTY 7 October 1997, *Prosecutor vs. Erdemovic*, case No. IT-96-22-A. The Chamber who convicted and sentenced him was aware of the difficult situation this young man faced. In a close verdict (3–2) he was nevertheless found guilty of war crimes and sentenced to five years' imprisonment. See both the joint separate and the separate and dissenting opinions.

²¹ During WWII the Nazi's called this quite appropriately '*Kadaverdisziplin*'.

arrest people, use violence, maim and kill without mercy (Dyer 1985; Grossman 1995; Haritos-Fatouras 1993, 2003; Nadelson 2005). They have been trained (or actually conditioned) to obey each and every order unquestionably, no matter how extreme and cruel. Initially the recruits within such a training programme will react to clearly visible threats and obey out of fear but during the several months of training (apparently a period of three months is usually enough), they internalise this fear and continue to do their jobs even in the absence of such a clear threat. At this stage they have been successfully transformed into instruments of violence and destruction and they have become professional torturers and killers.²² After the harsh training period the recruits become professional torturers or killers. Most perpetrators do not particularly enjoy maiming, torturing or killing people but ultimately they can get completely used to violence and violations and come to see their actions as a mere job, as nothing out of the ordinary. Haritos-Fatouras and Gibson (1986), who analysed the methods used at the Greek torture school which operated during the Greek colonels' regime (1967–1974),²³ concluded that 'there is a cruel method in teaching people how to torture. Almost anyone can learn it'.²⁴

The only way ordinary people can cope with being coerced into regularly inflicting extreme pain or killing a fellow human being is by emotionally distancing themselves from the pain they cause to their victims and by fully accepting the justification and rationale provided to them by the authority they obey as well as by a mechanism called *doubling* (Lifton 1986). Doubling refers to a psychological state of mind in which people create a separate reality (Crelinsten, 2003) out of the sheer urge to psychologically survive (Smeulers 2004). They accept this separate reality as their professional world in which they live but which is separated from the ordinary world of their private lives (Lifton 1986). These perpetrators have a professional self and a personal or private self. The professional self operates within the professional world in which the individual often wears a uniform and uses nicknames – and the norms and values which apply in this world are in many respects at odds with the norms and values which apply in the ordinary world. Whereas in the ordinary world it is not right to hurt someone, this moral rule does not apply to the dehumanised enemies whom they target in the professional world. To a certain extent the professional resembles the devoted warrior: they both come to see violence as a part of their job. The difference between a professional and a devoted warrior is that the devoted warrior is much more committed to a specific cause than the professional. A professional would

²² Huggins et al. (2002, 144) note quite correctly that there is a huge difference between the various professions such as torturers and killers. The work of a torturer is 'slow and methodological' whereas killing someone is often a 'quick and spontaneous' act.

²³ See Amnesty International 1977.

²⁴ See also Haritos-Fatouras 2003.

probably have no problem whatsoever in changing sides during a war. To the professional, torture and killing is just a job. To the devoted warrior it is a job with a cause.

A very well documented example of a true professional who has been trained in an extremely coercive training school is provided by Haritos-Fatouras (2003). Haritos-Fatouras describes the training given to the recruits of the military police, the ESA during the Greek colonels' regime (1967–1974). The recruits were forced to go through an extremely coercive training programme in which they were transformed into torturers. Haritos-Fatouras describes how one of the recruits adapted to the coercive system surrounding him and after the initial training period rapidly advanced to the rank of chief prison warden and became a torturer. He was good at his job and at the time proud of it. He could earn several days of leave if he managed to make the prisoners talk and that was what he tried to do. He did not enjoy the violence but ruthlessly used every method, no matter how cruel, in order to achieve his aim of making the prisoners talk and to gather information. In an interview the torturer explained that at the beginning he disliked his job but that he ultimately got used to it. In the end he felt nothing about what he was doing: it was his job, nothing more nothing less, and at the time he thought it was all justified. He did not give it much thought. He was trained to be tough so he was tough. Even several of his victims described him as a professional merely doing his job.²⁵ In a series of extensive interviews he said that he was transformed into an instrument, a human being without a will of his own who just did as he was told. Only after the fall of the regime did he start to realise what he had been doing. Both the compromised perpetrators and the professional are initially coerced into using force and violence and this is the only reason why they got involved.

4. HOW DO THE PERPETRATORS LOOK BACK?

Almost all perpetrators of international crimes will perceive their crimes and behaviour as legitimate and justified at the time of committing these crimes. After the fall of the regime and the subsequent return to normality, some perpetrators will have to stand trial and are held responsible for their crimes. Almost all perpetrators who have to stand trial will experience this as utterly unjust. They will feel betrayed. What they did seemed justified and legitimised: the state ordered or condoned their crimes and now they are held responsible and accountable. The devoted warrior, the professional, the conformist and the follower will all feel embittered by the fact that they have to defend themselves

²⁵ Movie *'Your Neighbours' Son'* by Ebbe Preisler in 1982.

once in the dock. They merely followed orders; they submitted themselves to an authority, leader or group. They wanted to do good, sometimes even at great costs to themselves and now suddenly they are held responsible because the authority, the leader or the group they trusted turned out to be untrustworthy. How could they have known? They feel lost and betrayed and expect their former superiors to protect them and take all the blame. But this seldom happens and leaves them exposed. They are angry at the system and the people who turned them into perpetrators. They feel abused and victimised and often end up bitterly accusing their superiors who let them down. Many realise that what they have done is wrong but will keep justifying it to themselves by pointing to the system and transformation process they were forced to go through. Typical excuses given by these perpetrators after they have committed mass atrocities and while standing trial are: 'I had to defend my country', 'I just followed orders' and 'I was merely a small cog in a big machine'.

The careerists too will feel embittered. They had embarked on glorious careers and are now exposed as criminals. This feels to them like an utter disgrace and careerists will probably start to deny any knowledge of the crimes or accept the reality and try to save face and perhaps ultimately their life by simultaneously pointing an accusing finger at their former leader and by acknowledging their limited guilt. Realistic careerists will start to work on a new career. They might show sorrow and remorse but sometimes they might only do so because they know this will earn them respect. In reality it might very well be that the only thing they really feel sorry about are their lost careers and shattered dreams, although in some cases the remorse of a careerist seemed genuine (Drakulic 2004, 181). They will have a strong feeling of bitterness and resentment towards the person they once followed: look what he has dragged me into and now my whole career is shattered. They will probably feel a strong urge to tell their side of the story, a bad luck story in which they have fallen victim to a deceptive leader. It is not uncommon for a careerist to try and reinstate himself by publishing their stories in a book.²⁶

Criminal masterminds will try to flee rather than surrender. If they are nevertheless apprehended they will always challenge the legitimacy of the court and deny the court the right to try them. They will try to use the court as a political arena. Fanatics will also not acknowledge the right of a court to hold them accountable. They perceive their own ideology as infallible and each and everyone who dares to question their ideology is perceived as incompetent. Even when in court the fanatics will not give up. They will use each and every opportunity to take the stand and try to convince others of their righteousness. They will seldom do their own defence any good.

²⁶ See for example the books by Karpinski (2005) and Speer (1975).

Criminals and sadists will, on the contrary – unless they are psychopaths – probably be fully aware of the crimes they committed and will consider the fact that they are caught most likely as plain bad luck. They will realise that they were wrong and realise that they have gone too far. For practical reasons they will either simply admit their guilt or take a specific line of defence such as: ‘These were the orders I got’, ‘Everyone did it’ or ‘I was serving my country’. In the dock it is probably difficult to distinguish them from the devoted warriors, conformists and followers. The compromised perpetrators are also fully aware of the fact that they committed crimes and that things turned out for the worse. They feel guilty about it despite the fact that they know that they had been faced with a devil’s choice. They feel genuine remorse and sometimes even feel that they deserve punishment. In the dock a genuine guilty plea is likely.²⁷

As long as we take into account that there will be individual differences we might be able to guess what kind of perpetrator someone was by the way he or she defends himself in court. In the dock perpetrators will use all means to defend themselves and some will deliberately lie or misrepresent the facts.²⁸ Apart from the criminal/sadist and the profiteer who will often and deliberately lie and try to get away with what they have done, it will be nevertheless interesting to listen to the defence arguments of many of these perpetrators. It appears that their misrepresentations of fact are sometimes conscious lies but more often they represent the truth as they perceived it. Many perpetrators did not aim to commit crimes but after the fall of the regime or in the dock suddenly realise that by going along with a situation, taking advantage of the situation and by just doing as they were told, they supported an oppressive regime and committed war crimes, crimes against humanity or genocide. It had all seemed justified and legitimate and now they are held responsible. They feel deceived and horrified and will do anything to sooth their consciences. They suddenly realise that they have been wicked and wrong. More important than deceiving the judges, is arguably their aim to deceive themselves: they desperately want to believe that they cannot be blamed, that they were victims themselves.²⁹ The lies many perpetrators tell in the dock are not invented excuses but often represent the psychological reality they have created for themselves to cope with the experienced cognitive dissonance (Festinger 1957).

Payne (2003, 163) refers to the lies of perpetrators as ‘vital lies’ as they keep the image of themselves as a good person intact. The concept of vital lies was developed by Goleman (1984) but fits the line of defence of many perpetrators perfectly.

²⁷ Many other guilty pleas are not genuine but merely accepted in a gamble of taking one’s chances in order to get a lighter sentence.

²⁸ See Payne 2003, for a discussion of the meaning of perpetrators’ confessions and Huggins et al., 2002: 196.

²⁹ See for example Gitta Sereny’s (1995) appropriately titled book based on the many interviews she had with Albert Speer, namely *Albert Speer: his battle with truth*.

People aim to justify themselves and want to believe that they are good people. Ordinary people who have committed atrocities will almost inevitably fall into a self-created 'state of denial' (Cohen 2001). Perpetrators who are courageous enough to face the crimes they have committed and accept their own responsibility will often suffer nightmares, nervous breakdowns or a post-traumatic stress disorder. Vernado Simpson, one of the soldiers responsible for the massacre at My Lai during the Vietnam War for example was completely nerve-wracked by the slow and gradual awareness of the devastating truth of what he had done which was triggered by the sad death of his own son (Bilton and Sim 1992, 5–7). He, however, is not the only one. Many perpetrators are known to suffer pangs of conscience (Browning 1989, Alvarez 2001; Huggins et al. 2002, 210; Sallah and Weiss 2006). Ordinary people who have committed horrendous crimes can seldom really cope with the horrors they have brought about. Denial and self-deception will be consciously and unconsciously used in order to psychologically survive this terrible burden.

5. COMMON FEATURES AND CONCLUDING REMARKS

When a social order progresses on a path to collective madness many individuals get involved: some fanatically and willingly, others reluctantly. One of the most remarkable features of a period of collective violence is that many ordinary people end up through circumstances maiming, torturing or killing their fellow human beings. Especially in situations when an entire state becomes involved, many law-abiding citizens become involved in international crimes such as war crimes, crimes against humanity and genocide. As individuals, many of them will not be able to change the course of events but by simply continuing to function – going along – they all play their own small but indispensable role. A criminal mastermind would be powerless without the support of the masses. These masses submit themselves to a collective goal and more importantly submit to a social construction and/or definition of reality in which maiming, torturing and killing a fellow human being becomes a necessity. These masses consequently function within a massive and destructive state apparatus. Many authors have stressed the point that perpetrators of international crimes are ordinary people in extraordinary circumstances. Within conventional criminology, crime is explained by motivation and opportunity and the lack of constraints and control. In criminogenic society the constraints and control are lacking, the norms and values have changed to such an extent that extreme cruelty seems to be nothing out of the ordinary. Due to this situation many people who under ordinary circumstances would probably never have committed any crime, might do so

under these circumstances. Extremely violent behaviour such as genocide or torture are no longer recognised or considered as being wrong.

The various perpetrator types described in this chapter can all be easily recognised in an ordinary state apparatus, army or business company, albeit known by different names: the boss, the careerist, the opportunist, the hardworking idealist, the almost invisible but indispensable bureaucrats who do as they are told. Within ordinary circumstances they would not turn to crime. But malicious intent, hatred, fear, greed and abused idealism sometimes create a dangerous mix and may explode in an episode of collective violence. Once this happens many people get involved merely by not actively opposing the orders of the state or not stopping the collective madness. In this manner they inevitably become involved in international crimes. Within an evil system the social context is thrown upside down and in such systems we have to fear those who abide by the law more than those who break the law. All those who believe in state policy, who just do as they are told, who go along with or simply follow the current get involved in mass atrocities. A common feature of all perpetrators is that they submit themselves to the dominant social order and adapt to these extraordinary circumstances and as such get progressively involved in an evil system.

People can be guided by more than one motive. The typology presented here is based on the presumed existence of one predominant motivational factor. Moving forward on a continuum of destructiveness, perpetrators can however sometimes be transformed from one type into another. Followers and conformists can become professionals or devoted warriors or turn into greedy profiteers. A professional can turn out to be a careerist or sadist. Someone who is compromised in co-operating can start to derive pleasure from his position, as for instance many so-called 'Kapos' in Germany's concentration camps.³⁰ It will largely depend on the type of regime and the ruling ideology to determine what type of perpetrator is predominant. Genocide scholars for example have among others distinguished between ideological genocides and developmental genocides. In the first type of genocide, as was the case in Nazi-Germany, a criminal mastermind supported by a group of loyal careerists and fanatics will lead masses of devoted warriors, followers and conformists, whereas in a developmental genocide an underprivileged minority tries to restructure society and make it fairer. Material and social gain will be the prime motive and the predominant type of perpetrator will be the profiteer. An extremely authoritarian and dictatorial regime like the colonels' regime in Greece (1967–1974) will train a limited number of recruits to become professional torturers and killers. In a war situation, a military unit can

³⁰ In German concentration camps some inmates, usually former convicts or political prisoners were appointed as *Kapos* and had a certain degree of power over the other inmates. Many *Kapos* abused this power.

be easily held under the spell of a fanatic, a criminal, sadist or a profiteer who instigates the crimes in which followers and conformists join.

Scholars have pinpointed many factors which facilitate or cause atrocities such as war crimes, crimes against humanity and genocide and have quite rightly stated that we need to look into many different levels starting with international society. Ultimately, however, it comes down to the individual perpetrator to apply an electric device or to pull the trigger. As public prosecutor Taylor said at the Nuremberg trials: abstract entities do not commit crimes, individuals do. This paper aimed to analyse how and why individuals are transformed into instruments of mass destruction. By creating a typology of perpetrators I aimed to give all these cogs within the machine, the big ones but also the extremely small (but still indispensable) ones a human face.

Execution of sentences for war criminals

by Barbora Holá

Thu., 24 June 2021; 15:00 – 16:00

Abstract:

Over the past decades, international criminal tribunals and courts (ICTs) have convicted over 150 perpetrators of genocide, crimes against humanity and war crimes. International convicts serve their sentences in numerous countries all over the world, from Mali to Sweden, from Benin to Estonia. Whereas ICTs aim to rehabilitate perpetrators of international crimes and cite rehabilitation in their case-law as one of the sentencing goals and a criterion for early release, this ulterior aspiration in reality seems to be devoid of a clear conceptualization, thought through objectives and consistent implementation. In this session we will discuss the realities of what happens after trials at ICTs are over and “justice is done” at the international level. How do convicted war criminal and genocidaires serve their prison sentences and what happens after their release?

Article:

Holá, Barbora and van Wijk, Joris (2014): Life after Conviction at International Criminal Tribunals – An Empirical Overview.

Life after Conviction at International Criminal Tribunals

An Empirical Overview

Barbora Holá* and Joris van Wijk**

Abstract

As of July 2013, the ICTY, ICTR and SCSL have together convicted and sentenced over 120 perpetrators of international crimes committed during the conflicts in the former Yugoslavia, Rwanda and Sierra Leone, respectively. Only 13% of these convicts serve life imprisonment. The vast majority has been sentenced to determinate sentences. According to the tribunals' Statutes convicted persons serve their sentences in a country designated by a tribunal. The enforcement of sentences, including any commutation of sentences, is governed by the laws of the countries of imprisonment. 'International prisoners' have been scattered around Europe and Africa and almost half of the convicts have already been (early) released. So far not much has been written about conditions under which international prisoners serve their sentences; factors that justify their (early) release; and what they do after their release. In this article we provide an initial overview of this empirical reality of the post-conviction stage at the international criminal tribunals. Since the ICC has adopted a largely similar approach to sentence enforcement, the findings might serve as a starting point for discussion and possible re-assessment of future enforcement of international sentences.

* Assistant Professor, Department of Criminal Law and Criminology, VU University Amsterdam. [b.hola@vu.nl]

** Associate Professor, Department of Criminal Law and Criminology, VU University Amsterdam. [j.van.wijk@vu.nl]

Both authors work at the Center for International Criminal Justice (CICJ) at VU University Amsterdam. They would like to thank Francesca Bufano, Patricia Dore Castillo, Josanne Mirolo Jessica Kelder, Noortje Klomp and Maaïke Zeeuw for all their help and assistance in data gathering and analysis.

1. Introduction

On 26 August 1998, Dražen Erdemović, a 27 year old Bosnian Croat arrived at the Norwegian maximum security 'Ringerike' prison to serve the remainder of a five year sentence. This day marked a novelty for international criminal justice. For the first time in history, an international criminal tribunal transferred a convict of international crimes to serve his sentence in a foreign prison. Meanwhile, after serving a little over three years, Erdemović has been released. He and his family entered a witness protection programme: they were given new identities, relocated, and are now living in a northern European country.¹ Erdemović's story serves as an illustration of the post-conviction stage at the international criminal tribunals. International prisoners serve their sentences in prisons outside their country of origin; are often released before having served their full sentence; and are repatriated or — either within a witness protection programme or not — relocated to a different country.

The post-conviction life of international prisoners and released individuals has been almost entirely neglected in scholarship and never systematically and empirically studied. It seems international criminal justice scholars (with few notable exceptions)² decided to disregard this important stage of the international criminal justice project. Given that international criminal tribunals are entering the final years of their existence this neglect is surprising. The enforcement of international sentences constitutes an important aspect of the evaluation of the tribunals' performance. As Kress and Sluiter argue, it forms 'the backbone of the system of the international criminal justice ... and [its] nature ... and application in practice must form part of a complete judgment about the legitimacy of this system'.³ The way how the convicted persons are treated has substantial impact on the public's and victims' opinion about the

- 1 See Sense Agency: Erdemović to Face Karadžić, available online at <http://www.sense-agency.com/icty/Erdemovic-to-face-karadzic.29.html?news.id=13684> (visited 1 July 2013).
- 2 Cf. M.M. Penrose, 'Lest We Fail: The Importance of Enforcement in International Criminal Law', 15 *American University International Law Review* (1999-2000) 322-394; R. Mulgrew, 'On the Enforcement of Sentences Imposed by International Courts, Challenges Faced by the Special Court for Sierra Leone', 7 *Journal of International Criminal Justice* (JICJ) (2009) 373-396; D. van Zyl Smit, 'International Imprisonment', 54 *International and Comparative Law Quarterly* (2005) 357-386; I. Weinberg de Roca, and C. Rassi, 'Sentencing and Incarceration in the Ad Hoc Tribunals', 44 *Stanford Journal of International Law* (2008) 1-62; J.C. Nemitz, 'Execution of Sanctions Imposed by Supranational Criminal Tribunals', in R. Haveman, O. Olusanya (eds), *Sentencing and Sanctioning in Supranational Criminal Law* (Intersentia, 2006) 125-144; R. Culp, 'Enforcement and Monitoring of Sentences in the Modern War Crimes Process: Equal Treatment before the Law?' available online at <http://www.jjay.cuny.edu/Culp.MonitoringTribunalPunishmentrev.9Apr11.1..pdf> (visited 30 July 2013); A. Klip, 'Enforcement of Sanctions Imposed by the International Criminal Tribunals for Rwanda and the former Yugoslavia', 5 *European Journal of Crime, Criminal Law and Criminal Justice* (1997) 144-164.
- 3 C. Kress and G. Sluiter, 'Enforcement: Preliminary Remarks', in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds), *The Rome Statute of International Criminal Court: A Commentary* (Oxford University Press, 2002), at 1753.

tribunals, clear repercussions for the assessment of the tribunals' legitimacy,⁴ and 'will be among [their] most important legacies'.⁵

In this article we aim 'to open the gates' of the post-conviction phase and provide an initial empirical overview of the enforcement of international sentences and life after release of the convicts at the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL).⁶ This contribution is explorative and descriptive in nature, aiming to open a discussion on this crucial, yet understudied aspect of international criminal justice. Data for our analysis were gathered from open sources such as tribunals' judgments, decisions on designation of the state of enforcement, early release decisions, other official documents and newspaper articles. Data were collected up to 16 July 2013 and analysed by SPSS 21 (an advanced statistical analysis software package). In addition, we conducted 17 exploratory interviews with (former) staff members of the ICTY, defence lawyers, journalists and prison authorities in some of the enforcement countries (Norway, Sweden, Denmark, Finland, Italy, France and Rwanda).

The article describes each phase of the post-conviction stage chronologically. The second section provides a brief overview of the sentencing practice at the international tribunals and presents general figures regarding the status of convicted persons. The third section outlines the legal framework for the enforcement of sentences at the tribunals. In the fourth section, the attention turns to the first stage of the enforcement process — the designation of the state of imprisonment. The fifth section presents some preliminary findings regarding the actual prison conditions of international prisoners. Section six focuses on the (early) release practice at the ICTY and ICTR⁷, while section seven provides illustrations of the (many) possible scenarios regarding the life of already released individuals.

2. General Sentencing Facts and Figures

As of July 2013 the ICTY, ICTR and the SCSL have together convicted and sentenced 121 persons (ICTY: 69; ICTR: 44 and SCSL: 8). Many commentators have discussed the differences in sentence severity among the tribunals.⁸ The ICTR and SCSL have handed out much more severe sentences compared to

4 Nemitz, *supra* note 2, at 144. See also online <http://www.vg.no/nyheter/innenriks/artikkel.php?artid=101489> (visited 20 February 2013).

5 Weinberg de Roca, *supra* note 2, at 60.

6 The article focuses on the enforcement of sentences rendered by the Tribunals for substantive crimes and excludes sentences rendered in contempt cases.

7 As of July 2013 the SCSL had not granted any (early) release.

8 Cf. M. Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press, 2007); S. Beresford, 'Unshackling the paper tiger: The sentencing practices of the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda', 1 *International Criminal Law Review (ICLR)* (2001) 33-90; B. Holá, A. Smeulers and C. Bijleveld, 'International Sentencing Facts and Figures: The Sentencing Practice at the ICTY and ICTR', 9 *JICJ* (2011) 411-439.

the ICTY. This is demonstrated not only by the more frequent imposition of life sentences at the ICTR (14 life sentences (31.8%) compared to two life sentences at the ICTY (2.9%)), but also by comparatively lengthier determinate sentences at the ICTR and SCSL. The determinate sentences range from three years to 40 years at the ICTY; from six to 45 years at the ICTR and from 15 to 52 years at the SCSL. The average determinate sentence at the ICTY is 14.84 years, while at the ICTR and SCSL it is 21.9 years and 37 years respectively.⁹ This variation in sentence severity between the tribunals has been explained by available sentencing options, case compositions and prosecutorial strategy.¹⁰ The high average sentence at the SCSL might be related to the fact that the tribunal is not allowed to render life sentences¹¹ and dealt only with a very limited number of top-ranking perpetrators. Similarly, the majority of the ICTR defendants were members of government and high ranking organizers of violence convicted to life in prison or lengthy determinate sentences for genocidal killing and/or genocidal violence against victims. The prevalence of genocide convictions at the ICTR could be seen as one of the primary reasons for the more severe ICTR sentences.¹² In contrast, the vast majority of the ICTY defendants were convicted of crimes against humanity and war crimes and the convictions include not only violent crimes such as killing, but also less serious offences such as crimes against property. Initially many more lower ranking hands-on perpetrators who are generally considered less culpable were prosecuted at the ICTY.¹³

In the academic literature, sentencing at the tribunals (in particular at the ICTY) is criticized for its leniency especially in light of the gravity of crimes.¹⁴ In practice, the vast majority of convicts do not even serve their full sentences. Fifty-five persons (45% of the persons convicted by the tribunals) have already been released. Of these, 46 individuals (84% of the released) have been granted early release, generally after having served 2/3 of their imprisonment term. The nine individuals who have served the totality of their sentences were sentenced to relatively low prison terms. Given the protracted character of international trials, they actually served the totality of their sentence during the course of the proceedings and were released immediately after a final verdict

9 This statistic is based on completed cases where the final decision by the tribunals was reached excluding cases pending on appeal.

10 A. Smeulers, B. Holá and T. van den Berg, 'Sixty-Five Years of International Criminal Justice: The Facts and Figures', 12 *ICLR* (2013) 7-41, at 21.

11 Art. 19 SCSLSt.

12 Despite the ICTY and ICTR judges' statements in the case law that there is no hierarchy between different categories of international crimes for the purposes of sentencing, many authors have demonstrated that empirically there are differences in the actual sentence length rendered. Genocide is subjected to the most severe sentences followed by crimes against humanity; war crimes are sentenced the most leniently. Cf. Holá et al. *supra* note 8.

13 Holá et al., *supra* note 8, at 433.

14 Cf. M. Bagaric and J. Morss, 'International Sentencing Law: In Search of a Justification and Coherent Framework', 6 *ICLR* (2001) 191-225, at 253 who noted that 'penalties imposed by the Tribunals are breathtakingly light compared to similar offences when committed in any other domestic jurisdiction'; Drumbl, *supra* note 8, at 15.

Table 1. Status of Convicted Individuals

Tribunal	Early released	Released after serving full sentence	Serving	Died in prison	Awaiting transfer	Total
ICTY	40	4	19	3	3	69
ICTR	6	5	30	3	0	44
SCSL	0	0	8	0	0	8
Total	46	9	57	6	3	121

was pronounced.¹⁵ 57 persons (47% of all convicts) are currently serving their terms of imprisonment in various European and African countries, six died in a detention unit or in a prison after their transfer and three ICTY convicts are awaiting their transfer. Table 1 presents data on the status of convicted persons per tribunal.

3. Enforcement of International Sentences in Law

The drafters of the tribunals' Statutes almost entirely neglected issues regarding the enforcement of sentences. As one commentator noted, 'the contrast between the meticulous regulation of the prosecution and trial, and the nearly total neglect of regulation of the execution of sentences could hardly have been more glaring'.¹⁶ According to Article 27 of the ICTY Statute the imprisonment is to be served in a state designated from a list of states willing to enforce the tribunal's sentences. The imprisonment is governed by the law of the enforcement state and subjected to the supervision of the tribunal. Since the conflict in the former Yugoslavia was still ongoing when the ICTY was established, countries of the former Yugoslavia were excluded from the possibility to enforce ICTY sentences.¹⁷ In contrast, Article 26 ICTR Statute explicitly includes Rwanda as one of the possible enforcement countries¹⁸ and in Article 22 of the SCSL Statute, Sierra Leone is given preference to enforce the

15 ICTY: Hadžihasanović, Prcać, Čerkez, Brahimaj; ICTR: Nsengiyumva. Four ICTR convicts convicted for rather low sentences and transferred to national prisons also served the totality of their sentence: Rutaganira, Nzabirinda, E. Ntakirutimana, Imanishimwe.

16 S. Karstedt, 'Life after punishment for Nazi War Criminals: reputation, careers and normative climate in post-war Germany', in S. Farrall et al. (eds), *Contemporary Perspectives on Life After Punishment* (Routledge, 2011) 243.

17 Art. 27 ICTYSt.; *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc. S/25704, 3 May 1993, § 121. It has been argued, however, that since the circumstances have changed fundamentally, it should be possible to enforce ICTY sentence in the countries of the former Yugoslavia especially taking into account the possibility of the ICTY to transfer cases to these countries according to the Rule 11bis RPE. Cf. ICTY Manual on Developed Practices (UNICRI Publisher, 2009), at 156.

18 Art. 26 ICTYSt.

Court's sentences. Only 'if circumstances so require', shall the individuals convicted by the SCSL serve their imprisonment in another willing state.¹⁹ In practice, none of the ICTR or SCSL convicts is serving his/her sentence in the country where (s)he committed crimes. The reasons for this range from security fears and the perceived inability of domestic prison authorities to prevent the escape of international prisoners, to humanitarian considerations relating to conditions and the treatment of prisoners, such as overcrowding of prisons or insufficient sanitary conditions.²⁰ Despite the fact that Rwanda has built a new prison facility — Mpanga prison — to ensure that the ICTR convicts would serve their sentences in accordance with international standards, concerns have been raised that ICTR prisoners could spend their whole sentence in isolation in violation of their right not to be subjected to inhuman punishment.²¹ Currently, the prison is exclusively used to host SCSL convicts and persons transferred from ICTR and third countries to face domestic prosecution in Rwanda.²²

The very limited regulation of enforcement of sentences in the tribunals' Statutes is complemented by the Rules of Procedure and Evidence (RPE). Rules 103 and 104 of the ICTY, ICTR and SCSL RPE do not add much more clarity and simply reiterate the regulation contained in the Statutes. The Presidents of each of the tribunals are the competent organs to designate the enforcement state and in the case of Rwanda the ICTR is required to notify the government of Rwanda of this decision. The transfer to the designated state shall be effected as soon as possible after the final verdict. Pending transfer the convicted persons remain in the detention unit of the respective tribunals.²³

Similar to conditions of imprisonment, the commutation of sentences and pardons are governed by the law of the enforcement state. Article 28 of the ICTY Statute states that if an imprisoned individual is eligible for commutation of sentence according to the domestic law of the state of enforcement, the state shall notify the tribunal and the President then decides if an early release is warranted, taking into account 'the interests of justice' and 'general principles of law'.²⁴ Consequently, the eligibility for early release differs depending

19 Art. 22 SCSLSt.

20 Mulgrew, *supra* note 2, at 378.

21 Mulgrew, *supra* note 2, at 376.

22 See online <http://www.newtimes.co.rw/news/views/article.print.php?i=14983&a=53286&icon=Print> (visited 10 January 2014). In October 2013, Charles Taylor, the last individual sentenced by the SCSL, was transferred to the UK to serve his 52-year sentence. He is the only individual convicted by the SCSL not serving his sentence in Rwanda.

23 Rule 103 ICTY, ICTR, SCSL RPE. See also ICTY Practice Direction on the Procedure for the International Tribunal's Designation of the State in which a Convicted Person is to Serve his/her Sentence of Imprisonment (IT/137/Rev.I), 1 September 2009; ICTR Practice Direction On The Procedure For Designation Of The State In Which A Convicted Person Is To Serve His/Her Sentence Of Imprisonment [As revised and amended on 23 September 2008]; SCSL Practice Direction of 10 July 2009.

24 Art. 28 ICTYSt. A similar regulation is contained in the ICTR (Art. 27) and SCSL (Art. 23) Statutes. Also see Rules 123, 124 ICTY RPE; Rules 124, 125 ICTR RPE and Rules 123, 124 SCSL

on the laws of the enforcement state. The tribunals, however, retain a supervisory power in this respect and an international prisoner cannot be released without the approval by the President. The four factors the President is meant to consider are stipulated in Rule 125 of the ICTY RPE (Rule 126 ICTR RPE): the gravity of crimes, the treatment of similarly situated prisoners, prisoner's demonstration of rehabilitation and any substantial cooperation with the Prosecutor. Consequently, many factors decisive in granting early release are in essence similar to factors taken into account by judges when determining sentences upon conviction.²⁵ For this reason, some scholars have expressed concerns that such practices might lead to double-counting of some of the factors to the detriment or to the advantage of sentenced persons.²⁶

4. Enforcement of International Sentences in Practice

As discussed above, the enforcement of international sentences, including conditions of imprisonment and eligibility for early release, is largely governed by the domestic laws of individual enforcement states. This fact has raised concerns among scholars regarding the transparency of the international enforcement system and the danger of inherent disparities.²⁷ It clearly matters in what country a convict is serving his/her sentence and there are significant differences in the treatment of international prisoners across different countries. To what extent these worries are justified is discussed in the next sections.

A. Designation of Enforcement State

The sentence enforcement system is based on double-consent of individual states: first, a state must enter into an enforcement agreement with a tribunal and express its willingness to enforce sentences in future and second, these states agree to accept individual convicts on an ad hoc basis. The designation of an enforcement state is further elaborated upon in the so-called Practice Directions, policy papers issued by the Presidents of the tribunals.²⁸ After a final verdict, and on a ad hoc basis, the Registrar will approach selected states that entered into enforcement agreements to indicate their preparedness to do

RPE and Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the International Tribunal (IT/146/Rev.1), 16 September 2010; Practice Direction for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the International Criminal Tribunal for Rwanda, 10 May 2000. During the review process of this article the President of the SCSL also issued Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone, 1 October 2013.

25 Holá et al., *supra* note 8.

26 Van Zyl Smit, *supra* note 2, at 373.

27 Weinberg de Roca, *supra* note 2, at 42.

28 ICTY, ICTR and SCSL Practice Directions, *supra* note 23.

so in a particular case. The ICTY Practice Directions contains rather general criteria to be considered in deciding which state(s) to approach: (i) the national laws regarding pardon and commutation of sentences, maximum sentences available and other considerations relating to the ability of the state to enforce a particular sentence; (ii) equitable distribution of convicted persons among all the states; and (iii) other relevant considerations.²⁹ If the approached state agrees, the proposal is made to the President of a tribunal to designate it as the enforcement state in the particular case. Convicted persons have no right to be heard in this respect, but can inform the President about their preferences. These can, however, without motivation be disregarded.³⁰ In this decision-making process, the Presidents are generally given large discretion but should consider several factors such as whether the convicted person is expected to serve as a witness in further proceedings; whether the person will be relocated as a witness following the sentence; any medical or psychological reports; linguistic skills; general conditions of imprisonment; and rules governing security and liberty in the state concerned. Particular attention should be paid to the proximity of the convicted person's relatives. Also in the Manual on Developed Practices, the ICTY emphasizes that the tribunal pays special attention to geographical distance between the enforcement state and the former Yugoslavia in order to enable family and friends to visit the prisoners.³¹ In practice, however, many convicts are sent to countries far away from their relatives. For example, at the time when Erdemović was about to serve his sentence, the ICTY entered into enforcement agreements with Norway, Finland and Italy. Since Italy is geographically closest to the former Yugoslavia, one would have expected Erdemović to have ended up there. However, he was sent to Norway.³²

In practice, it is not entirely clear what considerations are taken into account when designating an enforcement state. The majority of decisions and communications within each tribunal and with individual states are confidential. According to one of our interviewees who worked at the ICTY Office for Legal Aid and Detention Matters (OLAD), the most important consideration is the number of ICTY prisoners the country already has.³³ This criterion is also emphasized in the ICTY Manual on Developed Practices — the ICTY allegedly strives to ensure an even burden-sharing among enforcement states in terms of the number of convicted persons transferred and the length of the sentences imposed. The selection of enforcement states may involve considerable time and diplomacy.³⁴ This is also demonstrated by the fact that it takes on average

29 Similar regulation is missing at the ICTR and SCSL.

30 Decision on Request of Zoran Žigić (IT-98-30/1-ES), 31 May 2006; Interview with a legal advisor of an ICTY convict, 27 and 30 May 2013 where he indicated that his client wanted to go to Italy but ended up in France. Transcripts of all interviews are on file with authors.

31 ICTY Manual, *supra* note 17, at 152.

32 Penrose, *supra* note 2, at 390.

33 Interview with a former Legal Officer at the OLAD ICTY, 7 June 2013.

34 Interview with a representative of the ICTY OLAD, 7 October 2013; Mulgrew also details the difficulties encountered by the SCSL in finding enforcement states. Mulgrew, *supra* note 2.

Table 2. Designation of Enforcement State

ICTY					
State	Number of prisoners	Sentence Range	State	Number of prisoners	Sentence Range
Albania	0	NA	Norway	5	5–20
Austria	6	5–25	Poland	0	NA
Belgium	1	15	Portugal	1	20
Denmark	4	7–30	Spain	5	10–18
Estonia	2	29–35	Sweden	3	8–20
Finland	5	7–20	Slovakia	0	NA
France	4	8–40	UK	3	15–35
Germany	4	12-life	Ukraine	0	NA
Italy	4	12–40			
ICTR			SCSL		
State	Number of prisoners	Sentence Range	State	Number of prisoners	Sentence Range
Benin	16	11-life	Finland	0	NA
France	0	NA	Rwanda	8	15–52
Italy	1	12	Sweden	0	NA
Mali	20	12-life	UK	0	NA
Rwanda	0	NA			
Sweden	1	8			
Swaziland	0	NA			

10 months at the ICTY; 21.5 months at the ICTR; and 13.5 months at the SCSL after the final verdict is issued to transfer a convict to an enforcement country. Another employee of the OLAD Unit at the ICTY claimed that human rights considerations such as the proximity of family members, the presence of people who are able to speak to a prisoner in a language he understands and the security level of a potential prison are all relevant factors when approaching states with the request to enforce a particular sentence.³⁵

Table 2 shows a list of states which have concluded the enforcement agreements with each of the tribunals (column 1). In light of the emphasis on equitable burden-sharing, column 2 indicates how many persons were actually accepted by each country. The last column shows the range of sentences these persons were subjected to.

The table demonstrates clear differences in the designation practice among the tribunals. On the one hand, the ICTY has concluded enforcement agreements with 17 different European countries, with prisoners scattered across

³⁵ Interview, *supra* note 33.

13 of them. No country has been enforcing sentences for more than six ICTY convicts.³⁶ This practice has been labelled as a dispersion model.³⁷ Advantages of this system are, amongst others, its cost-efficiency (countries typically provide these ‘services’ for free) and the fact that former comrades-in-arms are prevented from forming alliances since they serve their imprisonment far away from each other. However, there are also disadvantages: for instance, the danger of disparities in the treatment of prisoners across individual countries and lack of language and culturally appropriate services in receiving prisons since only a few individuals are detained there. On the other hand, the ICTR and SCSL have pursued a different designation strategy. The ICTR concluded 7 enforcement agreements with three African and four European countries. The vast majority of the ICTR prisoners are sent to two countries: Mali and Benin.³⁸ The SCSL entered into an enforcement agreement with four countries. All its convicts (except recently-convicted Charles Taylor who was transferred to the UK) are, however, serving their sentences in Rwanda. The strategy of the ICTR and SCSL has been labelled a concentrated model.³⁹ The ICTR and SCSL prisoners are not only concentrated in a very limited number of countries but also serve their sentences in a special prisons or special wings interacting only with each other in contrast to the ICTY prisoners who are dispersed into domestic prison populations.

B. Prison Conditions

The majority of the enforcement agreements with the tribunals refer to international standards relating to treatment of prisoners.⁴⁰ Despite this “common ground”, however, there are differences between the prison conditions in different countries. The differences between incarceration practices in the African enforcement states and their European counterparts have already been noted in the literature.⁴¹ However, prison systems differ considerably even within Europe.⁴² On the one hand, prison conditions in the Scandinavian countries

36 Seventeen ICTY convicts served their sentence solely in the UNDU in The Hague.

37 Culp, *supra* note 2, at 10.

38 Six ICTR convicts served their sentence solely in the UNDF in Arusha.

39 Culp, *supra* note 2, at 10.

40 Standard Minimum Rules for the Treatment of Prisoners, ECOSOC Res. 663 C(XXIV) of 31 July 1957 and 2067 (LXII) of 13 May 1977; Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment, GA Res. 43/173 of 9 December 1988; Basic Principles for the Treatment of Prisoners, GA Res. 45/111 of 14 December 1990.

41 Various commentators have raised concerns relating to prison conditions in the African countries and their adherence to international human rights standards. Culp, *supra* note 2; Weinberg de Roca, *supra* note 2, at 45–48. It should be noted, however, that international prisoners are serving their times in special prisons/units built or adjusted specifically for international prisoners in order to conform to international prison standards. This practice, however, is also problematic since double-standards are created within prisons or national prison systems.

42 A.M. van Kalmthout, F.B.A.M. Hofstee-van der Meulen and F. Dunkel (eds.), *Foreigners in European Prisons* (Wolf Legal Publishers, 2007), at 9.

are known to be very prisoner-friendly. Norway, for example, exemplifies what is referred to as Scandinavian 'exceptionalism' in penal policies.⁴³ It has a low level of imprisonment, small prisons, a low occupancy rate with a single cell for each prisoner and a progressive system focused on rehabilitation. On the other hand, countries such as Italy or France are characterized by overcrowded prisons, shared prison cells and less focus on rehabilitation.⁴⁴ Not only are there differences between individual European countries regarding the general prison systems, but conditions may also vary between different prisons in the same country or even between units within the same prison depending on security levels. Whether an international prisoner is placed in a high security prison, protective custody, regular prison, or for example, an open prison, has a great consequences for his daily life and influences the execution of his/her sentence to a considerable extent. The law of the tribunals is virtually silent regarding the type of prisons international convicts shall be sent to. This determination lies with domestic authorities and arguably differs by state, but also by convict.

According to a representative of the ICTY OLAD the majority of international prisoners (at least initially) were placed in high security prisons.⁴⁵ Due to the character of international crimes, international convicts are often classified as 'the worst criminals' by domestic authorities. In practice, however, many of them are former politicians or military/state officials who according to our interviewee pose no immediate danger to society. Therefore, 'there is practically no need to place them in high security facilities'.⁴⁶ Our interviews with national prison authorities suggest that some of them have over time for this reason adopted a more nuanced approach. This seems to be in particular the case after they have had some experience with international prisoners. In Norway, for example, it turned out that international prisoners are usually 'exemplary prisoners' with a very low risk of escape compared to other categories of inmates such as for example organized criminals.⁴⁷ International convicts are now usually placed in high security prisons, but not necessarily in maximum security units with the strictest regime.⁴⁸ In contrast, in Sweden as a matter of standard operating procedure all international convicts are initially placed in 'protective custody units' (small units of six to 12 inmates with a strict security regime). Typically, other inmates staying in these units have themselves requested a stay there because they are or feel threatened, because

43 J. Pratt, 'Scandinavian Exceptionalism in an Era of Penal Excess', 48 *British Journal of Criminology* (2007) 119-137.

44 Cf. online <http://en.avaaz.org/1235/inside-frances-hellish-prisons>; <http://www.reuters.com/article/2013/06/12/us-italy-prisons-idUSBRE95B0IF20130612> (visited 1 June 2013).

45 Interview, *supra* note 34.

46 *Ibid.*

47 Interview with former counselor at the Correctional Services Department, Ministry of Justice, Norway, 4 June 2013.

48 Interview with a representative of the Correctional Services Department, Ministry of Justice, Norway, 5 June 2013.

they might have talked to the police, or have debts with other prisoners.⁴⁹ Conversely, in Finland, for example, it is known that an ICTY convict has been transferred to an open prison, i.e. a facility without any walls.⁵⁰

Generally, ICTY prisoners are typically integrated into domestic prison populations in the respective prisons.⁵¹ They are treated as any other foreign prisoners in the domestic context. In Africa, international prisoners are separated from domestic prisoners and concentrated in a special ‘international’ wing. In the following, preliminary findings regarding possibilities for family visits, leaves and rehabilitation available to international prisoners are discussed.

1. Visits

Prison authorities have to deal with the fact that international prisoners are usually incarcerated in countries far away from their countries of origin and that this may substantially limit possibilities of family visits. For example, in France a prisoner was never visited by his family for four and a half years, according to his counsel due to practical obstacles such as costs of travelling and housing or visa requirements.⁵² Prison officials from Norway and Rwanda underlined the extra costs of family visits to the international prisoners and the limited possibilities of international prisoners to maintain contact with their families.⁵³ For this reason the national authorities may provide special treatment for international prisoners. When international prisoners are visited by their family members in Norway or France, for example, special arrangements are made regarding visiting hours. These are adjusted to allow the prisoners to spend as much time as possible with their family within the limited timeframe available.⁵⁴ In other instances, prison authorities have adopted specifically tailored measures to alleviate the unique problems facing international prisoners: ‘We asked ourselves how we could give [one of the international prisoners] something as a compensation for the lack of family contact and the limitations he faced in leaving prison. So he could take a coffee outside, get some physical activity.’⁵⁵ Prison officials offered the international prisoner the possibility of additional escorted leaves from prison. This

49 Interview with a representative of National Security Unit, Prison and Probation Service, Sweden, 18 June 2013.

50 Order Issuing a Public Redacted Version of Decision on Hazim Delić’s Motion for Commutation of Sentence (IT-96-21-ES), 15 July 2008, § 7 where the President notes that Delić was transferred to Satakunta prison, which is according to the official website of the Finnish Criminal Sanctions Agency an open institution.

51 E.g. Interview, *supra* note 48; Interview with a representative of the French Prison and Probation Service, France, 20 May 2013; Interview with a representative of the Danish Prison and Probation Service, Denmark, 13 May 2013.

52 Interview, *supra* note 30.

53 In Rwanda for example under normal circumstances families are allowed to visit the SCSL prisoners once per year. Interview with a prison warden, Mpanga prison, Rwanda, 12 March 2013. Interview with a representative of a Norwegian prison, 14 June 2013.

54 Interviews, *supra* notes 30, 53.

55 Interview with a representative of a Norwegian prison, 24 July 2013.

started with a closely monitored visit to the local town, gradually leading to several trips a month which included cycling, Nordic skiing, watching football matches or making a two-day hike in the mountains. Not all international prisoners are, however, provided with such options.

2. Leaves

With respect to leaves, our data suggest that the approach across countries and prisons, once again, differs considerably. National officials generally denied requests to leave the country of imprisonment and go home, even when faced with tragic personal circumstances.⁵⁶ In Sweden international prisoners are not permitted to go on unaccompanied leaves: 'They can, together with prison staff, three to four times a year, go on leave for a maximum period of four to six hours.'⁵⁷ In contrast, a representative from a Norwegian prison stated that:

[a]lso the Hague people can go on leave. This is not directly after their arrival. But if they behave well, they too are allowed to go on (unaccompanied) leave. In principle, detainees have the right to a maximum of 18 days per year. If they have children or special needs, this can be upgraded to 30 days. Inmates can for example request to visit a friend, or stay a weekend over with family members. The prison officers can set conditions, that they for example are not allowed to leave a certain area.⁵⁸

One of the prisoners in Norway who became acquainted with a Serbian family living in the vicinity of his prison was for example allowed to spend some weekends at their place.⁵⁹ In contrast, prisoners in Rwanda are not allowed to leave the prison unless they need to see a doctor. In such cases, they are escorted by prison wardens to a medical facility.⁶⁰

3. Rehabilitation

One of the most interesting questions regarding imprisonment of international criminals is their rehabilitation. Rehabilitation is often cited as one of the goals of international sentencing and it is particularly emphasized at the enforcement stage. As discussed above, in Europe international prisoners are (with slight modifications) incorporated into domestic prison populations and are generally offered the same rehabilitation programmes as ordinary domestic criminals.⁶¹ As one of the respondents noted: 'For us, it is important to treat

56 The French district court, for example, denied a prisoner's request to attend his mother's funeral. Interview, *supra* note 30.

57 Interview, *supra* note 49.

58 Interview, *supra* note 53.

59 Interview with a representative of a Norwegian prison, 27 June 2013.

60 Interview, *supra* note 53.

61 Interview with a former representative of a Norwegian prison, 2 July 2013; Interview with a lawyer at the Judicial Unit of the Criminal Sanctions Agency, Ministry of Justice, Finland, 5

them like anybody else who committed a serious crime.’⁶² There are, however, several problems with this approach. First, international prisoners are usually kept in high security establishments and do not progress through the system to lower security regimes. Rehabilitation programmes in many countries are adjusted to the progressive nature of incarceration and a larger variety of rehabilitative activities is available in lower security prisons. Second, rehabilitative programmes are usually offered in the local language of the prison, which may prevent international prisoners from participating. Finally, and most importantly, it is questionable to what extent rehabilitation programmes developed for ordinary criminals are suitable for international prisoners who committed their crimes under very specific circumstances. Many criminologists consider that those who violated international criminal law are a different type of criminals than ordinary rapists or murderers.⁶³

The pertinent question is to what extent domestic prison officers and therapists are able to implement the tribunals’ ambitious goal of rehabilitating international offenders. The director of a small prison in northern Norway mentioned that the ICTY never directly or via the Ministry instructed prison authorities to work on rehabilitation. She also questioned if her prison actually had the expertise to deal with these matters, arguing that it was unusual to have inmates who committed such (levels of) violence:

For normal crimes we had programmes. Programmes like ‘breaking drug abuse’ or ‘breaking violence’. Many prisoners go to these programmes, they talk in group sessions or individually about the crime But what competence do we have to deal with them [the ICTY convicts]? ... To think about a programme for war criminals is out of our reach We are not educated in these matters.⁶⁴

C. Commutation of Sentences and Early Release

By now 45% of all international convicts have been released, while a majority of these (84%) has been granted early release by the ICTY and ICTR. As of July 2013, the SCSL had not granted any early release. Similar to the regulation of conditions of imprisonment, domestic laws of individual enforcement countries govern the eligibility of international convicts for early release. In practice domestic laws regarding early release are divergent. For example in France, Finland or Italy convicts are eligible for early release after serving 1/2 of their sentence. In Belgium, Denmark, Sweden, Italy or Norway the necessary period is 2/3 of the sentence. Spain generally requires convicts to serve 3/4 of an imposed sentence. In Mali or Benin the domestic laws do

August 2013; Interview, *supra* note 53; In Rwanda, on the other hand, according to our interviewee, no specific rehabilitation programmes are available to international prisoners, except courses in computer skills. Interview, *supra* note 53.

62 Interview, *supra* note 48.

63 A.L. Smeulders, *In opdracht van de staat: Gezagsgetrouwe criminelen en internationale misdrijven* (Prisma Print, 2012); Drumbl, *supra* note 8.

64 Interview with Norwegian prison representative, 24 July 2013.

not regulate any specific conditions in this respect.⁶⁵ The final decision whether a person is to be released, however, lies with the Presidents of the tribunals.⁶⁶

To establish an internal procedure for the determination of early release the tribunals have issued Practice Directions on the early release procedure.⁶⁷ Early release can be initiated by the enforcing state or by a prisoner.⁶⁸ After consultation with members of the Bureau and judges⁶⁹ and with Prosecution regarding the extent of cooperation of a prisoner with the OTP, and after giving an opportunity to the prisoner to be heard, the President decides on early release. As noted above, according to Rule 125 of the ICTY RPE the President is supposed to take into account (i) the gravity of crimes; (ii) the treatment of similarly situated prisoners; (iii) demonstration of rehabilitation; (iv) cooperation with Prosecutor and any other relevant information.⁷⁰ On the basis of an analysis of all early release decisions and their rejections at the ICTY and ICTR, we will discuss below how these factors have been evaluated in practice.

1. Gravity of Crimes

An early release decision has never been based on 'low gravity of crimes'. Conversely, gravity of crimes is often emphasized as the countervailing factor against early release. In the early practice at the ICTR, the fact that prisoners were convicted of extremely serious crimes and genocide was one of the motivating factors for denying their applications for early release.⁷¹ In some of the most recent decisions, the ICTR President adopted a slightly different approach and argued that 'since gravity of crimes was already assessed when determining sentence, it does not per se bar a person from early release, if otherwise

65 Weinberg De Roca, *supra* note 2, at 59.

66 Art. 28 ICTYSt., Rules 123-125 ICTY RPE; Art. 27 ICTRSt., Rules 124-126 ICTR RPE; Art. 23 SCSLSt.

67 ICTY, ICTR and SCSL Practice Directions on Early Release, *supra* note 24. The SCSL Practice Direction was issued in October 2013 and is therefore not included in the following analysis. *Prima facie*, however, there are significant differences between regulation of early release at the ICTY (ICTR) and SCSL. Not only is the SCSL Practice Direction more detailed but also the criteria that Presidents are supposed to take into account differ between the ad hoc tribunals and the Special Court. More fundamentally, the SCSL Practice Direction envisages *conditional* early release.

68 ICTY Practice Direction, *ibid.*, §§ 1, 2.

69 In making commutation decisions, the President normally states briefly whether his or her decision is unanimously supported by the Judges or whether some or all of them expressed contrary opinions.

70 See also Rule 126 ICTR Rules. Rule 124 SCSL Rules states that the President decides on early release on the basis of the interests of justice and the general principles of law.

71 Decision of the President on the Application for Early Release of Omar Serushago, *Serushago* (ICTR-98-39-S), 12 May 2005; Decision of the President on the Application for Early Release of Georges Ruggiu, *Ruggiu* (ICTR-97-32-S), 12 May 2005; Decision on Samuel Imanishimwe's Application for Early Release, *Imanishimwe* (ICTR-99-46-S), 30 August 2007. This practice has led to some criticism regarding the double-counting of gravity of crimes, Van Zyl Smit, *supra* note 2.

appropriate'.⁷² Because of this practice, it could be argued that factoring in the gravity of crimes is actually a redundant exercise.

2. Consistency with Other Decisions

This factor, on the other hand, seems to be a very decisive criterion in considering early release. At the ICTY, 'an unwritten rule' developed that international prisoners are released after serving 2/3 of their sentences. The 2/3 threshold was applied due to the fact that in the majority of enforcement countries prisoners are eligible for early release after serving 2/3 of their sentence.

The ICTR was initially reluctant to grant early release to prisoners after serving 2/3 of their sentence,⁷³ emphasizing gravity of their crimes.⁷⁴ The first three ICTR prisoners who were granted early release were set free after serving 3/4 of their sentences.⁷⁵ However, after the power to commute sentences handed out by both tribunals was transferred to the Residual Mechanism for International Criminal Tribunals (MICT) the most decisive criterion for granting early release seems to be the consistency with previous early release decisions and the 2/3 criterion. The MICT President in one of his first decisions determined that 'all the ICTY and ICTR convicts supervised by the Mechanism are to be considered eligible for early release upon the completion of two-thirds of their sentences, irrespective of the Tribunal that convicted them'.⁷⁶

As of 16 July 2013, 53 individuals applied for early release (at the ICTY 44 and at the ICTR nine prisoners applied for the early release, some of them repeatedly). Early release was granted by the tribunals to 46 individuals. In total, the Presidents rejected early release applications 25 times; 12 individuals at the ICTY and five at the ICTR faced rejection of their application for early release (some of them repeatedly). Many of them (eight at the ICTY and two at the ICTR) were ultimately released early. The reasons for rejection vary across the cases. The major consideration at the ICTY was whether a defendant had served 2/3 of his/her sentence.⁷⁷ The President, however, at times also

72 Decision on the Early Release Request of Juvénal Rugambarara, *Rugambarara* (ICTR.-00-59), 8 February 2012, § 7.

73 Both Ruggiu and Imanishimwe had served (almost) 2/3 of their sentences at the time when their application for early release was rejected.

74 *Supra* note 71.

75 Rugambarara, *supra* note 72; Decision on the Early Release of Michel Bagaragaza, *Bagaragaza* (ICTR-05-86-S), 24 October 2011; Decision on Tharcisse Muvunyi's Application for Early Release, *Muvunyi* (ICTR-00-055A-T), 6 March 2012.

76 Decision of the President on Early Release of Paul Bisengimana and on Motion to File a Public Redacted Application, *Bisengimana* (MICT-12-07, ICTR-00-60), 11 December 2012, § 20. Also note that the SCSL President explicitly accepted the 2/3 criterion in the SCSL Practice Direction on early release and all the SCSL convicts are eligible for early release after serving 2/3 of their sentences, provided they meet other requirements set out in the Directive. See SCSL Practice Direction, *supra* note 24, paragraph 2(A).

77 See for example Decision of President on Early Release of Zoran Žigić, *Žigić* (IT-98-30/1-ES), 8 November 2010; Decision of President on Early Release of Momčilo Krajišnik, *Krajišnik* (IT-00-39-ES), 26 July 2010, §§14-17, 33.

emphasized the gravity of crimes to underpin his rejection. Only in exceptional cases has the ICTY President rejected early release of a defendant who had served 2/3 of his sentence.⁷⁸ In contrast, very few individuals were released before serving 2/3 of their sentences. For example, Dragan Obrenović was granted early release eight months before serving 2/3 due to his 'exceptional cooperation' with the Prosecutor.⁷⁹ Similarly, Vladimir Šantić was released three months before the 2/3 threshold because of his 'exceptionally good behaviour' in prison and 'extensive' support to the Office of the Prosecutor.⁸⁰

3. Rehabilitation

The demonstration of rehabilitation as a criterion for early release is a very peculiar one. It is not entirely clear what rehabilitation from international crimes entails⁸¹ and there is a considerable confusion and lack of clear assessment criteria in the early release decisions. The Presidents usually consider various factors (and different combinations thereof) as a proof of rehabilitation such as: good conduct in prison,⁸² good relationship with fellow inmates (especially of different ethnicities and nationalities),⁸³ remorse for crimes, guilty plea and attitude towards his deeds,⁸⁴ intention not to reoffend,⁸⁵

78 In these cases, the reason for rejection seems to be ineligibility for early release under the domestic law of the enforcement country. Cf. Decision of the President on Early Release of Vidoje Blagojević, *Blagojević* (IT-02-60-ES), 3 February 2012, §15, 25; Decision of the President on the Application for Pardon or Commutation of Sentence of Milorad Krnolejać, *Krnolejać* (IT-97-25-ES), 12 November 2008, § 7. In only one case the president denied early release when a prisoner served 2/3 of his sentence and was eligible under domestic law of the enforcement state. The reason seems to be limited evidence of rehabilitation and that the sole factor that weighed in favour of a release was the period of 2/3 of a sentence served. Public Redacted Version of 13 February 2012 Decision of the President on Early Release of Mlađo Radić, *Radić* (IT-98-30/1-ES), 9 January 2013.

79 Decision of President on Early Release of Dragan Obrenović, *Obrenović* (IT-02-60/2-ES), 21 September 2011, § 28.

80 Decision of the President on the Application for Pardon or Commutation of Sentence of Vladimir Šantić, *Šantić* (IT-95-16-ES), 16 February 2009, §§ 12,13.

81 For conventional crimes an authoritative definition of rehabilitation is already lacking. It is, however, at least understood to encompass two aspects: (i) treatment, such as psychological counseling in order to prevent recidivism and (ii) reintegration into society, so that offenders will not commit crimes in future. Cf. P. Raynor, G. Robinson, 'Why help offenders? Arguments for rehabilitation as a penal strategy', 1 *European Journal of Probation* (2009) 3-20.

82 Cf. Muvunyi, *supra* note 75, § 6; Order of the President for the Early Release of Zlatko Aleksovski, *Aleksovski* (IT-95-14/1), 14 November 2001, at 4.

83 Cf. Decision of the President on the Application for Pardon or Commutation of Sentence of Pavle Strugar, *Strugar* (IT-01-42-ES), 16 January 2009, § 10; Decision of President on Early Release of Ivica Rajić, *Rajić* (IT-95-12-ES), 22 August 2011, § 18.

84 Cf. Decision of President on Early Release of Duško Sikirica, *Sikirica* (IT-95-8-ES), 21 June 2010, § 17. Bisengimana, *supra* note 77, § 26.

85 Cf. Order Issuing a Public Redacted Version of Decision of the President on Early Release, *Erdemović* (IT-96-22-ES), 15 July 2008, at 2; Order of the President on Commutation of Sentence, *Landžo* (IT-96-21-ES), 13 April 2006, § 7.

family circumstances and attachment to family,⁸⁶ career prospects and prospects of taking active role in his community,⁸⁷ involvement in rehabilitation programmes offered by a prison, participation in working activities or language courses⁸⁸ and prisoner's good character with no previous criminal record, stable mental health and personality.⁸⁹ It is difficult to see how some of these factors, such as the fact that a convict used to be of a good character before committing crimes or the fact that he participated in language courses, would 'demonstrate' a prisoner's rehabilitation. Not to mention that many of these factors, such as remorse, guilty plea, family circumstances, cooperation with OTP during trial or good character are usually already taken into account in mitigation during sentencing by trial chambers.⁹⁰ The President sometimes notes that due to language barriers, communication between a prisoner and prison authorities was severely hindered and that assessing the extent of rehabilitation is therefore difficult.⁹¹ Another particularly striking element of the early release decisions is that a lack of documents reporting on prisoner's rehabilitation is often disregarded. In order to prepare the President in making a well informed decision, Paragraph 3(b) of the Practice Direction states that the Registrar shall request the relevant authorities in the enforcing state to submit 'any psychiatric or psychological evaluations prepared on the mental condition of the convicted person during the period of incarceration'. If these evaluations are not available, which is often the case, the President regularly merely 'takes note' and accepts this as a matter of fact without further inquiries.⁹²

4. Cooperation

The final factor the Presidents are asked to take into account when deciding on early release concerns 'substantial cooperation' with the Prosecutor. In some cases the President refuses to take into account cooperation prior to conviction since it was already taken into account in the mitigation of sentence.⁹³ However in other cases, cooperation of the accused also during trial is considered when granting early release⁹⁴ and a guilty plea in the trial phase can

86 Cf. Order of the President on the Application for the Early Release of Simo Zarić, *Zarić* (IT-95-9), 21 January 2004, at 3; Order of the President on the Application for the Early Release of Anto Furundžija, *Furundžija* (IT-95-17/1), 29 July 2004, at 3.

87 Cf. Order of the President in Response to Zdravko Mucić's Request for Early Release, *Mucić* (IT-96-21-A bis), 9 July 2003, at 2.

88 Cf. Decision of the President on Commutation of Sentence, *Banović* (IT-02-65/1-ES), 3 September 2008, § 13; Public Redacted Version of Decision of the President on the Early Release of Omar Serushago, *Serushago* (MICT-12-28-ES), 13 December 2012, § 21.

89 Cf. Rugambarara, *supra* note 72, § 15; Žigić, *supra* note 77, § 18.

90 Holá et al., *supra* note 8.

91 Cf. Public Redacted Version of the 29 November 2012 Decision of the President on Early Release of Mladen Naletilić, *Naletilić* (IT-98-34-ES), 26 March 2013, § 26.

92 Cf. Obrenović, *supra* note 79, § 23.

93 Decision of the President on Commutation of Sentence, *Radić* (IT-98-30/1-ES), 22 June 2007, § 15.

94 Cf. Rugambarara, *supra* note 72, § 10; Obrenović, *supra* note 79, § 28.

Table 3. Average Imposed and Effective Sentences at the ICTY and ICTR

Tribunal	Sentence			
	Average Imposed (in years)	Average Effective (in years)	Range Imposed (in years)	Range Effective (in years)
ICTY (N = 44)	10.7	7.7	3–20	2–14
ICTR (N = 11)	11.5	9.3	6–15	5–14

also be qualified as such.⁹⁵ After conviction, it seems that there must be some active engagement by a prisoner with the Prosecution, such as testimony in other trials, in order to be taken into account in favour of early release. The mere availability of the convict to testify is not to be considered as a form of co-operation. When the Prosecution does not ask for cooperation, the willingness to cooperate is treated as a neutral factor.⁹⁶

In majority of early release decisions, the President discusses each of these factors and concludes that early release is possible. He typically argues that the gravity of crimes militates against granting early release, but that prisoners have demonstrated rehabilitation by behaving well in prison, participating in language courses, working in for example a kitchen brigade, and that there are no indications (or reports) showing any signs of mental problems. If the convict served 2/3 of his sentence, and has not frustrated court proceedings he will be released. This, obviously, means that the effective sentence international prisoners serve is considerably lower than the sentence that was initially imposed.⁹⁷ In order to ascertain how much time is actually deducted, we have compared the length of imposed sentences with the length of effective sentences. For methodological reasons (since it is impossible to calculate effective sentence of individuals who remain imprisoned) the following statistics is based on the population of all the individuals who have been released after serving their whole sentence or granted early release as of 16 July 2013 (Total = 55; ICTY = 44; ICTR = 11).

Table 3 presents the average imposed and average effective sentences at the ICTY and ICTR.

95 Decision of the President on Sentence Remission of Goran Jelisić, *Jelisić* (IT-95-10-ES), 28 May 2013, §§ 31 and 32.

96 Cf. Public and Redacted Version of the 27 March 2013 Decision of the President on Early Release of Radomir Kovać, *Kovać* (IT-96-23&23/1-ES), 3 July 2013, § 30; But see Banović, *supra* note 88, § 14 where the President weighed his willingness to cooperate in favour of his request for early release.

97 In few cases, a Trial Chamber tried to take the practice of releasing convicts after serving 2/3 of their sentence into account when handing out the sentence and based the final sentence determination, among others, on considerations of a minimal sentence to be actually served in practice. The Appeals Chamber, however, overturned this, stating that the Trial Chamber ‘mechanically ... gave effect to the possibility of an early release.’ Judgment, *Nikolić* (IT-94-2), Appeals Chamber, 4 February 2005, § 97. See also Judgment, *Stakić* (IT-97-24), Appeals Chamber, 22 March 2006, § 392.

Table 4. Imposed and Effective Sentence at the ICTY and ICTR

Tribunal	Total Imposed Sentence Years	Total Served Sentence Years	Total pardoned years
ICTY (N = 44)	514 (100%)	330 (64.2%)	184 (35.8%)
ICTR (N = 11)	126 (100%)	102 (80.9%)	24 (19.1%)
Total (N = 55)	640 (100%)	432 (67.5%)	208 (32.5%)

The table shows that the average effective sentence is three years lower compared to the average sentence imposed by the ICTY and two years lower at the ICTR. In general, at the ICTY the number clearly corresponds to the 2/3 rule policy which seems to be decisive for the commutation of sentences (2/3 of the average imposed sentence of 10.7 years is 7.1 years). At the ICTR the average effective sentence is almost two years more than 2/3 of the average imposed sentences (2/3 of 11.5 is 7.6). This difference is caused by the early ICTR practice, initially refusing early release and then only granting it after the applicants had served 3/4 of their sentences. As noted above, since the President of the MICT has decided to “synchronize” the early release practice across the tribunals, the identified “discrepancies” are likely to diminish in the future.⁹⁸

Table 4 complements this statistic by comparing sums of all sentence years imposed by the tribunals (across all 44 ICTY cases and 11 ICTR cases) to sums of all sentence years actually served by prisoners and sums of years pardoned by the tribunals’ Presidents. The ICTY President has in total pardoned 184 years, i.e. 35.8% of the sentence years imposed by the ICTY judges. In contrast, the ICTR President has in total pardoned only 24 years (19.1% of sentence years imposed by the ICTR). The ICTY prisoners seem to have benefitted from the early release practice to a much larger extent compared to the ICTR. This however is connected to the fact that not so many individuals at the ICTR have been sentenced to imprisonment terms below 20 years (which is the maximum imposed sentence in this population of already released international prisoners).

All early release decisions combined add up to a total of 208 years of pardoned sentence years (32.5% of imposed prison sentence). These numbers might not be surprising; granting early release is in line with the tribunals’ regulations and one could even consider the high percentage of early releases to be a demonstration of successful correctional policy. In how many national jurisdictions does it happen that almost all offenders of serious (conventional) crimes qualify for early release? At the same time, exactly this high ‘success rate’ begs a number of questions. Are offenders of international crimes really so well behaved and really so easy to rehabilitate as these data suggest? If so, how could that be explained? Perhaps by the nature of the crimes they

⁹⁸ Bisengimana, *supra* note 76.

committed or the nature of their personalities? Or could it be explained by completely other factors? The President is highly dependent on information provided by the authorities of the enforcing states. Could it be that these enforcement states are somehow more lenient in their assessment of these international prisoners' behaviour and levels of rehabilitation compared to serious offenders who are to reintegrate in their own societies? Another pertinent question relates to future possible problems regarding those sentenced to life imprisonment — since parole regulations regarding individuals convicted to life imprisonment differ across countries or is arguably non-existent in some countries such as Mali or Benin where most convicts incarcerated for life are actually held — how will the MICT deal with these individuals? Will they be incarcerated for the rest of their lives and not benefit from early release possibility available to those sentenced to determinate sentences? Again, our cursory analysis identifies a number of questions that demand further scrutiny.

D. Life after Release

In domestic criminal proceedings after being early released, individuals are usually subjected to reintegration programmes and supervision of a parole officer. Nothing of this sort exists at the international level.⁹⁹ After release, international prisoners are literally 'off the radar'. There is no institutional oversight and in general, there is a lack of information regarding their lives. We tried to collect some information regarding their whereabouts from popular press and newspaper articles — basically the only public sources that proved to be helpful in this respect. Our analysis so far suggests that a variety of outcomes exist. Those who end up in the tribunals witness protection programme, such as Dražen Erdemović, are relocated, given a new identity, might cooperate with a tribunal on a continuous basis and possibly be assisted with integration into their new countries. Some more prominent released individuals go happily back to former allies in their country of origin, are picked up by a governmental jet at the date of their release, welcomed by a state president, offered an office in a country's senate and enjoy moderate media attention, such as Biljana Plavšić, a former President of Republika Srpska, in Serbia.¹⁰⁰ Others return as celebrated war time heroes, write a bestselling book about their 'unfair' treatment at the tribunal and become public figures frequenting TV shows and providing interviews, such as Veselin Šljivančanin, a former Major in the Yugoslavian army, who recently stated he would 'do

99 But see the SCSL Practice Direction, *supra* note 24, paragraph 11, which unprecedentedly envisages conditional early release of the SCSL prisoners and monitoring of their conduct after their release.

100 See online at <http://dalje.com/en-world/dodik-will-give-plavsic-office-in-the-senate/281001> (visited 1 July 2013). <http://www.b92.net/eng/news/politics-article.php?yyyy=2009&mm=10&dd=28&navid=62644> (visited 1 July 2013).

everything the same he did, and he would go to Vukovar to fight again'.¹⁰¹ Some less prominent ones return back to their communities, live with their families and become (again) active in municipal politics, such as Blagoje Simić, a municipal political figure during the war in Bosnia¹⁰² or Simo Zarić, a former lower ranking assistant commander in the Bosnian Serb army.¹⁰³ On the other hand, there are persons like Miroslav Kvočka, a former de facto deputy commander of the Omarska camp, who go back to their old homes, live with their families, cannot find a job, feel rejected by a society, lose their pension entitlements and fight to make a living.¹⁰⁴ Some try to be relocated in another country than their homeland expressing fears for their safety upon return, such as Hazim Delić, a former deputy commander of the Čelebići camp.¹⁰⁵ Then there are persons like the former Tea Plantation chief Michel Bagaraza who upon release file a request to stay in the country where he served his sentence.¹⁰⁶ Finally, we identified some persons who cannot go anywhere and get stuck in the country where their trial took place, since they too do not feel safe returning to their home country and no other country is willing to accept them. This happened to a number of ICTR convicts who currently — and quite paradoxically — share a safe house in Tanzania with ICTR acquitted in a similar situation.¹⁰⁷

These stories provide anecdotal evidence of life after release of international prisoners. In order to fully evaluate the impact of 'doing international criminal justice' on convicted persons and their communities this topic warrants more systematic attention and should form an integral part of the research on the tribunals' effectiveness and legacy. In general, the faith of released international prisoners is to a large extent determined by the way the conflict ended in their respective countries. The former Yugoslavia disintegrated into various successor countries to a large extent reflecting ethnic lines of the former fighting groups. The ICTY Serb prisoners are thus free to return to Serbia, Croats to Croatia, or Bosniacs to Bosnia, and are often welcome as war heroes in their respective countries. In contrast, Rwanda is now governed by a

101 See online at <http://www.blic.rs/Vesti/Hronika/264586/Sljivancaninu-zao-zbog-zrtava-rata-ali-se-nije-pokajao> <http://www.rts.rs/page/stories/sr/story/125/Dru%C5%A1tvo/1216416/%C5%A0ljivan%C4%8Danin%3A+I%C5%A1ao+bih+u+Vukovar.html> (visited 1 July 2013).

102 See online at <http://www.accessmylibrary.com/article-1G1-306584080/convicted-serb-war-criminal.html> (visited 1 July 2013)

103 See online at <http://iwpr.net/report-news/bosnia-ban-convicts-holding-public-office-urged> (visited 1 July 2013).

104 See online at <http://www.balkaninsight.com/en/video-clip-template/episode-26-life-of-the-convicted-war-criminals-what-after-a-long-term-prison-sentence> (visited 1 July 2013); A. Sorguc, 'Life After Prison for Bosnia's War Criminals' (on file with the authors).

105 Order issuing a Public Redacted Version of Decision on Hazim Delić's Motion for Commutation of Sentence, *Delić* (IT-96-21-ES), 15 July 2008, § 15.

106 In this case Sweden. See J. van Wijk, 'When International Criminal Justice Collides with Principles of International Protection; Assessing the Consequences of ICC Witnesses Seeking Asylum, Defendants Being Acquitted and Sentenced Being Released', 26 *Leiden Journal of International Law* (2013) 173-191.

107 *Ibid.*

Tutsi-based government and the ICTR Hutu defendants do not want to return to Rwanda fearing discrimination or additional prosecutions.

5. Conclusion

Academic commentators have dedicated considerable attention to many aspects of international criminal trials and international criminal law. One issue, however, has consistently been neglected: what happens to an individual convicted by an international criminal tribunal after the final guilty verdict is pronounced. This article aimed to take an initial step in filling in this gap by presenting an empirical overview of the stage following conviction at the ICTY, ICTR and SCSL. The reality uncovered in this article largely confirms critical views expressed by the limited number of authors who have reflected on the current setup of the enforcement system of international sentences: it is not transparent, conceptually underdeveloped and leads to inequalities in the treatment of international prisoners. International prisoners are sent to various countries around Europe and Africa and it is not clear what considerations, apart from political factors, are taken into account when deciding on the enforcement country. International prisoners are scattered in different prisons across various countries and subjected to largely differing prison conditions. Within Europe they are integrated into domestic inmate populations and typically serve their time in units with domestic murderers, child molesters, or drug traffickers. They follow similar daily routines and are offered existing rehabilitation programmes. One might question whether rehabilitating *génocidaires* and war criminals in the same way as ordinary delinquents makes much sense, given the specific character of international crimes and their perpetrators. Despite being usually convicted of very serious crimes, the international criminals committed their crimes under very specific (ideological, social, individual) circumstances. One might argue this should be duly reflected in designing their rehabilitation programmes. Such reflection, however, seems to be entirely missing; scholars or policy makers at the international or domestic level have not yet dedicated any attention to this pressing issue. A vast majority of international prisoners is soon deemed rehabilitated if they behave well, attend work activities or language courses in the respective prisons and show (any) remorse. They are often released after serving 2/3 of their sentences. A mere cursory look at these factors allegedly demonstrating prisoners' rehabilitation show that the concept of rehabilitation of perpetrators of international crimes and its assessment and implementation in practice is far from clearly developed and would benefit from further conceptualization and reassessment. After their release, the international prisoners simply disappear from the radar of the international community (unless they enter a witness protection programme and cooperate with the tribunals) and there is no supervision of their conduct or any attention paid to their activities. Some go back to their countries of origin and return to political posts they held prior

to or during the periods when crimes were committed. Some simply cannot go anywhere since no country is willing to accept them.

It might be questioned, whether this picture indeed represents what we as the international community envisage by ‘doing justice’. In any case, the inequalities and a lack of principled approach towards the regulation and enforcement of international sentences have clear repercussions for the tribunals’ legacy. To what extent the current system of enforcement of international sentences promotes or hinders the achievement of the multiplicity of goals the international tribunals claim to achieve, such as retribution, deterrence, rehabilitation or reconciliation, is a matter of considerable importance for any future evaluations of their effectiveness and legitimacy. In addition, the ICC has adopted a largely similar approach to the enforcement of its sentences and despite being a permanent international criminal court the post-conviction phase as regulated in the ICC Statute largely resembles the system before the international criminal tribunals. It is therefore absolutely essential to further study the current system of enforcement of international sentences in order to evaluate the functioning of the regime of the ad hoc tribunals and their effectiveness and draw lessons for the future. The overview presented in this article raises many important and interesting questions for this endeavour, and might serve as a starting point for future systematic empirical and theoretical research of the post-conviction stage of the international criminal justice system.

In case readers have relevant information on, or illustrations of, any of the post conviction issues discussed above, the authors would very much appreciate being contacted: b.hola@vu.nl or j.van.wijk@vu.nl.

Covid 19 and state crime
by Valeria Vegh Weis
Fri., 25 June 2021; 09:00 – 10:00

Abstract:

The phrases, “essential businesses” and “essential jobs,” emerged at the beginning of the COVID-19 pandemic, raising questions about and reflecting concerns over which goods, services, and workers were necessary to prevent societal collapse. In an attempt to continue to probe “essentiality,” this presentation coins the term “essential crimes” to refer to those socially injurious acts and omissions that are part and parcel of a global neoliberal capitalist order, and that are, therefore, vital to keep the socioeconomic system running. In other words, if keeping humans alive in the midst of the COVID-19 pandemic required supermarkets and hospitals to remain open (“essential business and jobs”), maintaining the existing socioeconomic system and ensuring that the powerful remained powerful required harmful acts and omissions by states and corporations—what we refer to as “essential crimes.” This research sheds light on how the COVID-19 pandemic has helped illuminate just how essential these crimes and harms are to the perpetuation of the status quo by the powerful. In addition, this presentation encourages us to consider which punishments, if any, are vital to a well-ordered society, and it demands that we rethink whether prison is an “essential punishment” for ensuring public safety.

Article:

Friedrichs, David O. & Weis, Valeria Vegh (2021): COVID-19 and the U.S. Health Care Industry: Towards a “Critical Health Criminology” within State Crime Studies.

Weis, Valeria Vegh (2021): Essential Crimes? Essential Punishments? Rethinking Essentiality in Midst of the COVID-19 Pandemic.

COVID-19 and the U.S. Health Care Industry: Towards a “Critical Health Criminology” within State Crime Studies

Author(s): David O. Friedrichs and Valeria Vegh Weis

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COVID-19 AND THE U.S. HEALTH CARE INDUSTRY: TOWARDS A “CRITICAL HEALTH CRIMINOLOGY” WITHIN STATE CRIME STUDIES

David O. Friedrichs and Valeria Vegh Weis

Abstract: The core claim of this article is that critical criminology offers us an especially potent framework for interpreting state-corporate crime with the health care industry in the United States as one illustrative case, particularly in the context of the COVID-19 crisis. The unprecedented, surreal pandemic crisis that surfaced in 2020 brought into especially sharp relief many of the core claims of critical criminology in relation to domination, inequality and injustice within a contemporary capitalist political economy, while it also raised the need to broaden critical criminology studies to incorporate the specificities of the health care systems and the pharmaceutical industry. Following this challenge, the article proposes to foster a “critical health criminology” within state-corporate crime research. To do so, this article explores the “big picture” in relation to the COVID-19 pandemic crisis and reveals how it can be understood as a criminological phenomenon. Such a project incorporates the identification of some conceptual issues requiring attention in relation to advancing an enriched form of criminological analysis in these times, and toward building a foundation for a more fully realized twenty-first century criminology.

Keywords: critical criminology; state-corporate crime; COVID-19 pandemic crisis; health care industry; pharmaceutical industry

Preface: Moses Taylor Hospital and COVID-19

On April 11, 2020, *The Washington Post* published a front-page article entitled “Amid chaos, anguished nurses say Pennsylvania hospital risked infecting cancer patients, babies and staff with covid-19” (Butler 2020). The article reported that “[s]ome nurses were going directly from treating covid patients to administering chemotherapy to cancer patients, who would be especially endangered by a

David O. Friedrichs, Author, *Trusted Criminals*

Valeria Vegh Weis Alexander von Humboldt, Postdoctoral Fellow at Freie Universität Berlin; Buenos Aires University Law School

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covid-19 infection.” They were also moving between units with patients who had been diagnosed with this disease, or were being investigated for possible infection, and neonatal units. Asked by reporters, the nurses alleged that medical staff, as well as patients, were not provided with the necessary protective equipment and that preventive procedures were not in place. A statement issued on behalf of the hospital’s CEO took exception to these allegations, and representatives for the hospital claimed that the accusations were instigated by the health workers’ union “for its own purposes” (Bolus 2020).

The hospital in question is the Moses Taylor Hospital in Scranton, a small city in the northeast part of Pennsylvania. The hospital itself is owned by a Tennessee-based corporation, CHS (Community Health Systems), a “parent” holding company for various health-related facilities. The CEO of CHS, Michael Brown, was reported to have earned \$8 million in compensation the previous year (Butler 2020). He was not being rewarded for enhancing the quality of patient care at the hospitals and nursing homes, or for coming up with a cure for cancer. He was solely being rewarded for his perceived skill (and board of trustees’ connections) in overseeing the realization of the best possible financial return for shareholders (and disproportionately, for top executives) in the corporation he headed. The hospital itself was classified as “for profit,” which is of course one dimension of the widespread critique of the U.S. health care system, which has a huge private profit-seeking sector, unlike almost all other “advanced” Western countries.

This story is reflective of some of the darker dimensions of “predatory capitalism” (i.e., an economic system where “the few” profit at the expense of everyone else), which privileges those with excellent insurance and deep pockets over those in great need of good medical care but without the financial resources to obtain it (Rosenthal 2020; Slobodian 2020). So far, the COVID-19 pandemic has cast these issues into an especially sharp light, exposing the criminal dimension of the for-profit health complex in a clearer manner: if the allegations made by some nurses in this case were in fact true, and if patients and staff members were infected with COVID-19 and subsequently died as a consequence, would some form of homicide prosecutions directed at the executive officers of CHS be appropriate? Do such allegations go beyond the possibility of some form of civil liability, and reflect instead some form of criminal wrongdoing, even if only in the form of criminal negligence? And more broadly still: does the profit-driven health care industry in the United States, dominated by large-scale organizations operating with the core support of powerful politicians, demonstrate in an especially potent way the “structural violence” and inherent criminality of a capitalist system (Gordon and Green 2020)? In historical terms, will the current pandemic be viewed as having contributed to a broader and ultimately transformative public consciousness of this structural violence and criminality?

As it happens, one of the authors was a weekly patient in the chemotherapy infusion unit of Moses Taylor Hospital between February 25 and March 31, 2020 and directly observed some practices that appeared to be unsafe and in line with the nurses' allegations. To the best of his knowledge, he did not become infected with COVID-19 as a consequence of his chemotherapy treatments, but even so. And as someone who had published quite extensively over the course of several decades on crimes of corporations (Friedrichs 2010), he was struck by the potential irony involved if he did in fact become infected and suffer a fatal outcome. A possible "news of the weird" headline: "Criminologist who published on crimes of corporations killed by state-corporate crime."

Introduction

Beyond the vast avalanche of journalistic reporting and commentary on the COVID-19 pandemic crisis, it has attracted the attention of biologists, epidemiologists, virologists, ecologists, historians, economists, political scientists, sociologists and in fact academics and specialists from a broad range of contemporary disciplines and fields. Our concern here is to address some core *criminological* dimensions of the pandemic.

This article does so as an unapologetic exercise of "big picture" criminology (Rosenfeld 2011): the purpose here is not to examine in depth a specific criminological phenomenon—the focus of most criminological scholarship—but rather to explore the larger context within which immensely consequential criminological phenomena are best understood. In relation to a "big picture" prism, this article addresses the potential challenge of COVID-19 for criminology and particularly on the potential of critical criminology as a platform to address the pandemic with a focus on what might be referred as "critical health criminology." The article later addresses the U.S. health care system—and, within it, the U.S. pharmaceutical industry—as a possible case study of state-corporate crime in relation to COVID-19. Insofar as the U.S. health care system (including its pharmaceutical industry) is thoroughly interdependent with governmental entities, a state-corporate crime analysis is essential. Finally, concluding thoughts on the future of criminology are presented.

The Field of Criminology and COVID-19: Towards an Invisible Enemy?

Criminology as a multi-disciplinary field of inquiry has been regarded at its core as focused upon the bad (illegal) actions of individuals, gangs and organizations, and the societal response to these actions. Criminals—and criminal entities—although

they typically go to some lengths to conceal their criminal activity from representatives of the state and the social order, are nevertheless “visible” as human beings. At the same time, fear of being a victim of crime, and of perceived criminals in particular, has also been an enduring dimension of human social existence in all developed societies, with immense consequences in terms of public policy and social interaction, and therefore one core focus of criminology. There are many forces that influence the perception of crime, mainly in terms of individual acts, but criminology has been disproportionately focused historically on crimes committed by the poor and powerless (Reiman and Leighton 2020; Reiner 2016; Vegh Weis 2017).

In contrast, in a new COVID-19 era, fear is less concentrated on the ordinary “visible crimes and criminals,” but instead is more focused on an “invisible crime” and an “invisible enemy,” i.e. the virus. In terms of “invisible crimes,” some British criminologists have called for more attention to those hugely harmful human activities that are for various reasons less visible as crimes than conventional forms of criminal violence, in part because they precipitate social death over long periods of time, but not with the immediacy of common homicides (Hillyard et al. 2004; Davies et al. 2014; Gordon and Green 2020). As to the “invisible enemy” of COVID-19, it is associated first with the natural world and has its source, apparently, in the animal world (in this case, bats). Natural scientists with a range of different specializations—from epidemiology to infectious disease researchers—have been at the front line in the “war” against COVID-19. A range of human decision-makers is involved in instituting policies and practices to ideally limit the spread of COVID-19, to organize the most effective response to it, and to specifically address the vast range of economic consequences of this pandemic. But where are criminologists in all of this?

Mainstream (or “orthodox”) criminological research is sure to be affected by the COVID-19 pandemic crisis, with empirical investigations of the impact of the crisis across a range of criminological concerns, from patterns of criminal behaviour to changes in penal policies. Mainstream criminology addresses forms of crime—including but hardly limited to, homicide, assault, rape, burglary, robbery and theft—with regard to which there is a high level of societal consensus that harm is involved, that the status of these activities as “crimes” is wholly appropriate, and that the most effective (and just) criminal justice responses need to be identified, analysed and implemented.

Indeed, it was recognized early on that COVID-19 would have some impact on patterns of criminal behaviour. For example, some data early in the crisis indicated that, with people in large numbers “sheltering” at home but away from businesses, home burglaries decreased but those directed at businesses increased (MacFarquhar and Kovalski 2020). Conditions of living in close quarters under stressful circumstances were expected to lead to an increase of domestic violence (or intimate

partner violence) cases. Altogether, the “opportunity structure” for a wide range of delinquent and criminal conduct was being transformed by the pandemic.

As to the criminal justice system itself, criminologist Ezzat Fattah (2020) suggested early on that it was being “upended” by the pandemic. There were indications that police in some locations were modifying their approach to enforcement, delaying arrests or refraining from acting in response to nonviolent crimes. Court proceedings were having to make various types of adaptations, with courthouses closed down. And it was easily recognized that the conditions of prisons and jails were especially conducive to promoting COVID-19 infections. They were in fact “death traps” for both people serving time and staff. In some jurisdictions, prisoners who met certain criteria were being released early to minimize contagion. If contracting COVID-19 put people in prison—especially those who were older, and with “underlying” health conditions—at serious risk for a fatal outcome, questions in relation to justice, understood as an ethical and moral value, arose: i.e., should someone serving a jail or prison sentence—especially as is typically the case, not for a “heinous” crime—be subjected to “capital” punishment by COVID-19? More broadly, there was speculation on whether the vast number of citizens enduring involuntary confinement conditions themselves, due to “sheltering in place” orders, would become more empathetic toward those enduring incarceration, and whether, if so, this would lead to an acceleration of de-incarceration.

However, three relevant limitations of the mainstream framework have been brought into especially sharp relief by the pandemic. First, mainstream criminology treats the formal legal order’s characterization of “crime” as unproblematic, as it does the basic structure of the existing political economy (Reiner 2016; Vegh Weis 2017). Accordingly, it reinforces a long historical tradition of highlighting some forms of harm, for example, those disproportionately committed by the poor and the powerless, while either marginalizing or wholly neglecting other forms of harm, for example, those wholly committed by the rich and the powerful. Moreover, mainstream criminology also reinforces broad public and popular understandings of “who are the criminals” (Hagan 2010) that foster disproportionate attention to and harshness in relation to certain classes of offenders (e.g., illegal immigrants and inner city minorities who commit conventional crimes) and inattention to and excessive lenience to other classes of offenders (e.g., political leaders and corporations who perpetuate crimes of states and corporate crimes) (Michalowski 2009; Reiman and Leighton 2020). One of the authors introduced some years ago an “inverse hypothesis”: i.e., the level of criminological attention to a form of crime varies inversely with the level of harm caused by such crime (Friedrichs 2007: 5). If such a hypothesis, taken literally, is overly simplistic and one-dimensional, the claim here is that it incorporates a core truth.

Second, mainstream criminology takes the existing political and social status quo as a given and does not specifically address this context in relation to crime and criminal justice. Thus, it lends support—either intentionally, or by default—to an existing political economy that perpetuates pervasive forms of domination, oppression and inequality (Barak 2015; Rothe and Kauzlarich 2016b; Vegh Weis 2017). Moreover, as Meda Chesney-Lind (2019) —a recent president of the American Society of Criminology, and a critical criminologist—has observed, the field of criminology, historically, has addressed crime principally as a local phenomenon. Increasingly, a global and transnational criminology has called for transcending such parochialism, and the coronavirus pandemic crisis potentially reinforces the need to do so.

Third, mainstream criminology as it exists today tends to operate within “silos” of specialization, focusing on narrowly framed dimensions of crime and criminal justice, with much scholarship addressed to—and principally referencing—fellow specialists within the field of criminology. The pandemic produced an especially forceful reminder of the fact that the complex, multi-faceted, larger context within which crime and criminal justice plays out is hugely consequential.

When it addresses the health care industry, the limitations of mainstream criminology become especially clear. To exemplify, an article entitled “Health Criminology: New Developments in an Emerging Paradigm” published in the May/June 2020 issue of *The Criminologist* addresses the impact of health-related issues on involvement in conventional delinquent and criminal activity, and the impact of criminal justice processing and incarceration in relation to health-related issues (Vaughn et al. 2020). We can certainly acknowledge that health issues intersect with crime and criminal justice in significant ways, and a “health criminology” might usefully address historically marginalized dimensions of such intersection. But the focus of the article is on conventional offenders in relation to health and crime, while once again the crimes of the powerful in the health industry are missing. There is no acknowledgement within the “health criminology” article of the claim that the health care system as it is presently organized in the USA incorporates significant dimensions of a criminal enterprise. Accordingly, in what follows we address how a critical criminological perspective can effectively address this limitation of mainstream criminology in general and particularly in relation to “health criminology.” Or, in other words, what could a *critical* health criminology look like?

Critical Criminology and COVID-19: Towards a “Critical Health Criminology”

Critical criminology shows that crime does not occur within a vacuum, but rather within the context of what is happening within the larger political economy.

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This context is characterized today by political, economic and social inequality, as well as relations of domination and oppression within the contemporary capitalist political economy. Within this context the pandemic has caused even more catastrophic consequences on multiple different levels, which are well known and need hardly be spelled out here. Critical criminology has been characterized as having as its core mission the critique of domination, oppression and inequality, in all of its multiple manifestations (DeKeseredy and Dragiewicz 2018; Michalowski 1996; Schwartz and Brownstein 2016; Ugwudike 2015). The COVID-19 pandemic crisis brings domination, oppression and inequality into especially sharp relief, and has rendered more visible structural dimensions of the neoliberal global political economy.

Furthermore, it is within the tradition of critical criminology—which evolved in fundamental ways out of radical and neo-Marxist criminology—that the foundations for a twenty-first century criminology that highlights the crimes of the *powerful* and corrects for the disproportionate criminological attention to the crimes of the *powerless* is to be found (Barak 2015; Bittle et al. 2018; Rothe and Kauzlarich 2016b; Ruggiero 2015). While critical criminology has not been immune to the “silo” and internally focused tendencies of mainstream criminology identified above, we submit that altogether it has been more fully engaged with the broader context of the political economy. The pandemic seems early on to be impacting the political economy in hugely consequential ways, and so offers us a unique context for advancing the transformation of the field of criminology in a productive way.

In this vein, while the pandemic confronts us all with an “invisible” enemy, it might also open an opportunity to focus on “invisible” crimes that—as opposed to the ones committed by the “visible” poor and which might directly affect people a few times in a lifetime—affect us all on a daily basis and in a systematic manner (Davies et al. 2014). Many governments, especially those with autocratic leadership, are failing to protect the lives of their citizens, shedding light onto ordinarily invisible “state crime” in some form (Chambliss et al. 2010; Green and Ward 2004; Rothe 2009; Rothe and Kauzlarich 2016a). Corporations—including those in the financial sector, such as banks—are taking advantage unfairly of government financial relief programs, and of small business competitors, employees and consumers, exposing the traditionally invisible “corporate crime” as associated with the COVID-19 pandemic crisis (Silver-Greenberg et al. 2020a). Cooperation between the state and corporations to hide the extent of the pandemic has exposed the extent of invisible “state-corporate crime” and the true scope of state-corporate crime symbiosis (Michalowski and Kramer 2006; Friedrichs and Rothe 2014; Ghazi-Tehrani 2019; Tombs 2012). Raymond J. Michalowski and Ronald C. Kramer (2006: 3) have defined “state-corporate”

crime (a term they originally introduced in 1990) as a concept that “seeks to breach the conceptual wall between economic crimes and political crimes in order to create a new lens through which we can examine the ways crimes and social injuries often emerge from intersections of economic and political power.” If the claim is ultimately documented that the World Health Organization (WHO) had some responsibility for the scope of the pandemic by virtue of its alleged corrupt ties with China, from which the COVID-19 pandemic originated, this could be associated with usually invisible “crimes of globalization,” i.e. those demonstrably harmful policies and practices of institutions and entities that are specifically a product of the forces of globalization, and that by their very nature occur within a global context (Rothe and Friedrichs 2015). But there are surely other significant global dimensions of criminality in relation to the pandemic, including International Monetary Fund pressure to third world countries struggling to pay their external debt instead of devoting their meagre existing budgets to confront the pandemic and avoid unnecessary deaths.

Within the critical vision of the status quo and the broad range of crimes of the powerful, critical criminology provides us with an especially appropriate and potent framework to address the health care industry in times of pandemic as state-corporate crime under the framework of “critical health criminology.” We should note here that this is not a wholly new initiative, even if this particular labelling has not been applied to it. For example, Jeffrey Reiman and Paul Leighton (2020), in multiple editions of the classic text *The Rich Get Richer and the Poor Get Prison* (with early editions authored by Reiman only), addressed “How Health Care May Be Dangerous to Your Health.” O. Hayden Griffin and Bryan Lee Miller (2010) have specifically addressed the OxyContin catastrophe in the United States in relation to state-corporate crime, as a governmental failure to adequately regulate pharmaceutical companies. More recently Raymond Michalowski and Meredith Brown (2020) have addressed the “poisonous” consequences of regulatory rollback in the Trump era on public health. Other such examples could be identified. Our objective here is to further develop such incipient “critical health criminology” initiatives specifically in relation to the pandemic.

The U.S. Health Care Industry: A Case Study of “Critical Health Criminology” within State-Corporate Crime in the Context of COVID-19?

The health care industry in the United States is a vast enterprise. Large numbers of dedicated, highly educated and trained professionals—doctors, nurses and a whole range of other health care workers—provide hundreds of millions of people with health care that is sophisticated in at least some dimensions (Saphier 2020). Many

people can then live relatively pain-free, productive and long lives. A vast apparatus of institutions and organizations—from hospitals to health insurance plans—supports this enterprise. Pharmaceutical companies, as part of this industry, devote billions of dollars to producing a wide range of innovative and sometimes effective drugs to treat every imaginable ailment and health problem.

Specifically, within the context of a pandemic, the heroism of health care workers in all capacities—as well as researchers within the pharmaceutical industry—working long hours, with much dedication, and in many cases putting themselves at huge risk—was justly celebrated. Altogether, this whole health care enterprise could hardly be more different from that of organized crime entities, of drug cartels and gangs, and conventional criminal enterprises of any kind. At least all of what is stated in the foregoing is the implicit, if not explicit, claim of the health care industry, and those who support and praise it.

Alternatively, a vast literature on the profound deficiencies of the U.S. health care system has developed, along with a huge volume of on-going political and public discussion in relation to these deficiencies (Bogdanich 1991; Brill 2015; Case and Deaton 2020a, 2020b; Nussbaum 1990). It is not our purpose here to replicate this widely diffused critique, or engage with the massive relevant literature and commentary. Rather, our purpose is to specifically reframe the core issues in criminological terms building upon the concept of state-corporate crime. The overall objective is to contribute, however modestly, to the aspirational project of transforming both the core character of twenty-first century criminological inquiry, and to an endeavour that cuts across a broad range of disciplines with the goal of accelerating the inevitable transformation of U.S. health care into a fundamentally just and effective—and not profit-driven—enterprise. As Elizabeth Rosenthal has noted:

In our market-based system, hospitals are primed to compete, not cooperate . . . In the past quarter century, we have developed a reimbursement system that showers cash on elective and specialty care and discourages hospitals from serving the basic health needs of society . . . the system we need now is one that responds more to illness and less to profits (2020: 29).

What are the core dysfunctions and deficiencies of U.S. health care, stated as concisely as possible? As William Hsiao (2020) informs us, in a recent year, U.S. citizens spent over \$10,000, per person, on average, for health care; i.e. twice what other advanced countries spend, despite the fact that they have much better outcomes in relation to life expectancy, infancy mortality and the prevalence of various serious health conditions. Experts estimate that some 30 percent (or about \$1 trillion) of the vast expenditure of money on health care in the United States is

wasted in various ways, including some \$150 billion in unnecessary treatment, and specifically in relation to fraud. Altogether, there are huge medical pricing mark-ups and many incentives to “game” the system in the interest of profit.

Moreover, the United States is the only country with an advanced economy without some form of universal health care coverage. All of these other countries treat health care as a “social good,” not as a “commercial product,” which is the case for the United States. In the latter country, health care is more equivalent to such services and products as being served at a high-end restaurant or obtaining fancy jewellery, as opposed to as a basic human right. A physician and bioethicist, Jacob Appel (2011), has characterized private health insurance in the United States as a large-scale criminal endeavour that should in fact be criminalized. It extracts hundreds of billions of dollars from its customers, often denies claims they submit, and rewards its top executives extravagantly. It has more in common with predatory schemes such as loansharking than it does with fire insurance. And some 28 million U.S. citizens are uninsured, with an additional 44 million U.S. citizens underinsured. Millions forego basic health treatment—including for children—due to this circumstance, and of those who do seek treatment at least a half a million are driven into personal bankruptcy annually due to medical bills they cannot pay. Altogether, while U.S. above can provide very good outcomes for the wealthy and the well-insured, it is profoundly inequitable, and for the most part the less well-off suffer accordingly.

Within the U.S. health care system, the pharmaceutical industry is a core component that brings into especially sharp relief the criminogenic dimensions. Every year some \$1 trillion dollars is spent on pharmaceutical industry drugs in the country (Goldacre 2013; Posner 2020). Since the middle of the twentieth century, it has been one of the most profitable industries in this country, and by some measures the single most profitable industry. However, John Braithwaite’s (1984) *Corporate Crime in the Pharmaceutical Industry*, is a classic contribution to the criminological literature exposing the “dark” side of this industry. As with private health insurance, the pharmaceutical industry has been described as a “criminal enterprise,” due to its wide range of exploitative, corrupt and deceptive practices (Zorn 2015). In one notorious case several years ago, the price per tablet of one pharmaceutical product was raised overnight from \$13.50 to \$750.

Illicit drugs—including heroin, cocaine and marijuana—became a huge focus of the U.S. criminal justice system, especially in the last couple of decades of the twentieth century, with vast numbers of those involved in trafficking it (disproportionally inner city, minority group men) going to prison for long periods of time (Caulkins and Reuter 2017). But the pharmaceutical industry has a very long history of profitable promotion of addictive drugs (Posner 2020). It is not widely known among the general public that early in the last century the pharmaceutical

industry sold and actively promoted heroin, with claims of various beneficial dimensions of a drug that ultimately acquired major criminalized associations, with users profoundly stigmatized as “junkies.”

In more recent times the pharmaceutical industry has aggressively promoted the over-prescription of Valium, menopause treatments, anti-depressants and pain killers, among other pharmaceutical products, for vast profits (Goldacre 2013; Posner 2020). These over-uses have had a range of harmful—and sometimes fatal—consequences, as has been true of a vast over-prescription of antibiotics, with up to 90 percent being unnecessary. By 2020, at least 200,000 U.S. deaths—a staggering number—had been attributed to opioid use (Case and Deaton 2020a, 2020b). Most notoriously, Purdue Pharma—founded by three physician brothers with the name of Sackler—became the “poster case” for the complicity of the pharmaceutical industry in the massive devastation associated with opioid addiction in the early part of the twenty-first century (Macy 2018). Much evidence eventually surfaced documenting the aggressive promotion of OxyContin by this pharmaceutical company—including by members of the Sackler family—while marginalizing or concealing emerging evidence of its profoundly addictive qualities.

As early as 2007, three executives of this company pleaded guilty to criminal charges in relation to deceptive marketing practices, and the company paid over \$600 million in fines and other charges (Griffin and Miller 2010). The Sackler family itself, however, continued to receive much acclaim as philanthropists—with buildings and halls in cultural, educational and medical institutions named for them—while transferring billions of dollars of their profits into off-shore accounts, to protect this money from lawsuits directed at their company (Hakim et al. 2019; Metcalf et al. 2019). The difference between the fate of members of the Sackler family and inner-city drug dealers is exceptionally striking, despite the fact that in both cases they were selling hugely harmful drugs to vulnerable people, exposing the under-criminalization of state-corporate crime, despite its harmful effects. The failure of the federal and state governments to exercise appropriate regulatory oversight on the production, distribution and marketing of OxyContin was a core contributory element in the epidemic of opioid addiction and deaths by overdoses (Griffin and Miller 2010).

On the retail level, pharmacies and pain clinics were complicit in selling vast numbers of these opioids, absent any legitimate medical oversight (Eyre 2020). By May 2020, the role of major pharmacy chains such as CVS and Rite-Aid in the opioid epidemic was getting more attention (Hoffman 2020). Since 2003, far more people in the United States died prematurely from prescription drugs—opioid analgesics—than from heroin and cocaine combined (Paulozzi et al. 2012). Overdoses involving opioids killed more than 47,000 people in 2017, and 36 percent of those

deaths involved prescription opioids (CDC 2020a). The overall opioid prescribing rate in 2018 was 51.4 prescriptions per 100 people, meaning that one of every two U.S. citizens has been legally prescribed drugs (CDC 2020b). More striking is that some U.S. counties had rates that were six times higher than that.

All-too-many medical researchers and physicians are corrupted by the pharmaceutical industry, obtaining lucrative speaker and consulting fees, outright gifts and bribes, and other direct and indirect financial benefits from the industry in return for promoting drugs in their research publications and by over-prescribing, including for “off-label” uses (Ornstein and Thomas 2018; Posner 2020). In the profit-focused private enterprise system of which the pharmaceutical industry is a part, there are really no effective controls on pricing and as many such products are deemed “needed” and paid for partly if not wholly by third parties (i.e., health insurance plans) vastly inflated prices are pursued. Many outrageous mark-ups of pharmaceutical products could be cited. In one case, the drugs needed by a single family with several members afflicted with a rare bone disease cost some \$6 million annually, with most of that cost paid through an employer-based health plan (and accordingly borne by its members) (Thompson and Abelson 2019). In a recent six-year period, prescription drug prices rose at a rate that was about four times the rate of inflation, and with no obvious rationale aside from the pursuit of exorbitant profits (Posner 2020). In fact, the very high cost of pharmaceutical drugs—with at least some portion of that cost borne directly by U.S. consumers—had become such a high-profile concern by the second decade of the twenty-first century that President Trump announced that his administration would take on this issue (New York Times 2019; Weiland 2020). To date—perhaps at least in part due to the immense political clout of the pharmaceutical industry and its ties to the administration—this has not happened.

The range of harms associated with the pharmaceutical industry exemplify state-corporate crime, because they are only possible as a consequence of the multiple, cooperative ties between public and private sector entities, or government power brokers and corporate decision-makers. Political office holders benefit in many different ways from doing the bidding of the pharmaceutical industry, including but hardly limited to generous campaign donations. To exemplify, in March, 2020 the U. S. Congress passed legislation including an allocation of over \$3 billion to produce and develop drugs and vaccines for COVID-19, and the pharmaceutical industry successfully lobbied to weaken or prevent the inclusion of measures to control the pricing of such drugs (Zaitchik 2020). Something parallel occurred when the Obama administration’s Affordable Care Act was adopted. In effect, taxpayers have long subsidized the development of drugs that the pharmaceutical industry then grossly overcharges them for as patients. By mid-summer 2020, pharmaceutical company insiders were cashing in on the desperate pursuit of a COVID-19 vaccine

(Gelles and Drucker 2020). They were selling off their stock options whose values had risen dramatically following the announcement that their pharmaceutical company was making progress in this pursuit.

Let us be clear. The U.S. pharmaceutical industry is filled with many people, on many different levels, working hard to produce pharmaceutical products that are beneficial in some way to tens of millions of citizens, in some cases making it possible for them to live pain-free, productive lives, and saving their lives (Saphier 2020). There are many good people among them. Our point here is that the core structure and organization of the pharmaceutical industry is such that it is inherently a form of state-corporate crime, with a broad range of hugely harmful consequences suggested above. The transformation of the production and disposition of pharmaceutical products into a form wholly marginalizing if not completely eliminating these criminogenic dimensions requires recognition of the true nature of this existing industry. Stripping out the profit-seeking dimension of the pharmaceutical industry—in effect, recognizing that what it produces is aligned with a core right of human beings in relation to the pursuit of good health—would go a long way toward removing the criminogenic character of this industry. If it were possible for the industry as presently constituted to demonstrate that it has made significantly better health and mortality outcomes for U.S. citizens than is true for other advanced countries, that would be one thing, but as we have noted earlier that is far from the case. Even though the management of an eventual vaccine and treatments for COVID-19 is yet far from clear, it seems virtually inevitable that the pharmaceutical industry will approach a COVID-19 solution with its institutionalized, criminogenic, profit-maximizing focus.

The Health Care Industry and Exploitation of the Coronavirus Pandemic Crisis

There is a long history of private enterprise—including major corporations—finding ways to profit from natural disasters (Mutter 2015). Early in the coronavirus pandemic crisis efforts to profit from it in various ways emerged, with health care entrepreneurs and enterprises as part of this. These endeavours related to attempts to take advantage of shortages of ventilators and other essential supplies and equipment and of testing, in addition to the corrupt efforts of well-connected and well-funded health care providers to obtain government aid (Bradley 2020; Wu 2020). Political insiders within the government were in some cases directly attempting to facilitate and take advantage of such opportunities (Vogel 2020). It was quite clear that much state-corporate crime was being initiated at the outset of the crisis.

More specifically, a significant potential exists for the pharmaceutical industry to exploit the COVID-19 crisis: for example, with price gouging or price-fixing for

essential pharmaceutical drugs; for false claims about the effectiveness of pharmaceutical products to combat COVID-19 infections; and for anti-trust practices to monopolize control of essential pharmaceutical products; and in relation to the search for and ultimate pricing of a vaccine (Kaplan et al. 2020; Mazzucato and Momenghalibat 2020; Thomas and Grady 2020). Should such practices occur—and be broadly exposed—they would be quite certain to inspire formidable public outrage. Historically, the pharmaceutical industry has had considerable success in limiting or deflecting public outrage over some of its more pernicious practices. It remains to be seen whether that would be true within the context of an on-going COVID-19 pandemic crisis.

One striking, illustrative case of attempting to exploit for profit the pandemic crisis involved Gilead Sciences (Zaitchik 2020). This pharmaceutical company, with ties to the Trump administration, claimed “orphan status” for Remdesivir, a drug currently used to treat those with COVID-19. The orphan drug status provides a seven-year-market exclusivity period along with other tax benefits. Historically, and by design, orphan status is only applied to drugs for treating rare diseases affecting less than 200,000 people. Gilead applied for orphan status when COVID-19 affected less than this threshold in the U.S., but with full awareness of the immediate spread of the virus that would follow (Kohrman 2020). It was not the Trump Administration—in charge of taking care of the health of the U.S. population—that stopped this outrage. Civil associations, including Public Citizen, a consumer-rights advocacy group, and 50 other organizations, were the ones that denounced Gilead’s use of “a loophole in the law to profiteer off a deadly pandemic” (Public Citizen 2020), forcing the corporation to withdraw its request (Gilead 2020). Rather than privileging public well-being, at least some parts of the U.S. pharmaceutical industry—with complicity on the part of the Trump administration—privileged maximizing of profits, which might result in deprivation of access to a COVID-19 cure for those who cannot afford it. An estimated 27.5 million Americans who do not have health insurance coverage would be especially vulnerable in this regard.

Concluding Thoughts: Thinking about Crime—and Re-imagining the Criminological Future

How might deaths from COVID-19 be understood in relation to crime? Indeed, what proportion of those who died was due principally, if not exclusively, to the negligent policies and practices of governmental and corporate leadership, from the president of the United States down? In May, 2020, the *New York Times* headlined a front-page story with “Lockdown Delays Cost at Least 36,000 Lives, Data Suggest” (Glanz and Robertson 2020). If this claim holds up, tens of thousands of people in

the United States—just through this period—need not have lost their lives had the public and private sector leadership taken the right steps, policy-wise, early on. Are they best classified as victims of a crime, then? And looking forward, if the state-corporate alliance between Gilead Sciences and the Trump administration to develop a cure for COVID-19 succeeds, shall we consider those millions of people without access to the drug also as victims of crime? It should be clear that, when millions of people face death as a result of state-corporate actions or omissions, a critical criminology perspective on health criminology is an urgent task for state crime studies.

In the spring of 2020, fairly early in the pandemic, the observation that this crisis could “turn our world upside down” was being made. That capitalism itself is a source of huge and devastating forms of harm has been well-documented (Chang 2010; Shaxson 2019). As of this writing (during summer 2020) it is too early to say whether the impact of the crisis will foster enduring, structural changes in the political economy, society and culture, or only more cosmetic and largely temporary ones. The pandemic crisis, at a minimum, exposed the precariousness of the financial circumstances of tens of millions of people in the world’s richest country. It demonstrated in full the massive interdependency of members of society, and further discredited a myth of “rugged individualism” as the key source of success and prosperity. It highlighted, more specifically, who the really “essential” workers in our society are, meaning the frontline health care workers, food store employers, teachers, drivers, sanitation workers and so forth. And that such workers are all-too-often under-appreciated and undercompensated. Altogether, the COVID-19 pandemic brought into sharp relief many core deficiencies and distortions within the existing political economy and social order.

Even if the full scope of the impact of this pandemic is not yet wholly known, we submit here that the COVID-19 pandemic crisis could—and indeed should—bring about a long overdue transformation in the field of criminology. The formidable growth of support for fundamental social change in relation to the existing political economy and openness to socialistic policies, especially by the younger generation, strongly suggests that traditional political—and criminological—frameworks will be increasingly rejected. The monopolistic role of enterprises such as Google, Facebook, Apple and Amazon in conjunction with political or governmental interests in various dysfunctional dimensions of contemporary social existence is being increasingly recognized. Such recognition should align with greater receptivity within criminology to the significance of the state-corporate crime concept and, within it, of a critical health criminology. The pandemic has brought into especially sharp relief the interdependency of state and private sector organizational actors, and accordingly, state-corporate crime in relation to the health care and pharmaceutical industries. The COVID-19 crisis has exposed some of the most substantial sources of harm to human beings, and they do not

come from conventional criminal offenders. Both the actions and the failures to act on the part of the powerful (and the rich) —in the public and the private sectors—greatly amplified the loss of life along with a vast range of other forms of suffering that emanated out of the pandemic. Criminology as a field, through the first two decades of the twenty-first century, has continued to privilege attention to the crimes of the poor and the powerless—and the control of such crime—over the crimes of the rich and the powerful. Critical criminology, over the course of the past half century or so (originating, in the United States as radical criminology), has systematically exposed the broad range of harms associated with domination, oppression and inequality, within the context of a capitalist political economy. During this same period, far more substantial attention to crimes of the powerful (rooted in the work of Sutherland and others) has documented the huge scope of harm from such crime, and the more limited accountability for such crime relative to that imposed upon conventional crime. Over the past 30 years or so in particular, in addition to a substantial growth of attention to corporate crime, we have seen the emergence within criminology of significant attention to crimes of states, to state-corporate crime, to crimes within the financial sector, to crimes of globalization, and related manifestations of crimes of the powerful. In a special issue of the newly established *Journal of White Collar and Corporate Crime*, the specific criminological consequences of the Trump administration’s regulatory rollback—an inherently state-corporate crime enterprise—were addressed (Michalowski 2020). It may also be worth noting that between 2014 and 2020, six of the seven presidents of the American Society of Criminology were women, one being a woman of colour, two being associated with critical criminology, and one (the current president) being a leading white-collar crime scholar. Meda Chesney-Lind (2020), the 2019 president, chose “[f]eminist criminology in an era of misogyny” as the topic of her presidential address. Chesney-Lind, a self-described feminist activist, highlighted the on-going importance of criminological attention to gender, sexism and racism, and specifically of embracing reproductive justice as a criminological concern, along with a call for more attention to newsmaking or public criminology. Sally Simpson (2019), the 2020 president, was planning to highlight issues of corruption in her presidential address. In a similar vein, the president of the British Society of Criminology in 2020, Sandra Walklate, has published extensively on criminology of war, and on intimate partner violence. In turn, the vice president of the British Society of Criminology, Pamela Davies, was a co-editor of *Invisible Crimes and Social Harms* (Davies et al. 2014). The foregoing represents a very selective “snapshot” of how a field of criminology long dominated by white men focused principally upon conventional forms of crime is in fact undergoing some significant change, going forward. If the COVID-19 pandemic crisis emerging at the beginning of the third decade of the twenty-first

century contributes to a paradigmatic shift within criminology, one that privileges attention to the crimes of the powerful and rich over those of the powerless and poor, that would be something beneficial coming out of these dreadful times.

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Essential Crimes? Essential Punishments? Rethinking Essentiality in the Midst of the COVID-19 Pandemic

Valeria Vegh Weis^{1,2}  · Brittany Magnin¹

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Abstract

The phrases, “essential businesses” and “essential jobs,” emerged at the beginning of the COVID-19 pandemic, raising questions about and reflecting concerns over which goods, services, and workers were necessary to prevent societal collapse. In an attempt to continue to probe “essentiality,” this article coins the term “essential crimes” to refer to those socially injurious acts and omissions that are part and parcel of a global neoliberal capitalist order, and that are, therefore, vital to keep the socioeconomic system running. In other words, if keeping humans alive in the midst of the COVID-19 pandemic required supermarkets and hospitals to remain open (“essential business and jobs”), maintaining the existing socioeconomic system and ensuring that the powerful remained powerful required harmful acts and omissions by states and corporations—what we refer to as “essential crimes.” This article sheds light on how the COVID-19 pandemic has helped illuminate just how *essential* these crimes and harms are to the perpetuation of the status quo by the powerful. In addition, this article encourages us to consider which punishments, if any, are vital to a well-ordered society, and it demands that we rethink whether prison is an “essential punishment” for ensuring public safety.

Introduction

The COVID-19 pandemic invites us to think broadly about what is *essential* in our individual lives. Governments around the world have had to face the challenging decision of identifying what and who are really essential for our societies in terms of personnel. For example, without doctors, nurses and other healthcare professionals, public health would suffer and morbidity and mortality would increase. In the same vein, only specific companies and stores have been deemed essential businesses and have been allowed to remain open—and, in some instances (such as supermarkets), for longer hours. Indeed, for much of the world, supermarkets are necessary for people to obtain food. Meanwhile, guidelines and orders regarding social distancing and sheltering-in-place have forced us all to think about our essential relationships.

✉ Valeria Vegh Weis
valeriaveghweis@derecho.uba.ar

¹ Freie Universität Berlin Law School, Berlin, Germany

² Buenos Aires University Law School, Buenos Aires, Argentina

This article explores the concept of *essentiality* in the context of our criminal justice system by putting forth two ideas: “essential crimes” and “essential punishments.” At first blush, the notion of an “essential crime” might seem odd or even oxymoronic. Usually, crime is something that societies want to *prevent* or *reduce*. How can an act or omission that causes harm be important or necessary for a society? But as we intend to argue, certain acts and omissions, while injurious to many, are integral to the success of powerful sociopoliticoeconomic entities. Thus, they are *essential* to the maintenance of an order that benefits these elites: they are “essential crimes” for the powerful to (commit to) remain powerful. And during the COVID-19 pandemic, as we will explain, many of these acts and omissions—many of these “essential crimes” by states and corporations—were laid bare.

The notion of “essential punishments” is a bit more straightforward in that it serves as a heuristic device for inquiring which penalties and sanctions are really necessary for public safety. The pandemic allowed for the early release of many individuals serving time in jails and prisons, and as we argue, provided us with an opportunity to consider not only the nature, type, and extent of certain punishments, but *who* should be punished and *for what*.

Part I of this article develops the concept of “essential crimes” by situating it in the criminological literature on social harms and crimes of the powerful. Part II explores different state crimes, corporate crimes, and state-corporate crimes committed during the COVID-19 that were or have been particularly *essential* to powerful entities. Part III analyzes the notion of “essential punishment” and Part IV concludes the article with some final reflections. Overall, the argument of the article is that it is *essential* (absolutely necessary, extremely important) to identify and reflect upon the extensive social harms committed during the COVID-19 pandemic, to understand how those harms are integral to the existence and success of powerful entities, and to rethink the priorities of our criminal justice systems, which keep downplaying the crimes of the powerful and perpetuating certain antiquated forms of punishment.

“Essential Crimes”?: Crimes Essential to the Powerful; Crimes Essential for Us to Study

Many of the workers that we consider “essential” (e.g., delivery employees, supermarket cashiers, farmworkers, medical care staff) are not employed directly by the companies for whom they work but by recruiting services; they often do not have a contract and may be paid under the table. The current economic system has contributed to the emergence of these precarious, underpaid, and temporary jobs, particularly in the service sector (Wacquant and Standing 2011; Young 2007). This is a global trend but the situation in the United States (US) is particularly critical. For example, the largest employer in the US, Walmart, pays its employees a low hourly wage, often leaving its workers with no option but to rely on food stamps and Medicare (USA Today 2019).

Even though these “essential workers” produce the food we need, deliver the goods we order, and care for us when ill, all too often, they are treated by corporate entities in ways that do not allow them to meet their own basic needs. As consumers, we may be complicit in that we make purchases and accept deliveries from workers without inquiring whether the individuals providing us with such “essential” goods are being paid a living wage—or even a subsistence wage. In short, we measure “essentiality” according to an ontological reality: if a person provides a service or product that we deem “essential,” then that person is an “essential worker.”

Criminologists often follow a similar logic. They study and focus on acts and omissions that are labeled “crimes” because they are categorized as “crimes.” But as Schwendinger and Schwendinger (1970) and others (e.g., Hillyard et al. 2004; Presser 2013) have argued, we should focus on what behaviors are *harming* society, regardless of whether or not they appear in criminal statutes. Many harmful behaviors are, indeed, not criminalized—particularly those perpetrated by the state or powerful actors—because such powerful entities are the ones making the laws and do not tend to criminalize their deviant behavior (or enforce violations thereof).

All of us would probably agree that the doctor is more “essential” than the football player, at least in times of pandemic. Following the same logic, we might also agree that middlemen mask brokers making massive profits by depriving the population of access to facial protection and putting people at risk of contracting a virus (in this case, COVID-19) should be regarded as committing a greater wrong, at least in times of pandemic, than the person stealing our cell phone (see McSwane 2020; Willber et al. 2020; Salman et al. 2020).

In the next part, we offer various examples of behaviors that have endangered the lives and physical integrity of people around the world, but which have not been appreciated, much less prioritized, by the criminal justice system. These are not actions committed by isolated individuals in the streets, but reflect the so-called “crimes of the powerful.”

What are “crimes of the powerful”? Barak (2015: 104) offers the following definition:

[Crimes of the powerful are] the crimes of the economy or the crimes of capital accumulation and reproduction. Within the prevailing interests and relations of global capital, these crimes include those institutionalized political and economic arrangements that structurally routinize harm, injury, and victimization ... refer to those transgressions that simply normalize victimization as “the costs of doing business” and as “collateral damages.”

Barak (2015:105) adds that the lack of criminalization of these behaviors (or the lack of prosecution of individuals who commit such harms when they are proscribed by law) is dismissed because of the alleged necessity of capital accumulation and enhancing the interests of the capitalist state.

This phenomenon can be understood by considering the notion of “criminal selectivity,” which refers to the ways in which the criminal justice system prioritizes the enforcement of violations of certain laws while ignoring others. “Criminal selectivity” also describes the overly punitive treatment of those behaviors committed by individuals that are in vulnerable positions because of their class, gender, race, sex, and sexual orientation (“over-criminalization”) and the absence or minimization of the punitive treatment of behaviors committed by those individuals in positions of power (“under-criminalization”) (Vegh Weis 2017). “Criminal selectivity” also involves a second dimension: “under-criminalization” of acts and omissions by the powerful often harm those who are the most vulnerable members of society, resulting in what can be considered “selective victimization” (Barak 2015).

The next part explores the current situation in the US during the COVID-19 pandemic and utilizes the concepts of “crimes of the powerful,” “criminal selectivity,” “over-criminalization,” “under-criminalization,” and “selective victimization” to analyze what should be deemed the essential focus of the criminal justice system during the pandemic. In particular, we make the argument that state crimes, crimes of globalization, state-corporate crimes, and corporate crimes have been “essential crimes”

for those who have committed them and that it is *essential* that criminologists and the criminal justice system devote more attention to them.

“Essential Crimes” and COVID-19 in the US

State Crimes of Omission

When dealing with egregious crimes and harms, some key examples are those in which a state, charged with the well-being of its citizens, is, in turn, the one responsible for causing the greatest harms. Barak (1991) defines “state crimes” as those acts that bring material, physical, or social harm to its people resulting from the actions or consequences of government policy mediated through the practice of state agencies, whether these harms are intentional or unintentional. Rothe (2013: 27), in turn, describes “state crime” as “actions that violate domestic or international public law or cause serious social and personal harm through acts of omission or commission, varying from genocide, war crimes, crimes of aggression, illegal use of unmanned aerial vehicles, to racial segregation, immigration policies, and lack of social support systems for the most vulnerable populations.” Notably, the concept of “state crime” has been enriched by Ward’s (2004: 86) notion of “state harm,” defined as “an invasion by a state agency of any person’s basic welfare interests, whether such invasion is justified or not,” including lawful imprisonment.

With these definitions in mind, we can see that state agencies might perpetrate state crimes through various acts or omissions. Kauzlarich and Mullins (2003: 245) assert: “[d]ue to the nature of trust involved in a state as a social institution, when a state or state agency refuses or fails to act responsibly and such action or inaction generates harm, we can call this a crime.” These are known as “crimes of omission” and, once again, are not necessarily proscribed by law but are part of the general expectations of the social contract.

Interestingly, state crimes of omission might be characterized as either “explicit acts of omission,” which occur “when the state disregards unsafe and dangerous conditions, when it has a clear mandate and responsibility to make a situation or context safe” (Kauzlarich and Mullins 2003: 249), or “implicit acts of omission,” which refer to “state complicity in these wider, but nonetheless injurious structural relationships and practices” (Kauzlarich and Mullins 2003: 250), including structural sex, racial, gender and class biases. In the context of the COVID-19 pandemic, state crimes of “explicit omission” could describe the gross negligence of the Trump Administration that had been informed in advance and chose not to act, failed to adequately inform the US about the situation, and failed to take the necessary steps towards preventing social harm. While other countries also botched their initial response to the COVID-19 pandemic (e.g., Brazil, Mexico, the United Kingdom), the most egregious offender was, until January 2021, President Donald J. Trump, whose refusal to take the virus seriously caused thousands of preventable deaths.

To explicate, months before the outbreak of COVID-19, President Trump had been informed that “mass casualties and economic devastation from the new coronavirus” were on their way (Al Jazeera 2020). The Trump Administration, however, did not heed these official warnings. On February 28, 2020, President Trump accused Democrats of using the coronavirus as a “hoax” to damage him and his administration (Franck 2020). On March 9, 2020, two days after the Governor of the State of New York declared a state of emergency following a severe spike in cases, President Trump continued to claim that COVID-19 was nothing more serious than the common flu (BBC 2020). Moreover, President Trump

refused to use the test kits adopted by the World Health Organization (WHO) and preferred that the Center for Disease Control (CDC) develop a new test instead (Dwyer 2020). By the time the CDC had an approved test, the virus had already been in the country for two weeks and had already spread widely (Fink and Baker 2020). In late 2020, the Trump Administration blocked a publication from the CDC which outlined how to reopen public places safely over concerns that the guidance would slow down efforts to reboot the economy quickly (Dearen and Stobbe 2020). Overall, reports from April 2020, in the early days of the pandemic, where taking action was most crucial, reveal that the Trump Administration publicly downplayed the coronavirus at least eleven times (CNN 2020). In fact, in an interview between President Trump and journalist Bob Woodward, the President Trump stated, “I wanted to always play it down. I still like playing it down because I don’t want to create a panic” (NPR 2020).

At this point, it is clear that President Trump’s remarks, including the suggestion that ingesting bleach could be a good remedy for COVID-19 (BBC 2020), contradicted scientific evidence and data arriving from international organizations, had an adverse impact on the public’s understanding of COVID-19 from the very beginning, and failed to protect the population from illness and death. If the Trump Administration had trusted the reports that it had received, followed the guidance of the previous administration, communicated a science-based message to the public and state and local leaders, and adopted the international test kit, containment would have happened much more quickly, and fewer individuals would have fallen ill or lost their lives.

As of February 2021, the death toll in the US has surpassed 500,000 people (five times the number registered in the first draft of the article in May). President Trump’s lack of acknowledgment of the severity and potential danger of the illness can also be deemed responsible for the ongoing national debate and confusion regarding social distancing and face coverings. President Trump spent numerous press briefings mocking reporters for wearing a face mask in public despite advising citizens to adhere to CDC guidelines, which recommend wearing face coverings (Johnson 2020).

A core aspect of “criminal selectivity” is how neither the mainstream media nor the criminal justice system perceived the lack of the Trump Administration’s early intervention, the sharing of misinformation, or the mockery of protective measures in COVID-19 as *crimes* or *harms*, even though people died as a result of these acts and omissions. Just a quick look at the headlines of the US’s most widely read online news sources confirms that public opinion of his actions and inactions has not deemed them to be *criminal* despite the amount of social harm caused. As Koehler (2020) puts it, “It will take a particularly strong case with particularly provable links to Trump’s refusal to dispatch medical equipment or test kits to hot spots in places like New York City or Detroit to bring Trump personally to justice, either criminally or civilly. That will be a tough sell, as they say in litigation circles, even before open-minded judges and juries.”

Koehler’s (2020) statement suggests that Trump will likely benefit from “under-criminalization”—the absence or minimization of the punitive treatment of behaviors committed by those individuals in positions of power. Such harmful inaction has not impacted all people in the same way. Rather, it has resulted in “selective victimization”: Latinos and African-Americans have experienced death tolls that are twice as high as that of the Caucasian population in the US (Mays and Newman 2020). This is likely because those two populations are *over-represented* among the “essential” workers who are on the frontline and exposed to the virus daily. Indeed, as much as 75% of shop employees, drivers, and care workers belong to racial minorities (Mays and Newman 2020). These socioeconomic factors emerge from what might be regarded as “historical state crimes”—crimes that have

been at the core of the creation of the state and an intrinsic element of nation-building throughout history. Slavery and segregation represent two examples in the US and have shaped contemporary racism and selective victimization. In the past, the poor and people of color suffered from exploitation, discrimination, and a lack of access healthcare. Today, many minority populations in the US still cannot obtain adequate medical care, increasing their rates of morbidity and mortality, in general, and making them more vulnerable to unattended chronic diseases that aggravate COVID-19 symptoms, in particular (Fouad et al. 2020). In addition, such populations often live in conditions or environments in which maintaining the recommended social distance and washing hands—two “simple” ways of reducing the spread of COVID-19—represent serious challenges.

Sex and race are also important when exploring “selective victimization”: women of color have been disproportionately impacted by the number of job losses since the beginning of the pandemic in the US because they are overrepresented in service sectors, which have been impacted by shutdowns (Micklas 2020). Meanwhile, women, in general, have been overwhelmed with the responsibilities of both work and caregiving at home, and the lack of public policy designed to compensate these disparities could amount to a state crime of omission (Micklas 2020).

COVID-19 has also exposed another state crime of omission resulting in sex-based “selective victimization”—the lack of comprehensive sex-based violence public policies. Home isolation and the disruption of social and community networks have given rise to an alarming increase in sex-based violence during the pandemic. For example, in the first quarter of 2020, the city of Chicago experienced a 12% increase in domestic violence calls to the police (Bosman 2020)—adding further support to the proposition that President Trump’s negligence in preventing the spread of the disease and his failure to implement (or even endorse) policies to protect the poor, racial minorities, and women, who are particularly affected by the pandemic, could be framed as state “crime of omission.”

Crimes of Globalization

“Crimes of globalization” are “those demonstrably harmful policies and practices of institutions and entities that... by their very nature occur within a global context” (Rothe and Friedrichs 2015: 26). They occur, “in part, by the policies of neoliberalism and the actions of international financial institutions such as the World Bank and the International Monetary Fund and, in part, by the competitive needs of global markets and capital accumulation” (Barak 1991: 8). These crimes deserve particular attention as they involve the most powerful global interests influencing or making decisions that oftentimes result in negative consequences for the masses.

The United Nations (UN) and the WHO have been working to address several types of global crises arising in the face of COVID-19, including a lack of data and information sharing between countries and access to essential medical supplies and personal protective equipment, as well as more general humanitarian aid. Nonetheless, mid-pandemic, President Trump cut funding for the WHO. This may constitute a crime of globalization because Trump’s decision was a state-based decision that resulted in a reduced budget of the main global actor addressing the pandemic on a global scale, and which might have eventually led to countless lives lost worldwide. Richard Horton, editor-in-chief of *The Lancet*, took matters a step further, writing that Trump’s decision regarding the WHO was “a crime against humanity” and that “every scientist, every health worker, every citizen must resist and rebel against this appalling betrayal of global solidarity” (Davidson 2020).

Another decision made by the Trump Administration, which may constitute a crime of globalization in the context of the COVID-19 pandemic, was its refusal to lift sanctions against Iran. The Trump Administration claimed that humanitarian aid was exempt from sanctions and, therefore, any issues with receiving the aid was the fault of Iran's government. It cannot be denied, however, that US "secondary sanctions on financial institutions and companies that do business with Iran have made it nearly impossible for Iran to buy items like ventilators to treat coronavirus patients" (Fassihi 2020). Months before the pandemic swept the globe, Human Rights Watch (2019) explained that US sanctions "have largely deterred international banks and firms from participating in commercial or financial transactions with Iran, including for exempted humanitarian transactions, due to the fear of triggering US secondary sanctions on themselves." In short, Iranians were denied access to essential medical care due, at least in part, to these sanctions. It is essential that we consider Trump's actions and inactions here through the lens offered by the notion of "crimes of globalization."

Interestingly, the concept of "crimes of globalization" reveals that "selective victimization" can also be analyzed at the state level. In the abovementioned examples, US sanctions and secondary sanctions have threatened the lives of Iranians seeking essential aid and services for survival, while the US's withdraw of funding to the WHO has had a direct negative impact on the poor nations that are most dependent on the organizations' interventions. Considering the global power structure, it is unlikely that the US will encounter any repercussions for the adverse effects of its decisions regarding Iran and the WHO.

State-Corporate Crimes and Harms

"Essential crimes" are perpetrated not only by state and international organizations but also by corporations in collaboration with state agents. These actions have been described as "state-corporate crimes," which Kramer and Michalowski (1990:3) define as "illegal or socially injurious actions that occur when one or more institutions of political governance pursue a goal in direct cooperation with one or more institutions of economic production and distribution." Building on this earlier work, Kramer and Michalowski (2006) expose how those in positions of political and economic power perpetrate the most harmful actions and frequently operate in collaboration.

Even though state-corporate crimes are present around the world, the Trump Administration purposely and systematically pursued these offenses as part of an overall program aimed at "rolling back or weakening regulations designed to protect workers, consumers, the environment, and general public health from *known* corporate harms" (Michalowski and Brown 2020: 113 (emphasis in the original)). Moreover, "these rollbacks constitute[d] the most far-reaching effort to free corporate capital from regulatory restraint since the onset of corporate regulation at the dawn of the twentieth century" (Michalowski and Brown 2020: 113).

With COVID-19, state-corporate crime has become widespread (Jones 2020; Okeson 2020) and its harmful effects more dreadful, particularly those perpetrated by the pharmaceutical industry in the US (Griffin and Miller 2011). During the pandemic, the collusion of "Big Pharma" and the Trump Administration could be observed in the rollback of regulations for price-gauging and profiteering coupled with participation in insider trading (Friedrichs and Vegh Weis 2021). Particularly striking is how the Trump Administration managed the information related to potential vaccines. The objective seems to have been to increase profits for corporations and their stakeholders rather than to protect public health:

“[i]n late June [2020], a San Francisco company called Vaxart announced that the Trump administration had selected it to develop a coronavirus vaccine. The value of stock options distributed to company insiders just weeks before increased six-fold. Stock options held by Vaxart’s CEO went from \$4.3 million to more than \$28 million” (Reich 2020). In a similar case, President Trump announced a US\$765 million loan to the Eastman Kodak Company, the photography company, to engage in the manufacture or ingredients used in pharmaceuticals, despite the company lacking an arm or subsidiary involved in such activities. Just before this information went public, “Kodak had handed its board of directors 240,000 stock options, and just the day before had given its CEO [Jim Continenza] 1.75 million stock options” (Reich 2020).

Another example of state-corporate crime involves the US Food and Drug Administration (FDA), one of the main regulatory bodies responsible for promoting public health, which made the bold decision to award Gilead Sciences, Inc., the American biopharmaceutical company, full approval for the use of their drug, Remdesivir, to treat COVID-19, despite data from trials completed by the WHO questioning the efficacy of the drug (Cohen and Kupferschmidt 2020). The FDA also awarded Gilead Sciences a priority review voucher, which can be used in the future to speed the review and therefore approval of another drug. In addition, Gilead Sciences has the option to sell this voucher to another company, which could be worth around US\$100 million (Brennan 2020). As a further demonstration of this state-corporate crime, Trump’s 2017 financial disclosure forms, which were presented to the United States Office of Government Ethics, revealed that he earned between US\$100,001 and US\$1 million from the sale of shares in Gilead Sciences, Inc. (Tyko 2020).

It is also necessary to explore how “selective victimization” associated with these state-corporate crimes disproportionately affect disadvantaged people and communities. In the pre-pandemic times of 2019, about 58 million people in the US reported the inability to afford pharmaceutical medicine and 34 million people reported personally knowing someone who had died as a result of lack of access to adequate medical treatment (Lerner 2020). Ironically, it was taxpayers who contributed US\$99 million to the development of Remdesivir, and yet the treatment may be unaffordable for many Americans considering that cost estimates for a five-day treatment course for the privately insured will be US\$3,120 (Lupkin 2020a, b). Indeed, the treatment cost for the uninsured remains unclear but will probably be higher. This situation is unsettling considering that an estimated 27.5 million people in the US do not have health insurance according to a study of health insurance coverage in the US (Berchick, Barnett and Upton 2019). This population includes informal workers, undocumented immigrants, and other vulnerable populations, such as the homeless or unemployed.

Another example of a state-corporate crime is the previously mentioned state-corporate denial of the scope of the pandemic, despite extensive scientific evidence to the contrary, which placed the lives of millions of people at stake. State-corporate crime can “consist[...] of corporate propaganda built around lies and deceptions masquerading as science, which is then disseminated by ideological and political forces in conservative think tanks, industry trade associations, the corporate media and some government officials” (Kramer 2012: 47). One of Trump’s largest misinformation advocates has been the Fox News Channel, whose audience is at heightened risk from COVID-19 because the average age of viewers is sixty-five. Interviews with experts on the channel have been surrounded by false claims coming from politicians, such as Trump, making it nearly impossible for viewers to understand which of the interviewees can be trusted to provide fact-based and data-backed information. The Fox News Channel allows these false claims to be stated as if they were facts

rather than to allow them to be rebutted by experts, which seems intended to “mislead a vulnerable public about risks and harms,” according to an open letter sent to Fox Corporation’s chairman, Rupert Murdoch, by journalists and teachers begging for truth during the pandemic (Gitlin 2020). Misinformation furthers the reach and intensifies the dangers of the pandemic, but Trump is great for Murdoch’s ratings and Murdoch provides a crucial platform for Trump’s dangerously misleading information—the perfect recipe for a state-corporate crime that leaves older adults, the most vulnerable population during this pandemic, selectively victimized.

Corporate Crimes

Without needing to rely on the state, corporations, by themselves, also participate in activities that they deem to be essential to their success and which we have referred to as “essential crimes.” Within the context of the COVID-19 pandemic, the extent of corporate crime has been particularly striking. Corporations have been increasing their profit throughout the pandemic while exposing their workers to unsafe working conditions. For example, Amazon increased the value of its shares by 40% in April 2020 (Soper 2020) and, at the same time, fired unionized warehouse employees in the US who were fighting for safe working conditions amidst the global pandemic. Two corporate employees were fired just for organizing a virtual event in which warehouse employees would be able to discuss working conditions with tech employees at Amazon. Another employee was suspended and then terminated for providing a coworker with a 24-hour hotline to report concerns about the warehouse shuttle service, for requesting that management implement social distancing measures for employees’ clock-in stations, and for recommending paid leave for part-time workers (Sainato 2020). This type of retaliation against employees that pressured Amazon to protect the health and safety of its workers, who were deemed *essential* during the pandemic, is just one example of a corporate crime going unpunished in the US.

“Selective victimization” also becomes apparent when we look closely at the pay rate offered by Amazon and the demographics of warehouse employees. According to 2017 data collected by the National Employment Law Project, 54% of warehouse employees in California were Latinx, 9.5% were Asian-American, and 9% African American (Tung and Berkowitz 2020). These workers were deemed *essential*, yet were awarded just a US\$2.00/hour pay increase during the pandemic in exchange for risking their lives in the potentially unsafe warehouse working conditions, aggravated by the revocation of unlimited paid time off at the end of April 2020 (O’Brien 2020).

Several other large US companies, which were not considered *essential* businesses, forced employees to violate stay-at-home orders and report to work, thus unlawfully exposing them to the threat of contracting the virus with deadly consequences, in what might be regarded as an “essential crime” by corporations. Some of the companies accused of this were the call center that administers surveys called TenPoint Complete, the craft store chain, Michaels, and GameStop, the video game and consumer electronics store (Davenport 2020).

Along the same lines, throughout the pandemic, some private hospitals have been unable to provide adequate personal protective equipment for frontline healthcare workers, have ordered them to not wear their masks while on the job, and have fired them for speaking out, exposing them to the illness (Davenport 2020). This corporate crime not only causes harm to those working in the profession but also to the patients that these potentially infected employees are treating. For example, a nurse at Select Specialty Hospital, owned

by Select Medical, was working with patients with acute or chronic respiratory disorders—a population that is at high-risk for serious complications caused by COVID-19 (Davenport 2020). Despite her hospital having medical protective equipment available, health-care workers were not allowed to wear these masks in the common areas of the hospital to avoid scaring other patients. Laura Moreno, the nurse in this predicament, explained to *The Washington Post*, “I was told if I wanted to wear a mask, I would not be working there. So, I said I’m not willing to put my life at risk, and my contract was terminated” (quoted in Davenport 2020). Lauri Mazurkiewicz, a nurse at Northwestern Memorial Hospital, was prohibited from using an N95 mask that she brought into work herself and was instead instructed to use the less protective surgical masks that were provided by the hospital. She then wrote to some coworkers warning them of the ineffectiveness of surgical masks in protection against COVID-19 and was fired from her position (Davenport 2020).

No less harmful have been the actions of big corporations in increasing the prices of vital drugs and health-related supplies, including masks, gloves, and sanitizers without relation to production or commercialization costs. Massachusetts received reports of pharmacies charging US\$30 for eight ounces of hand sanitizer and New York City issued 550 violations for price gouging on items in high demand (Levenson 2020). About forty states have laws against price gouging, yet many of the laws were just recently “activated by emergency declarations issued by their governors in response to the coronavirus pandemic” (Levenson 2020). Some sellers withheld masks to manipulate the market and later charged outrageous prices. As a result, healthcare facilities and citizens were forced to buy these essential products at exorbitant amounts that far exceeded their normal retail price. According to an article in the *Wall Street Journal*, which reviewed federal contracting data, the US government placed more than US\$110 million in mask orders at inflated prices with unproven vendors that claimed to have masks and offer quick delivery. The average cost per mask purchased was US\$6.00—roughly six times the nonpandemic price (Maremont 2020).

Overall, from mainstream media to the health industry and the pharmaceutical complex, corporations have been profiting from the pandemic at the expense of the health and the lives of employees and the general population. While these entities have abused the notion of “essential,” as this article has suggested, such harmful acts and omissions are often deemed *essential* to the powerful to remain powerful. In other words, these socially injurious acts and omissions—these “essential crimes”—are part and parcel of a global neoliberal capitalist order. The COVID-19 pandemic has helped illuminate just how *essential* these crimes and harms are to the perpetuation of the status quo by the powerful.

“Essential Punishments” in Times of COVID-19

Modern history has responded to crime with state-based and prison-centered punishment (Vegh Weis 2017), but the COVID-19 pandemic has called into question what types of punishment are “essential” to society. Many states and counties in the US have approved the early release of people behind bars, based on the belief that their imprisonment is not *essential* for public safety. Should this reasoning set the tone for a reconsideration of why those imprisonments had ever been imposed in the first place? Should states have waited until a pandemic to make decisions regarding the lives of people imprisoned in inhumane conditions despite those people not posing a threat to public safety?

In April 2020, the Federal Bureau of Prisons reported that it had released 1,300 people to home confinement in response to COVID-19, although this is a small fraction of the 170,000 individuals in federal custody (Brennan Center for Justice 2020). At the state level, California has granted early release to 3,500 incarcerated individuals and Los Angeles County has released close to 25% of its jail population (Brennan Center for Justice 2020), while Iowa has released 482 incarcerated people (Brennan Center for Justice 2020). Kentucky Governor Andy Beshear (D) signed an executive order releasing nearly 900 people detained in the commonwealth's prisons (Brennan Center for Justice 2020). Maryland has released nearly 200 people from its juvenile detention centers and New Mexico Governor Michelle Lujan Grisham (D) signed an executive order releasing some of the state's incarcerated individuals (Brennan Center for Justice 2020). New York State announced the release of 1100 people incarcerated across the state who were imprisoned because of parole violations, while in New York City, fifty-one young prisoners were released from Rikers Island and sixty-five set free from a prison in Westchester County (Brennan Center for Justice 2020). Ohio has recommended the release of 141 incarcerated people in minimum security prisons, and Oklahoma is commuting the prison sentences of more than 450 people behind bars, while Pennsylvania has taken steps that could lead to the release of between 1500 and 1800 "non-violent, at-risk" individuals (Brennan Center for Justice 2020). Washington state will commute the sentences of up to 950 incarcerated people who are considered to be part of a vulnerable population (Brennan Center for Justice 2020). These decisions are consistent with the statement issued by the UN Sub-Committee on Prevention of Torture (2020), which called for governments worldwide to reduce the numbers of incarcerated people.

Early releases due to COVID-19 might seem like a sign of empathy on the part of decision-makers, but they are actually a necessary reaction to the fact that prisons are unsanitary depositories that lack the means to prevent the spread of the virus through social distancing and sanitization. The fact that correctional healthcare systems cannot deal with massive outbreaks of coronavirus in prison has been the rationale for early release, not a sudden bout of clemency or leniency. Despite the figures listed above, 98% of those who have sought early release on compassionate grounds have had their requests rejected and are still suffering in unhealthy prison conditions (Blakinger and Neff 2020). Indeed, as of December 2020, one in every five people imprisoned in the US had COVID-19 (Schwartzapfel et al. 2020). We must also remember that "over-criminalization" has resulted in African-Americans, Latinos, and the poor being disproportionately held in prisons. Latinos and African-Americans are stopped by police, convicted and incarcerated at a much higher rate than Whites (Alexander 2010), meaning that prisoners with COVID-19 are more likely to be members of these minority groups.

The situation in the immigration enforcement system is not much better. An investigation by *The New York Times* and The Marshall Project revealed how Immigration and Customs Enforcement (ICE) became a spreader of COVID-19 (Kassie and Marcoloni 2020). The detention centers for immigrants are unsanitary and cramped, making social distancing nearly impossible; protective gear is rarely available. In addition, the Trump Administration pressured countries to hold deportees who, because they had been infected with the virus, spread it upon arrival at their destinations (Kassie and Marcoloni 2020).

It is worth considering that the COVID-19 pandemic has shown *all of us* how difficult isolation is and the threat it poses to our mental and physical well-being. Indeed, we spent several weeks or months—depending on the region—in confinement, albeit with many advantages: 1) we were often in the comfort of our own homes; 2) we knew that our friends and neighbors were experiencing the same confinement; 3) we believed that

the confinement would be short-lived; and 4) we had access to the internet to be able to continue to socialize digitally, exercise, research, stay up-to-date with current events, and entertain ourselves. Despite all these advantages, we were afflicted by feelings of imprisonment and suffocation, the loss of sense of time, a lack of agency, and loneliness. All the while, we held fast to the belief that we needed to maintain balance and not let any previously made life progress slip away. The WHO (2020) reported that the pandemic “has disrupted or halted critical mental health services in 93% of countries worldwide ... bereavement, isolation, loss of income and fear are triggering mental health conditions or exacerbating existing ones.” While confinement in one’s home is far different from imprisonment in a correctional facility, the glimpse of isolation that we were provided during COVID and its lasting harmful effects might create an opportunity to discuss jail and prison as punishment for crime.

We must ask ourselves: what would it be like, then, to be in this situation of confinement, but in a drab, hostile, foreign place, without creature comforts, for months or years, at the mercy of a third party (e.g., prosecutors, judges, prison staff, parole boards) on which we have little influence, without access to the internet, almost no contact with our loved ones, and very few daily activities to keep us occupied? Can we imagine that this would improve our lives in any way? Although incarceration and state-imposed isolation as a response to COVID-19 are incommensurable, sheltering-in-place did grant us the opportunity to appreciate the confinement is not a positive experience. Moreover, many of the benefits that we have been able to enjoy during self-isolation, such as cooking, spending time with the family, or learning a new skill, are not available in prison. Shall our personal experiences during the pandemic set the basis for a discussion about confinement as a suitable response to crime and an eventual debate on prison reform or abolition?

Overall, the fact that public safety was not threatened by early releases, that states themselves recognized the deplorable conditions of prisons that made them dreadful places in the context of a pandemic, and the worldwide experience of the iatrogenic effects of isolation should call into question whether imprisonment should still exist. It should force us to consider if imprisonment, itself, regardless of the pandemic, is a form state harm. It should compel us to pay renewed attention to abolitionist literature, which has, for decades, been pointing to the limitations of criminal law as a means to solve problems (see, e.g., Coyle and Schept 2018). Isolation due to COVID-19 should provide us with a chance to rethink prison as an unsuitable solution to crime. And it should force us to examine whether prison is *essential* to protect us from those who do harm.

Conclusion

This article has argued that the COVID-19 pandemic has afforded us the opportunity to consider what is genuinely *essential* in our lives. In so doing, it has allowed us to understand how certain harmful acts and omissions are essential to the perpetuation of power by the powerful—what we have called “essential crimes.” In addition, the COVID-19 pandemic has offered a unique occasion to rethink what is *essential* in terms of punishment. Focusing on the pandemic in the US as a case study, we have suggested that crimes of the powerful and reduction (and, perhaps, abolition) of prisons are the *essential* challenges of the present.

Ten years ago, Friedrichs (2011) put forth the notion of a “prospective criminology”—one that could try, to the extent possible, to prevent harm from happening in the first place.

Academic work generally engages with past facts because it relies on data that need to be processed, posing an obstacle for the study of prospective crimes. Given our experience with COVID-19, we might reconsider how to embrace Friedrichs' challenge. As Friedrichs states, the idea is to draw upon criminological knowledge to contribute uniquely and significantly to the understanding of crimes of the powerful as a way to develop prevention methods or effective responses. The world has become increasingly global and, while the COVID-19 virus, itself, has not been a crime of the powerful, the pandemic has created opportunities for crimes of the powerful and has exposed how certain "essential crimes" perpetuate imbalances and cause harm. Hopefully, we can use this experience to put our research to the service of building awareness of some of the prospective crimes that might take place so that we can protect that which is really *essential*.

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Israel-Palestine before the ICC

by Chantal Meloni

Fri., 25 June 2021, 10:30 – 11:30

Abstract:

In March 2021 the Prosecutor of the International Criminal Court has announced the opening of an investigation into the Situation in Israel/Palestine. The long-awaited statement followed the decision taken by the Pre-Trial Chamber in February of this year, confirming the Court's territorial jurisdiction in Palestine, which is the occupied Palestinian territory and encompasses the Gaza Strip and West Bank, including East Jerusalem. The decision had been triggered by a request filed by the Prosecutor in December 2019, five years into the preliminary examination of the situation and over a decade after Palestine sought to initiate an investigation at the ICC.

Despite the March announcement, which was celebrated as a critical step forward in the quest for justice of the Palestinian people, the investigation at the ICC has yet to become active. Although some have been removed, many obstacles – including of political nature – still pave the way of these proceedings before the Court in The Hague. Moreover, the scope of the investigation, as it was revealed so far by the Prosecutor, appears to be limited, not including very serious and systematic crimes such as apartheid and persecution, which have been the object of a very recent major report by Human Rights Watch.

Article:

Mariniello, T. and Meloni, C. (2020): Foreword to the Symposium “Litigating Palestine Before the International Criminal Court”.

Erakat, N. and Reynolds, J. (2021): We charge Apartheid? Palestine and the International Criminal Court.

Gross, A. (2021): Decolonizing the ICC: The Situation in Palestine and Beyond.

Clancy, P. and Muhareb, R. (2021): Putting the International Criminal Court's Palestine Investigation into context.

Materials:

ICC Prosecutor's Request, 22 January 2020: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-12>

ICC Pre-Trial Chamber Decision, 3 March 2021: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-143>

HRW Report on Apartheid and Persecution by Israel, 27 April 2021: <https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution>

ICC investigation in the Situation in the State of Palestine: <https://www.icc-cpi.int/palestine>

LITIGATING PALESTINE BEFORE THE INTERNATIONAL
CRIMINAL COURT

Foreword

Triestino Mariniello* and Chantal Meloni**

This symposium on ‘Litigating Palestine before the International Criminal Court’ reflects on recent critical developments, following the conclusion of the preliminary examination into the ‘Palestine situation’ before the Court.¹ After five years of analysis, on 20 December 2019, the Prosecutor found that there is a reasonable basis to start an investigation into the ‘situation in Palestine’,² pursuant to Article 53(1) of the Rome Statute of the International Criminal Court (ICC). According to the Office of the Prosecutor (OTP), there are reasonable grounds to believe that war crimes have been or are being committed in the West Bank, including East Jerusalem, and the Gaza Strip. However, before initiating a formal investigation, the Prosecutor requested the Pre-Trial Chamber I to rule on the scope of the Court’s territorial jurisdiction.³ Thus, with a Request under Article 19(3) of the Statute, the Prosecution asked the Judges to confirm that the territory over which the Court may exercise its jurisdiction comprises the Occupied Palestinian Territory, that is the West Bank, including East Jerusalem, and the Gaza Strip. The OTP had to resubmit the Request on 22 January 2020,⁴ pursuant

* Senior Lecturer in Law, Liverpool John Moores University, United Kingdom. Co-signatory of a submission on behalf of Palestinian victims which has been filed before the ICC Pre-Trial Chamber on 16 March 2020. [T.Mariniello@ljmu.ac.uk]

** Associate Professor for International Criminal Law and Criminology, University of Milan, Italy; Senior Legal Advisor, European Center for Constitutional and Human Rights, Germany. Co-signatory of a submission on behalf of Palestinian victims which has been filed before the ICC Pre-Trial Chamber on 16 March 2020. [Chantal.Meloni@unimi.it]

1 This symposium covers legal developments up to 21 October 2020.

2 Prosecution request pursuant to Article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine, *Situation in the State of Palestine* (ICC-01/18-10), Pre-Trial Chamber I, 20 December 2019.

3 *Ibid.*, § 220.

4 Prosecution request pursuant to Article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine, *Situation in the State of Palestine* (ICC-01/18-12), Pre-Trial Chamber I, 22 January 2020 (hereafter ‘Request’).

to an order by the Pre-Trial Chamber for procedural reasons.⁵ Almost one year after, the decision is still pending.⁶

On 28 January 2020, ‘considering the complexity and novelty of the Prosecutor’s Request’, Pre-Trial Chamber I invited states, organizations and/or persons to submit observations on the *question of jurisdiction*.⁷ Forty-three participants were authorized to submit written observations as *amici curiae*.⁸ This includes seven states,⁹ two international organizations, 33 academics and civil society organizations (individually or in groups), and the ICC Office of Public Counsel for the Defence. Moreover, upon invitation of the Chamber, eight filed observations on behalf of Palestinian victims, as legal representatives. The State of Palestine also filed observations, upon invitation by the Chamber, while Israel refused to do so. The deadline for filing the observation was set to 16 March 2020 and applied quite strictly.¹⁰

Although the Prosecutor’s Request clearly focuses on one single legal issue — i.e. confirmation of the scope of the territorial jurisdiction of the ICC in Palestine — a considerable part of the 110-pages request is dedicated to discussing another, preliminary, issue, i.e. the status of Palestine as a state.

The Prosecutor concludes her comprehensive and thorough analysis on the point by noting that, on 2 January 2015, Palestine became a state party to the Rome Statute under Article 12(1) and thus ‘[t]he Court need not conduct a different assessment regarding Palestine’s Statehood to exercise its jurisdiction’.¹¹ However, as an unwanted consequence of the Prosecutor’s Request, many *amici curiae* focused on the statehood issue, de facto derailing from what was the *petitum* before the Pre-Trial Chamber. Despite the fact that the debate over Palestine’s statehood vis-à-vis the ICC may have seemed to be solved at this point, considering the State of Palestine’s participation in the Assembly of the States Parties (ASP) since 2015, the Prosecutor’s Request to the Pre-Trial Chamber created an occasion for the issue to be revisited.

Notably, the question of Palestine’s status with respect to the Court has more than a decade-old history. Already back in 2009, one of the most controversial issues before the Court related to the uncertain status of Palestine as a state under

5 Decision on the Prosecutor’s Application for an extension of the page limit, *Situation in Palestine* (ICC-01/18-11), Pre-Trial Chamber I, 21 January 2020.

6 The Prosecutor invited the Chamber ‘to issue its ruling, subject to any modification needed to accommodate representations by other participants, within 120 days. This timeline is based on the timeline for article 15 requests and the similarity of the nature and scope of the present Request and an article 15 request’. Request, *supra* note 4, § 220.

7 Order setting the procedure and the schedule for the submission of observations, *Situation in the State of Palestine* (ICC-01/18-14), Pre-Trial Chamber I, 28 January 2020, § 15.

8 Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, *Situation in the State of Palestine* (ICC-01/18-63), Pre-Trial Chamber I, 20 February 2020.

9 Another state, Canada, did not seek leave to provide the Court with an observation, but it submitted its views to the Court in writing, which brings to eight the number of submissions by states.

10 *Ibid.*, § 59.

11 Request, *supra* note 4, § 7.

international law (and to the consequent extent of the Court's jurisdiction). In January 2009, in the wake of Israel's 'Operation Cast Lead' in Gaza, Palestine sought to trigger the ICC jurisdiction through the submission of an Article 12(3) declaration, accepting the jurisdiction of the Court *ad hoc*, and retroactively.¹² The subsequent preliminary examination, conducted by the former Prosecutor Luis Moreno Ocampo, lasted over three years and was concluded in April 2012 — only a few days before the end of Ocampo's term — by a two-page decision, that effectively *deferred* the question to a host of political bodies.¹³ The then-Prosecutor concluded that the ASP and/or the United Nations (UN) General Assembly should have addressed Palestine's status as a state.¹⁴ In doing so, the Prosecutor *de facto* 'delegated' to these bodies the competence to determine whether Palestine could be considered a state under the Rome Statute.¹⁵ The Prosecutor's 2012 'decision not to decide' generated public and scholarly debate.¹⁶ Moreover, commentators questioned that the OTP was the best placed organ within the Court to make a final determination on the issue.¹⁷

The 2012 decision raised serious concerns about the OTP's attitude towards the Israel–Palestine situation and, more generally, the Court's ability to face political pressure.¹⁸ At the same time, it might have contributed to reinvigorate and speed up the political process of recognition of Palestine at the UN level. On 29 November 2012, the UN General Assembly upgraded Palestine's observer status in the General Assembly to that of a non-member *state* (previously entity), thus *affirming* Palestine's status as a state.¹⁹ Notwithstanding

12 Palestinian National Authority Declaration Recognizing the Jurisdiction of the ICC, 21 January 2009.

13 Situation in Palestine, Office of the Prosecutor, 3 April 2012.

14 *Ibid.*, § 5.

15 W. Schabas, 'The Prosecutor and Palestine: Deference to the Security Council', PhD Studies in Human Rights, 8 April 2012, available online at <http://humanrightsdoctorate.blogspot.com/2012/04/prosecutor-and-palestine-deference-to.html> (visited 10 November 2020).

16 See D. Akande, 'ICC Prosecutor Decides That He Can't Decide on the Statehood of Palestine. Is He Right?', *Ejil: Talk!*, 5 April 2012, available online at <https://www.ejiltalk.org/icc-prosecutor-decides-that-he-cant-decide-on-the-statehood-of-palestine-is-he-right> (visited 10 November 2020); M. Kearney, 'The Situation in Palestine', *Opinio Juris*, 5 April 2012, available online at <https://opiniojuris.org/2012/04/05/the-situation-in-palestine> (visited 10 November 2020); A. Pellet, 'The Palestinian Declaration and the Jurisdiction of the International Criminal Court', 8 *Journal of International Criminal Justice (JICJ)* (2010) 981-999.

17 K.J. Heller, 'Which Organ of the ICC Decides Whether Palestine Is a State? (Updated)', *Opinio Juris*, 4 April 2012, available online at <http://opiniojuris.org/2012/04/04/which-organ-of-the-icc-decides-whether-palestine-is-a-state> (visited 10 November 2020); C. Meloni, 'Palestine and the ICC: Some Notes on Why It Is Not a Closed Chapter', *Opinio Juris*, 25 September 2012, available online at <http://opiniojuris.org/2012/09/25/palestine-and-the-icc-some-notes-on-why-it-is-not-a-closed-chapter/> (visited 10 November 2020).

18 J. Dugard, 'Palestine and the International Criminal Court: Institutional Failure or Bias?' 11 *JICJ* (2013) 563–570.

19 UN General Assembly Resolution 67/19, 29 November 2012. From 2014 onwards, the State of Palestine ratified a number of UN treaties, including the key human rights instruments, including ICCPR, IESCR, CAT, CEDAW, CERD, CRC; as well as the Geneva Conventions and related instruments; and other international treaties in a range of areas.

the new circumstances, the OTP did not take the initiative to reconsider its previous decision not to open an investigation; instead of reopening the preliminary examination *proprio motu*, the Prosecutor took the position that Palestine had to either submit a new declaration under Article 12(3) of the Statute or ratify the Statute.²⁰

Following the so-called operation ‘Protective Edge’ of July 2014, Palestine ratified the Rome Statute in January 2015,²¹ and lodged a new ad hoc declaration under Article 12(3), accepting the Court’s jurisdiction retroactively since June 2014.²²

Three years into the second preliminary examination, in May 2018, the State of Palestine also lodged a formal referral to the ICC, asking the Prosecutor to investigate, in accordance with the temporal jurisdiction of the Court, alleged crimes committed in all parts of the territory of the State of Palestine.²³ There were no new facts added to what Palestinian civil society organizations and victims had already submitted to the Court, but Palestine’s move had a procedural purpose. Palestine was in this way hoping to reinforce and speed up the new preliminary examination process. In fact, procedurally speaking, the presence of a state referral indubitably carries a sizeable weight on the process, as it enables the Prosecutor to directly open an investigation, pursuant to Article 53(1), without the obligation to obtain the authorization by the competent Pre-Trial Chamber. Hence, the Request lodged by the Prosecutor under Article 19(3) of the Statute in the situation Palestine, procedurally speaking, was not necessary. The Prosecutor could have decided on the opening of the investigation without the involvement of the Pre-Trial Chamber. In probable search of more robust legitimacy for her decision to open the investigation, the Prosecutor requested the Pre-Trial Chamber to confirm that the territory over which the Court may exercise its jurisdiction comprises the Occupied Palestinian Territory, that is the West Bank, including East Jerusalem, and the Gaza Strip.

Pursuant to the Prosecutor’s Request under Article 19(3) of last December, the Pre-Trial Chamber I is called to rule on a seemingly circumscribed issue — the territorial jurisdiction in the Palestine situation — which however has much broader implications in terms of defeating the criticism of ‘double standards’ that has been voiced against the Court in the past years.²⁴ This is particularly true in the present moment where the Court’s ability to withstand

20 Office of the Prosecutor, *Report on Preliminary Examination Activities 2013*, November 2013, § 234.

21 State of Palestine Accession to the Rome Statute, 2 January 2015.

22 Declaration Accepting the Jurisdiction of the International Criminal Court, 31 December 2014.

23 Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute, 15 May 2018.

24 V. Azarova and T. Mariniello, ‘Why the ICC Needs a “Palestine Situation” (More Than Palestine Needs the ICC): On the Court’s Potential Role(s) in the Israeli-Palestinian Context’, 11 *Diritti Umani e Diritto Internazionale* (2017) 115–150.

political pressures and interference is questioned, following the Pre-Trial Chamber II decision of 2019 not to authorize the investigation in Afghanistan,²⁵ and the recent executive order issued by the president of USA, Donald Trump, ‘sanctioning’ the Prosecutor.²⁶ As we have already argued elsewhere, the situation is also an opportunity for the ICC to reinforce its normative power and uphold its institutional integrity.²⁷ In this sense, we believe that the Court’s ability to establish its jurisdiction in the situation Israel–Palestine continues to constitute the critical *test bench* for the ICC itself and for international criminal justice in general.²⁸

This symposium aims to provide a critical and detailed assessment of the central matters that were triggered by the Prosecutor’s Request under Article 19(3) of the Rome Statute and the ensuing filing of an unprecedented number of observations by *amici curiae* and victims’ legal representatives. With our invitation to contribute to this symposium, our aim was to bring together a group of international law and international criminal law experts — some of whom were directly involved in the proceedings before the ICC — to comment upon the proceedings in question.

The symposium starts off with a contribution by Sarah Williams and Hannah Woolaver, who address the procedural challenges raised by states and international organizations participating as *amici curiae*. They identify three distinct functions of *amici curiae* in the ICC’s proceedings: expert, representative and communicative *amici*. According to the authors, states’ submissions (individually or through international organizations) perform a communicative function. The authors examine the impact that an extensive participation of ‘communicative state *amici*’ has on the legitimacy of the proceedings and its outcome(s). They argue that enabling states to submit their observations may contribute to improve the legitimacy of the proceedings before the ICC, since the Court thus appears as an institution capable of listening to the allegations of key stakeholders. However, Williams and Woolaver do not overlook the impact that so-called ‘communicative *amici*’ may have on resources and time, as well as on the integrity, independence and impartiality of the

25 Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, *Situation in the Islamic Republic of Afghanistan* (ICC-02/17-33), Pre-Trial Chamber II, 12 April 2019. However, the Pre-Trial Chamber’s decision was reversed by the Appeals Chamber that authorized the Prosecutor to commence an investigation. See Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, *Situation in the Islamic Republic of Afghanistan* (ICC-02/17-138), Appeals Chamber, 5 March 2020.

26 White House, ‘Executive Order on Blocking Property of Certain Persons Associated with the International Criminal Court’, 11 June 2020, available online at <https://www.whitehouse.gov/presidential-actions/executive-order-blocking-property-certain-persons-associated-international-criminal-court> (visited 10 November 2020).

27 T. Mariniello and C. Meloni, ‘“Sometimes They Come Back”: The Question of the ICC’s Territorial Jurisdiction in Palestine’, *Opinio Juris*, 3 February 2020, available online at <http://opiniojuris.org/2020/02/03/symposium-sometimes-they-come-back-the-question-of-the-iccs-territorial-jurisdiction-in-palestine> (visited 10 November 2020).

28 C. Meloni and G. Tognoni, *Is There a Court for Gaza? A Test Bench for International Justice* (Springer, 2012).

Court. Particularly when it comes to states' submissions, there appears to be a higher risk of political interference with the Court's proceedings. For this reason, they suggest that 'communicative *amici*' should be allowed only in limited circumstances, such as when the Court is dealing with a complex legal issue that is of direct significance to the international community, particularly states.

The next contribution, by Ardi Imseis, focuses exactly on the risk that state *amici* may contribute to a politicization of the Court and its proceedings. The author critically assesses the *amici curiae* observations submitted to the Pre-Trial Chamber by eight states parties. In fact, as mentioned earlier, the Prosecutor's Request raises only one legal question, namely the extent of the ICC's jurisdiction on Palestinian territory (encompassing the West Bank, including East Jerusalem, and the Gaza Strip), 'strictly for the purposes of determining the Court's ability to exercise its jurisdiction'.²⁹ However, rather than addressing such question, Imseis argues, states' observations provide several unconvincing arguments that aim to deny Palestine's statehood. Either states ignore the question on the geographical scope of the ICC's territorial jurisdiction in Palestine or they do not provide any arguments on this issue raised by the Prosecutor. Imseis examines how each of the intervenor states submitted that the Court does not have jurisdiction over any part of the territory of Palestine, arguing that Palestine is not a state, despite its accession to the Rome Statute. In doing so, these states attribute to Palestine a legal status that is inferior to the one attached to all other states parties. According to the author, state *amici* appears in clear contradiction with the commitment that these states parties have taken to fulfil the object and purpose of the Rome Statute, that is to ensure that 'the most serious crimes of concern to the international community as a whole must not go unpunished'. The author stresses that, if the Pre-Trial Chamber were to agree with intervenor states in the proceedings, one of the immediate consequences would be the deprivation of the only hope of effective redress for millions of victims.

Robert Heinsch and Giulia Pinzauti then focus on the impact of occupation on Palestine's statehood question. As observed by the authors, the issue has not received adequate attention either in the Prosecutor's Request or in scholarly discussions. In the authors' view, in line with the Prosecutor's Request, there is in fact no need to ascertain whether Palestine fulfils the traditional criteria for statehood under general international law, as reflected in the 1933 Montevideo Convention on the Rights and Duties of States. The authors suggest resorting to a functional notion of statehood, thus affirming that Palestine should be regarded as a state within the framework of the Rome Statute, and that it validly triggered the Court's jurisdiction pursuant to Articles 12(2)(a) and 14 of the Statute, without any need for further analysis under general international law. Nevertheless, their paper aims to show that, even if the Court decided to analyse Palestine's statehood under general international law, the Montevideo Convention criteria would be fulfilled. Their main argument is that the impact of belligerent occupation under international

29 Request, *supra* note 4, § 17.

humanitarian law should be taken into account when assessing Palestine's ability to fulfil the criteria for statehood, even beyond the current proceedings before the ICC. The authors refer their argument, in particular, to the interpretation of one of the traditional Montevideo Convention criteria, i.e. that an entity possesses an 'effective government', and affirm that such requirement should not be interpreted strictly. In particular, the paper suggests that, when assessing whether an occupied entity meets the criteria for statehood, deficiencies in its government's effectiveness should be measured against the right to self-determination of the occupied people.

The right to self-determination plays a central role also in the analysis of the following paper, authored by Yaël Ronen, who however comes to conclusions opposite to those of Heinsch and Pinzauti. Ronen examines the role of the right to self-determination with regard to statehood, as reflected in the Request by the ICC Prosecutor, singling it out from other possible legal arguments to assess Palestine's status.

The author argues that the right to self-determination cannot compensate for the lack of an effective government, which would instead be required to achieve statehood under the traditional Montevideo Convention paradigm. She critically analyses the second proposition that would emerge from the Prosecutor's Request on the point, according to which when effective control over a territory is lacking because of 'illegal obstruction of the realization of the right to self-determination', recognition of statehood may be an appropriate response regardless of the circumstances. The author thus argues that it would be mistaken to assign to the right to self-determination a role in the formulation of the law on the achievement of statehood. Ronen disagrees that the right to self-determination can dispose of the requirement of an effective government, and that an entity can be regarded as a state as a 'legal consequence of a violation of a peremptory norm that hinders it from exercising such control'. Based on a critical analysis of the precedents that have been brought in support of the idea that statehood can be achieved prior to the consolidation of an effective government, the author takes the view that the progressive interpretation based on the right to self-determination advanced in the Prosecutor's Request is neither based in existing law nor in *lex ferenda*.

The following paper by Marco Pertile addresses specifically the legal issue that is the core of the Prosecutor's Request: the Court's territorial jurisdiction in Palestine. In fact, as the author observes, '[i]nternational criminal law requires certainty, arguably much more than general international law does'. These different standards between the two bodies of law, and consequent need for clarity before the ICC, became manifest with regard to the scope of the territorial jurisdiction of the Court. Thus, before starting the investigations, the Prosecutor had to take position on an alleged contentious issue in the law of international relations, object of decades of negotiations: what are the borders of Palestinian territory?

In seeking confirmation by the Chamber, the Prosecutor took the clear view that Palestine is the Occupied Palestinian Territory, which corresponds to the West Bank, including East Jerusalem, and the Gaza Strip. Pertile's paper

discusses this finding from a twofold perspective. First, it investigates the actual existence of an international consensus on the borders of the Palestinian territory. Secondly, it addresses the qualification of such consensus in the system of the sources of international law. Pertile reconnects the elements analysed by the Prosecutor with the positions and statements expressed by states individually, and at the regional level. Pursuant to such analysis, the author finds that the Prosecutor's position — defining the borders of Palestine as the West Bank, including East Jerusalem, and the Gaza Strip — is accurate. Moreover, the paper shows that the existing consensus on the borders can be qualified as evidence of a procedural customary rule implementing the right to self-determination of the Palestinian people.

The following paper by Michael Kearney focuses on the object, in terms of subject matter jurisdiction, of the possible investigation into the situation Palestine before the ICC. The author does so by analysing and drawing parallels with the OTP's practice in the Bangladesh/Myanmar situation, that recently recognized the denial of the right to return as a crime against humanity under Article 7(1)(k) of the Rome Statute. He also investigates the basis for the right of return in general international law, with a specific focus on the Palestinians' right of return. In doing so, the author notes the differences and similarities between the situation of Rohingya and Palestinian refugees deprived of the right to return. As regards the differences, while Rohingya refugees are mainly in Bangladesh, Palestinian refugees are spread among various states, both Parties and Non-Parties to the Rome Statute. According to the author, parallels between the Myanmar/Bangladesh and Israel/Palestine situations before the Court include both procedural issues related to Article 19 jurisdiction requests and the participation of a considerable number of *amici curiae*, and substantive issues regarding alleged crimes. Moreover, similarly to what happens in Myanmar with regard to the Rohingya, as widely documented in the various Reports of Human Rights Council Fact-finding Missions, the Israeli authorities continue to exercise policies that prevent Palestinians from exercising the right of return and that justify surveillance, deportation and state violence. Particularly, in light of the several similarities between the situation of Rohingya and Palestinian people, the author claims that the denial of the right to return as an 'other inhuman act' pursuant to Article 7(1)(k) of the Statute could play an important role also in a potential investigation into the Palestine situation.

Scholars, practitioners, diplomats and interested observers still debate whether the ICC helps or hinders the pursuit of conflict resolution and peace. In particular, critics argue that the Court may contribute to an increase in the incidence of violence and mass atrocity, protracting violent political conflicts and negatively affecting the path to establishing and maintaining peace. In the last contribution to this symposium, Mark Kersten critically assesses the validity of assertions that an ICC investigation could undermine the chances of an enduring 'peace' in the Israeli/Palestinian setting. He addresses the alleged risks of an ICC intervention for the peace process. The author places emphasis on the lack of evidence that the Court will negatively impact 'peace' between

Israel and Palestine, while at the same time, however, not suggesting that the Court will positively contribute to peace negotiations. Without any operative peace plan or a genuine commitment to negotiations, the argument that the Court may threaten peace appears unsound. Kersten argues that the most serious threat to peace and security in the region derives from the kind of peace that is currently on offer for Palestinians and Israelis. He notes that the so-called 'deal of the century', that excluded any involvement of Palestinian authorities, together with the unilateral and internationally prohibited annexation of Palestinian territories, constitutes the most serious threats to a peace process in the area.

We very much hope that this symposium will provide food for thought and contribute to bringing valuable views on the issue that is currently underdetermination before the Court with regard to the Israel/Palestine situation.



THIRD WORLD APPROACHES to INTERNATIONAL LAW *Review*

TWAILR: Reflections #33/2021

We Charge Apartheid? Palestine and the International Criminal Court

Noura Erakat & John Reynolds

At the end of 2008, Israel went to war on the Gaza Strip on a scale not seen in Palestine for decades. The Israeli military's International Law Department had spent months prior crafting 'legal advice that allowed for large numbers of civilian casualties'. This heralded the starting point of formal Palestinian interaction with the International Criminal Court, with an initial failed attempt by the Palestinian authorities to trigger ICC jurisdiction over crimes committed in occupied Palestine. It would be a long twelve years before eventually, in February and March 2021, the ICC's Pre-Trial Chamber ruled that the Court does indeed have jurisdiction and the Prosecutor confirmed that an investigation will now proceed. Through these years, the Office of the Prosecutor often appeared at pains to draw out the wrangling over the preliminary question of whether it could accept jurisdiction. In the meantime, Gaza was besieged and bombarded, again and again: 'sky of knives ... reincarnation of metal, children limp grey dust beneath buckled buildings', as captured by Hala Alyan. This materialised most devastatingly in Israel's 2014 war on Gaza. Its modalities of lethal force were also adapted in 2018 to maim and execute Palestinians demonstrating in the Great March of Return.

This hot violence of intense and spectacular military assault – airstrikes and artillery shelling, sonic booms and white phosphorous, home demolitions and shoot-to-kill sniping, plus the resistance of Palestinian armed groups (of a decidedly lesser scale and 'gravity' in its reach) – will be an obvious focus for the ICC investigation into events from June 2014 onwards. But 'not all violence is hot', as Teju Cole succinctly surmises. The slow, cold violence of Israeli apartheid has continued to plough its furrow ever-

deeper. This encompasses the settlement project and economic exploitation of Palestinian land and labour in the West Bank, the blanket denial of Palestinian refugee return, and the Israeli state's exclusionary constitutionalism. As Hassan Jabareen shows, it transcends the partition lines and permeates through a single legal order of Israeli racial domination over the Palestinians. All of these elements are ongoing, all are pillars of what Lana Tatour emphasises as the overarching *settler-colonial structure* of apartheid – and all are potentially within the remit of the ICC.

And so our purpose here is not to dwell on the technicalities around jurisdiction, but rather to take the ICC conjuncture as grounds for reflection on the politics of Palestinian legal engagement. We situate this reflection in the larger context of Israeli colonial-apartheid, thinking about Palestinian legal tactics – and the charge of the crime of apartheid in particular – in relation to political strategy. Conscious of the limits of international criminal law, we are at the same time animated by the question of whether the turn to international criminal justice as a site of struggle can feed into the more radical transformations of social, economic and ecological relations that are needed for settler-decolonisation¹ and liberation of Palestine.

Warfare, Lawfare and the Limits of International Criminal Law

Many may consider criminal investigation and prosecution for purposes of accountability and deterrence to be sufficient ends in themselves. Our particular concern is the potential of the ICC bid, precipitated as it was by the hot violence of the Gaza wars, to foment a rupture whereby an international tribunal contends with the cold violence of Israeli apartheid. We are clear that law itself, especially international criminal law, is 'insufficient to lead Palestinians to emancipation'. Beyond the general incapacities of individualised responsibility to produce social transformation, we agree with and are engaged in particular critiques of international

¹ Settler-decolonisation here exceeds the international legal understandings of colonialism and decolonisation that began to crystallise in the aftermath of the First World War. It evokes Indigenous Studies literatures which have clarified that land and territory remain central elements of settler-colonial domination and its unravelling. It also challenges time as a linear continuum whereby the Indigenous body stands in as a primordial figure and therefore an anachronistic possibility of becoming. Relevant works include Nick Estes, *Our History Is the Future: Standing Rock Versus the Dakota Access Pipeline, and the Long Tradition of Indigenous Resistance* (Verso, 2019); Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Duke University Press, 2014); Eve Tuck & K Wayne Yang, 'Decolonization is not a Metaphor' (2012) 1:1 *Decolonization: Indigeneity, Education & Society*; Rana Barakat, 'Lifta, the Nakba, and the Museumification of Palestine's History' (2018) 5:2 *NAIS: Journal of the Native American and Indigenous Studies Association* 1; Lana Tatour, 'The Culturalisation of Indigeneity: the Palestinian-Bedouin of the Naqab and Indigenous Rights' (2019) 23:10 *International Journal of Human Rights* 1569; Raef Zreik, 'When Does a Settler Become a Native? (With Apologies to Mamdani)' (2016) 23:3 *Constellations* 351.

criminal law that have come from TWAIL and Marxist perspectives: of international criminal law as 'reproduction of the civilizing mission' and 'capitalism's victor's justice'.

The ICC itself is a political institution which 'operates ideologically' as part of our contemporary global order to 'sustain prevailing constellations of power'. Kamari Maxine Clarke has shown how the Court reifies white supremacy and helps mask and perpetuate core-periphery relations of economic exploitation and inequality. If the institutional dynamics at the UN were different, we would certainly be directing all arguments and energies towards the necessity of political and economic sanctions against Israel itself rather than criminal prosecutions of some officials. As things stand, however, the ICC is the institutional door that has been forced ajar, and so it is imperative to think about what space it may open for anti-colonial forms of 'principled opportunism'.

With this in mind, we support the sentiment that the jurisdiction decision was a victory for Palestinian legal activists and a testament to their tireless work. The functional question of whether the ICC could accept jurisdiction over a situation in Palestine under the Rome Statute should have been straightforward – if not in response to the initial request in 2009, certainly after Palestine was admitted as a full member of the Court in 2015. Yet there was a very real possibility that the ICC would have found a way to reject jurisdiction as advocated by the 'strained arguments and conspicuous hypocrisy' of Israel-supporting ICC members, or to continue to drag out any decision indefinitely. And so the victory, such as it is, was hard-fought. It is a victory for Palestine over major ICC member states such as Germany, Canada, Brazil and Uganda who actively intervened to advocate that the Court refute jurisdiction (with Brazil and Uganda taking 'manifestly incoherent' positions against their own pre-existing recognition of Palestine, in favour of new-found neocolonial alliances). It is vindication for Palestinian rights organisations over the Israeli Attorney-General and the self-proclaimed 'leading experts on international law' who feature on a mock 'ICC Jurisdiction' website sponsored by Israel's Ministry of Strategic Affairs.

At the same time, the victory is very much provisional. Political hurdles, in the form of Israeli and US opposition backed up by quintessential European duplicity, have been surmounted for now but will redouble in the higher-stakes contestations to come. Such external pressures will compound the particular technical and logistical challenges of prosecuting Israeli personnel in a context of staunch formal non-cooperation from Israel, and the potential for jurisdiction challenges to arise again in individual cases. Funding and basic administrative challenges are also an ongoing

material issue for the Court. In her statement confirming that an investigation will now be initiated, the Prosecutor was careful to temper expectations in terms of the priority and pace of proceedings, as well as striking an almost contrite tone to convince Israel to trust the ICC.² Still, Israel confirmed it does not recognise the Court's authority and will not cooperate with the investigation. Israeli Prime Minister Benjamin Netanyahu characterised the Court's decision to accept jurisdiction as 'pure antisemitism'. This absurd claim fits the Israeli playbook. Israel and its Ministry of Strategic Affairs have spent the last fifteen years trying to undermine the Boycott, Divestment, Sanctions (BDS) movement, and are now deploying similar tactics to delegitimise the ICC. The appointment of an army Major General³ rather than a lawyer to 'lead the battle against the ICC' highlights, as observers have quipped, that Israel's 'lawfare' is 'getting increasingly literal'. In this context, questions of strategy and tactics are crucial.

Tactics and Strategy

In the *New Left Review* in 1971, Palestinian intellectual and PFLP spokesperson Ghassan Kanafani emphasised the need for anti-colonial struggle not to be dictated by 'bourgeois moralism and obedience to international law'. There is a legitimate critique that, over the decades since, the Palestinian liberation project has become overly dominated by legalism and, more generally, has functioned to assuage power structures rather than disrupt them. Mezna Qato and Kareem Rabie make the case persuasively that organising around international law involves a reduction of the original and higher aim of 'until liberation and return' to a less ambitious and ultimately self-defeating resort to liberal legalism. Conscious of international law's own colonial entanglement, they argue that law-based advocacy ends up being geared 'towards a better colonialism rather than the end of colonialism'. By fixating on Israel's excesses and not Zionism's essence, legalist advocacy elides the state's settler-colonial nature and the underpinning

² On the question of pace and priorities, according to the Prosecutor's statement: 'How the Office will set priorities concerning the investigation will be determined in due time, in light of the operational challenges we confront from the pandemic, the limited resources we have available to us, and our current heavy workload. ... To both Palestinian and Israeli victims and affected communities, we urge patience'. On the point about appealing to Israel, the Prosecutor goes out of her way to emphasise that in the other situation previously referred to the Court regarding Israel – the Israeli military attacks on the Mavi Marmara humanitarian flotilla – she declined to pursue any charges. The statement's references to complementarity and continuing scope for domestic investigations, as well as to the Court's commitment 'to investigate incriminating and exonerating circumstances equally', also appear designed to placate specific concerns that Israel has raised previously.

³ Previously this general, Itai Virob [also transliterated Veruv], was a brigade commander placed under investigation between 2009 and 2011 'when he admitted he encouraged his soldiers to use violence against Palestinians they were questioning'. Israel's Military Advocate-General concluded that Virob had not been advocating 'violence for the sake of violence' but rather 'violence which was necessary for the mission'. So Virob was absolved in 2011, promoted straight away by then Israeli military Chief-of-Staff, Benny Gantz, and continued to rise up the ranks. See +972 Magazine's report here.

structures of imperialism and capitalism. In this sense, it is 'problematic to pivot movement strategy on bodies of law that emerged in order to regulate imperialism, and that often function to legalize Israeli colonization'.

The reference to strategy here is key. Strategy cannot hinge on law. But in certain conditions, legal tactics may work to support transformative strategy. What is needed most in the Palestinian context, as we have both argued previously drawing on the work of [Duncan Kennedy](#), [Robert Knox](#) and others, is 'a coherent political strategy towards which appropriate legal tactics are thoughtfully deployed' and 'a robust political movement to inform legal advocacy and to leverage tactical gains'. In this sense, engagement through law requires an acute understanding of international legal institutions as a field of political struggle. Knox and Ntina Tzouvala trace the lineage of such thinking in anti-colonial movements back to the Bolshevik theory of imperialism, which had 'a certain irreverence for international law, and an explicit sense that it needed to be subordinated to the wider anti-imperialist project'.

There is a rich and growing tradition of Palestinian scholars and activists today who are thinking deeply about these dynamics in various iterations as well, including [George Bisharat](#), [Lana Tatour](#), [Mazen Masri](#), [Nimer Sultany](#), [Samera Esmeir](#), [Yara Hawari](#), [Rafeef Ziadah](#), [Suhad Bishara](#), [Victor Kattan](#), [Nahed Samour](#), [Nadija Samour](#), [Emilio Dabed](#), [Ardi Imseis](#), [Ata Hindi](#), [Hadeel Abu Hussein](#), [Reem al-Botmeh](#), [Hassan Jabareen](#), [Munir Nuseibah](#), [Reem Bahdi](#) and [Mudar Kassis](#), and many more. Certain core threads run through their work: Israel's settler-colonial essence; its oppression of the Palestinians *as a whole*; the one-state reality over the fictions of partition; law as often central to these problems; and the necessity of political strategy in relation to law, rights, development, recognition, and so on. Masri's [articulation](#) is illustrative: 'law and legal tactics cannot replace strategy, but they can play a role in a strategy – one that enjoys a high level of support, mobilizes the grassroots, employs a range of tools and is guided by a clear vision'.

In this sense, there is scope for principled anti-apartheid legal tactics to trigger transformational possibilities, if harnessed effectively under the right conditions in service of a cogent political strategy. However, given the current state of the Palestinian leadership, and the disconnects between Palestine's political institutions, popular movements and global solidarity campaigns, such conditions and strategy remain distant. Following the PLO's abandonment of the single democratic state strategy and its 'pragmatic revolutionary' tactics, and especially since the collapse of the Camp David talks signalling the putative death of the Oslo peace process, the

Palestinian leadership has pursued a politics of acquiescence. They have placed faith in the idea that good native behaviour will be rewarded with imperial benevolence, despite consistently damning evidence to the contrary. Palestinian foreign policy is, of course, subject to larger systemic coercive forces, and the 'sovereignty trap' that presently incapacitates it is constructed by international relations and international law. But Palestinian officialdom has also sacrificed vital opportunities over the past two decades to reconstruct a serious anti-colonial political strategy and to channel available legal mechanisms accordingly.

The 2004 ICJ Advisory Opinion on the Wall offered a major opening for the Palestinian official leadership to build an alliance towards pushing UN members not to recognise or assist the illegitimate occupation infrastructure – to divest from and sanction Israel. Palestinian civil society played its part by launching its BDS call in 2005 on the first anniversary of the ICJ opinion. This was inspired by the struggle to abolish apartheid in South Africa, and sought to build upon and expand the growing global anti-apartheid movement for Palestine. The Palestinian leadership should be mirroring this at an institutional level. It could have formulated an expansive, proactive strategic vision of decolonisation with which the BDS tripartite goals (ending occupation and colonisation, full equality, refugee return) align. The Palestinian leadership has instead been preoccupied with 'preening like a state' – even if that means a limited Bantustan state – and its legal initiatives have been haphazard and reactive. Rather than lead an anti-apartheid freedom struggle, the Palestinian Authority has been implicated in neoliberal apartheid and unequal capital accumulation.

This context has underpinned ongoing debates among Palestinian legal practitioners and scholars that consider what Palestinians can realistically obtain in court settings, versus what Palestinians need to do in order to catalyse fundamental paradigmatic shifts at the real cost of losing legal contests along the way. We are sympathetic to the school of thought that favours pragmatic advancements over more radical tactics. But in the absence of an institutional strategy to harness any such incremental advances, we find this approach unconvincing.

How then does a more radical tactical approach overcome the debilitating lack of a visionary programme from above? It doesn't. It is, rather, a bet placed on the capacity of movement to develop strategy in the course of what will be an explicit and pitched political contest. This approach seeks to propel strategic coherence from below in the course of fervent but fluid struggle and provocation, based on historical evidence that societies can be prepared for transformative social justice movements but cannot

dictate them. This approach may be fraught, but in light of the current status quo and uninspiring alternatives, there is little to lose. Thinking about this in the context of the ICC involves acceptance of the limits of the process on its own terms and places focus on how it is harnessed tactically in the '[legitimacy war](#)', regardless of victory or defeat in the courtroom. Criminal prosecutions, even if they happen, will not deliver justice for the Palestinians in the larger sense of the settler-colonial structure that shapes their lives. The struggle will remain political.

With that in mind, what tactical opportunities can be located in the ICC's exercise of jurisdiction? Michael Kearney has done important analysis on both the [war crime of transfer of settlers](#) and [denial of the right to return as a crime against humanity](#), while Palestinian organisations have [flagged](#) the pillage, extraction and destruction of Palestinian natural resources. These are all essentially forms of colonial crime within the jurisdiction of the Court, and offer avenues into unsettling certain facets of Zionism through their prosecution. The larger structural framework within which these crimes are all committed, however, is the Israeli apartheid regime over Palestinians. Exposing the crime against humanity of apartheid itself can potentially work in tactical service of broader anti-apartheid political strategy and grassroots organising. It can also operate as a crucial bridge on a number of fronts: linking together the hot violence of Israel's war crimes with the cold violence of its legal structures of dispossession, exclusion and persecution; reconnecting the partitioned but shared realities of occupied, exiled and citizenised Palestinians under Israel's constitutional order; and mapping the trail from individual responsibility for crimes of apartheid to state responsibility and sanctions for maintaining an apartheid regime.

We Charge Apartheid?

The [controversy](#) which engulfed the UN's 2001 Durban anti-racism conference was precipitated by the insistence of social movements from around the world on calling Israel out as an apartheid state. This was a political and moral argument to challenge institutionalised racism against Palestinians in the context of global anti-racist action. The anti-apartheid framework became increasingly central to political organising and global solidarity through the Palestinian BDS call and initiatives like [Israeli Apartheid Week](#). More recently it has informed [renewals of Black-Palestinian solidarities](#) and the Black Lives Matter [demand](#) for divestment from apartheid Israel. While Palestinians had [diagnosed](#) and [detailed](#) Israeli apartheid conditions for many decades prior, the concomitant international legal arguments had only started to be developed in the 1990s by [individual scholars](#) and [Palestinian rights organisations](#). More concerted legal

analyses likewise began to follow after Durban. Palestinian organisations like [Badil](#), [Al-Haq](#), [Adalah](#), and [Stop the Wall](#) applied the prohibition of apartheid as part of their deconstruction of Israeli law and policy. International legal [studies](#), [scholarship](#) and [reports](#) steadily [mounted](#). The [Russell Tribunal on Palestine](#) deliberated the issue in Cape Town and concluded that 'Israel's rule over the Palestinian people, wherever they reside, collectively amounts to a single integrated regime of apartheid'. The UN [Special Rapporteurs](#), [CERD Committee](#) and [ESCWA Commission](#) made similar findings in their own spheres.⁴ There is clear momentum.

After Palestine joined the ICC in 2015, a collective of Palestinian rights organisations began to file submissions to the Prosecutor detailing crimes committed by high-level Israeli civilian and military officials. The first three submissions related to the hot violence of the [wars](#) and [siege](#) on Gaza. The fourth, a 700-page brief [submitted](#) in 2017, covered war crimes and crimes against humanity in the West Bank – including the crime of apartheid. Following the Pre-Trial Chamber's February 2021 jurisdiction decision, the organisations [reiterated](#) the charge, albeit limited in this context as it is to the manifestations of apartheid in the West Bank: Israel's systemic segregation and subjugation of the Palestinians constitute 'an institutionalised regime of racial domination and oppression, and amount to the crime of apartheid; it is imperative that the Prosecutor include acts of apartheid in the scope of her investigation'.

While Palestinian rights organisations filing submissions to the ICC today are more legalistic in their approach and less radical in their politics, we understand their 'charge' of apartheid as carrying some echoes of the [We Charge Genocide petition](#) submitted by the Civil Rights Congress to the UN in 1951. Knox and Tzouvala [recount](#) how the Black radicals behind that petition were informed by Marxist conceptions of imperialism and political economy as much as by the Genocide Convention itself. The petition represented a 'tactical deployment of international law in order to serve broader purposes of radical social transformation', and was consciously aimed at 'connecting US racism at home with structures of US imperialism abroad'. It was 'invoked tactically to strengthen those forces who were opposing racism and imperialism' more than in expectation that an international legal process would itself resolve deep racial injustice in the United States. Coming at a crucial transitional moment for the Black freedom movement, UN institution-building processes, Cold War manoeuvring, and Third World liberation struggles alike, the petition was

⁴ Most recently, Israeli human rights organisations [Yesh Din](#) and [B'Tselem](#) have also adopted the apartheid framework – albeit based on somewhat more 'liberal readings of Israeli apartheid' – and international human rights organisations are expected to follow.

significant in mobilising internationalist support and damaging US delegations at the UN. Eleanor Roosevelt lamented that the petition was so 'prominently featured in the papers'⁵ during the UN General Assembly in Paris and admitted that 'we were hurt in so many little ways' by it. It also had lasting ramifications within the US, both on the back of its submission to the UN and its wide circulation in book form. It exposed the extent of ongoing racial violence, 'whipped up the kind of necessary pressure that led to the final cracking of the spine of Old Jim Crow',⁶ and charted a more radical course for equality struggles that continues to reverberate. William Patterson, primary architect of the petition, was forthright in response to criticism of his organisation's 'politicisation' of civil rights by conservative and anti-communist elements of African-American leadership: 'The attitude of using only the legal approach had something of the Booker T. Washington in it. The NAACP leadership did not understand the gravity of the situation'.⁷

Though coming in a very different moment and political context,⁸ the Palestinian activist charge of Israeli apartheid is a comparable vanguard assertion of institutionalised oppression as international crime beyond what mainstream representatives of the oppressed group have articulated. It is likewise one which the offending state goes to great lengths to undermine as beyond the pale. Crucially, it is also the legal claim that most directly feeds into the mass popular mobilisation of Palestinian and global social movements over the last twenty years, which have emphasised the racialised legal structure of settler-colonial dispossession.

Even with this relatively radical approach, the distinct tactical risks in engaging the ICC generally and the crime of apartheid specifically must be acknowledged. Most

⁵ Gerald Horne, *Communist Front? The Civil Rights Congress, 1946–1956* (Associated University Presses, 1988) 172.

⁶ Ibid, 167.

⁷ Quoted in Carol Anderson, *Eyes Off the Prize: The United Nations and the African American Struggle for Human Rights, 1944–1955* (CUP 2003) 210. The NAACP is the National Association for the Advancement of Colored People. Booker T. Washington was an early 20th century moderate Black leader who was seen by many contemporary and subsequent strands of civil rights activism as too accommodating of white supremacy.

⁸ Even physically submitting *We Charge Genocide* to the UN was a debacle for the CRC. Patterson had asked WEB Du Bois and Paul Robeson to join him in Paris to present the petition to the UN General Assembly. The US government had, however, just attempted to prosecute Du Bois as a foreign agent and confiscated his passport, deterring him from travelling. The State Department also stripped Robeson of his passport – meaning he was only able 'to deliver a copy of the petition to a "subordinate in the Secretariat's office" in New York' (Anderson, *ibid*, 194). The main consignment of copies of the petition was intercepted on route to Paris, resulting in Patterson having to bring other copies in Budapest to distribute them at the General Assembly. He then had to flee Paris himself when the US embassy tried to seize his passport and deport him. The Palestinian rights organisations' submissions to the ICC were a more standard process, though not without their own backstory: the file containing the apartheid allegation was handed over to the Prosecutor by Al-Haq director Shawan Jabarin who Israel had previously detained without trial and then placed under travel ban for many years, and researcher Nada Kiswanson who has been subjected to repeated death threats due to her work on the ICC and Palestine.

obviously, it is a tactic without control over the agenda when compared with other forms of civil or inter-state litigation. The Prosecutor may choose to ignore apartheid entirely and focus the investigation on more discrete war crimes, irrespective of Palestinian interventions.

Warning signs are already there in the scope of the investigation. In the Prosecutor's [summary of preliminary examination findings](#), several crimes are identified as likely to have been perpetrated. The document refers to five categories of war crimes committed by Israel – four specific to Gaza, plus transfer of settlers into occupied territory – and six categories of war crimes when it comes to Palestinian armed groups. There is no reference to apartheid or any other crimes against humanity. That said, the document emphasises that the crimes mentioned are 'illustrative only' and the 'investigation will not be limited only to the specific crimes that informed the assessment at the preliminary examination stage'. A new Prosecutor will take over before any investigation gathers pace, adding another variable to this mix.⁹

For Israeli officials to be indicted for apartheid, the prosecution needs to show an intention to maintain systemic racial oppression. There is a perception that this element of intent makes it more difficult to prove than some other categories of crime. But the intentional nature of the regime is what underpins the significance of the crime of apartheid, and the concerted design and maintenance of Israel's oppressive regime is well-documented. As a structural crime, it demands prosecution of its political architects at the highest level. Because of this, combined with ['the racial politics of international criminal law'](#), there has never been a prosecution of the crime of apartheid in any court. In this sense, we see the charge of Israeli apartheid as being also an indictment of, and challenge to, international criminal law itself. If the ICC cannot bring itself to investigate and prosecute apartheid crimes in the most widely-analysed instance of apartheid since South Africa – after it has been presented with documentation and asked to do so by those subjected to the apartheid regime – that will say a lot about the politics of international criminal law.

⁹ There has been much speculation about the potential implications of Karim Khan's appointment as incoming Prosecutor, for the ICC generally and the Palestine investigation specifically. According to some media conjecture, 'Israel [reportedly](#) hopes Khan may be less hostile or even cancel' the investigation. An April 2021 [letter](#) from British Prime Minister Boris Johnson to the Conservative Friends of Israel group put it on record for the first time that the British government is opposed to the ICC investigation in Palestine, and also appears to claim the appointment of Khan, a British national, as a victory for Britain and its allies seeking to 'reform' the Court in accordance with their own agenda. The role of the Prosecutor is formally independent of any state interests, but clearly Johnson's wording must be either a reflection of a pre-designed diplomatic initiative, or a statement of intent to mark Khan's card.

The very fact of Palestinians submitting the claim of apartheid to an international tribunal can make its own tactical contribution to anti-colonial strategy, as global consciousness of the cold violence of Israeli apartheid continues to grow. All too often, cold violence 'takes its time and finally gets its way' and so, against that, a sharper focus on the strategic horizons ahead is essential. We see a place for legal contestations in that vista, though we should be under no illusions about the prospects of seeing Netanyahu and his counterparts on the stand, or the likelihood of big courtroom 'victories' for Palestinians. And, ultimately, the law cannot serve as a substitute for 'what only a critical mass of people are capable of achieving'.

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Decolonizing the ICC: The Situation in Palestine and Beyond

by Aeyal Gross

March 8, 2021

On March 3, the International Criminal Court (ICC) Prosecutor, Fatou Bensouda, announced the initiation of an investigation concerning the “*Situation in Palestine*” which will cover crimes that are alleged to have been committed in the *Situation*. This decision followed on the recent ICC Pre-Trial Chamber (PTC) decision that the ICC has jurisdiction over the “*Situation in Palestine*” – a decision that was given pursuant to the Prosecutor’s request for a ruling by the PTC on the scope of the ICC’s jurisdiction in this *Situation*.

In this article I consider the PTC’s decision on, and approach to, the jurisdiction question, and thus to the question of Palestine’s statehood. I argue that the decision is of significance in avoiding a problem inherent in the Rome Statute. The problem is that by determining that (apart from the Security Council) only States (either on a personal or a territorial basis) can confer jurisdiction on the ICC, the Rome Statute perpetuates a colonial premise under which only those accorded the status of statehood can be actors who count in the international legal arena. In this form it replicates the procedural exclusion from the International Court of Justice of peoples who do not “have” a State, which in this context can also create impunity regarding alleged crimes committed against occupied people. As this article shows, the ostensibly formal PTC decision in fact represents overcoming this exclusion in way that is a significant development in public international law.

Interpreting Territorial Jurisdiction – The Reasoning of the PTC and Prosecutor

The seemingly formalistic analysis that led to the PTC’s decision on jurisdiction was as follows: Palestine was admitted in 2015 as a State Party to the Rome Statute of the ICC, and hence to the Assembly of State Parties (ASP) (with no country objecting other than Canada). It would accordingly be contradictory, said the PTC majority, to allow an entity to accede to the Rome Statute and become a State Party while simultaneously limiting the Statute’s inherent effect and denying the consequences of joining by refusing to allow that party to confer on the ICC territorial jurisdiction as other State Parties can. The text in the Rome Statute, which refers to the “State on the territory of which the conduct in question occurred” as one of the grounds for ICC jurisdiction, must be interpreted as referring to a “State Party” to the Statute. As a consequence, Palestine qualifies as the State “on the territory of which the conduct in question occurred” for the purpose of the Rome Statute. This determination, the PTC added, does not say anything about Palestine’s status in general international law – including whether it fulfils the prerequisites of statehood– beyond the context of the interpretation of the Rome Statute.

But the PTC reasoning did not end there. When it came to determining the scope of Palestine’s territorial jurisdiction, the majority relied on a series of U.N. General Assembly resolutions. These included General Assembly Resolution 67/19 (2012) which recognized Palestine as “a non-member

observer State in the United Nations,” and which addressed the right of the Palestinians to self-determination and to independence in their State “on the Palestinian territory occupied since 1967.” Also cited was Security Council Resolution 2334 (2016), which reaffirmed the two-State solution (i.e. the idea of a Palestinian State) and the determination that the establishment by Israel of settlements in the Occupied Palestinian Territory (OPT) is illegal and a major obstacle to achieving that two-State solution. The PTC noted that the General Assembly resolutions on self-determination, as well as Resolution 2334, referred to the territories occupied by Israel in 1967 (the West Bank including East Jerusalem and the Gaza Strip). On this basis, held the PTC, the territorial jurisdiction in the *Situation in Palestine* extends to these territories.

The Role of Self-Determination in Assessing Statehood

In making this determination, the PTC emphasized that in accordance with the Rome Statute, the application and interpretation of law must be consistent with internationally recognized human rights. The right to self-determination, noted the PTC, is just such a right, and Palestine’s right to self-determination within the OPT has been explicitly recognized by bodies such as the International Court of Justice and the U.N. General Assembly. Thus, the conclusion that the ICC’s territorial jurisdiction extends to the OPT was found to be consistent with the right to self-determination.

The Prosecutor’s submission to the PTC in January 2020 also took the position (subsequently adopted by the PTC) that the ICC had jurisdiction over Palestine based on Palestine’s status as a member of the Rome Statute. But the Prosecutor had also put forward an “alternative position” that Palestine fulfilled the criteria for statehood under general international law, a position which relied on the right to self-determination. The PTC avoided the question of Palestine’s status as a State beyond the Rome Statute, finding it both unnecessary and unwarranted to decide. The PTC did rely on the Palestinian right to self-determination as recognized in U.N. decisions, but only for the purpose of determining the territorial scope of Palestine. In this it differs from the position of the Prosecutor.

In making the case for the “alternative position,” the Prosecutor argued that the Montevideo criteria for statehood (permanent population; territory; government; and capacity to enter into relations with other states), generally regarded as customary international law, have been less stringently applied in cases where the circumstances so warrant. These would include, according to the Prosecutor, the recognition of a right to self-determination of peoples within a territory, and an inability to fulfill all of the criteria because of acts deemed to be illegal or invalid under international law. In cases where a people’s right to self-determination is recognized, said the Prosecutor, statehood has been recognized despite not having stringently fulfilled the Montevideo criteria, particularly in the context of decolonization.

We can see, then, that while both the Prosecutor and the PTC rely on the right to self-determination, they do so for different purposes. For the Prosecutor, in her “alternative position,” self-determination – together with the illegal nature of the acts denying its exercise, such as the settlements – serves to determine Palestine’s status as a State. For the PTC, on the other hand, self-determination only serves to determine the scope of the State’s territory for the purpose of ICC jurisdiction.

Formalistic Analysis – or Decolonizing Interpretation?

In order to see the connection between reasoning that may seem formalist at first and the substantial question at stake in the PTC's determination, we should recall that the path to Palestine's membership in the Rome Statute and the ASP was paved after the adoption of U.N. General Assembly Resolution 67/19 (2012) according Palestine "a non-member observer State status" in the U.N. Earlier in 2012, the former ICC Prosecutor, Luis Moreno Ocampo, had indicated that he would defer to the U.N. or the ASP on the question of whether to accept Palestine as a State. Indeed, once the General Assembly decided to view Palestine as a State, the door was open for Palestine to deposit its instruments of accession to the Rome Statute with the U.N. Secretary General, join the ICC, and be admitted to the ASP. This was possible because the Secretary General is guided by General Assembly determination as to whether it considers an entity to be a State.

It was through these supposedly technical arguments that the PTC was able to overcome the exclusion of peoples who do not "have" a State from the ICC, an important institution of international law in a way that perpetuates the colonial premises mentioned above. This exclusion could persist, in the ICC's context, not only because of the way in which the demand that peoples be organized as a State perpetuates a colonial legacy but also because this requirement, as a built-in feature of the Rome Statute, denies protection to those who may need it most, including those living under foreign rule or occupation. In other words, the position advocated by Israel and the seven States who filed amici curiae briefs before the ICC – that Palestine cannot confer jurisdiction on the ICC because it does not fulfill the criteria of statehood under international law – perpetuates the idea that people living under an occupation that denies their independence and dispossesses them should be excluded from the potential protection of the ICC precisely because they live under occupation. In cases such as that of Palestine, there is also no realistic prospect of ICC protection by way of Security Council referral due to Israel's support by veto-wielding members of the Council.

Thus, the position taken by Israel, and supported by some States, is that without full control of the territory, Palestine does not fulfill the statehood criteria in international law, and is thus not a "State" for ICC purposes. This position further entails that the denial of the Palestinian right to control its own territory leads to a denial of one of the only international legal mechanisms that could potentially offer redress for war crimes or crimes against humanity on that territory, including those potentially committed by the occupying power.

From this perspective, we can see the connection between the "formal" parts in the Prosecutor's and PTC's respective positions – that of reliance on Palestine's membership in the ASP – and the parts, notwithstanding the differences between the two, relying on self-determination. Palestine's admittance to the ASP is a way to establish its position within international law, notwithstanding the denial of its ability to exercise independence because of the ongoing occupation.

Here it is crucial to note again that this development – admittance to the ASP – was made possible because of the status awarded to Palestine in General Assembly Resolution 67/19 (2012). The admission of Palestine to the U.N. as a full Member State has not been possible given the U.N. Charter

requirement that membership be recommended by the Security Council and the expected veto by the United States and possibly by other permanent (P5), veto-empowered members. The General Assembly decision accepting Palestine as a “State” (albeit not a Member State) is a critical way to bypass the “legalized hegemony” that is entrenched in the U.N. Charter through the veto power given to the P5 in the Security Council. As we know from post-colonial history, General Assembly resolutions can reflect sovereign equality at least among all U.N. member States, thus deciding things that could not pass in the Security Council.

It is for these reasons that the PTC’s decision is, I think, of historical importance. Obviously, the investigation concerning the *Situation in Palestine* will not by itself bring about the end of the occupation or give Palestinians the justice they deserve. But the decision opens a way through the ICC structure that was designed in a way that denies protection to people living under occupation, particularly in cases where they had never enjoyed independence as a State prior to the occupation. The decision may thus pave the way for investigation of alleged war crimes committed in the Palestinian-Israeli context.

Even if one is skeptical that the *Situation in Palestine* will ever reach a full ICC trial, we can see various ways in which the ICC’s involvement in the issue may have effects on the ground. Consider, for example, how the Prosecutor’s statement expressing concern over Israel’s plan to evict the Bedouin village of Khan Al Ahmar in the West Bank caused Israel to defer this plan.

Palestinian Statehood in International Law

Of course, the Palestine situation is a complex one from an international law perspective. While occupation does not deny a State’s pre-existing sovereignty, in the case of Palestine the argument that is increasingly being made is that a State emerged under occupation – i.e. during the period when its effective control was denied.

On the other hand, Yaël Ronen argues that Israel’s effective control as occupier “*ipso facto* negates satisfaction of the Montevideo criteria by Palestine, regardless of how far reliance on the right to self-determination may lower the bar.” Furthermore, she argues, “One cannot hold that Palestine has sufficient control over a territory to be regarded a State, and at the same time that Israel has sufficient control to be regarded as an occupant in the same territory.”

This latter argument adheres to an occupation/sovereignty binary that as I have analyzed elsewhere does not reflect reality. It also ignores the fact that States are often occupied – e.g. Kuwait under the Iraqi occupation or Iraq under the American and British occupation. There is nothing novel in that, but only in the idea that a State came to exist under occupation while its effective control was denied – which is the contradiction that Ronen presumably aims to point at, though some writers argue that in fact there are precedents for States emerging under occupation.

But in any case, we can consider the case of Palestine from the perspective of the approach cited by the Prosecutor, developed in the decolonization era. According to this approach, when assessing self-

determination, recognition can be granted to States with flexibility regarding the question of effective control of the territory. Ronen rejects this comparison, arguing that in the textbook cases of the Congo and Guinea-Bissau that the Prosecutor nods to as examples, there was an existing impetus to recognize statehood that does not exist in the case of Palestine. The absence of statehood in the Palestine case, she argues, would not lead to a legal vacuum of the sort feared in Congo and Guinea-Bissau given that Israel as occupant bears international obligations with respect to the territory and its population.

However, in my view this distinction does not give enough weight to the fact that at least some of the questions at stake are exactly about whether Israel fulfills its obligations as occupier or rather violates its duties as occupier (for example, in regards to the prohibition on settlements) as well as other international law obligations. Moreover, the approach denying ICC jurisdiction over the *Situation in Palestine* may legitimize the continuing denial of protection to people living under occupation, especially if they did not enjoy independence as a State before. After all, is a continuing occupation of over 50 years – that dispossesses the local population rather than providing for them, and that neglects the idea of temporariness essential to occupation – less risky than a “vacuum”? Robert Heinsch and Giulia Pinzuati are correct to argue that “an occupier cannot complain that an occupied entity does not fulfill the criterion of effective government, as it is the occupier itself that sets the factual reason why the effectiveness of the government is hampered.”

More generally, the case of Palestine in the ICC also shows the importance of a *normative* rather than merely *factual* approach to the question of statehood, i.e. one that puts an emphasis on the right to independence rather than on a strict examination of the Montevideo factual criteria. It is not new to point out that such an approach is important if we want to decrease the power of the colonial legacy within international law. However, the way in which the PTC decision will allow Palestine to grant territorial jurisdiction to the ICC – notwithstanding its continued occupation by Israel – is a novelty that overcomes what seemed like a lacuna in the Rome Statute. The objection to this development based on the demand for strict factual adherence to the Montevideo criteria partakes in the effort to deny international legal protection to those who are occupied by other States and who accordingly may need it most.

The author is grateful to Catriona Drew and Yaël Ronen for their helpful suggestions.

Image: A picture taken on March 4, 2021 shows the so-called Italian complex in Gaza City which was severely damaged by Israeli airstrikes during the 2014 war. – The International Criminal Court opened a formal investigation on March 4, 2021 into alleged war crimes in the Palestinian territories, in a move blasted by Israeli premier Benjamin Netanyahu as the “essence of anti-Semitism”. (Photo by MOHAMMED ABED/AFP via Getty Images)

About the Author(s)

Aeyal Gross

Aeyal Gross (@AeyalGross) is Professor of International and Constitutional Law at Tel-Aviv University and Visiting Professor of Law at SOAS, University of London.

Putting the International Criminal Court's Palestine Investigation into Context

opiniojuris.org/2021/04/02/putting-the-international-criminal-courts-palestine-investigation-into-context/

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[Pearce Clancy is a PhD candidate at the Irish Centre for Human Rights at the National University of Ireland, Galway, and a legal Researcher with the Palestinian human rights organisation Al-Haq. Rania Muhareb is a PhD candidate at the Irish Centre for Human Rights, a consultant with Al-Haq, and a Policy Member of Al-Shabaka, the Palestinian Policy Network.]

Wall severing Palestinian agricultural lands east of Qalqilya in the occupied West Bank, taken on 11 July 2017. Photo credit: Rania Muhareb.

The Prosecutor of the International Criminal Court has finally announced the opening of an investigation into the Situation in Palestine. This long-awaited decision follows five years of preliminary examination and comes over a year since the Prosecutor's request for a ruling on the Court's territorial jurisdiction in Palestine, which encompasses the Gaza Strip and West Bank, including East Jerusalem, as the ICC's Pre-Trial Chamber I decided in February.

Palestinians have sought justice at the ICC for over a decade—a history on which the Prosecutor reflects in her statement dated 3 March. The Prosecutor recalls, notably, that she declined to initiate an investigation into the Israeli military attack on the Gaza Freedom Flotilla on 31 May 2010, seemingly in order to initiate the broader investigation

into the Situation in Palestine. This is despite the fact that the incident led to the killing of ten individuals and the injury of 50 others, with the Prosecutor having recognised that there was a reasonable basis to believe that war crimes had been committed.

Nevertheless, the Prosecutor decided not to proceed on the basis that the gravity threshold had not been met, a conclusion contested by the ICC's Pre-Trial Chamber I, spurring a long controversy over prosecutorial discretion and judicial overview. Whether one agrees with the Prosecutor or the Chamber, the decision not to initiate an investigation into the Mavi Marmara case exemplifies the fragmented and piecemeal manner in which Israeli impunity has been approached to date.

While welcoming the Prosecutor's important decision to finally open an investigation into the Situation in Palestine in the face of immense political pressure, it is nonetheless crucial to recall the broader context within which the ICC operates, both in terms of the Court's own internal dynamics and limitations, and in light of past international failures to hold Israeli perpetrators to account.

Contextualising the Palestine Investigation

On the whole, discussions thus far of the ICC's recent movements in the Situation in Palestine have taken place in a relative vacuum, divorced from previous and other ongoing attempts to pursue justice and accountability for Palestinians. Over the past two decades, the United Nations (UN) has established no less than ten investigatory mechanisms into serious violations of international human rights and humanitarian law in Palestine, including suspected international crimes. These initiatives all failed to meaningfully challenge Israel's pervasive culture of impunity and were either abandoned due to Israel's refusal to cooperate and to grant investigators access to the occupied Palestinian territory, or had their recommendations otherwise unimplemented and effectively disregarded by the international community (see civil society submission on accountability, para 67-75).

Similarly, while the International Court of Justice in its 2004 Advisory Opinion on the construction of a wall in the occupied Palestinian territory made numerous significant determinations—not least that the construction and maintenance of Israeli settlements in the occupied West Bank, including East Jerusalem, constitute the grave breach of population transfer, prohibited under Article 49(6) of the Fourth Geneva Convention—the Opinion ultimately spurred little to no meaningful action by third states. The international community has continued to trade in settlement products, for example and as such contributes to the maintenance of the illegal situation created by Israel, facilitating the recurrence of violations against Palestinians.

Experiments with individual responsibility, both civil and criminal, have largely resulted in failure. Attempts to harness universal jurisdiction mechanisms to pursue accountability through judicial means have been, as noted by Azarova and Mariniello, “thwarted by political pressures and legislative amendments to ensure political vetting.” In particular, ongoing pressure from the United States has undermined the viability of domestic courts as vehicles for international justice for Palestinians. It would appear that the US intends to

continue to shield Israeli perpetrators from accountability, as evidenced by continued US sanctions on key members of ICC staff, including the Prosecutor, through the widely-condemned Executive Order 13928.

This is the landscape now faced by the ICC and the Office of the Prosecutor—one of ambivalence at best, and intentional obstruction by powerful states at worst. This reality was perhaps best put by the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Professor Michael Lynk, when he noted in his October 2019 report to the General Assembly that “An international community that took seriously its legal responsibilities to challenge and end internationally wrongful acts would have concluded long ago that Israel, the occupying Power, was not sincere about seeking to end the occupation.”

Limitations

Notwithstanding the political landscape faced by the ICC, it is moreover important to recognise that the Court has numerous limitations built into its very framework. The colonial dispossession, displacement, and domination of the Palestinian people far exceed the territorial confines of the Gaza Strip and West Bank, including East Jerusalem, and yet the ICC may only investigate international crimes committed in that territorial unit.

Due to the terms of the State of Palestine’s accession to the Rome Statute, the Court’s temporal jurisdiction is set at 13 June 2014, a time frame which—while covering notable and largescale campaigns of atrocities such as ‘Operation Protective Edge’ on the Gaza Strip in 2014 and the systematic suppression of Gaza’s Great March of Return demonstrations in 2018-2019—encompasses only a fraction of the decades-long denial of the individual and collective rights of the Palestinian people since the *Nakba* (‘catastrophe’) of 1948.

To date, no international investigation or UN mechanism has meaningfully addressed the plight of the Palestinian people as a whole, including Palestinians on both sides of the Green Line and Palestinian refugees and exiles denied their right of return. While the ICC’s jurisdiction in Palestine is limited, it can go some way in challenging the fragmentation of the Palestinian people, including by attempting to investigate and prosecute the continued denial of the right of return of Palestinians.

Notably, concerned with the Situation in Bangladesh/Myanmar, the same Pre-Trial Chamber I as in the Situation in Palestine, recognised in September 2018 that the denial of the right of return of the Rohingya people may constitute a crime against humanity under Articles 7(1)(h) and 7(1)(k) of the Rome Statute. Citing the right to enter one’s country under international human rights law and the 1973 Apartheid Convention, the Chamber highlighted that

“the anguish of persons uprooted from their own homes and forced to leave their country is deepened. It renders the victims’ future even more uncertain and compels them to continue living in deplorable conditions” (see here, para 77).

However, it remains to be seen whether the Office of the Prosecutor will entertain this central question, in the face of vehement objection by Israel and the US despite universal recognition of the Palestinian right of return.

Crucially, the domination of the Palestinian people is a prolonged and *systemic* enterprise, whereas the ICC is designed to pursue justice at an *individual* level. The ICC can and should rule on whether individual perpetrators have committed Rome Statute crimes, for example in relation to the construction and maintenance of Israeli settlements and the indiscriminate targeting of civilians—two focuses for investigation already identified by the Prosecutor. Yet, the Court's mandate is limited in terms of addressing root causes, such as Israel's prolonged occupation, the closure of Gaza, and the continued denial of the right of the Palestinian people to self-determination, the continuation of which facilitates the commission of Rome Statute crimes.

Despite these limitations, the Court does have jurisdiction over the crime against humanity of apartheid and should investigate Israel's maintenance of an institutionalised regime of systematic racial domination and oppression, allegations of which the Office of the Prosecutor had already acknowledged receipt in 2017 (see here, para 63). In doing so, the ICC must take into consideration the broader context of Israeli fragmentation of the Palestinian people, including by examining crimes which cross the Green Line, such as the illegal transfer of Palestinian prisoners from the occupied territory to detention facilities in Israel, where detainees suffer from routine torture and other forms of ill-treatment.

Significance

Palestinian victims have long sought meaningful accountability for ongoing crimes committed against them. Representatives of Palestinian victims as well as Palestinian human rights organisations have played a central role thus far in engaging with the ICC process. The Court's outreach to Palestinian victims is a positive beginning, which must continue.

For many Palestinians, the ICC has come to represent an avenue of last resort in the pursuit of justice. The significance of an ICC investigation lies in its ability to challenge decades of Israeli impunity, within which the institutionalised oppression of Palestinians is deeply embedded. The ICC has the power to finally prosecute perpetrators of serious crimes committed in Palestine. It therefore provides an important avenue to pursue the implementation of the recommendations for accountability issued by the latest UN investigatory bodies on Palestine.

The UN Commissions of Inquiry on the 2014 Gaza Conflict and the 2018 Great March of Return demonstrations in the Gaza Strip, which were mandated to “identify those responsible”, compiled dossiers on alleged perpetrators and recommended that the Office of the High Commissioner for Human Rights make these files available to the ICC. The ICC's investigation into the Situation in Palestine must now build on the findings of these mechanisms.

Finally, as important as the ICC process is to challenge Israeli impunity, it is not sufficient on its own and must be pursued alongside other accountability avenues. The 2018 Commission of Inquiry stressed that states parties to the Rome Statute and/or the Fourth Geneva Convention have a duty to exercise criminal jurisdiction (see [here](#), para 128) and prosecute suspected perpetrators of crimes committed in Palestine in their own courts or extradite them. Crucially, such universal jurisdiction mechanisms generally do not present the ICC's temporal and geographic limitations and have been used in the past—albeit unsuccessfully—to challenge crimes committed against Palestinian refugees denied their right of return.

Conclusion

If the plight of the Palestinian people is to be meaningfully improved through international justice and accountability mechanisms, whether at the ICC or through universal jurisdiction, the root causes of Palestinian oppression must be addressed. Only treating symptoms of the wider displacement and dispossession of the Palestinian people would constitute little more than “temporary band-aids” at the expense of urgently needed structural change. Ultimately, international criminal justice—while essential to challenging Israeli impunity—must be supplemented by sanctions and other effective coercive measures by third states in an effort to end the illegal situation imposed on the Palestinian people and to prevent the commission of further crimes in Palestine.

Lectures *by* Students

Private military contractors and state crime: A case study of Blackwater in Iraq

by Muriel Imhof & Julia Goedeke

Abstract:

During the war in Iraq the US government used private military contractors, most notably Blackwater, to support their own forces. Over the course of the conflict Blackwater employees have been involved in shootings that have injured and killed Iraqi civilians without facing proportionate repercussions. This presentation explores the use of private military contractors and the challenges of holding them accountable.

National Prosecution of International Crimes

by Astrid Walter

Abstract:

In recent years, where international organizations such as the UN or the ICC seem to have failed to prosecute and judge international crimes that have raised international attention, national prosecutors have taken over. And still, though the application of Universal Jurisdiction can be seen in practice on an ever broader scale, its legal basis remains to present scholars with room for debate.

Criminal States and Legitimacy – Russia and the Nawalny Case

by R. & Lara Sophie Sander

Abstract:

The presentation is centered around the phenomenon of states maintaining their legitimacy in cases of state supported criminal activities. It will focus especially on the poisoning of Aleksey Nawalny in 2020 through the Russian FSB, his ensuing arrest on rather dubious claims and sentencing in January and February of 2021, as well as his imprisonment in Russian penal camps known to violate human rights standards. With other similar cases (Serge Skripal, murder in Tiergarten), the presentation will highlight the continuity of such actions by the Russian Federation and what symbolic effect (mainly intimidation) they entail. The main point of interest, however, is to show how the state succeeds to maintain an illusory legitimacy throughout those crimes

Consideration of the forced sterilization of indigenous peoples in Peru under the premise of genocide

by Cecilia Giebel

Abstract:

EU Asylum Policy at its external borders – A human tragedy or crimes against humanity?

by Franziska Heidgen & Celia Steffens

Abstract:

When it comes to EU Asylum Policy at its external borders, one can observe that, within the discourse about the mistreatment of asylum seekers on the Greek hotspots and at the Greek-Turkish land border, the use of a human tragedy-narrative is often dominant. Depicting the case of an Article 15 communiqué which has been brought to the Office of the Prosecutor of the International Criminal Court (ICC) by the 'The Syria Justice and Accountability Centre (SJAC)' in January 2021, we argue for a different framing, aiming at using the concept of crimes against humanity in order to point out that the phenomenon of state crime may apply to the current policy by Greece and the EU in a broader sense.

Repression and Racism in German law

by Friederike Drews

Abstract:

Addressing the issue of racial profiling as an intersectional phenomenon of criminalization, exclusion and dehumanization is a topic inherently linked to state violence. To comprehend the lived experiences of racist policing and criminalization, the interconnectedness between the security concept of the Global North and the colonial past of state law needs to be pointed out. The continuity of repressive practices in Germany is still visible in German regulatory law. This approach makes it possible to examine different forms of police violence and how an everyday state of emergency justifies this phenomenon.

Post-Graduate Course of State Crime: Crimes of the Powerful

Schedule

Mon, 21 June to Fri, 25 June 2021

Zoom: Meeting-ID: 980 2991 6865 / Code: SC-2021MR

	Mon, 21 June	Tue, 22 June	Wed, 23 June	Thu, 24 June	Fri, 25 June
Focus	Introduction	Counter Insurgency	History/Criminology	Counter Insurgency / Execution of sentences for war criminals	Transitional Justice
9:00-10:00	Introduction to the course Drenkhahn/Form	Protecting and/or Punishing the Population: The Contradictory Role of Civilians in Western Counterinsurgency Operations Markus Kienschlerf	Research on female perpetrators - an introduction Linn-Sophie Löber	Japanese counter-insurgency operations in occupied Southeast Asia (WWII) Sandra Wilson/Robert Cribb	Covid 19 and state crime Valeria Vegh Weis
10:00-10:30	<i>Break</i>	<i>Break</i>	<i>Break</i>	<i>Break</i>	<i>Break</i>
10:30-11:30	Introduction to the criminology of state crime Kirstin Drenkhahn	War on Terror Taxiarchis Fiskatoris	Prosecution of female supervisory staff in Poland after WWII Andrea Rudorff	Columbian peace agreement Beatriz Mayans-Hernida	Israel-Palestine before the ICC. Chantal Meloni
11:30-12:00	<i>Break</i>	<i>Break</i>	<i>Break</i>	<i>Break</i>	<i>Break</i>
12:00-13:00	The Crime of Aggression before the ICC Astrid Reisinger Coracini	COIN in Argentina – Forced Disappearances Valeria Vegh Weis	Women as victims of war crimes Wolfgang Form	Execution of sentences for war criminals after the Nuremberg trials Viktoria Pickarska & Sophie Straßer Students	Closing session (1 Hour) and Farewell
13:00-15:00	<i>Lunch</i>	<i>Lunch</i>	<i>Lunch</i>	<i>Lunch</i>	
15:00-16:00	R2P Taxiarchis Fiskatoris	The Colombian Special Jurisdiction for Peace and Prosecution of Serious Crimes in Macro Cases Gustavo Cote-Barco	14:30 - 15:30 State Crime and Memorials in Berlin Thomas Lutz & Kirstin Drenkhahn	Execution of sentences for war criminals Barbora Holá	
16:00-16:30	<i>Break</i>	<i>Break</i>	Students	<i>Break</i>	
16:30-17:30	Social Identity and International Crimes: Legitimate and Problematic Aspects of the 'Ordinary People' Hypothesis Stefan Harrendorf	Students Private military contractors and state crime: A case study of Blackwater in Iraq Imhof/Goedeke National Prosecution of International Crimes Walter	Criminal States and Legitimacy – Russia and the Navalny Case R./Sander Consideration of the forced sterilization of indigenous peoples in Peru under the premise of genocide Giebel	Students EU Asylum Policy at its external borders – A human tragedy or crimes against humanity? Heidgen/Steffens Repression and Racism in German law Drews	