The Normative Framework of
International Humanitarian Law
Overlaps, Gaps and Ambiguities

M. Cherif Bassiouni

The year 1998 marked the fiftieth anniversary of the Universal Declaration of Human Rights\(^1\) and the Convention on the Prevention and Punishment of the Crime of Genocide,\(^2\) respectively adopted on the tenth and ninth of December 1948. The year 1998 marked also the birth date of the Treaty on the Establishment of an International Criminal Court adopted in Rome on July 17, 1998. On this occasion, it is important to take stock of international law’s progress, to assess how much its veneer has thickened, and to determine what needs to be done to make more effective its goals of prevention and control. Since most of the world’s victimization occurs in violation of international law’s proscriptions against war crimes, crimes against humanity, and genocide, this article will deal with the weaknesses of the normative framework of these three *jus cogens* crimes. My purpose is to eliminate, or at least substantially narrow, the legal loopholes through which the perpetrators of war crimes, crimes against humanity, and genocide are able, with impunity,

An earlier version of this article was published in *8 Transnat’l L & Cont. Prob* 199 (1998).

The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.
The Nonnative Framework of International Humanitarian Law

to escape accountability for their international crimes and widespread violations of fundamental human rights.

International humanitarian law is that body of norms that protects certain categories of persons and property and prohibits attacks against them during the course of armed conflicts be they of an international or non-international character. These norms derive from conventional and customary international law which are respectively referred to as the "Law of Geneva" (for the conventional law of armed conflicts) and the "Law of The Hague" (for the customary law of armed conflicts). The "Law of The Hague" is not, however, exclusively customary law because it is in part treaty law and the "Law of Geneva" is also not exclusively treaty law because it includes customary law. Thus, the traditional distinction between conventional and customary law is substantially eroded. Additionally, the treaty law that applies to weapons derives from customary as well as conventional law, and some of its specific norms have become part of customary law. In sum, in the last one hundred years, the evolution of the dual sources of international humanitarian law, namely conventional and customary law, have become so intertwined and so overlapping that they can be said to be two sides of the same coin. The nomenclature the "Law of Geneva" and the "Law of The Hague" is therefore only a useful shorthand label.

In addition to this historic dual-track evolution of the law of armed conflicts, two additional developments have expanded the general scope of the term "international humanitarian law," namely, the proscriptions against crimes against humanity and genocide. The first originated as an outgrowth of war crimes even though it subsequently evolved into a distinct category of international crimes; the second, though originally intended to encompass crimes against humanity, also evolved into a distinct and separate category of international crimes. The norms contained in these three major international crimes—war crimes, crimes against humanity, and genocide—have become part of jus cogens. Deriving from multiple legal sources, they overlap relative to their context, content, purpose, scope, application, perpetrators, and protected interests.

These norms also contain certain ambiguities and gaps, the existence of which is due essentially to two factors. The first is the haphazard evolution of international criminal law. The second is that governments, which control the international legislative processes, are not, for a variety of reasons, though mostly for political reasons, desirous of eliminating the overlaps, closing the gaps, and removing the ambiguities—not a surprising fact given that two of the three categories of crimes, crimes against humanity and genocide, occur
with deliberate State action or policy, and that governments are not particularly inclined to criminalize the conduct of their high officials. War crimes can also be a product of State action or policy, but frequently are committed by individual combatants acting on their own, which probably explains why there is less reluctance to criminalize this type of individual criminal conduct.

Crimes against humanity and genocide are essentially crimes of State, as are sometimes war crimes, because they need the substantial involvement of State organs, including the army, police, paramilitary groups, and the State’s bureaucracy. These crimes generate significant victimization and must be strenuously deterred. Nevertheless, governments are reluctant to remove the ambiguities in the relevant normative provisions applicable to crimes against humanity and genocide, and to fill the existing gaps in these proscriptions. The individual criminal responsibility of soldiers and others in the lower echelons of State power is much more easily accepted by governments than that of political leaders and senior government officials and, as well, those in the governmental bureaucracy who carry out, execute, and facilitate the policies and practices of crimes against humanity, genocide, and even war crimes. Indeed, the articulation of relevant international norms effectively shields them from criminal responsibility; existing international norms of criminal responsibility relative to crimes against humanity, crimes of genocide, and even war crimes, are too ambiguous to reach effectively into this category of violators. This renders their prosecution virtually impossible.

Since World War II, there have been an estimated 250 conflicts of an international, non-international, and purely internal legal character. The estimates of the resulting casualties reach as high as 170 million. Most of that victimization occurred at the hands of tyrannical regimes and by non-State actors during internal conflicts. This tragic new dimension in world victimization requires a reexamination of international humanitarian law to make it unambiguously applicable to non-State actors, and to reconcile their overlapping application, fill in their gaps, and clarify their ambiguities so as to render their enforcement sufficiently effective to prevent, deter, and punish the perpetrators of such crimes. This article discusses these questions.

**Crimes Against Humanity**

Crimes against humanity originated after World War I in the concept of "crimes against the laws of humanity," a term found in the Preamble to the 1907 Hague Convention.
Until a more complete code of laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience.\textsuperscript{17}

After the war, in 1919, the Allies established a Commission to investigate war crimes\textsuperscript{18} which thereafter found that the killing of Armenians by the Turks around 1915\textsuperscript{19} constituted “crimes against the laws of humanity.” The United States and Japan strongly objected to the concept and insisted on having their dissenting positions reflected in the Report.\textsuperscript{20} In 1923, after the failure of ratification of the 1919 Treaty of Sèvres,\textsuperscript{21} which required that the Turkish government turn over to the Allies those responsible for such crimes, the Treaty of Lausanne\textsuperscript{22} excluded such a provision and a protocol was attached, giving amnesty to the Turks who had committed the crime irrespective of whether they acted as State actors or non-State actors.\textsuperscript{23} By 1942, the Allies realized that they would have to revisit that crime,\textsuperscript{24} and in 1945 the London Charter provided, in Article 6(c), for the prosecution of those who committed “crimes against humanity.”

Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian populations, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.\textsuperscript{25}

But that article linked Article 6(c) crimes to “crimes against peace” (the initiation and conduct of war) as defined in Article 6(a) and to “war crimes” as defined in Article 6(b). This meant that all “crimes against humanity” committed before the initiation of the war, between 1932 and 1939, were not prosecutable.\textsuperscript{26}

The war-connecting link was removed in a 1950 Report of the International Law Commission (ILC).\textsuperscript{27} The question that remained, however, was the legally binding effect of such a report.\textsuperscript{28} On its face, a report of the ILC has no binding effect, unless it is deemed to be the embodiment of customary international law, in which case the ILC report can be seen as the progressive codification of customary international law and therefore binding as to its content. However, the practice of States remains an important element in addition to
the element of *opino juris* to establish customary international law, and this practice seems to be somewhat wanting because there are few States that have prosecuted persons for such crimes. Moreover, no convention on crimes against humanity has been developed since 1945, even though many other conventions on various international crimes have been adopted since that time. There is no rational explanation for this gap other than the lack of political will by governments.

The next opportunity to reaffirm the London Charter's "crimes against humanity" arose in 1993 when the Security Council adopted the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY). In this statute, however, the connection to an armed conflict was preserved with Article 5 requiring that "crimes against humanity" take place in the context of "an armed conflict" of an international or internal character. The difference between the war-connecting link of the London Charter's Article 6(c) and the ICTY's Article 5 is the addition in Article 5 of a conflict of an internal character.

In 1994, however, when the same Security Council adopted the Statute for the International Criminal Tribunal for Rwanda (ICTR), it did not include any war-connection whatsoever. Why the change? One explanation is that the ICTY's formulators sought to preserve the London Charter's requirement, though expanding it to internal conflicts, to offset arguments that Article 5 of the ICTY departed from existing customary law. Since there was no convention on crimes against humanity, that category of crimes had to be deemed as falling within customary law. But with respect to the ICTR, the Government of Rwanda was not expected to challenge the absence of such a requirement. To have included such a war-connecting requirement in the ICTR statute would have meant that prosecutions for such crimes would have been impossible because that conflict was purely internal.

An examination of the contents of crimes against humanity as defined in Article 6(c) of the Nuremberg Charter reveals that it covers the following acts: "murder, extermination, enslavement, imprisonment, deportation or other inhumane acts," and "persecution." The ICTY and ICTR added "rape" for specificity. However, the ICTR also added the restrictive requirement not present in the ICTY; that the acts constituting the crime must be the result of "widespread or systematic" practices. Furthermore, some of the terms used in the London Charter's Article 6(c), the ICTY's Article 5, and the ICTR's Article 3 may be deemed to lack sufficient specificity to satisfy the "principles of legality" required in the world's major legal systems. For example, "other inhumane acts" can be deemed vague, "murder" overlaps with "extermination,"
and "imprisonment" and "deportation" can be lawful. Of course, careful judicial interpretation can avoid such vagueness and ambiguity, but that presupposes the existence of a judicial process that can develop a clear and precise jurisprudence, and in that respect much is expected from the ICTY and ICTR.

Another issue concerning "crimes against humanity" is whether it is essentially a category of mass victimization crimes, which is predicated on the existence of State-action or State-policy, or whether it is but a catch-all category for mass crimes even when committed by non-State actors. The formulation of Article 6(c) raises that issue relative to whether "persecution" is a required policy element or simply another genre of the specific crimes listed in Article 6(c), or indeed, whether it is both a specific type of prohibited act as well as a policy element applicable to State and non-State actors alike. In this writer's judgment, "crimes against humanity" as set forth in Article 6(c) is no mere catch-all category for mass victimization, but rather a category of international crimes, distinguishable from other forms of mass victimization by the jurisdictional policy element of a "State action or policy." But when the ICTR's Article 3 was made to qualify Article 6(c)'s policy of persecution by the addition of the terms "widespread or systematic," the drafters, while doubtless seeking to tailor the definition of "crimes against humanity" to the Rwandan conflict, brought about a progressive development. This is evidenced in the disjunctive "or" as opposed to the conjunctive "and." If the mass victimization can be only "widespread" and not also "systematic," then it can be the spontaneous consequence of a given conflict and not necessarily a reflection of "State action or policy."

The statute of the ICC adopted in Rome on July 17, 1998, follows the ICTR's precedent in that it states in its Article 7 that "for the purpose of this statute, 'crimes 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..." At the same time, the ICC Statute's Article 7(h) makes "persecution" specifically prohibited conduct; and while it is one of the forms of carrying out an "attack directed against any civilian population," the persecution of a group of persons is by its very nature possible only as a consequence of State action or policy carried out by State actors or non-State actors, or the product of policy carried out by non-State actors. In fact, most of the specific crimes listed within the meaning of this definition can occur only as a result of State action or policy carried out by State actors or non-State actors: "(b) extermination; (c) enslavement; (d) deportation or forcible transfer of population;... (j) the crime of Apartheid." The other specifically listed crimes presumably can be committed by individuals without the existence of State action or policy. But clearly if such crimes are directed against
a "civilian population," they are necessarily the product of State action or policy carried out by State actors or the product of policy of non-State actors. These specific crimes are:

(a) murder; . . . (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; . . . (i) enforced disappearance of persons; . . . (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.52

Thus, the element of State policy for State actors and that of policy for non-State actors is dominant throughout this latest definition of "crimes against humanity."

The element of State action or policy is not the only distinguishing international jurisdictional characteristic of crimes against humanity,53 it carries with it also certain implications concerning the criminal responsibility of a State’s agents who contribute to the overall execution of the State’s plan or policy. Thus, if it is established that a State has developed a policy, or carried out a plan, or engaged in acts whose outcomes include the crimes contained in the definition of crimes against humanity, then those persons in the bureaucratic apparatus who brought about, or contributed to, that result could be charged with complicity to commit crimes against humanity. Further those who intended to carry out the policy could be charged with the commission of that crime, or at least, with complicity to commit that crime.54 The responsibility of State agents arises in this case irrespective of whether their conduct was lawful under national law. However, it is important to note that the policy element, whether developed or carried out by State actors or non-State actors, is the jurisdictional element that makes “crimes against humanity” a category of international crimes and that distinguishes it from other forms of mass victimization which otherwise are within national criminal jurisdiction. On June 30, 2000, the Preparatory Commission adopted the Elements of Crimes55 for the three ICC crimes.56

Between the Nuremberg formulation of Article 6(c) in 1945 and the ICTR’s formulation of Article 3 in 1994, “crimes against humanity” have shifted from a category of crimes applicable only to situations involving State policy or action to situations involving non-State actors. This shift has been evidenced in the ICTR and ICC Statutes which provide the requirements of “widespread or systematic” and “attack against any civilian population.” The combination of the
two requirements makes the crime applicable to both State and non-State actors; and also applicable in time of peace and war, without any connecting link to the initiation or conduct of war or to war crimes.

Other than these two formulations, "crimes against humanity" never have been the subject of a specialized international convention, thus leaving some doubt as to some of the specific contents of that category of international crimes and as to their applicability to non-State actors. This is evident in the eleven international instruments that have been elaborated between 1907 and 1998 and that define, in different though similar ways, "crimes against humanity." Thus, "crimes against humanity" remain part of customary law, with a mixed baggage of certainty as to some of its elements, and uncertainty as to others and to their applicability to non-State actors.

A textual comparison of these formulations evidences the differences between them. It also evidences the overlap that exists between genocide and war crimes relative to the protected targets and prohibited conduct.

Genocide

In defining protected groups the Convention on the Prevention and Punishment of the Crime of Genocide, specifies only three, namely: national, ethnic, and religious groups. This enumeration excludes political and social groups, an omission that was no accident. The Convention was elaborated in 1948, and at that time the USSR was not desirous of having political and social groups included in those being given protection because Stalin and his regime already had begun their purges which targeted these very groups. As a consequence of this omission, the killing of an estimated one million persons in Cambodia by the Khmer Rouge between 1975 and 1985, almost forty percent of the population, can be argued to have not constituted genocide because the perpetrators and victims were of the same ethnic group and because the targeted victim group was a political group which is not covered by the Convention.

This gap in the Genocide Convention is well-known, but at no time since 1948 has there been any effort to fill it. In fact, three opportunities were never seized. The Statutes of the ICTY in 1993 and the ICTR in 1994 were adopted with the same formulation as Article II of the Genocide Convention. Later, in connection with the elaboration of the Statute of the International Criminal Court, the Preparatory Committee failed to support any changes to Article II of the Genocide Convention.

As stated, the Genocide Convention protects three groups, national, ethnic, and religious. It also specifies that there must be a specific “intent to destroy
[the protected group] in whole or in part.” This requirement makes it appear that the criminal responsibility befalls essentially those who plan, initiate, or carry out the policy that is specifically intended to produce the result of destroying the protected group “in whole or in part,” and leaves open the questions of the responsibility of those in the lower echelons of the execution of such a policy and the legal standards required to prove it. The requirement of specific intent in the criminal laws of most legal systems is more difficult to prove than that of general intent. General intent can be proven inferentially by the legal standard of what the ordinary reasonable person would have known under existing circumstances. This difficulty is especially true of lower echelons of executors where typically there exists no “paper trail.” But to prove specific intent by higher echelons may also be arduous if there is no paper trail. The reason is that the Genocide Convention was drafted with the Nazi experience in mind; the Germans, who were meticulous in everything, left behind a detailed paper trail. But this situation never has been repeated. In the Yugoslav and Rwandan conflicts, for example, a paper trail, if it exists, has yet to be found, and it may never be made public by those who have the information. The same is true of other conflicts such as Cambodia. There are, moreover, conflicts where a paper trail exists but has not been made public.

In addition to the issue of specific genocidal intent, which is fraught with evidentiary difficulties, there is the question of whether the protected group can be identified differently. For example, can it be based on gender, or limited to a group in a given area? The Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), which investigated violations of international humanitarian law in the former Yugoslavia, concluded that these two questions can be answered in the positive. In the French trial of Papon who was convicted on April 2, 1998 of complicity for “crimes against humanity” as defined in French criminal law, the central issue, where “genocide” was frequently referred to though the charge was only “crimes against humanity,” was how to prove complicity in these types of crimes by agents of the State. When a person charged is a bureaucrat operating in a large bureaucracy, it is so far unclear how individual criminal responsibility can be established for such a person where no specific criminal act is accomplished, but whose administrative function aids in the ultimate conduct. These questions remain unanswered by the norms applicable both to “genocide” and to “crimes against humanity.”

Lastly, a question arises as to “genocide,” and that is the nature and size of the “group” targeted for elimination “in whole or in part.” Is it the entire group as it exists in the world, or a smaller portion of that group which is identified and targeted by the perpetrators? Could it be, for example, that portion of
The Normative Framework of International Humanitarian Law

the group that inhabits a certain area, or a given town, or a segment of that
group such as the intellectuals or the women in that group? That was the issue
that faced the Commission of Experts\(^7\) in determining whether "ethnic
cleansing"\(^7\) could be deemed a form of genocide. Similarly, the issue arose with re-
spect to the policy of systematic rape of the women of a certain identifiable group.\(^8\)

The Genocide Convention leaves these questions unanswered, but it would
be valid to consider the Convention as susceptible of progressive interpretation
in light of the new techniques that nefarious planners devise to achieve their
evil goals. The Genocide Convention justifies an evolving interpretation that
fulfills its goals and purposes.\(^8\)

Since 1948, "genocide," as defined in the Genocide Convention,\(^8\) has been
embodied in three international instruments, to wit, the statutes of the
ICTY,\(^3\) ICTR,\(^4\) and the Statute of the International Criminal Court,\(^5\) and
the incorporation of Article II of the Genocide Convention into these three in-
struments has been without change.\(^6\) Accordingly, none of the problems evi-
dent since 1948 have been addressed to date.

The ICC Statute, Article 6, basically adopted the Genocide Convention's
formulation with almost no change,\(^7\) except that of combining in one article
the provisions contained in Articles 2 and 3 of the Genocide Convention.

War Crimes

The regulation of armed conflicts has two sources: (1) conventional law,
also referred to as the "Law of Geneva," consisting of the four Geneva conven-
tions of 1949\(^8\) plus two additional protocols of 1977\(^9\) relating to "conflicts of
an international character" and to "conflicts of a non-international character;"
and (2) customary law, also referred to as the "Law of The Hague," which refers
to the customary practices of States.\(^0\)

As stated above, however, the "Law of The Hague" is not exclusively cus-
omy law because it is in part treaty law and the "Law of Geneva" is also not
exclusively treaty law because it incorporates customary law. Thus, the tradi-
tional distinction between conventional and customary law is substantially
eroded. Additionally, the treaty law that applies to weapons derives from both
customary and conventional law, and that body of treaty law, as well as some of
its specific norms, has become part of customary law. Customary law, however,
is binding only on the States that share in the custom and that express their will
to be bound by it unless it becomes a general custom that is binding on all
States. Consequently, States that do not follow the custom, unless it is a general
custom, are not bound by it as a legal obligation. Nevertheless, a custom can
rise to such a level of general acceptance that it may become binding even on those States that do not share in the custom or that may express their will not to be bound by it. This applies to those general customs that rise to a higher level of acceptance and which reflect a universal sense of opprobrium, namely *jus cogens* or a peremptory norm of international law. Among the international crimes that fall within this category are: aggression, genocide, "crimes against humanity," war crimes, slavery and slave-related practices, torture, and piracy. In time, other international crimes may rise to that level and be deemed *jus cogens* crimes.

In 1899 and then again in 1907, the customary law of armed conflicts was "codified" in the Hague Convention Respecting the Laws and Customs of War on Land. But that codification was applicable only to States and only when a conflict was between States—in other words, a "conflict of an international character," as that term was developed subsequently in the 1949 Geneva Conventions. Contrary to general belief, the 1907 Hague Convention did not establish the principle of individual criminal responsibility for the enunciated violations, but only the principle of compensation, which was incumbent upon the violating State. It was only in time, starting with the aftermath of World War I, but more particularly in the aftermath of World War II, that the principles of individual criminal responsibility, and of command responsibility under international law, were made part of customary law.

In addition to this original customary law of armed conflicts, a number of international instruments have been executed. Most of these cover the use or prohibition of use of certain weapons in time of war, the prohibition of certain weapons at all times, and the prohibition of emplacement of weapons in certain places at any time, as well as the protection from destruction and pillage of cultural property in the time of war. There is a divergence of views among governments and experts as to which of these treaties rise to the level of a general custom and which do not. Nevertheless, a general custom has evolved from the cumulative effect of these treaties that weapons that "cause unnecessary pain and suffering" are prohibited even though what these weapons are is still the subject of debate.

The "Law of Geneva" (four Geneva Conventions of 1949 and portions of Protocols I and II which embody customary law) are also deemed to have risen to the level of a general custom. They are therefore binding on all States irrespective of whether a given State has or has not ratified one of them. But it should be noted that some States maintain that not all of Protocols I and II codify customary international law and therefore some of their provisions are still deemed to be part of conventional law which is applicable only to States parties.
As a result, there is an overlap in the binding legal effect of these conventions since they are first binding on their signatories, then also binding on the same signatories and on all other States because they are part of customary law. But some governments, like the United States, argue that only portions of Protocols I and II, which the United States has not yet ratified, have risen to the level of a general custom. Selecting what is and what is not part of custom is not only a challenging legal exercise, but one that is fraught with political considerations.

As earlier noted, the "Law of Geneva" is divided into two categories: (1) "conflicts of an international character" where violations (war crimes) are referred to as "grave breaches"—well defined, but applicable only to armed conflicts taking place between States; and (2) "conflicts of a non-international character" where violations are not referred to as "grave breaches"—involving a foreign element, according to some, but applicable mainly to armed conflicts between a State and a belligerent or insurgent group within that State. There are, therefore, two regimes applicable to war crimes within the "Law of Geneva:” the "grave breaches" regime of the four Geneva Conventions of 1949 and Protocol I, in addition to the "violations" regime of common Article 3 of the four Geneva Conventions of 1949 and Protocol II. Within the first "grave breaches" regime, war crimes are not limited to "grave breaches" but extend to other transgressions of norms contained in these codifications which also incorporate customary law. Within the second "violations" regime there is lingering reluctance to consider all the transgressions of norms contained in Protocol II as war crimes. In that regime, "violations" of common Article 3 are deemed war crimes and require no foreign element to make common Article 3 applicable; but, Protocol II, which applies to this regime, precludes the application of common Article 3 to conflicts between dissident groups within a given State. Thus, the two regimes of the "Law of Geneva" exclude most of those conflicts that may be deemed purely internal conflicts, including tyrannical regime victimization, even though these types of conflicts have caused most of the world's wartime victimization since World War II.

As noted, conflicts of a "non-international character" are regulated in the 1949 Geneva Conventions by a single article, common to all four conventions—common Article 3. Protocol II expands upon common Article 3 relative to what that article deems to be "violations" and not "grave breaches." But, common Article 3 and Protocol II are limited in scope and do not have the specificity or detail contained in the articles defining "grave breaches." The "grave breaches" contained in common Articles 50, 51, 130, and 147 of the 1949 Geneva Conventions embrace nine categories of war crimes:
1. wilful killing (I-IV Conventions);
2. torture or inhuman treatment, including biological experiments (I-IV Conventions);
3. wilfully causing great suffering or serious injury to body or health (I-IV Conventions);
4. extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (I, II, and IV Conventions);
5. compelling a prisoner of war or a protected person to serve in the forces of the hostile Power (III and IV Conventions);
6. wilfully depriving a prisoner of war or a protected person of the rights of fair and regular trial prescribed in the Convention (III and IV Conventions);
7. unlawful deportation or transfer of a protected person (IV Convention);
8. unlawful confinement of a protected person (IV Convention); and
9. taking of hostages (IV Convention).

To be considered a “grave breach,” each of the categories listed above must be committed against persons or property protected by the relevant conventions.

Common Article 3 of the four Geneva Conventions does not categorically establish that “violations” of that provision are war crimes, but scholars have interpreted common Article 3 violations as constituting war crimes. Article 4(2) of Protocol II, expanding on Article 3 of the four Geneva Conventions, provides:

Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:

(a) violence to the 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;
(b) collective punishments;
(c) taking of hostages;
(d) acts of terrorism;
(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
(f) slavery and the slave trade in all their forms;
(g) pillage; and
(h) threats to commit any of the foregoing acts.
Cognate provisions further provide that certain fundamental protections be observed: (1) humane treatment for detained persons, such as protection from violence, torture, and collective punishment; (2) protection from intentional attack, hostage-taking, and acts of terrorism of persons who take no part in hostilities; (3) special protection for children to provide for their safety and education and to preclude their participation in hostilities; (4) fundamental due process for persons against whom sentences are to be passed or penalties executed; (5) protection and appropriate care for the sick and wounded, and medical units which assist them; and (6) protection of the civilian population from military attack, acts of terror, deliberate starvation, and attacks against installations containing dangerous forces. However, Article 4(2) of Protocol II is narrow in scope: (1) it applies only to internal conflicts in which dissident armed groups are under responsible command and exercise control over such a part of the national territory as to carry out sustained and concerted military operations; (2) it has the effect of excluding many internal conflicts in which dissident armed groups occupy no significant territory but conduct sporadic guerrilla operations over a wide area; (3) it does not guarantee all the protections of the Conventions for international armed conflicts, e.g., prisoner-of-war treatment for captured combatants; and (4) it does not contain provisions to punish offenders—non-international conflicts are not covered by the definition of “grave breaches” contained in the 1949 Geneva Conventions and its Protocol I.

The essential differences between the explicit obligations arising from the two normative regimes deemed “grave breaches” and “violations” arise with respect to the duties and rights associated with their enforcement. For “grave breaches” the duties are: (1) to investigate; (2) to prosecute; (3) to extradite; and (4) to assist through judicial cooperation of investigations; and the rights include (1) the right for any State to rely on universal jurisdiction to investigate, prosecute and punish; (2) the non-applicability in national or international processes of statutes of limitations; (3) the non-applicability of the defense of “obedience to superior orders”; and (4) the non-applicability of immunities including that of Head of State. The same duties and rights are not explicit relative to “violations” of common Article 3, and thus a normative gap exists with respect to the enforcement consequences that arise out of transgressions of these two regimes. There is, however, a notable trend among legal experts to consider such formalism as historically dépassé and to consider the same enforcement consequences applicable to both legal regimes.

The formal distinctions discussed above, and the gaps that exist in their scope, application, protection, and enforcement, are no longer tenable. The “writings of the most distinguished publicists” agree that there should be no
distinctions between "grave breaches" and "violations" of common Article 3 and Protocol II; they agree that both contain equally enforceable prohibitions carrying the same enforcement consequences.\textsuperscript{111} They do so at least in part because the overwhelming majority of post-World War II conflicts have been of a "non-international character,"\textsuperscript{112} and because these conflicts have produced an overwhelming number of victims. As noted above, there have been, since World War II, some 250 conflicts and internal tyrannical regime victimizations that have produced an estimated 170 million casualties.\textsuperscript{113} Thus, to maintain a distinction between these two legal regimes and their enforcement consequences ignores the purpose of these regimes, which is to protect innocent victims from harm.

For purposes of war crimes, however, the distinction between types of conflicts and the legal regimes applicable to them does not apply with respect to crimes against humanity and genocide. These two categories of crimes are deemed applicable in time of peace as well as in time of war. The most significant problems arising out of overlaps and gaps in the law of armed conflict are the legal standards applicable in distinguishing between conflicts of an international and non-international character, and in ascertaining the relevant parts of conventional and customary law of armed conflicts applicable to these contexts, considering that the two sets of norms mirror one another.\textsuperscript{114} Another layer of confusion originates in doctrines of international law from which improvident extrapolations are made into the law of armed conflicts; legal interpretation and analysis of these two overlapping areas are thus frequently more confusing than they are elucidating.

The foregoing observations were evidenced in two related judgments by the ICTY. The first was in connection with the Tadić jurisdictional appeal case.\textsuperscript{115} Commenting on that judgment Professor Meron notes:

The appeals chamber's expansive interpretation that "laws or customs of war" in Article 3 of the Tribunal's Statute reach noninternational armed conflicts largely avoided the worst possible consequences. However, the chamber refused to use Article 3 of its Statute (laws and customs of war) as a conduit to bring in as customary law conduct comprising grave breaches of the Geneva Conventions (grave breaches are the subject of Article 2 of the Statute; these can be regarded as customary law whose content parallels the pertinent provisions of these Conventions). The grave breaches are the principal crimes under the Conventions. Thus deprived of the core of international criminal law in cases deemed to be noninternational, the Tribunal can only raise the level of actionable violations to crimes against humanity and perhaps, in the future, genocide. Not only does this handicap the Tribunal's ability to carry out its
mandate, but some commentators also criticize the resort to such heavy artillery against evil, but relatively minor, actors. Disregarding considerations of judicial economy, the appeals chamber has therefore enabled the creation of a crazy quilt of norms that would be applicable in the same conflict, depending on whether it is characterized as international or noninternational. No less, the potential for unequal and inconsistent treatment of the accused is great. Fortunately, until Tadić, the decisions of the trial chambers on indictments pursuant to Article 61 of the Tribunal's Rules of Procedure and Evidence found that the situations involved international armed conflicts and that the grave breaches provisions were therefore applicable, avoiding potential chaos.116

Meron then further notes that the decision was not inevitable, as the proposition that the fighting was part of an international armed conflict—a proposition advanced by the Commission of Experts, the U.S. Government, and many scholars—was a position known to the majority of the appeals chamber though one they chose not to adopt. Further, Meron notes, Judge Georges Abi-Saab proposed terming the fighting as part of non-international armed conflicts, but including “grave breaches” within the applicable customary law.117

The fact remains, however, that the ICTY eschewed this reasoning. Worse, the subsequent Tadić judgment on the merits erroneously applied another international law standard to the issue presented.118 In that decision, the Tadić majority erroneously applied the international law standard of State responsibility to determine whether a conflict is or is not of an international character. In so doing, the Tribunal relied on the opinion of the International Court of Justice in Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.).119 The Court, however, failed to appreciate that the agency relationship needed to establish State responsibility, essentially for the purposes of civil damages, is distinguishable from the legal standard required to establish whether a given conflict is of an international or non-international character. Meron, aptly commenting on this confusion, writes:120

[The Tadić case] was not an issue of (state) responsibility at all. Identifying the foreign intervenor was relevant to characterizing the conflict. . . . Conceptually . . . [the Nicaragua test] cannot determine whether a conflict is international or internal. In practice, applying the Nicaragua test to the question in Tadić produces artificial and incongruous conclusions.

Indeed, even a quick perusal of international law literature would establish that imputability is not a test commonly used in judging whether a foreign intervention leads to the internationalization of the conflict and the applicability of

16
those rules of international humanitarian law that govern armed conflicts of an international character.

This decision led several government experts at the ICC Diplomatic Conference to express their fear that, unless the war crimes provision of Article 8 was clearly and unambiguously drafted, judges may, in the future, interpret Article 8 in a confusing or expansive manner, and thus create new law by judicial fiat. Such concern for strict judicial interpretation did not however produce the desired lack of ambiguity. On the contrary, it gave, in my opinion, more opportunities for non-strict interpretative approaches.

Thus, in these two judgments, which are the first of an international jurisdiction since the close of World War II and the subsequent proceedings at Nuremberg\(^1\) and in the Far East,\(^2\) we find more confusion than clarity regarding the following issues:

### A. Generally
1. What norms of conventional law of armed conflicts have become part of customary law, and how is that evidenced?
2. What norms of customary law have been codified in conventional law, and how is that evidenced?

### B. Specifically
1. Does customary law include all the “grave breaches” of the 1949 Geneva Conventions?
2. Does customary law include all or some of the “grave breaches” of Protocol I, and, if so, which ones?
3. Does customary law include common Article 3 of the 1949 Geneva Conventions?
4. Does customary law include all or some of the provisions of Protocol II, and, if so, which ones?
5. What other treaties on the regulation of armed conflicts, particularly those concerning the prohibition and use of certain weapons, have become part of customary law,\(^3\) and on what basis?

### C. Legal Standards
1. Are the standards applicable to State responsibility applicable also to the determination of whether a conflict is of an international or non-international character; and, if applicable, is it exclusively applicable or simply applicable as one of several legal standards?
2. Is the determination of the nature of a given armed conflict based on one or more standards deemed part of customary law, and, if so, to what extent does customary law rely on legal standards that derive from:

(a) Common Article 3 of the 1949 Conventions; and
(b) Protocol II.

These and other questions still loom large in the law of armed conflicts; and, as stated above, they were reflected in the range of governmental positions on the definition of war crimes in the draft statute of the ICC. In 1995, the United Nations General Assembly established an Ad Hoc Committee for the Establishment of an International Criminal Court. In 1996, it established a Preparatory Committee for an International Criminal Court. Subsequently, during three-and-a-half years of deliberations, the question of defining war crimes became the subject of detailed discussions. Questions were raised, in particular, about whether all of the contents of Protocols I and II have risen to the level of customary law, about the specific contents of customary law, and still more particularly, about the rules governing conflicts of a non-international character and the prohibitions of the use of certain weapons in all categories of conflicts. While there was no dispute that the “grave breaches” provisions of the 1949 Geneva Conventions are applicable, and substantial agreement that most of the “grave breaches” in Protocol I are included, there was less agreement that some of the Protocol II prohibitions can be deemed part of custom. In fact, the texts proposed, and the one adopted reflect, a partial regression from the norms contained in Protocol I and a substantial regression from the norms contained in Protocol II. The draft provision submitted to the diplomatic conference evidences these divergent views. The chart was developed and circulated at the Preparatory Committee for the Establishment of an International Criminal Court and, in setting forth the various sources for the provisions, highlights the overlaps and gaps.

The ICC adopted a similar text but the distinction between conflicts of an international and non-international character is reflected in the distinction between “grave breaches” and other violations of common Article 3 in this instance. Protocols I and II are neither specifically nor entirely applied, but norms are taken selectively therefrom and are listed under what can be termed “war crimes” under customary law. Subparagraph 2(a) of Article 8 refers specifically to the “Grave Breaches of the Geneva Conventions of 12 August 1949…” and lists eight such under this heading:
(i) Wilful killing;
(ii) Torture or inhuman treatment, including biological experiments;
(iii) Wilfully causing great suffering, or serious injury to body or health;
(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
(vii) Unlawful deportation or transfer or unlawful confinement;
(viii) Taking of hostages. 129

Subparagraph 2(b) of Article 8 refers to "Other serious violations of the laws and customs applicable in international armed conflict ..." 130 It incorporates the customary law of armed conflict and some of the provisions of Protocol I.

In subparagraphs 2(c) and 2(d) of Article 8, the ICC Statute then focuses on the distinction between conflicts of an international character and those of a non-international character. In so doing, it invokes the domain of common Article 3 of the four 1949 Geneva Conventions. Subparagraph 2(c), focusing on "the case of armed conflict not of an international character," refers to the serious violations of Article 3 common to the four Geneva Conventions of August 12, 1949, 131 thus adding the limitation of "serious" to the "violations" of common Article 3 for the exclusive purposes of the ICC's statute. Subparagraph 2(c), like subparagraph 2(a), embodies the contents of the 1949 Geneva Conventions, the former relative to "grave breaches" and the latter relative to the prohibitions contained in common Article 3. The latter prohibits the following acts:

(i) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (ii) committing outrages upon personal dignity, in particular humiliating and degrading treatment; (iii) taking of hostages; (iv) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable. 132

Subparagraph 2(d) of Article 8 emphasizes, like Protocol II, that subparagraph 2(c) "does not apply to situations of internal disturbances and tensions, such as riots, isolated and specific acts of violence or other acts of a similar nature." 133 The specificity contained herein by far exceeds what Protocol II contains and it is therefore specific to this statute.

19
Subparagraph 2(e) of Article 8 is the counterpart of subparagraph 2(b) and it applies customary law to armed conflicts not of an international character. What follows is an extensive list that includes most of the provisions of Protocol II and overlaps in part with common Article 3. It also adds several specifics that Protocol II does not contain, but which have come to be recognized as part of customary law. Further, it is progressive when it comes to sexual violence in (vi) and to the protection of children in (vii). It reads as follows:

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

(i) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
(ii) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva conventions in conformity with international law;
(iii) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the law of armed conflict;
(iv) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
(v) pillaging a town or place, even when taken by assault;
(vi) committing rape, sexual slavery, enforced prostitution, enforced pregnancy, as defined in Article 7, paragraph 2, enforced sterilization, and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions;
(vii) conscripting or enlisting children under the age of fifteen years into armed forces or groups using them to participate actively in hostilities;
(viii) ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
(ix) killing or wounding treacherously a combatant adversary;
(x) declaring that no quarter will be given;
(xi) subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the
person concerned nor carried out in his interest, and which cause death to or
seriously endanger the health of such person or persons;

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

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

The structure of the foregoing formulation of “war crimes” is thus divided
into four parts, reflecting the different sources of applicable law, conventional
and customary, and the two relevant contexts, of international and
non-international conflicts. Regrettably, these distinctions were maintained
even though the overlaps are glaringly evident. Suffice it to compare subpara-
graphs 2(b) and 2(e) which incorporate what the drafters believed to be cus-
tomary law, even though it also clearly reflects existing conventional law, to
wit, Protocol II. 134 The ICC missed the opportunity to eliminate these distinc-
tions and to focus on the protected persons and protected targets irrespective
of the conflicts’ context. But, then, the ICC was an exercise in political feasibil-
ity, not progressive codification. From this perspective, it must be said that the
definition of “war crimes” is as good as can be achieved at the present time, tak-
ing into account the diversity of concerns and interests. 135

Overlapping Prohibitions: Genocide, Crimes Against Humanity
and War Crimes

The crimes of genocide, crimes against humanity, and war crimes are con-
tained in the Statute of the ICTY, ICTR and ICC. As discussed above, the def-
inition and elements of these crimes differ slightly in the three statutes.

It is important to understand that in the common law’s approach, an ac-
cused’s conduct can be the basis of multiple criminal charges, all of which may
be presented to the court and, of course, to the jury, simultaneously, even
though some of the charges may have different legal elements. The reason is
that the trier of fact, expected to be the jury, is free to determine whether the
facts, as presented and proven, satisfy the elements of any or all of the crimes
charged on the basis of the judges instructions on the law. This approach
eliminates the need for the Prosecutor to make an outcome-determinative decision at the charging stage of the criminal proceedings as to what crime or crimes to charge, thus leaving the Prosecutor with some leeway that may at times permit what is commonly referred to as the “shotgun approach.” The Romanist/Civilist/Germanic-influenced systems are positivistic systems, whereby a Prosecutor must charge the crime that the law requires based on the facts of the case. The Prosecutor does not have the leeway of presenting alternative charges that differ as to their elements unless they are what is considered to be “lesser included crimes.” Even so, the Prosecutor is bound by law to charge and press for the crime which the law presupposes applies best to the facts.

The common law's pragmatic approach which gives the Prosecutor some leeway in presenting multiple charges for the same conduct, even though they may differ as to their elements, in effect transfers the problem of specificity of charges and outcomes to the stage of sentencing. Thus, the issue is no longer a technical legal issue of deciding specifically on the legally appropriate crime to charge, as opposed to multiple charges that may apply to the conduct in question, but whether the penalty shall be a single penalty, multiple penalties running concurrently, or multiple penalties running consecutively.

The Romanist/Civilist/Germanic systems are more positivistic than the common law that relies on customary law more than on codified law. Consequently, they are more rigid in their approaches, and they require, in the event that a given conduct can give rise to different criminal charges, that the Prosecutor make such an election at the stage of the formal charges. Therefore, a person must be charged with a specific crime and not with alternative crimes or different crimes requiring different elements depending on how, in the case of the common law, a jury may determine which facts satisfy what crime. Nevertheless, the Romanist/Civilist/Germanic-influenced legal systems recognize two eventualities of overlap. The first is the concours idéal d'infraction, which is when the legislation promulgates multiple crimes that have the same legal elements. This is essentially the case with respect to certain aspects of the crimes of genocide, crimes against humanity, and war crimes, as defined in the ICC's Articles 6, 7, and 8, and as developed in the “elements of crimes” adopted by the Preparatory Commission at its Fifth Session of June 30, 2000. The second eventuality arises whenever a given criminal conduct is sufficient to satisfy the elements of more than one crime. That too is the case with respect to the ICC's three crimes. The distinction between the two approaches is that the first deals with an overlap of the law and the second deals with a factual situation that may satisfy the required legal elements of more than one provision of the law.
To the common law jurist this Romanist/Civilist/Germanic conception of overlap may appear highly doctrinal. Instead, it is simply the result of a positivist legal approach which relies on codification and on the strict interpretation of the law by the judge without the existence of a jury. These legal systems require that in the case where the same facts can be the basis of a conviction for more than one crime, or, in the case of the concours idéal d'infraction, that the conviction be only for that specific crimes which the court ultimately finds have been committed and where that is factually impossible, then the Court is to decide whether the more serious or less serious of the crimes is to apply, depending upon the social interest protected. This approach essentially means that there will be only one sentence for the crime, which can of course be subject to mitigation or aggravation.

In the three crimes in question, if all else is equal, the distinguishing factor is the nature of the protected interests, or what is called in the French legal system and others in the Romanist/Civilist tradition, le bien social protégé. Thus, in genocide the protected social interest is the racial, ethnic, religious, or national group, irrespective of the degree to which the plan was carried out or accomplished to "eliminate that group in whole or in part." Whereas the protected social interest in crimes against humanity is the combination of a "widespread or systematic" harm committed against "any civilian population" in pursuit of a State "policy" or the policy of a non-State-actor. The policy element in crimes against humanity is the international jurisdictional element that distinguishes between large scale crimes which, even though committed by State agents, remain part of domestic criminal jurisdiction and the category of an international crime called crimes against humanity. Furthermore, the distinguishing legal element between genocide and crimes against humanity is the requirement of a specific intent in genocide which is the "intent to eliminate in all or in part," while crimes against humanity do not necessarily require specific intent as to the ultimate goal pursued, carried out or executed in pursuance of the policy manifested by the "widespread or systematic" commission of certain described acts against any "civilian population." Thus, general intent is sufficient for crimes against humanity.

War crimes do not require a policy, either by a State or non-State-actor; they also do not necessarily require specific intent. Most war crimes require knowledge as the requisite mental element, while, in some cases, recklessness might suffice. War crimes is a category of international crimes that prohibit harm from being perpetrated on certain protected persons and targets against whom harmful conduct will expose the perpetrator to individual criminal responsibility. Furthermore, what distinguishes war crimes from the other two crimes of
genocide and crimes against humanity are three legal elements: \(^{141}\) (a) the prohibited conduct occurred in the context of an armed conflict whether international or non-international; (b) by a combatant; and (c) against another combatant, a member of the civilian population, a protected person, or against a protected target. Both customary and convention law of armed conflict define the legal context, the persons to whom the prohibitions apply and the persons and circumstances under which the protections apply. That body of law also provides for factual and legal defenses.

The overlap in legal norms also extends beyond these three crimes. It includes, for example, the commission of torture and the placing of persons under slavery and slave-related conditions. Torture \(^{142}\) and slavery and slave-related practices \(^{143}\) are the subject of specialized international criminal law conventions, but their underlying conduct is also included in the three crimes which are within the jurisdiction. Torture may indeed be a classic example where commission of torture can be the basis of a criminal charge for: (1) the violation of the Torture Convention; \(^{144}\) (2) a war crime, if conducted by a combatant in time of conflict against, for example, a prisoner of war; (3) a crime against humanity, if torture is used in a widespread and systematic way by State agents; and (4) genocide, if torture is used as an international means of destroying a given group in whole or in part.

Regrettably, the ICC Statute did not take into consideration the problems of overlap between the three crimes contained in Articles 6, 7, and 8 and ... for the Elements of Crimes. \(^{145}\) For the ICC however, the problem extends beyond what the Prosecutor should charge and what judges should find as the appropriate crime committed when the provisions of the law are overlapping or when the facts appear to be sufficient to satisfy the elements of more than one of these crimes. The ICC Statute also failed to take the problems discussed above into account with respect to the penalties. \(^{146}\) The Preparatory Commission also failed to take the opportunity in working on rules of procedure and evidence to deal with the questions of concurrent and consecutive sentencing. Furthermore, the ICC Statute contains a provision in Article 20 on *ne bis in idem*. \(^{147}\) Thus the problem of overlap will also reach the Court not only by means of what is an appropriate charge and what the judges should appropriately convict on, and what penalty to mete out, but also on how the Court, and for that matter how the Prosecutor, will determine whether a given criminal conviction by a national court will be deemed a bar to another prosecution before the ICC and whether a given conviction by the ICC will bar prosecution before the ICC or before national courts for another crime which may be based on substantially the same facts.
It is therefore expected that the ICTY, ICTR, and ICC will have to struggle with these problems and hopefully arrive at a conclusion which will provide certainty of the law and predictability of outcomes.

The ICTY

The ICTY confronted that issue in the case of Prosecutor v. Kupreškić, et al.\textsuperscript{148} In that judgment, the trial chamber posited the problem as follows:

(ii) Relationship between the various Offences Charged in the Indictment

696. Having set out the general principles of criminal law governing multiple offences in international law, the Trial Chamber will now apply these principles to the relations between the various substantive provisions of the Statute relied upon by the parties in the instant case.

697. Unlike provisions of national criminal codes or, in common-law countries, rules of criminal law crystallised in the relevant case-law or found in statutory enactments, each Article of the Statute does not confine itself to indicating a single category of well-defined acts such as murder, voluntary or involuntary manslaughter, theft, etc. Instead the Articles embrace broad clusters of offences sharing certain general legal ingredients. It follows that, for instance, a crime against humanity may consist of such diverse acts as the systematic extermination of civilians with poison gas or the widespread persecution of a group on racial grounds. Similarly, a war crime may for instance consist in the summary execution of a prisoner of war or the carpet bombing of a town.

698. In addition, under the Statute of the International Tribunal, some provisions have such a broad scope that they may overlap. True, some acts may only be characterised as war crimes (Article 3): e.g., the use of prohibited weapons against enemy combatants, attacking undefended towns, etc. Other acts or transactions may only be defined as crimes against humanity (Article 5): e.g., persecution of civilians, whatever their nationality, on racial, religious or political grounds. However, other acts, depending upon certain circumstances, may either be characterised as war crimes or both as war crimes and crimes against humanity. For instance, murder, torture or rape of enemy civilians normally constitute war crimes; however, if these acts are part of a widespread or systematic practice, they may also be defined as crimes against humanity. Plainly, Articles 3 and 5 have a different scope, which, however, may sometimes coincide or overlap.
699. In order to apply the principles on cumulation of offences set out above specific offences rather than diverse sets of crimes must be considered. The Trial Chamber will therefore analyse the relationship between the single offences with which the accused are charged, such as murder as a war crime, murder as a crime against humanity, etc.

1. Relationship Between “Murder” under Article 3 (War Crimes) and “Murder” under Article 5(a) (Crimes Against Humanity)

700. Following the principles set out above, the relevant question here is whether murder as a war crime requires proof of facts which murder as a crime against humanity does not require, and vice versa (the Blockburger test). Another relevant question is whether the prohibition of murder as a war crime protects different values from those safeguarded by the prohibition of murder as a crime against humanity.

701. With regard to the former question, while murder as a crime against humanity requires proof of elements that murder as a war crime does not require (the offence must be part of a systematic or widespread attack on the civilian population), this is not reciprocated. As a result, the Blockburger test is not fulfilled, or in other words the two offences are not in a relationship of reciprocal speciality. The prohibition of murder as a crime against humanity is lex specialis in relation to the prohibition of murder as a war crime [footnote 958].

702. In addressing the latter question, it can generally be said that the substantive provisions of the Statute pursue the same general objective (deterring serious breaches of humanitarian law and, if these breaches are committed, punishing those responsible for them). In addition, they protect the same general values that they are designed to ensure respect for human dignity. Admittedly, within this common general framework, Articles 3 and 5 may pursue some specific aims and protect certain specific values. Thus, for instance, the prohibition of war crimes aims at ensuring a minimum of humanitarian concern between belligerents as well as maintaining a distinction between combatants’ behaviour toward enemy combatants and persons not participating in hostilities. The prohibition of crimes against humanity, on the other hand, is more focused on discouraging attacks on the civilian population and the persecution of identifiable groups of civilians.

703. However, as under Article 5 of the Statute crimes against humanity fall within the Tribunal’s jurisdiction only when committed
in armed conflict, the difference between the values protected by Article 3 and Article 5 would seem to be inconsequential.

704. As explained above, the validity of the criterion based on the difference in values protected is disputable if it is not also supported by reciprocal speciality between the two offences. It follows that, given also the marginal difference in values protected, the Trial Chamber may convict the Accused in violating the prohibition of murder as a crime against humanity only if it finds that the requirements of murder under both Article 3 and under Article 5 are proved.

2. Relationship Between “Persecution” under Article 5(h) (Crimes Against Humanity) and “Murder” under Article 5(a) (Crimes Against Humanity)

705. On the grounds set out above, the Trial Chamber agrees with the Prosecutor that “persecution” may comprise not only murder carried out with a discriminatory intent but also crimes other than murder. Count 1 of the indictment, which charges persecution, refers not only to killing, but also to “the comprehensive destruction of Bosnian Muslim homes and property” (para. 21(b)) and “the organised detention and expulsion of the Bosnian Muslims from Ahmići-Dantići and its environs” (para. 21(c)); in short, what in non-legal terms is commonly referred to as “ethnic cleansing”. There are clearly additional elements here beyond murder.

706. As for the relations between murder as a crime against humanity and persecution as a crime against humanity, it should be noted that persecution requires a discriminatory element which murder, albeit as a crime against humanity, does not. The Trial Chamber is of the view therefore that there is reciprocal speciality between these crimes; indeed, both may have unique elements. An accused may be guilty of persecution for destroying the homes of persons belonging to another ethnic group and expelling the occupants, without however being found guilty of any acts of killing. The destruction of homes and the expulsion of persons, if carried out with a discriminatory intent, may in and of themselves be sufficient to constitute persecution. Equally, an accused may commit a non-discriminatory murder as part of a widespread attack on a civilian population which, because it is non-discriminatory, fails to satisfy the definition of persecution. These, then, are two separate offences, which may be equally charged.
707. If an accused is found guilty of persecution, *inter alia* because of the commission of murders, it seems that he should be found guilty of persecution only, and not of murder *and* persecution, because in that case the *Blockburger* test is not met: murder is in that case already encompassed within persecution as a form of aggravated murder, and it does not possess any elements which the persecutory murders do not. Hence, in that case, murder may be seen as either falling under *lex generalis* or as a lesser included offence, and a conviction should not ensue when there is already a conviction under *lex specialis* or for the more serious office, i.e. persecutory murder.

708. Things however are different when a person is charged both with murder as a crime against humanity and with persecution (including murder) as a crime against humanity. In this case the same acts of murder may be material to both crimes. This is so if it is proved that (i) murder as a form of persecution meets both the requirement of discriminatory intent and that of the widespread or systematic practice of persecution, and (ii) murder as a crime against humanity fulfils the requirement for the wilful taking of life of innocent civilians and that of a widespread or systematic practice of murder of civilians. If these requirements are met, we are clearly faced with a case of reciprocal speciality or in other words the requirements of the *Blockburger* test are fulfilled. Consequently, murder will constitute an offence under both provisions of the Statute (Article 5(h) and (a)).

709. Let us now consider whether the prohibition of persecution as a crime against humanity protects different values from those safeguarded by the prohibition of murder as a crime against humanity. It is clear that the criminalisation of murder and persecution may serve different values. The prohibition of murder aims at protecting innocent civilians from being obliterated on a large scale. More generally, it intends to safeguard human life in terms of armed conflicts. On the other hand, the ban on persecution intends to safeguard civilians from severe forms of discrimination. This ban is designed to reaffirm and impose respect for the principle of equality between groups and human beings.

710. This test then bears out and corroborates the result achieved by using the other test. Under the conditions described above, the test based on protection of values leads to the conclusion that the same act or transaction (murder) may infringe two different provisions of Article 5 of the Statute.
3. Relationship Between “Inhumane Acts” under Article 5(i) (Crimes Against Humanity) and “Cruel Treatment” under Article 3 (War Crimes)

711. These two crimes are clearly presented as alternatives in the Indictment and should be considered as such. Except for the element of widespread or systematic practice required for crimes against humanity, each of them does not require proof of elements not required by the other. In other words, it is clear that every time an inhumane act under Article 5(i) is committed, *ipso facto* cruel treatment under Article 3 is inflicted. The reverse is however not true: cruel treatment under Article 3 may not be covered by Article 5(i) if the element of widespread or systematic practice is missing. Thus if the evidence proves the commission of the facts in question, a conviction should only be recorded for one of these two offences: inhumane acts, if the background conditions for crimes against humanity are satisfied, and if they are not, cruel treatment as a war crime. Given this, it is not strictly necessary to consider the “different values test”, since the *Blockburger* test is ultimately dispositive of the issue.

4. Relationship Between the Charges for Inhumane Acts (or Cruel Treatment) and the Charges for Murder

712. A brief word here should be said about the relationship between charges for inhumane acts/cruel treatment and murder. In Counts 2-9, for example, the accused are charged with the murder of the Ahmići family, and in Counts 10-11 for inhumane acts/cruel treatment of Witness KL by murdering his family before his eyes. These are clearly separate offences. Not only are the elements different, but the victims are even different. Witness KL’s family are the victims of the murder counts, while KL himself is the victim of the inhumane acts/cruel treatment counts.

(iii) The Sentence to be Imposed in the Event of More Than One Conviction for A Single Action

713. The question remains as to how a double conviction for a single action shall be reflected in sentencing. Both parties seem to agree that a defendant should not suffer two distinct penalties, to be served consecutively, for the same transaction. However, the Trial Chamber is under a duty to apply the provisions of the Statute and customary international law. Article 24(1) of the Statute provides that:
The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the term of imprisonment, the Trial Chamber shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

714. Pursuant to Article 48 of the former SFRY Criminal Code, which is still applied in the successor States of the SFRY, if the accused has committed several criminal offences by one action, the court shall first assess the punishment for each criminal offence and then proceed with the determination of the principal punishment. In the case of imprisonment, the court shall impose one punishment consisting of an aggravation of the most severe punishment assessed, but the aggravated punishment may not be as high as the total of all incurred punishments [footnote 959].

715. The 1997 Criminal Code of the Republic of Croatia contains similar rules on sentencing in the case of multiple offences committed by one action [footnote 960]. Outside the former Yugoslavia, the Italian Criminal Code includes a similar rule [footnote 961].

716. As was held by the Trial Chamber in the Tadić case, "[t]he practice of courts in the former Yugoslavia does not delimit the sources upon which the Trial Chamber may rely in reaching its determination of the appropriate sentence for a convicted person" [footnote 962]. In numerous legal systems, the penalty imposed in case of multiple convictions for offences committed by one action is limited to the punishment provided for the most serious offence. An instance of this approach is represented by Article 52(2) of the German Penal Code [footnote 963].

718. The following proposition commends itself as sound. If under the principles set out above a Trial Chamber finds that by a single act or omission the accused has perpetrated two offences under two distinct provisions of the Statute, and that the offences contain elements uniquely required by each provision, the Trial Chamber shall find the accused guilty on two separate counts. In that case the sentences consequent upon the convictions for the same act shall be served concurrently, but the Trial Chamber may [increase] the sentence for the more serious offence if it considers that the less serious offence committed by the same conduct significantly adds to the heinous nature of the prevailing offence, for instance because the less serious offence is characterised by distinct, highly reprehensible elements of its
own (e.g. the use of poisonous weapons in conjunction with the more serious crime of genocide).

719. On the other hand, if a Trial Chamber finds under the principles set out above that by a single act or omission the accused has not perpetrated two offences under two distinct provisions of the Statute but only one offence, then the Trial Chamber will have to decide on the appropriate conviction for that offence only. For example, if the more specialised offence, e.g. genocide in the form of murder, is made out on the evidence beyond a reasonable doubt, then a conviction should be recorded for that offence and not for the offence of murder as a war crime. In that case only one conviction will be recorded and only one sentence will be imposed.

The ICTR

The ICTR also faced that question in Prosecutor v. Akeyusu. In that case, the trial chamber took a different approach from that of the ICTY trial chamber in the Kupreškić case referred to above. Thus the difference may well be due to the fact that the ICTR Trial Chamber was more influenced by French Civilist legal concepts while the ICTY took another approach, which happened to be akin to a common law pragmatic approach. In the Kupreškić case, the ICTY relied on the Yugoslavian criminal law, while in the Akeyusu case, the ICTR relied on the criminal law of Rwanda, which originally derived from Belgian law, influenced by French law. Yugoslavian criminal law is also influenced by French law, though as well by certain so-called socialist conceptions of criminal law which had developed during the prior regime. The Akeyusu case posed the problem in terms of what French criminal law doctrine refers to as concours idéal d'infractions. The issue was addressed as follows:

196. 6. THE LAW: 6.1 Cumulative Charges

...
double jeopardy or a substantive non bis in idem principle in criminal law. Thus an accused who is found guilty of both genocide and crimes against humanity in relation to the same set of facts may argue that he has been twice judged for the same offence, which is generally considered impermissible in criminal law.

[paragraph omitted]

201. The Chamber notes that this question has been posed, and answered, by the Trial Chamber of the ICTY in the first case before that Tribunal, The Prosecutor v. Dusko Tadić. Trial Chamber II, confronted with this issue, stated:

202. "In any event, since this is a matter that will only be relevant insofar as it might affect penalty cannot be made to depend upon whether offences arising from the same conduct are alleged cumulatively or in the alternative. What is to be punished by penalty is proven criminal conduct and that will not depend upon technicalities of pleading." (Prosecutor v. Tadić, Decision on Defence Motion on Form of the Indictment at p. 10 (No. IT-94-1-T, T.Ch.II, 14 Nov, 1995).

203. In that case, when the matter reached the sentencing stage, the Trial Chamber dealt with the matter of cumulative criminal charges by imposing concurrent sentences for each cumulative charge. Thus, for example, in relation to one particular beating, the accused received 7 years' imprisonment for the beating as a crime against humanity, and a 6 year concurrent sentence for the same beating as a violation of the laws or customs of war.

[paragraph omitted]

205. The Chamber takes due note of the practice of the ICTY. This practice was also followed in the Barbie case, where the French Cour de Cassation held that a single event could be qualified both as a crime against humanity and as a war crime.

[paragraph omitted]

207. It is clear that the practice of concurrent sentencing ensures that the accused is not twice punished for the same acts. Notwithstanding this absence of prejudice to the accused, it is still necessary to justify the prosecutorial practice of accumulating criminal charges.
209. The Chamber notes that in Civil Law systems, including that of Rwanda, there exists a principle known as *concours ideal d'infractions* which permits multiple convictions for the same act under certain circumstances. Rwandan law allows multiple convictions in the following circumstances:

210. Code pénal du Rwanda: Chapitre VI—Du concours d'infractions:

Article 92.- Il y a concours d'infractions lorsque plusieurs infractions ont été commises par le même auteur sans qu'une condamnation soit intervenue entre ces infractions.

Article 93.- Il y concours idéal:

1° lorsque le fait unique au point de vue matériel est susceptible de plusieurs qualifications;

2° lorsque l'action comprend des faits qui, constituant des infractions distinctes, sont unis entre eux comme procédant d'une intention délictueuse unique ou comme étant les uns des circonstances aggravantes des autres.

Seront seules prononcées dans le premier cas les peines déterminées par la qualification la plus sévère, dans le second cas les peines prévues pour la répression de l'infraction la plus grave, mais dont le maximum pourra être alors élevé de moitié.

211. On the basis of national and international law and jurisprudence, the Chamber concludes that it is acceptable to convict the accused of two offences in relation to the same set of facts in the following circumstances: (1) where the offences have different elements; or (2) where the provisions creating the offences protect different interests; or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did. However, the Chamber finds that it is not justifiable to convict an accused of two offences in relation to the same set of facts where (a) one offence is a lesser included offence of the other, for example, murder and grievous bodily harm, robbery and theft, or rape and indecent assault; or (b) where one offence charges accomplice liability and the other
offence charges liability as a principal, e.g. genocide and complicity in genocide.

[paragraph omitted]

213. Having regard to its Statute, the Chamber believes that the offences under the Statute—genocide, crimes against humanity, and violations of article 3 common to the Geneva Conventions and of Additional Protocol II—have different elements and, moreover, are intended to protect different interests. The crime of genocide exists to protect certain groups from extermination or attempted extermination. The concept of crimes against humanity exists to protect civilian populations from persecution. The idea of violations of article 3 common to the Geneva Conventions and of Additional Protocol II is to protect non-combatants from war crimes in civil war. These crimes in relation to the same set purposes and are, therefore, never co-extensive. Thus it is legitimate to charge these crimes in relation to the same set of facts. It may, additionally, depending on the case, be necessary to record a conviction for more than one of these offences in order to reflect what crimes an accused committed. If, for example, a general ordered that all prisoners of war belonging to a particular ethnic group should be killed, with the intent thereby to eliminate the group, this would be both genocide and a violation of common article 3, although not necessarily a crime against humanity. Convictions for genocide and violations of common article 3 would accurately reflect the accused general’s course of conduct.

[paragraph omitted]

215. Conversely, the Chamber does not consider that any of the genocide, crimes against humanity, and violations of article 3 common to the Geneva Conventions and of Additional Protocol II are lesser included forms of each other. The ICTR Statute does not establish a hierarchy of norms, but rather all three offenses are presented on an equal footing. While genocide may be considered the gravest crime, there is no justification in the Statute for finding that crimes against humanity or violations of common article 3 and Additional Protocol II are in all circumstances alternative charges to genocide and thus lesser include offences. As stated, and it is a related point, these offences have different constituent elements. Again, this consideration renders multiple convictions for these offences in relation to the same set of facts permissible.

34
The ICC

The Statute did not take into account the various issues raised by the overlap between these three crimes. This is evident in the absence of any reference to that question in connection to the definition of crimes as well as in connection with the Elements developed by the Preparatory Commission. The problem of overlap has been particularly aggravated by the elements of crime which seem, in so many cases, to be identical particularly with respect to the material conduct of the perpetrator (such as that of killing or torturing). It should be noted that the Statute does not contain a provision on the material element of the crime which is a significant omission. This was due to the fact that the delegates did not seem to be able to agree on the distinctions between commission and omission. A distinguishing feature as to these three crimes, particularly when the material conduct is identical, is the mental element. Article 30 on the mental element in the Statute lacks sufficient clarity to allow for the subtle distinctions that would be required. It appears that the Elements sought to partially remedy the situation by adding throughout the different descriptive elements such words as “intended,” “aware of,” and “knew or should have known of the conduct.” In the opinion of this writer, the drafting of the Elements produces further confusion with respect to the problem of overlap (not to speak of other problems they are likely to create when the Court will seek to apply them).

Articles 77 to 79 deal with penalties, but these articles do not address the issues that arise out of a conviction for multiple crimes arising out of the same conduct. Thus the problem of overlap which could have been resolved in the sentencing was not addressed in the Statute. Thus it is theoretically possible not only to have the same conduct give rise to a conviction for more than one crime, but for this conviction to give rise to multiple penalties. One can assume that the judges will have the good sense of at least having the sentences run concurrently as opposed to consecutively, but it would have surely been better if the Statute would have provided for it.

Lastly, these overlaps raise a series of questions with respect to ne bis in idem. If a given conduct can be the basis of multiple convictions because of overlap of three crimes, what legal criteria should be relied upon by the ICC to determine whether a conviction in a national legal system falls within the meaning of ne bis in idem. The converse is also true with respect to States parties who are required to recognize ICC judgements and not to prosecute the same person for the crime for which that person was previously prosecuted before the ICC.
The Normative Framework of International Humanitarian Law

One would have hoped that the Statute and the Elements would have resolved these issues. Instead, they have simply avoided them entirely.

Not only are there overlaps in some applications of the sources of law relevant to war crimes, crimes against humanity, and genocide, there also are gaps and ambiguities in their content and scope. So far, however, there is no political will to close the gaps and eliminate the ambiguities. Thus, it is necessary to examine these sources of law separately in order to establish which source applies to which context and then to determine whether the legal elements contained in the applicable sources apply to the facts.162

Some 188 States have so far embodied “war crimes” in their military codes. This is a requirement of the Geneva Conventions and therefore every State party must domesticate their provisions and criminalize “grave breaches” violations. However, prosecutions for “war crimes” or “grave breaches” or an equivalent term (such as violations of the military code) have, with the exception of the prosecutions arising out of World War II,163 been few and far between. Since 1949, Germany has prosecuted an estimated 60,000 cases mostly in the categories of genocide and war crimes, but the United States, in relation to the Vietnam War, prosecuted only two cases for war crimes—the Calley164 and Medina165 cases. It is noteworthy, too, that the only case brought against one of the World War II Allies for war crimes, by Japanese citizens for the use by the United States of atomic weapons against Japan, which killed and injured an estimated 225,000 innocent civilians,166 was dismissed by the Supreme Court of Japan on technical jurisdictional grounds.167

With respect to “crimes against humanity,” Canada, France, and Israel have been the only countries to have carried out prosecutions. In Israel, the Eichmann168 and Demjanjuk169 cases were carried out, both for crimes not committed in the territory of the prosecuting State. Demjanjuk was acquitted because he turned out to be the wrong person. In France, prosecutions have occurred for Barbie,170 Touvier,171 and Papon.172 In 1989, Canada prosecuted the first case under a 1987 statute that permits retrospective application of international law.173 This writer served as Canada’s chief legal expert in testifying on what constituted “crimes against humanity” before 1945. Regina resulted in the acquittal of Hungarian Gendarmerie Captain Finta on the facts but the judgment recognized the existence of “crimes against humanity” under international law before 1945. Prosecutions before the ICTY and ICTR have included “war crimes,” “crimes against humanity,” and “genocide,” but when
the opportunity arose to prosecute Pol Pot for such crimes in Cambodia, it was not seized. 174

Many of the specific acts deemed criminal are contained within the definitions of “war crimes,” “crimes against humanity,” and “genocide.” That is where the overlap exists. Thus, legal questions arise as to when the same acts constitute one or the other of these three crimes. At this point, a jurist must examine the other legal elements required in the sources of law applicable to these three categories of crime. The “grave breaches” of the 1949 Geneva conventions 175 and Protocol I 176 are the clearest enunciation of what the elements of “war crimes” are, but that is because they apply to the context of conflicts of an international character. This is not quite the case with respect to common Article 3 of the 1949 Geneva conventions 177 and Protocol II, 178 which apply to conflicts of a non-international character, but with the exclusion in Protocol II of conflicts between internal dissident groups. Still, the gap between normative proscriptions applicable to the two contexts of conflicts exists, as does the overlap between these violations. The overlaps essentially are aimed at individual deviant conduct, the same type of criminal conduct that falls also within the scope of crimes against humanity and genocide, since the latter two crimes apply to all contexts of armed conflicts as well as to other non-armed conflicts contexts and to tyrannical regime victimization. Clearly, such a situation need not exist since it would be easy to articulate the elements of each of these three categories of crimes clearly, in a way that prevents these unnecessary overlaps and gaps. So far, however, the political will to do so is nonexistent.

Because there is a connection between the rigors of evidentiary requirements to prove “war crimes,” “crimes against humanity,” and “genocide,” and access to that evidence, the major governments who have the capacity to obtain such evidence remain in control of its use, and thereby in control of any eventual prosecution. This leaves such governments with the option to barter the pursuit of justice in exchange for political settlements. 179 An examination of what happened in all types of post-World War II conflicts clearly indicates that the pursuit of justice has been almost always bartered away for the pursuit of political settlements. 180 Consequently, the pursuit of justice has become part of the toolbox of political settlement negotiations. 181 This is true for all three major crimes, essentially because they are committed by armies, police, and paramilitary groups which act pursuant to orders from the State’s highest authorities. The need for an integrated codification of these three categories of crimes is self-evident. But when that opportunity arose in connection with the establishment of a permanent international criminal court, it was carefully
avoided for lack of political will by many governments, including the major powers.

The road ahead is arduous and the same hurdles that have long existed continue to bar the way for the effective protection of the victims of these three major crimes. The voices of millions of victims since World War I continue to cry out, unheard by the politicians of this world, and the sway of conscience represented by civil society is insufficient to overcome the steadfastness of real-politik. To recall the words of a popular ballad of the sixties: "When will they ever learn."

Impunity for international crimes, and systematic and widespread violations of fundamental human rights, is a betrayal of our human solidarity with the victims of conflicts to whom we owe a duty of justice, remembrance, and redress. To remember and to bring perpetrators to justice is a duty we owe also to our own humanity and to the prevention of future victimization.\(^\text{182}\) To paraphrase George Santayana, if we cannot learn from the lessons of the past and stop the practice of impunity, we are condemned to repeat the same mistakes and to suffer their consequences. The reason for our commitment to this goal can be found in the eloquent words of John Donne:

\[
\begin{align*}
\text{No man is an island, entire of itself;} \\
\text{every man is a piece of the continent, a part of the main . . .} \\
\text{Any man's death diminishes me because I am involved in mankind, and} \\
\text{therefore never send to know for whom the bell tolls;} \\
\text{it tolls for thee . . . .}^{183}
\end{align*}
\]

Notes


6. See M. Cherif Bassiouni, International Crimes: Jus Cogens and Obligatio Erga Omnes, 59 LAW & CONTEMP. PROBS. 63 (1996). The Tadić majority opinion dealt with several aspects of international humanitarian law in an overlapping manner when it held:

The second aspect, determining which individuals of the targeted population qualify as civilians for purposes of crimes against humanity, is not, however, quite as clear. Common Article 3, the language of which reflects “elementary considerations of humanity” which are “applicable under customary international law to any armed conflict,” provides that in an armed conflict “not of an international character” Contracting States are obliged “as a minimum” to comply with the following: “Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely...” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims in International Armed Conflicts (Protocol I) defines civilians by the exclusion of prisoners of war and armed forces, considering a person a civilian in case of doubt. However, this definition of civilians contained in Common Article 3 is not immediately applicable to crimes against humanity because it is a part of the laws or customs of war and can only be applied by analogy. The same applies to the definition contained in Protocol I and the Commentary, Geneva Convention IV, on the treatment of civilians, both of which advocate a broad interpretation of the term “civilian.” They, and particularly Common Article 3, do, however, provide guidance in answering the most difficult question: specifically, whether acts taken against an individual who cannot be considered a traditional “non-combatant” because he is actively involved in the conduct of hostilities by membership in some form of resistance group can nevertheless constitute crimes against humanity if they are committed in the furtherance or as part of an attack directed against a civilian population.

Prosecutor v. Duško Tadić, (IT-94-I-T), reprinted in 36 I.L.M. 908 at 939–940 (1997) (citations and footnotes omitted). It is unclear, in the understanding of the majority, what are the legal boundaries between the customary law of armed conflicts applicable to conflicts of a non-international character and, respectively, Common Article 3 of the 1949 Geneva Conventions. See also Protocol II, infra note 89, reprinted in 2 II.B.11 Weston, supra note 2. See also Theodor Meron, International Criminalization of Internal Atrocities, 89 AM. J. INT'L L. 554 (1995).

7. For example, the International Criminal Tribunal for the Former Yugoslavia, in the Tadić majority opinion, erroneously applied the standards of “State responsibility” reflected in the I.C.J.'s Nicaragua v. U.S. to the determination of whether a conflict is of an international or non-international character. See Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14, 331–47 (June 27). The majority also did not contribute to clarity when it very broadly concluded that:
International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.


10. One reason will be the fact that international crimes involving State action or policy potentially reach all the way to the top of the military and civilian hierarchy. See M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 Harv. Hum. RTS. J. 11 (1997), [hereinafter Bassiouni, *From Versailles to Rwanda*], describing the history of international criminal investigatory bodies and international criminal tribunals. With respect to the limits of command responsibility, see *International Criminal Law*, supra note 5, at 21–74.

11. The regulation of armed conflicts benefits from the fact that regular armies are usually well disciplined and have a tight command structure that controls discipline and the observance of the laws of armed conflicts. Furthermore, regular armies have a shared interest in the observance of the laws of armed conflicts because violations by one side to a conflict can result in actions by the other side, even though reprisals are limited. See Frits Kalshoven, *Belligerent Reprisals* (1971). Conversely, however, when genocide or crimes against humanity occur, the same constraints that exist in armies arising out of the considerations stated above, are not usually present in the course of genocide and crimes against humanity.

12. Genocide and crimes against humanity, as discussed below, are, however, also applicable to non-State actors. The problem of non-State actors, acting by themselves or in concert with State actors nevertheless remains, as the definitions of genocide and crimes against humanity do not specifically contemplate non-State actors, particularly when there is no concert of action with State actors. By implication, however, it should be clear that genocide and crimes against humanity apply to non-State actors as well.


M. Cherif Bassiouni


15. BASSIOUNI, CRIMES AGAINST HUMANITY, supra note 4.


17. Id., Preamble.


25. Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic, and the Government of the Union of the Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis and the Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 1546, 82 U.N.T.S. 279, 3 Bevans 1238, entered into force Aug. 8, 1945 [hereinafter London Charter], reprinted in 2 Weston, supra note 2, at II.E.1. See also Special Prosecution Establishing an International Military Tribunal for the Far East and Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, at 3, 4 Bevans 20 [hereinafter IMTFE], reprinted in 2 Weston, supra note 2, at II.E.2. Article 5(c) is similar to Article 6(c) of the London Charter, as is Article II(c) of Control Council Law No. 10, though it removes the war connecting requirement.


The Normative Framework of International Humanitarian Law

30. The States that have done so are Canada, France, and Israel.
31. See BASSIOUNI, CRIMES AGAINST HUMANITY, supra note 4.
32. BASSIOUNI, ICL CONVENTIONS, supra note 8.
34. Prosecutor v. Duško Tadić, (IT-94-1-T), reprinted in 36 I.L.M. 908 (1997). See also ICTY Statute, supra note 33. Concerning the war-connecting link, the Tadić decision stated:

Article 5 of the Statute, addressing crimes against humanity, grants the International Tribunal jurisdiction over the enumerated acts "when committed in armed conflict." The requirement of an armed conflict is similar to that of Article 6(c) of the Nürnberg Charter which limited the Nürnberg Tribunal's jurisdiction to crimes against humanity committed "before or during the war," although in the case of the Nürnberg Tribunal jurisdiction was further limited by requiring that crimes against humanity be committed "in execution of or in connection with" war crimes or crimes against peace. Despite this precedent, the inclusion of the requirement of an armed conflict deviates from the development of the doctrine after the Nürnberg Charter, beginning with Control Council Law No. 10, which no longer links the concept of crimes against humanity with an armed conflict. As the Secretary-General stated: "Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character." In the Statute of the International Tribunal for Rwanda the requirement of an armed conflict is omitted, requiring only that acts be committed as part of an attack against a civilian population. The Appeals Chamber has stated that, by incorporating the requirement of an armed conflict, "the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law," having stated earlier that "[s]ince customary international law no longer requires any nexus between crimes against humanity and armed conflict ... Article 5 was intended to reintroduce this nexus for the purposes of this Tribunal." Accordingly, its existence must be proved, as well as the link between the act or omission charged and the armed conflict.

The Appeals Chamber, as discussed in greater detail in Section VI.A of this Opinion and Judgment, stated that "an armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." Consequently, this is the test which the Trial Chamber has applied and it has concluded that the evidence establishes the existence of an armed conflict.

The next issue which must be addressed is the required nexus between the act or omission and the armed conflict. The Prosecution argues that to establish the nexus for a
violation of Article 5 it is sufficient to demonstrate that the crimes were committed at some point in the course or duration of an armed conflict, even if such crimes were not committed in direct relation to or as part of the conduct of hostilities, occupation, or other integral aspects of the armed conflict. In contrast the Defence argues that the act must be committed “in” armed conflict.

The Statute does not elaborate on the required link between the act and the armed conflict. Nor, for that matter, does the Appeals Chamber Decision, although it contains several statements that are relevant in this regard. First is the finding, noted above, that the Statute is more restrictive than custom in that “customary international law no longer requires any nexus between crimes against humanity and armed conflict.” Accordingly, it is necessary to determine the degree of nexus which is imported by the Statute by its inclusion of the requirement of an armed conflict. This, then, is a question of statutory interpretation.

The Appeals Chamber Decision is relevant to this question of statutory interpretation. In addressing Article 3 the Appeals Chamber noted that where interpretative declarations are made by Security Council members and are not contested by other delegations “they can be regarded as providing an authoritative interpretation” of the relevant provisions of the Statute. Importantly, several permanent members of the Security Council commented that they interpret “when committed in armed conflict” in Article 5 of the Statute to mean “during a period of armed conflict.” These statements were not challenged and can thus, in line with the Appeals Chamber Decision, be considered authoritative interpretations of this portion of Article 5.

The Appeals Chamber, in dismissing the Defense argument that the concept of armed conflict covers only the precise time and place of actual hostilities, said: “It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.” Thus it is not necessary that the acts occur in the heat of battle.


36. See id., art. 3.

37. See, e.g., Ch. 2, “Establishment of the Tribunal and Legislative History” of M. CHERIF BASSIOUNI, & PETER MANIKAS, THE LAW OF THE INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 199-235 (1996). The Appeals Chamber in the Tadić case noted that “it is by now a settled Rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed . . . customary international law may not require a connection between crimes against humanity and any conflict at all.” Decision in Prosecutor v. Duško Tadić, (IT-94-1-AR72), reprinted in 35 I.L.M. 32, at 72 (1996). Further, the Tadić decision stated:
If customary international law is determinative of what type of conflict is required in order to constitute a crime against humanity, the prohibition against crimes against humanity is necessarily part of customary international law. As such, the commission of crimes against humanity violates customary international law, of which Article 5 of the Statute is, for the most part, reflective. As stated by the Appeals Chamber: "There is no question ... that the definition of crimes against humanity adopted by the Security Council in Article 5 comports with the principle of nullum crimen sine lege."

Id. at 937. The Appeals Chamber in the Nikolić case noted that a crime against humanity must be shown to have been committed in the course of an armed conflict. Nikolić Rule 61 Hearing, (IT-95-2-R61).

38. See, e.g., Bassiouni, supra note 6.
39. See Bassiouni, From Versailles to Rwanda, supra note 10, at 46–49.
40. For an insight into the establishment of the ICTR, see VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (2 vols. 1998).
41. See London Charter, supra note 25, art. 6(c).
42. See ICTY Statute art. 5(g), supra note 33; ICTR Statute art. 3(g), supra note 35.
43. See ICTR Statute supra note 35, art. 3. It is interesting to note that Article 5 of the ICTY does not refer to the words “widespread or systematic” contained in Article 3 of the ICTR. Yet, in the Tadić opinion the Trial Chamber referred to the words “widespread or systematic” using the disjunctive. See generally MICHAEL P. SCHARF, BALKAN JUSTICE (1997).
44. See BASSIOUNI, CRIMES AGAINST HUMANITY, supra note 4, at Ch. 4 “The Principles of Legality.”
45. See id., Ch. 5.
46. See id. See also Roger S. Clark, Crimes Against Humanity at Nuremberg, in THE NUREMBERG TRIAL AND INTERNATIONAL LAW 177 (George Ginsburgs & Vladimir N. Kudriavtsev eds., 1990); Egon Schwelb, Crimes Against Humanity, 23 BRIT. Y.B. INT'L L. 178 (1946).
47. ICTR Statute, supra note 35, art. 3 (emphasis added).
48. For sure, the terms “widespread or systematic” as used in Article 3 of the ICTR cannot be interpreted as a characteristic of the specific crimes listed in the definition because, for example, there can be no particular crime called “widespread extermination.”
49. ICC Statute, supra note 13, art. 7 (emphasis added).
50. Article 7 states:

Persecution against any identifiable group or collectivity on political, social, 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 . . .

Id.

51. Id.
52. Id. For a commentary, see generally Herman von Hebel & Daryl Robinson, Crimes within the Jurisdiction of the Court, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS 79–126, (Roy S. Lee ed., 1999); Margaret McAuliffe deGuzman, The Road from Rome: The Developing Law of Crimes Against Humanity, 22 HUM. RTS. Q. (2000).
53. For example, genocide requires a specific "intent to eliminate in whole or in part," while war crimes, no matter how widespread or systematic or both, do not require any element of State action or policy in connection with the commission of these crimes.

54. This was the case with the Touvier and Papon cases in France. See generally sources cited infra notes 167, 168, and 169. See also SORJ CHALANDON & PASCALE NIVELLE, CRIMES CONTRE L'HUMANITÉ: BARBIE, TOUVIER, BOUSQUET, PAPON (1998).


56. See ICC Statute, supra note 13, art. 6-8. The chapeau for crimes against humanity (Article 7) states: "For the purposes of this statute, "crimes 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."

57. See generally M. Cherif Bassiouni, "Crimes Against Humanity": The Need for a Specialized Convention, 31 COLUM. J. TRANSNAT'L L. 457 (1994). See also BASSIOUNI, CRIMES AGAINST HUMANITY, supra note 4, at Ch. 7.


61. See ICTY Statute, supra note 33, art. 4.

62. See ICTR Statute, supra note 35, art. 2.

63. See ICC Statute, supra note 13, art. 6.

64. See Genocide Convention, supra note 58, art. II.

65. Id.

66. See generally BASSIOUNI, CRIMES AGAINST HUMANITY, supra note 4, at Ch. 8 "Elements of Criminal Responsibility."

67. That standard exists in the criminal laws in those legal systems influenced by the Romanist/Civilist/Germanic legal traditions, as well as those legal systems influenced by the Common Law tradition.


71. It is also believed that in the Yugoslav conflict the U.S. had satellite and other air-reconnaissance pictures and probably recorded air-waves and telephone communications that would establish certain facts constituting any one of the three major crimes mentioned, but for political reasons had elected not to make them available to the ICTY Prosecutor.

72. See sources cited supra note 60, particularly Abrams & Ratner.


78. See Final Report, supra note 74.

79. Id.

80. Id. See also M. Cherif Bassiouni, Investigating Serious Violations of International Humanitarian Law in the Former Yugoslavia (DePaul University, Occasional paper); Meron, supra note 6. See also the indictment of Karadžić and Mladič, in which the judge referred to "ethnic cleansing" as a form of genocide, (IT-95-18-1).


82. See Genocide Convention, supra note 58, art. II.

83. See ICTY Statute, supra note 33, art. 4.

84. See ICTR Statute, supra note 35, art. 2.

85. ICC Statute, supra note 13, art. 2.

86. See Genocide Convention, supra note 58.

87. See von Hebel & Robinson, supra note 52.


91. See Bassiouni, supra note 6, and the authorities cited therein.

92. At present there are 25 categories of international crimes. They are: (1) aggression; (2) genocide; (3) crimes against humanity; (4) war crimes; (5) crimes against United Nations and associated personnel; (6) unlawful possession or use or emplacement of weapons; (7) theft of nuclear materials; (8) mercenarism; (9) apartheid; (10) slavery and slave-related practices; (11) torture and other forms of cruel, inhuman, or degrading treatment; (12) unlawful human experimentation; (13) piracy; (14) aircraft hijacking and unlawful acts against international air safety; (15) unlawful acts against the safety of maritime navigation and the safety of platforms on the high seas; (16) threat and use of force against internationally protected persons; (17) taking of civilian hostages; (18) unlawful use of the mail; (19) unlawful traffic in drugs and related drug offenses; (20) destruction and/or theft of national treasures; (21) unlawful acts against certain internationally protected elements of the environment; (22) international traffic in obscene materials; (23) falsification and counterfeiting; (24) unlawful interference with submarine cables; and, (25) bribery of foreign public officials. These crimes are reflected in 323 international instruments elaborated between 1815–1997. See BASSIOUNI, ICL CONVENTIONS, supra note 8.


94. See Bassiouni, From Versailles to Rwanda, supra note 10.

95. There are 35 treaties on the control of weapons. See BASSIOUNI, ICL CONVENTIONS, supra note 8.


97. For example, the U.S. takes the position that incendiary and laser weapons and land mines are not included in that category.


99. See Geneva Conventions of 12 August 1949 and Additional Protocols of June 1977: ratifications, accessions and successions (Oct. 5, 1998), <http://www.icrc.org/unicc/icrnews>. See also BASSIOUNI, ICL CONVENTIONS, supra note 8, at, respectively, pp. 416–17, 426–27, 434–35, 440–41, 457–60 and 486–87. This position is bolstered by the number of ratifications for these conventions. They are:

- The First Geneva Convention of 1949: 188
- The Second Geneva Convention of 1949: 188
- The Third Geneva Convention of 1949: 188
- The Fourth Geneva Convention of 1949: 188
- Protocol I of 1977: 152
- Protocol II of 1977: 144

See supra note 88 for the full citation to the first four Geneva Conventions. See supra note 89 for the citations to Protocol I and Protocol II.

100. This was obvious in the 1997 Preparatory Committee for an International Criminal Court at its second and third sessions.

101. See Geneva Conventions supra note 88, arts. 50 and 51 of the First and Second Convention, reprinted in 2 Weston, supra note 2, at II.B.11–12 and arts. 130 and 147 of the Third and Fourth Conventions, respectively, reprinted in 2 Weston, supra note 2, at II.B.13–14; 1977 Protocol I, supra note 89.

102. See Common Article 3, supra note 88.

103. See Protocol II, supra note 89.

104. See generally LEVIE, supra note 3; Meron, supra note 6.

105. See Conventions cited supra note 88, arts. 5 and 6.


removed the defense of immunity from heads of state. See 1950 ILC Report, supra note 27, at Principle III. The defense was also removed in the statutes for the ICTY and the ICTR. See ICTY Statute, supra note 33, at art. 7; ICTR Statute supra note 35, at art. 6.

109. Compare Common Article 3, supra note 88, with “grave breaches” of the Third and Fourth Conventions, respectively Articles 130 and 147.


111. See generally Meron, supra note 6.

112. See Bassiouni, supra note 14. See also, e.g., sources cited supra note 14.

113. See Balint, supra note 14. See generally sources cited supra note 14 and accompanying text.


116. Meron, supra note 7, at 238.

117. Id.


120. Meron, supra note 7, at 237. Professor Dinstein agrees that intervention by a foreign State on behalf of the insurgents turns a civil war into an interstate war. Specifically, with regard to Yugoslavia Meron writes:

The Tadić trial chamber has already accepted that, before the announced withdrawal of JNA forces from the territory of Bosnia-Herzegovina, the conflict was an international armed conflict. The facts of the situation and the rules of international humanitarian law should determine whether the JNA continued to be involved after that date and during the period pertinent to the indictments; if so, the international character of the conflict would have remained unchanged. The provisions of the Fourth Geneva Convention on termination of the application of the Convention, including Article 6, are relevant, not the legal tests of imputability and state responsibility. Finally, the appeals chamber would also be well-advised to abandon its adherence to the literal requirements of the definition of protected persons and help adapt it to the principal challenges of contemporary conflicts.

Meron, supra note 7, at 242.

121. See London Charter, supra note 25. For the proceedings before the IMT, see International Military Tribunal sitting at Nuremberg, reported in TRIAL OF THE MAJOR WAR
CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL (1949) (commonly known as the "Blue Series"). For the subsequent proceedings of the IMT, see TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 (1949) (commonly known as the "Green Series").


123. See BASSIOUNI, supra note 8.
124. See PrepCom Committee, supra note 114.
126. See PrepCom Committee, supra note 114.
127. Id.
129. ICC Statute, supra note 13, at art. 8, para. 2(a).
130. Id., para. 2(b).
131. Id., para 2(c).
132. Id.
133. Id., para 2(d).
134. The United States did not ratify either Protocol and wanted to avoid any references to these Protocols, insisting that whatever norms were derived therefrom should be drafted as part of customary law. In a sense, the United States' position is defensible because the Protocols essentially embody customary law and that too evidences the overlap between the two sources of applicable law.
135. See von Hebel & Robinson, supra note 52.
136. That approach comes from the analogy to the use of a shotgun in hunting which spreads pellets across a certain range and is thus more capable of having some of the pellets hit the target than if the weapon was a rifle with a single bullet following a single projectile.
137. It is beyond the scope of this paper to go into detail as to the different doctrines on what constitutes a single or multiple criminal transactions or how sentences shall be meted out. See, e.g., JOHN DECKER, 1 ILLINOIS CRIMINAL LAW: A SURVEY OF CRIMES AND DEFENSES § 1.19 (3rd ed. 2000).
139. Except in cases where lay jurors sit along with professional judges in certain cases as established in the applicable code of criminal procedure. The origin of such lay jury participation in the French legal system is the cour d'Assizes.

140. See e.g., for the Italian system, Alfonso Stile, Il Bene Giuridico.

141. It should be noted that these legal elements also include facts. They are therefore a cumulation of law and facts.


143. See M. Cherif Bassiouni, Enslavement, in 1 INTERNATIONAL CRIMINAL LAW, supra note 5, at 663.

144. Torture Convention, supra note 142.

145. See Elements of Crimes, supra note 138.

146. See ICC Statute, supra note 13, at Articles 77-80.

147. See id. at Article 20. The principle ne bis in idem prevents persons from being tried before the Court twice for conduct that formed the basis of crimes for which the person had either been convicted or acquitted by the Court [Article 20(1)]. Moreover, it prevents a national legal system of a State party from prosecuting an individual for the same conduct that formed the basis of a crime for which the person had previously been convicted or acquitted by the Court [Article 20(2)]. In addition, an individual, who has been either previously acquitted or convicted by a national court for conduct that formed the basis of crimes under the Statute, may not be prosecuted by the Court [Article 20(3)]. However, a conviction or acquittal by a national jurisdiction will not bar subsequent prosecution by the ICC if: (a) the purposes of the State proceedings were to "shield the person concerned from criminal responsibility" [Article 20(3)(a)]; or (b) the domestic proceedings were not conducted independently or impartially [Article 20(3)(b)].

Thus, ne bis in idem only prevents a second prosecution of an accused in two circumstances: (1) when the first attempt was either made by the ICC, and the second effort is by either a State party or the ICC; or (2) when the first attempt was by a national legal system (assuming that the first prosecution was independent, impartial, and not for the purposes of shielding the accused from criminal responsibility [Article 20(3)(a)-(b)]) and the second prosecution is by the Court. The principle is plainly only applicable when the ICC is involved, and, as such, a conviction or acquittal by one national legal system, while barring a second prosecution by the ICC, seemingly does not then bar subsequent prosecution in another national jurisdiction.

148. IT-95-16-T Judgement of the Trial Chamber of 14 January 2000.

149. [Footnote 958 in original] This result is borne out by the Appeals Chamber in its Decision on Jurisdiction: "Article 3 thus confers on the International Tribunal jurisdiction over [any] serious offence against international humanitarian law not covered by Article 2, 4 or 5. Article 3 is a fundamental provision laying down that any "serious violation of international humanitarian law" must be prosecuted by the International Tribunal. In other words, Art. 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal (emphasis added)". See Tadić, Appeals Chamber Decision on Jurisdiction, 2 Oct. 1995, para. 91.

150. [Footnote 959 in original] The text of Art. 48 reads as follows:
(1) If, by one or more acts, the perpetrator has committed more than one criminal offence for which he is being tried simultaneously, the court shall first determine the sentences for each offence and then impose a single sentence for all the offences.

(2) The single sentence shall be imposed according to the following rules:
   i) if the death penalty was determined for one of the concurrent criminal offences, only that sentence shall be imposed;
   ii) if a sentence of twenty years imprisonment was determined for one of the concurrent criminal offences, only that sentence shall be imposed;
   iii) if a sentence of up to three years imprisonment were determined for all concurrent criminal offences, the single sentence may not exceed eight years of imprisonment.

152. [Footnote 961 in original] Art. 81 of the Codice Penale reads:

(1) Anyone who, by a single act or omission, violates different provisions of law or commits more than one violation of the same provision of law, shall be punished with the punishment which would be imposed for the most serious violation, increased up to no more than three times that sentence. [ . . . ]

154. [Footnote 963 in original] Art. 52 reads:
   (1) If the same act violates several criminal statutes or violates the same statute more than once, only one punishment may be imposed.
   (2) If several criminal statutes have been violated, the punishment shall be determined by the statute which provides the most severe kind of punishment. It may not be any less severe than the other applicable statutes permit.
155. The Prosecutor v. Jean-Paul Akayesu (ICTR-96-4-T) (judgement), reprinted in 37 I.L.M. 1399 (1998); see also www.ictr.org/english/judgements/akeysu.html
156. That same concept exists in all Romanist/Civilist/Germanic-influenced legal systems.
157. See Elements of Crimes, supra note 138; The Diplomatic Conference provided in Resolution F that a Preparatory Commission be established to inter alia develop the Elements of Crimes in accordance with Article 9 of the ICC Statute. The Elements for war crimes contain significant overlaps with those for genocide and crimes against humanity.
158. See M. Cherif Bassiouni, Negotiating the Treaty of Rome on the Establishment of an International Criminal Court, 32 CORNELL INT'L L.J. 443, at 454:

The Statute's omission of the material elements of crimes, or actus reus, creates another problem area. During the Conference, an article defining actus reus was dropped from the Statute because some delegations could not agree on its content. However, until the last moment, the Drafting Committee expected to receive such a provision. Lacking a provision on the elements of crimes, the Court will have to determine what constitutes an act or omission by analogy to national legal systems. However, Article 22(2) specifically excludes interpretation by analogy. Furthermore, Article 22(2)'s prohibition on interpretation by analogy also conflicts with Article 31(3), which allows the Court to develop other grounds for exclusion from criminal responsibility.

159. Id.
160. See ICC Statute, supra note 13, at Articles 77 to 79.
162. For a distinction between humanitarian law norms and human rights law norms as customary law, see THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989).
163. See Bassiouni, From Versailles to Rwanda, supra note 10.
166. 29 THE NEW ENCYCLOPEDIA BRITANNICA 1022 (1990).
167. Shimoda v. The State, 355 Hanrel Jiho (Supreme Court of Japan 7 December 1963); also quoted in part in 2 Friedman, supra note 1, at 1688. See also Richard A. Falk, The Shimoda Case: A Legal Appraisal of the Atomic Attacks Upon Hiroshima and Nagasaki, 59 AM. J. INTL L. 759 (1965). The claim in that case was against the United States of America for dropping atomic bombs on Nagasaki and Hiroshima in violation of the laws and customs of war.
170. The Barbie judgments:


For information on the Barbie case, see generally LADISLAS DE HOYAS, KLAUS BARBIE (Nicholas Courtin trans., 1985); BRENDAN MURPHY, THE BUTCHER OF LYON (1983).

171. The Touvier judgments:


For information on the Touvier case, see generally ÉRIC CONAN & HENRY ROUSSO, VICHY, UN PASSÉ QUI NE PASSE PAS (1994); ALAIN JAKUBOWICZ & RENÉ RAFFIN, TOUVIER HISTOIRE DU PROCÈS (1995); ARNO KLARSFELD, TOUVIER UN CRIME FRANÇAIS (1994); JACQUES TRÉMOLET DE VILLERS, L'AFFAIRE TOUVIER, CHRONIQUE D'UN PROCÈS EN IDÉOLOGIE (1994).
172. The Papon case:


175. See Conventions cited supra note 88.

176. See 1977 Protocol I, supra note 89.

177. See Conventions cited supra note 88.

178. See 1977 Protocol II, supra note 89.

179. See Bassioumi, supra note 14.

180. See id. See also Bassioumi, From Versailles to Rwanda, supra note 10; TRANSNATIONAL JUSTICE (3 vols., Neil Kritz ed., 1995).

182. To paraphrase the classic and profoundly insightful characterization of George Orwell, "Who controls the past, controls the future; who controls the present, controls the past." GEORGE ORWELL, 1984 (2d ed. 1977). Thus, to record the truth, educate the public, preserve the memory, and try the accused, it is possible to prevent abuses in the future. See Stanley Cohen, State Crimes of Previous Regimes: Knowledge, Accountability and the Policy of the Past, 20 L. & SOC. INQUIRY 7, 49 (1995).

183. JOHN DONNE, DEVOTIONS UPON EMERGENT OCCASIONS XVII (1624).

The views expressed herein are solely those of the author.