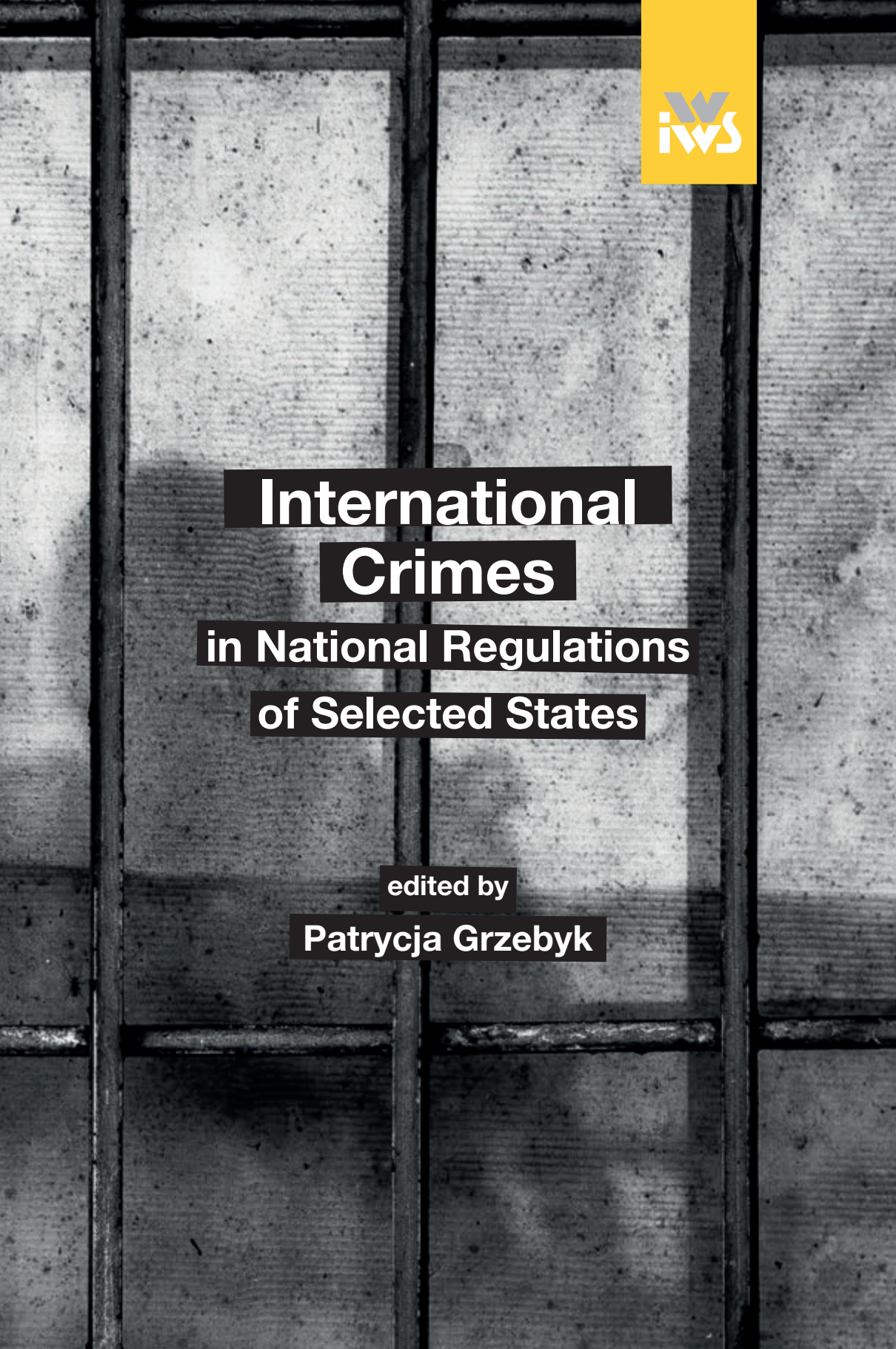

International Crimes

in National Regulations of Selected States

edited by

Patrycja Grzebyk

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REVIEWERS *dr hab. Joanna Nowakowska-Małusecka, prof. UŚ*
dr hab. Karolina Wierczyńska, prof. INP PAN

TRANSLATED AND EDITING BY *Paweł Madej, Tomasz Pałkowski*
TYPESETTING *Wiaczesław Krysztal*
COVER DESIGN *Tomasz Smołka*
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WYDAWNICTWO INSTYTUTU WYMIARU SPRAWIEDLIWOŚCI
ul. Krakowskie Przedmieście 25, 00-071 Warszawa
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COMPARATIVE STUDIES

PATRYCJA GRZEBYK

Difficulties in Penalizing International Crimes in National Law: Preliminary Remarks

The Rome Statute of the International Criminal Court (ICC) of 1998 indicated "the most serious crimes of concern to the international community, which threaten the peace, security and well-being of the world" (i.e., core crimes):[1] genocide, crimes against humanity, war crimes, and the crime of aggression. Similar lists of the most serious international crimes were introduced in the statutes of other international criminal courts, both international[2] and internationalized (hybrid),[3] as well as in the work of the International Law Commission on the Nuremberg principles[4] or on the Code of offences/crimes against the peace and security of mankind.[5]

However, from the point of view of individual states, of key importance are those documents that impose specific obligations on them to try, and sometimes prevent, international crimes. Among the binding international agreements on the core crimes, one should mention the Convention on the

[1] See paragraphs 3 and 4 of the Preamble to the Statute of the International Criminal Court, 2187 UNTS 3.

[2] See, e.g., the Charter of the International Military Tribunal (Article 6), 82 UNTS 279; or the Statute of the International Criminal Tribunal for the former Yugoslavia (Articles 1–5), S/RES/827 of 1993 as amended, available at https://www.icty.org/en/documents/statute-tribunal.

[3] See, e.g., the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia (Articles 2–8) of 2004, NS/RKM/1004/006, available at https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

[4] A/95(I) of 1946; A/488(V) of 1950.

[5] Code of Offences against the Peace and Security of Mankind adopted in 1954, *Yearbook of the International Law Commission*, vol. 2, 1954; Code of Crimes against the Peace and Security of Mankind adopted in 1996, *Yearbook of the International Law Commission*, vol. 2, part 2, 1996.

Prevention and Punishment of the Crime of Genocide of 1948[6] or the Geneva Conventions for the Protection of War Victims of 1949[7] and additional protocols thereto of 1977.[8] Also of great importance are documents developed by the International Law Commission, such as the above-mentioned Codes of Offences (Crimes) against the Peace and Security of Mankind of 1954 and 1996,[9] or the Draft Articles on Prevention and Punishment of Crimes Against Humanity adopted in 2019.[10] With them, the Commission confirmed that the obligation to prosecute and try perpetrators of crimes stems not only from the wording of international agreements, but also from customary international law.

To meet this obligation, national legislation must be laid down. International law may indeed set out the definitions of international crimes, and even the rules of related responsibility, yet the respective treaties fail to address any penal sanctions with which states would be obliged to punish perpetrators. Meanwhile, under the *nullum crimen sine poena* principle, a missing specific penal sanction prevents the prosecution of perpetrators before national courts. Moreover, in dualist systems, courts cannot rely directly on international agreements but must specify as the basis for trial national legislation transposing the international norms.

Various conventions, therefore, emphasize the need for states to enact relevant national legislation,[11] and the entry into force of the Rome Statute provided an extra stimulus for them to pass appropriate laws. States – both parties to the Statute and those that did not decide to ratify it – wanted to enable their authorities to prosecute criminals and thus, in reliance on the principle of complementarity, exclude the jurisdiction of the International Criminal Court (a case is inadmissible before the Court if it is the subject of criminal proceedings in a state having jurisdiction over the case, unless it is unwilling or unable to genuinely investigate or prosecute; or if the case

[6] 78 UNTS 277.

[7] 75 UNTS 31.

[8] 1125 UNTS 3.

[9] *Yearbook of the International Law Commission*, vol. 2, 1954; *Yearbook of the International Law Commission*, vol. 2, part 2, 1996, respectively.

[10] *Yearbook of the International Law Commission*, vol. 2, part 2, 2019.

[11] See, e.g., Article 49 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31.

has been investigated in a state that has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; or the person concerned has already been tried for conduct which is the subject of the complaint, unless the proceedings in the other court were for the purpose of shielding the person concerned from criminal responsibility or otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, given the circumstances, was inconsistent with an intent to bring the person concerned to justice – Articles 1, 17 and 20 of the ICC Statute). Giving priority to national courts to exercise their jurisdiction is entirely justified. Proceedings before national courts, as a rule, should be cheaper, faster, more effective as regards collecting evidence, and better ensure, due to their proximity, the participation of victims in the trial.

However, the analysis of national systems shows that states do not follow a single legislative model to govern criminal responsibility for international crimes nationally, and often face doubts as to how far they are only expected to copy international constructions, and how far they should modify treaty or customary international law solutions to adapt them to their specific needs or legal culture. Added to that is the need to account for changes in the interpretation of international law resulting from judgements of international and national courts, which often lack consistency, and problems with retroactivity of national laws or the applicability of statute of limitations and amnesty.

The Polish criminal law system, which is an interesting example of how international law norms can be transposed into the national order, is not devoid of the issues mentioned above. The current Penal Code of 1997[12] (as amended also in response to the ratification of the ICC Statute) includes Chapter XVI entitled "Offences against peace, mankind and war crimes", which primarily makes references to the Charter of the International Military Tribunal, which is an appendix to the Agreement concluded by and between 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

[12] Polish Journal of Laws of 1997, No. 88, item 553 as amended.

of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis; and to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 26 November 1968.[13] The Polish legislator, however, did not decide to assign the names of international crimes to specific provisions of the Code, the content of which mostly differs from the definitions of crimes and the rules of related criminal responsibility as adopted in international law and thus binding on Poland (e.g., the extension of protection against genocidal offences to political groups or groups with a specific worldview, under Article 118 of the Penal Code; or in the case of crimes against humanity – to any population groups, under Article 118a of the Penal Code). The legal system of Poland further features the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation,[14] which also, for its own purposes, defines a number of crimes of an international nature within a specific period. The inconsistency of Polish legislation with treaties and customary international law results in judgements which raise legal doubts, as Polish courts have considered, for example, individual cases of internment for 9–14 days as a crime against humanity.[15]

Besides the doubts as to the definition of crimes and the rules of related criminal responsibility in national law and their dynamic interpretations, there are problems with delimiting the jurisdiction of national courts, along with controversies over the exercise of the "universal jurisdiction" (applicable regardless of where a crime has been committed or the citizenship of the perpetrator and the victim) and the framing of judgements to properly convey the gravity of the crimes.

This monograph, which follows up on the conference "Penalization of international crimes in national law" organized by the Institute of Justice on 14–15 June 2021, tackles the above problems based on case studies of different legal systems in Europe and Asia. In this way, on the one hand, the reader is presented with an overview of regulations legislated in a region where states

[13] 754 UNTS 73.

[14] See the consolidated text in the Polish Journal of Laws of 2021, item 177.

[15] Judgement of the District Court in Skierniewice of 1 Feb. 2017, II K 504/15.

aspire to be champions in the implementation of norms of international criminal law and claim to have the most effective regional system of human rights protection, with its European Court of Human Rights at the forefront; on the other hand, there is a region (Asia–Pacific) where only 19 states have adopted the ICC Statute and where there is no binding regional human rights instrument covering all Asian states.

The overview covers the solutions adopted in Germany (Bartłomiej Krzan), Portugal (Alexandre Guerreiro), and Hungary (Tamás Hoffmann), in Bosnia and Herzegovina (Nedžad Smailagić, Barbara Janusz-Pohl), Poland (Karolina Sikora), and also in India (Aman Kumar, Ishita Chakrabarty), Pakistan (Ayesha Jawad, Sadia Farooq), Cambodia (Bradey Wright) or Japan and South Korea (Shayana Sarah Vieira de Andrade Mousinho, Arnelle Rolim Peixoto). Note that several texts focus on the prosecution of sexual crimes and problems related to their trial before international and national courts (Barbara Janusz-Pohl, Bradey Wright, Shayana Sarah Vieira de Andrade Mousinho, Arnelle Rolim Peixoto) and victim protection (Karolina Sikora). The book also features seemingly unobvious comparative analyses of national orders such as the pairs China–Italy (Riccardo Vecellio Segate) or Iraq–Ukraine (Karolina Aksamitowska). An analysis of the problem of the transposition of international crimes into national law from the point of view of the principle of legality, among others, (Patryk Gacka) is intended to provide a proper introduction to the whole selection.

In the presented texts, the reader will find a range of commentaries on the definition of crimes, the rules of jurisdiction, the rules of responsibility, as well as difficulties in the framing of specific crimes within a judgement. The texts refer to the practice of national courts as well as international and internationalized courts.

The authors of this publication hope that by showing various national perspectives, political and at times cultural impacts on certain legal solutions they will both make it easier to understand the doubts as to the current shape of international law norms and the system of international justice now in operation, and permit conclusions about the paths that amendments to national legislation should follow, so that errors or difficulties once encountered by some countries could translate into more robust legal constructions in others.

PATRYK GACKA

Legality, Fair Labelling and Copyright Principles Versus Transposition of International Crimes into National Legal Systems

Introduction

The transposition of legal norms between systems can follow either a horizontal or a vertical model. The former consists in the adoption of certain regulations in systems at the same level. It is therefore about one state borrowing a legal norm from another state,[1] as well as its individual institutional "subsystems" taking over an international regulation from within the system of international law.[2] The latter, in turn, is associated with the relationship between the international and the national legal systems. A vertical transposition will proceed either from national law to international law,[3] or in the opposite direction, from international law to domestic law.

In this study, my scholarly interest is with the last of the above-mentioned configurations. Its format is limited by the scope of international normative material, including provisions classifying international crimes, the definitions

[1] E. Grande, 'Italian Criminal Justice: Borrowing and Resistance', *The American Journal of Comparative Law*, vol. 48, no. 2, 2000, pp. 227–259 (describing the transplantation of American solutions into the Italian system of criminal law).

[2] N. Boister, R. Cryer, *The Tokyo International Military Tribunal – A Reappraisal*, Oxford 2008, p. 38 (Charter of the Nuremberg Tribunal as an inspiration for the Charter of the Tokyo Tribunal).

[3] C. Steer, 'Legal Transplants or Legal Patchworking? The Creation of International Criminal Law as a Pluralistic Body of Law', in E. van Sliedregt, S. Vasiliev (eds.), *Pluralism in International Criminal Law*, Oxford 2014, p. 39 ("As a branch of public international law, ICL has been born out of the same institutional framework that governs law-making and law-applying in this traditionally interstate playing field, yet because it deals with individual criminal responsibility, its normative content is drawn predominantly from domestic criminal law systems").

of which are to be transposed to the national level. Instead of a detailed assessment of individual vertical transposition practices, however, my considerations will focus primarily on a general reflection on their assumptions and effects. For this reason, after presenting the essence of the legality principle and the concept of international crimes versus other types of prohibited acts (section 2), I will analyze the transposition of international crimes into domestic law from the perspective of the principle of fair labelling and the copyright principle, one framed specifically for the purposes of this study (section 3). All these principles will provide arguments to support the underlying thesis of this study, whereby the transposition of the definitions of international crimes to the national level should assume – for reasons of protection and as well as procedural and communication reasons – possibly the most accurate and essentially imitative form,[4] so that criminalization at both international and national levels, in so far as it relates to crimes of concern to the international community, has an analogous scope and identical content.

1. Transposition of international crimes and the legality principle

1.1 International, transnational and ordinary crimes versus transposition

The limits of vertical transposition along the line linking international law to national law are determined by the scope of international criminalization in the form of specific types of international crimes. Since international crimes have not yet been defined in international law, it remains unclear which offences should be classified under this normative category. What remains beyond dispute, however, is the catalogue of the most serious international

[4] By imitative character, I mean striving to achieve the substantive (content-related) objective of international criminalization at the national level. It is in this sense that the idea of transposition that I am referring to here is conveyed in the EU legal order by directives, which bind a Member State with regard to the result, but not the means used to achieve it. Cf. Article 288 of the Treaty on the Functioning of the European Union (OJ C 202, 7.6.2016).

crimes (i.e., "core crimes"), which covers the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[5]

From the perspective of transposition practices, rather than on the very definition of international crimes, one should focus on the distinction between these crimes and transnational crimes, as well as ordinary crimes. Transnational crimes rest on the premise of "indirect suppression" of a specific conduct defined as prohibited by international law through national law.[6] To be legally effective, a transnational crime has to be transposed into a domestic law system.[7] An ordinary crime, despite being subject to national criminalization (like a transnational crime), is not a product of the transposition required under an obligation assumed by a state under a treaty or a convention, but the result of a free decision of the national legislator.

Contrary to transnational and ordinary crimes, international crimes are originally only binding internationally. Their effectiveness, therefore, does not depend on the transposition onto the national level.[8] In practice, however, these crime types apply at both levels of regulation due to the more or less precise transposition of their content into national law. International crimes can thus be the subject of national and international criminal trials. Also, certain specific procedural rules apply to them, which is distinctly demonstrated by the exclusion of classic limitation clauses that limit temporally trials for ordinary crimes.[9]

However, it is the scope of the transposition of international crimes to the national level that will determine whether the transposed types of crimes will

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[5] A.K.A. Greenawalt, 'What is an International Crime?', in K.J. Heller, F. Mégret, S.M.H. Nouwen et al. (eds.), *The Oxford Handbook of International Criminal Law*, Oxford 2020, p. 294.

[6] N. Boister, 'Transnational Criminal Law?', *European Journal of International Law*, vol. 14, no. 5, 2003, p. 955.

[7] C. Nowak, 'O pojęciu transnarodowego prawa karnego', *Państwo i Prawo*, no. 12, 2012, p. 9 ("As a matter of fact, offences in transnational criminal law are not offences in the strict sense of the word, because they are criminalized at the level of national law").

[8] K.J. Heller, 'What Is an International Crime? (A Revisionist History)', *Harvard International Law Journal*, vol. 58, no. 2, 2017, pp. 354–355 ("*direct criminalization thesis*": "certain acts are universally criminal because they are directly criminalized by international law itself, regardless of whether states criminalize them").

[9] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted by the General Assembly of the United Nations on 26 November 1968 (Journal of Laws of 1970, No. 26, item 208).

actually have features distinguishing them from ordinary and transnational crimes. From a systemic perspective, both narrowing down and extending the substantive scope of these crimes at the national level can be deemed problematic in this regard.[10]

If an extensive definition of international crime is adopted at the national level, a bizarre situation arises, where a fragment of the domestic definition of an international crime has (also) an international character, while the remaining part is only reserved for a national crime somewhat hidden behind a "disguise" of international criminalization.[11] For example, the domestic definition of the crime of genocide, broader than that applied in international law, is partly equivalent to an international crime, and partly only an ordinary crime.[12]

In the opposite situation – where the definition of an international crime is broader than one transposed domestically – the above dilemma obviously does not arise. However, the effect of such an incomplete transposition is that the perpetrators of crimes cannot be held criminally responsible before national courts for all acts criminalized at the international level,[13] of course, unless the national courts have the power to apply the international definition directly.

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[10] On the crime of genocide, see T. Hoffmann, 'The Crime of Genocide in its (Nearly) Infinite Domestic Variety', in *The Concept of Genocide in International Criminal Law – Developments after Lemkin*, M. Odello, P. Łubiński (eds.), Abingdon–New York 2020, p. 68 ("100 countries and the Special Administrative Region of Macao have opted to change – through their national implementations – at least some aspects of the internationally recognized definition of genocide, often significantly expanding or limiting the scope of application of the crime").

[11] In a similar vein, see in J.K. Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law', *Journal of International Criminal Justice*, no. 1, 2003, p. 100 ("some States have established offences under the rubric of international crimes that do not find a basis in international law, for instance by widening the groups against whom 'genocide' can be committed. Strictly speaking, these are domestic crimes in 'international disguise'").

[12] For example, Article 118 of the Criminal Code (6 instead of 4 protected groups); Act of 6 June 1997 – Criminal Code (Journal of Laws of 1997, No. 88, item 553). Cf. Hoffmann, 'The Crime of Genocide', p. 93 ("a simultaneous co-existence of international and domesticated norms at one and the same time").

[13] Cf. Articles 1 and 17 of the Rome Statute of the International Criminal Court (Journal of Laws of 2003, No. 78, item 708); K. Wierczyńska, *Przesłanki dopuszczalności wykonywania jurysdykcji przez międzynarodowy trybunał karny: studium międzynarodowoprawne*, Warszawa 2016; E. Socha, *Zbieżność a komplementarność jurysdykcji Międzynarodowych Trybunałów Karnych i sądów krajowych*, Wrocław 2004.

1.2 The legality principle and transposition practices

In international law, the principle of legality is framed, among others, in Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms,[14] which introduces formal and substantive requirements to assess the quality of criminal law in relation to a specific perpetrator and the act they have committed. From a formal perspective, the perpetrator may be held criminally responsible either under national law or under international law (ECHR Article 7(1)). From the substantive perspective, however, the standard of legality under the Convention attributes essential importance to, among others, the principle of legal certainty (*lex certa*), the principle of strict construction (*lex stricta*) and the prohibition of retroactivity (*lex praevia*).[15]

With its binary character as regards the sources of criminal responsibility, the principle of legality set out in Article 7(1) of the ECHR, however, makes room for some apparent departures from the *lex praevia* principle; these "exceptions" are particularly important in the context of prosecution and punishment of "historical crimes" committed under the auspices of the previous regime.[16] If a certain behaviour violated international law,[17] then

[14] Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (Journal of Laws of 1993, No. 61, item 284).

[15] J.L. Corsi, 'An Argument for Strict Legality in International Criminal Law', *Georgetown Journal of International Law*, vol. 49, no. 3, 2018, pp. 1332–1339; Cf. M. Timmerman, *Legality in Europe. On the principle nullum crimen, nulla poena sine lege in EU law and under the ECHR*, Cambridge 2018; Judgment in the case *Pantalon v. Croatia*, ECHR, 19 Nov. 2020, application no. 2953/14, sections 46 and 48.

[16] Judgment in the case *Streletz, Kessler and Krenz v. Germany*, ECHR, 22 March 2001, applications nos. 34044/96, 35532/97, 44801/98, section 81; Judgement in the case *Kononov v. Latvia*, ECHR, 17 May 2010, application no. 36376/04, section 241 ("it is legitimate and foreseeable for a successor State to bring criminal proceedings against persons who have committed crimes under a former regime and that successor courts cannot be criticised for applying and interpreting the legal provisions in force at the material time during the former regime, but in the light of the principles governing a State subject to the rule of law and having regard to the core principles on which the Convention system is built"). Cf. K. Karski, 'Zasada lex retro non agit a międzynarodowe prawo karne: kilka refleksji na tle genezy pojęcia', in J. Nowakowska-Małusecka, I. Topa (eds.), *Międzynarodowe i europejskie prawo karne – osiągnięcia, kierunki rozwoju, wyzwania*, Katowice 2015, pp. 45–61.

[17] Judgment in the case *Milanković v. Croatia*, ECHR, application no. 33351/20, 20 January 2022, section 54 ("the Court must satisfy itself that the applicant's conviction for war crimes […] had sufficiently clear basis in international law at the time when those crimes were

the guilty individual will not be able to argue *post factum* that their act was not a prohibited act, because it was not criminalized also under domestic law at the time of its commission.[18] Therefore, the legality principle will not be infringed if a criminal judgement is based on a subsequently framed statutory provision criminalizing an act which has been previously criminalized solely under international norms, as long as the act was indeed subject to international criminalization at the time of its commission, its criminal nature was predictable, and the applicable national instrument transposing the crime falls within the scope of regulation determined so far only under international law sources.[19]

As regards the requirement of foreseeability, the ECHR case law shows that a prohibited act should be "clearly defined" by a legal norm.[20] At the same time, the Court does not rule out a "gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence

committed, that is, having regard to the state of international law in 1991"); Judgment in the case *Korbely v. Hungary*, ECHR, 19 September 2008, application no. 9174/02, section 78.

[18] Judgment in the case *Sinan Çetinkaya and Ağyar Çetinkaya v. Turkey*, ECHR, 24 May 2022, application no. 74536/10, section 37 ("a contemporaneous legal basis for the applicant's conviction"); Judgment in the case *Antia and Khupenia v. Georgia,* ECHR, 18 June 2020, application no. 7523/10, section 37; Judgment in the case *Kadagishvili v. Georgia*, ECHR, 14 May 2020, application no. 12391/06, section 184; cf. *Streletz, Kessler and Krenz v. Germany*, sections 74, 77–79 and 105–106.

[19] Cf. *Milanković v. Croatia*, sections 10–26, 53 ("The applicant's conviction for war crimes was, therefore, primarily based on international law and must, in the Court's view, be examined chiefly from that perspective"); Judgment in the case *Parmak and Bakir v. Turkey,* ECHR, 3 Dec. 2019, applications nos. 22429/07 and 25195/07, section 58 ("it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences"); cf. *Antia and Khupenia v. Georgia*, section 36 ("an offence must be clearly defined in the law, be it national or international"); *Kononov v. Latvia*, section 243 ("the applicant's prosecution (and later conviction) by the Republic of Latvia, based on international law in force at the time of the impugned acts and applied by its courts, cannot be considered unforeseeable").

[20] Judgment in the case *Khodorkovskiy and Lebedev v. Russia (no. 2)*, ECHR, 14 Jan. 2020, applications nos. 51111/07 and 42757/07, section 568 ("an offence must be clearly defined in law"); Judgment in the case *Jidic v. Romania,* ECHR, 18 Feb. 2020, application no. 45776/16, section 79 ("qualitative requirements, notably those of accessibility and foreseeability"); Judgment in the case *Vasiliauskas v. Lithuania*, ECHR, 20 Oct. 2015, application no. 35343/05, section 154.

and could reasonably be foreseen."[21] Further, the foreseeability test should not be interpreted in terms of certainty that an act is criminalized, but only in terms of a possibility that an act could be recognized as punishable.[22]

Historical trials organized during transitional periods, in which the sentences of the perpetrators of international crimes passed by national courts were justified by the *ex ante* applicability of international definitions, have so far raised normative doubts, primarily with regard to the substantive requirements of the legality principle.[23] In turn, there have been no formal doubts as long as the domestic definition of an international crime adopted *ex post* did not extend the international scope of criminalization and was not applied retroactively by a national court.[24]

The contemporary normative landscape, however, differs markedly from that which existed only thirty years ago. At present, the main uncertainty as to the guarantees relates not so much to violations of the *lex praevia* rule or the availability of criminalization data, but to a kind of *criminalization eclecticism* as regards international crimes, which may engender a sense of

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[21] Judgment in the case *Jorgic v. Germany*, ECHR, 12 July 2007, application no. 74613/01, section 101; cf. *Milanković v. Croatia*, section 59 ("In the Court's view this applies equally to the development of national as well as of international law").

[22] Cf. *Jorgic v. Germany*, section 114 ("could reasonably be foreseen").

[23] Cf. *Vasiliauskas v. Lithuania*, *Kononov v. Latvia*.

[24] Cf. *Vasiliauskas v. Lithuania*, section 184 ("The Court cannot accept the argument by the Supreme Court that the 1998 amendments to the Criminal Code, expanding the definition of genocide to include 'political groups', could be justified on the basis of Article V of the Genocide Convention. While Article V of the Genocide Convention does not prohibit expanding the definition of genocide, it does not authorise the application of a broader definition of genocide retroactively"); Judgment in the case *Drėlingas v. Lithuania*, ECHR, 12 March 2019, application no. 28859/16, section 108 ("The Court considers that the *Drėlingas* ruling, adopted by the Supreme Court acting in plenary session, has dispelled the lack of clarity identified in *Vasiliauskas* arising out of the discrepancy within the domestic law, namely Article 99 of the Criminal Code, and Article II of the Genocide Convention. In addition, the Supreme Court has brought clarification as regards the scope of review when the charges of genocide are examined by the domestic courts, including the prohibition on retroactive prosecution for genocide of individuals belonging to a political group […]. In this way the domestic system, based on the international law (the Genocide Convention), and case-law of the domestic courts […] no longer displays the contrast that the Court identified in *Vasiliauskas* […]. The statutory obligation on the domestic courts to take into account the Supreme Court's case-law provides an important safeguard for the future […]").

confusion in those concerned under criminal law norms, and thus also lead to a justified finding that the foreseeability requirement has not been met.

To illustrate this, let me invoke a hypothetical situation where a professional attorney is asked to assess[25] whether a behaviour meets the constituent elements of an international crime.[26] An opponent of the arguments presented in this paper might say that the attorney should only draw the attention of a potential perpetrator of international crimes to the fact that their act *may* be classified as, for example, the crime of genocide, even if it is committed against a political group or another group that is not, however, protected under the international definition of the crime. Even if such advice, much imprecise after all, is considered sufficient, can anyone, even a professional, be expected to have knowledge of all national legal systems, all differences in definitions and jurisdictional rules relevant to the liability of a potential offender? From yet another perspective, we could further ask whether it is reasonable to expect that an international crime, considering the *quantum* of reprehensibility inherent in its constituent elements, should have uniform wording at every level of regulation, clearly communicating which acts are prohibited by the international community? At present, these questions are unfortunately ignored by both states involved in transposition and the international community. As it seems, it is hardly conceivable that this is proper and desirable, especially in the light of the protection-oriented principle of legality.[27]

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[25] Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law, ECHR, Request no. P16-2019-001, 29 May 2020, section 61 ("A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail"); Judgment in the case *Norman v. United Kingdom,* ECHR, application no. 41387/17, 6 July 2021, section 59.

[26] Cf. *Jorgic v. Germany*, section 113 ("the Court finds that the applicant, if need be with the assistance of a lawyer, could reasonably have foreseen that he risked being charged with and convicted of genocide for the acts he committed in 1992"); *Kononov v. Latvia*, section 238. An analysis of interpretation practices reveals yet another problem. Advisory opinion concerning the use of a "blanket reference", section 62.

[27] One must admit that the so-called gravity argument significantly undermines the above reasoning regarding the foreseeability; cf. *Milanković v. Croatia*, section 64 ("to the flagrant unlawful nature of the war crimes"); *Kononov v. Latvia*, section 241; *Jorgic v.*

2. Transposition of international crimes and the principle of fair labelling, as well as the copyright principle

Historical cases that have been referred to the ECHR, citing the legality principle violation, prove that the adoption of different (i.e., in practice, broader) definitions of international crimes when transposing them onto the national level may provide sufficient grounds for finding them contrary to the applicable human rights standards.[28] However, it can also be argued that such a transposition practice exemplifies a misuse of the label of a crime by a state undertaking not a transposition as such, but a transposition combined with an extended scope of regulation of an international crime in its domestic legislation. Although the label as such is not legally binding, using it too freely is undesirable. The fair labelling principle and the copyright principle offer substantive support for this position.

Fair labelling is deemed to be one of the fundamental principles of criminal law both in common law systems[29] and in continental law systems.[30] It was conceived as a principle that allows everyone "to see that widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law, and that offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law-breaking."[31]

The literature of the subject notes that individual legislations often use different terms to name similarly defined crimes.[32] While this practice is hardly questionable where ordinary crimes are dealt with, it is hard to accept a similar approach in the case of similar differences between the international and national legal systems in relation to international crimes. The names adopted to label particular international crimes are used for a reason, under

Germany, section 113; *Streletz, Kessler and Krenz v. Germany*, section 87. P. Gacka, 'Klauzula norymberska siedemdziesiąt lat później', *Roczniki Nauk Prawnych*, no. 4, 2020, pp. 167–198.

[28] Cf. *Vasiliauskas v. Lithuania*, section 191.

[29] A. Ashworth, J. Horder, *Principles of Criminal Law*, Oxford 2013, pp. 77–79.

[30] Cf. I. Andrejew, *Ustawowe znamiona czynu: typizacja i kwalifikacja przestępstw*, Warszawa 1978.

[31] As defined by Andrew Ashworth and Jeremy Horder in their *Principles of Criminal Law*, p. 77.

[32] Cf. J. Chalmers, F. Leverick, 'Fair Labeling in Criminal Law', *The Modern Law Review*, vol. 71, no. 2, 2008, p. 218 (demonstrating differences between the legislations of England and Scotland).

a well-established semantic and legislative convention. As such, they have a practical and symbolic significance.[33] The latter aspect is especially visible when the victims' opinions are taken into account. Here, the crime of genocide is attributed special significance, with a name (as the victims believe) testifying to the highest gravity of genocide among all types of international crimes.[34]

However, when the fair labelling principle is extended to the domain of international criminal law, two aspects should be distinguished. On the one hand, the analysis of the content of individual international crimes, especially crimes against humanity and war crimes, yields a conclusion that their scope of regulation is broad. In distinguishing between the various types of international crimes, therefore, international criminal law no doubt implements the fair labelling principle, but it does so in a different way than national legislations, as the criterion of the distinctions made in this case is primarily the contextual nature of specific crimes, and to a lesser extent the nature of the protected legal interests.[35] Moreover, the labelling of international crimes raises general doubts as to whether such broadly delimited types of crimes, which include various prohibited perpetration acts with various levels of gravity, can fully meet the default fair labelling principle. These doubts also emerge upon closer examination of judicial practice.[36]

On the other hand, the fair labelling principle can be studied in the light of the domestic law into which international crimes are transposed.

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[33] D. Robinson, 'The Identity Crisis of International Criminal Law', *Leiden Journal of International Law*, vol. 21, no. 4, 2008, p. 927 ("A third is the principle of 'fair labelling', which requires that the label of the offence should fairly express and signal the wrongdoing of the accused, so that the stigma of conviction corresponds to the wrongfulness of the act"); N. Kersting, 'On Symbolism and Beyond: Defining Ecocide', *Völkerrechtsblog*, 8 July 2021.

[34] H.R. Garry, "For Victims in Ukraine, Saying 'Genocide' Does Matter", *The Hill*, 30 April 2022 (https://thehill.com/opinion/international/3472617-for-victims-in-ukraine-saying-genocide-does-matter); cf., however, K. Wierczyńska, 'Hierarchia zbrodni w prawie międzynarodowym', *Państwo i Prawo*, no. 1, 2016, p. 71 ("the assessment of a crime is based on its gravity, and not on a possible position in the hierarchy").

[35] In contrast with the methods used in domestic law; cf. Chalmers, Leverick, 'Fair Labelling in Criminal Law', p. 221 ("At a macro-level, most systems of criminal law – either formally or informally – group individual offences into broader categories").

[36] Cf. H.M. Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals*, Oxford 2014, pp. 88 and 105 ("the current broad labelling of gender-based crimes […] has led to inconsistent prosecutions and verdicts, resulting in the failure of these judicial bodies to adequately address grievous offences").

This approach to the principle differs fundamentally from the approach presented for the labelling of ordinary crimes in domestic law and international crimes in international law. In this case, the accuracy of labelling in the domestic law in respect of the fair labelling principle must be assessed not so much in the light of the general principles of justice or the past legislative practice of a state,[37] but with due regard for the designations and definitions adopted in international criminal law. In this connection, it should be concluded that the acceptance of an extended transposition with the use of a default label in practice means a negation of the fair labelling principle. It is so because this leads to a situation where a specific name of a crime (e.g., genocide), carrying a specific message and a dose of gravity, is used to designate behaviours that are actually anything but international crimes. Thus, a model that a state may adopt to transpose an international crime into the domestic legal order may fundamentally modify its subsequent assessment in terms of the fair labelling principle.

The latter remark is closely linked to the other principle discussed in this paper, namely the copyright principle. Unlike the fair labelling principle, which is accepted by default in both national and international law,[38] the copyright principle is included in neither of the two normative systems. Nor is it known to the science of international criminal law. However, I formulate it in this paper to demonstrate another aspect, slightly different from the issues discussed above, related to the transposition of the definitions of international crimes onto the national level.

The copyright principle relates to the problem that arises when transposition either is not fully consistent with or goes beyond the scope of the international definition of a crime. Should the transposing state be free to determine the content and scope of a crime to be transposed into its domestic law? This question seems justified insofar as one can imagine a situation where, for example, one state uses the name of the crime of genocide to

[37] V. Tadros, 'Fair Labelling and Social Solidarity', in L. Zedner, J.V. Roberts (eds.), *Principles and values in criminal law and criminal justice: essays in honour of Andrew Ashworth*, Oxford 2012, p. 67 ("justice imposes restrictions not only on the scope of the criminal law, but also on the way that content is divided up and described").

[38] Cf. Zawati, *Fair Labelling*, p. 33 ("Applying the principle of fair labelling in international criminal law could be justified under Article 38(1)(c) of the ICJ").

denote attacks not only against four, but at a dozen or several dozen different protected groups.

In view of the copyright principle, therefore, the answer to the question whether the labels originally adopted in international law can be freely used domestically is negative. Since the object of transposition is a specific international crime, a state carrying out this procedure should not be treated as *the rights holder (author)* of the concept of a crime, but only as its *user*. The state should therefore not be entitled to arbitrarily define the scope of an international crime transposed onto the national level by using the same label (e.g., *genocide*). It is the international community that grants a crime a binding nature, and therefore it should be in a position to decide how the concept and designation of the crime will be used at different levels of regulation. For example, since the crime of genocide was criminalized by a decision of the international community of states in 1948, the then adopted international definition should delimit the framework within which this crime will be criminalized *under a name already in use*, not only in the system of international law, but also in domestic systems of individual states. To reject this rule would mean in practice that states are not constrained in their transposition at all, and that they can name any act (regardless of its content), a crime of genocide, for example.[39]

As the copyright principle is currently not binding, this practice is unfortunately permissible *de lege lata*. This regulatory gap can hardly be recognized as positive.[40] It contradicts the unifying nature of the clauses obligating states to transpose crimes onto the national level[41] and the general principle of systemic consistency, as well as the communicative function of criminal law.

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[39] B. Saul, 'The Implementation of the Genocide Convention at the National Level', in P. Gaeta (ed.), *The UN Genocide Convention. A Commentary*, Oxford 2009, p. 64 ("Overly-broad national definitions of genocide may not be internationally unlawful as such, since there is no prohibitive rule that misusing or misapplying the terminology of an international crime is internationally wrongful").

[40] Cf. Kleffner, 'The Impact of Complementarity', p. 100 ("While nothing prevents States from criminalizing such acts in principle, for each State is entitled to adopt whatever criminal laws it considers appropriate, such an approach of unilaterally broadening the scope of international offences and the punitive regime applicable to them gives rise to a number of problems").

[41] Cf. Article 5 of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948 (Journal

Conclusions

This paper seeks to highlight several problems as regards the transposition of international crimes into internal legal systems. The practice of states so far shows that the normatively uniform definitions of international crimes have been modified to a greater or lesser extent, resulting in a kind of *criminalization eclecticism*. All the discussed approaches – the legality principle, the fair labelling principle, and the copyright principle (framed for the purposes of this paper) – provide a range of arguments in the critique of this state of affairs.

By adopting different national definitions of international crimes, states seem to express their opposition to the status of international criminalization. After all, if the international definition corresponded to their positions, they would not narrow down or extend the definition of international crimes in domestic legislations. At the same time, the ECHR's case law proves that states decide to modify the scope of international criminalization in their domestic legal systems with a view to equipping themselves with such legal instruments that – especially in the event of a historical turmoil – will empower them to effectively hold accountable the perpetrators of crimes acting on behalf of the previous regime. This, in turn, can cause significant problems from the perspective of the *lex praevia* prohibition and the standard of foreseeability of the criminal nature of a crime.

It must be admitted that in many cases this covert criticism of the state of international criminalization evident in the practice of individual states is supported by arguments and intuitions articulated by scholars. Perhaps the over 70-year-old international definition of the crime of genocide should indeed be revised to extend its scope to other protected groups.[42] Still, even if the arguments put forward in the extensive literature on the subject are considered justified from the perspective of the general criminalization goal defining the essence of international criminal law, any changes effected in the bottom-up model will deserve a negative assessment from the perspective

of Laws of 1952, No. 2, item 9); Article 6 of the *Draft Articles on Prevention and Punishment of Crimes Against Humanity* (2019).

[42] Cf. Hoffmann, 'The Crime of Genocide', p. 82 ("The closed list of groups of people protected by the Genocide Convention has been a source of contention ever since the adoption of the Convention").

of the legality, fair labelling and copyright principles, until the international community as a whole, and not only individual states, takes such an initiative. *De lege ferenda* it should be postulated, therefore, that states strive to maintain the systemic consistency of international criminal law and cooperate towards more frequent modifications of the content of the law, should they deem it inadequate. Only in this way can international criminal law be an effective and legitimate legal mechanism. Neither expanding nor narrowing the definitions of international crime at the national level will help to achieve this goal. In contrast, it may generate complications related to practice and protection that undermine the applicable international standards.

EUROPE

BARTŁOMIEJ KRZAN

German Code of Crimes against International Law: A Look from Outside

Introduction

There is no doubt that the development of international criminal law and judiciary has from the outset been closely linked with Germany.[1] It is against officials of that country that attempts were first made to mobilize international criminal justice, with varying degrees of success. The Federal Republic took an active part in the work on the Statute of the International Criminal Court (ICC), where it firmly advocated an extensive basis for the application of the Court's jurisdiction (as rooted in universal jurisdiction of the States Parties to the proposed Statute[2]), and then played a key role in negotiating the definition and terms of exercising the jurisdiction over the crime of aggression. Last but not least, Germany has been a pioneer in the implementation of the Rome Statute. This paper sets out precisely to analyze the German approach, and in particular to look at the Code of Crimes Against International Law and how it is applicable in the German judicial practice.

[1] G. Werle, F. Jessberger, 'International Criminal Justice Is Coming Home: The New German Code of Crimes against International Law', *Criminal Law Forum*, no. 13, 2002, p. 196.

[2] The jurisdiction of the International Criminal Court: an informal discussion paper submitted by Germany, A/AC.249/1998/DP.2; see also E. Wilmshurst, 'Jurisdiction of the Court', in R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute. Issues, Negotiations, Results*, The Hague 1999, pp. 132–133.

1. Germany and the prosecution of international crimes

Germany signed the Rome Statute on 10 December 1998, and ratified it almost exactly two years later in December 2000. In this context, a symbolic reference to the date of adoption of the Universal Declaration of Human Rights can be noted. On 26 June 2002, the German Bundestag passed a law introducing the Code of Crimes Against International Law.[3]

The government's explanatory memorandum[4] listed four objectives of the enactment of the Code of Crimes Against International Law. In the first place, it claimed that the specific nature of crimes against international law would be better addressed than was possible before under the general criminal law. Next, it pointed to the need to promote legal clarity and practical manageability through standardization within a single set of rules. Further, as regards the complementarity of the jurisdiction of the International Criminal Court, it indicated that Germany should ensure beyond any doubt that the country was at all times in a position to prosecute crimes falling within the jurisdiction of the ICC. As a complementary objective, it highlighted the promotion of international humanitarian law through relevant national legislation laws and through contributing to its furthering elsewhere.

The law entered into force on 30 June 2002. Article 1 lays down the Code of Crimes Against International Law, while subsequent provisions introduced, among others, amendments to the Criminal Code (*Strafgesetzbuch*, StGB) and the Code of Criminal Procedure. The ratification of the Rome Statute also required certain amendments to the Constitution. This was primarily a modification of Article 16 of the Basic Law (*Grundgesetz*, GG),[5] which was intended to enable the surrender of a German citizen to the ICC. Constitutional obstacles did not allow a direct application of customary international law or a reference to the norms of the Rome Statute. Under Article 103II GG, an act is punishable only if it has been defined in the law as a crime before the act is committed. According to Article 25 GG, international custom takes

[3] Published in Bundesgesetzblatt (BGBl). 2002 I, p. 2254.

[4] Deutscher Bundestag, Drucksache 14/8524, Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Einführung des Völkerstrafgesetzbuches, p. 12.

[5] M. Böhm, V. Teubert, 'Völkerstrafgesetzbuch und Grundgesetz', in Ch. Safferling, S. Kirsch (eds.), *Völkerstrafrechtspolitik: Praxis des Völkerstrafrechts*, Heidelberg 2014, pp. 447–470.

priority over the ordinary legislation, but it does not enjoy a constitutional rank, hence these crimes cannot be punished only on the basis of customary law, that is, they are subject to the *nullum crimen sine lege scripta* principle. Their framing in the Rome Statute (and in the Elements of Crimes) is extensive, but from the perspective of German constitutional standards, the general framework of punishments and sentencing, as contained in Articles 77–78 of the Rome Statute, were insufficient as they had no direct reference to specific crimes.[6]

In theory, the Rome Statute could be implemented in various ways, either by an amendment (to elaborate on the existing criminal legislation) or by passing a separate law. The government's bill opted for separate codification. A possible solution would be to copy the provisions of the ICC Statute into German law word for word, although all definitions would still have to be in line with the constitutional standards of legal certainty. Ultimately, the choice was made for a modified codification. Indeed, there were voices of criticism that by a separate codification, next to the criminal code, international criminal law would be degraded to a rank of "ordinary supplementary law."[7] Instead, a clear structure was achieved, along with an opportunity to address those issues that could not be resolved during the negotiations of the Rome Statute.[8] Finally, the clear message that was given in this way, about a kind of emancipation, should be highlighted as well.[9]

German ordinary legislation, which was essentially blind to the prosecution of international crimes, also required a number of amendments. Apart from the crime of genocide provided for in Article 220a StGB, it lacked a reference to international crimes. In theory, it was possible to subsume most of the prohibited acts under the existing provisions of the Criminal Code

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[6] H. Satzger, 'German Criminal Law and the Rome Statute – A Critical Analysis of the New German Code of Crimes against International Law', *International Criminal Law Review*, vol. 2, 2002, p. 264.

[7] This is dealt with in G. Werle, 'Konturen eines deutschen Völkerstrafrechts: Zum Arbeitsentwurf eines Völkerstrafgesetzbuchs', *JuristenZeitung*, vol. 56, no. 18, 21 September 2001, p. 886.

[8] C. Kreß, *Vom Nutzen eines deutschen Völkerstrafgesetzbuchs*, Berlin 2000, pp. 2 and 21.

[9] Satzger, 'German Criminal Law', p. 266.

or the Military Criminal Code, but such measures could blur the specific character of these crimes.[10]

Before the Code of Crimes Against International Law came into force (until 30 June 2002), the German commitment to developing international criminal law and judiciary was therefore barely manifested in substantive criminal law. This can be seen as a reflection of the traditionally sceptical attitude towards international justice.[11]

One must note that for many decades the Federal Republic was satisfied with the "zero option."[12] Although Article 2(1)(c) of the Law No. 10 of the Allied Control Council on Direct Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity[13] provided for the prosecution of crimes against humanity under the occupation law in post-war Germany, these were not incorporated in the legislation of the Federal Republic of Germany. As highlighted in the literature, the German legal system largely failed to deal with Nazi injustice by simply not undertaking any investigations or trials or by doing so with insufficient commitment.[14] The German Democratic Republic, on the other hand, incorporated the Nuremberg Principles into its national legislation.[15]

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[10] E. Zielińska, 'Implementacja Statutu Międzynarodowego Trybunału Karnego w Niemczech – kodeks karny międzynarodowy', in A. Łopatka et al. (eds.), *Prawo-społeczeństwo-jednostka. Księga jubileuszowa dedykowana Profesorowi Leszkowi Kubickiemu*, Warszawa 2003, p. 338.

[11] Werle, Jessberger, 'International Criminal Justice', p. 198. Cf. also G. Werle, 'Die Entwicklung des Völkerstrafrechts aus deutscher Perspektive', in G. Hankel (ed.), *Die Macht und das Recht. Beiträge zum Völkerrecht und Völkerstrafrecht am Beginn des 21. Jahrhunderts*, Hamburg 2008, p. 97ff.

[12] See Werle, 'Konturen eines deutschen Völkerstrafrechts', p. 887, who mentions a bill on the punishment of those guilty of crimes under international humanitarian law of 10 June 1980, as drafted by the Federal Ministry of Justice, which was not submitted to the Bundestag.

[13] Official Gazette of the Control Council for Germany, No. 3, 31 J. 1946.

[14] H. Kreicker, 'Deutschland', in A. Eser, H. Kreicker (eds.), *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, vol. 1: *Deutschland*, Berlin 2003, p. 87.

[15] Crimes against humanity were punishable under section 91 of the East German Criminal Code. See Werle and Jessberger, 'International Criminal Justice', p. 192. Cf. R. Steinke, *The Politics of International Criminal Justice. German Perspectives from Nuremberg to the Hague*, Oxford 2012, p. 66.

(West) German courts did not refer to the Nuremberg Principles when punishing Nazi crimes.[16] It was only in 1990s, and therefore several decades later, in the context of the prosecution of crimes committed under the auspices of the German Democratic Republic, that the Federal Supreme Court (*Bundesgerichtshof*, BGH) explicitly recognized the principles of international criminal law.[17]

It was also then that German prosecutors began to more willingly prosecute those suspected of committing war crimes abroad. Noteworthy, the Federal Republic was a popular destination, attractive from the point of view of immigration from areas affected by bloody ethnic conflicts.[18] Germany was the natural direction of emigration from the former Yugoslavia. Under §7 StGB, German criminal law applies to acts committed against a German citizen abroad, if the act is punishable at the place where it was committed or if the place where it was committed is not covered by any criminal jurisdiction. Paragraph 2 of this provision extends the application of German criminal law to other offences committed abroad.

In this context, one should note that the principle of universal repression was also established by §6 StGB[19] but the courts used a restrictive construction of it. In the Tadić case, the BGH concluded that for universal jurisdiction to be exercised there must be a "legitimizing link" (*ein legitimierender Anknüpfungspunkt*) between the suspect and the state, as "in the absence of such a link with the forum state, the prosecution would violate the principle of non-interference, under which each state is obliged to respect the sovereignty

[16] The activity of the Centre for the Investigation of National Socialist Crimes in Ludwigsburg (*Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung nationalsozialistischer Verbrechen*) and its evaluation lie beyond the scope of our considerations.

[17] See G. Werle, 'Völkerstrafrecht und geltendes deutsches Strafrecht', *JuristenZeitung*, vol. 55, nos. 15–16, 2000, p. 756. See BGHSt 41, 101 – Mauerschützen III, Bundesgerichtshof, Urteil vom 20. März 1995, Zur Beurteilung vorsätzlicher Tötungshandlungen von Grenzsoldaten der DDR an der innerdeutschen Grenze.

[18] T. Ostropolski, *Zasada jurysdykcji uniwersalnej w prawie międzynarodowym*, Warszawa 2008, p. 174.

[19] The provision extended the application of the code, irrespective of the law of the place where the act was committed, to cover the following acts committed abroad: genocide (§6(1) StGB in the wording applicable before the entry into force of the Code of International Crimes) and acts committed abroad, prosecuted on the basis of agreements binding on the Federal Republic of Germany (§6(9) StGB, in the unchanged wording).

of other states."[20] In this way, a reference was made to the legitimizing link, as construed by BGH in the 1970s in the Dost case, beyond what was literally required under §6 StGB.[21] The fate of that reference in the case-law of the Supreme Court provoked extensive criticism.[22] The first person[23] convicted of genocide (under the former Article 220a StGB) by a German court was Nicola Jorgić, given a life sentence on 26 September 1997 by the Higher Regional Court (*Oberlandesgericht*) in Düsseldorf. The first German judgement against Rwandan citizens who had fled to Germany was passed in 2014.[24]

2. Code of Crimes against International Law

The situation changed significantly with the entry into force of the Code of Crimes against International Law. Part 1 of the Code ("General provisions") opens with §1 defining its scope of application. The law applies to all crimes against international law specified in its content, even if a crime has been committed abroad without any reference to Germany. In turn, as regards the acts referred to in §13 (crimes of aggression) that have been committed abroad, the law applies regardless of the law of the place where the crime was committed, if the perpetrator is German or the act is directed against the

[20] Bundesgerichhtshof, Ermittlungsrichter, Beschluß vom 13. Februar 1994, BGs 100.94, reprinted in *Neue Zeitschrift für Strafrecht*, 1994, p. 233.

[21] See Ostropolski, *Zasada jurysdykcji*, pp. 165–166.

[22] See K. Ambos, S. Wirth, 'Genocide and War Crimes in the Former Yugoslavia Before German Criminal Courts', in H. Fischer, C. Kreß, S.R. Lüder (eds.), *International and National Prosecution of Crimes under International Law: Current Developments*, Berlin 2001, p. 783.

[23] F. Jessberger, 'Jorgić', in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford 2009, p. 738.

[24] OLG Frankfurt am Main, Judgement of 18 February 2014 (5-3 StE 4/10-4-3/10); the Higher Regional Court in Frankfurt-am Main found a Rwandan, Onesphore Rwabukombe, guilty of genocide committed in the church in Kiziguro, Rwanda in 1994, and sentenced him to life imprisonment. Rwabukombe was initially convicted of aiding, abetting and inciting genocide. After the case had been examined by the Federal Supreme Court (BGH 3 StR 575/14 – Beschluss vom 21. Mai 2015,OLG Frankfurt) and referred back to the Higher Regional Court in Frankfurt, Rwabukombe was convicted of genocide as an accomplice under §220a StGB – OLG Frankfurt, 29.12.2015, 4-3 StE 4/10-4-1/15, ECLI:DE:OLGHE:2015:1229.4.3STE4.10.4.1.15.0A, finally validated by BGH, 26.07.2016 – 3 StR 160/16. See also G. Werle, B. Burghardt, 'Der Völkermord in Ruanda und die deutsche Strafjustiz', *Zeitschrift für Internationale Strafrechtsdogmatik*, vol. 10, no. 10, 2015, pp. 46–56.

Federal Republic of Germany. Thus, in principle, full universal jurisdiction was established.

Under §2, it was stipulated that the provisions of the general part of the Criminal Code also apply with respect to the Code of International Crimes, unless the latter states otherwise. The establishment of an alternative parallel general part would lead to unpredictable difficulties in the application of the law. Accordingly, the Code does not contain any specific provisions with respect to most of the "general principles" set out in Articles 22–33 of the ICC Statute. §3 excludes the guilt of the perpetrator who, in carrying out a military order or an instruction of comparable effect, commits war crimes or special acts covered by the Code of Crimes against International Law, unless the person knew that the order to commit an act specified in §§8 to 14 was unlawful or unless the person considered the order or instruction so executed manifestly unlawful. §4 explains that a superior, who is vested with appropriate supervisory powers and who does not prevent a subordinate from committing genocide, crimes against humanity or war crimes, will be punished as the perpetrator of a crime committed by the subordinate. The general part also regulates the statute of limitations. §5 of the Code excludes the statute of limitations on genocide, crimes against humanity, war crimes and crimes of aggression. With regard to crimes consisting in breach of the supervision obligation (§14) and failure to report a crime (§15), the Code does not stipulate a statute of limitations, so that general criminal law (§§78–78(c) of the German Criminal Code) will apply.

The second part is a special part devoted to particular types of crimes against international law. The order of appearance, as developed in the Rome Statute, was used here. However, one should emphasize that, contrary to the ICC Statute, each crime is assigned a statutory penalty, which also makes it possible to distinguish between the gravity of individual crimes. The first chapter deals collectively with the crime of genocide (§6) and crimes against humanity (§7). Obviously, war crimes required much more extensive regulation. Contrary to the Rome Statute, the Code of Crimes Against International Law does not maintain the distinction between international and non-international armed conflicts. Instead, the Code distinguishes between the "Geneva law", which aims to protect persons and property, and the "The Hague law", which limits the methods and means of warfare. Thus, §8 refers to war crimes

against people, §9 against property and other rights, and §10 regulates war crimes against humanitarian operations and emblems. In turn, subsequent provisions regulate respectively war crimes with the use of prohibited methods of warfare (§11) and war crimes with the use of prohibited means of warfare (§12). As a result of the 2016 amendment,[25] a separate chapter was added as devoted to the crimes of aggression (§13), which forced the renumbering of the provisions of the last, now fourth chapter of the second part, dealing with the remaining crimes (other offences): violation of the supervision obligation (§14) and failure to report a crime (§15).

The crime of aggression was introduced under Article 1 of the Law of 22 December 2016, in force from 1 January 2017. This was the aftermath of the Kampala Review Conference, which, with a significant contribution of German diplomacy, was instrumental in defining the crime and the terms for exercising the ICC's jurisdiction over it. Previously, German general criminal law had contained a similar provision in former §80 StGB, which was repealed. Of note in this context is Article 26 GG, whereby it is a crime to prepare or wage a war of aggression.

The criminal procedure in Germany is based on the principle of legality. The Code of Criminal Procedure (*Strafprozessordnung*, StPO)[26] establishes an obligation to prosecute for any crime, if there are sufficient factual grounds (§152(2) StPO), as well as an obligation to prosecute the perpetrator (§170 StPO).[27] Regardless of these clear messages, however, a number of exceptions that allow for opportunism were also laid down,[28] which undermines the normative realness of the solution.[29] From the perspective of these considerations, §153f(1) StPO is of utmost importance; under this provision, the prosecutor may refuse to initiate proceedings if the prosecuted person does not stay in the territory of the Federal Republic of Germany and is not anticipated to be present. With regard to a German citizen, a refusal to initiate proceedings

[25] BGBl. 2016 I, p. 3150.

[26] BGBl. 2019 I, p. 1066.

[27] M. Rogacka-Rzewnicka, O*portunizm i legalizm ścigania przestępstw w świetle współczesnych przeobrażeń procesu karnego*, Warszawa 2007, p. 85. See also J. Schulenburg, 'Zasady legalizmu i oportunizmu w niemieckim kodeksie postępowania karnego – zależności i sprzeczności', *Prokuratura i Prawo*, no. 5, 2003, p. 89ff.

[28] §§153–154e StPO.

[29] Rogacka-Rzewnicka, *Oportunizm i legalizm*, p. 91.

may take place when proceedings against the person are conducted either by an international court or a court of the country where the act was committed, or finally by a court of the country of which the aggrieved person is a citizen. In its next paragraph, the provision of §153ff allows for a broader use of prosecution opportunism, when neither the prosecuted person nor the aggrieved person have German citizenship and the presence of the prosecuted person, against whom the proceedings are conducted by an international court, a *loci commissi delicti* court or a court of the citizenship of the perpetrator or the aggrieved person, is not anticipated in Germany. This suggests a three-tier structure, with priority given first to the jurisdiction of the place where a crime was committed, the citizenship of the perpetrator or the aggrieved person, second to international jurisdiction, and only lastly to German courts exercising universal jurisdiction.[30] Otherwise, Germany's exercise of universal jurisdiction could increase tensions between states for which the exercise of universal jurisdiction would be tantamount to interfering with their internal affairs.[31] This approach does not easily fit in the vision of complementary jurisdiction of the permanent ICC.[32]

Moreover, it is necessary to take into account the provisions of the Law on the constitution of courts (*Gerichtsverfassungsgesetz*). In accordance with its §120(1)(8) in conjunction with §142(1) sentence 1, the prosecution of crimes under the Code is a task of the Federal Public Prosecutor General (*Generalbundesanwalt*). On the other hand, under §18–20, German criminal jurisdiction may not be exercised against persons who are granted immunities under diplomatic and consular law, nor against representatives of other countries and their accompanying persons staying in Germany at an official invitation of the Federal Republic of Germany, and finally against other persons, insofar as they are excluded from its application under international law.

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[30] This in the justification, Drucksache 14/8524, p. 37. Subsequently upheld by the Supreme Court – see BGH-Ermittlungsrichter: Verfahren wegen Verbrechen gegen die Menschlichkeit – Akteneinsicht, NStZ 2012, 223, §17.

[31] K. Ambos, 'Prosecuting International Crimes at the National and International Level: Between Justice and Realpolitik', in W. Kaleck et al. (eds.), *International Prosecution of Human Rights Crimes*, Berlin 2007, p. 66; cf. M. Langer, 'Universal Jurisdiction as Janus-Faced: The Dual Nature of the German International Criminal Code', *Journal of International Criminal Justice*, vol. 11, 2013, p. 758.

[32] See Article 17 of the Rome Statute.

3. The Code's application practice

The first attempts to bring persons to justice under the Code of Crimes Against International Law were unsuccessful.[33] A vain attempt to initiate proceedings against Donald Rumsfeld resonated loudly;[34] both the application of 30 November 2004 filed by the Centre for Constitutional Rights and a later one of 2006, by former Abu Ghraib and Guantanamo detainees, were rejected by the federal prosecutor under §153f StPO.[35] In turn, the notification of a crime committed by former Chinese President Jiang Zemin against Falun Gong was also refused on the basis of §20 *Gerichtsverfassungsgesetz*, that is, with functional immunity cited.[36]

A refusal was also issued regarding an application to initiate proceedings against former Uzbek Interior Minister Zokirjon Almatov, who was charged with torture and crimes against humanity by the police and security service of Uzbekistan in Andijan in 2005. When a group of refugees from Uzbekistan applied, Almatov was undergoing clinical treatment in Germany, and the decision to refuse to initiate proceedings was issued after his return to his homeland.[37]

On 28 September 2015, the Higher Regional Court in Stuttgart handed down convictions in the trial of two Rwandan leaders of a combat organization

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[33] N. Geißler, F. Selbmann, 'Fünf Jahre Völkerstrafgesetzbuch – Eine kritische Bilanz', *Humanitäres Völkerrecht: Informationsschriften*, vol. 20, no. 3, 2007, p. 160ff.

[34] See A. Fischer-Lescano, 'Torture in Abu Ghraib: The Complaint against Donald Rumsfeld under the German Code of Crimes against International Law', *German Law Journal*, vol. 6, 2005, p. 689ff.; K. Ambos, 'International Core Crimes, Universal Jurisdiction and §153f of the German Criminal Procedure Code: A Commentary on the Decisions of the Federal Prosecutor General and the Stuttgart Higher Regional Court in the Abu Ghraib/Rumsfeld Case', *Criminal law forum*, vol. 18, 2007, p. 43ff.

[35] See K. Gallagher, 'Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-Level United States Officials Accountable for Torture', *Journal of International Criminal Justice*, vol. 7, no. 5, 2009, p. 1107. See more in Ostropolski, *Zasada jurysdykcji*, p. 170ff.

[36] W. Kaleck, 'German International Criminal Law in Practice: From Leipzig to Karlsruhe', in W. Kaleck et al. (eds.), *International Prosecution of Human Rights Crimes*, Heidelberg 2007, p. 106.

[37] S. Zappalà, 'The German Federal Prosecutor's Decision Not to Prosecute a Former Uzbek Minister: Missed Opportunity or Prosecutorial Wisdom?', *Journal of International Criminal Justice*, vol. 4, no. 3, 2006, p. 602ff.; Kaleck, 'German International Criminal Law', p. 109; Ostropolski, *Zasada jurysdykcji*, p. 172.

Forces Democratiques de Libération du Rwanda (FDLR).[38] From the justification of the judgement, the most publicly remembered was the opening sentence by the presiding judge of the adjudicating panel, Jürgen Hettich, who emphatically highlighted the incompatibility of the national legal instruments with the requirements of such an enormous ("mammoth") trial.[39] Hettich's opinion raised a major controversy,[40] which further translated into additional initiatives in the Bundestag.[41]

When analyzing the judicial application of the Code, one can notice a clear shift of interest to Iraq and Syria.[42] The limits of this paper do not allow for a more detailed analysis.[43] Not infrequently, they generate wide interest, as can be seen in the trial of two former Syrian government officials for using torture, brought before the OLG in Koblenz in April 2020.[44] They ended with

[38] OLG Stuttgart Urteil vom 28. September 2015, 5-3 StE 6/10). Ignace Murwanashyaka, president of the FDLR, and Straton Musoni, its vice-chairman, were charged with serious violations of international law in the Eastern Democratic Republic of Congo in 2008/2009 and convicted: principal defendant Murwanashyaka for aiding and abetting war crimes and leading a foreign terrorist group (§129b StGB), and his accessory Musoni for leading a foreign terrorist group, respectively for 13 and 8 years in prison.

[39] Presiding Judge Hettich said: "It does not work that way. Such mammoth proceedings cannot be managed by means of the Code of Criminal Procedure" (So geht es nicht. Ein solches Mammutverfahren ist mit den Mitteln der Strafprozessordnung nicht in den Griff zu kriegen).

[40] See S. Bock, 'International Adjudication Under Particular Consideration of International Criminal Justice: The German Contribution', in P. Hilpold (ed.), *European International Law Traditions*, Berlin 2021, p. 299.

[41] See D. Bentele, 'Völkerstrafprozesse in Deutschland voranbringen – Eine rechtpolitische Betrachtung', *Zeitschrift für Internationale Strafrechtsdogmatik*, vol. 11, no. 11, 2016, p. 803.

[42] See L. Büngener, 'Aus der Praxis des Generalbundesanwalts im Völkerstrafrecht – Aktuelle Entwicklungen', *Zeitschrift für Internationale Strafrechtsdogmatik*, vol. 12, no. 12, 2017, p. 755ff.; Ch. Ritscher, 'Aktuelle Entwicklung in der Strafverfolgung des Generalbundesanwalts auf dem Gebiet des Völkerstrafrechts', *Zeitschrift für Internationale Strafrechtsdogmatik*, vol. 13, no. 12, 2018, p. 543ff. and vol. 14, no. 12, 2019, p. 519ff.

[43] OLG Frankfurt am Main, Urteil vom 1 August 2018 – 4 U 188/17; OLG Stuttgart Urteil vom 4. April 2019, 2 U 101/18; OLG Düsseldorf, Urteil vom 24. September 2018 – 5-3 StE 7/16; 6 BGH, Urteil vom 20. September 2018 – 3 StR 236/17.

[44] This is the first criminal trial against state torture in Syria. On 24 February 2021, the Higher Regional Court in Koblenz found Eyad Al-Gharib guilty of aiding, abetting and inciting torture and of illegal detention as crimes against humanity. He was sentenced to 4.5 years in prison. See E. Baier, 'A Puzzle Coming Together – The Henchmen of Assad's Torture Regime on Trial in Germany', *Völkerrechtsblog*, 23 April 2020, https://doi.org/10.17176/20200423-182318-0; cf. B. Burghardt, 'Endlich! – Erster Haftbefehl gegen einen ranghohen Vertreter des syrischen Assad-Regimes', *Völkerrechtsblog*, 11 June 2018, https://doi.org/10.17176/20180611-135326-0.

two convictions.[45] The practice now pursued makes it possible to counter the accusations that the Code is a blunt sword or a paper tiger[46] and also substantiates the phrase "no safe haven Germany" as really serious.[47]

Conclusions

The above considerations show, on the one hand, the potential, but also, on the other, the dangers of exercising universal jurisdiction. The Code of Crimes Against International Law is the cornerstone of German international criminal law, and is of paramount symbolic importance, also outside Germany.[48] This national regulation is often seen as a model for the future and for other countries.[49] Even if the wheels of justice turn slowly, then despite the many critical remarks outlined above, it is worth taking into account the German experience.

[45] The first of the defendants was sentenced to 4.5 years of imprisonment for complicity in February 2021 – see Urteil vom 24. Februar 2021, Az. 1 StE 3/21; and https://olgko.justiz.rlp.de/de/startseite/detail/news/News/detail/urteil-gegen-einen-mutmasslichen-mitarbeiter-des-syrischen-geheimdienstes-wegen-beihilfe-zu-einem-ver. In January 2022 the second defendant was sentenced to life imprisonment – OLG Koblenz, Urteil vom 13. Januar 2022, Az. 1 StE 9/19; see also https://olgko.justiz.rlp.de/de/startseite/detail/news/News/detail/lebenslange-haft-ua-wegen-verbrechens-gegen-die-menschlichkeit-und-wegen-mordes-urteil-gegen-ein-1.

[46] B. Burghardt, 'Zwischen internationaler Solidarität und "not in my backyard": Eine Bilanz der bisherigen Strafverfolgung von Völkerrechtsverbrechen auf der Grundlage des VStGB', *Kritische Justiz*, no. 1, 2018, p. 26.

[47] See Th. Beck, 'Das Völkerstrafgesetzbuch in der praktischen Anwendung', in F. Jeßberger, J. Geneuss (eds.), *Zehn Jahre Völkerstrafgesetzbuch: Bilanz Perspektiven eines "deutschen Völkerstrafrechts"*, Baden-Baden–Bern 2013, p. 161; cf. J. Geneuss, *Völkerrechtsverbrechen und Verfolgungsermessen: §153f StPO im System völkerrechtlicher Strafrechtspflege*, Baden-Baden 2013, p. 263.

[48] For example, a reference to it was included in the joint dissenting opinion of judges Higgins, Kooijmans and Buergenthal in the Congo v. Belgium dispute before the ICJ – ICJ Rep. 2002, p. 69, §20.

[49] A. Klip, 'Zehn Jahre Völkerstrafgesetzbuch: Mitfeiern aus europäischer Perspektive', in Jeßberger, F., Geneuss, J., *Zehn Jahre Völkerstrafgesetzbuch: Bilanz Perspektiven eines "deutschen Völkerstrafrechts"*, Baden-Baden–Bern 2013, p. 241. Similarly, Kaul considered the Code as "a major step forward in the legal policy, with a significant signalling effect, […] as a valuable and future-oriented enhancement of the international criminal justice system " – see H.-P. Kaul, 'Das Völkerstrafgesetzbuch aus Sicht der internationalen', in F. Jeßberger, J. Geneuss, *Zehn Jahre Völkerstrafgesetzbuch: Bilanz Perspektiven eines "deutschen Völkerstrafrechts"*, Baden-Baden–Bern 2013, p. 224.

ALEXANDRE GUERREIRO

Prosecuting International Crimes: The Portuguese Experience

Introduction

Because of its nature, some crimes can have a negative impact on the conscience of humanity. If these crimes can also pose a threat to international peace and security, such acts may create a legal obligation for all States to adopt the necessary measures in order to prevent and punish international crimes with such quality.

The difference between international crimes as a whole and those international crimes that rise to the level of *ius cogens* influences Portugal's policy of recognizing the need to enact legislation on certain types of offences as well as the need to draw a legal strategy in order to combat and pursue crimes with *ius cogens* status when committed outside the Portuguese domestic jurisdiction.

Concerning the *obligatio erga omnes* deriving from *ius cogens* crimes, Portugal soon ambitiously undertook to introduce the amendments needed in its legal framework in order to reflect the country's commitment to combatting the most serious crimes of concern to the international community as a whole. Thus, Portugal started the necessary procedures with the aim to define such international offences in its domestic legal system with the same elements of crimes as set out in international treaties and weighed such commitment with the limitations imposed by the Portuguese Constitution.

1. The accession to the Rome Statute as a turning point

Portugal was among the first States to sign the Rome Statute and the Portuguese Government formally deposited the instruments of ratification on

5 February 2002. Such a step had a strong impact on the Portuguese criminal system. Until then, international crimes could be found in the Portuguese Penal Code, which was adopted in 1982 and thoroughly reviewed in 1995.[1] Between 1995 and 5 May 2022, it was amended 54 times.

The international crimes typified in the Portuguese legal order were limited to genocide, some acts considered to be war crimes as they were seen as violations to Geneva Conventions of International Humanitarian Law and to 1899 and 1907 Hague Conventions and not much more than that.[2] Crimes against humanity were not called like that but some of its acts if wished to be tried before a court of law should be tried as other sorts of acts as they were all dispersed in the Portuguese Penal Code (for example, slavery is an independent crime, crimes against sexual freedom and self-determination are also independent crimes regardless of an international perspective).

It was in such a context that the Portuguese accession to the Rome Statute led to profound changes in the Portuguese legal system, not only in terms of substance or material changes, but also from a formal and structural perspective. Firstly, the Portuguese lawmakers adopted Law no. 31/2004 of 22 July, entitled Penal law on violations of international humanitarian law and related offences.[3] Such a law was adopted in order to reflect both national and international worries over the global threat that such violations represent, in a context where crimes of genocide, crimes against humanity and war crimes are seen as the most serious violations of the universal values of human dignity, freedom, equality and solidarity, respect for human rights and fundamental freedoms.

It should be highlighted that besides Croatia Portugal is the other Member State of the European Union (EU) without life imprisonment sentences. Under the Portuguese Constitution, sentences cannot be perpetual in nature or have

[1] Decreto-Lei n.º 48/95 of 15 March, Diário da República no. 63/1995, Série I-A of 15 March 1995, pp. 1350–1416.

[2] Back then, the Portuguese Penal Code punished 10 different offences as "crimes against peace and humanity" from Articles 236–245 (incitement to warfare; recruitment of armed forces; recruitment of mercenaries; genocide; racial or religious discrimination; war crimes against civilians; destruction of monuments; torture and other cruel, inhumane and degradating treatments; torture and other cruel, inhumane and degradating serious treatments; failure to report by a commander or a superior).

[3] Diário da República no. 171/2004, Série I-A of 22 July 2004, pp. 4560–4565.

an unlimited or undefined duration,[4] and the Portuguese Penal Code establishes a maximum sentence of 25 years imprisonment for the most serious crimes.[5] In such a context, there was the concern to ensure the adoption of changes to the legal order in accordance with the terms of the Constitution and also the need to match the criteria of the Portuguese core of principles in order to reduce – within reasonable parameters – the likelihood of a person, whether Portuguese or a foreigner present within Portuguese territory, to be subject – due to the jurisdiction of the International Criminal Court (ICC) – to a measure involving deprivation of liberty for the rest of his life.

In fact, one must bear in mind that according to Articles 6(1)(f) and 6(2)(b) of Law no. 144/99 of 31 August,[6] which sets out the rules for international judicial cooperation in criminal matters, Portuguese authorities should not grant the extradition of persons wanted for an offence punishable by a life sentence or detention order for life, unless the applicant State can guarantee that it will not impose any of these solutions.[7] A similar rule is set out in Article 13(1)(a) of Law no. 65/2003 of 23 August, which adopts the legal framework of the European Arrest Warrant.[8] Under this provision, Portuguese authorities only surrender the suspect to the issuing judicial authority if this State's legal framework contemplates the possibility of revision within the maximum period of 20 years and the judicial authority provides guarantees that such rules will be applied to the concrete case.

Presently, the general rules of the Portuguese legal system open the way for a person to be tried before Portuguese courts and face the rules of the Portuguese criminal law regarding certain acts committed abroad even when committed by a foreigner or against foreigners in cases where such a person is in Portuguese territory and cannot face extradition or be surrendered as

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[4] Article 30(1).

[5] Article 41(2). Besides aggravated murder (Article 132 of the Portuguese Penal Code), only the crimes set in Law no. 31/2004 of 22 July 2004, establish a maximum sentence of 25 years' imprisonment.

[6] Diário da República no. 203/1999, Série I-A of 31 Aug. 1999, pp. 6012–6040.

[7] J. Harrington, 'Extradition of transnational criminals', in N. Boister, R.J. Currie (eds.), *Routledge Handbook of Transnational Criminal Law*, New York 2015, p. 157.

[8] Diário da República no. 194/2003, Série I-A of 23 Aug. 2003, pp. 5448–5458.

a consequence of being likely to face life imprisonment or death penalty.[9] As a rule, under Article 6(2) of the Portuguese Penal Code, Portuguese courts shall apply the rules of the country where the offence was committed if such rules are more favourable to the defendant than the rules laid down in the Portuguese legal system for the same offence.[10] However, regarding international crimes, an exceptional rule was brought into force by Law no. 31/2004, when it comes to offences commited out of Portuguese territory that amount to genocide, war crimes, crimes against humanity and the crime of aggression.

Hence, Article 5(2) of Law no. 31/2004 expressly prevents the application of such a provision, applying only the Portuguese rules set out in such a law and ignoring the rules in force in the place where the act was committed regardless if such legal regime is more favourable or not to the defendant. The main reason behind this is that the principle of complementarity of the jurisdiction of the ICC holds that States have priority in proceeding with cases within their jurisdiction and the ICC only acts when States are unwilling or unable genuinely to carry out the investigation or prosecution.[11]

Furthermore, one must also take into account that some States do not even expressly classify some of the offences considered to be international crimes and that other States adopted or could be willing to adopt special rules for immunities, amnesties and exceptional regimes of reduction of sentences in such an extent that could not reflect a genuine will to tackle such violations.[12] With this in mind, the adoption of an exceptional rule applying the Portuguese rules to offences against international law when such violations are to be tried by Portuguese courts must be seen as a solution created to reduce the risk of contributing to the impunity of the suspects and, consequently, run counter to everything the international legal order intends to avoid.

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[9] Under articles 5 and 6 of the Portuguese Penal Code. See also M.J. Costa, *Extradition Law: Reviewing Grounds for Refusal from the Classic Paradigm to Mutual Recognition and Beyond*, Leiden 2020, pp. 294–295.

[10] K.S. Gallant, *International Criminal Jurisdiction – Whose Law Must We Obey?*, Oxford 2022, p. 524.

[11] See Governo, Proposta de Lei n.º 72/IX/1, *Parlamento*, 28 May 2003, pp. 2–3.

[12] As an example, Japan has been a case study regarding the option to not introduce amendments to its laws in order to differentiate particular cases of genocide from mass murder. J. Meierhenrich, K. Ko, 'How Do States Join the International Criminal Court? The Implementation of the Rome Statute in Japan', *Journal of International Criminal Justice*, vol. 7, no. 2, 2009.

Simultaneously, Law no. 31/2004 repealed the international crimes from the Penal Code and autonomized them under this new legal instrument. Then, it also created a new crime called "crime against humanity", setting out all acts classified as crimes against humanity in the Rome Statute. Thus, what was previously only a short list of offences and criminal conducts in the midst of many others, including minor offences, now became special crimes with a special regime and treatment due to its importance to humankind as a whole.[13]

2. Exceptions to statutory limitations

One should also underline changes on statutory limitations. In Portugal, all crimes are subject to statutory limitations. The general rules set out in Articles 118 to 121 of the Portuguese Penal Code determine that a criminal procedure prescribes after a maximum of 15 years from the moment an act was completed depending of the type of crime and unless there are grounds for suspension or interruption of limitation periods. This is the rule applied to any kind of crime even to those acts one can see as the most serious offences, like aggravated murder of a plurality of persons.[14] Before Law no. 31/2004 entered into force, all international crimes were subjected to this rule. Afterwards, its Article 7 brought into force a special rule that created an exception to the general regime and imposed the non-applicability of statutory limitations for international crimes.

Looking at Law no. 31/2004, one should be able to see that the first version of the law did not cover the crime of aggression and only addressed the crimes of genocide, war crimes as well as crimes against humanity. The classification of the crime of aggression only became real in 2019 because it was only in 2017 that Portugal decided to incorporate the amendments to the

[13] This was recognized by the Portuguese Government as a symbolic step and a clear message to the international community emphasizing with growing conviction the fact that such offences are worthy of a clear, strong and reassuring protection. See Governo, pp. 3–4.

[14] As Paula Escarameia underlined, the Portuguese approach towards the statute of limitations, which establishes specific deadlines for all the crimes set out in the Penal Code, is only a matter of "political will" and not "constitutional limitations". P. Escarameia, 'Notes on the Implementation of the Rome Statute in Portugal', in C. Kreß, F. Lattanzi (eds.), *The Rome Statute and Domestic Legal Orders*, vol. 1, Baden-Baden 2000, p. 167.

Rome Statute adopted by the Review Conference which took place in Kampala.[15] After the jurisdiction of the ICC was activated, the Resolution of the Assembly of the Republic no. 31/2017 of 20 February,[16] officially adopted the new amendments and also triggered a legislative initiative that proceeded in a peaceful and consensual way. In the end, a new Article 16-A was added to Law no. 31/2004 by Law no. 11/2019 of 7 February.[17]

It is worth noting the way the Portuguese legal order deals with war crimes. On the one hand, Law no. 31/2004 classifies war crimes from Articles 10 to 16, isolating offences for the use of methods of warfare that are the subject of a comprehensive prohibition (Article 11) and war crimes for the use of means of warfare prohibited under International Law (Article 12). On the other hand, all these crimes find the exact wording and are punishable exactly in the same way in Law no. 100/2003 of 15 November, which adopts the Code of Military Justice.[18] The main difference lies in the fact that different war crimes classified as such in the Code of Military Justice have an additional element: offences should be committed in a "time of war", which means only when Portugal "is in a state of declared war against a foreign country"[19] and regardless of the citizenship of the suspect. Nevertheless, if the state of war is not declared but Portugal still participates in hostilities, the rules set out in the Code of Military Justice do not apply to such cases and Law no. 31/2004 prevails. Thus, such offences will always be punished as war crimes but under a different legal instrument.

However, crimes set out in Law no. 31/2004 are crimes committed when hostilities are taking place and an international or a non-international armed conflict is in progress, regardless of both the place and the actors involved. Because the acts involved amount to war crimes, the offences classified in

[15] It is commonly known that the entry into force of the amendments regarding the crime of aggression relied on the activation through 30 ratifications and a one-time decision by States Parties after 1 January 2017. Portugal ratified these amendments on 20 Feb. 2017.

[16] Diário da República no. 36/2017, Série I of 20 Feb. 2017, pp. 1002–1005.

[17] Diário da República no. 27/2019, Série I of 7 Feb. 2019, pp. 990–991.

[18] Diário da República no. 265/2003, Série I-A of 15 Nov. 2003, pp. 7800–7821. For the evolution of the Portuguese military justice since the 17th century and its main elements in the present, see B.J. Kyle, A.G. Reiter, *Military Courts, Civil-Military Relations, and the Legal Battle for Democracy – The Politics of Military Justice*, New York 2021, pp. 94–103.

[19] Article 8. Such crimes are compared to offences committed during the state of siege and the act is punishable regardless of being committed by the Armed Forces or by civilians.

both laws are not subject to statutory limitations. Here, one should highlight the fact that although the Portuguese position on statutory limitations to war crimes meets the rules determined by the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Portugal is not one of the States signatory to the Convention.

Concurrently, Portugal extended the non-applicability of statutory limitations to the crimes of genocide, crimes of aggression and crimes against humanity.[20] This decision was taken because it follows the rule set out in Article 29 of the Rome Statute, therefore avoiding the risk of opening the floodgates to the absence of complementarity between ICC and the Portuguese courts of law if under Portuguese law such offences were somehow considered time barred, mainly under the legal regime set out on the Portuguese Penal Code.

This would in fact reduce the chance to fully observe what UNGA Resolution 3074 (XXVIII) defines in its number 2 as the "right" of "every State" to "try its own nationals for war crimes or crimes against humanity." And it should also be noted that according to the 1996 report of the Preparatory Committee I to the General Assembly, the possibility of States with statutory limitations to find themselves "unable" to prosecute after time had elapsed was a huge risk to take into account in case the Rome Statute accepted to introduce statutory limitations.

In the end, Portugal expressly recognizes crimes aganst humanity, genocide, war crimes and aggression as particular threats to peace and security of mankind, and that such violations shock the conscience of humanity in such a way that they need to be ring-fenced and should enjoy a different status regarding non-statutory limitations when compared to all other crimes. Considering that, presently, minimum consensus could not be reached regarding a catalogue of peremptory norms because of significant doctrinal divergencies and also due to what Cezary Mik calls "self-perpetuating circular mechanism",[21] Portugal seems to be clearly signalling its recognition of the

[20] G. Mettraux, *International Crimes: Law and Practice*, vol. 1: *Genocide*, Oxford 2019, p. 145.

[21] C. Mik, 'Jus Cogens in Contemporary International Law', *XXXIII Polish Yearbook of International Law*, 2013, pp. 58–60.

above-mentioned offences as among those international crimes that achieved the status of *ius cogens*.[22]

Nonetheless, regardless the doubts and lack of certainty whether there is a customary rule imposing the non-application on statutory limitations to *ius cogens* crimes,[23] States Parties to the Rome Statute have the duty to reject the adoption and application of statutory limitations. This happens, not only because the application of statutory limitations could be seen as a breach of the Rome Statute,[24] but also because the wording of Article 29 of this instrument reflects a common view and a commitment of all States Parties on a particular point regarding all the crimes within the jurisdiction of the Court and not necessarily related to the proceedings before the Court.

3. The elements of crimes

Considering the four types of crimes against the international community set out in the Portuguese legal framework, a conduct is only a crime if it infringes a legal interest protected in the Portuguese Constitution.[25] In these four cases the international community is the main legal interest meant to be protected. Such crimes were added to the Portuguese Penal Code in 1982 for the first time as there was a need to criminalize conducts that infringe core values which the international community acknowledges as essencial to its development.

The conducts in question correspond, in general, to the so-called "international crimes" in the strict sense, which in turn amount, for most publicists,

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[22] M.C. Bassiouni, *International Criminal Law – Sources, Subjects, and Contents*, 3rd ed., vol. 1, Leiden 2008, p. 176.

[23] See S.R. Ratner, J. Abrams, J. Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Oxford 1997, p. 126; C. van den Wyngaert, J. Dugard, 'Non-applicability of Statute of Limitations', in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford 2002, p. 879.

[24] W.A. Schabas, 'Article 29', in O. Triffterer, K. Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd ed., Munich–Oxford–Baden-Baden 2016, p. 1110.

[25] J.J.G. Canotilho, V. Moreira, *Constituição da República Portuguesa Anotada*, 4th ed., vol. 1, Coimbra 2007, p. 495.

for war crimes, crimes against peace and crimes against humanity, all of these already set out in the 1945 Charter of the International Military Tribunal at Nuremberg. With the classification of such conducts as crimes in the Penal Code, Portugal intended to integrate in domestic law the core of rules and principles of international law with humanitarian nature, which often derives from international conventions ratified, approved and published in respect to Article 8 of the Portuguese Constitution.

When one looks at those acts classified as international crimes under the Portuguese legal framework, the core element of the crime of genocide which leads to the classification as a crime is the list of acts set out in Article 8 which allow us to distinguish between physical genocide and biological genocide, the two forms of genocide covered by Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide.

The first case concerns acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group: killing members of the group, causing serious bodily or mental harm to members of the group and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. In the case of biological genocide, there are acts that do not attempt to directly destroy a group, but they prepare the long-term destruction of a national, ethnical, racial or religious group through the dispertion of its members, by imposing measures intended to prevent births within the group or by forcibly transferring children of the group to another group. Though, one must highlight that the broad conception of genocide, covering both "political genocide" and "cultural genocide", is not punishable under Portuguese law.[26]

Simultaneously, although Portugal kept the same elements of the crime of genocide in the same way it was classified before 2004,[27] the evolution of international crimes as they have been treated by international criminal tribunals demands an update on the view in force in Portugal until decades

[26] See, I.M. Barroso, 'O acordo com vista à prática de genocídio: o conceito, os requisitos e o fundamento da punição do "contrato criminal"', in A.M. Cordeiro, L.M. Leitão, J.C. Gomes (eds.), *Estudos em Homenagem ao Professor Doutor Inocêncio Galvão Telles*, vol. 5, Coimbra 2003, p. 121.

[27] See M.J. Antunes, 'Artigo 239.º: Genocídio' in J.F. Dias (ed.), *Comentário Conimbricense do Código Penal*, vol. 2: *Artigos 202.º a 307.º*, Coimbra 1999, pp. 570–574.

ago. In fact, according to the members of the commission responsible for revising the Portuguese Penal Code in 1993, the understanding back then and since 1982 was in a sense to demand more than one act in order to classify an act as genocide.[28] However, this interpretation did not yet have in mind decisions of the International Criminal Tribunal for the former Yugoslavia, of the ICJ or the ICC.

When one looks at *Prosecutor v. Tolimir*, it is possible to understand that the scope of the decision was not to take into account the number of persons killed but the quality and impact they have in the community and how symbolic each of the victims were in order to conclude that the killing of that person could be decisive for the fate of the "group."[29] At the same time, in the judgment of 26 February 2007 on the ICJ case "Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)", the Court suggests that such "criteria are not exhaustive."[30]

Finally, the wording used in Portuguese law suggests that the killing of a single victim can be sufficient to convict a person for the crime of genocide.[31] According to Article 8(1)(a) of Law no. 31/2004, the reference to *homicídio de membros do grupo* (killing members of the group) highlights the fact that *de* is a neutral preposition with no direct meaning of gender or quantity. Therefore, the consequent use of the word *membros* must be understood as not intended to exclude the killing of one person with impact on the survival of a community.

When the wording chosen by the lawmaker for the crime of genocide is compared with the wording present in other crimes, few doubts remain about the scope of this rule: Article 132(1)(h) of the Portuguese Penal Code

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[28] See M.J. Antunes, p. 572.

[29] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law Committed in the Territory of the Former Yugoslavia since 1991, *Prosecutor v. Tolimir* (IT-05-88/2-T), Judgment of 12 Dec. 2012, pp. 343–344, para. 780–782.

[30] ICJ, *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 Feb. 2007, para. 198–201.

[31] Following the understanding of S. Sayapin, 'The Implementation of Crimes Against Peace and Security of Mankind in the Penal Legislation of the Republic of Kazakhstan', in *Asian Journal of International Law*, vol. 10, no. 1, 2020, p. 3; C. Soler, *The Global Prosecution of Core Crimes under International Law*, Hague 2019, p. 92.

provides that the crime of murder can be aggravated if the author commits the fact with, at least, *mais duas pessoas* (two more persons); Article 151(1), regarding participation in a brawl, sets out that the crime could only be committed in case there are *duas ou mais pessoas* (two or more persons); and Article 144-B(4) makes reference to *as pessoas* (the persons), hence, an express reference to a minimum of two persons.[32]

Regarding war crimes, Portugal follows exactly the writing set out in the Rome Statute. Therefore, the criminal conduct consists of destruction of property not justified by military necessity against historical or cultural monuments, buildings dedicated to religion, education, art, science or humanitarian purposes. Interestingly though, Portugal does not incriminate the conduct of using such monuments and buildings for the support of the military effort, incrimination suggested by the Additional Protocols I and II (Articles 53 and 16 respectively) to the Geneva Conventions.

Finally, regarding aggression, the seven points that set out what acts amount to crimes of aggression were transposed exactly with the same wording of Article 8 *bis* of the Rome Statute. However, there are differences. First, one must have in mind the process that lead to the amendment that allowed the crime of aggression to become a reality in the Rome Statute. In fact, this instrument seems to exhaust the possible conducts that can be classified as aggression, although Andreas Zimmermann and Elisa Freiburg understand that "any of the following acts" cannot be read as "only the following acts",[33] a vision that immediatly raises doubts and if one considers the main principles of criminal law, than it is hard to conceive how to conciliate the principle of legality with acts punished by rules that do not expressly classify them as offences.

Portugal, for example, took an ambitious step in this sense by prescribing on Article 16-A(3) that, besides the seven situations set out in the Rome Statute, "other acts that integrate the requirements of the preceding paragraphs" also

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[32] See J.F. Dias, 'Artigo 132.º: Homicídio qualificado', in J.F. Dias (ed.), *Comentário Conimbricense do Código Penal*, vol. 1: *Artigos 131.º a 201.º*, Coimbra 1999, p. 36; A.T. Carvalho, 'Artigo 151.º: Participação em rixa', in J.F. Dias, *Comentário Conimbricense do Código Penal*, vol. 1: *Artigos 131.º a 201.º*, Coimbra 1999, p. 317.

[33] A. Zimmermann, E. Freiburg, 'Article 8 *bis*', in O. Triffterer, K. Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd ed., Munich 2016, p. 606.

constitute acts of aggression, meaning "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State." Here, Portugal follows the example prescribed in Article 4 of UNGA Resolution 3314 (XXIX) of 14 December 1974 that confers to the Security Council the sole prerogative to classify other acts as acts of aggression. Thus, one might consider as a possibility the support provided to armed groups which cannot be labeled as "sent by or on behalf of a State", namely those cases that cannot be considered to be "*de facto* bodies" or an extension of the Armed Forces abroad or even over which the State has no effective control and only supports its operations. Therefore, under Portuguese law, the notion of aggression does not close the door to other methods of modern warfare like cyberforce.

4. Procedural aspects regarding international crimes

Considering procedural aspects important for the present subject, a case against persons indicted by the Public Prosecutor for international crimes can be tried by a jury court[34] and if the jury court is not requested such persons will always be tried by a collective court.[35] Then, any person can request to become "assistant" of the Public Prosecutor (*constituir-se assistente*) concerning any of the crimes against international law.[36] Besides these crimes, the only exception that allows any person to be an assistant to the Public Prosecutor are the crimes committed by political office holders. Since 2014, the Portuguese society witnessed a case against former Prime Minister José Sócrates for offences of corruption and money laundering.[37] Once the start of the investigations became known, journalists requested to be "assistants"

[34] Article 13(1) of the Code of Criminal Procedure.

[35] Article 14.

[36] Article 68.

[37] On case "Operação Marquês", the Portuguese Public Prosecutor charged 19 persons and 9 companies with the practice of different offences, among which was the former Portuguese Prime Minister José Sócrates for the practice of 3 crimes of passive corruption while on duty, 16 crimes of money laundering, 9 crimes of document fraud and 3 offences of aggravated tax evasion. José Sócrates was accused of conducting business in favour of Ricardo Espírito Santo Salgado, former President of Espírito Santo Bank as well as of several Portuguese businessmen (like Carlos Santos Silva, Joaquim Barroca and Zeinal Bava). For more information on the charges issued by the Portuguese Public Prosecutor in a case that has not started the trial phase

in order to be present at the measures of inquiry and have access to the case file depending on the permission conceeded by the Public Prosecutor.

The position of assistant was created in order to assign some rights to the persons who have a direct interest in the causes, not only when the persons are victims, but also to recognize that any person is the holder of the interest that constitutes the immediate legal object of the crime.[38] Concerning the four mentioned crimes, what is at stake are the interests of the humankind as a whole. Therefore, it is logical that any person can become an assistant to the Public Prosecutor and there is no express objection as to the citizenship or the place of residence of the person requesting to be an assistant.

Although the spirit of the norm allows one to interpret it in the sense that a connection needs to be established between the crime and the person requesting to become an assistant – for example, in offences of corruption it makes sense that the holder of the interest could be any person living in Portugal – in the case of crimes against the international community, it is hard to establish a connection when the interest belongs to humankind as a whole.[39] By becoming assistants, it is recognized that such persons have a direct interest in the cause. Thus, assistants can take part in the investigation, provide evidence and request proceedings, formulate charges independently from the Public Prosecutor and appeal the decisions even if the Public Prosecutor decides not to do so.[40] However, it is always necessary that an investigation is formally started by the Public Prosecutor, which means that without this act it is impossible that a person can start proceedings on their own initiative for offences the person considers that were committed.

yet, see Ministério Público, Nota para a Comunicação Social: Operação Marquês – Acusação, *Ministério Público*, 11 Oct. 2017.

38 M.J. Antunes, *Direito Processual Penal*, Coimbra 2021, pp. 50–52.

39 Ibid., pp. 47–49.

40 Articles 68 and 69.

5. The principle of universal jurisdiction and the Portuguese legal order

Presently, Article 5 of the Portuguese Penal Code enshrines the so-called *princípio da universalidade* (principle of universality) or *princípio da aplicação universal* (principle of universal application), with roots lying in the circumstance of the integration of Portugal in the international community, granting the protection of values, goods or interests that are of interest to humankind as a whole and also sharing other values and principles with any other State or international organization due to the need to punish certain crimes, regardless of who its authors are. The Portuguese approach demonstrates that the State punishes all conducts legally relevant against the interests of humankind, regardless of the citizenship of both the perpetrator and the victim or the place of commission.

As a rule, this domestic principle of universal jurisdiction has subsidiary application compared to jurisdictions of universal nature, in case they exist. There is also a special rule for the cases set in the Convention Against Torture and Other Cruel, Inhuman or Degradating Treatment or Punishment, from which Portugal extends the application of the principle of the universal jurisdiction deriving from the obligation to comply with international treaties (Article 5(2) of the Portuguese Penal Code).

Last but not least, as a rule, Portuguese law respects the principle of territoriality, recognizing the jurisdiction of each State to apply its own criminal law to events happening in their respective territory. This has been the reality since 1852, the date of the first autonomous codification, with the iconic international courts' decisions on this issue such as the "S.S. Lotus", "Questions relating to the obligation to Prosecute or Extradite", "Barcelona Traction" and "Arrest Warrant of 11 April 2000".

There are exceptions, nonetheless. The Portuguese view of the principle of universal jurisdiction observes two conditions: only if the suspect of the crimes is found in the Portuguese territory and cannot be extradited or surrendered to the International Criminal Court (Article 5(1) of Law no. 31/2004). This position differs froms the view judge Christine van den Wyngaert follows in the case "Arrest Warrant of 11 April 2000", where she supports the legality

of the issuance of an arrest warrant by a State against a person that is not located in the territory of the authority that issues the warrant.[41]

Conclusions

Over the last decades, obligations deriving from international treaties or from the emergence of costumary principles concerning international crimes have had a strong impact in Portugal's justice system, inspiring lawmakers to create more and more exceptions to the core values enshrined in the Portuguese legal order since 1976. For instance, one of the major examples of this is the fact that all crimes are defeasible, including homicide, except those considered to be "against International Law" such as the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

one conclusion can be formulated. Although crimes against life, crimes of military nature and criminal offences against State security are considered to be the most serious crimes of concern to the Portuguese society, *ius cogens* crimes, when recognized as such, are seen as justifying a greater level of protection as such crimes go beyond the interest of one country or the Portuguese national community as a whole: *ius cogens* crimes are a matter of concern for all humankind.

[41] ICJ, *Case concerning Arrest Warrant of 11* April *2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 Feb. 2002: Dissenting opinion of Judge ad hoc Van den Wyngaert (English original text).

TAMÁS HOFFMANN

The Crime of Genocide in Hungarian Criminal Law: A Seemingly Perfect Implementation

Introduction

After the adoption of the Genocide Convention by the United Nations General Assembly on 9 December 1948,[1] the crime of genocide became generally perceived as the "crime of crimes" in international criminal law.[2] It would seem natural that a crime whose commission "shocks the conscience of mankind"[3] was uniformly regulated in all domestic jurisdictions; however, the majority of countries that criminalized the crime of genocide have modified its international definition.[4]

The implementation of the crime of genocide in Hungarian criminal law at first glance seems like a textbook example of translation of international

[1] Convention on the Prevention and Punishment of the Crime of Genocide (1951), 78 UNTS 277.

[2] ICTR, *The Prosecutor v. Kambanda* (ICTR-97-23-S), Judgment and Sentence of 4 Sept. 1998, para. 16. The ICTR Appeal Chamber emphasized that "there is no hierarchy of crimes under the Statute, and […] all of the crimes specified therein are serious violations of international humanitarian law, capable of attracting the same sentence"; *The Prosecutor v Kayishema and Ruzindana* (ICTR-95-1-A), Appeal Judgment of 1 June 2001, para. 367. However, international courts tend to award significantly longer sentences for genocide than for war crimes or crimes against humanity. See J.W. Doherty, R.H. Steinberg, 'Punishment and Policy in International Criminal Sentencing: An Empirical Study', *American Journal of International Law*, vol. 110, no. 1, 2016, pp. 49–81, p. 72.

[3] The Crime of Genocide, UN GA Res. 96/1946 (I), 11 Dec. 1946, UN Doc. A/RES/96.

[4] 100 countries and the Special Administrative Region of Macao changed at least some aspects of the international definition in their domestic legislation while only 41 States Parties to the Genocide Convention retained the international definition. See T. Hoffmann, 'The Crime of Genocide in Its (Nearly) Infinite Domestic Variety', in M. Odello, P. Łubiński (eds.), *The Concept of Genocide in International Criminal Law – Developments after Lemkin*, Abington 2020, pp. 67–97, 70–74.

norms into the domestic legal environment. During the adoption of the latest Hungarian Criminal Code, Act C of 2012, the legislator emphasized that it wanted to respect Hungary's international legal obligations and thus preserving the content of international crimes in Hungarian criminal law, relying primarily on the Rome Statute of the International Criminal Court. Nevertheless, in this chapter I will try to demonstrate that while the textual conformity of domestic legal definitions to their international counterparts is important, the implementation of international crimes is often even more crucially influenced by the doctrinal interpretation, which in Hungary could potentially radically change the application of the crime of genocide in an actual criminal proceeding. While this seems like a purely hypothetical argument, given that Hungarian courts have never actually had to try a case involving genocide, on 11 October 2021, the Metropolitan Regional Court delivered the first Hungarian judgment based on the exercise of universal jurisdiction. The Court sentenced the defendant, Hassan Faroud, to life imprisonment without parole for the commission of crimes against humanity in Syria.[5] This clearly demonstrates that international crimes such as genocide could be invoked in the future as well in Hungarian criminal proceedings.

1. The definition of the crime of genocide before the adoption of Act C of 2012

Hungary acceded to the Genocide Convention on 7 January 1952 and implemented its text in Hungarian law in 1955.[6] While the promulgated text was essentially identical to the conventional text, the actual implementation in criminal law resulted in significant alterations from the international definition. Article 137 of the first socialist criminal code, Act V of 1961, omitted the qualification of protected groups "as such", while replacing the concept "destroy" with "exterminate". The provision also emphasized that the first *actus reus* is "killing a member of the group", changing the original plural to

[5] For a background on the case, see https://trialinternational.org/latest-post/hassan-faroud (accessed 2.5.2022).

[6] Hungary, Decree Law No. 16 of 1955.

singular. The second prohibited act – "causing serious bodily or mental harm to members of the group" – was completely left out, however, a new "crime against national, ethnic, racial or religious group" was adopted in Article 138 that criminalized this conduct as a *sui generis* crime albeit without requiring genocidal intent.

The following criminal code, Act IV of 1978, initially reproduced the previous regulation in Article 155. In 1996, however, an amendment to the Criminal Code reinstated the *actus reus* of "causing serious bodily or mental harm to members of the group" into the Hungarian definition of genocide and changed the wording of the first prohibited offence to "killing members of the group", bringing it in line with the international definition.[7]

2. The definition of the crime of genocide in the current Hungarian Criminal Code

As part of a broad law reform, a new Hungarian criminal code was adopted in 2012.[8] This time, the legislation intended to devote special attention to the harmonization of domestic criminal law with Hungary's international legal obligations, especially following the provisions of the Rome Statute of the International Criminal Court.[9]

Genocide is defined in Article 142(1) of the Criminal Code. According to the official English translation of the provision genocide is committed by

> any person who – with the ultimate aim of the destruction, in whole or in part, of a national, ethnic, racial or religious group:
> a) murders the members of the group;
> b) causes serious bodily or mental injury to the members of the group;

[7] Hungary, Act XVII of 1996 on the Amendment of Act IV of 1978 on the Criminal Code.

[8] Hungary, Act C of 2012 on the Criminal Code.

[9] The Justice Minister's official Explanatory Note emphasized that "the Act drafts again these provisions [concerning international crimes] with special regard to the Rome Statute of the International Criminal Court…" – Explanatory Note concerning Act C of 2012 on the Criminal Code.

c) constrains the group into living conditions threatening the demise of the group on the whole or certain members thereof;
d) takes any action aimed to prevent reproduction within the group;
e) abducts the children of the group and installs them into another group.[10]

While this text seems to be substantially different from the international definition, in reality the actual Hungarian wording is an almost verbatim reproduction of Article II of the Genocide Convention, which is a useful reminder that even official translations can be unreliable. The only difference is that the Hungarian definition uses the term "aim" instead of "intent" and that the qualification "as such" is entirely missing. In light of such minor textual divergence, it could be assumed that the application of the crime of genocide should be identical to the international practice. In the following section, however, I would like to point out 4 issues which could have significant practical ramifications due to doctrinal disagreement among Hungarian scholars.

3. Potential issues concerning the application of the crime of genocide in Hungarian practice

3.1 Definition of protected group

The Genocide Convention limits its scope of protection to national, ethnic, racial and religious groups. Even though the Convention fails to present the definition of these groups, it has been relatively uncontroversial and scholars generally adopt the analysis provided by the International Criminal Tribunal for Rwanda (1CTR) in the *Akayesu* case.[11] However, there has been some controversy concerning whether the victims' membership of a protected group should be based on an objective approach, which is based on the concept of the group as a stable and permanent reality, whereby the subjective approach

[10] https://thb.kormany.hu/download/a/46/11000/Btk_EN.pdf (accessed 15.6.2021).

[11] The ICTR defined national groups as a collection of people sharing the same citizenship (para. 512); ethnic groups as people sharing a common language and culture (para. 513); racial groups as people sharing "hereditary physical traits often identified with a geographical region" (para. 514); while religious groups were characterized by "the same religion, denomination or mode of worship" (para. 515); *The Prosecutor v. Akayesu* (ICTR-96-4-T), Judgment of 2 Sept. 1998.

focuses on the self-identification of them members or their perception as such by others.[12] The jurisprudence of international criminal fora, on the other hand, generally tried to combine both objective and subjective criteria.[13]

Hungarian scholarship invokes international jurisprudence concerning the definition of protected groups[14] but takes a somewhat rigid approach concerning membership in the groups that has not changed since the 1960s. This view, that is repeated almost verbatim in every single Hungarian criminal law and commentary, holds that belonging to a group is generally based on objective facts, i.e. same life conditions but recognizes that membership in a group can be based on voluntary association or marriage. The first doctrinal analysis along these lines dates to 1969[15] and has been repeated with minor modifications ever since[16] and even received an official recognition in the Explanatory Note of the Justice Minister in 2012.[17]

Even though this interpretation at first sight seems to provide a useful definition for practice, it suffers from a fatal oversight by not taking into account that in most cases, the perpetrator's determination of the victim's

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[12] G. Mettreaux, *International Crimes: Law and Practice*, vol. 1: *Genocide*, Oxford 2019, pp. 197–199.

[13] K. Ambos, *Treatise on International Criminal Law*,vol. 2: *The Crimes and Sentencing*, Oxford 2014, pp. 7–9.

[14] See, e.g., N. Kis (ed.), *A Büntető Törvénykönyv magyarázata II*. Kötet, *Különös Rész* (1), Budapest 2008, p. 468; F. Sántha, 'XIII. fejezet – Az emberiesség elleni bűncselekmények', in I. Görgényi et al. (eds.), *A magyar büntetőjog különös része*, Budapest 2013, pp. 17–30, 19; S. Törő, 'XIII. fejezet – Az emberiesség elleni bűncselekmények', in K. Karsai (ed.) *Nagykommentár a Büntető Törvénykönyvhöz*, Budapest 2019, pp. 305–313, 305; Sz. Hornyák, 'Emberiesség elleni bűncselekmények', in M. Tóth, Z. Nagy (eds.), *Magyar büntetőjog – Különös rész*, Budapest 2014, pp. 19–29, 21.

[15] J. Földvári, *Büntetőjog – Különös Rész*, Budapest 1969, p. 81.

[16] T. Horváth, 'XI. fejezet – Az emberiség elleni bűncselekmények', in L. Fehér, T. Horváth, M. Lévay (eds.), *A magyar büntetőjog különös része I*, Miskolc 2003, pp. 47–73, 54; V. Maráz, 'Az emberiség elleni bűncselekmények', in B. Kereszty et al. (eds.), *A magyar büntetőjog különös része*, Budapest 2005, pp. 47–58, 52; F. Sántha, 'XIII. fejezet – Az emberiesség elleni bűncselekmények', in I. Görgényi et al. (eds.), *A magyar büntetőjog különös része*, Budapest 2013, pp. 17–30, 19; S. Törő, 'XIII. fejezet – Az emberiesség elleni bűncselekmények', in K. Karsai (ed.), *Nagykommentár a Büntető Törvénykönyvhöz*, Budapest 2019, pp. 305–313, 305; Sz. Hornyák, 'Emberiesség elleni bűncselekmények', in M. Tóth, Z. Nagy (eds.), *Magyar büntetőjog – Különös rész*, Budapest 2014, pp. 19–29, 21; M.G. Molnár, 'Az emberiesség elleni bűncselekmények – Btk. XIII. Fejezet', in E. Belovics (ed.), *Büntetőjog II. – Különös Rész*, Budapest 2019, pp. 19–36, 25.

[17] The Note defines group as "community of persons, who belong together based on nationality, ethnicity, race or religion, or who profess to belong to these groups." Explanatory Note of the Justice Minister to Act C of 2012.

status is more important than the fact that the victim actually shares a bond to the group or not.[18] During World War II, numerous Hungarian citizens were identified and subsequently killed as belonging to the Jewish ethnic/religious groups even though many of these people have not self-identified as Jewish. Consequently, the Hungarian doctrinal interpretation could fail to give justice to victims of genocide.

3.2 The requisite mental element (*mens rea*) of genocide

One of the most important features of the crime of genocide is the requirement that the prohibited acts must be "committed with intent to destroy, in whole or in part" the four protected groups. The exact scope of the special intent to commit genocide (*dolus specialis*), however, cannot be determined by solely relying on the text of the Convention. According to the prevailing view, without proving the special intent of the perpetrator, the accused cannot be found guilty of genocide, even if the perpetrator's actions constituted one of the prohibited acts and they took place in the context of a genocidal campaign. Thus, the Rwanda Tribunal held in the Akayesu case that the perpetrator had to possess "clear intent to cause the offence",[19] while the Darfur Commission emphasized that *dolus specialis* "implies that the perpetrator consciously desired the prohibited acts he committed to result in the destruction, in whole or in part, of the group as such, and knew that his acts would destroy in whole or in part, the group as such."[20] This view is also supported by most scholars.[21]

The minority position advocates the adoption of the "knowledge-based standard", i.e. the concept that special intent can be inferred from the perpetrator's knowledge that the actions in which s/he participated could potentially

[18] See W.A. Schabas, *Genocide in International Law*, Cambridge 2009, p. 125.

[19] ICTR, *The Prosecutor v. Akayesu* (ICTR-96-4-T), Judgment of 2 Sept. 1998, para. 518.

[20] International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the Secretary General. Pursuant to SC Res. 1564*, 18 Sept. 2004, Annex to letter dated 31 Jan. 2005 from the Secretary General addressed to the President of the SC, S/2005/60, 1 Feb. 2005, para. 491.

[21] See K. Ambos, *Treatise on International Criminal Law*, vol. 1: *Foundations and General Part*, Oxford 2013, authors cited in footnote 227.

destroy in whole or in part the protected group.[22] Even though the Hungarian definition explicitly requires the "aim" of destruction, some part of the Hungarian scholarship advocated for adhering to the knowledge-based standard. These commentators claim that mere awareness of the risk that the prohibited acts could cause genocide (*dolus eventualis*) satisfies the *mens rea* requirement of the crime of genocide and neither the Genocide Convention, nor the statutes of international criminal fora prescribed a specific intent.[23] Recently, the most prestigious online commentary of the Criminal Code also adopted this view and even claimed that such an interpretation follows settled international jurisprudence.[24]

This approach, however, is hardly tenable. As seen above, both the established jurisprudence of international courts and the prevailing scholarly opinion rejects lowering the special intent requirement and the importance of *dolus specialis* as an indispensable element of the crime of genocide has been recognized both by the official Explanatory Notes attached to the current and the previous Hungarian Criminal Code[25] and by most Hungarian scholars as well.[26] This is unsurprising as already Act IV of 1978 included the term "aim" in the definition of genocide.

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[22] See, e.g., A.K.A. Greenawalt, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation', *Columbia Law Review*, vol. 99, 1999, pp. 2259–2294; O. Triffterer, 'Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such,' *Leiden Journal of International Law*, vol. 14, 2001, pp. 404–405.

[23] N. Kis, B. Gellér, 'A nemzetközi bűncselekmények hazai kodifikációja, de lege ferenda', in K. Ligeti (ed.), *Ünnepi kötet Wiener A. Imre 70. születésnapjára*, Budapest 2005, p. 385; P.M. Nyitrai, *Nemzetközi és európai büntetőjog*, Budapest 2006, p. 199; G. Balázs, 'Az emberiesség elleni bűncselekmények', in P. Péter (ed.), *Új Btk Kommentár – 3. kötet, Különös rész*, Budapest 2013, p. 16.

[24] Wolters Kluwer Jogtár (legal database).

[25] Explanatory Note of the Justice Minister to Act IV of 1978; Explanatory Note of the Justice Minister to Act C of 2012.

[26] F. Sántha, 'XIII. fejezet – Az emberiesség elleni bűncselekmények', in I. Görgényi et al. (eds.), *A magyar büntetőjog különös része*, Budapest 2013, pp. 21; S. Törő, 'XIII. fejezet – Az emberiesség elleni bűncselekmények', in K. Karsai (ed.), *Nagykommentár a Büntető Törvénykönyvhöz*, Budapest 2019, pp. 305–313, 306; M.G. Molnár, 'Az emberiesség elleni bűncselekmények – Btk. XIII. Fejezet', in E. Belovics (ed.), *Büntetőjog II – Különös Rész*, Budapest 2019, pp. 27.

3.3 Existence of a genocidal plan or policy

There is a fierce debate in international jurisprudence concerning the necessity of the existence of a genocidal plan or policy for the determination of the crime of genocide, i.e., whether a perpetrator's conduct had to take place in some form of organization framework or in an extreme case genocide could even be committed by a single person without any organization support.

While Raphael Lemkin, the creator of the concept of genocide, found it self-evident that the commission of genocide requires the coordinated execution of a plan,[27] the International Criminal Tribunal for the Former Yugoslavia rejected this approach. In the Jelisić case the ICTY held that even though the existence of a genocidal plan or policy could assist in proving the commission of genocide, it is not a legal prerequisite of the crime and thus the offence can be committed even by individual acting alone.[28] The International Court of Justice concurred with this assessment.[29] Although many commentators followed this reasoning,[30] others maintained that in practice

> it is nearly impossible to imagine genocide that is not planned and organized either by the State itself or a State-like entity, or by some clique associated with it.[31]

The International Criminal Court tried to find a compromise between the two approaches. The document *Elements of Crimes* requires that

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[27] R. Lemkin: *Axis Rule in Occupied Europe*, Washington 1944, p. 79.

[28] ICTY, *The Prosecutor v. Jelisić* (IT-95-10-A), Judgment of 5 July 2001, para. 48.

[29] ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 Feb. 2007, para. 373; 11 states prescribed in their respective criminal codes that a genocidal plan or policy is an indispensable element of the crime of genocide. See T. Hoffmann, 'The Crime of Genocide in Its (Nearly) Infinite Domestic Variety', in M. Odello, P. Łubiński (eds.), *The Concept of Genocide in International Criminal Law – Developments after Lemkin*, Abington 2020, p. 71–73.

[30] See, *inter alia*, A. Cassese, *International Criminal Law*, Oxford 2008, pp. 140–141; G. Werle, *Principles of International Criminal Law*, The Hague 2009, pp. 271–273.

[31] W.A. Schabas, 'State Policy as an Element of International Crimes', *The Journal of Criminal Law and Criminology*, vol. 98, 2008, p. 966.

> the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.[32]

Accordingly, the commission of genocide would usually entail association with a state or a highly organized non-state actor in pursuing a genocidal plan or policy unless under some unlikely circumstances an individual would be capable of destroying a protected group in whole or in part. Even though the ICTY declared that the ICC's interpretation diverges from established custom,[33] the International Criminal Court continues to follow this approach.[34]

Resolving this issue is exceptionally important for national courts, since racist hate crimes could objectively meet both the *mens rea* and the *actus reus* requirements of the crime of genocide. Kreß convincingly argues that adopting the Elements of Crimes approach is the only realistic solution as the prohibited act has to present a real danger to the survival of the protected group and thus in practice it is almost inconceivable that a lone génocidaire or a few perpetrators acting in concert could commit genocide.[35] Remarkably, in the criminal proceedings of the perpetrators of the only racially motivated serial killings of Post-World War II. Hungary, it was never suggested that the offences could qualify as genocide. Between 21 July 2008 and 3 August 2009, 9 attacks were carried out against Roma victims by 4 perpetrators with the intention to incite a race war between the Roma minority and the ethnic Hungarian population. The attacks killed 6 people and wounded 3 and the perpetrators were motivated by a hatred against the entire Roma population and wished to destroy them.[36] Yet, their actions were qualified as hate crimes which implies that the Hungarian authorities – at least implicitly – followed the ICC's approach.

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[32] *ICC Elements of Crimes*, Article 6(a)(4); Article 6(b)(4); Article 6(c)(5); Article 6(d)(5); Article 6(e)(7).

[33] ICTY, *The Prosecutor v. Krstić* (IT-98-33-A), Judgment of 19 April 2004, para. 224.

[34] ICC, *Al Bashir (Decision on Arrest Warrant)* (ICC-02/05-01/09), Decision of 4 March 2009, para. 132.

[35] C. Kreβ, 'The ICC's First Encounter with the Crime of Genocide: The Case against Al Bashir', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford 2015, pp. 678–679.

[36] For an overview of the case see M. Subert, 'Motives and Legacies behind 2008–2009 Hungarian Roma Murders and Apologies', *Contemporary Justice Review*, vol. 22, 2019, pp. 3–22.

3.4 Offences against one member of a protected group

The Genocide Convention defines the prohibited acts in the plural, such as "killing members of the group" or "forcibly transferring children of the group to another group." A strict textual interpretation could thus lead to the conclusion that an *actus reus* committed against one member of a protected group does not constitute genocide. For instance, killing a single member of a protected group cannot amount to genocide but the perpetrator must kill at least two persons. This, however, could lead to absurd consequences in a hypothetical scenario where a substantial part of a protected group is destroyed, the perpetrators all possessed the requisite special intent but each killed "only" one person. That would result in a genocide where none of the perpetrators have actually committed the offence. *Mutatis mutandis*, the same applies to all the other prohibited acts as well.

Unsurprisingly, international jurisprudence[37] and the majority of legal scholars[38] support the position that even the killing of a single member of the group could constitute genocide and some countries have specified in their domestic legislation that prohibited acts committed against one person can be regarded as genocide.[39] Following this approach, the Elements of Crimes of the ICC specifies that a prohibited act had to be committed against "one or more persons."[40]

In Hungarian legal literature, however, those authors that address the issue all claim that due to the use of plural, the Hungarian Criminal Code requires that the *actus reus* had to affect at least two persons. Accordingly, killing only one person merely constitutes attempted genocide.[41] While this

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[37] ICTR, *The Prosecutor v. Mpampara* (ICTR-01-65-T), Judgment of 11 Sept. 2006, para. 8.

[38] See, e.g., Werle, *Principles of International Criminal Law*, p. 265.; Schabas, *Genocide in International Law*, p. 179. Ambos, on the other hand, supports a restrictive reading based on the *lex stricta* principle; Ambos, *Treatise on International Criminal Law*, vol. 2, p. 10.

[39] These include Fiji, Germany, Italy and Uruguay; see Hoffmann, *The Crime of Genocide*, p. 75.

[40] *ICC Elements of Crimes*, Article 6(b)(1); Article 6(c)(1); Article 6d(1); Article 6(e)(1).

[41] B. Gellér, 'Az emberiesség elleni bűncselekmények', in P. Polt (ed.), Új *Btk Kommentár – 3. kötet, Különös rész*, Budapest 2013, p. 14; Sz. Hornyák, 'Emberiesség elleni bűncselekmények', in M. Tóth, Z. Nagy (eds.), *Magyar büntetőjog – Különös rész*, Budapest 2014, p. 21; P. Polt, 'Btk. XIII. Fejezet – Az emberiesség elleni bűncselekmények', in B. Blaskó et al. (eds.), *Büntetőjog – Különös rész I*, Budapest–Debrecen 2018, p. 16.

interpretation seems to be in conformity with the actual text, I submit that Hungary's international obligations would require a reading of the provision that is consistent with its generally recognized content. Even if that were to result in a departure from the ordinary meaning of the text, it would not violate the principle of legality as the Hungarian Constitutional Court had already recognized decades ago that

> International law applies the guarantee of *nullum crimen sine lege* to itself, and not to the domestic law… irrespective whether the domestic law contains a comparable criminal offense, and whether those offenses have been integrated into an internal legal system.[42]

Conclusions

The domestic implementation of international criminal law norms is influenced by numerous factors such as an inevitable adaptation to the domestic legal system, deliberate change by the legislator (expanding or narrowing the scope of the crime, often by introducing new prohibited acts or protected groups), or sometimes the mistranslation of the original norm.[43] However, even if the implementing legislation faithfully conveys the original content of the international norm, whether the actual application is consistent with international practice very much depends on the international law expertise of the judiciary. As I have tried to demonstrate in this article, even the provisions of the "crime of crimes" can be subject to radically different interpretations. Since in the Hungarian legal system the *jura novit curia* principle creates the irrefutable fiction that judges are proficient in every system of law, including public international law, in previous Hungarian jurisprudence concerning the application of war crimes law and crimes against humanity,

[42] *Hungary*, Constitutional Court of the Republic of Hungary, Decision No 53/1993, 13 Oct. 1993, section 5. In a later decision the Constitutional Court specified that "it is international law itself which defines the crimes to be persecuted and to be punished as well as all the conditions of their punishability." Constitutional Court of the Republic of Hungary, Decision No 36/1996, 4 Sept. 1996, sect. 2(1).

[43] See Hoffmann, *The Crime of Genocide*, pp. 91–93.

the courts usually came to a conclusion without assessing international jurisprudence and scholarship and often drew conclusions that radically differed from the internationally accepted interpretations.[44] While currently the Hungarian judiciary refuses to accept the participation of legal experts in judicial proceedings,[45] this seems to be the most reliable solution to avoid future mishaps during the application of international criminal law norms.

[44] See, e.g., T. Hoffmann, 'Trying Communism Through International Criminal Law? – The Experiences of the Hungarian Historical Justice Trials', in K.J. Heller, G. Simpson (eds.), *Hidden Histories of War Crimes Trials*, Oxford 2013, pp. 229–247.

[45] For instance, the Curia (the Hungarian Supreme Court) affirmed that experts can only be involved in the proceedings "when the issue to be resolved is outside or beyond legal competence"; *Hungary*, Curia, Decision Bt.III.1.604/2015/4.

NEDŽAD SMAILAGIĆ*

Penalization of International Crimes in Bosnia and Herzegovina: Diversity of Applicable Law and Implications of the Principle of Legality

Introduction

International crimes (ICs)[1] are breaches of international law violating fundamental values of the international community and amount to individual criminal responsibility.[2] Putting in place adequate legal framework is of fundamental importance for ending the culture of impunity regardless of whether such crimes are prosecuted before an international or a national court. The question of substantive criminal law applicable in proceedings for ICs cases before courts in Bosnia and Herzegovina (BaH) represents one of key legal issues in contemporary case law and domestic legal scholarship. The issue became apparent in the aftermath of the adoption of the *Completion Strategy of the International Criminal Tribunal for the Former Yugoslavia* (ICTY) in 2003[3] with the establishment of specialized departments for war crimes within the Criminal Division of the Court of BaH (i.e., War Crimes Chamber, WCC) and the Prosecutor's Office of BaH (SDWC,

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[1] Throughout this paper the term "ICs" is used to denote core ICs, namely the crime of genocide, crimes against humanity, and war crimes.

[2] For a definition of ICs, see the ones provided by A. Cassese et. al., *Cassese's International Criminal Law*, Oxford 2013, p. 18; or Lj. Bavcon, 'Mednarodna hudoletvstva', in Lj. Bavcon, M. Škrk (eds.), *Mednaredno kazensko pravo*, Ljubljana 2012, p. 149. On the process and criteria for international criminalization see, M. Ch. Bassiouni, *Principles of International Criminal Law*, 2nd ed., Leiden 2013, pp. 142–150.

[3] UN SC Res. 1503 (28 Aug. 2003), S/RES/1503 (2003).

PO BaH), which initially qualified allegations of ICs under the Criminal Code of BaH adopted in 2003 (2003 CC BaH).[4] In contrast, other courts in the country, almost as a rule, apply the Criminal Code of the Socialist Federal Republic of Yugoslavia (1976 CC SFRY)[5] as the code in force during the 1992–95 war in BaH.[6] Opposing views as to what constitutes the national law applicable in ICs cases are based on different views and interpretation of principles and rules on application of criminal codes with respect to time and, generally, the principle of legality.

Adherence to requirements of the principle of legality (*nullum crimen, nulla poena sine lege*), as the essential principle of criminal law,[7] is of fundamental importance in modern legal systems since it represents embodiment of its guarantee function.[8] It puts specific requirements for legislators in terms of providing definitions of criminal offences and prescriptions of criminal sanctions in form of a written law (*lex scripta*) which is sufficiently specific (*lex certa*), strictly construed (*lex stricta*), and with prospective effect (*lex praevia*).[9] It further defines specific requirements for courts in terms of interpretation of criminal codes and rules their application of with respect to

[4] 2003 CC BaH (Službeni glasnik BiH, no. 3/03 as amended).

[5] 1976 CC SFRY (Službeni list SFRJ, no. 44/76 as amended); Uredba sa zakonskom snagom o preuzimanju i primjenjivanju saveznih zakona koji se u Bosni i Hercegovini primjenjuju kao republički zakon (Službeni list R BiH no. 2/92); Zakon o potvrđivanju uredbi sa zakonskom snagom (Službeni list RBiH no. 13/93).

[6] For a detailed account of early case law of the WCC and courts in the Entities and Brčko District BaH (BD BaH), see OSCE, *Moving towards a Harmonized Application of the Law Applicable in War Crimes Cases before Courts in Bosnia and Herzegovina*, Mission to BaH, 2008.

[7] M.N. Simović, D. Jovašević, *Leksikon krivičnog prava Bosne i Hercegovine*, Sarajevo 2018, p. 244.

[8] H.H. Jescheck, Th. Weigend, *Lehrbuch des Strafrechts, Allgemeiner Teil*, 5th ed., Berlin 1996, p. 126ff.; Z. Tomić, *Krivično pravo I*, Sarajevo 2008, p. 111; P. Novoselec, *Opći dio kaznenog prava*, Osijek 2016, p. 47; P. Novoselec, I. Martinović, *Komentar Kaznenog zakona. I. knjiga: opći dio*, Zagreb 2019, p. 8.

[9] J. Pradel, *Droit pénal compare*, 4th ed., Paris 2016, pp. 59–60; H. Sijerčić-Čolić, Dž. Mahmutović, N. Smailagić, 'Bosnia and Herzegovina', in F. Verbuggen, V. Franssen (eds.), *International Encyclopaedia of Laws: Criminal Law*, Alphen aan den Rijn 2021, pp. 53–54; M.D. Dubber, T. Hörnle, *Criminal Law. A Comparative Approach*, Oxford 2014, pp. 73–74; Lj. Bavcon et al., *Kazensko pravo, Splošni del*, Ljubljana 2013, pp. 131–132; Ž. Horvatić, D. Derenčinović, L. Cvitanović, *Kazneno pravo. Opći dio I: kazneno pravo i kazneni zakon*, Zagreb 2016, pp. 132–140.

time in context of determination and potential application of *lex mitior*. In that form, the legality principle is widely accepted in comparative law, specifically in legal systems of the Civil law tradition, and constitutes an integral part of international human rights law.[10]

Adherence to this principle is important in context of prosecutions of ICs and other past violations of human rights before criminal justice mechanisms in post-conflict settings. Criminal trials, with all the critiques and limitations identified in transitional justice studies, remain the relevant mechanism for re-embodiment of rule of law norms in context of determination of individual criminal responsibility for past wide-scale wrongdoings.[11] One of preconditions for national prosecutions of ICs stemming from the principle of legality is that these crimes (i.e., its elements and criminal sanctions) are defined in national law.[12]

The focus of this paper is on the analysis of the scope of penalization of ICs in the criminal legislation applicable by courts in BaH in the context of contemporary national prosecutions of ICs committed during the 1992–95 war. In order to determine the legal framework under which ICs are punishable before national courts and considering the rules on application of criminal legislation with respect to time, the paper aims to identify criminal codes in force over the past thirty years and analyze relevant provisions on ICs. The analysis is based on the inquiry of crimes constituting the catalogue of ICs with emphasis on the scope of criminalization, prescribed criminal sanctions, and models of criminal liability, with specific reference to institutes of command responsibility and joint criminal enterprise. In addition, given the extensive temporal distance between the perpetration of crimes and actual trials and differences between the applicable criminal codes, the paper examines what are the implications of the legality principle. Specific emphasis is on the non-retroactivity requirement (*lex praevia*) and its exceptions, namely

[10] K.S. Gallant, *The Principle of Legality in International and Comparative Criminal Law*, Cambridge, 2009, p. 11ff.; B. Petrović, N. Smailagić, 'Načelo zakonitosti u savremenom međunarodnom krivičnom pravu: srednji put između kontinentalnog i angloameričkog koncepta zakonitosti?', *Godišnjak Pravnog fakulteta u Sarajevu*, vol. 59, 2016, p. 302ff.

[11] For a detailed account on the history of international criminal trials in context of transitional justice, see R. Teitel, *Tranziciona pravda*, Belgrade 2014, pp. 47–61.

[12] V.Đ. Degan, B. Pavišić, *Međunarodno kazneno pravo*, Rijeka 2005, p. 68.

the application of *lex mitior* and punishment for crimes according to general principles of laws under Article 7 of the European Convention of Human Rights (ECHR)[13] and Article 4a of the 2003 CC BaH.[14] Emphasis is given to the landmark ruling of the European Court of Human Rights (ECtHR) in the case of *Maktouf and Damjanović v. BaH* from 18 July 2013 which provided some guidance in context of the requirements stemming from Article 7 of the ECHR and the subsequent national case law.

1. General remarks on criminal legislation of BaH and domestic ICs prosecutions

It is commonly considered that the context and legislative framework for processing of cases of ICs cases in BaH is extremely complex and multilayered.[15] It can be submitted that two factors contribute to this assessment: fragmented judicial and legal system (a) and the almost three-decade distance between the 1992–95 war and the national trials under analysis (b).

(a) *Fragmented legal and judicial system* mirrors the country's complex constitutional design and consists of four structurally independent judicial hierarchies, namely at the State level, in each of the two Entities, and the Brčko District BaH (BD BaH) with own sets of (criminal) legislation.[16] Each consists of courts of the first instance and appellate courts[17] producing its

[13] Convention for the Protection of Human Rights and Fundamental Freedoms, ETS, vol. 5, 1950.

[14] Article 4a (Trial and Punishment for Criminal Offences Pursuant to the General Principles of International Law) of the 2003 CC BaH.

[15] OSCE, *Delivering Justice in Bosnia and Herzegovina. An Overview of War Crimes Processing from 2005 to 2010*, Mission to BaH, May 2011, p. 11; M.A. Drumbl, *Atrocity, Punishment, and International Law*, New York 2007, p. 99.

[16] BaH comprises two Entities: Federation of BaH (FBaH) and Republika Srpska (RS); see Article I(3) (*Composition*) of the Annex 4 (Constitution of BaH) of GFAP. In addition, BD BaH was established in 2000 as a result of arbitration pursuant to Annexes 2 (*Agreement on Inter-Entity Boundary Line and Related Issues*) and 10 (*Agreement on Civilian Implementation*) of GFAP. See 'Arbitral Tribunal for Dispute Over Inter-Entity Boundary in Brčko: The Federation of Bosnia and Herzegovina v. The Republika Srpska (Final Award)', *International Legal Materials*, vol. 38, no. 3, 1999, pp. 534–550.

[17] For an overview of the domestic judicial system, see K. Trnka, *Ustavno pravo*, 2nd ed., pp. 345–352, and Sijerčić-Čolić et al., 'Bosnia and Herzegovina', pp. 27–36.

own case law which, taken altogether, often involve opposing stances on particular legal issues.[18] Domestic criminal justice system in its present form is a result of extensive reforms in the justice sector in early 2000s extending to the institutional reforms, reappointment of judges and prosecutors, and the adoption of new substantive and procedural criminal legislation.[19] Exclusive competence over ICs is with the State level judiciary, i.e., the WCC and SDWC.[20] Initially established as internationalized institutions, with a joint registry and international personnel (including judges, prosecutors, and support staff) alongside national employees, WCC and SDWC are full nationalized but with significant degree of international support.[21] However, the extensive backlog of ICs cases mandated the adoption of a specific policy based on sharing the burden of processing with Entity and BD BaH-level judiciary. According to the *National Strategy for Processing of War Crimes Cases*, adopted in December 2008[22] and revised in September 2020,[23] allocation of cases between the State and Entity/BD BaH level judiciary depends upon complexity of a case,[24] according to which the WCC shall process complex

[18] *Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina*, CDL-AD(2012)014-e (Venice Commission, 15–16 June 2012).

[19] In more detail see L.J. Nettelfield, *Courting Democracy in Bosnia and Herzegovina*, New York 2010, pp. 238–241.

[20] The subject-matter competence of the Court of BaH in criminal matters extends, *inter alia*, to all crimes prescribed in 2003 CC BaH, as the State level code. See Article 7 (Competence in Criminal Matters) of the Law on the Court of BaH – consolidated version (Službeni glasnik BiH, no. 49/09 as amended).

[21] For a detailed account on the establishment of the WCC and the SDWC, see T. Abdulhak, 'Building Sustainable Capacities – From an International Tribunal to a Domestic War Crimes Chamber for Bosnia and Herzegovina', *International Criminal Law Review*, vol. 9, no. 2, 2009, p. 333ff.; N. Smailagić, 'Diversity of Internationalised Criminal Courts: Fragmentation or Consolidation of International Criminal Justice?' in M.C. Baruffi, M. Ortino (eds.), *Trending Topics in International and EU Law: Legal and Economic Perspectives*, Naples 2019, pp. 139–141.

[22] Council of Ministers of BaH, Državna strategija za rad na predmetima ratnih zločina, Dec. 2008, http://www.mpr.gov.ba/web_dokumenti/drzavna%20strategije%20za%20rad%20na%20predmetima%20rz.pdf (accessed 11.7.2021).

[23] Council of Ministers of BaH, Revidirana Državna strategija za rad na predmetima ratnih zločina, Sept. 2020, http://www.mpr.gov.ba/dokumenti/projekti/default.aspx?id=10813&langTag=bs-BA (accessed 11.7.2021).

[24] Case review criteria prescribed by the (Revised) Strategy allows for legal and factual assessment of complexity by introducing a two-fold alternative test based on gravity of the crime and role of the suspect. In relation to the gravity of the crime criterion, the case will be assessed as complex if it contains allegations of the crime of genocide, crimes against humanity,

cases only, while proceedings in less complex ones will be transferred to the Entity/BD BaH court in whose area the alleged crime was committed.[25] Based on the foregoing, it follows that in practice proceedings in ICs cases are conducted both at the State level (WCC and SDWC in charge of processing of factually and legally most complex cases) and before the Entity[26]/BD BaH level courts (in charge of less complex cases).[27] The Constitutional Court of BaH has, *inter alia*, appellate jurisdiction over issues under the Constitution of BaH arising from any court in the country, including on constitutional matters in relation to processing of ICs.[28]

(b) *Temporal distance*. The second factor contributing to the complexity *the almost three-decade time differential* between the outbreak of the 1992–95 war in BaH during which atrocities were committed, and the actual conduct

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and more severe forms of war crimes (including systematic killings and severe forms of other underlying offences, such as rapes, deprivation of liberty, etc.). Under the second criterion, case will be assessed as complex if the suspect performed a duty of a certain degree within military or civilian hierarchy (such as formation or civilian role, commanding position etc.) or the case involves allegations of command responsibility or membership in a joint criminal enterprise. See Aneks A: *Kriteriji za pregled predmeta*, Državna strategija…, pp. 41–42; Revidirana Državna strategija…, pp. 51–52.

[25] Article 27a (Transfer of proceedings for the criminal offenses referred to in Chapter XVII of the CC BaH) of the Code of Criminal Procedure of BaH – CPC BaH (Službeni glasnik BiH, no. 3/03 as amended). However, it should be emphasized that the institute of transfer of proceedings, as prescribed in Article 27a of the CPC BaH, should be distinguished from the institute of delegation of jurisdiction in criminal procedural law. The latter is commonly regarded as transfer of the power to adjudicate in a case from the subject matter and territorially competent court to an equally subject-matter competent court, however without territorial competence. In case of the former, there is a transfer of the power of adjudication in ICs cases from a subject matter and territorially competent court (WCC) to another court which is neither subject-matter nor territorially competent court, but the crime was committed in within the area of its territorial competence (in this case either one of ten cantonal courts in FBaH, one of six district courts in RS, or the Basic Court of BD BaH).

[26] In FBaH, ten cantonal courts (as courts of the first instance) and the Supreme Court of FBaH (as a court of full appellate jurisdiction); in RS, six district courts (as courts of the first instance) and the Supreme Court of RS (as a court of full appellate jurisdiction).

[27] Basic Court of BD BaH, as the court in the first instance, and the Appellate Court of BD BaH, as the court of full appellate jurisdiction.

[28] Article VI(3)(b) (Constitutional Court) of Annex IV (Constitution) of GFAP. For a detailed account on the composition and jurisdiction of the Constitutional Court of BaH, including an overview of its relevant case law, see N. Smailagić, 'Constitutional Court of Bosnia and Herzegovina (Ustavni sud Bosne i Hercegovine)', in R. Grote, F. Lachenmann, R. Wolfrum (eds.), *Max Planck Encyclopedia of Comparative Constitutional Law [MPECCoL]*, Oxford 2020, https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e804 (accessed 17.7.2021).

of investigative and judicial proceedings for those crimes nowadays. In this period, criminal legislation changed not only in context of penalization of ICs, but also conceptually to reflect new developments in criminal law theory, to implement international law obligations, as well as to reflect the needs of the post-war society, and the criminal justice policy needs. In retrospect, dynamic legislative activity in criminal law, during and after the state of war, ranges between the incorporation of SFRY legislation in 1992 into the legal system of (then newly independent) Republic of BaH[29] and the adoption of criminal legislation in 2003 as part of wider reforms in the justice sector in early 2000s, which is currently in force. Development of criminal legislation in BaH since 1992 can be divided into three phases.[30] Whilst the first phase covers the wartime period and is characterized by incorporation of 1976 CC SFRY,[31] the second phase extends to the post-war period following the entry into force of GFAP and is characterized by the adoption of criminal legislation in the Entities and BD BaH.[32] Thus, 1976 CC SFRY was superseded in 1998 in FBaH by adoption of Criminal Code of FBaH (1998 CC FBaH),[33] in 2000 in RS by adoption of Criminal Code of RS (2000 CC RS),[34] and in 2000 in BD BaH by adoption of Criminal Code of BD BaH (2000 CC BD BaH).[35] This reform was based on *horizontal division of competence in criminal matters* as each of the three codes represented complete codifications of criminal law, consisting of a general and a special part, including the catalogue of ICs.[36] Finally, adoption of new criminal legislation in 2003 constitutes the third phase characterized by *vertical and horizontal division of competence in*

[29] Uredba sa zakonskom snagom…; Zakon o potvrđivanju uredbi sa zakonskom snagom…

[30] For a detailed account on the development of criminal justice system of BaH in this period, see Sijerčić-Čolić et al., 'Bosnia and Herzegovina', pp. 36–46; B. Petrović, D. Jovašević, A. Ferhatović, *Krivično pravo I (Uvod u krivično pravo, krivično djelo, krivnja)*, Sarajevo 2015, pp. 60–62; Tomić, *Krivično pravo I*, pp. 72–77.

[31] For a detailed account of events, including those leading to the adoption of GFAP, see K. Trnka, *Ustavno pravo*, pp. 95–107, and for an account of conditions affecting criminal legislation in the 1992–95 period, see Tomić, *Krivično pravo I*, pp. 72–73.

[32] Ibid., pp. 73–74.

[33] 1998 CC FBaH (Službene novine Federacije BiH, no. 43/98 as amended).

[34] 2000 CC RS (Službeni glasnik RS, no. 22/00 as amended).

[35] 2000 CC BD BaH (Službeni glasnik BD BiH, no. 6/00 as amended).

[36] Sijerčić-Čolić et al., 'Bosnia and Herzegovina', p. 43; Tomić, *Krivično pravo I*, p. 74.

criminal matters[37] as it encompassed the exclusive State-level competence in criminal matters over certain crimes, including ICs, as well as new criminal codes in the Entities[38] and the BD BaH.[39] The 2003 CC BaH was introduced by the decision of the High Representative, as the international authority with mandate to oversight of civilian aspects of the GFAP[40] and subsequently adopted by the Parliamentary Assembly of BaH.[41]

For the reasons provided above, it follows that the domestic framework for prosecution of ICs committed in the 1992–95 war can be assessed as very complex. Such an assessment is based on two key criteria, i.e., the fragmented legal and judicial system in place, on one side, and the significant passage of time from the commission of such crimes until investigations and trials, on the other.

2. Diversity of applicable domestic law and the scope of penalization of international crimes

National legal framework on penalization of ICs did reflect major developments of international law over time, both in context of criminal legislation of SFRY and BaH. Nowadays, BaH is a state party, either through succession[42]

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[37] Ibid.

[38] 2003 Criminal Code of FBaH (Službene novine FBiH, no. 36/03 as amended); 2003 Criminal Code of RS (Službeni glasnik RS, no. 49/03 as amended, and superseded by 2017 Criminal Code of RS, Službeni glasnik RS, no. 46/17 as amended).

[39] 2003 Criminal Code of BD BaH (Službeni glasnik BD BiH, no. 19/20, consolidated text).

[40] For a detailed account of the High Representative and its role in implementation of GFAP, see N. Smailagić, '*Međunarodne organizacije*', in D. Banović, S. Gavrić (eds.), *Država, politika i društvo u Bosni i Hercegovini: analiza postdejtonskog političkog sistema*, Sarajevo 2011, pp. 551–554.

[41] 2003 CC BaH (Službeni glasnik BiH, no. 37/03 as amended).

[42] Convention on the Prevention and Punishment of the Crime of Genocide (1948 Genocide Convention), UNTS 78, 1951, p. 277 (notification of succession as of 29 Dec. 1992); International Covenant on Civil and Political Rights, UNTS 999 (1976), p. 1057 (instrument of succession as of 1 Sept. 1993). For a full overview and information on succession of the 1949 Geneva Conventions and the 1977 Additional Protocols, and other relevant treaties, see International Committee of the Red Cross, *Treaties, States Parties and Commentaries: Bosnia and Herzegovina*, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=BA (accessed 11.7.2021).

or accession[43] to relevant international treaties. The Constitution of BaH clearly defines the scope of application on international law in the domestic order. Firstly, it provides for direct application and supremacy of rights and freedoms set forth in the ECHR and its Protocols[44] as well as for application of a number of key human rights treaties, including the 1948 Genocide Convention, the 1949 Geneva Conventions and 1977 Additional Protocols, and the 1966 International Covenant on Civil and Political Rights (ICCPR).[45] Secondly, it further provides that general principles of international law shall be an integral part of domestic law at all levels.[46] Thus, apart from the latter, legal obligation to implement binding treaty requirements lies both in the domestic constitutional law, subject to review at the domestic level, and international law, as BaH has either succeeded or acceded to certain treaties as the state party.

Dynamic legislative activities at all levels in BaH over the past three decades contributed to the diversity of criminal codes in applicable in domestic trials for ICs. Given the time differential between the perpetration of crimes and the trial, as well as the obligation to apply the *lex mitior* as the corollary requirement of the principle of legality, courts have statutory obligation to take into consideration not only the criminal code *tempore criminis*, but also all other criminal codes in force after the crime was committed but before the trial, i.e., the temporal or interim codes, in addition to the code in force at the time of trial.[47] Pursuant to these rules and depending upon the place of perpetration of the specific crime, at least three codes need to be taken into consideration:

- 1976 CC SFRY, with territorial application over BaH, as code in force during the 1992–95 period;

[43] E.g., Rome Statute of the International Criminal Court, UNTS 2187, 2004, p. 3 (instrument of ratification of 11 April 2002).

[44] Article II/2 (International Standards) of the Constitution of BaH provides for direct application and supremacy of rights and freedoms set forth in the European Convention for the Protection of Human Rights (ECHR) and its Protocols. See Annex IV (Constitution) of GFAP.

[45] See Annex I (Additional Human Rights Agreements to be Applied in BaH) to the Annex IV (Constitution) of GFAP.

[46] Article III(3)(b) (Law and Responsibilities of the Entities and the Institutions) of the Annex IV (Constitution) of GFAP.

[47] Articles 4 of 1976 CC SFRY; 4 of 1998 CC FBaH; 4 of 2000 CC RS; 4 of 2000 CC BD BaH; and 4 of 2003 CC BaH.

- 1998 CC FBaH, 2000 CC RS, and 2000 CC BD BaH, with territorial application in the respective Entity or the BD BaH, as interim (temporal) codes;
- 2003 CC BaH, with territorial application over BaH, as the code currently in force.

The scope of penalization of ICs will be assessed in the context of these codes, with an emphasis on the catalogue of crimes, prescribed criminal sanctions, and the modes of liability. In context of the catalogue of crimes, all codes provided for the crime of genocide and war crimes, whereas the 2003 CC BaH provides for crimes against humanity. Different regulation of sentencing adds further to the difference between these codes and goes beyond the mere difference in sentencing frameworks for individual crimes, but also the catalogue of punishments and conditions for their imposition. The final point of difference relates to modes of liability, as only 2003 CC BaH provides explicitly for individual criminal responsibility and command responsibility for IC. Each of the above points will be discussed in detail below.

2.1 Catalogue of ICs

With the exception of crimes against humanity defined only in 2003 CC BaH, all codes provide for the crime of genocide and war crimes. Given the method of cataloguing crimes based on the values protected by respective incriminations, these crimes are grouped in a single chapter on crimes against humanity and values protected international law.[48] Thus, *humanity*[49] and *international law*[50] represent values protected by these incriminations.

[48] Ch. 16 of 1976 CC CFRY; Ch. 16 of 1998 CC FBaH; Ch. 34 of 2000 CC RS; Ch. 16 of 2000 CC BD BaH; and Ch. 17 of 2003 CC BaH.

[49] According to legal scholars and commentators, in this context humanity should be regarded as respect for basic rights and freedoms during peace, and as prohibition of inhumane treatment of combatants and non-combatants in times of war or armed conflict. See N. Srzentić et al., *Komentar KZ SFRJ*, Belgrade 1982, p. 493; Z. Rajić, Lj. Filipović, 'Glava XVII – Zločini protiv čovječnosti i vrijednosti zaštićenih međunarodnim pravom', in M. Babić (ed.), *Komentari KZ u BiH*, Sarajevo 2005, p. 556; M. Babić, I. Marković, *Krivično pravo, Posebni dio*, Banja Luka 2014, pp. 414–418; Z. Tomić, *Krivično pravo II, Posebni dio*, Sarajevo 2007, p. 414.

[50] In the same vein, international law is understood in terms of norms of international law which define certain acts as international crimes and attaching individual criminal

(a) *Crime of genocide*. Definition of the crime of genocide provided in the codes under analysis reflect the essential elements under international law. In that vein, the crime consists in intentional destruction, in part or as a whole, of a national, ethnical, racial, or religious group by committing any of the five underlying acts, i.e., (i) killing members of the group; (ii) causing serious bodily or mental harm to members of the group; (iii) deliberate infliction on the group or community of such conditions of life that are calculated to bring about its physical destruction in whole or in part; (iv) imposition of measures intended to prevent birth within the group; and (v) forcible transfer of children of the group to another group.[51] Thus, national definition of the crime of genocide in all five criminal codes reflect the definition of the crime provided in the Article II of the 1948 Genocide Convention,[52] Article 4 of the ICTY Statue, and Article 6 of the Rome Statute with regard to the 2003 CC BaH.[53]

(b) *Crimes against humanity*. Only the 2003 CC BaH specifically provides for definition of crimes against humanity.[54] In its essential elements, the definition in Article 172 of 2003 CC BaH largely reflects the definition of Article 7 of the Rome Statute. Thus, *chapeau* elements of the crime consist in perpetration of any of the specified underlying acts as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Underlying acts in context of Article 172(1), and with minor difference in terminology to Article 7 of the Rome Statute, include: i) murder; ii) extermination; iii) enslavement; iv) deportation or forcible transfer of population; v) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; vi) torture; vii) rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization, or any other form of severe sexual violence; viii) persecution against any identifiable group or collectivity on political, racial national, ethnic, cultural,

responsibility. See Srzentić et al., *Komentar KZ SFRJ*, p. 493; Rajić, Filipović, 'Glava XVII', p. 556; Tomić, *Krivično pravo II*, p. 414.

[51] Articles 141 (1976 CC SFRY); 153 (1998 CC FBaH); 432 (2000 CC RS); 147 (2000 CC BaH); 171 (2003 CC BaH).

[52] Convention on the Prevention and Punishment of the Crime of Genocide, UNTS 1951, vol. 28.

[53] Rajić, Filipović, 'Glava XVII', p. 559.

[54] Article 172 of 2003 CC BaH.

religious, gender, or other ground that is universally recognized as impermissible under international law, in relation to any underlying act of Crimes against Humanity; ix) enforced disappearance of persons; x) the crime of apartheid; and xi) other inhumane acts of similar character perpetrated with intention of causing great suffering, or serious injury to body or to mental or physical health. In the same way as in the Rome Statute, this incrimination is complemented by definitions of specific terms used to define the *chapeau* elements as well as underlying acts including, among others, the definition of the attack against any civilian population, extermination, or enslavement.[55]

Extension of the catalogue of ICs to crimes against humanity in the 2003 CC BaH was based *inter alia* on the obligation to implement the 1998 Rome Statute into domestic law.[56] Legal scholars and commentators generally agree that whilst crimes against humanity *per se* represent a new crime in national law, some of its underlying acts constituted punishable acts under previous codes, most notably as underlying acts of war crimes against civilians and other crimes.[57] The similarity between the two crimes in terms its of underlying acts was the ground for some scholars to further argue that the incrimination of crimes against humanity does not represent a new crime in context of the applicable criminal law in domestic ICs trials, but rather a "repackaged" form of war crimes against civilians given that the difference between these crimes is largely limited "only" to *chapeau* elements.[58] Taking into consideration the substantive contextual differences between crimes against humanity and war crimes, it follows that this argumentation cannot be upheld as it is not supported in legal scholarship and settled case law. Crimes against humanity and war crimes substantially differ in terms of c*hapeau* elements, where the

[55] Article 172(2) of 2003 CC BaH.

[56] Representing both the codification and progressive development of international law, the Rome Statute provides for a comprehensive definition of crimes against Humanity. For an analysis and interpretation of elements; see C.K. Hall, K. Ambos, 'Article 7 (Crimes against humanity)', in O. Triffterer, K. Ambos (eds.), *RS Commentary*, München 2016, p. 145ff.

[57] Including, e.g., racial discrimination punishable under Article 154 of 1976 CC SFRY. See Rajić, Filipović, 'Glava XVII', p. 565; Tomić, *Krivično pravo II*, p. 418; Babić, Marković, *Krivično pravo*, p. 423.

[58] M. Babić, *Komentar KZ RS*, Banja Luka 2021, p. 60; M. Babić, 'Da li je zločin protiv čovječnosti novo krivično djelo?', *Nezavisne novine*, 26 Aug. 2014, https://www.nezavisne.com/novosti/kolumne/Da-li-je-zlocin-protiv-covjecnosti-novo-krivicno-djelo/259982 (accessed 17.7.2021).

former is not characterized by isolated acts of violence but rather forms part of widespread and systematic practice enforced or sponsored by government or similar types of authority against civilian population through a collective action of force in power.[59] Thus, the fact that underlying acts of crimes against humanity and war crimes against civilians largely overlap is not a decisive factor, as two crimes differ in *chapeau* elements, i.e., context and the scope of victims. Based on the foregoing, it follows that the *differentia specifica* of crimes against humanity lies in specific context and that the thesis of it being a "repackaged" form of war crimes against civilians is based neither on the state of development of international (criminal) law at the material time nor in present scholarship and case law.

(c) *War crimes*. As serious violations of international humanitarian law,[60] war crimes are criminalized in all five codes under analysis to reflect what is usually referred to as the "Geneva Law" and "The Hague Law."[61] Contextual *chapeau* element of war crimes in all analyzed codes is the perpetration of

[59] Cassese et al., *Cassese's International Criminal Law*, p. 91; Hall, Ambos, 'Article 7', p. 164; Simović, Jovašević, *Leksikon*, p. 729. In this vein see C. Stahn, *A Critical Introduction to International Criminal Law*, Cambridge 2019, p. 52. Further, Mettraux identifies four elements distinguishing crimes against humanity and war crimes: (i) unlike war crimes, crimes against humanity can be committed either during the time of war and peace; (ii) crime against humanity may be committed against nationals of any state; (iii) unlike war crimes, which can be committed both against civilians and enemy combatants, crimes against humanity can be committed only against civilians; and (iv) crimes against humanity can be committed only as part of a widespread and systematic attack. See G. Mettraux, *International Crimes and the Ad Hoc Tribunals*, Oxford 2006, https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199207541.001.0001/acprof-9780199207541-chapter-24?q=population (accessed 17.7.2021). It is a matter of settled case law that, while a plan or policy is not legal element, its existence might be useful to establish "[T]hat the attack was directed against a civilian population and that it was widespread or systematic." See *Prosecutor v. Dragoljub Kunarac et al.* (IT-96-23 & 23/1), Appeals Chamber Judgment of 12 June 2002, §98; *Prosecutor v. Tihomir Blaškić* (IT-95-14-A), Appeals Chamber Judgment of 29 July 2004, §120; *Prosecutor v. Laurent Semanza* (ICTR-97-20-A), Appeals Chamber Judgment of 20 May 2005, §296.

[60] A. Cassese et al., *Cassese's International Criminal Law*, p. 65; M. Cottier, 'Article 8 (War crimes)', in O. Triffterer, K. Ambos (eds.), *RS Commentary*, München 2016, p. 304ff.

[61] H. Satzger, *International and European Criminal Law*, München 2018, p. 312.

any of underlying acts in time of war,[62] armed conflict,[63] or occupation.[64] It follows that this element is broader than the contextual element under international law (armed conflict of an international or non-international character).

Definitions of war crimes are provided in several specific provisions to reflect particular protected group/value, in particular:

- *War crimes against civilian population*.[65] This incrimination is primarily based on the 1949 Geneva Convention (IV) on the Protection of Civilian Persons in Time of War and the 1977 Additional Protocols.[66] The definition criminalizes perpetration or ordering the perpetration of wide range of different types of acts constituting, *inter alia*, attack on life or bodily integrity of civilian population, imposition of severe conditions of life, or forcing civilian population to serve in the enemy forces or administration.[67]

[62] War in this context is regarded in its classical notion as an armed conflict between at least two states which meets formal requirements of a war. See Srzentić et al., *Komentar KZ SFRJ*, p. 434; Babić, Marković, *Krivično pravo*, p. 428.

[63] Armed conflict is understood not only as an international armed conflict which does not meet formal requirements of a war, but also an armed conflict of non-international character, i.e., civil wars. Srzentić et al., *Komentar KZ SFRJ*, p. 434; Babić, Marković, *Krivično pravo*, p. 428.

[64] Occupation is regarded as conquest of territory of one state by another by use of force. See ibid.

[65] Articles 142 of 1976 CC SFRY; 154 of 1998 CC SFRY; 433 of 2000 CC RS; 148 of 2000 CC BD BaH; and 173 of 2003 CC BaH.

[66] Tomić, *Krivično pravo II*, pp. 420–421.

[67] Underlying acts include: (i) attack on civilian population resulting in death or serious injuries; (ii) indiscriminate attack causing injuries to the civilian population; (iii) killings, torture, as well as conducting experiments; (iv) dislocation or displacement or forced conversion to another nationality or religion; (v) rape, forcible prostitution, application of measures of intimidation and terror, taking hostages, imposing collective punishment, unlawful bringing to concentration camps and unlawful deprivation of liberty, deprivation of the right to fair trial, and forced service in armed forces, intelligence service, or the administration of the enemy; and (vi) forced labor, starvation of the population, property confiscation, pillaging, illegal and arbitrary destruction and large-scale plunder of property unjustifiable by military needs, taking an illegal and disproportionate contribution or requisition, devaluation of domestic money or unlawful issuance of money. See Tomić, *Krivično pravo II*, p. 422; Simović, Jovašević, *Leksikon*, p. 548–549.

- *War crimes against the wounded and sick*.[68] Based on the 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, the 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, and the 1977 Additional Protocols, the crime consists in perpetration or ordering acts of (i) inhuman treatment of wounded, sick, and shipwrecked, as well as medical and religious staff, and (ii) destruction or appropriation of medical supplies, vehicles intended for medical transport, and stocks of medical supplies.[69]
- *War crimes against prisoners of war.*[70] The 1949 Convention (III), relative to the Treatment of Prisoners of War and the 1977 Additional Protocols, defined the scope of criminalization at national level, extending to: (i) killing, torture, inhuman treatment, conducting various types of experiments, as well as taking of tissue or organs for the purpose of transplantation; (ii) causing of great suffering or serious injury to bodily integrity or health; and (iii) compulsory enlistment into the armed forces of a hostile power, or deprivation of the right to a fair and impartial trial.[71]

Although not formally labeled as such, criminal codes provide for other crimes which, given their nature and binding international law, fall under the umbrella of war crimes.[72] These crimes include: (i) unlawful killing or wounding the enemy,[73] (ii) marauding,[74] (iii) making use of the forbidden means of warfare[75]

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[68] Articles 143 of 1976 CC SFRY; 155 of 1998 CC SFRY; 434 of 2000 CC RS; 149 of 2000 CC BD BaH; and 174 of 2003 CC BaH.

[69] Tomić, *Krivično pravo II*, p. 424; Simović, Jovašević, *Leksikon*, pp. 549–550.

[70] Articles 144 of 1976 CC SFRY; 156 of 1998 CC SFRY; 435 of 2000 CC RS; 150 of 2000 CC BD BaH; and 175 of 2003 CC BaH.

[71] Tomić, *Krivično pravo II*, p. 426; Simović, Jovašević, *Leksikon*, p. 550.

[72] Babić, Marković, *Krivično pravo*, p. 428; M. Babić, *Međunarodno krivično pravo*, Banja Luka 2011, p. 169.

[73] Articles 146 of 1976 CC SFRY; 158 of 1998 CC FBaH; 438 of 2000 CC RS; 152 0f 2000 CC BD BaH; and 152 of 2003 CC BaH.

[74] Articles 147 of 1976 CC SFRY; 159 of 1998 CC FBaH; 439 of 2000 CC RS; 153 of 2000 CC BD BaH; and 178 of 2003 CC BaH.

[75] Articles 148 of 1976 CC SFRY; 160 of 1998 CC FBaH; and 154 of 2000 CC BD BaH.

or violations of laws and customs of war,[76] (iv) cruel treatment of wounded, sick, and prisoners of war,[77] and (v) destruction of cultural and historical monuments.[78] In addition, organization of a group for perpetration of ICs as well as incitement is punishable as a separate crime by all analyzed codes.[79]

In defining war crimes, legislators have resorted to blanket dispositions ("Who in violation of international law…") as its elements are based on binding international law. Such technique has been regarded as adequate to cover subsequent development of international law without the need for additional amendments of criminal code.[80] In this way it was ensured that the criminal code allows for determination of binding international law at the time of perpetration of the crime.

2.2 Sentencing

Criminal codes under analysis considerably differ in relation to sentencing. While punishments (*kazne*) constitute the main criminal sanction prescribed for ICs under all five criminal codes, the differences in relation to the *catalogue of punishments* and *sentencing frameworks* are extensive.

Punishments constitute the most serious type of criminal sanctions prescribed in criminal codes. In retrospect, given the serious nature of ICs, the catalogue of punishments included those related to deprivation of life and deprivation of liberty, and in case of the latter, severe sentencing frameworks.[81] Taking into account all criminal codes under analysis, the catalogue of punishments includes the death penalty (1976 CC SFRY), imprisonment for life (2000 CC RS), long-term imprisonment (1998 CC FBaH, 2000 CC

[76] Article 179 of 2003 CC BaH.

[77] Articles 150 of 1876 CC SFRY; 163 1998 of CC FBaH; 441 of 2000 CC RS; and 157 of 2000 CC BD BaH.

[78] Articles 151 of 1976 CC SFRY; 164 of 1998 CC FBaH; 443 of 2000 CC RS; 158 of 2000 CC BD BaH; and 183 of 2003 CC BaH.

[79] Articles 145 of 1976 CC SFRY; 157 of 1998 CC FBaH; 437 of 2000 CC RS; and 176 of 2003 CC BaH.

[80] Srzentić et al., *Komentar KZ SFRJ*, p. 494.

[81] See Srzentić, *Komentar KZ SFRJ*, p. 343ff.; Simović, Jovašević, *Leksikon*, p. 147; Ž. Horvatić, D. Derenčinović, L. Cvitanović, *Kazneno pravo. Opći dio II: kazneno djelo i kaznenopravne sankcije*, Zagreb 2017, p. 213.

BD BaH, and 2003 CC BaH), and the imprisonment term of specified duration (all codes). Neither of the punishments was proscribed as the only one for a particular crime, but as a combination of a term of imprisonment for a specified duration, on one side, and the death penalty, life imprisonment or the long-term imprisonment for severe forms or consequences of these crimes, on the other.

Based on the foregoing, the following sentencing frameworks were prescribed for core ICs as per each of the codes:

- *Imprisonment of minimum five years or the death penalty under the 1976 CC SFRY*.[82] Given that the incriminations provide only for special minimum of the imprisonment it follows that the general maximum of 15 years of imprisonment is applicable.[83] Further requirements were proscribed for imposition of the death penalty. Firstly, this sentence could be issued only in most severe cases of crimes for which it was prescribed.[84] Secondly, the possibility of issuing this sentence was excluded with regards to a minor or a pregnant woman.[85] Finally, given its extreme nature, a possibility of issuing a fixed imprisonment term of 20 years as a substitute to the death penalty was provided.[86] Legal commentators have observed that if the death penalty is prescribed for a certain crime, including the crime of genocide or war crimes, the proper interpretation of the sentencing framework would be to consider issuing a sentence of imprisonment in duration between 5 and 15 years, or imprisonment in duration of 20 years, or the death penalty.[87]
- *Imprisonment of minimum five years or the long-term imprisonment under the 1998 CC FBaH*[88] *and the 2000 CC BD BaH*.[89] Given that the general maximum of imprisonment was 15 years[90] and that long-term

82 Articles 141–145 of 1976 CC SFRY.
83 Article 38(1) of 1976 CC SFRY.
84 Article 37(2) of 1976 CC SFRY.
85 Article 37(3) of 1976 CC SFRY.
86 Article 38(2) of 1976 CC SFRY; Srzentić et al., *Komentar KZ SFRJ*, p. 184.
87 Srzentić et al., *Komentar KZ SFRJ*, p. 183.
88 Articles 153–156 of 1998 CC FBaH.
89 Articles 147–150 of 2000 CC BD BaH.
90 Articles 37(1) of 1998 CC FBaH and 37(1) of 2000 CC BD BaH.

imprisonment was prescribed for most severe forms of ICs,[91] it follows that the sentencing framework ranged between 5 and 15 years (im-prisonment), and 20–40 years (long-term imprisonment).[92]

- *Imprisonment of minimum 10 years or life imprisonment under the 2000 CC RS*.[93] As the general maximum of imprisonment was 20 years,[94] it follows that the range of the imprisonment term for ICs was between 10–20 years, or life imprisonment. Under Article 35(2) of 2000 CC RS, imposition of life imprisonment was limited to the most severe cases and was subject to specific conditions, such as that it could not be imposed on a defendant under 21 years of age at the time of the perpetration of the crime or a pregnant woman.[95]
- *Imprisonment of minimum 10 years or long-term imprisonment under the 2003 CC BaH*.[96] Given that only the statutory minimum is defined, the general maximum of 20 years is applicable.[97] Long-term imprisonment, in the range between 21–45 years,[98] is limited to most severe cases and it could not be imposed on an accused who, at the time of the perpetration of the crime, was under 21.[99]

Statutory rules on sentencing provide for considerable latitude for courts with respect to individualization of punishments within the said limits. Thus, in its determination of the type and scope of punishment in an individual case, the court takes into account the defined sentencing framework the for the crime and general criteria for meting out of the punishment in all codes

[91] Articles 38(1) of 1998 CC FBaH and 38(1) of 2000 CC BD BaH.

[92] Articles 38(3) of 1998 CC FBaH and 37(3) of 2000 CC BD BaH. Specific conditions were precondition for imposition of long-term imprisonment such as that it could not be imposed on the defendant who at the time of the perpetration of the crime was under 21 years of age (Articles 38(4) of 1998 CC FBaH and 37(4) 2000 CC BD BaH), or a pregnant woman (Article 37(4) of 2000 CC BD BaH).

[93] Articles 432–436 of 2000 CC RS.

[94] Article 36(1) of 2000 CC RS.

[95] Article 35(3) of 2000 CC RS.

[96] Articles 171–175 of 2003 CC BaH.

[97] Article 42b(1) of 2003 CC BaH.

[98] The range of the long-term imprisonment until amendments from 2010 was from 20–45 years.

[99] Article 42b(3) of 2003 CC BaH.

under analysis.[100] These criteria, apart from the purpose of punishment, relate assessment of aggravating and mitigating circumstances can be distinguished into two main categories, i.e., criteria related to the defendant (such as the degree of guilt, motive, past life, personal circumstances, or his/her behavior after the perpetration of the crime) and criteria related to circumstances of the crime (circumstances under which the crime was committed and the degree of violation of the protected value).[101] Mitigation of punishment is a facultative option defined by all codes under analysis which allow the court to issue punishment below the prescribed statutory minimum in case of extraordinary mitigating circumstances indicating that the purpose of punishment will be met with such reduced punishment.[102] In ICs cases, the sentence of imprisonment may be reduced to maximum one year of imprisonment under 1976 CC SFRY,[103] 1998 CC FBaH,[104] up to two years under 2000 CC BD BaH,[105] and up to five years under 2000 CC RS[106] and 2003 CC BaH.[107]

2.3 Modes of liability

Explicit definition of modes of liability for ICs, i.e., the individual criminal responsibility and command responsibility, is provided in the 2003 CC BaH. Article 180, substantially based on the respective provisions of the ICTY Statute,[108] defines not only defines the (co-)perpetration and accessorial modes of participation in perpetration of crimes, but also command responsibility, and statutory exclusion of official status or acting under orders.[109]

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[100] Articles 41 of 1976 CC SFRY; 40 of 1998 CC FBaH; 38 of 2000 CC RS; 40 of 2000 CC BD BaH; and 48 of 2003 CC BD BaH. See also Simović, Jovašević, *Leksikon*, p. 335.

[101] Articles 41(1) of 1976 CC SFRY; 40(1) of 1998 CC FBaH; 38(1) of 2000 CC RS; 40(1) of 2000 BD BaH; and 48(1) of 2003 CC BaH.

[102] Articles 42 of 1976 CC SFRY; 41 of 1998 CC FBaH; 39 of 2000 CC RS; 41 of 2000 BD BaH; and 49 of 2003 CC BaH. See also Simović, Jovašević, *Leksikon*, p. 650.

[103] Article 43(1)(1) of 1976 CC SFRY.

[104] Article 42(1)(1) of 1998 CC FBaH.

[105] Article 42(1)(2) of 2000 CC BD BaH.

[106] Article 40(1)(1) of 2000 CC RS.

[107] Article 50(1)(a) of 2003 CC BaH.

[108] Article 7 (individual criminal responsibility) of ICTY Statute.

[109] See also Rajić, Filipović, 'Glava XVII', p. 594.

Individual criminal responsibility extends, under Article 180(1), to planning, ordering, perpetration, and aiding and abetting in the perpetration of the crime of genocide, crimes against humanity, war crimes, as well as crimes of unlawful killing and wounding of the enemy, marauding, and violations of laws and customs of war. WCC held that the doctrine of joint criminal enterprise (JCE) falls within the scope of meaning of perpetration as defined in Article 180(1).[110] The definition and elements of command responsibility in CC BaH also mirrors the definition provided in Article 7(3) of the ICTY Statute. Thus, under Article 180(2), the fact that any of ICs was committed by his subordinates does not relieve the superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit the crime or had done so and the superior failed to take necessary and reasonable measures to prevent such crimes or punish the perpetrators. Finally, Article 180(1) and (3) explicitly excludes the official capacity and acting under orders as grounds for exclusion of individual criminal responsibility or as grounds for mitigation of the punishment.

Other four criminal codes, including the 1976 CC SFRY, do not provide for a similar definition, thus rules on modes of individual criminal responsibility applicable to all crimes are applicable to ICs as well.

3. Implications of the principle of legality

Diversity of applicable criminal codes and substantial difference between them raise the question of implications stemming of the principle of legality. Is the 1976 CC SFRY the only applicable code given that it was in force at the material time? Are the interim codes applicable? Should the 2003 CC BaH be retroactively applied, for which crimes, and under what conditions? What principles and rules should be taken into consideration in determination of the applicable code? The current general assessment of legal scholars is that the question has been largely resolved mainly by application of international

[110] See WCC case no. X-KR-06/275, First Instance Judgment of 28 Feb. 2008, pp. 114–115, and reiterated in the WCC case no. S1 1 K 003485 12 Kžk, Second Instance Judgment of 18 Dec. 2013, §351.

standards.[111] Specific reference in that regard is given to the 2013 ruling of the ECtHR in the case *Maktouf and Damjanović v. BaH*,[112] which concerned the violation of Article 7 of the ECHR in respect to two applicants convicted for war crimes against civilian population on the basis of retroactive application of the 2003 CC BaH. While this ruling does provide some guidance as to the main question constituting merits of that case, i.e., applicable code for crimes punishable under both the 1976 CC SFRY and the 2003 CC BaH in a case not amounting to the most severe consequences, it is argued that the question of temporal application of criminal codes in ICs trials in BaH goes well beyond the scope of challenges raised in this case. These questions are related to the issue of criminal responsibility under international law before national courts and sentencing frameworks in cases involving allegations of most severe forms of ICs. This section will firstly explore the context and scope of the *Maktouf and Damjanović* case and what effect it had on the subsequent national case law. Secondly, it will analyze key implications of the *lex praevia* requirement of the legality principle i.e., the non-retroactivity, the *lex mitior* rule, and specific circumstances related to punishment for crimes under general principles of international law.

3.1 On the Maktouf and Damjanović ruling and subsequent case law

In *Maktouf and Damjanović*, the ECtHR found violation of Article 7(1) ECHR due to the failure of the WCC to assess specific circumstances in applicants' cases and to determine whether the most favorable code for the applicants was applied.[113] In particular, both applicants were tried for war crimes against civilians, the crime that was identically defined in both the 1976 CC SFRY and the 2003 CC BaH, and punished within the latitude of both codes.[114] The first applicant, Abduladhim Makfouf, was found guilty as an accessory

[111] R. Higgins et al., *Oppenheim's International Law – United Nations*, vol. 2, Oxford 2017, p. 1430.

[112] *Maktouf and Damjanović v. BaH*, app. nos. 2312/08 and 34179/08, Grand Chamber Judgment (Merits and Just Satisfaction) of 18 July 2013.

[113] *Maktouf and Damjanović v. BaH*, §65ff.

[114] Ibid., §§67 and 70.

in taking hostages as war crimes against civilians and sentenced to five years of imprisonment.[115] The second applicant, Goran Damjanović was sentenced to eleven years of imprisonment for torture as war crimes against civilians.[116] Both were convicted and sentenced on the basis of retroactive application of the 2003 CC BaH for crimes that were committed in 1993 and 1992, respectively.[117] Both applicants were charged and convicted for the crime which was identically defined both in the 2003 CC BaH and the 1976 CC SFRY (section 2.1 above). However, as shown above, significant difference between the two codes relates to sentencing, both in context of types of punishments and their range (section 2.2). Thus, the court found a violation of Article 7(1) ECHR given that applicants cold have received lower sentences if 1976 CC SFRY was applied in their case.[118] In particular, the court noted due to the nature of charges against them that neither of the applicants were

> […] criminally held liable for any loss of life, the crimes they were convicted clearly did not belong to that category.[119]

Their sentences were either mitigated well below the statutory minimum or slightly above the minimum under 2003 CC BaH, but within the latitude of 1976 CC SFRY.[120] The Court also generally noted that the domestic courts "[…] have no other option but to apply the 2003 Criminal Code" in cases involving allegations of crimes against humanity as only that code provides for definition of that crime.[121] The ECtHR thus followed its earlier stance

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115 Article 173 in conjunction with Article 31 of the 2003 CC BaH. See, WCC case no. Kpž-32/05, Second Instance Judgment of 4 April 2006. On 30 March 2007 the Constitutional Court of BaH dismissed as unfounded the constitutional appeal finding that the application of 2003 CC BaH was in conformity with Article 7(2) of the ECHR. See, case no. *AP-1785/06*, Decision on Admissibility and Merits of 30 March 2007 (Official Gazette of BaH no. 57/07).

116 Article 173 of 2003 CC BaH. See WCC case no. X-KRŽ/05/107, Second Instance Judgment of 19 Nov. 2007 (upholding the First Instance Judgment of 18 June 2007, case no. X-KR/05/107). Constitutional court of BaH declared inadmissible the constitutional appeal. See, case no. AP-565/08, Decision on Admissibility of 15 April 2009.

117 *Maktouf and Damjanović v. BaH*, §§11 and 19.

118 Ibid., §§70 and 76.

119 Ibid., §69.

120 Ibid., §69.

121 Ibid., §55.

held in *Šimšić v. BaH* which elated to an applicant convicted by the WCC for crimes against humanity.[122]

The ECtHR based this ruling on the stance adopted in *Scoppola v. Italy* according to which the application of more lenient criminal law falls within the scope of Article 7(1)[123] and departed from the stance held by the European Commission for Human Rights in *X v. Germany*.[124] With the exception of a few cases it can be said that until *Maktouf and Damjanović* ruling, WCC and the Constitutional Court of BaH generally held that the question of the applicable criminal law in cases involving allegations of ICs falls within the scope of trial and punishment for crimes under general principles of international law as the exception defined in Article 7(2) of ECHR.[125] Following the ruling in *Maktouf and Damjanović*, the Constitutional Court of BaH altered its case law by declaring violation of Article 7 of ECHR and revoked final judgments rendered by WCC in at least 21 cases related to convictions for the crime of genocide and war crimes pursuant to 2003 CC BaH, including those involving allegations of multiple killings and in which the WCC issued sentences amounting towards the maximum sentencing framework. These include cases involving mass executions of Bosniak civilians in July 1995 qualified as genocide,[126] and severe forms of war crimes, such as the massacre in

[122] *Šimšić v. BaH*, app. no. 51552/10, Chamber Decision of 10 April 2012.

[123] *Scoppola v. Italy (No. 2)*, app. no. 10249/03, Grand Chamber Judgment (Merits and Just Satisfaction) of 17 September 2009, §§105–109.

[124] See *X v. Germany*, app. no. 7900/77, Decision on Admissibility of 6 March 1978, p. 2.

[125] See, e.g., case no. *AP-519/07*, Decision on Admissibility and Merits of 30 January 2010. In this case, which relates to the applicant's conviction for crimes against humanity and sentence to 24 years of long-term imprisonment, the Constitutional Court of BaH held that there is no violation of Article 7 of the ECHR "[…] as paragraph 2 of that Article provides for exceptions where it regards cases related to the offences of war crimes and crimes in violation of international humanitarian law recognized by 'civilized nations' and the appellant's case is actually the exception to the rule under Article 7(1) of the European Convention" (§81).

[126] See, e.g., cases nos. *AP-4239/12*, Decision on Admissibility and Merits of 26 Oct. 2016; *AP-3113/12*, Decision on Admissibility and Merits of 27 Oct. 2015; *AP-1240/11*, Decision on Admissibility and Merits of 6 Nov. 2014; *AP-4606/13*, Decision on Admissibility and Merits of 28 March 2014; *AP-4100/09*, Decision on Admissibility and Merits of 22 Oct. 2013; *AP-4126/09*, Decision on Admissibility and Merits of 22 Oct. 2013; and *AP-4065/09*, Decision on Admissibility and Merits of 22 Oct. 2013.

Tuzla in May 1995[127] and others.[128] In these cases the WCC conducted new proceedings and applied the 1976 CC SFRY as *lex mitior* and issued sentences ranging between 5–15 years or 20 years of imprisonment. The Constitutional Court of BaH held that there no issues arise under Article 7 in cases that involved applicants who were convicted by the WCC for both crimes against humanity, which involves application of the 2003 CC BaH, and war crimes, which might involve application of criminal code other than the 2033 CC BaH, pursuant to the rules on concurrence of crimes, as it could not be established that the applicants would have received lower sentences.[129]

Ruling of the ECtHR in *Maktouf and Damjanović* case altered the subsequent national case law in terms of application of 1976 CC SFRY by the WCC not only in cases which involve allegations that do not amount to consideration of meting out punishments towards the statutory minimum or below the minimum, but in all cases involving the crime of genocide and war crimes as defined both under the 1976 CC SFRY and the 2003 CC BaH. The 2003 CC BaH has continued to be applied by the WCC in cases of crimes against humanity. One of the outcomes of such case law is the question of statutory maximum sentence for genocide and war crimes, on one side, and crimes against humanity, on the other.

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127 *AP-5161/10*, Decision on Admissibility and Merits of 23 Jan. 2014.

128 See, e.g., *AP-3939/12*, Decision on Admissibility and Merits of 10 Nov. 2015; *AP-3227/12*, Decision on Admissibility and Merits of 21 July 2015; *AP-717/11*, Decision on Admissibility and Merits of 15 April 2015; *AP-929/12*, Decision on Admissibility and Merits of 17 March 2015; *AP-4613/12*, Decision on Admissibility and Merits of 17 March 2015; *AP-1751/11*, Decision on Admissibility and Merits of 6 Nov. 2014; *AP-556/12*, Decision on Admissibility and Merits of 4 July 2014; *AP-4378/10*, Decision on Admissibility and Merits of 24 April 2014; *AP-1705/10*, Decision on Admissibility and Merits of 5 Nov. 2013; *AP-116/09*, Decision on Admissibility and Merits of 22 Oct. 2013; *AP-503/09*, Decision on Admissibility and Merits of 22 Oct. 2013; *AP-2948/09*, Decision on Admissibility and Merits of 22 Oct. 2013; and *AP-325/08*, Decision on Admissibility and Merits of 27 Sept. 2013.

129 See, e.g., case no. *AP-2789/08*, Decision on Admissibility and Merits of 28 March 2014.

3.2 Contemporary case law on ICs in light of rules on temporal application of criminal codes

Implications of the principle of legality go well beyond the issues raised in *Maktouf and Damjanović* case and are reflected in opposing case law and views in legal scholarship. Those relate to the question of maximum statutory sentence under 1976 CC SFRY given the elimination of the death penalty, the application of crimes against humanity and harmonization of sentencing, and generally the determination of *lex mitior*. It is submitted that crystallization of possible solutions to these issues can only be done by their juxtaposition in context of rules on temporal application of criminal codes, namely the non-retroactivity rule (a), the application of the *lex mitior* requirement (b), and trial and punishment for crimes under general principles of international law (c).

(a) *Non-retroactivity*. As a corollary requirement of the legality principle and a fundamental rule of temporal application of criminal code, this rule prohibits the retroactive effect of a criminal code and requires as a rule that the code that was in force at the time of perpetration of the crime shall be applied (*nullum crimen, nulla poena sine lege praevia*). As such it is embodied in all five criminal codes under analysis, both in terms of definition of crimes as well as prescription of criminal sanctions.[130] The 1976 CC SFRY, which was adopted as law of Republic of BaH as of 11 April 1992 and remained in force until 27 November 1998 in FBaH and 30 September 2000 in RS, represents code *tempore criminis*, i.e., the code in force at the material time. Taking into consideration the catalogue of ICs in all codes under analysis and time constraints regarding applicability of criminal codes, it follows that as a rule the 1976 CC SFRY should be taken into consideration as the code in force at the material time in cases involving allegations of genocide, war crimes, and adjacent crimes.

(b) *Lex mitior*. Application of (the most) lenient code is considered as a legitimate exception to the general rule on non-retroactivity and in criminal

[130] Articles 3 and 4(1) of 1976 CC SFRY; 3 and 4(1) of 1998 CC FBaH; 3 and 4(1) of 2000 CC RS; 3 and 4(1) of 2000 CC BD BaH; and 3 and 4(1) of 2003 CC BaH.

law theory it is regarded as an expression of the eclectic approach.[131] All codes under analysis provide for the obligatory application of *lex mitior*[132] and its determination is made on the assessment of specific circumstances of each case.[133] The determination of *lex mitior* is limited to criteria related to sentencing, given the continuity of penalization of genocide and war crime *stricto sensu*, both in terms of definition and the elements.

Opposing views were formed in case law and scholarship as to the maximum sentence under the 1976 CC SFRY prescribed for most serious forms of ICs. The dominant view represented in case law, including that of the Constitutional Court of BaH and the WCC, is that the imprisonment term of 20 years is the maximum allowed sentence.[134] On the other side, certain scholars argue that the term of 15 years represents the maximum sentence given the elimination of the death penalty under GFAP.[135] In essence, opposing views are based on the question of whether the imprisonment term of 20 years represents an individual punishment under 1976 CC SFRY or a substitute for the death penalty. As noted above, death penalty was regarded as an exceptional type of punishment and could have been issued only in cases of most severe forms of crimes for which it was prescribed.[136] In the alternative, the possibility of its substitution by a fixed imprisonment term of 20 years was allowed[137] in cases the court in the context of individualizing the punishment, finds that neither the death penalty nor the imprisonment term of 15 years would not serve the

[131] Horvatić et al., *Kazneno pravo. Opći dio I*, p. 140.

[132] Articles 4(2) of 1976 CC SFRY; 4(2) of 1998 CC FBaH; 4(2) of 2000 CC RS; 4(2) of 2000 CC BD BaH; and 4(2) of 2003 CC BaH.

[133] Tomić, *Krivično pravo I*, p. 155; Novoselec, *Opći dio kaznenog prava*, pp. 61–63; Horvatić et al., *Kazneno pravo. Opći dio I*, p. 140; Sijerčić-Čolić et al., 'Bosnia and Herzegovina', pp. 57–60. See also A. Cassese, *Opinion on the possible retroactive application of some provisions of the new Criminal Code of Bosnia and Herzegovina*, PCRED/DGI/EXP (2003) 32, 5 June 2003, https://archives.eui.eu/en/fonds/257095?item=ACA-10 (accessed 17.7.2021).

[134] See, e.g., WCC case no. S1 1 014263 13 Krž, Second Instance Judgment of 23 Jan. 2014, §453ff.

[135] See M. Babić, *Komentar KZ RS*, p. 64, with reference to G.P. Ilić, 'O predvidiljivosti retroaktivne primene blažeg krivičnog zakona – osvrt na Odluku Evropskog suda za ljudska prava: Mikulović i Vujisić protiv Srbije', in *Identitetski preobražaj Srbije*, Belgrade 2016, pp. 115–126.

[136] Article 37(2) of 1976 CC SFRY.

[137] Article 38(2) of 1976 CC SFRY.

purpose of punishment.[138] Legal commentators were of the view that in light of Article 38(2) of 1976 CC SFRY, the court had the opportunity to either issue a sentence of 15 years, of 20 years, or ultimately, the death penalty.[139] WCC, given the changed context and legal regime for domestic war crimes prosecutions, held in some cases that the domestic legal framework should provide for adequate sanctioning for crimes under international law.[140]

(c) *Trial and punishment for crimes under international law and general principles of law*. Settled case law, both of the WCC, the Constitutional Court of BaH, and the ECtHR in *Šimšić v. BaH* and *Maktouf and Damjanović v. BaH*, is that application of the 2003 CC BaH in cases qualified as crimes against humanity fall under the exception defined in Article 7(1) of the ECHR. Further, Article 4a of the 2003 CC BaH, based on Article 7(2) of the ECHR, provides that requirements of the principle of legality and rules on temporal application of criminal code do "not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law." Further, settled case law of the WCC allows for the application of command responsibility and joint criminal enterprise as rules of customary international law.[141] This exception to the non-retroactivity (of national criminal code) is not only of constitutional character, given provision of Article II/2 of the Constitution of BaH which provides for the supremacy and direct application of rights and freedoms defined by the ECHR, but also binding international law, including the ECHR and the ICCPR.[142] Whilst the statutory maximum sentence for crimes against humanity under Article 172 of 2003 CC BaH is long term imprisonment (up to 45 years), recent case law of the WCC is that sentences for this crime are issued within the latitude of sentencing frameworks for other ICs under the applicable law.[143]

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138 Srzentić et al., *Komentar KZ SFRJ*, p. 183.

139 Ibid.

140 See WCC case no. *S 1 K 015222 14 Krž*, Second Instance Judgment of 11 April 2014, §168.

141 See WCC case no. S1 1 K 003485 12 Kžk, §351.

142 Sijerčić-Čolić et al., 'Bosnia and Herzegovina', pp. 60–61.

143 See, e.g., WCC case no. S1 1 K 017626 18 krž 6, Second Instance Judgment of 26 April 2019, §§226–230.

Conclusions

National legal framework for processing of ICs in BaH is complex and multilayered largely due to the country's complex legal and judicial system, and almost 30-years' time difference between the war and the time in which prosecutions take place. Such context has generated the diversity of criminal codes applicable in domestic proceedings which are substantially different with regard to the scope of penalization of ICs. Not only is the catalogue of these crimes different, as only the 2003 CC BaH provides for crimes against humanity and the explicit definition of command responsibility, but also the sentencing regimes and rules on criminal liability are different. While the ECtHR did provide some guidance in landmark cases of *Šimšić v. BaH* and *Maktouf and Damjanović v. BaH*, many questions remain yet to be resolved by national courts. It is expected that courts will continue with application of different criminal codes, most notably the 1976 CC SFRY, as the code applicable in the material time, and the 2003 CC BaH, as the code currently in force. Such an expectation is based on requirements of the principle of legality and temporal application of criminal codes, with specific reference to rules of *lex mitior* and the trial punishment according to general principles of international law exception. As to the former, determination of the applicable criminal code should be based on factual and legal circumstances of each case. As for the latter, the exception falls within the scope of Article 7(1) of the ECHR and Article 4a of 2003 CC BaH and allows for retroactive application of the 2003 CC BaH in cases involving allegations of crimes against humanity as it constituted the crime under international law at the material time. These factors, including the requirements of the principle of legality, condition the diversity of applicable criminal codes in domestic war crimes proceedings.

Appendix: Breakdown of criminal codes applicable in ICs proceedings in BaH

	196 CC SFRY	1998 CC FBaH	2000 CC RS	2000 CC BD BaH	2003 CC BaH
In force	11 April 1992–27 Nov. 1998 (FBaH), 30 Sept. 2000 (RS)	28 Nov. 1998–31 July 2003	1 Oct. 2000–30 June 2003	1 April 2001–30 June 2003	1 March 2003 onwards
Territorial scope	Country-wide	Territory of FBaH	Territory of RS	Territory of BD BaH	Countrywide
Catalogue of crimes	Genocide (Article 141) War crimes against the civilian population (Article 142) War crimes against the wounded and sick (Article 143) War crimes against prisoners of war (Article 144)*	Genocide (Article 153) War crimes against the civilian population (Article 154) War crimes against the wounded and sick (Article 155) War crimes against prisoners of war (Article 156)**	Genocide (Article 432) War crimes against the civilian population (Article 433) War crimes against the wounded and sick (Article 434) War crimes against prisoners of war (Article 435)***	Genocide (Article 147) War crimes against the civilian population (Article 148) War crimes against the wounded and sick (Article 149) War crimes against prisoners of war (Article 150)****	Genocide (Article 171) Crimes against humanity (Article 172) War crimes against the civilian population (Article 173) War crimes against the wounded and sick (Article 174) War crimes against prisoners of war (Article 175)*****
Prescribed criminal sanctions	Not less than 5 years of imprisonment (5–15 years) or the death penalty (or imprisonment of 20 years – Article 38(2))	Not less than 5 years of imprisonment (5–15 years) or long-term imprisonment (20–40 years)	Not less than 10 years of imprisonment (10–20 years) or imprisonment for life	Not less than 10 years of imprisonment (10–15 years) or long-term imprisonment (20–40 years)	Not less than 10 years of imprisonment (10–20 years) or long-term imprisonment (21–45 years)
Modes of liability	No specific reference to command responsibility; rules of the general part apply	No specific reference to command responsibility; rules of the general part apply	No specific reference to command responsibility; rules of the general part apply	No specific reference to command responsibility; rules of the general part apply	Individual and Command Responsibility (Article 180)

* Other crimes of relevance include (punishable by shorter imprisonment terms): organizing a group and instigating the commission of genocide and war crimes (Article 145); unlawful killing or wounding of the enemy (Article 146); marauding (Article 147); making use of forbidden means of warfare (Article 148); cruel treatment of the wounded, sick and prisoners of war (Article 150); destruction of cultural and historical monuments (Article 151), 1976 CC SFRY.

** Other crimes of relevance include (punishable by shorter imprisonment terms): Organizing a group and instigating the commission of genocide and war crimes (Article 157); unlawful killing or wounding of the enemy (Article 158); marauding (Article 159); making use of forbidden means of warfare (Article 160); cruel treatment of the wounded, sick and prisoners of war (Article 163); destruction of cultural and historical monuments (Article 164), 1998 CC FBaH.

*** Other crimes of relevance include (punishable by shorter imprisonment terms): war crimes by making use of forbidden means of warfare (Article 436); organizing a group and instigating the commission of genocide and war crimes (Article 437); unlawful killing or wounding of the enemy (Article 438); marauding (Article 439); cruel treatment of the wounded, sick and prisoners of war (Article 441); unjustified delay of the repatriation of prisoners of war (Article 442); destruction of cultural and historical monuments (Article 443), 2000 CC RS.

**** Other crimes of relevance include (punishable by shorter imprisonment terms): organizing a group and instigating the commission of genocide and war crimes (Article 151); unlawful killing or wounding of the enemy (Article 152); marauding (Article 153); making use of forbidden means of warfare (Article 154); cruel treatment of the wounded, sick and prisoners of war (Article 157); destruction of cultural and historical monuments (Article 158), 2000 CC BD BaH.

***** Other crimes of relevance include (punishable by shorter imprisonment terms): organizing a group of people and instigating the perpetration of genocide, crimes against humanity and war crimes (Article 176); unlawful killing or wounding of the enemy (Article 177); marauding the killed and wounded at the battlefield (Article 178); violations of laws and customs of war (Article 179); unjustified delay of the repatriation of prisoners of war (Article 182); destruction of cultural, historical and religious monuments (Article 183), 2003 CC BaH.

BARBARA JANUSZ-POHL

SGBV as an Element of CAH. Impact of International Courts' Jurisprudence on National Prosecution: A Case Study of Bosnia and Herzegovina Court

The focus of this article is on the concept of sexual violence, specifically, sexual and gender-based violence (SGBV) as part of the definition of crimes against humanity. Sexual violence seen as a "form" of crimes against humanity has no long tradition in humanitarian law. In this article, the general definition of crimes against humanity with the recent developments will be discussed, that is, until it acquired the sexual violence component. Since a strong influence of the jurisprudence of international courts and tribunals – especially ad hoc tribunals – can be observed, ICTY judicial decisions will be considered too. It follows that decisions rendered by ad hoc international tribunals have created the ground for a proper codification of "atrocity crimes" in the Rome Statute, and for penalization of those kinds of particularly heinous forms of sexual or gender violence as crimes against humanity. In this context, some of the ICTY milestone judgments are discussed.

Such crimes could be tried both at the international (transnational) and national levels. Special attention will be given to the cases that were transferred by the ICTY to domestic courts, especially the Court of Bosnia and Herzegovina, War Crimes Section I, established in 2005 (B&H Court). As a consequence, the general theme of our deliberations is the influence of ICTY jurisprudence on domestic court decisions. To this end, Courts of B&H case law will be analyzed. Notably, the enforcement of jurisdiction of those courts over crimes against humanity with sexual elements suffers from certain deficiencies. In this context, the lenience of applicable law (*lex mitior*) will be examined in light of an ECHR judgment. Finally, the procedural problems connected with the prosecution before national courts shall be highlighted based on the example of the B&H Court. They include fair-trial provision

infringements and the question of admissibility of evidence gathered by the ICTY and then transferred to domestic courts. In conclusion, the impact of the ICC on the global fight against the SGBV shall be assessed.

* * *

1. The concept of "crimes against humanity" was first employed at the international level in the 1910s with respect to the massacres of Armenians.[1] A crucial contribution to the development of this concept was made by the International Military Tribunal (IMT), established after World War II. In fact, the Charter of the IMT[2] defined in Article 6(c) crimes against humanity with "an open formula", a *numerus apertus,* as: "namely murder, extermination, enslavement, deportation, and **other inhumane acts** committed against any civilian population, before or during the war [nexus element], or persecutions on political, racial or religious grounds in execution 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." It can be observed that a similar definition was included in the Tokyo Charter of 1946, Article 5(c),[3] establishing the IMT for the Far East.[4] However, the IMT did not expressly prosecute sexual violence, and the Tokyo Tribunal generally ignored the Japanese army's enslavement of selected women, as indicated by experts.[5] Clearly,

[1] See V.V. Dadrian, 'The Historical and Legal Interconnections Between the Armenian Genocide and the Jewish Holocaust: From Impunity to Retributive Justice', *Yale Journal of International Law*, vol. 23, 1998, p. 503ff.

[2] United Nations – Treaty Series 1951, no. 251, p. 280ff; available at http://untreaty.un.org/unts/1_60000/2/35/00003709.pdf.

[3] Treaties and other international acts series, p. 20ff., https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf (accessed 6.6.2021).

[4] See S. Garibian, 'Crimes against humanity and international legality in legal theory after Nuremberg', *Journal of Genocide Research*, no. 1, 2007, p. 93ff.

[5] During World War II, the Japanese created "comfort women" sex camps for their soldiers. The women were systematically raped by soldiers. The IMT for the Far East adjudicated on only one case of sexual violence, see Y. Tanaka, *Japan's Comfort Women: Sexual Slavery and Prostitution during World War II and the US Occupation*, London, 2003, p. 32; G. Peterossian, 'Elements of Superior Responsibility for Sexual Violence by Subordinates', *Manitoba Law Journal*, vol. 43, no. 3, 2019, p. 126, http://themanitobalawjournal.com/wp-content/uploads/articles/MLJ_42.3/42.3_Petrossian.pdf (accessed 6.7.2021).

at the time, the definition of crimes against humanity did not cover a sexual element.[6]

A turning point in the development of the definition of "crimes against humanity" was represented by the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993.[7] The crimes-against-humanity provision in the ICTY Statute[8] reads:

> The [ICTY] shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; […] (c) enslavement; […] (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.

The provision improved on an open formula definition and developed the nexus element – an armed conflict was defined as international and internal in nature. Apparently, the ICTR Statute 3 (1994),[9] in Article 3 uses almost the same wording, except that it does not include the requirement that the crime should be committed in an armed conflict and it lists grounds upon which a widespread or systematic attack directed against any civilian population must be perpetrated namely, "national, political, ethnic, racial or religious grounds."[10] So, we could emphasise that the ICTR's jurisdiction over crimes

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[6] See V.C. Bassiouni, *Crimes Against Humanity in International Criminal Law*, The Hague–London–Boston 1999, p. 26ff; P. Sellers, *The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation*, 2007, p. 7, https://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf; S. Sharratt, *Gender, Shame and Sexual Violence: The Voices of Witnesses and Court Members at War Crimes Tribunals*, London 2016, p. 15.

[7] Bassiouni, *Crimes Against Humanity*; M. Banks, 'Sexual Violence and International Criminal Law: An Analysis of the Ad Hoc Tribunal's Jurisprudence & the International Criminal Court's Elements of Crimes', in *William & Mary Law School Scholarship Repository*, 2005, p. 5ff.

[8] Statute of the International Criminal Tribunal for the former Yugoslavia, the Security Council Resolution 808, U.N. Doc. S/25704, Annex (1993).

[9] Statute of the International Criminal Tribunal for Rwanda, Security Council. Resolution 955, UN Doc. Annex (1994).

[10] See A. Cassese, 'Crimes against Humanity: Comments on Some Problematical Aspects', in L. Boisson De Chazournes, V. Gowlland-Debbas (eds.), *The International Legal System in Quest of Equity and Universality*. The Hague–London–Boston 2001, p. 429ff.

against humanity is narrower than that of the ICTY's. The ICTY Statute follows the customary international law approach, while the ICTR requires that the acts take place as part of a discriminatory attack.[11] Hence, the ICTY and ICTR Statute definitions do not describe all the general legal elements of atrocity crimes, but it was the jurisprudential output of each court that did just that.

In describing the short evolution of the nominal definition, one could point out that for now, the final step was taken when the ICC was established in 1998 and the Rome Statute came into force in 2002.[12] In the Rome Statute, crimes against humanity are defined as follows:

> Crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

CAH that could be connected with a sexual element, are set out there as well: murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court, enforced disappearance of persons, the crime of apartheid, other inhumane acts of a similar character intentionally causing great suffering, or serious injury to the body or to mental or physical health. Essentially, the Rome Statute employs the similar definition of crimes against humanity that the ICTR does, minus the requirement that the attack be carried out "on national, political, ethnic, racial or religious grounds." Additionally, the Rome Statute definition introduces an intentional and intellectual element (with knowledge of attack)

[11] Banks, *Sexual Violence*, p. 12.

[12] Available at https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf.

and offers the broadest list of specific criminal acts that may constitute crimes against humanity to date, but an open formula is still preserved.[13] Besides, the Rome Statute is not to be considered a definitive codification of international criminal law, and the question of universal definition is still open, even though the definition given in the Statute is considered by scholars as the most authoritative one,[14] despite the fact that attempts are being made to regulate this issue separately in the context of the activities of the United Nations (see Article 2 of the Draft articles on Prevention and Punishment of Crimes Against Humanity, 2019).[15]

It should be added that at the domestic level, crimes against humanity are in most national criminal law systems defined as inhumane acts – committed as part of a widespread or systematic attack against civilians.[16] It is the latter element that distinguishes crimes against humanity from ordinary crimes under national law. The targeting of a collective in the form of a civilian population is what matters, while the motives of the accused for taking part in the attack are irrelevant as a crime against humanity may be committed for purely personal reasons. Moreover, following the definition of CAH formulated in the Rome Statute, national definitions do not contain a nexus element; consequently, a criminal act need not be part of or be linked to an armed conflict.

2. The scope of the definition of crimes against humanity, including the sexual element, has been strongly influenced by the ICTY and ICTR jurisprudence. Noteworthily, the ICTY and ICTR were established to try only those "most responsible" for serious instances of such atrocity crimes, focusing mainly on the leadership.[17] Therefore, the jurisdiction of the ad hoc tribunals

[13] A. Cassese, 'Crimes against Humanity', in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court. A Commentary*, Oxford 2002, p. 350ff.

[14] One could argue that this definition is an unambiguous delimitation since the essence of the concept does not lie in a conventional definition but in custom (natural law), and that there is no "real" legal definition; see V.C. Bassiouni, 'Crimes Against Humanity: The Need for a Specialized Convention', *Columbia Journal of Transnational Law*, 1994, p. 457ff.

[15] https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_7_2019.pdf.

[16] The critical comments are given by E. van Sliedregt, 'Criminalisation of Crimes Against Humanity under National Law', *Journal of International Criminal Justice* 2018, vol. 16, p. 729ff.

[17] Peterossian, "Elements of Superior Responsibility".

was rather selective. The ICTY was also the first international criminal tribunal to enter convictions for rape as a form of torture and for sexual enslavement as a crime against humanity and the first international tribunal based in Europe to convict defendants of rape as a crime against humanity.[18]

Approaches taken by the ICTY had a tremendous cultural aspect.[19] The Tribunal proved that the effective prosecution of wartime sexual violence was possible and that the victim and witness rights could be adequately incorporated into the trial to protect them from being revictimized and to treat them with dignity (as discussed in section 4 of this study). As a result, it helped break the silence that shrouded the SGBV and get rid of the culture of impunity. The ICTY took positive steps to ensure that the victims of sexual violence could testify without retribution or fear for their safety.[20] Through the development of its rules of procedure, the ICTY sought to protect the victims of sexual violence from offensive lines of questioning during testimony and established the Victim and Witness Section. The large collection of the ICTY's cases encompasses atrocity crimes committed from 1992 to 1995 by mainly perpetrators of Serbian origin against civilians (predominantly Muslim and Croatian populations).[21] Sexual violence took on various forms: rape, torture, enslavement, and persecution as crimes against humanity; rape, torture, outrages upon personal dignity and inhuman treatment as war crimes. Rape and/or other sexual violence constituted a form of torture in several cases: *Bralo*,[22]

[18] Following a previous case adjudicated by the International Criminal Tribunal for Rwanda, see G. Mettraux, 'Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda', *Harvard International Law Journal*, 2002, p. 237ff.

[19] UN, Department of Peacekeeping Operations, *Review of the Sexual Violence elements of the Judgments of The ICTY, ICTR and the Special Court for Sierra Leone in the Light of Security Council Resolution 1820*, United Nations, New York 2010, https://www.icty.org/x/file/Outreach/sv_files/DPKO_report_sexual_violence.pdf.

[20] See the report *Echoes of Witnesses: A Pilot Study into the Long-Term Impact of Bearing Witness before the ICTY*, 2017, https://www.icty.org/x/file/About/Registry/Witnesses/Echoes-Full-Report_EN.pdf.

[21] See Banks, *Sexual Violence*, p. 5ff.; Mettraux, *Crimes Against Humanity*, p. 237ff.

[22] *Prosecutor v. Bralo* (IT-95-17).

Brdanin,[23] *Celebici*,[24] *Kunarac et al.*,[25] *Kvocka*,[26] *Milan Simic*,[27] *Vasiljevic*,[28] *Tadić*,[29] *Dragan Nikolic*.[30] The complexity of criminal sexual behaviour was immense, only to mention that women and men were also raped or otherwise sexually assaulted in the qualified form (i.e., by co-perpetrators): the *Bralo*, *Brdanin*, *Furundzija*[31] and *Kvocka* cases.[32]

The official statistics of the ICTY[33] show that since the Tribunal had started its work, 78 individuals, or 48 percent of the 161 accused, had charges of sexual violence included in their indictments, 32 individuals were convicted of their responsibility for crimes of sexual violence. In 16 of the 24 cases, sexual violence was found by the court to be part of a widespread and/or systematic attack directed against civilian populations. Besides, in the ICTY cases, sexual violence was found by the court to constitute not only crimes against humanity but also war crimes or even genocide (see the *Krstić* case discussed below).

As the practice has shown, the definition of crimes against humanity previously referred to, stipulated in Article 3 of the ICTY Statute, was not operative, and consequently, further interpretation was needed. Its development – especially in connection to SGBV crimes – by linking it to customary law has laid foundations for incorporating sexual violence into the definition of CAH. In relation to this, briefly, an overview of the subjectively selected ICTY cases that had a strong impact on the definition of SGBV crimes is presented as follows. In the *Mucić et al.*[34] case, rape was seen as a form of torture. In this trial of four former members of the Bosnian armed forces marked a milestone in international justice by the adjudication of rape charges brought against the deputy camp commander Hazim Delić. Meanwhile, in

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23 *Prosecutor v. Brdanin* (IT-99-36).
24 *Prosecutor v. Celebići (Mucić et al.)* (IT-96-21).
25 *Prosecutor v. Kunarac, Kovac, Vukovic* (IT-96-23 & 23).
26 *Prosecutor v. Kvočka* (IT-98-30).
27 *Prosecutor v. Milan Simic* (IT-95-9).
28 *Prosecutor v. Vasiljević* (IT-98-32).
29 *Prsecutor v. Tadić* (IT-94-1).
30 *Prosecutor v. Nikolić Dragan* (IT-94-2).
31 *Prosecutor v. Furundžija* (IT-95-17).
32 UN, Department of Peacekeeping Operations, *Review of the Sexual Violence Elements.*
33 https://www.icty.org/en/features/crimes-sexual-violence.
34 *Prosecutor v. Mucić et al.* (IT96-21).

the *Furundžija* case a rape definition was challenged. Furthermore, charges of sexual violence for the first time, in this case, created the sole legal basis for conviction. The trial focused on the multiple rapes of a Bosnian Muslim woman committed during interrogations led by Furundžija, who commanded the Jokers' group. Presenting its legal considerations in the judgment, the ICTY widened the scope of rape definition and stated that rape might also be prosecuted as a grave breach of the Geneva Conventions and as a violation of the laws and customs of war not only as a CAH. In the excerpt from the court reasoning, we could read that rape might also amount to an act of genocide if the requisite elements were present and might be prosecuted accordingly.[35] In the *Kunarac, Zoran Vuković and Radomir Kovač* case, sexual enslavement and rape were perceived as crimes against humanity. The judgment broadened the acts that constitute enslavement as a crime against humanity to include sexual enslavement and determined the relationship of gender crimes qualified as the CAH to customary law. This was a significant ruling because international law had previously associated enslavement with forced labour and servitude.[36] The judgment in *Kunarac et al.* clearly defined rape as a means of warfare; of the numerous decisions setting a new direction, the *Krstić* case could be added,[37] which established a link between rape and ethnic cleansing. The latter, in turn, was closely associated with genocide in the context of the Srebrenica crimes.

3. As indicated above, ICTY jurisdiction was selective, both in terms of subject matter and the persons accused, therefore the prosecution of SGBV crimes before the ICTY was only a substitute for their prosecution on the national level. The majority of cases were tried by national courts in which

[35] A landmark precedent was set in 1998 when the ICTR rendered a judgment in the *Akayesu* case in which it was concluded that rape constituted genocide, see *The Prosecutor v. Jean-Paul Akayesu* (ICTR-96-4).

[36] This approach has been confirmed by the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime that was adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000. Available at https://www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx.

[37] *Prosecutor v. Kristić* (IT-98-33).

intermediate and lower-ranking accused, transferred by the ICTY to the courts of the region, stood trial. Most of these cases included charges of sexual violence.[38] Selected observations of the trials before the B&H Court let us assess the real contribution of the ICTY standards to national prosecution, and then the significance of the ad hoc tribunals soars indeed.[39]

The legal basis for case transfer was created by the Rules on Procedure and Evidence of the ICTY.[40] Significantly, Rule 11 *bis* provided for the possibility of transferring a case not only to the authorities of the country in whose territory the crime had been committed, but also to the country in which the accused had been arrested, as well as to the country having jurisdiction and willing and adequately prepared to accept such a case. Under the case referral procedure, which began in 2005, the ICTY transferred to national judiciaries a total of 19 cases,[41] that is, 13 cases being in the investigative stage and 6 cases in which the ICTY had already confirmed indictments. The fundamental basis for trying the latter six cases was laid by the Law adopted by the Parliamentary Assembly of Bosnia and Herzegovina on 14 December 2002 on the Transfer of Cases and the Use of Evidence Collected by the ICTY in Proceedings before the Courts in Bosnia and Herzegovina (Law on Transfer).[42] Rule 11 *bis* provided for a possibility, after an indictment had been confirmed, of referring the case by the ICTY to the authorities of another country for trial. In compliance with this Rule, referral orders for these cases were issued by separate "Referral Benches" appointed by the President of the ICTY. In determining whether to refer a case, the Referral Benches considered the gravity of the crimes charged and the level of responsibility of the accused, since Rule 11 *bis* provided that a decision on referral might only be issued in cases against

[38] Banks, *Sexual Violence*, p. 12ff.

[39] See *Transitional Justice in the Former Yugoslavia*, International Centre for Transitional Justice, 2011, https://www.ictj.org/publication/transitional-justice-formeryugoslavia (accessed 6.6.2021).

[40] Adopted on 11 February 1994, amended several times – last on 8 July 2015 (IT/32/Rev.50); available at https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf .

[41] See *10th Anniversary of Section I for War Crimes at the Court of Bosna and Herzegovina*, published by Court of Bosnia and Herzegovina, Sarajevo 2015, p. 19; available on the official website of the Court of Bosnia and Herzegovina, www. sudbih.gov.ba (accessed 6.6.2021).

[42] Official Gazette of Bosnia and Herzegovina Nos. 61/04, 46/06, 53/06, 76/06.

intermediate- and lower-ranking perpetrators.[43] Even though Rule 11 *bis* provided for a possibility, at any time after the referral of a case and before the accused was found guilty or acquitted by the national court, of revoking the referral order by the ICTY and making a formal request to the state to which the case had been transferred for deferral, that actually never occurred.

With the accusations already confirmed, six cases were transferred to the B&H Court pursuant to the referral orders issued by the ICTY under Rule 11 *bis* of the Rules on Procedure and Evidence. The cases with a sexual violence element as the crime against humanity were the following: *Janković and Stanković: The Prosecutor v. Gojko Janković and Radovan Stanković*; and *Mejakić et al., (Željko Mejakić, Momčilo Gruban, Duško Knežević, Dušan Fuštar)*.[44] A brief summary of the outcomes of the proceedings conducted in each of the six referred cases is presented below.

In the first case transferred by the ICTY to the B&H Court, i.e., the *Radovan Stanković* case (X-KRŽ-05/70),[45] on 14 November 2006, the B&H Court entered the first-instance convicting judgment whereby the accused was found guilty of crimes against humanity, and sentenced to imprisonment for a term of 16 years. The *Gojko Janković* case (X-KRŽ-05/161) was referred to in 2005.[46] On 16 February 2007, the court found Gojko Janković guilty of crimes against humanity. On 9 May 2006, the ICTY referred to the B&H Court, the complex case against *Željko Mejakić, Momčilo Gruban, Dušan Fušar, and Duško Knežević* (X-KRŽ-06/200). On 17 April 2008, the Court convicted Dušan Fuštar of crimes against humanity, who entered into a plea agreement with the prosecutor. The first-instance proceedings against the other accused were completed on 30 May 2008 and all the accused were found guilty of crimes against humanity. Željko Mejakić received a 21-year

[43] See *10th Anniversary of Section I*, p. 11.

[44] See UN, *Review of the Sexual Violence*, passim.

[45] The case was referred on 1 September 2005 and the accused was transferred from the ICTY's Detention Unit to Bosnia and Herzegovina on 29 Sept. 2005. On 7 December 2005, the B&H Court accepted/confirmed the adjusted indictment against Radovan Stanković.

[46] The case against Gojko Janković was referred to the B&H Court on 15 November 2005. The accused was transferred from the ICTY's Detention Unit to Bosnia and Herzegovina on 8 December 2005. The B&H Court accepted/confirmed the indictment against Gojko Janković on 20 February 2006, while an additional indictment was confirmed on 4 July 2006, whereupon a single proceeding was conducted based on both indictments.

imprisonment sentence, Momčilo Gruban was sentenced to 11 years of imprisonment, while Duško Knežević was sentenced to a long-term imprisonment of 31 years. In the appellate procedure, the court altered the first-instance judgment with regard to the legal qualification of crimes, and on the grounds of joint criminal enterprise, upheld the factual findings of the first-instance court, and found all the accused guilty. The court of second instance upheld the sentences of long-term imprisonment imposed on Željko Mejakić and Duško Knežević, while in the case of Momčilo Gruban reduced the sentence to 7 years of imprisonment.[47] Undoubtedly, the prosecution in those cases seems to be effective, even though, in general, trials before national courts continue to be challenging. Further analysis would be devoted to those issues.

4. It can be seen that the conferment of "jurisdiction" on the B&H Court over crimes against humanity with sexual element suffered from certain deficiencies, especially due to the lenience of applicable law (*lex mitior*). An ECHR judgment is crucial here: *Maktouf and Damjanović v. Bosnia and Herzegovina.*[48]

The plurality of the criminal codes (codes of 1976 and 2003) that had been in force in B&H since the crimes were perpetrated (1992–1995) was a major problem,[49] especially in the light of the principle of legality and the *nullum crimen sine lege* doctrine. The latter is provided for by Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECPHR), which states that no one shall be held guilty of a criminal offence that did not constitute a criminal offence under national or international law at the time when it was committed, nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. An attractive acknowledgment of this issue was presented by the B&H Court, which argued: "When a criminal offence is punishable under both laws, it is necessary to establish all the circumstances that may be relevant to the decision as to the more lenient law. Those circumstances primarily relate to the provisions on sentencing and meting out or reducing the sentence (which law is more lenient in that regard) – measures of warning, possible accessory

[47] See *10th Anniversary of Section I*, p. 21.

[48] 2312/08 and 34179/08; Judgment of 18 July 2013.

[49] On the diversity of Criminal Codes in Bosnia and Herzegovina see *10th Anniversary of Section I*, p. 24ff.

punishments, new measures that replace the punishment (community service, for example), security measures, legal consequences of the conviction, as well as the provisions on criminal prosecution, whether the new law envisages the basis for excluding unlawfulness, criminal liability or punishability."[50]

As a rule, the extensions of penalisation and sanctions in both criminal codes (of 1976 and 2003) had not been the same, so the problem of law leniency appeared in the jurisprudence of the B&H Court. In various ways, this issue concerned various types of atrocity crimes, mainly war crimes. An interpretation guideline was delivered by the ECHR in *Maktouf and Damjanović v. Bosnia and Herzegovina* when it entertained the question of the breaches of Article 7 of the ECPHR with respect to the retrospective application of criminal law, imposing heavier sentences for war crimes than the law in force when the offences were committed. Briefly, Maktouf and Damajanović complained that the State Court had retroactively applied to them the more stringent Criminal Code of 2003 than that which had been applicable at the time of their perpetrating the offences in question, namely the 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia. As a result, they had received heavier sentences. In this respect, the ECHR maintained that it was not its task to review *in abstracto* whether the retroactive application of the 2003 Criminal Code to war crime cases was *per se* incompatible with Article 7. In the Court's opinion, that matter had to be assessed on a case-by-case basis, taking into consideration the specific circumstances of each case. At issue in this case was, therefore, not the lawfulness of convictions but the different sentencing frameworks applicable to war crimes under the two Codes. The essential point was that the applicants could have been awarded lower sentences if the Code of 1976 had been applied. The ECHR argued that Article 7(1) contained the general rule of non-retroactivity. Article 7(2), in turn, was only a contextual clarification, removing any doubt about the legitimacy of prosecutions of crimes in the wake of World War II. Following the Court reasoning – it was clear that the drafters of the Convention had not intended to allow for any general exception to the rule of non-retroactivity. Thus, the decision of the ECHR improved the *lex mitior* principle in criminal law. The impact of this

[50] Appeals Judgment of the Court of B&H, No. X-KRŹ-06/299, 25 March 2009, see *10th Anniversary of Section I*, p. 44.

judgement on the prosecution of crimes against humanity before the courts of B&H is fundamental because crimes against humanity were not regulated by the Code of 1976; selected types of such crimes were introduced only to the Code of 2003.[51]

5. As mentioned earlier, the proceedings in cases transferred by the ICTY to national courts had certain deficiencies, such as fair-trial provision infringements. The question of admissibility of evidence gathered by the ICTY posed a serious problem, too. Other problems concerned fair-trial guarantees and the abuse of the right to defence. A tendency to abuse the right to defence, especially by obstructive legal actions by the defendant, was visible in proceedings before the B&H Court. For these reasons, the most important are those judicial decisions where the B&H Court attempted to balance the core fair-trial concepts against the efficiency of proceedings. Thereby, the Court created a response to the obstructive tactics of defendants.

The B&H Court stated that under Article 247 of the B&H CPC, the ban on trial *in absentia*, provided for in Article 6 of the ECPHR, was not absolute. Article 6 says that the person "charged with a criminal offence" has the right to participate in the criminal proceedings. Hence, the use of force is not an appropriate way to let the accused know that the trial will continue even without his presence. Furthermore, "bringing the accused to the Court in his underwear", with the use of force, might actually represent the inhumane treatment of the accused and would at the same time undermine the authority and dignity of the Court. Rather than using force, it is more purposeful to duly and timely inform the accused that the trial shall continue even without his presence and inform him that he may attend the hearing whenever he wishes to do so.[52]

As regards the abuse of the right to defence a destructive attitude of the accused who went on hunger strike could be mentioned. In one of its decisions, the B&H Court held that if the health condition of the accused who was on hunger strike deteriorated due to his deliberate refusal to take food, to the extent that he could not participate in the trial, the Court would provide

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[51] *10th Anniversary of Section I*, p. 44.

[52] Decision of the B&H Court No. X-KR-05/70 of 4 July 2006. Similar argumentation was presented by the ICTR in the case against Jean-Bosco Barayagwiza (ICTR-97-19-T).

the accused with trial transcripts and ensure that his right to defence was not jeopardized. The reasons given by the accused for his refusal to enter the courtroom and attend the main trial do not justify the adjournment of the trial. Furthermore, the consequence of a hunger strike is entirely predictable not only for the bench, but also for the accused himself, this being the fact that as a result of the intentional refusal to eat, the health of a person on hunger strike will deteriorate.[53]

As for the specific requirements of the right to remain silent, especially its temporal and *ratione materiae* aspects, following the interpretation by the ECHR,[54] the B&H Court clarified that it was admissible to use the accused person's statement from the investigation when he exercised his right to remain silent at the main trial (court stage). In such circumstances, the court may establish the factual background of a judicial decision based on the accused person's explanations obtained lawfully during the investigation. However, a single condition is to be met: the accused must be present in the courtroom and have an opportunity to explain or deny his previous statements. Thus, the B&H Court confirmed that *tacitus consensus* entailed the acceptance of the previous expressions of knowledge of the defendant. As a result, the condition that the defendant be given the opportunity to explain or deny his prior statement is consistent with Article 6 of the ECPHR.[55]

As regards the critical element of the right to defence that proper legal representation is, a situation has been discussed in which defence counsel was appointed by the court on its own motion against the will of the accused and whether this infringed the ECPHR, Article 6. The B&H Court argued that there was no violation of Article 6 if the court appointed defence counsel, even though the defence counsel was appointed against the expressly stated will of the defendant. Nonetheless, this was done in the interest of justice and adequate defence.[56]

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[53] Decision of the B&H Court No. X-KR-06/202 of 17 Sept. 2007.

[54] In *Luca v. Italy* the ECHR stated that a prior statement may serve to a material degree as the basis for a conviction and it constitutes evidence for the prosecution to which the guarantees provided by Article 6 of the Convention apply. If the defendant has been given an adequate and proper opportunity to challenge the depositions, either when made or at a later stage, their admission in evidence will not in itself contravene Article 6.

[55] Decision of the B&H Court No. X-KR-05/24 of 18 April 2007.

[56] Court of B-H, Decision No. X-KR-05/70 of 6 April 2006.

Besides the fair-trial infringements in the course of proceedings before the courts of B&H, evidentiary issues were the most complicated. Those of the admissibility of evidence collected and furnished by the ICTY and the transfer of cases to national courts by virtue of the Law on Transfer seem to be the most controversial.[57] The transfer issue controversy paved the way for redrafting the rules on the admissibility of evidence transferred to national courts. Those rules concern particular types of evidence such as witness testimonies, defendant explanations, expert witness opinions, forensic reports, official documents, etc. The Law on Transfer created a "rule of primacy", stipulating that its provisions were *lex specialis* regarding domestic requirements. In case of Law on Transfer provisions did not provide for special conditions, other relevant provisions of the B&H Criminal Procedure Code, the criminal procedure codes of the Republika Srpska and the Federation of Bosnia and Herzegovina and the District of Brcko were to apply. Even though the general rule of admissibility of legally collected evidence by the ICTY in proceedings before the courts in B&H had been adopted, there was the exception that the courts should not base a conviction of a person solely or to a decisive extent on the prior testimonies of the witnesses who did not testify at trial. Thus, the limit concerned witness testimonies as recorded by the ICTY. Article 3 says that the transcripts of witness testimonies given legally before the ICTY and records of depositions of witnesses made before the ICTY shall be admissible before the courts provided that a testimony or deposition is relevant to a fact in controversy. The courts may exclude evidence given by a witness with protective measures where its probative value is outweighed by its prejudicial value. Nothing in this provision prejudices the defendant's right to request the attendance of witnesses for the purpose of cross-examination. The court should rule on the request. A binding exclusionary rule in respect of witness testimonies, derived from the right to defence, says that the use in proceedings before the B&H Court of incriminating testimony the accused gave in the capacity of a witness before the ICTY represents a non-admissible derogation of the privilege of non-self-incrimination and, consequently, a violation of the right to a fair trial.[58]

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[57] Official Gazette of Bosnia and Herzegovina, Nos. 61/04, 46/06, 53/06, 76/06.

[58] B&H Court, Decision No. X-KR-05/24, 29 March 2007.

In accordance with Article 4 of the Law on Transfer, the acceptance of facts established by legally binding ICTY decisions does not constitute a violation of the principle of presumption of innocence, the right to defence, or the principle according to which the burden of proof lies with the prosecutor, since the parties may challenge those facts during proceedings by presenting evidence bringing into question their veracity. Hence, there is no prejudice to the presumption of veracity and the principle of independence of court decisions in criminal matters. Following Article 4, at the request of a party or *proprio motu,* the Court, after hearing the parties, may decide to accept as proven those facts that are established by a legally binding decision in any other proceedings before the ICTY or to accept documentary evidence from proceedings before the ICTY if it relates to matters at issue in the current proceedings. Further, it is at the discretion of the Court to accept the facts proposed by the prosecutor. But the laws do not provide for requirements based on which it would be possible to perceive such facts as proven. The ICTY established criteria in that regard in the cases *Prosecutor v. Vujadin Popović et al.* (IT-05-88-T) and *Prosecutor v. Momčilo Krajišnik* (IT-00-39-T).

As the Tribunal found – in *Prosecutor v. Momčilo Krajišnik*[59] – for a fact to be admissible, it should be:

1. sufficiently distinct, concrete and identifiable;
2. restricted to factual findings and not include legal characterizations;
3. contested at trial and forming part of a judgment that has either not been appealed or has been finally settled on appeal; or
4. contested at trial, now forming part of a judgment which is under appeal, but falls within issues that are not in dispute during the appeal;
5. not attesting to the criminal responsibility of the accused;
6. not the subject of reasonable dispute between the parties;
7. not based on plea agreements in previous cases;
8. not impacting on the fair trial right and the right to defence.

According to the decision in *Prosecutor v. Vujadin Popović et al.*, cognizance may be taken of an adjudicated fact provided that:

1. the fact has some relevance to an issue in the current proceedings;
2. the fact is distinct, concrete and identifiable;

[59] ICTY Decision on adjudicated facts in *Momčilo Krajišnik* (IT-00-39-T) of 28 Feb. 2003.

3. the fact as formulated by the moving party must not differ in any substantial aspect from the formulation of the original judgment;
4. the fact is not unclear or misleading in the context of the party's evidentiary motion;
5. the fact is precisely established;
6. the fact does not contain descriptions of an essentially legal nature;
7. the fact is not based on an agreement between the parties to previous proceedings;
8. the fact does not relate to the behaviour or mental state of the accused;
9. the fact is validly established – it cannot be subject to a pending appeal or review.

The criteria for the admission of adjudicated facts, as established in the *Krajišnik and Popović* cases, are similar, but those in the *Popović* case show a tendency to greater precision. Consequently, the rule was adopted that national courts are authorized to independently assess evidence and autonomously determine the facts for adjudication. Thus, the principle of subsidiarity of the ITCY determination of facts and evidence gathered was accepted. As a result, the principle of autonomy of national courts and the principle of free appraisal of evidence by national courts are adopted. The pieces of evidence performed by the ICTY may be used when the appropriate standards of veracity and adversarial formula of taken evidence are preserved.

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The reflections presented in this article, without any doubt, support the thesis about the considerable influence of the ICTY (as well as its sister tribunal – the ICTR) on the perception of SGBV crimes when prosecuted either at the international or national level. The reflections indicate the turning point in the activity of the *ad hoc* tribunals – of fragile organizational structure and only a symbolic significance in terms of jurisprudence – while the jurisprudential analysis of the B&H Court manifestly testifies to the influence of *ad hoc* tribunal standards on national prosecution of atrocity crimes. While the ICTY itself is perceived rather as ineffective, rather slow, and expensive, it

demonstrates that its crucial significance lies instead in the culture, that is, "the culture of law", especially when it comes to the prosecution of SGBV crimes.[60]

Now, in a purely natural way, the legacy of the ad hoc tribunals is transferred to the ICC. Hence, prosecuting SGBV crimes is among the key strategic goals of the ICC Prosecutor;[61] however, there are still too few convictions by the ICC. Apparently, the first conviction for committing crimes of sexual violence and the first conviction of an individual charged with command responsibility, under Article 28 of the Rome Statute, was in the *Bemba* case. It was also the first case in which testimony from male victims of sexual violence was heard in support of the charge of rape before the ICC. On 21 March 2016, Trial Chamber III of the ICC found the former Vice-President of the Democratic Republic of Congo (DRC), Jean-Pierre Bemba Gombo, guilty of crimes against humanity and war crimes, including rape.[62] As the next step, a recent non-valid conviction of Ongwen can be mentioned.[63]

Despite these developments, much work needs to be done in advancing the prosecution of SGBV crimes. Since the ICC primarily concentrates on crimes committed by supervisors, ascribing SGBV crimes perpetrated by subordinates to the defendant with command responsibility is highly challenging. Even though the options of prosecutorial tactics are complex and charges of SGBV can either be brought as crimes *per se* or as special forms: e.g. rapes and torture, the reasons for ineffective prosecution are numerous. Among them, lack of evidence and the social stigma of victims loom large. From this perspective, the global prosecution of SGBV crimes under universal jurisdiction at the national level is to be striven for. The example of the Courts of B&H is a landmark in this struggle.

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[60] See the report *After ICTY: Accountability, Truth and Justice in Former Yugoslavia*, available at https://birn.eu.com/wp-content/uploads/2018/12/After-the-ICTY-Report-2018.pdf (accessed 6.6.2021).

[61] See the Policy Paper on SGBV available at https://www.icc-cpi.int/Pages/item.aspx?name=policy-paper-on-sexual-and-gender-based-crimes-05-06-2014.

[62] ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05-01/08). Unfortunately, this judgment was cancelled in 2018.

[63] *The Prosecutor v. Dominic Ongwen* (ICC-02/04-01/15). In February 2021, Trial Chamber IC found Dominic Ongwen guilty of a total of 61 crimes comprising crimes against humanity and war crimes, committed in Northern Uganda between 1 July 2002 and 31 December 2005. On 6 May 2021, he was sentenced to 25 years of imprisonment. The judgment is not final and valid.

KAROLINA SIKORA

Protection of Victims of International Crimes in Polish Law and under the Rome Statute: A Comparative Analysis

Introduction

The need to protect victims and to compensate them for the harm that they have suffered as a result of an international crime committed is a problem of great significance, which is due primarily to the specific nature of acts that may be covered by proceedings before the International Criminal Court (ICC) concerning crimes falling within its jurisdiction: the crimes of genocide, against humanity, or war crimes and crimes of aggression. These are the most serious crimes of international concern, and to determine the degree of their social harm is often beyond human capability.[1] No doubt, therefore, that to compensate for the harm suffered from them is a top priority.[2] It should be emphasized that very often the perpetrators of international crimes are individuals with high positions in the state hierarchy, those in power and much privileged in contrast to victims. In view of this, it was all the more necessary not to allow a situation where victims of crimes would be left to their own devices, and to send a signal that they could count on adequate assistance and support.[3]

Polish criminal law provides for mechanisms allowing the application of the national criminal provisions to a Polish citizen or foreigner who has committed an international crime and has not been extradited to be held accountable (Article 113 of the Criminal Code).[4] Thus, there may be cases

[1] K. Kremens, 'Mechanizmy ochrony świadków w międzynarodowych procesach karnych', *Prokuratura i Prawo*, no. 6, 2012, pp. 73–74.

[2] Ibid.

[3] Ibid.

[4] Whenever the term "Criminal Code" is used here, it refers to the Act of 6 June 1997 – Criminal Code (consolidated text: Journal of Laws of 2020, item 1444 as amended).

where the assessment of the criminal liability for an international crime rests with Polish courts, which applying Polish substantive and procedural norms.[5] No doubt, then, the need to protect victims of such crimes and the potential levels of this protection is fully justified. The normative grounds for such protection are provided in Polish procedural regulations, chiefly the Code of Criminal Procedure.[6] Nonetheless, a trivial point that needs emphasizing is that the norms of the Rome Statute[7] and those of the Code of Criminal Procedure are not identical. In my opinion, the standard for international crime proceedings before Polish criminal courts should be at the same level as the standard provided by the norms of international law. The basic assumption for this postulate is that the extension by the Polish legislator of the jurisdiction of national criminal courts to cover cases of crimes under the Rome Statute[8] should not result in undermining the rights of victims of these crimes. Thus, it seems advisable to discuss the provisions of national law and those of the Rome Statute in respect of protection of crime victims, as well as to assess whether and on which matters the respective protection systems remain insufficient and should be supplemented.

There are several levels on which international crime victims can seek redress for the wrongs done to them. In the first place, one should point to the satisfaction derived from the very fact that the perpetrator of a crime is held accountable, a possibility safeguarded by a set of procedural mechanisms underlying the functioning of both the International Criminal Court (hereinafter: the Court) and Polish criminal courts.[9] Extremely important is also the

[5] J. Raglewski, in W. Wróbel, A. Zoll (eds.), *Kodeks karny. Część ogólna*, vol. 1/2: *Komentarz do art. 53-116*, 5th ed., Warszawa 2016, art. 113, https://sip.lex.pl/#/commentary/587713015/510455/wrobel-wlodzimierz-red-zoll-andrzej-red-kodeks-karny-czesc-ogolna-tom-i-czesc-ii-komentarz-do-art…?cm=URELATIONS (accessed 10.7.2021).

[6] "Code of Criminal Procedure" as used here refers to the Act of 6 June 1997 – Code of Criminal Procedure (consolidated text: Journal of Laws of 2021, item 534 as amended).

[7] "Rome Statute" as used here refers to the Rome Statute of the International Criminal Court, done in Rome on 17 July 1998 (Journal of Laws of 2003, No. 78, item 708 as amended).

[8] Raglewski in Wróbel, Zoll, *Kodeks karny.*

[9] J. Ohlin, 'The Right to Punishment for International Crimes', in F. Jeßberger, J. Geneuss (eds.), *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal Law*, Cambridge 2018, pp. 20–22; similarly, see A. Jaskulska, 'Międzynarodowe sądy karne a poprawa ochrony praw człowieka we współczesnych stosunkach międzynarodowych', *Refleksje*, no. 18, 2018, pp. 130–131.

protection of victims during proceedings, especially if they are also witnesses giving testimony. Crime victims should also receive adequate compensation for the harm they have suffered in the form of pecuniary redress.[10]

1. The definition of "victim"

Before we move on to establish the normative bases for the various spheres of protection and discuss them in detail, let us consider how the concept of "victim" is defined for the purposes of the Rome Statute and the Polish Code of Criminal Procedure. To recreate a legal definition, one should go back in time to 1985, when by virtue of Resolution 40/34, the UN General Assembly adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (hereinafter: the Declaration).[11] According to Section A(1) of the Declaration, 'victims' denotes "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power."[12] In the other paragraphs of Section A, this definition is detailed to indicate that a person may be considered a victim regardless of any pending criminal proceedings or their potential outcomes, and that the term 'victim' may also include the immediate family or dependants of the direct victim and persons

[10] The English language version of the Rome Statute uses the term 'reparations', which is why some Polish authors use the word *reparacje* to denote the means of restitution and compensation for the harm or injury of victims of international crimes, the word that will also be used by the author hereinafter in this paper. Cf. Article 75(1) sentence 1 of the English language version of the Rome Statute: "The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation"; P. Hofmański, H. Kuczyńska, *Międzynarodowe prawo karne*, Warszawa 2020, p. 259.

[11] The Declaration in question, although not binding, is an inspiration for drafting and interpreting instruments of international law referring to the situation of victims of international crimes. The literature sometimes dubs it *The Magna Carta for Victims*, for example in M. Bachrach, 'The Protection and Rights of Victims under International Criminal Law', *The International Lawyer*, vol. 34, no. 1, p. 9.

[12] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN General Assembly Resolution 40/34 of 29 Nov. 1985.

who have suffered harm in intervening to assist the direct victim. Moreover, the application of the Declaration, and hence the analysis of the concept of "victim", should be free from any kind of discrimination based on any type of criteria.

One could conclude, therefore, that the definition of a victim framed for the purposes of the UN regulation is fairly broad to cover persons with various factual and legal situations, and those who have suffered indirect damage or harm as a result of a crime.[13] Although the definitions contained in the Declaration are not binding, they undoubtedly provide a valuable interpretative guide for the analysis of solutions adopted directly for the purposes of the International Criminal Court.

The definition of "victim" is also contained in the ICC Rules of Procedure and Evidence (hereinafter: the RPE).[14] Pursuant to Rule 85, "victims" denotes natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court. Moreover, in certain situations,[15] the status of a victim may be given to organizations and institutions.[16]

The Polish Code of Criminal Procedure does not use the term "victim"; instead, it introduces the term "aggrieved (person)." While these concepts should be considered equivalent,[17] in order to find a definition similar to the quoted one, we should refer to Article 49(1) of the Code of Criminal Procedure, according to which "the aggrieved is a natural or legal person whose legal rights have been directly violated or threatened by an offence."

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[13] Bachrach, 'The Protection and Rights', pp. 9–10.

[14] The ICC Rules of Procedure and Evidence are included among the sources of international criminal law as an act of a lower rank than the Rome Statute and supplementing the Statute with regulations, without which its application would be impossible, or at least significantly impeded; see Hofmański, Kuczyńska, *Międzynarodowe prawo karne*, p. 43. Whenever the term "Rules of Procedure and Evidence" is used here, it refers to the ICC document *Rules of Procedure and Evidence*, available at https://www.icc-cpi.int/Publications/Rules-of-Procedure-and-Evidence.pdf.

[15] According to Rule 85(b), the status of a victim may be granted to organizations and institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

[16] C. Schwöbel-Patel, 'The "ideal" victim of international criminal law', *European Journal of International Law*, vol. 29, no. 3, 2018, p. 719.

[17] It is justified to recognize the above terms as equivalent, because the Polish language version of the Rome Statute uses the word *pokrzywdzony* (aggrieved) for the English "victim"; also in the literature on international criminal law one see that the words "aggrieved person" and "victim" are used interchangeably; cf. Hofmański, Kuczyńska, *Miedzynarodowe prawo karne*, p. 259.

While the above-quoted provision does not refer directly to the situation of immediate family members of the aggrieved person, the Act, and more precisely in its Article 52(1), further provides that immediate family members and dependants of the aggrieved person may exercise the rights vested in the aggrieved person in the event of their death.

When comparing the above definitions as formulated in the Declaration, the RPE and the Code of Criminal Procedure, one should note that they are not identical, although they address the same ideas. A broad definition was proposed by the UN General Assembly, whereby recognizing a person as a victim depends on the actual harm or injury done. The RPE adopted a similar approach.[18] The Polish legislator, on the other hand, links the status of an aggrieved person with the violation of a legal right. One should further emphasize that under the Polish legislation, unlike the Declaration, immediate family members of the direct victim are not considered to be aggrieved, with only procedural rights granted in the event of the aggrieved person's death. Therefore, it seems justified to conclude that the standard of protection under the norms governing the ICC activities, based on the definition of "victim" as derived from the RPE, will cover a broader catalogue of entities than the standard provided under the Polish criminal procedure, which results from the subtle but discernible differences in definitions as described above.

2. The need to protect victims

Let us now point out why the protection of victims of crime is important from the perspective of both legal orders discussed.

The need to focus on victims of international crimes had been emphasized even before the International Criminal Court was established.[19] At this point it is worth quoting the Declaration again. It indicates, among others,

[18] Bachrach, 'The Protection and Rights', pp. 9–10; Schwöbel-Patel, 'The "ideal"; p. 719.

[19] Kremens, 'Mechanizmy ochrony świadków', pp. 74–75; C.F. de Casadevante Romani, 'International law of victims', *Max Planck Yearbook of United Nations Law*, vol. 14, 2010, pp. 221–222; P. Vega-Gonzàlez, 'The Role of Victims in International Criminal Court Proceedings: Their Rights and the First Rulings of the Court', *Sur International Journal on Human Rights*, no. 5, 2006, p. 19.

that victims should be treated with compassion and respect for their dignity, and that they should be ensured access to the mechanisms of justice. It also expresses the need to establish an appropriate legal framework to enable victims to obtain redress, and to provide them with relevant information on their rights. The Declaration itself refers directly to the obligation of the perpetrators to compensate for harm suffered by victims of committed crimes.[20] This obligation, in accordance with the Declaration, covers both restitution and compensation for the harm or injury suffered. Similarly, Article 75 of the Rome Statute emphasizes that "reparations to, or in respect of, victims, include restitution, compensation and rehabilitation." Interestingly, as regards international criminal proceedings, the UN General Assembly pointed out both the need to make a fair restitution to compensate the aggrieved persons and their families for harm and losses suffered individually, and for collective harm consisting in significant damage to the environment. Under the Rome Statute, the power to decide as to the nature and type of reparations is vested in the Court, which will adapt them on a case-by-case basis depending on the circumstances. It is rightly pointed out that, due to the nature of the crimes within the jurisdiction of the Court, collective reparations are generally decided. This is justified by the fact that the sheer number of victims often makes it is impossible to fully identify them, and thus to order individual reparations for each of the victims.[21] The case law of the Court also tends to order both individual-symbolic and collective reparations.[22]

Following the adoption of the Declaration described above still before the ad hoc criminal courts were established for the former Yugoslavia (1993)[23] and Rwanda (1994),[24] the acts governing their activities highlighted the need to provide protection measures for victims and witnesses.[25] These circumstances

[20] Bachrach, 'The Protection and Rights', pp. 9–10.

[21] Hofmański, Kuczyńska, *Międzynarodowe prawo karne*, pp. 261–263.

[22] Cf., e.g., the *Katanga* case, where the Court decided to award individual reparations in the symbolic (as the Court put it) amount of USD 250 per person and collective reparations for the entire aggrieved community; see Ordonnance de réparation en vertu de l'article 75 du Statut, ICC-01/04-01/07-3728, Case *The Prosecutor v. Germain Katanga*.

[23] Resolution 827 adopted by the UN Security Council on 25 May 1993.

[24] Resolution 955 adopted by the UN Security Council on 8 Nov. 1994.

[25] E. Bieńkowska, 'Ofiary w postępowaniu przed Międzynarodowym Trybunałem Karnym', in P. Hofmański, C. Kulesza (eds.), *System Prawa Karnego Procesowego*, vol. 6: *Strony*

were additionally emphasized in the Rome Statute.[26] One of the recitals of the Preamble to the Statute signalled the problem by indicating that the States Parties were mindful that "millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity." A very similar statement can be found in the introduction to the 1985 Declaration. The need to protect victims of international crimes was also reflected in the obligations imposed on individual bodies involved in the procedure: the prosecutor (Article 54(1)(b)), the Pre-Trial Chamber (Article 57(3)(c)) and the Trial Chamber (Article 64(2)). These bodies are required to protect the aggrieved persons, to take account of their interests and rights when carrying out their activities, and pay attention to their specific characteristics (age and gender, in particular, which is important for the assessment of acts constituting sexual crimes and crimes against children) when making decisions.[27] Under the Rome Statute, a special organizational unit was established at the ICC Registry, that is, the Victims and Witnesses Units, whose staff provide advice and assistance to victims. It seemed particularly advisable to establish the unit, given the sheer numbers of people affected by international crimes. It would be impossible to allow all of them to participate in criminal proceedings individually and represent their rights, hence it was necessary to establish a body which, employing appropriately competent and experienced persons, would deal with comprehensive legal assistance provided to crime victims and witnesses in the proceedings.[28]

As for the Polish legal order, inspiration for the establishment of appropriate protection guarantees for crime victims should be sought already in the basic functions of criminal law and the criminal process. There is a protective function, which provides for the need to ensure, through the application of criminal law, protection of legal rights (values) considered by the society as essential.[29] As indicated above in this paper, in the Polish legal system the status of the aggrieved person is closely linked to the category of a legal right, and

i inni uczestnicy postępowania, Warszawa 2016; Hofmański, Kuczyńska, *Międzynarodowe prawo karne*, pp. 259–260.

[26] Ibid., p. 260.

[27] Ibid., pp. 176–177.

[28] Hofmański, Kuczyńska, *Międzynarodowe prawo karne*, p. 177.

[29] W. Wróbel, A. Zoll, *Polskie prawo karne*, Kraków 2014, pp. 39–40.

a violation of it or a threat to it. No doubt, then, the need to protect persons whose legal rights have been infringed is related to the protective function of criminal law. Moreover, a compensatory function of criminal law is also distinguished, consisting in the need to provide crime victims with appropriate compensation for the harm and injury suffered as a result of a crime.[30] Importantly, criminal proceedings also have their intrinsic objectives, such as to achieve "procedural fairness". Simply put, the state of procedural fairness should be considered attained when all participants in the criminal process share the sense that they have experienced an equitable, fair and impartial trial.[31] Although this most often refers to the situation of persons accused of a crime, who should be provided with appropriate procedural guarantees, the principle of procedural fairness is no doubt related to the situation of victims, too. Under the Polish criminal procedure, the aggrieved person remains under law a party to pre-trial criminal proceedings, and at the trial stage, they may still participate in the capacity of an auxiliary prosecutor. It happens very often that the aggrieved person is also a witness in a trial.[32] The Rome Statute (Article 68) and the related RPE (Rules 89–91) also introduce appropriate mechanisms to enable victims to participate in the proceedings. In particular, victims have the opportunity to present their views and concerns, observe the procedural activities and appoint a professional representative. However, this opportunity is not granted *ex officio* but it is necessary to submit an appropriate application, which will be assessed by the Court. Aggrieved persons may participate in procedural activities during the entire proceedings, but they are not a party to the proceedings.[33] Aggrieved persons – as participants in criminal proceedings – should also be protected to be able to develop a sense of a fair trial. We note a conflict of interest arising on this ground, which requires special care on the part of the bodies involved in the procedure.[34] The interests of the accused and the interests of the aggrieved person in experiencing a fair

[30] Ibid.

[31] S. Waltoś, P. Hofmański, *Proces karny. Zarys systemu*, Warszawa 2020, pp. 25–26.

[32] Ibid., p. 190.

[33] Hofmański, Kuczyńska, *Międzynarodowe prawo karne*, pp. 176–178.

[34] A. Balta, M. Bax, R. Letschert, 'Trial and (potential) error: Conflicting visions on reparations within the ICC system', *International Criminal Justice Review*, vol. 29, no. 3, 2019, pp. 222–225.

trial will be weighed, which will often entail the need to limit the scope of the guarantees enjoyed by one of these parties for the benefit of the other. It is a fundamental problem, not least in terms of assessing the admissibility of using the institution of an anonymous witness.

3. Protection of victims in the course of criminal proceedings

Moving on to the compared regulations as regards the standard of protection of victims of international crime, let us start our considerations with the period during criminal proceedings. As already mentioned, victims often act as witnesses in criminal proceedings, and their participation entails high stress and the risk of re-victimization.[35] Given the severity of social harm caused by acts considered as international crimes, this risk is very likely to be considerable.

Article 68(1) of the Rome Statute requires the Court and the prosecutor in the pre-trial proceedings to take appropriate measures to ensure safety, physical well-being, dignity and privacy of victims and witnesses. When applying these measures, all the relevant facts and the circumstances relating to the personal factors of the protected persons should be taken into account. The Rome Statute places emphasis chiefly on the vulnerability of victims of sexual crimes, but protection under the Statute is not limited to this sort of crimes.[36] Also, the document underscores the need to observe the rights of the accused to a fair and impartial trial, which reflects the conflict of interest in a criminal trial as pointed out above. Article 68 further lists examples of measures that may be applied by the judicial bodies involved, such as conducting part of the proceedings *in camera*, enabling the aggrieved persons to present their views and concerns over the case or limiting access to evidence containing information, the disclosure of which could endanger the security of a witness or their family.[37] As regards the limited publicity of individual activities undertaken during the proceedings, it is absolutely justified because more emphasis is on the protection of victims of sexual

[35] Kremens, *Mechanizmy ochrony świadków*, p. 75.
[36] Hofmański, Kuczyńska, *Międzynarodowe prawo karne*, p. 176.
[37] Waltoś, Hofmański, *Proces karny*, p. 177.

crimes as the court has to analyse in detail the facts accompanying a serious interference in the victims' intimacy.

The norm under Article 68 of the Rome Statute is specified in the RPE, for example in Rules 87 and 88. Rule 87(1) provides more precise information on how, in addition to the Court's own initiative, protective measures may be applied. Pursuant to Rule 87(1), such measures may be taken upon the motion of the prosecutor or the defence or upon the request of a victim (or their legal representative). Importantly, the RPE provide for the autonomy of victims, which follows from the widely accepted principle of human dignity in international law, and thus also the dignity of participants in criminal trials.[38] This is a requirement that the Chamber must seek to obtain, whenever possible, the consent of the person in respect of whom the protective measures are sought, so as to prevent their use against the will of the potentially protected person themselves.[39] It should also be emphasized that the application of protective measures by the chamber on its own initiative requires consultation with the Victims and Witnesses Unit, which also deserves an approval, given that it is the Unit that has the most detailed knowledge about victims themselves and about their needs. Rule 87(3) sets out the options for limiting the publicity of hearings and individual procedural steps conducted by the Chamber, with a specification of such limitations. In addition to conducting some of the proceedings or activities *in camera*, as mentioned above, there is an option to limit the access of the press and other media to a witness' testimony, expunge the identity of the protected person from public records of the trial, prohibit the disclosure of the identity of the protected person to unauthorized persons, give the protected person a pseudonym or hear the testimony using electronic means of communication.[40]

Further, Rule 88 complements Article 68 of the Rome Statute as regards the options to limit access to individual pieces of evidence containing information about a victim or a witness, the disclosure of which could endanger these persons. Under Rule 88(1), the Chamber may take appropriate, special protective measures with respect to a victim, which may include, in particular,

[38] M.M. Giannini, 'The procreative power of dignity's evolution in the victims' movement', *9 Drexel Law Review*, no. 43, 2016, p. 44.

[39] Kremens, *Mechanizmy ochrony świadków*, p. 94.

[40] Hofmański, Kuczyńska, *Międzynarodowe prawo karne*, p. 177.

facilitating the testimony of a traumatized victim or witness, child, elderly person or a victim of sexual violence. When interpreting the content of Rule 88 in conjunction with the content of Article 68 of the Rome Statute, especially its paragraph 5, it should be asked whether the institution of an anonymous witness could be used in the proceedings before the ICC as a special form of victim protection.[41] The Rome Statute and the RPE leave a margin of discretion in the choice of protective measures by the Court, without enumerating these measures in an exhaustive manner or clearly specifying the premises for their application. These legal norms so framed would indicate that the institution of an anonymous witness could be used, which in each case would pose a fairly high risk of violating the procedural guarantees of the accused in a criminal trial, above all their right to defence.[42] One should note, however, that in accordance with the above-quoted Article 68(1) and (5) of the Rome Statute, the application of protective measures by the Court may not infringe the rights of the accused.

Our analysis should now cover the regulations of the Polish criminal procedure, which put in place similar possibilities to those available under the Rome Statute for the protection of victims in the course of criminal proceedings. As already mentioned several times, , there are options to limit the publicity of proceedings before the ICC, or of individual steps taken in the course of the proceedings. Also, the Polish Code of Criminal Procedure, in its Article 360, provides that the court may exclude the public from the hearing, in part or in whole. Article 360(1) specifies the situations where such a protective measure is permissible. Under Article 360(1)(1)(c), the court may decide to exclude or limit the publicity if the openness of the proceedings could infringe a legitimate private interest. It seems that the interest of a victim of an international crime, who is at risk of making the facts of their case available to people other than the participants in the trial or is at risk of secondary victimization, in the exclusion of the publicity of the trial, could lead to a justified application of the norm under Article 360(1)(1)(c) of the Code of Criminal Procedure.[43] What could hinder the application of this instru-

[41] Kremens, *Mechanizmy ochrony świadków*, p. 95.

[42] Kremens is critical about this suggestion (p. 95).

[43] Cf. D. Świecki et al., *Kodeks postępowania karnego*, vol. 1, *Komentarz aktualizowany*, art. 360, LEX/el. 2021, https://sip.lex.pl/#/commentary/587748685/661563/swiecki

ment, on the other hand, is an objection of the prosecutor to the exclusion of limitation of publicity, which is permissible under Article 360(2), which renders the court's decision in this respect ineffective, without a consultation with the person to protect whom the measure has been taken.

One should also note that under Article 184 of the Code of Criminal Procedure, it is possible to use the institution of anonymous witness in proceedings before Polish criminal courts. The coverage of victims with this type of protection is made difficult by the well-established jurisprudence of the Polish Supreme Court regarding the inadmissibility of applying the *incognito* witness mechanism to the victim due to the fact that the identity of the victim cannot be kept secret from the perpetrator of the crime.[44] However, taking into account the characteristics of acts meeting the definition of international crimes, the question of whether the arguments of the Supreme Court remain valid in this respect deserve a serious reflection. As mentioned earlier in this paper, international crime cases are characterized by a large number of victims. Therefore, it may be much more difficult for the perpetrator to identify them from testimonies than in cases involving just one or a few aggrieved persons. In view of this, the argumentation of the Supreme Court, which emphasizes the futility of using the institution of anonymous witness for the aggrieved, will not always be fully valid and will depend on the circumstances of a specific case. The norms under the Rome Statute and the RPE make the application of a special protection measure conditional on the decision of a body involved in the procedure in the circumstances of individual cases. In light of the above, the system of protection based on the procedural norms for the ICC appears to be more adequate and open to the needs arising from specific facts. One should note, however, that taking special protective measures towards victims may not violate the guarantee

-dariusz-red-kodeks-postepowania-karnego-tom-i-komentarz-aktualizowany?cm=URELATIONS (accessed 10.7.2021): "The premise of a legitimate private interest indicated in §1 (1) (d) relates to the sphere of intimate life or the sphere of privacy, which might be revealed during the trial, and which require protection as personal human rights."

[44] Resolution of the Supreme Court of 20 Jan. 1999, I KZP 21/98, OSNKW 1999/1–2, item 3. The doctrine argues about the *de facto* inadmissibility of inclusion of the aggrieved person in the subjective scope of application of the institution of an anonymous witness: Świecki et al., *Art. 184* (accessed 10.7.2021).

rights of the accused, which should also be reflected in the decision-making process of the bodies involved in the procedure.[45]

4. Redress and compensation for the harm and injury

In order to discuss in detail the reparation system under the Rome Statute, let us first note that the rules for redressing the harm and injury suffered by the aggrieved persons are regulated in Article 75 of the Rome Statute. In the first place, the provision designates the Court as the entity competent to define the rules for redressing the harm and injury. The obligation to redress the harm and injury includes, first of all, restitution, compensation and rehabilitation. The extent of the harm and injury caused to the aggrieved persons is determined by the Court on request, and in exceptional circumstances also *ex officio*. Financial resources, referred to as reparations, can be (as under the Declaration discussed earlier in this paper) both individual and collective. In the collective form, they may include charging the perpetrator of an international crime with the costs of rebuilding infrastructure in the place where the population has been affected by the crime.[46]

The enormous extent of harm and injury due to the commission of an international crime entails an equally high financial effort required to redress the same. It will rarely be the case that the perpetrator of a crime actually has the requisite resources. In response to cases where the perpetrator is unable to remedy the damage and compensate for the harm on their own, the Trust Fund was established under Article 79 of the Rome Statute. The Trust Fund is an entity operating independently of the Court and managed under the terms laid down by the States Parties through a designated Board of Directors.[47] The resources at its disposal come from money and other property collected through fines or forfeiture transferred by the Court, as well as from

[45] Differently in Kremens, *Mechanizmy ochrony świadków*, p. 95: "The author paid particular attention to the insufficiently high level of guarantees under the norms governing the proceedings before the Court, to give a negative assessment of the admissibility of using the institution of an anonymous witness in cases concerning international crimes."

[46] Hofmański, Kuczyńska, *Międzynarodowe prawo karne*, pp. 259–260.

[47] Waltoś, Hofmański, *Proces karny*, p. 261.

contributions from States Parties. Once a perpetrator is found financially liable for the harm and injury, the Court may issue an order determining the method of redress directly to the convicted person, or order the transfer of resources through the Trust Fund. In such a case, the Fund establishes a reparation program, the implementation of which should be paid by the convicted person, and if this is impossible, financed by the Fund itself. The Trust Fund is also in a position to provide appropriate assistance to aggrieved persons regardless of the Court's decision as to the criminal liability; then, independently (on its own initiative), it establishes and finances a reparation program.[48]

A controversial issue under Article 75 of the Rome Statute is how the procedure for the Court's adjudicating on redress is established. Two models can be distinguished; in the first one, the order to make restitution, compensation and rehabilitation would be considered in the course of criminal proceedings, and thus a decision on awarding reparations would be determined at the same time as the criminal liability of the accused. The other model requires that the two proceedings be separated, making it possible to adjudicate on reparations only when a conviction has been handed down against the accused. At present, the latter has been recognized as appropriate under the Rome Statute, with a justification that Article 75 of the Rome Statute, which sets out the principles of awarding reparations, applies to the convicted person.[49] Therefore, it is only reasonable that a decision on reparations is issued in a separate proceeding after a conviction. However, besides the linguistic issues, shortcomings of this solution should be pointed out. In the first place, lengthy trials before the Court should be taken into account. In this time, individuals who have suffered harm and injury from the crimes committed are kept waiting for help in solving their problem and getting compensation for their suffering.[50] An example here is the *Katanga* case, in which the sentence of imprisonment for Germain Katanga was passed in March 2014, and the decision on reparations for the victims was made by the Court as late as 3 years afterwards.[51] Moving the adjudication on reparations from the main criminal proceedings to separate proceedings additionally extends the wait

[48] Hofmański, Kuczyńska, *Międzynarodowe prawo karne*, p. 261.
[49] Balta, Bax, Letschert, 'Trial and (potential) error', pp. 225–226.
[50] Ibid., pp. 235–236.
[51] The full *Katanga* case timeline is available at https://www.icc-cpi.int/drc/katanga.

of the aggrieved persons. Therefore, it would be advisable to consider options for decisions on reparations to be issued either immediately after or even in parallel with the conviction, which would not violate the requirement that such decisions may only be handed down to a convicted person.

In deciding on reparations, the Court may also consider the need for legal assistance from States Parties. Where the Court uses this option, the rules provided for in the Rome Statute for the enforcement of fines and forfeiture decisions (Article 75(5) of the Rome Statute) apply to the Party State's giving effect to such a decision.

The Court has already made the first decisions on reparations for victims of international crimes. One of these was passed in the above-cited Katanga case, in which the Court exercised the option to grant the victims both individual and collective compensation for the entire community.[52] A reparation decision was also made in the *Al Mahdi* case. An interesting aspect of this decision is that it gives the victims the option to conceal their identity from the convicted person in seeking individual redress.[53] At the same time, therefore, it reveals the protective aspect related to redressing the harm and injury, and to the need to ensure security of crime victims at every stage of the proceedings, also when seeking redress.

In the Polish legal system, the basic regulations concerning compensation for harm can be found in the Criminal Code, and more precisely in its Article 46. According to Article 46(1), if the perpetrator is convicted, the court may decide on its own initiative or on the request of the aggrieved person to impose an obligation to redress and compensate for harm and injury, applying the provisions of civil law for this purpose. Paragraph 2 of this provision permits, in turn, a decision to award exemplary damages for the benefit of the aggrieved person in the amount of up to PLN 200,000, in place of the above obligation. Exemplary damages can be awarded if a decision imposing the obligation under §1 is significantly impeded. Moreover, exemplary damages

[52] Ordonnance de réparation en vertu de l'article 75 du Statut, ICC-01/04-01/07-3728, *The Prosecutor v. Germain Katanga*.

[53] Reparations Order ICC-01/12-01/15-236, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*; public redacted judgment on the appeal of the victims against the 'Reparations Order', ICC-01/12-01/15-259-Red2, *The Prosecutor v. Ahmad Al Faqi Al Mahdi.*

may be awarded to the immediate family members of the aggrieved person following the death of the latter and a deterioration of their situation.

The analysis of the protection standards contained in Polish legislation and the provisions of the Rome Statute leads to the conclusion that the standards of protection of victims contained therein are not identical. The system of the Rome Statute is characterized by a greater level of discretion granted to the bodies involved in the procedure as to making decisions on whether and which protective measures should be applied, while Polish regulations are characterized by high statutory specificity. For example, the competence of the Court to conduct part of the proceedings or individual procedural steps with the exclusion or limitation of publicity depends on the finding that taking this type of measure is necessary to protect the crime victim, while the application of a similar mechanism on the basis of the Polish criminal procedure requires the existence of at least one of the statutory premises, for instance a "violation of a legitimate private interest". While the system of norms under the Rome Statute and documents elucidating its provisions[54] seems to give broader options for adapting protective measures to the needs of victims in specific cases, the Polish system of procedural criminal norms appears to offer more guarantees to the accused. In support of this claim, let me once again refer to the mechanisms of excluding publicity of the proceedings. One should note that their application entails a restriction of the accused's right to a public trial.[55] Binding a body involved in the procedure with statutory prerequisites, characteristic of the Polish criminal procedure, reduces the risk of making decisions inadequately interfering with the procedural rights of the accused.

The non-uniform understanding of the concept of "victim" under the Rome Statute and the Polish criminal procedure gives rise to controversy, which could result, if proceedings were held before criminal courts, in a failure to protect individuals who would be covered with protection under the provisions of the Rome Statute. No doubt, then, both systems can draw inspiration from each other – the Polish system, for example, in terms of the subjective extent of protection, and the international system – in terms of guarantees to the perpetrator.

[54] Mainly the Rules of Procedure and Evidence of the International Criminal Court.

[55] Świecki et al., *Art. 360* (accessed 10.7.2021).

ASIA

AMAN KUMAR

Finding India's International Criminal Law Obligations in its Domestic Laws

Introduction

India's relationship with international law is unique. It became independent from British colonial rule only in 1947, but had been a founding member of the League of Nations since 1919 and of the United Nations since 1945.[1] The drafters of the constitution of the new state of India were conscious of international law obligations and included few provisions on international law and its domestication in the constitution. However, these provisions are not clearly worded and have caused problems in their interpretation.

India has also been an active participant in the international rule-making process. While its work in international environmental law and especially on climate change is well recognised,[2] its work on international criminal law has been patchy.[3] India has either not signed some of the core international

[1] R.P. Anand, 'The Formation of International Organizations and India: A Historical Study', *Leiden Journal of International Law*, vol. 23, 2010, pp. 5–21.

[2] B.H. Desai, B.K. Sidhu, 'India', in E. Lees and J.E. Viñuales (eds.), *The Oxford Handbook of Comparative Environmental Law*, Oxford 2019; S. Sengupta, 'India's Engagement in Global Climate Negotiations from Rio to Paris', in N.K. Dubash (ed.), *India in a Warming World: Integrating Climate Change and Development*, Oxford 2019, pp. 114–141; L. Rajamani, 'India's Approach to International Law in the Climate Change Regime', *Indian Journal of International Law*, vol. 57, nos. 1–2, 2017, pp. 1–23; L. Rajamani, S. Ghosh, 'India', in R. Lord et. al., *Climate Change Liability: Transnational Law and Practice*, Cambridge 2012, pp. 139–177.

[3] H. Jamil, 'Critical Evaluation of India's Position on the Rome Statute', *Indian Journal of International Law*, vol. 57, nos. 3–4, 2017, pp. 411–442; U. Ramanathan, 'India and ICC', Journal of International Criminal Justice, vol. 3, 2005, p. 627; A. Weisburd, 'Customary International Law and Torture: The Case of India', *Chicago Journal of International Law*, vol. 2, no. 1, 2001, pp. 81–100; D. Bais, 'India and the International Criminal Court', *FICHL Policy Brief Series*, no. 54, 2016; R. Viswanath, 'Hate Crimes against Minorities in India Locating the Value of an International Criminal Law Discourse?' *Journal of International Criminal Justice*, online first, 2021.

criminal law treaties or has not ratified them. Further, the legislature and the judiciary in India seem to have contrasting views on domestic implementation of India's international criminal law obligations. This chapter discusses four such international crimes, i.e., crime of genocide, crimes against humanity, war crimes and torture, and their domestication/non-domestication by India. The reasons for selecting these four crimes have been explained in the subsequent parts. The aim of the chapter is to highlight the vague and often contradictory reasons given for not domesticating India's international criminal law obligations. The author tries to understand if there is any reason behind India's continued reluctance to domesticate its international criminal law obligations.

The chapter begins by explaining the current domestic criminal law structure of India. Here, some core criminal law legislations and their history are discussed. Next, the procedure for domesticating India's international law obligations is analysed. Provisions from the Indian constitution in this regard is discussed along with the confusion surrounding their interpretation. The penultimate section deals with India's obligations under international criminal laws. That part highlights how India has skirted around the topic of incorporating its international criminal laws obligations into its domestic criminal law framework. Finally, the chapter ends with some concluding remarks.

1. Domestic criminal law structure of India

The Republic of India, which came into existence on 15 August 1947, borrowed a lot of legislation from the erstwhile British India. These legislations were drafted by the (colonial) British government of India. The Indian constitution, drafted after India became an independent nation, provides for continuance of such pre-independence legislation. Article 372(1) of the Constitution, titled "Continuance in force of existing laws and their adaptation" provides that

> …subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution

> shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.

The Article further explains the meaning of term "Law in force" as it appears under Article 372(1). According to the *Explanation I*:

> The expression 'law in force' in this article shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

The Law Commission of India (LCI), in its Fifth Report discussed the continued application of British Statutes. The report, titled *British Statues Applicable to India*, dealt with the following question: "Should not India having regard to her new and independent status as a Republic enact her own laws on the subject-matter of these statutes where it is necessary to do so and take legislative action making it clear that these statutes are no longer applicable to India?"[4] The Report ends with the conclusion that "(t)he large majority of these Statutes shall be repealed."[5]

One such statute and a major criminal law legislation, the Indian Penal Code, 1860 (IPC),[6] was drafted for the British India and is continued to be used in independent India. The IPC's drafters were inspired from the English criminal law, the French Penal Code, and Edward Livingston's Code for Louisiana.[7] IPC was revised comprehensively by the LCI, first in the year 1971[8] and then in 1997.[9] The same is true for another major criminal law legislation,

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[4] Law Commission of India, *Report No. 5: British Statues applicable to India*, 1957, p. 1.

[5] Law Commission of India, *Report No. 5: British Statues applicable to India*, 1957, p. 6. The Report has three Appendixes titled *British Statute applicable or of possible application to India*, *Analysis of British Statute applicable or of possible application to India*, *List of subjects covered by British Statutes with respect to which legislation in India appears to be prima facie necessary*.

[6] The Indian Penal Code, 1860, Act No. 45 of 1860.

[7] S. Yeo, 'India', in K.J. Heller, M. Dubber (eds.), *The Handbook of Comparative Criminal Law*, Stanford 2011, p. 289.

[8] Law Commission of India, *Report No. 42: Indian Penal Code*, 1971, pp. 1–579.

[9] Law Commission of India, *Report No. 156: The Indian Penal Code*, 1997, pp. 1–572.

the 1973 Code of Criminal Procedure (CrPC).[10] The modern avatar of the Act came into existence on the recommendation of the LCI. In its 41st Report, the LCI did an extensive study of the CrPC and made overhauling suggestions. It concluded by recommending that "the Code should be replaced by a new Criminal Procedure Code."[11] That is how the CrPC of 1898 was replaced by the New (yet old since it retains most of the provisions of the old Act) CrPC of 1973.

Another important legislation is the 1872 Indian Evidence Act (IEA), which, too, was drafted for the British India and is continued to be used in independent India. These three legislations (IPC, CrPC and IEA) are arguably the most important criminal law legislation in India. They are supplemented by a host of other legislation, regulating different aspects of crimes.[12]

Since international criminal law developed mostly in the 1980s and 1990s, it is obvious that international crimes are absent in the IPC or CrPC. As and when India accepted new international obligations, it incorporated them in its domestic laws, for example India's obligations under the United Nations Convention on Rights of Child[13] are incorporated through the Protection of Children from Sexual Offences Act, 2012[14] and Juvenile Justice (Care and Protection of Children) Act, 2015[15].[16] But such an incorporation is missing in the field of international criminal law. In the next part I will explain what I mean by international crimes. I will then explain India's obligations, if any, vis-a-vis those crimes. Finally, I will explain to what extent they are present or absent in India's domestic legislations.

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[10] Code of Criminal Procedure, 1973, Act No. 2 of 1974.

[11] Law Commission of India, *Report No. 41: The Code of Criminal Procedure, 1898*, 1969, p. 372.

[12] For example, see the Juvenile Justice (Care and Protection of Children) Act 2015; Unlawful Activities (Prevention) Act, 1967; Narcotic Drugs and Psychotropic Substances Act, 1985.

[13] UN General Assembly, Convention on the Rights of the Child, 20 Nov. 1989; UN, Treaty Series, vol. 1577, p. 3, available at https://www.refworld.org/docid/3ae6b38f0.html, accessed 19 May 2022.

[14] Protection of Children from Sexual Offences Act, 2012, Act No. 32 of 2012.

[15] Juvenile Justice (Care and Protection of Children) Act, 2015, Act No. 2 of 2016.

[16] The Preamble of both the Acts notes: "AND WHEREAS, the Government of India has acceded on the 11th December, 1992 to the Convention on the Rights of the Child, adopted by the General Assembly of United Nations, which has prescribed a set of standards to be adhered to by all State parties in securing the best interest of the child."

2. Incorporation of international law in India's domestic law

As discussed earlier, the Indian legislative system is a continuance of the British-Indian system in certain aspects. Domestic incorporation of international law is one such aspect. Generally, international law and municipal law or national law are considered as two distinct sets of laws. Scholars differ on the degree of similarity or overlap between these two sets. Without getting into that debate or taking a position there, I will talk about the mechanism existsing in India regarding incorporation of international law in India's domestic structure.

Generally, there are two schools of thought on the relationship between international law and municipal law, i.e., monism and dualism. (It is also debatable whether we should say relationship *between* international law and municipal law or relationship *of* international law and municipal law.)

According to the monist school, international law and municipal law are parts of the same legal order or "at least a number of interlocking orders which should be presumed to be coherent and consistent."[17] On the other hand, dualists maintain that international law and municipal law are separate branches of law. They consider states as supreme and maintain that the two branches of international law and municipal law cannot overrule each other.[18]

Of these two prevalent theories of relationship between international law and municipal law, India follows the dualist school. While there is no specific mention of this in clear terms, the Indian constitution does say in its Article 253 that:

> Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

[17] J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed., Oxford 2012, p. 48.

[18] M.N. Shaw, *International Law*, Cambridge 2017, p. 97.

This article has been interpreted as meaning that India is a dualist country. V.G. Hegde writes that "Article 253 could be regarded as articulating a 'transformation doctrine', essentially a positivist–dualist position."[19] However, Aparna Chandra has categorised India's practice as *formal* dualism. She writes,

> in the context of India […] formally at least the allocation of the power of assumption of international obligations rests with the Executive, while its domestic implementation requires Parliamentary sanction.[20]

But she also agrees that, at least formally, India follows dualism.

Further, there is an ambiguity as to what is the meaning of international law, as per the Indian constitution. Article 51(a) of the Constitution, titled 'Promotion of international peace and security', provides that:

> The State shall endeavour to:
> (a) promote international peace and security;
> (b) maintain just and honourable relations between nations;
> (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and
> (d) encourage settlement of international disputes by arbitration.

Clause (c) of this article has been the primary source of confusion. It mentions "international law" and "treaty obligations" separately, which gives the impression that they are two separate things. This problem becomes aggravated when the clause is read against Article 38(1) of the Statute of the International Court of Justice, which provides for treaties, customary international law, general principles of law recognised by civilised nations and – as a subsidiary measure – judicial decisions and the teachings of the most highly qualified publicists, as the four sources of international law.[21]

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[19] V.G. Hegde, 'Indian Courts and International Law', *Leiden Journal of International Law*, vol. 23, 2010, pp. 53–77, p. 59.

[20] A. Chandra, 'India and International Law: Formal Dualism, Functional Monism', *Indian Journal of International Law*, vol. 57, 2017, p. 26.

[21] Article 38(1) of the Statute of the International Court of Justice says: The Court, whose function is to decide in accordance with international law such disputes as are submitted to

Therefore, according to Article 38(1) treaties are part of international law. But the Indian Constitution uses them separately.

Another question, which stems from this confusion, is that since Article 51 (a) mentions "international law" and "treaty obligations" separately, does the term "international law" include customary international law or not? C.H. Alexandrowicz,[22] V.S. Mani,[23] B.S. Chimni,[24] V.G. Hegde,[25] Aparna Chandra[26] have all tried to address these problems in some ways or the other but there seems to be no consensus as to how to answer these questions. I will not offer my opinion on these questions here. For the sake of continuity, I will proceed with the argument that India follows dualism in incorporating international law in its domestic structure. This means that when India signs an international treaty, it does not become part of India's domestic law unless a legislation incorporating that treaty is enacted. This mechanism does not apply to the Customary International Law though. As for the incorporation of Customary International Law, the Indian Constitution is silent. Article 253 discussed above only provides for "treaty, agreement or convention". In the *Vellore Citizens Welfare Forum* case,[27] the Indian Supreme Court was dealing with customary international law on environment protection. After citing the Indian legislation on the issue, it noted:

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it, shall apply:

international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

[22] C.H. Alexandrowicz, 'International Law in India', *International and Comparative Law Quarterly*, vol. 1, no. 3, 1952, 289–300.

[23] V.S. Mani, 'Effectuation of International Law in the Municipal Legal Order: The Law and Practice in India', in Ko Swan Sik et al. (eds.), *Asian Yearbook of International Law*, vol. 5, 1997, pp. 145–174.

[24] B.S. Chimni, 'India', in S. Chesterman, H. Owada, B. Saul (eds.), *The Oxford Handbook of International Law in Asia and the Pacific*, Oxford 2019, pp. 552–575.

[25] V.G. Hegde, 'Indian Courts and International Law', *Leiden Journal of International Law*, vol. 23, 2010, p. 59.

[26] A. Chandra, 'India and International Law: Formal Dualism, Functional Monism', *Indian Journal of International Law*, vol. 57 (2017), p. 26.

[27] *Vellore Citizens Welfare Forum vs Union of India & Ors*, 1996 5 SCR 241.

> In view of the above mentioned constitutional and statutory provisions we have no hesitation in holding that the precautionary principle and the polluter pays principle are part of the environmental law of the country. *Even otherwise* once these principles are accepted as part of the Customary International Law there would be no difficultly in accepting them as part of the domestic law. It is almost accepted proposition of law that the rule of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of Law. (emphasis mine)

So, the Supreme Court has made customary international law as part of India's domestic law, almost automatically. Aparna Chandra therefore writes that "India follows the common law tradition of requiring the legislative transformation of treaty obligations, while directly incorporating rules of customary international law."[28]

3. India's international criminal law obligations

International Criminal Law is a very broad category and indeed a disputed one. What amounts to an international crime is a question which does not have one concrete answer.[29] Should it include crimes that shock the conscience of humankind, or should it be limited to crimes crossing territorial borders (transnational crimes)? What makes a crime international? Who can prosecute for the commission of an international crime? Because by nature a crime is international, should it mean that any criminal court of any country can prosecute those crimes (universal jurisdiction)? These questions, albeit relevant, are not necessarily important for my argument. Here, my endeavour

[28] Chandra, 'India and International Law', p. 34.

[29] K.J. Heller, 'What Is an International Crime? (A Revisionist History)', *Harvard International Law Journal*, vol. 58, no. 2, 2017; A. Reisinger Coracini, '"What Is an International Crime?": A Response to Kevin Jon Heller', available at https://harvardilj.org/wp-content/uploads/sites/15/Coracini-Response.pdf; R.A. Wilson, 'What Does International Actually Mean for International Criminal Trials?' in *Writing History in International Criminal Trials*, Cambridge 2011, p. 24.

is to assess whether India's international criminal law obligations are present in its domestic criminal law structure?

But before discussing India's obligations under international criminal law, it is pertinent to delimit which international crimes the chapter will be dealing with. For the purpose of this chapter, international crimes include genocide, crimes against humanity, war crimes and torture.[30] The first three are the crimes included in the Statute of the International Criminal Court (ICC).[31] Article 5 of the Statute lists four crimes, i.e. genocide, crimes against humanity, war crimes, and crime of aggression.[32] The fourth crime, i.e., torture, is prohibited and its prohibition is recognised as a *ius cogens* norm.[33] In this part, I will discuss India's position on each of these crimes.

3.1 Genocide

India co-sponsored the United Assembly General Assembly Resolution 96 (I), on the crime of genocide, along with Panama and Canada.[34] This was done on 11 December 1946, around eight months before India gained independence from United Kingdom. Based on the resolution, around two years later (9 December 1948), the UNGA adopted the Convention on the Prevention

[30] This is a subjective list, but one can easily argue for including piracy, terrorism, enforced disappearance in the list. See Y.M. Dutton, 'Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court', *Chicago Journal of International Law*, vol. 11, no. 1, 2010, Article 8; P.J. Wertheim , 'Should "Grave Crimes of International Terrorism" Be Included in the Jurisdiction of the International Criminal Court?' *Policy and Society*, vol. 22, no. 2, 2003, pp. 1–21.

[31] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, https://www.refworld.org/docid/3ae6b3a84.html (accessed 21.8.2021).

[32] Article 5 is worded thus: 'The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.'

[33] E. de Wet, 'The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law', *European Journal of International Law*, vol. 15, no. 1, February 2004, pp. 97–121.

[34] UN General Assembly, *The Crime of Genocide*, 11 Dec. 1946, A/RES/96, available at https://www.refworld.org/docid/3b00f09753.html (accessed 13.8.2021).

and Punishment of the Crime of Genocide[35] (hereafter: Genocide Convention). The Genocide Convention entered into force on 12 January 1951. India, which led the first UNGA Resolution 96 (I), took another 8 years to ratify the Genocide Convention in 1959.

As per Article 253 of the Indian Constitution discussed earlier, "Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty." It has been 62 years since India ratified the Genocide Convention and the Parliament is yet to make a law implementing the convention.

On 2 March 2016, a question in this regard was asked in the Indian Parliament. MP Avinash Pande asked the Minister of Home Affairs "whether Government is planning to enact any law in conformity with India's obligations under the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, 1948…?"[36] In its reply, the Home Ministry said:

> By acceding to the Convention on the Prevention and Punishment of the Crime of Genocide in 1959, India has recognized genocide as an international crime. The principles embodied in the Convention are part of general International law and therefore already part of common law of India. The provisions of Indian Penal Code including the procedural law (Criminal Procedure Code) provide effective penalties for persons guilty of crime of genocide and take cognizance of the acts which may be otherwise taken to be in the nature of genocide, as culpable offences.[37]

This reply raises many problems, so let me discuss a few. Firstly, the question concerned domestic implementation. So, replying that "India has recognized genocide as an international crime…" does not really answer the question. Also, by moving the UNGA resolution 96 (I) on genocide, India recognised genocide as an international crime way back in 1946, not 1959, as stipulated

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[35] UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948; United Nations, Treaty Series, vol. 78, p. 277, available at https://www.refworld.org/docid/3ae6b3ac0.html (accessed 13.8.2021).

[36] Ministry of Home Affairs, *Rajya Sabha, Unstarred Question No. 718, To be Answered on the 2*nd March*, 2016/PHALGUNA 12, 1937 (SAKA)*.

[37] Ibid.

in the answer. That 1946 resolution notes that "(t)he punishment of crime of genocide is a matter of international concern" and affirmed that "genocide is a crime under international law."[38]

Secondly, the answer makes a confusing claim that "(t)he principles embodied in the Convention are part of general International law and therefore already part of common law of India." In the language of international law, this would be tantamount to saying that India follows monism and any principle of general international law *automatically* becomes part of India's domestic law. As discussed earlier, Article 253 of the Indian Constitution makes it clear that India follows dualism. Hence, the answer is *prima facie* wrong. The parliament has not made any amendment to the said article to date. Therefore, any principle of general international law can only become part of India's domestic law if it has been incorporated through a legislation enacted by the Indian parliament.

Thirdly, it is claimed in the answer that "Indian Penal Code including the procedural law (Criminal Procedure Code) provide effective penalties for persons guilty of crime of genocide…." As discussed earlier, the Indian Penal Code was drafted before the Genocide Convention came into existence. In fact, it was drafted even before the term 'genocide' entered the vocabulary of international law or international criminal law. The IPC was revised in 1971 and 1997, well after India had ratified the Genocide Convention. Yet, 'genocide' is absent from it.

The same is true for the Criminal Procedure Code, which was drafted in the last decade of the 19th century and replaced by a new revised Criminal Procedure Code in 1973, again well after India had ratified the Genocide Convention. Yet, like the Indian Penal Code, it is silent on the crime of genocide. Therefore, for a Member of Parliament to claim then that these laws provide for punishment for the crime of genocide is a serious violation of his constitutional duty.

A Member of Parliament had answered the question on 2 March 2016 by saying that Genocide is already a part of domestic laws of India. Yet, on 17 December 2018, while ruling on mass killings of members of the Sikh

[38] A/RES/96, UN General Assembly, The Crime of Genocide, 11 Dec. 1946, A/RES/96, available at https://www.refworld.org/docid/3b00f09753.html (accessed 13.8.2021).

community in 1984, Justice S. Muralidhar of the Delhi High Court lamented that "neither 'crimes against humanity' nor 'genocide' is part of our domestic law of crime. This loophole needs to be addressed urgently."[39]

Finally, it is stated in the reply that the Indian Penal Code and the Criminal Procedure Code "take cognizance of the acts which may be otherwise taken to be in the nature of genocide, as culpable offences." This a serious misjudgement of the crime of genocide. The reply equates the crime of genocide with other offences punished under the Indian Penal Code, which is wrong considering the serious nature of genocide. Such dilution of the seriousness of the crime "weakens the terrible stigma associated with the crime and demeans the suffering of its victims."[40] William Schabas notes that "(t)he crime of genocide belongs at the apex of the pyramid."[41] With respect to what makes genocide a 'crime of crimes', the Trial Chamber of the International Criminal Tribunal for Rwanda noted that:

> The crime of genocide is unique because of its element of *dolus specialis* (special intent) which requires that the crime be committed with the intent to destroy in whole or in part, a national ethnic, racial or religious group as such; hence the Chamber is of the opinion that genocide constitutes the crime of crimes, which must be taken into account when deciding the sentence.[42]

None of the crimes listed in the Indian Penal Code or, for that matter, in any other criminal laws of India is of the seriousness of genocide. As Schabas noted, genocide is at the top of the pyramid, so it requires its own legislation. The existing provisions of the Indian Penal Code or Criminal Procedure Code does not and *cannot* provide punishment for crime of genocide.

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[39] *State through CBI v Sajjan Kumar & Ors.*, Delhi High Court, Crl.A. 1099/2013 & Connected Matters, 2018, para. 367.6, p. 194.

[40] W.A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd ed., Cambridge 2010, p. 10.

[41] Ibid., pp. 10–11.

[42] *Prosecutor v. Kambanda*, Judgment and Sentence, ICTR-97-23-S, 4 Sept. 1998, para. 16.

3.2 Crimes against humanity

The term "crime against humanity" was first used to describe the atrocities committed by the Ottoman Empire against its Armenian population in 1915. During the Nuremberg Trials, the Nazi war criminals were prosecuted for crimes against humanity and marked the first instance of prosecution for the said crimes. It was included in the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY)[43] and International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (ICTR).[44] Subsequently, crime against humanity was also included in the jurisdiction of the International Criminal Court *via* article 7 of the Rome Statute.

India is not a party to the Rome Statute, so Article 7 of the Rome Statute is not relevant for our discussion. One of the primary reasons why India did not sign the Rome Statute was due to Article 7 on Crime against Humanity. Dilip Lahri, the leader of India's delegation to the Rome Conference has written that Article 7 has

> (b)lurred the legal distinction between normative customary law and treaty obligations, particularly in respect of the definitions of crimes against humanity and their applicability to internal conflicts, placing countries in a position of being forced to acquiesce through the Rome Statutes to provisions of international treaties they have not yet accepted.[45]

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[43] UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993, available at https://www.refworld.org/docid/3dda28414.html (accessed 16.8.2021).

[44] UN Security Council, Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 Oct. 2006), 8 Nov. 1994, available at https://www.refworld.org/docid/3ae6b3952c.html (accessed 16.8.2021).

[45] D. Lahiri, 'Should India Continue to Stay Out of ICC?', *Observer Research Foundation*, 24 Nov. 2010, http://www.orfonline.org/ research/should-india-continue-to-stay-out-of-icc.

This means that the Rome Statute diluted the difference between International Armed Conflict (IAC) and Non-International Armed Conflicts (NIAC). India's position on NIAC has been explained by Haris Jamil.[46] Jamil notes that in the pre-1998 era India was not in favour of NIAC situations being regulated by international law.[47] However, during the time of Rome Statute negotiations, India revised its policy on NIAC and argued that "the ICC should have jurisdiction over acts committed during NIAC only when the State machinery ceases to function."[48]

However, as Haris points out, India's concerns were misplaced. He cites the presence of Principle of Complementarity, among others, as evidence of recognition of a state's sovereignty *vis-a-vis* International Criminal Court's jurisdiction.[49]

Since the Rome Statute has a consent-based framework, if States are not a party to it, they can operate with impunity. This is not the case with the crime of Genocide or War Crimes or Torture, all of which have a treaty independent of the Rome Statute. Therefore, the Working Group of the International Law Commission noted that "a global convention on crimes against humanity appears to be a key missing piece in the current framework of international humanitarian law, international criminal law and international human rights law."[50]

In its 71st session, the International Law Commission adopted the Draft Articles on Prevention and Punishment of Crimes Against Humanity, 2019. On 14 October 2020, at the Sixth Committee of the 75th session of the United Nations General Assembly, India responded to the draft Articles:

> …existing international instruments already accommodate for crimes against humanity as punishable offences. Member States that are parties to the Rome Statute are fully aware of this fact. Our understanding is that *even those*

[46] H. Jamil, 'Critical evaluation of India's position on the Rome Statute', *Indian Journal of International Law*, vol. 57, nos. 3–4 (2017), pp. 411–442.

[47] Ibid., p. 417.

[48] Rome Conference Official Records, vol. 2, supra note 2, 323, as cited in ibid., p. 417.

[49] Ibid., pp. 417–422.

[50] Report of the International Law Commission, 65th Session, Annex II, *Crimes Against Humanity*, p. 93

> *member states that have not yet subscribed to the Rome Statute, their extant national legislations already capture these offences.* (emphasis mine)[51]

India reiterated this concern on 10 October 2022 at the Sixth Committee of the 77th session of the United Nations General Assembly.[52]

While the comment on a parallel regime being created by the Draft Article might have some substance, it is factually incorrect to say that those States who have not signed the Rome Statutes already take care of Crimes against Humanity through their national legislation. Disregarding the sweeping nature of the statement, in the sense that it talks about States (plural) and not just India, it needs scrutiny. India has not signed the Rome Statue and if the Statement is to be believed, its "extant national legislations already capture these offences." But I have failed to find any national legislation in India that even mentions the term "crime against humanity."

The Preamble of the Draft Articles recalls that 'it is the duty of every State to exercise its criminal jurisdiction with respect to crimes against humanity'. In Article 6 it provides for "criminalization under national law", where it provides that "(e)ach State shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law." India, on the other hand, refuses to believe even in the necessity of the Draft Articles. It reiterated its position that "since international mechanisms dealing with the said matter are already in existence, the necessity for an exclusive Convention does not arise…"[53]

In the absence of any provision on crimes against humanity in India's domestic criminal laws, the Delhi High Court, while dealing with mass murder of people of Sikh community in 1984, observed that:

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[51] Statement by Mr. Yedla Umasankar, First secretary/Legal adviser, Permanent Mission of India to the UN on agenda item 81 "Crimes against Humanity" at the Sixth Committee of the 75th session of the United Nations General Assembly, 14 Oct. 2020.

[52] Statement by Dr. Kajal Bhat, Counsellor and Legal adviser, Permanent Mission of India to the UN on agenda item 78 "Crimes against Humanity" at the Sixth Committee of the 75th session of the United Nations General Assembly, 10 Oct. 2022, available at https://pminewyork.gov.in/IndiaatUNGA?id=NDc4Mg (accessed 5.12.2022).

[53] Ibid.

> The Court would like to note that cases of the present kind are indeed extraordinary and require a different approach to be adopted by the Courts. The mass killings of Sikhs between 1st and 4th November 1984 in Delhi and the rest of the country, engineered by political actors with the assistance of the law enforcement agencies, answer the description of "crimes against humanity" that was acknowledged for the first time in a joint declaration by the governments of Britain, Russia and France on 28th May 1915 against the government of Turkey following the large scale killing of Armenians by the Kurds and Turks with the assistance and connivance of the Ottoman administration.[54]

Lamenting over the weak legal system, the Court noted that "neither 'crimes against humanity' nor 'genocide' is part of our domestic law of crime. This loophole needs to be addressed urgently."[55] When the judgment was delivered in 2018, the ILC was still working on the Draft Articles. On this the court said that "India, in view of her experience with the issue, should be able to contribute usefully to the process."[56] The court concluded by observing the problems of dealing with issues of mass crimes under the limited scope of India's domestic criminal legislation. It said that "cases like the present are to be viewed in the larger context of mass crimes that require a different approach." This different approach is, till date, missing in India.

3.3 War crimes

The provisions on war crimes were first codified in the Geneva Conventions of 1949.[57] They are also listed under Article 8 of the Rome Statute. Though India did not sign the Rome Statute, it did sign the Geneva Conventions. In fact, India was the fifth country in the world and the first in its region to ratify the Geneva Conventions. The Geneva Conventions have three Additional

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[54] *State through CBI v Sajjan Kumar & Ors*., para. 367.1, p. 191

[55] Ibid., para. 367.6, p. 194.

[56] Ibid., para. 367.9, p. 197.

[57] International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 Aug. 1949, 75 UNTS 287, available at https://www.refworld.org/docid/3ae6b36d2.html (accessed 19.5.2022).

Protocols.[58] India has signed the third Additional Protocol, but not the first and the second one. The chapter will not go into the details of why India has not signed the first and the second Additional Protocols.[59]

To give effect to its obligations under the Geneva Conventions, India enacted a legislation titled 'Geneva Conventions Act' (1960).[60] The preamble of the Act notes that it is "an Act to enable effect to be given to certain international Conventions done at Geneva on the twelfth day of August, 1949, to which India is a party, and for purposes connected therewith." This Act repealed the Geneva Conventions Act, 1911 and the Geneva Conventions Implementing Act, 1936. Further, it also provides "Punishment for Grave Breaches of Conventions" in section 3.

3.4 Torture

The International Criminal Court does not list Torture as a separate crime. In fact, it lists Torture as one of the Crimes against Humanity. However, even before the Rome Statute of the International Criminal Court was drafted, the crime of Torture had already entered the vocabulary on international law.

The United National General Assembly, through its Resolution 39/46 on 10 December 1984, adopted and opened for signature, ratification and accession the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[61] India signed the convention on 14 October 1997, but it is yet to ratify the convention. It is quite shocking that India is one of

[58] ICRC, Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, available at https://www.refworld.org/docid/3ae6b36b4.html (accessed 19.5.2022).

[59] See S. Burra, *India's Strange Position on the Additional Protocols of 1977*, 5 Feb. 2019, EJIL Talk!, available at https://www.ejiltalk.org/indias-strange-position-on-the-additional-protocols-of-1977 (accessed 13.8.2021).

[60] Geneva Conventions Act, 1960, Act No. 6 of 1960.

[61] UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at https://www.refworld.org/docid/3ae6b3a94.html (accessed 15.8.2021).

the only four nations who are yet to ratify the convention.[62] The other three are Brunei Darussalam, Haiti and Palau.

While signing the convention, India made reservations against Articles 20, 21 and 22, which are regarding inquiry by the Committee against Torture, State Complaints and Individual Complaints.[63] As with the crime of genocide and crimes against humanity, the Indian government's initial stand was that torture is punishable under the Indian Penal Code (despite the code not providing for the crime of torture). Subsequently, the government moved towards having a separate legislation for the crime. It then introduced the Prevention of Torture Bill (2010) in the Lok Sabha (the lower house of the Indian parliament) on 26 April 2010, which passed it on 6 May 2010. When the Bill was introduced in the Rajya Sabha (the upper house), it referred the Bill to a Select Committee for certain amendments. Before the amended Bill could be re-introduced, it lapsed.

The 2010 Bill noted that "India is a signatory to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; (and whereas) it is considered necessary to ratify the said Convention and to provide for more effective implementation." Despite the noble intentions of the drafter, the Bill could not see the light of the day.

The main person behind that Bill was Member of Parliament, Dr. Ashwani Kumar. When the Bill failed in the Parliament, he approached the Supreme Court of India in 2016 with a Writ Petition asking the Court to direct the Central Government to enact a suitable stand-alone, comprehensive legislation against custodial torture…" By the time the matter was taken up by the Court, the Indian Government had asked the LCI "to examine the issue of ratification of UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment and submit a report on the matter."[64]

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[62] See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en.

[63] Law Commission of India, Report No. 273: Implementation of 'United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment' through Legislation, p. 4. While the Report mentions that India had made reservations, the website of the Office of the High Commissioner of Human Rights does not mention the said reservations, see https://indicators.ohchr.org (accessed 25.8.2021).

[64] Law Commission of India, Report No. 273: Implementation of 'United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment' through Legislation, p. 8.

The LCI submitted its report in October 2017 and on 27th November 2017 the Supreme Court dismissed the Writ Petition noting that the Law Commission has already submitted its report which is being seriously considered by the government.

When no immediate action was taken on the report, Dr. Ashwani Kumar again approached the Supreme Court seeking direction for the Legislature to enact a law on Torture. Rejecting the petition this time, the Court observed that:

> We do not think that any such direction can be issued for it would virtually amount to issuing directions to enact laws in conformity with the UN Convention, a power which we do not "possess," while exercising power of judicial review.[65]

Here, I should also discuss the LCI's report. The report is titled "Implementation of 'United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment' through Legislation." It makes six recommendations, the first of which is ratifying the Convention against Torture. The Commission went beyond its call of duty and drafted a legislation too titled "The Prevention of Torture Bill, 2017." It is beyond the scope of the present chapter to discuss the similarities and differences between this bill and that of the "Prevention of Torture Bill, 2010" which was passed in the Lok Sabha. Further, the commission recommended amending existing statutes, punishment for acts of torture, compensation to victims, protection of victims, complainants and witnesses and, waiver of sovereign immunity for state officials when they commit torture.[66]

It has been four years since the report was submitted. So far, not action has been taken by the legislature to make the recommendations of the report a reality.

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[65] *Dr. Ashwani Kumar v Union of India and Others*, Miscellaneous Application No. 2560 of 2018, in Writ Petition (Civil) No. 738 of 2016, para. 33, p. 40.

[66] Law Commission of India, Report No. 273: Implementation of 'United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment' through legislation, pp. 69–71.

Conclusions

An overview of India's attitude towards domesticating its international criminal law obligations reveals a very ambiguous and confused approach. On the one hand, the legislature maintains that India's existing domestic criminal laws already provide punishment for international crimes. Contrary to this claim, as this chapter has shown, none of such domestic laws even define the international crimes, let alone punish them.

On the other hand, and contrary to the legislature, the judiciary has lamented the absence of provisions on international crimes under India's domestic laws. This observation, as this chapter has shown, is true. One wonders why, after ratifying the Genocide convention, India has still not enacted a legislation domesticating the convention.

As highlighted by the Delhi High Court judgment discussed earlier, there have been numerous cases of crimes against humanity in India.[67] Therefore, it becomes even more surprising to see India arguing against the Draft Articles on Crimes Against Humanity. The statement which India made at the discussion of the Draft Articles at an international forum was factually incorrect and so it needs greater scrutiny at the international level.

The case with torture is a bit different than the other two crimes discussed in this chapter, i.e., genocide and crime against humanity. India's approach on torture should be adopted for other international crimes also, as far as it envisions having a standalone law for torture. As discussed earlier, international crimes cannot be equated with or treated at par with domestic crimes and so was noted by the Delhi High Court too in *State through CBI v Sajjan Kumar and Ors*.[68] The court noted that such cases of mass crimes should "be viewed in the larger context of mass crimes that require a different approach."[69]

Like it did with War Crimes in the context of Geneva Conventions, India should have separate legislation for all the international crimes. Since it had already tried (albeit unsuccessfully) to enact one for torture, and the LCI had also suggested to enact one now, that should be the starting point. Based on

[67] *State through CBI v Sajjan Kumar & Ors*., para. 367.6, p. 193.
[68] Ibid.
[69] Ibid., para. 367.6, p. 197.

the model of Prevention of Torture Bill (2010) or of Prevention of Torture Bill (2017), the legislature can subsequently enact legislations for other international crimes too. Inspiration can also be taken from domestication of Geneva Convention which was done *via* the Geneva Conventions Act, 1960.

Moreover, India's position on domesticating international criminal law needs further scrutiny. India has reasoned that since its domestic laws already provide protection against similar crimes, it need not domesticate its international criminal law obligations. This is a wrong position because, in most of the cases, India's domestic laws don't even mention the international crimes, and even when they do, the reference is not in the context of international law. For example, the question asked in the Indian parliament on 2 March 2016 (discussed earlier) also concerned the International Convention on the Elimination of All Forms of Racial Discrimination (1965).[70] In its reply, the Home Ministry stated that

> adequate safeguards exist in the Constitution of India and other legislations expressly prohibiting racial discrimination in all forms. The Constitution of India is widely recognized as a progressive document that provides a comprehensive legal framework for guarantee of human rights. The principles enshrined in the Part-III of the Constitution of India provide legal framework to combat all forms of discrimination including those forms that are based on race, religion, caste, colour and creed.[71]

Equating the protection from racial discrimination under Indian Constitution with that of under International Convention on the Elimination of All Forms of Racial Discrimination (1965) is problematic. Further research is needed on this line of argument taken by India.

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[70] UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 Dec. 1965, United Nations, Treaty Series, vol. 660, p. 195, available at https://www.refworld.org/docid/3ae6b3940.html (accessed 19.5.2022).

[71] Rajya Sabha, Unstarred Question No. 718, To be Answered on 2 March 2016/Phalguna 12, 1937 (Saka), Enacting law in conformity with UN Convention on Genocide and Racial Discrimination.

ISHITA CHAKRABARTY

India's Experience with Mass Crimes: Lessons to Give, Lessons to Take

Introduction

India's decolonisation coincided with the creation of a separate state of Pakistan and a population transfer of unimaginable proportions, formally termed as the "Partition of India". And while it is almost 75 years since the event, the division of India along religious lines still remains relevant today, often invoking violent responses.[1] The body of international law is still perceived as "alien" and Euro-centric, which could be one of the reasons why India never took to the international criminal justice mechanisms – seen as an extension of the larger hegemonic project that is public international law.[2] Yet at the same time, the state has variously used the colonial language of riots to inflict mass crimes upon these partly assimilated, partly foreign civilians within its boundaries.

The reason why this paper focuses on religious minorities to the exclusion of the others is because religion in India has such unique connotations. Even prior to the Partition, the attitude of perceiving Muslims and Christians as a different race and hence foreign to the Indian culture, and the almost forcible assimilation of Sikhs, Jains, and Buddhists, back into the Hindu fold, is widely recorded by political theorists.[3] Events such as the Sikh insurgency in Punjab

[1] R. Thapar, 'Citizenship: The Right to be a Citizen', in *On Citizenship* by R. Thapar et al., New Delhi 2021, p. 19.

[2] On how structure-agency play out in international criminal justice, see M. Klamberg, 'Rebels, The Vanquished, Rogue States and Scapegoats in the Cross-Hairs: Hegemony in International Criminal Justice', in M. Bergsmo et al. (eds.), *Power in International Criminal Justice*, Brussels 2020, pp. 643–644.

[3] T. Fazal, *Nation-State and Minority Rights in India: Comparative Perspectives on Muslim and Sikh Identities*, New York 2014, pp. 18–19.

in a struggle for a separate state of Khalistan, or the anti-occupational struggle in Kashmir, are also premised to a large extent on this religious majority (Hindus) versus minority narrative.[4] Additionally, the Indian Penal Code (IPC), which is the primary code providing for offences and their punishment, has special provisions over promotion of hatred or enmity by member/s of one community towards another, offending (or "outraging") the religious feelings of another or insulting their religious beliefs,[5] defiling places of worship,[6] and insulting with the intention to "breach peace",[7] that implicitly acknowledges the divisive role pluralistic identities could play in the Indian society.

This paper addresses two aspects: firstly, it looks at the adjudicatory roles played by constitutional courts in the event of mass crimes. This analysis is limited to the Supreme Court (SC) and the High Courts (HCs) not only because of easier availability of records, but also because they have the final say on the issue. In India, for instance, the SC's powers extend to the dispensation of "complete justice" – a constitutional mandate that the court has often taken too seriously, earning itself the tag of the state organ with the highest comparative legitimacy. In the course of analysis, the paper looks at whether there exists an inferable pattern of events that come up before the courts for adjudication, what the courts make of these patterns in individual cases, the language used by these courts in the context of a lack of substantive provisions on mass crimes, and their justifications if any, for using stringent or relaxed standards (both evidentiary and sentencing) against the accused.

Secondly, the paper takes cue from these aforementioned patterns to show the political nature of decisions. As will be seen, it is not so much the lack of substantive provisions but their inherently political consequences that impedes the victims' access to justice. It is also suggested here that international obsession with showing of bodily violence and casualty numbers not

[4] Lok Sabha Debates, *Further Discussion Regarding Atrocities Committed on Minorities*, 9 Dec. 1998.

[5] IPC, s. 295A.

[6] Ibid., s. 295.

[7] Ibid., s. 504.

too separate in time and space, fails to capture crimes in the likes of pogroms and ethnic cleansing that often serve as precursors to the larger crimes.[8]

The author adopts a case-narration paradigm. Here, the first section deals with cases where prosecutions were successful, yet belated. The second section deals with cases where prosecutions ended without any logical conclusion, and primarily because of political influences. The final section draws upon this anthology to suggest a change in approach to the substantive tenets of international criminal law.

Before proceeding, it is pertinent to note that the Indian courts have generally prioritised adequate sentencing over an appropriate designation of the crime. This perhaps stems from the belief that both, enhanced sentencing, including the imposition of the death penalty, and the moral approbation that follows from such designation, contribute to the same result – to deter crime.[9] In the absence of substantive provisions, both the victims and the judicial authorities have looked to the Constitution to ease procedural constraints and assume executive powers. In one case the concerned bench termed such cases of institutionally perpetrated crimes as "constitutional criminal" matters.[10] Such nomenclature appears insignificant at first sight, but on a more careful consideration it can be seen as a means to adopt the international framework into the national domain without the legislature or executive's approval. That is, the Indian courts can use such reference to the constitution to legitimise the way they arrive at their decisions.

[8] See M. Sirkin, 'Expanding the Crime of Genocide to Include Ethnic Cleansing: A Return to Established Principles in Light of Contemporary Interpretations', *Seattle University Law Review*, vol. 33, no. 2, 2009; R. DeFalco, 'Time and the Visibility of Slow Atrocity Violence', *International Criminal Law Review*, 20 July 2021.

[9] *Ankush Maruti Shinde and Ors v. State of Maharashtra*, 30 April 2009: "For instance a murder committed due to deep-seated mutual and personal rivalry may not call for penalty of death. But an organised crime or mass murders of innocent people would call for imposition of death sentence as deterrence."

[10] *Extra Judicial Execution Victim v. Union of India and Ors.*, 14 July 2017.

1. The Cases under Scrutiny

1.1 Hashimpura (1987)

In 1987, the northern state of Uttar Pradesh oversaw the infamous Hashimpura massacre, where 42 to 45 Muslims were subjected to mass arrests, packed in trucks, driven to an unknown location, and shot to death, by the Provincial Armed Constabulary (PAC) – a paramilitary body that had been assigned riot control duties on the fateful day. The officials dumped the bodies in a nearby canal, but five of the victims managed to escape. Subsequently, eleven other bodies were recovered.[11]

Two First Information Reports (FIRs) and belatedly submitted charge sheets later, the trial ended in an acquittal of over 19 accused officials, after 28 years. In between, the SC had transferred the proceedings to Delhi, since the local court failed to secure the accused's attendance despite issuing summons over 20 times. The trial commenced in 2006 over charges of participation in an unlawful assembly, kidnapping or abducting in order to commit murder, and causing the disappearance of evidence.[12]

Interestingly, the trial court's recital of the facts, focused on the 'deadly assault on the officials by anti-social elements', to the point of dubbing one act of violence committed by a fringe element as heinous, while trivialising the victims' experiences. This event was used to justify the imposition of riot-control measures, and the indiscriminate arrests of over 644 people within a single residential area, notably, all Muslims.[13] Despite documentary evidence, survivor accounts and testimonies of two police officers, the court concluded that the testimonies while credible, detailed, and corroborative of each other, failed to attribute the offence to the specific PAC officers.[14] In their opinion, the fact that they were last seen in the custody of these officials, did not remove the burden of proof from the prosecution. Moreover, the acquittal of the accused was a direct consequence of "scanty, unreliable" investigations.[15] Notably, the criminal procedure in India does not separate

[11] *Zulfikar Nasir and Ors v. State of Uttar Pradesh & Ors*, 31 Oct. 2018, para 1.2.
[12] Ibid., paras. 1.6, 14–16.
[13] Ibid., paras. 18.1, 22.
[14] Ibid., paras. 22–27.
[15] Ibid., paras. 28–31.

the maintenance of law-and-order functions from the conduct of investigation, often compromising on the latter.[16] The proceedings also do not contemplate the involvement of the victims in what is perceived as a state-led process for punishment of offences against the society.

In 2015, the National Human Rights Commission (NHRC) and the victims filed individual appeals to the Delhi HC, requesting further enquiries, and calling for the production of several documents including attendance registers, logbooks, and previous inquiry commission reports, which had not been submitted before the lower court.[17] The HC observed that the PAC's records for the concerned year had also been weeded out, and the state government failed to offer any explanation over who had ordered such weeding, and on which date.[18] The HC's intervention, allowed these facts to be produced and recorded as "additional evidence."[19]

The two-judge bench of the HC went beyond the arguments advanced to hold that this was an instance of "targeted killing of unarmed, innocent and defenceless members of a particular community", and described the failures on part of the state machinery as "systemic", or a consequence of "institutional bias."[20] The judgement itself began with a background of the residents (Muslim artisans with low incomes), reflecting on the asymmetry of power between them and the assailants,[21] and went further to quote independent studies that showed the lack of trust amongst minorities over policing bodies.[22] It observed that the arrests themselves were unlawful, and the resultant killings were custodial. Under such circumstances, the insistence of a "proof beyond reasonable doubt" standard would be exaggerated – eye-witness evidence is hard to come by, while police officials are wont to lie or they feign ignorance in favour of their colleagues, "bound by the ties of brotherhood."[23] It further clarified that the courts cannot rely exclusively upon the prosecution to bring all facts home, since often the prosecutions are "designedly ineffective".

16 Ibid., para. 105.
17 Ibid., para. 34.
18 Ibid., para. 34 (1)–(3).
19 Ibid., para. 37.
20 Ibid., paras. 1.8, 102.
21 Ibid., para. 1.2.
22 Ibid., paras. 102–103.
23 Ibid., paras. 81–83.

To do so, they would "perpetuate injustice."[24] In its final observations, the court also resorted to the language of international law, observing that the victims' next of kins had the right to know the truth, not only as a part of the right to justice, but as an independent right.[25]

1.2 Enforced Disappearances and Extra-Judicial Killings (EJKs) in Punjab

The second issue involves two intertwined cases: the enforced disappearance and EJKs of over 1,500 Sikhs (in one administrative district alone) by police officials in Punjab during the insurgency period, and the EJK of a noted Sikh activist, Jaswant Singh Khalra, who first brought this matter to the attention of the courts.[26] The investigation of the former, actually arose when a SC judge was notified of the activist's abduction, over a telegram. The SC treated the letter as a *habeas corpus* petition and issued notices to the concerned state authorities.

This case is markedly different from the previous case – post issuance of notice, the advocate general of the state, assured the court that the accused police officials would be transferred out of the district, and it was agreed that the central investigation agency, the CBI, would conduct the investigation, and the SC would oversee it. In the absence of any victim protection schemes, the SC also directed the state to provide protection to the victims.[27]

In 2007, the accused, all convicted by the trial court (upheld by the HC) for entering into a conspiracy and committing offences of kidnapping or abduction with the purpose of committing murder, and the subsequent destruction of evidence, appealed for their acquittal. At the same time, the next of kins appealed to the court for the imposition of a higher sentence.[28] In its decision, the SC gave an account of police violence in India, describing it as commonplace, and highlighted the necessity in cases of custodial violence to

[24] Ibid., paras. 96–100.
[25] Ibid., para. 111.
[26] *Prithipal Singh v. State of Punjab & Anr.*, 4 Nov. 2011, paras. 2.A–2.C, 31.
[27] Ibid., para. 31.
[28] Ibid., para. 1.

shift the burden of proof upon the accused, once the initial factum of custody is proved and violence or death follows soon after.[29] In its opinion, Article 21 of the Constitution (asserting the right to life), includes a prohibition on cruel, inhuman and degrading treatment.[30] The SC also confirmed the power of constitutional courts to *suo motu* enhance sentences upon revisions or appeals in "appropriate cases", and after providing the accused an opportunity to challenge the same. In its opinion, the tolerance of these actions would deter the rule of law – again, a constitutionally protected objective.

This case marked how the court, in the absence of substantive or procedural guidance, broadened the investigation's mandate to consider allied facts (of EJKs and disappearances across the state) and directed the state to register and proceed against these "heinous crimes." It also illustrated that the resolution of mass crimes before domestic courts, is a direct function of the level of state machinery that was implicated in them (low level officials or higher leaders), and consequently, the level of political will.

1.3 Sikh "Genocide" (1984)

The Sikh genocide orchestrated across different areas within the capital city, Delhi, and more largely across India, followed the assassination of then Prime Minister Indira Gandhi, by her two Sikh bodyguards. In Delhi alone, over 2,000 Sikhs had been killed in three days of violence, which started off as an "unlawful assembly", a "riot." Sikh males were dragged out of their houses and burnt to death. Sikh residences were looted, and then destroyed, male members were hit or forced to wear rubber tyres around their necks after which they were set on fire, places of worship and the *guru granth* (holy book) were defiled, set ablaze, and destroyed.[31] The violence continued in full sight of police officials who either refused to intervene, or actively participated in the offence. One of the principal accused persons in these cases was then Congress leader, Sajjan Kumar. Kumar presided over the raging mobs, instigated

[29] Ibid., paras. 10–11, 19, 25.
[30] Ibid., para. 8.
[31] *State Through CBI v. Sajjan Kumar & Ors.*, 17 Dec. 2018, paras. 54–58.

them, and also addressed them *post factum* not to leave a single Sikh alive.[32] In 2013, the trial court convicted all of the accused, except Kumar, on charges of entering into and executing a conspiracy to commit murder, and using fire or explosives intentionally to destroy houses (residential/place of worship). Kumar was acquitted of all charges.

Nonetheless, prior to the 2013 trial, proceedings had commenced on two separate occasions, only to end in failure.[33] More importantly, this was the same time when the concerned party, of whom the accused were high level members, was in power at the Centre. Several high-level committees were set up, but then replaced by others.[34] When the case came up on appeal before the Delhi HC's two-judge bench, circumstances had changed – a different political party was now in power at the central and the state levels.

The last commission had suggested that any proceedings should be ideally limited to those instances where the victims specifically named the accused, but the police did not include them in the charge sheets submitted to the magistrate, or those where they submitted a closure report to the magistrate (indicating its opinion that there was no *prima facie* case to proceed) despite the existence of such material.[35] The report caused an uproar in the parliament, and the then Minister of Home Affairs (2005) promised to hand over further investigation to the CBI.[36] In 2010, the charge sheets were filed. But at the trial, the court while finding the victims credible held that their accounts only proved a riotous mob armed with deadly weapons, and not the attacks over gurudwaras or burning of properties.[37] The court had even recognised how the investigations themselves were compromised – statements were not recorded, damages only cited without any records of killings, and separate FIRs were not registered. Despite this, it went on to reduce the credibility of the victims' testimonies.[38]

[32] Ibid., para 178.
[33] Ibid., para. 44.
[34] Ibid., paras. 43–45.
[35] Ibid., para. 48.
[36] Ibid., paras. 49–51.
[37] Ibid., paras. 65, 217.
[38] Ibid., para. 61.

The Delhi HC refused to side with the accused, citing the "extraordinary" background to the events, including the police's "apathy and active connivance" in failing at its statutory obligations,[39] and the high political stature enjoyed by the accused.[40] It lamented the lack of any witness protection schemes which have a direct repercussion for the proceedings – those with information either refuse to come forward, or turn hostile, and the courts are left only with the victims' accounts.[41] The court opined that it is the responsibility of courts to "innovate" so as to move beyond administration of law, to the dispensation of justice.[42] It derided the previous reports that described the event as "spontaneous"[43] and held that the very nature of the attacks proves that there existed a conspiracy to spur it into action – the perpetrators were armed, knew the properties that had to be targeted. The witnesses also claimed to have seen the same perpetrators before, moving across the residential areas. The attacks had a pattern to them, were communal (targeting only one community, their places of worship) and in a manner that showed their confidence, that there would be no consequences.[44]

Innovation, it said, innovate, it did. The criminal conspiracy is similar to the joint criminal enterprise theory before the international chambers. Under Indian law, not just the crime committed upon such conspiracy, but the conspiracy (agreement) itself is punishable. The court agreed that such agreements are made in private and hard to prove, but nevertheless, are inferable through the circumstances and the past and present conduct of the accused.[45] The final leg of the judgement dealt with the concepts of "genocide" and "crimes against humanity" without qualifying this act specifically as either or both of them. Nevertheless, it did become the first judgement to lament the lack of substantive laws on addressing mass crimes.[46]

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39 Ibid., paras. 136–149.
40 Ibid., paras. 154.1, 154.2, 155.
41 Ibid., paras. 176–177.
42 Ibid., para. 150.
43 Ibid., para. 154.5.
44 Ibid., paras. 282–289.
45 Ibid., paras. 290–296.
46 Ibid., paras. 367.6, 367.9.

2. The Case That Fell Through

2.1 Gujarat "Genocide" (2002)

The Gujarat anti-Muslim massacre followed the burning of a train at the Godhra station in Gujarat, carrying Hindu *karsevaks* (religious fanatics), who were in favour of building a temple over the same spot where a 16th-century mosque once stood (demolished in 1992), believing that the land was the mythical birthplace of the Hindu lord Rama. Over 50 Hindus died in the fire, and the immediate suspicion fell upon the Muslim community. The Hindu fanatics retorted by carrying out simultaneous attacks across the state. By the end of the violence, the death toll stood at over 2,000 (700 according to official figures). Ehsan Jafri (Congress leader and an MP) and Bilkis Bano, who were burnt to death and subjected to gang rapes respectively, became some of the faces of the massacre.[47] The cases were divided according to the major areas where they were perpetrated (Gulbarg Society, Naroda Patiya, Naroda Gam, etc.) and a few of them have been surmised below.

a. Best Bakery

In 2002, an "unruly mob" burnt down the Best Bakery, killing over 14 people, during the anti-Muslim massacre across the state. Zahira Habibullah, an eyewitness to the killings, became the main complainant, naming 21 accused. In 2003, the trial court acquitted all the accused, and the Gujarat HC upheld the acquittals, refusing victims' requests for retrial or leading further evidence. Zahira and the rest of the victims alleged that they were coerced into turning hostile, including by a BJP MP, and the investigations were carried with the objective of protecting the accused. The trial was held behind closed doors, witnesses who accused specific individuals were dropped or declared unfit. When the appeals were brought to the HC, the HC refused to allow any affidavits from the victims that would have explained the outcomes at trial.

[47] *Whether This Case Involves a Substantial Question of Law v. Special Investigation Team*, 5 Oct. 2017, para 2.2.

At the same time, it went on to malign the victims' affiliations by claiming that they were being led by "persons with oblique motives."[48]

In 2004, the SC heard a consolidated set of appeals filed by Zahira, and another set by the state government, against the acquittal of the accused. The latter's move appeared as eyewash in the midst of allegations of participation and only done because it was theoretically supposed to represent the victims. The SC too, noted, that the appeal was shabbily framed. Additionally, it observed that the prosecutor for the case acted like a defence counsel, while the trial court did not exercise its powers to elicit the truth, acting merely as an onlooker. Finally, it criticized the HC's attitude as lacking judiciousness.[49]

b. NHRC petition

In 2008, the SC ordered the constitution of a special investigation team (SIT) to further investigate allegations, which the state police had "closed." It directed the SIT to submit progress in 9 of such cases within a specific period. Following its predecessors, the SC emphasised the importance of witness protection schemes, appointment of competent public prosecutors and fair trial – a standard which could only be met if the courts did not "play into the hands" of a faulty investigation or prosecution. Rather, it reiterated that it is the duty of the courts to sieve through materials, to gather credible portions.[50] To bolster its observations, the court cited examples of proceedings before the international criminal courts and within comparative jurisdictions.[51] However, it gave priority to the "inspiring [of] public confidence" – indicating that the courts realise their perceptions before the public and they seek to uphold it as such.[52] Perhaps apprehensive of the proceedings' fate – if it were left to the state to appoint prosecutors – the court directed the SIT members themselves, to appoint a special public prosecutor. It left it to the SIT to appoint trusted officials for victims' protection where they so requested, securing their safe passage and alternate accommodation – if need be, even

48 *Zahira Habibulla H Sheikh & Anr. v. State of Gujarat & Ors.*, 12 April 2004.
49 Ibid.
50 *NHRC v. State of Gujarat & Ors.*, 1 May 2009, paras. 4, 5, 7.
51 Ibid., paras. 16–20, 35.
52 Ibid., para. 7.

outside the state. Finally, it ordered the setting up of fast-track courts led by high judicial officers and proceeding on an everyday basis, *considering the history of the litigation*.[53]

The only drawback to this decision was perhaps the bench's observation recording its satisfaction with the number of witnesses being called, and the number of those charge-sheeted – using these as metrics for the SIT's performance.[54] In 2012, the SIT submitted a 'closure report', without even supplying the necessary documents for rebuttal to the victims, and the magistrate's court deemed it fit to close the case in 2013.[55]

c. Gulbarg Society massacre

In 2006, Zakia Jafri, the wife of victim Ehsan Jafri, sought to file a complaint against 62 political leaders alleging a conspiracy and imputing aiding-abetting roles to them. Jafri's petition again evoked the constitutional language but was unique in the way it interpreted constitutional obligations – appealing that the participation of these actors who used the state machinery, exhibited a failure of governance, and questioned the legitimacy of a government that used force against its own civilians.[56] This case marked the backsliding in the court's record on mass crimes adjudication.

The highest police official refused to record Jafri's complaint, and on appeal, the HC rebuked her for approaching it with a mere "private complaint for cases already underway", without acknowledging that the charges made by Jafri and the ones underway were substantially different. The court asked her to go back to the same mechanism that refused to record her complaint.[57] On appeal to the SC, her petition was clubbed with the NHRC's previous petition requesting an SIT investigation and retrial.[58]

When Jafri appealed to the Gujarat HC against the 2013 closure order, the bench referred to the SC's order over retrial stating that the court's job is

[53] Ibid., paras. 36, 46.
[54] Ibid., para. 3.
[55] *Whether this Case*, paras 4.6–5, 10.
[56] Ibid., paras. 2.3, 2.4.
[57] Ibid., paras. 2.5, 2.7, 9.
[58] Ibid., para. 4.0.

limited to the integrity of the process, and "not with the merit", and thus its came to an end upon submission of any closure report.[59] Jafri's plea that the magistrate's court did not take account of documentary evidence, including speeches given by then chief minister Narendra Modi, testimonies of former police officials, sting operations, were all rejected. The magistrate had essentially conducted a mini trial at the stage of commencing trial.[60]

More importantly, unlike the Sajjan Kumar case, the HC refused to look into conspiracy on a larger scale and confined examination only to conspiracy within the Gulbarg society.[61] The HC was convinced that hundreds of guilty persons had already been convicted, and supposedly the trial of the case had contributed to "separation and fundamentalist tendencies."[62] In other words, the conviction of ground level perpetrators served its aesthetics for the court. The outcome seems inferable with the way in which the bench hailed Modi's attempts at "appealing for peace" and attacked the credibility of all those who had deposed against him.[63]

3. Lessons from India

Gujarat was certainly not the last – while the cases were still being adjudicated, the state saw violence in Muzaffarnagar (2013) and Delhi (2020) again targeting its Muslim population. The former event displaced close to 75,000 while the number of casualties rose to 100.[64] The latter saw about 2,000 displaced and over 50 dead. In an article for AlJazeera, I have argued that the latter was nothing short of a pogrom.[65] Both these phenomena, as before, arose from the stirring of communal sentiments amongst religious communities in already

[59] Ibid., para. 4.5.
[60] Ibid., paras. 6–7.
[61] Ibid., para. 13.
[62] Ibid., para. 16.2.
[63] Ibid., paras. 11, 14.
[64] H. Mander et al., 'Wages of Communal Violence in Muzzaffarnagar and Shamli', Economic and Political Weekly, vol. 51, no. 43, 2016, pp. 39–45, JSTOR, http://www.jstor.org/stable/4416584.
[65] A. Khan, I. Chakrabarty, 'Why the 2020 Violence in Delhi Was a Pogrom', *AlJazeera*, 24 Feb. 2021, https://www.aljazeera.com/opinions/2021/2/24/why-the-2020-violence-in-delhi-was-a-pogrom.

fractured societies, and for political purposes. The usual tropes of "love jihad" – a bogey that Muslim men lure Hindu women in order to proselytize them and procreate more Muslims to change India's originally Hindu demography, or that all Muslims have their allegiance towards Pakistan or Bangladesh – were used to dehumanise the community and desensitise the population to atrocities. Both events saw the active participation of the state machinery and ended with a re-framing of the entire situation to suit the dominant community's perspective. Victims were threatened to retract statements, and in several instances charges were filed against them, accusing them of promoting disharmony and engaging in a "conspiracy" to remove the lawfully instated government. This is not new: for instance, post-Gujarat violence, several individuals (overwhelmingly Muslims) were charged under draconian counter-terror laws, for allegedly conspiring to kill senior state officials.

Just as in the Gujarat case, the judiciary failed to offer any relief in these two instances. In fact, following the Delhi violence one of the judges presiding over the matter who decided to offer any relief to the victims – by playing the videos of hate speeches that immediately preceded the Delhi pogrom in open court, inquiring why no charges were framed against the perpetrators – was abruptly transferred.[66] The message that any intervention critical of the ruling party's political ambitions would have professional repercussions, was clearly articulated. Another memo in circulation around the same time directed investigating officials to refrain from arresting Hindus because it was leading to resentment amongst the community members. The court while taking notice of this official document, refused to intervene since in its opinion, there was little to prove that any prejudice occurred in fact.[67] This was despite the fact, that an overwhelming number of those arrested – and who subsequently failed to secure bail despite a lack of prima facie material against them – were Muslims. These examples prove that resort to national courts may not be the best option, especially where one state organ is involved in the perpetration of the act, and the other while not involved during the commission of the fact, subsequently falls to majoritarian sentiments.

[66] Citizens Against Hate, *Darkness at Noon: Incitement to Violence, Obfuscation and Perversion of Justice in Delhi*, 2021, p. 62.

[67] Ibid., pp. 68–69.

In this paper, I have consciously avoided qualifying these incidences into one of the international crimes for multi-fold reasons. Firstly, although international criminal jurisprudence has previously held areas as small as a municipality to constitute the contextual element ("widespread") for the purposes of the element of CAH, there is little jurisprudence outside the context of failed and post-conflict states, and dictatorships, to provide such material basis (for a "widespread and systematic nature of attack").[68] Further, a question arises whether the Indian domestic system, officially categorised as a democracy, will be able to rebut the presumption that it can effectively prosecute such cases.

Secondly, on a more substantive level, international criminality is associated with an element of 'shock' that fails to appreciate that mass murders and physical violence are crimes that fall at the end of the spectrum. As one scholar notes, international crimes are very often juxtaposed against events in Nazi-era Germany or Rwanda.[69] State actors, on the contrary, use organisational authority that does not require them to directly participate in crime perpetration.[70] In several cases, only one department might be motivated to directly act, while the other might omit to take any actions. But, as Professor Margaret deGuzman notes, the jurisprudence over commission through omission is scant, when compared to cases of action as commission.[71] The *Hashimpura* incident falls within this conundrum, where the trial court adjudged the PAC's actions as a one-off incident, not motivated by externalities. Similarly, in Gujarat, the state government – despite intelligence – is known to have allowed Hindus to "vent," omitting to bring in reinforcements for three days.[72]

As an example of organisational power, one could also evaluate the case of Myanmar where the external appearance of democratic processes such as regular conduct of elections, hid the large-scale suffering inflicted upon the ethnic minorities, including through the enactment of legislations that

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[68] M. deGuzman, 'Systemic Racist Police Brutality Shocks the Conscience of Humanity, but Is It an International Crime?', *Just Security*, 11 July 2020, https://www.justsecurity.org/71255/systemic-racist-police-brutality-shocks-the-conscience-of-humanity-but-is-it-an-international-crime.

[69] DeFalco, 'Time and Visibility', p. 6.

[70] Ibid., pp. 7–8.

[71] deGuzman, 'Systemic Racist Police Brutality'.

[72] 'We Have No Orders to Save You', *Human Rights Watch*, vol. 14, no. 3(C), April 2002, pp. 5, 21, https://www.hrw.org/reports/2002/india/gujarat.pdf.

deprived them of sustenance.[73] Professor deGuzman observes that it is easy to classify certain acts as amounting to international crimes, but international definitions may fail to capture them.[74] The violence in Muzaffarnagar, or Delhi, while not so spectacular within the international imagination, nevertheless managed to displace several thousands. The two events saw open exhortations to kill or forcibly effect the displacement of minorities ("musalmaan ke do hi sthaan, Pakistan ya kabristan", which roughly translates as "Muslims belong either within graves, or in Pakistan"). Several individuals who had not been formerly displaced, subsequently moved outwards, while those remaining, continue to live in terror. While these instances would ideally suffice to constitute ethnic cleansing, it is doubtful if they could legally qualify as "genocide" – it could be argued on behalf of the accused that there existed no specific intent to destroy the group in whole or as a part, but only a political intent to constitute an ethnically homogenous Hindu-state. This again is problematic, since it draws an arbitrary distinction between the intent to destroy and the intent to achieve a homogenous territory, ignoring that the ultimate intention is to deny collectives the right to exist.[75] As the current jurisprudence stands, ethnic cleansing can be used as evidence of genocide, not genocide *per se* – currently, it only bears the stigma associated with the CAH of forcible displacement, or persecution.[76]

deGuzman, on the contrary, argues that international criminal jurisprudence is not too far removed from moral considerations, and thus must acknowledge these un-spectacular crimes.[77]

Moreover, the nature of attack contemplated typically is also one that is aligned in temporal and spatial terms. As Professor Randle DeFalco argues, the traditional understanding of ICL not only prioritises certain crimes over others, but also obscures its point of origin.[78]

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[73] A.B. Plunkett, 'Democratization as a Protective Layering for Crimes against Humanity, the Case of Myanmar', *Genocide Studies and Prevention: An International Journal*, vol. 14, no. 3, 2020.

[74] deGuzman, 'Systemic Racist Police Brutality'.

[75] Sirkin, 'Expanding the Crime', p. 501.

[76] Ibid., p. 502.

[77] deGuzman, 'Systemic Racist Police Brutality'.

[78] DeFalco, 'Time and the Visibility', p. 3.

In the case of situations classed as "riots", arguing that an international crime is underway becomes particularly tenuous since the ordinary presumption is that the state enjoys sovereignty in matters of use of force, to control "law and order" or "public order" situations. But political theorists, including Ashutosh Varshney and Paul Brass, who have extensively worked on Hindu-Muslim violence in post-independence India, argue that the frequent riots are a product of "institutionalised riot systems" that are operated by state officials. In brief, the word "riot" is inappropriate in the Indian context, since the state is almost always an active participant.[79] Others have extended this argument to conclude that the term 'riot' is deficient, both legally and politically. In criminal law discourse, the term diminishes mental culpability, and represents violence as a collective and unpremeditated response to a triggering act.[80] To the contrary, "riots" in India have identifiable patterns – direct perpetrators are often brought into residential communities from outside, armed; they are almost always instigated by local political leaders and possess extensive prior knowledge regarding their targets through official sources.

I have already given an account of the physical violence in India – but the bodily violence that the international order seems to emphasise, discounts the civic attacks that usually accompany or precede them. The latest episode of violence in Delhi, for instance, followed months of protests led primarily by the Muslim community against the implementation of the citizenship act that excludes Muslims from naturalisation. In Assam, the determination of citizenship has seen mass statelessness, of the state's Muslim population, who are readily inferred as Bangladeshis. The enactment of such a legislation through majoritarian control over the parliament, along with political statements, gave credible reasons for apprehending that the statelessness would be repeated on an all-India scale. Previously, legislations have been weaponised to use them against the male members of the community, including through the criminalisation of divorce, and the use of criminal laws against victims of lynching by private mobs and allies of the Hindu nationalist party.

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[79] R. Dhattiwala, M. Biggs, 'The Political Logic of Ethnic Violence: The Anti-Muslim Pogrom in Gujarat', *Politics and Society*, vol. 40, no. 4, 2012, pp. 2–6.

[80] J. Gupte, *What's Civil About Intergroup Violence? Five Inadequacies of Communal and Ethnic Constructs of Urban Riots*, Brighton 2012, pp. 2–4, 11.

These "isolated" and "sporadic" acts that the international order omits to see, in fact provide a lens to examine the genesis of a mass atrocity event, or can constitute the multiple means through which mass crimes are perpetrated.[81] Time is of essence, and the international community's hesitation to move beyond legalism, often frustrates its own undertakings, for instance, under the responsibility to protect doctrine, where states commit to protect populations from atrocity crimes.[82] This responsibility clearly goes beyond the prosecution of offences, although the atrocity crimes that warrant such protection related intervention, definitionally speaking, coincide with the material jurisdiction of the International Criminal Court.

Conclusions

India's lack of a substantive legislative framework on mass crimes has had its own shortcomings: absence of guidelines on how to proceed and what reliefs to offer, withdrawal of immunity that state officials enjoy, and so forth. But the SC and the HC have somehow managed to dispense justice by reverting to the Constitutional principles, alongside oblique references to the international order, and by resorting to higher sentencing to serve as a deterrent. Nevertheless, the case of Gujarat and, more recently, Delhi would show how political these adjudications can be – how their success is contingent on the regime in power. Thus, it is not so much the substantive provisions but the political nature of these adjudications that have deterred victims' rights to access justice.

To put it in other words, the ideal (and rather optimistic) recommendation would be to push states towards enacting legislations addressing mass crimes and effectively enforcing them. However, where such legislations are unavailable, domestic courts must step in to "innovate" as Justice Muralidhar and Justice Vinod Goel put it in the *Sajjan Kumar* case, to dispense justice. Towards this purpose, courts can take recourse to existing provisions such as the right to life or the right to access legal remedies, to intervene in order

[81] D. Scheffer, 'Genocide and Atrocity Crimes', *Genocide Studies and Prevention: An International Journal*, vol. 1, no. 3, 2006, pp. 229–239.

[82] D. Kuwali, 'Old Crimes New Paradigms', in R.I. Rotberg (ed.), *Mass Atrocity Crimes Preventing Future Outrages*, Cambridge, MA–Washington, DC 2010, p. 29.

to direct law enforcement officials to register complaints and investigate or direct the state to afford witness protection and award interim compensation, to lower the standard of proof where there is overwhelming documentary evidence, and to monitor the overall process. However, substantive legislations by themselves do not guarantee success. At the present point, courts that were the last bastion of hope for many in India, have become increasingly politicised – taking stances in support of the existing government either for ideological reasons, or for favourable prospects, such as securing in-service or post-retirement benefits.[83] Under these situations, victims have become more inclined towards turning to international mechanisms – as seen most prominently in advocacy efforts.[84]

For the international regime, there are both substantive cues to take for improving the ICL regime itself, and for seeing that "the most serious crimes of concern to the international community as a whole do not go unpunished." Taking cue from the cases above, the paper raises the point that the understanding of international crimes must not be so limited. Rather, as the Indian case shows, situations categorised as mere internal disturbances, riots, or the like, and the state's defence where casualties were but few, could be only an excuse to avert international scrutiny. Indian journalist and human rights activist, Fatima Khan, perhaps best captures this when she documents how targeted attacks against religious communities have been moving from one violent event on a large-scale, to sustained "everyday communalisms."[85] Following this argument, the international community must be receptive to

[83] M. Sebastien, 'How Has the Supreme Court Fared During the Modi Years?', *The Wire*, 12 April 2019, https://thewire.in/law/supreme-court-modi-years.

[84] The increasing advocacy efforts have also sought to be curtailed by the present regime for instance, through the invocation of violation of the Foreign Contributions Regulation Act (FCRA). Using such arguments, the state has suspended licenses and criminalized operations of several prominent human rights organisations in India, like the Amnesty International India, Greenpeace International. In other cases, individual activists have also been stopped from attending periodic review meetings of the HRC for instance. See Joint Submission of the Front Line Defenders, FIDH and OMCT, 41st Session of the Working Group on the Universal Periodic Review UN Human Rights Council 2022; 'Arbitrary Travel Restrictions, Harassment of Activists and Targeting of Journalists in India', *Civicus Monitor*, 15 April 2022, https://monitor.civicus.org/updates/2022/04/15/arbitrary-travel-restrictions-harassment-activists-and-targeting-journalists-india.

[85] F. Khan, 'How a Hindu Woman's Death Became a Pretext for Attacking Muslims in Agra', *The Quint*, 2022.

advocacy efforts and push beyond the state narrative that usually precludes for instance, interventions on the principle of complementarity which prioritises domestic redressal efforts in the first place, and state sovereignty which exempts state officials from standing before domestic courts of other countries.[86] Considering the shortcomings and inhibitions within the broader international law regime itself over bringing such state officials to account, diplomatic efforts should be pursued by the international community at the same time, convincing the state to respect and protect human rights.

[86] For instance, see Laura Clarke, 'Complementarity as Politics', *St John's Journal of International and Comparative Law*, vol. 2, no. 2, 2012, pp. 38–65, discussing how complementarity practices prior to its codification as a legal doctrine in the Rome Statute was historically premised on examination of contextual situations such as international order and stability (through means of cooperation for example) and domestic conditions which could directly impact international stability, and finally, on fears of being held to account themselves individually.

AYESHA JAWAD
SADIA FAROOQ

Pakistan's Criminal Law and Its Compliance with International Standards

Introduction

Ethnic and sectarian conflicts have pervaded world politics for several decades. These are conflicts in which the goals of the parties involved are defined in ethno-linguistic terms.[1] The available literature on such conflicts appears to present two explanatory approaches for their occurrence. The first approach is rooted in primordialism, which argues that such conflicts emerge due to accumulated hatred between cultures, groups, and nations. It endorses the argument that it is basic human instinct to define a group as "another."[2]

Alternatively, many historians have argued that violent conflict stems from security conundrums. The focus of this theory is not on "individual identity or collectively exclusivity" as is predominant in the primordial approach. On the contrary, the argument identifies the significance of institutions in maintaining social order. This approach suggests that in the absence of strong governmental institutions anarchy will prevail. In this struggle, the dominant groups may take measures to render other groups insecure and weak, and thus create this cycle of threats, fuel fear and foment constant battle for security and preservation of life.

Pakistan's genesis lay in religious homogeneity; however, it paid a heavy price for igniting regional and ethnic aspirations following the insufficient

[1] R. Khan, 'Sources of Ethnic Conflict', *The News on Sunday*, 15 March 2020, https://www.thenews.com.pk/tns/detail/629102-sources-of-ethnic-conflict#:~:text=Ethnic%20conflict%20arises%20if%20two,the%20group's%20identity%20and%20culture.

[2] B. Crawford, R. Lipschutz (eds.), 'The Myth of "Ethnic Conflict": Politics, Economics and Cultural Violence', Berkeley 1998, available at https://escholarship.org/content/qt7hc733q3/qt7hc733q3_noSplash_0b1b9a891995e4785aff98a42ac660a9.pdf.

legal regime and defective, criminal system of response. Here is the case in point: the separation of East Pakistan in 1971. Furthermore, the religious homogeneity led to systematic radicalization of the masses. Combined with the absence of a stable democratic government, these challenges created an imbalance in Pakistan's security system.

Since its inception, Pakistan has faced ethnic and sectarian conflicts along with the rise in religious extremism. However, irrespective of such crises, Pakistan legislative structure is weak not only substantively but also procedurally. Criminal legislative regime in Pakistan is not equipped to deal with the crimes of genocide, crimes against humanity, etc.

The focus of this research paper is on the ongoing ethnic and sectarian conflict in Pakistan which has taken the form of genocide against the resident Hazara community.

1. International obligations on the prevention and punishment of genocide

The primary treatise on the international obligation to prevent genocide is the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 (Genocide Convention), which was among the first documents in which the UN and member states recognized genocide as an international crime, imposing both positive and negative obligations to prevent and prosecute the same.

Genocide is defined as the "intentional destruction of any *national, ethnical, racial or religious group*" (Article 2, emphasis mine). Amongst the set of actions proscribed under the Genocide Convention, the following are deemed constitutive of genocide: "killing members of the group, causing them serious physical or mental harm, imposing conditions of life calculated to bring about their physical destruction, taking measures intended to prevent births within the group, and transferring children from one group to another".

The Genocide Convention goes beyond punishing the act of genocide to cover other elements of the crime, which includes a direct and public incitement, a conspiracy and an attempt to commit genocide and/or complicity in genocide (Article 3).

As far as the trial of the crime of genocide is concerned, pursuant to Article 6 of the Genocide Convention, a competent tribunal of the states where the act was committed shall have the jurisdiction to try the accused or by any such international tribunal agreed by the contracting parties.

This Convention is an ambitious piece of legislation since it was drafted following the General Assembly Resolution 180(II) of 21 December 1947, which clearly stipulated that genocide is an international crime, entailing national and international responsibility on the part of individuals and states.

Moreover, in addition to carrying responsibility for the prosecution of perpetrators of the crime of genocide, states are obliged to prevent any commission of genocide.

However, the problem with the Convention lies in its enforcement provisions. Domestically, the Convention presupposes the existence of and/or the incorporation of relevant domestic legislation with adequate penal sanctions (Article 5),[3] and international control through the United Nations and the International Court of Justice (Articles 8–9).

It is worth noting that the Genocide Convention introduces and allows for state discretion in adopting national legislation by the use of the words "necessary legislation" (Article 5).

In addition to the above, Article 6 of the Genocide Convention prescribes that the jurisdiction of the offence of genocide would be confined on a territorial basis (Article 6). This necessarily calls for strong domestic institutional structures, effective to suppress genocidal eruptions in a state.[4]

It is worth mentioning that the Genocide Convention in itself has inherent flaws regarding enforcement, some of which are explored below.

The "intent" requirement under the Genocide Convention is problematic. The definition of genocide is the intention to kill/destroy a group of people. While the Genocide Convention does not require a strict interpretation of its provisions, the general approach to this subjective element of "intent" is one of "specific intent." This automatically imposes a high threshold.

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[3] The same requires that States pass "necessary legislation to give effect" to the Genocide Convention's provisions.

[4] 'Genocide: A Commentary on the Convention', *The Yale Law Journal*, vol. 58, 1948–1949, pp. 1142–1160, https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4830&context=ylj.

Secondly, the scope of the definition of genocide is limited, as it only caters for groups based on "ethnic, national, racial or religious" categories. It does not however take into account social and political groups. This is problematic in light of historic events, such as the Nazi extermination of homosexuals based on their sexual orientation, or the extermination of mentally ill Germans.

In addition to the above, it appears that economic development/interests are prioritized as opposed to giving effect to the obligations carried out under the Genocide Convention. For example, the Sudanese military and ethnic Arab militia has been conducting a genocidal campaign against non-Arab ethnic groups in Darfur since 2003. Despite having the mandate to impose sanctions on the Sudanese government, the UN Security Council failed to do so. This is partly because of China's strategic position on the Council[5] and the economic interest that China has in Sudan.

A state's compliance with international law obligations is also heavily influenced by its individual political agendas, such as the security conundrum. States are often seen to take measures on the basis of "self-defense" and "necessity" to justify their actions. Interestingly, at times, states have completely ignored a genocidal conflict in cases where the ongoing conflict had no significant impact on their national security concerns or economic goals. This was the case in 1994 when Rwanda was caught in a genocidal conflict and the United Nations failed to take action.[6]

2. Pakistan's domestic legislation on the penalization of the crime of genocide

Theoretically, Pakistan is a dualist state, where once ratified, international treaties must be adopted by way of a domestic legislation. Pakistan ratified

[5] China is heavily involved in Sudan's oil fields through the state-owned China National Petroleum Company. On account of such involvement, China has been Sudan's ally in the Darfur conflict; see Sudan Disinvestment Task Force, *PetroChina, CNPC, and Sudan: Perpetuating Genocide*, Washington 2007, available at https://www.investorsagainstgenocide.org/files/PetroChina_CNPC_Sudan.pdf.

[6] D. Maritz, 'Rwandan Genocide: Failure of the International Community', *E-international Relations*, 7 April 2012, https://www.e-ir.info/2012/04/07/rwandan-genocide-failure-of-the-international-community.

the Genocide Convention in 1958 and it is ironic that even after 65 or more years has passed, the State of Pakistan has been unable to incorporate the standards of the Convention in its domestic system of law. There is presently no domestic legislation to give effect to the provisions of the Genocide Convention.

The question then is: How are racial, ethnic, and religious minorities protected against genocide, specifically in Pakistan? Here is the answer: through scattered provisions found in several laws across Pakistan's legislative framework which allow for scanty protection to such identified groups, and substantiated by the interpretation/application of such laws by the Pakistani judiciary. Given this legislative and institutional framework, it will not come as a surprise that Pakistan's protection of its minorities is uninspiring and at times even lacking.

Notwithstanding the above, an attempt can be made to consolidate these scattered provisions on the protections afforded under Pakistani legislation, and a few such provisions are detailed further below.

2.1 The Constitution of Pakistan

The Pakistani Constitution[7] carries express provisions on fundamental human rights, afforded to each individual residing within Pakistan, irrespective of caste, creed, race, or religion. These fundamental human rights are in line with Pakistan's obligations under several international obligations including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Pursuant to Article 8 of the Constitution, any law incompatible with the rights constituted under the Constitution shall be void, to the extent of such inconsistency.

The following rights/fundamental guarantees are important to note:[8]

a) The right to life:

[7] The Constitution of the Islamic Republic of Pakistan, 1973, available at http://www.na.gov.pk/uploads/documents/1333523681_951.pdf.

[8] The Constitution also provides the following fundamental rights and guarantees: freedom of movement, freedom of trade and profession, freedom of association, equality before law, safeguards against discrimination, and preservation of language, script and culture.

"No person shall be deprived of life or liberty, save in accordance with law" (Article 9). This fundamental right has been held to include: the right to earn a livelihood,[9] the right to be free from threats to historical monuments and the right to enjoy cultural heritage,[10] and the right to live a meaningful, complete, and worthy life.[11]

b) Safeguards as to arrest and detention and the right to a fair trial:
The right to a fair trial and due process, as enshrined in Articles 10 and 10A of the Constitution refer to basic judicial functions and envisage the right of each individual to have access to a fair and proper trial before an impartial court or tribunal.[12]

c) The inviolability of human dignity:
"The dignity of man, and subject to law, the privacy of home shall be inviolable" (Article 15(1)); and "No person shall be subjected to torture for the purpose of extracting evidence" (Article 14(2)). Rights ancillary to such dignity, such as freedom from torture, freedom of movement, the right to life and liberty must be guaranteed to each individual.[13]

d) Freedom to manage religious institutions and to profess religion:
"Subject to law, public order and morality: (a) every citizen shall have the right to profess, practice and propagate his religion; and (b) every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions" (Article 20). The Supreme Court of Pakistan elaborated that such right is therefore not absolute, but remains subject to regulation for the protection of the society.[14]

It is worth noting that the fundamental rights protected and guaranteed under the Constitution are subject to reasonable restrictions. The afore-noted rights have the effect of prohibiting *inter alia* extra-judicial killings,

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[9] *Imran Sajid v. Managing Director Telephone Industries of Pakistan*, PLC 2015 (CS) 1487, Supreme Court.

[10] *Kamil Khan Mumtaz v. Province of Punjab*, PLD 2016, Lahore High Court 699.

[11] *Fakheryar Khan v. Agriculture University, Peshawar*, PLD 2016, Peshawar High Court 266.

[12] *Watan Party v. Federation of Pakistan*, PLD 2012, Supreme Court 292.

[13] *Watan Party v. Federation of Pakistan*, PLD 2011, Supreme Court 997.

[14] *Jibendra Kishore Accharya Chowdhary v. Province of East Pakistan*, PLD 1957, Supreme Court 9.

perpetration of hate crimes based on divisive factors (such as religion, caste, creed and ethnicity), the guarantee of a fair trial which ensures that instead of vigilante justice, the aggrieved and the accused have recourse to the procedure prescribed under law. These provisions are imperative to note in the context of the Genocide Convention as these go to show that as a bare minimum Pakistan has in place constitutionally guaranteed fundamental rights for each individual irrespective of the specified group such individual belongs to.

2.2 The Pakistan Penal Code (1860)

The Pakistan Penal Code, 1860 (PPC) is the primary penal legislation inherited from the British colonial rule and modified over the years to reflect Pakistan's theocratic tendencies.

It is worth mentioning that the PPC does not specifically prohibit international crimes such as crimes of aggression or genocide. As a bare minimum, the following provisions can be seen as laying down certain fundamental cornerstones on the prevention of crimes against identified groups:

a) Promoting enmity between different groups:
   Section 153A of the PPC penalizes individuals for:
   i. "Promoting or inciting, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups."
   ii. "Committing or inciting another person to commit an act prejudicial to the maintenance of harmony between different groups."
   iii. "Organizing or inciting another person to organize any exercise, movement, drill or other similar activity intending that the participants of such exercise, movement, drill or activity shall use or be trained to use criminal force or violence against any religious, racial, language, or regional group or caste and community or any group of persons identifiable on such grounds."

The penalty prescribed under Section 153A of the PPC is imprisonment for a term which may extend to five years plus a fine.

The aforesaid provisions are perhaps the only provision in Pakistani legislative framework that carries a wide list of actions, which are penalized when taken against a specified group.

In addition to the above, Chapter 15 of the PPC "Offences Relating to Religion" punishes offences related to religion including:

a) injuring or defiling a place of worship of any religion (Sect. 295),
b) deliberate and malicious acts intended to outrage feelings of any class by insulting its religion (Sect. 295A),
c) disturbing religious assembly (Sect. 296), and
d) uttering words to wound religious feelings (Sect. 298).

The fundamental concern with these provisions lies with the additional ambiguous clauses, rendering penalization subjective.

2.3 Anti-Terrorism Act, 1997

Section 6 of the Act defines "terrorism" thus:

… the use or threat of action where:

> the use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause [or intimidating and terrorizing the public, social sectors, media persons, business community or attacking the civilians, including damaging property by ransacking, looting, arson or by any other means, government officials, installations, security forces or law enforcement agencies:[15]

However, this Act, due to its procedural requirements such heavy reliance on witness testimony, lack of witness protection, long delays, and poor investigative capacity, gave rise to ATC judgments full of observations on failure of investigating agencies reflecting on flawed administration of evidence. Though the Judiciary has started to apply a broad interpretation of, for example, cases of terrorism, the Court stated that "the procedural defects and sometimes even the illegality committed during the course of investigation,

[15] The Anti-Terrorism Act of 1997, available at https://nacta.gov.pk/wp-content/uploads/2017/08/Anti-Terrorism-Act-1997.pdf.

shall not demolish the prosecution case nor vitiate the trial."[16] However, such judgments are unique and rare, furthermore, this is also insufficient in the absence of any robust effective legislation to rectify procedural flows.

3. Pakistan and its demographic structure: the background of Hazara in Pakistan

The provincial landscape of Pakistan is defined ethnically, as noted by Monis Ahmer. He elaborates that all the provinces of Pakistan are named ethnically: Sindh where Sindhis reside, Punjab because the language here is Punjabi, Baluchistan due to ethnic identity of Baluchis, and KPK because of Pashtuns.[17] This shows that in Pakistan ethnic identity is an important factor in their identification.

However, in the absence of any common language and a sense of community, Pakistan used "Islam" as a unifying factor. This policy of unification was miscarried and the government of Pakistan fell deep into ethnic conflicts especially in late 1970s. With the Islamic revolution in Iran in 1978, the Proxy War in Afghanistan in 1979, and the conservative military regime in Pakistan 1978, Pakistan faced the acceleration in ethnic and sectarian conflicts on its territory.

As noted by Amin, Pakistan's major unresolved areas have always been a problem of ethnic and regional subnationalism in provinces. Pakistan, nonetheless, shows a very cohesive picture on the map of post-East Pakistan separation; however, Pakistan's critical problems remain unresolved.

As discussed, Pakistan, being naturally pluralistic – having distinct religions, cultures, and languages – is home to the second largest Shia Population after Iran, comprised of 80–85% Sunni and 15–20% Shia in the country.[18]

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[16] M. Zaidi, *Terrorism Prosecution in Pakistan*, Washington 2016, https://www.usip.org/sites/default/files/PW113_Terrorism-Prosecution-in-Pakistan.pdf.

[17] M. Ahmar, 'Conflict Prevention and the New Provincial Map of Pakistan: A Case Study of Hazara Province', *Journal of Political Studies*, vol. 20, no. 2, 2013.

[18] M. Kalin, N. Siddiqui, *Religious Authority and the Promotion of Sectarian Tolerance in Pakistan*, special report, Washington 2014, available at https://www.usip.org/sites/default/files/SR354_Religious-Authority-and-the-Promotion-of-Sectarian-Tolerance-in-Pakistan.pdf.

Hazaras living in the city of Quetta (Hazara Town) are the Persian-speaking ethnic group native to central Afghanistan, who follow the Shia sect of Islam and have distinct oriental features,[19] counting around 500,000 to 550,000.[20]

In the name of sect and ethnicity, their massacre has recently been highlighted on international and national platforms.

4. Atrocities against the Hazara community and absence ofan effective system of response

The tale of devastation, persecution and atrocities of the Hazara community is deeply rooted in sectarianism. However, this sectarian violence between Shia and Sunni accelerated post 9/11 amid the crisis of Islamophobia, which was taken as a challenge by militants to establish their school of thought in the world.

The violence against the Hazaras in Pakistan started in phases. The initial phase was roughly from the 1970s to the 1990s, and involved propagation against their sectarian beliefs. The second phase was violent and consisted in targeting, harassing and killing of Hazara members, lasting from the 1990s to 2000. The most horrific phase started in early 2000, and it continues till today as the Hazara community is being targeted in masses. In 2003, as a result of an attack on worshippers during Friday prayers on Mekongi Road, Quetta, or a targeted attack on Hazara police cadets, the plight of Hazara people and the failure of the Pakistani government surfaced into the legal and political arena. Whether it was a religious procession, or a peaceful rally, with children playing in an open field, all were targeted in the name of cleansing Pakistan of Shias. Later Lashkar-e-Jhangvi had claimed the responsibility. Later, brutal

[19] UK Home Office, *Country Policy and Information Note: Hazaras, Pakistan,* July *2022*, https://www.gov.uk/government/publications/pakistan-country-policy-and-information-notes/country-policy-and-information-note-hazaras-pakistan-july-2022-accessible.

[20] H. Gazdar, S. Ahmad Maker, I. Khan, *Buffer Zone, Colonial Enclave or Urban Hub? Quetta: Between Four Regions and Two Wars*, Crisis States Research Centre working papers series 2 (69), London 2010.

attacks on the Hazara Eid Prayers and infamous Mastung killings shook Pakistan to the core.[21]

Moreover, the recent sit-in of the Hazara community in January 2021 and their refusal to bury the bodies of the ones killed in targeted attacks in a coal mine was a clear proof of Pakistan's failure to address this grave and challenging issue. As noted by SATP (South Asian Terrorist Portal)[22] only in 2014 there were 51 distinct sectarian attacks in the country, killing 140 individuals and injuring 198. It is noteworthy that most of these killings were claimed by Lashkar-e-Jhangvi, another banned organization in Pakistan. However, the recent coal miners attack in 2021 was claimed by militant Islamic State group (IS or Daesh).

Few of these perpetrators have been tried but acquitted on the grounds of "lack of evidence". The case of Malik Ishaq, leader of LEJ, is a clear example: the Supreme Court of Pakistan released him in 2011, after he had served 14 years in prison for his involvement in militant attacks. After his release he openly participated in public rallies and instigated hate speech against Shias. In another case where the escape of the chief of LeJ's Baluchistan chapter, Usman Kurd, together with his deputy Dawood Badini, from a high security prison. These are but a few instances to point fingers at in connection with the crippled criminal justice system of Pakistan.

5. Governmental response

In the context of Pakistan, keeping in mind the above mentioned definition of genocide, two elements are clearly satisfied: violations by groups like Lashkar-e-Jhangvi (LeJ), which has openly declared their purpose of "cleansing Pakistan", satisfying one of the conditions of the genocide definition "deliberately inflicting on a group conditions of life calculated to bring about its physical destruction in whole or in part." In an open letter released in June 2011, LeJ leaders declared their intention to "abolish the impure sect"

[21] S. Shah, 'Timeline of Attacks on the Hazara community', *The News*, 8 Jan. 2021, https://www.thenews.com.pk/print/771143-timeline-of-attacks-on-the-hazara-community.

[22] 'Fatalities in Terrorist Violence in Pakistan 2000–2019', *South Asia Terrorism Portal*, https://www.satp.org/satporgtp/countries/pakistan/database/casualties.htm.

of "Shia and Hazara Shia."[23] Secondly, "causing serious bodily or mental harm to members of the group" proved to be true in the case of Hazara, where persecution takes a systematic turn.

Here one can clearly assert that the Pakistani judiciary has been ineffective in punishing the perpetrators, architects, and offenders under legislation on terrorism, but one can also observe and analyze that judiciary is not well equipped when it comes to implementing laws in absence of any clear and specific law. Factors such as the lack of responsive criminal justice system, witness protection and religious pressures are a few of the many challenges.

Nevertheless, the Government's inability to control these militants from seeping into the mainstream politics is also a worrisome situation. Despite being members of proscribed organizations, people like Maulana Ludhanvi and Azam Tariq (chief members of Sipah-e-Sahaba and Lashkar-e-Jhangvi) took active part in elections in 2002 and 2005.[24]

As noted by Harff, "genocide is more of a social action, with victimized groups being identified by ethnicity, nationality or religion."[25] In Pakistan, genocide of Hazara has been accelerated through hate speech, change in the power sharing arrangement, external involvement, regional instability and above all lacunas in legal regime. Pakistan can clearly be identified as a country running high risks for mass killing of targeted religious and ethnic minorities.

Undeniably, Pakistan has a huge responsibility under its international commitments to protect vulnerable sects of its society to genocidal acts. However, this cannot be done without realizing the scope of the problem and this requires the Government to acknowledge the fact that anti-Shia attacks are triggers of genocide, potentially jeopardizing the society at large.

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[23] DFAT, 20 Feb. 2019, p. 36; see also USCIRF, April 2020, p. 33, and USDOS, 10 June 2020, section II.

[24] 'Incidents and Statements involving Sipah-e-Sahaba Pakistan: 1986–2012', *South Asia Terrorist Portal*, 2012, https://www.satp.org/satporgtp/countries/pakistan/terroristoutfits/ssp_tl.htm.

[25] B. Harff, 'No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder since 1955', *The American Political Science Review*, vol. 97, no. 1, 2003, pp. 57–73, JSTOR, http://www.jstor.org/stable/3118221.

Conclusions and recommendations

The discourse above proves that Pakistan should redraft its security strategies and priorities by focusing on human security and refrain from legalizing every action of the State as a national security measure. Security in ungoverned areas such as Baluchistan, need to be regulated by strengthening the local law enforcement agencies. Instead of ghettoization by confining members of the Hazara community in their town, Pakistan's government should take vigorous and effective measures to curb this menace. Pakistan, as member of international community has always been vocal about the plight of Kashmiris and Palestinians; however, unfortunately, it has not succeeded in proposing any concrete, sustainable solution for the issue of Hazara in its own land.

It is also imperative to realize that a major part of the problem in Pakistan's failure to classify the Hazara atrocities as genocide is the lack of effective legislative framework. Pakistan is clearly in breach of its international obligations, as its current legislation does not provide for genocide as a crime, let alone defining it. Pakistan's current legislation is insufficient substantially and procedurally to deal with the crimes such as genocide, crimes against humanity, etc. The Constitution of Pakistan does talk about fundamental rights as mentioned and discussed above, but they lack specificity, which let such heinous crimes go unnoticed and unpunished.

In the light of the above discussions and analysis, the following can be recommended. Firstly, Pakistan should adopt a local legislation to give effect to the provisions of the Genocide Convention. Secondly, it needs to institute an effective and impartial investigating commission in compliance with the UN Investigation Principles and the Minnesota Protocol to look into the violations of international law at domestic level. Undoubtedly, this might clash with the concept of state sovereignty; however, the time demands that stringent obligations be imposed on states. Thirdly, Pakistan must adopt new and innovative prosecution methods in order to avoid delays in prosecution and trials. Fourthly, the state must strive to strengthen its criminal system of response.

BRADEY WRIGHT

Sentencing Rape in Connection with Genocide: The Shortcomings of the Extraordinary Chambers in the Courts of Cambodia

Introduction

The "hell on earth" and the "prison without walls" ended in Cambodia with the dawning of 1979.[1] For almost four years, Cambodia endured violence and oppression at the hands of Pol Pot and the Khmer Rouge. Pol Pot and the leaders of the Communist Party of Kampuchea (CPK) established the totalitarian state referred to as Democratic Kampuchea and thrust Cambodia into a period marked by horror and death. In implementing its new regime, the CPK demolished all former economic, political, and legal structures and executed anyone considered enemies of the revolution.[2] In total, the Khmer Rouge's reign of terror caused the deaths of over one and a half million Cambodians.[3] Pol Pot's control over the nation and the genocide finally ceased after the Vietnamese invaded Cambodia and established the People's Republic of Kampuchea. While scholarship has widely covered the CPK's genocidal policies implemented during the four years under Pol Pot, the nation also endured untold sexual violence later prosecuted by the Khmer Rouge Tribunal.

Following the dastardly acts and murders committed by the Khmer Rouge, Cambodia established the Extraordinary Chambers in the Courts of Cambodia (ECCC), or the Khmer Rouge Tribunal, to prosecute the leaders

[1] A.L. Hinton, *Why Did They Kill?: Cambodia in the Shadow of Genocide*, Berkeley 2005, p. 1.

[2] Case 001, Case No. 001/18-07-2007/ECCC/TC, Judgment, 26 July 2010, para. 82.

[3] ECCC, 'Introduction to the ECCC', www.eccc.gov.kh/en/introduction-eccc, accessed 14 July 2021.

responsible. Cambodia passed a law in 2001 establishing the ECCC to try the crimes committed in the nation from 1975 to 1979.[4] In 2003, Cambodia reached an agreement with the United Nations outlining the extent and mode of the international community's forthcoming involvement in the trials. The ECCC Law empowered the Court to "bring to trial senior leaders of [DK] and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions […].[5] The Tribunal, comprised of Cambodian and international judges, split up the proceedings against the CPK officials into multiple suits and followed a primarily civil legal framework.[6] Case 001 focused on prosecuting Kaing Kek Iew for overseeing over 12,000 deaths as the Deputy Secretary of the Tuol Sleng prison and death camp.[7] While Case 001 prosecuted one instance of rape, the focus here will be on Case 002. Case 002 indicted two high-ranking leaders, Noun Chea and Khieu Samphan. Chea was the Deputy Secretary of the CPK alongside multiple other roles including acting Prime Minister and Minister of Propaganda and Information.[8] Samphan served as the Head of State beginning in 1976.[9] The ECCC divided Case 002 into two portions to focus on the multitude of crimes committed under their commands. Case 002/01 dealt with the crimes against humanity from the forced movement of the population and the execution of former Khmer Republic Officials. Subsequently, Case 002/02 focused on the purges, execution sites, treatment of targeted ethnic and religious groups, and the regulation of marriage.[10]

This article will analyze the approach to sentencing taken by the ECCC in Case 002 regarding the forced marriages that occurred under the Khmer

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4 ECCC, 'About ECCC', www.eccc.gov.kh/en/about-eccc (accessed 11.12.2019).

5 Case 001, para. 13.

6 A.T. Cayley, 'Prosecuting Mass Atrocities at the Extraordinary Chambers in the Courts of Cambodia (ECCC)', Washington University Global Studies Law Review, vol. 11, no. 2, 2012, p. 445.

7 E. Stover et al., 'Confronting Duch: Civil Party Participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia', *International Review of the Red Cross*, vol. 93, no. 883, 2011, pp. 503–504.

8 Case 002/01, Case No. 002/19-09-2007/ECCC/TC, Judgment, 7 Aug. 2014, para. 9.

9 ECCC, 'Khieu Samphan', www.eccc.gov.kh/en/indicted-person/khieu-samphan, accessed 3.12.2019.

10 Case 002/02, Case No. 002/19-09-2007/ECCC/TC, Judgment, 16 Nov. 2018, para. 3701.

Rouge. Part I will give background on the practice of forced marriage and rape within that context perpetrated by the Khmer Rouge. Part II focuses on the ECCC's departure from the International Criminal Court (ICC), the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR) when sentencing the Khmer Rouge leaders. Part III outlines the model of sentencing set forth by the Rome Statute of the ICC. Part IV provides an analysis of the ECCC's sentencing approach by looking at Cambodian Buddhism and national sentiments toward reconciliation. In light of Cambodia's culture, this article argues the ECCC should have named the specific sentence given for each crime committed, as opposed to one general sentence encompassing the broad punishment for the multitude of crimes perpetrated, to provide a greater sense of justice and visibility to victims of forced marriages and rape.

1. Forced marriages under the Khmer Rouge

Marriage and children played a central role in furthering Pol Pot's vision for Cambodia and resulted in the loss of marital and bodily autonomy. Throughout its entire period of control over the country, the Khmer Rouge forced people to get married and looked at marital and familial relationships as critical to the building of its new society.[11] In order to assure he would stay in power, Pol Pot wanted people to start having children so he could indoctrinate them to blindly follow his commands. Samphan contributed to the propaganda issued pushing procreation saying CPK Party Members should "rapidly increase the size of the population […] giving the people basic political, ideological and organizational education."[12] Due to the importance of growing the population and an entire generation of followers, to ensure the CPK's ideals remained in complete control, the Khmer Rouge created a policy leading to widespread forced marriages.

With the Khmer Rouge's familial centric strategy, rape became commonplace in connection with the growing number of forced marriages. Anyone

[11] Ibid., para. 3539.
[12] Ibid., para. 3551.

who wanted to marry had to receive the CPK's permission. If someone did not receive authorization, their hopes to marry their desired partner ended and they then could face an arranged marriage to someone else.[13] Largely, the CPK matched spouses based on similarities in their backgrounds.[14] Women who refused to consent to marry the person chosen for them faced rape and death threats. The Khmer Rouge abducted the husband of an already married woman, Mom Vun, and told her to remarry. When she refused, five militiamen raped her before she agreed to the marriage after her assailants threatened to kill her children.[15] With the widespread fear the Khmer Rouge inflicted, the Tribunal rightly recognized that no real consent could have been given for the CPK's marriages.[16] After the weddings, the Regime expected the coerced parties to have intercourse and monitored the couples on the nights of their weddings. This expectation befell Mom Vun. Militiamen stormed into her room and forced her and her husband to consummate their marriage in front of them before they moved to the next couple.[17] Another woman resisted her husband on the night of her wedding and, after her husband complained, a military commander called her alone to a room where he threatened and raped her.[18] Inhumanity was abundant in the CPK culture that enforced unwanted marriages and nonconsensual intercourse. The ECCC had to grapple with these truly heinous practices when prosecuting the Khmer Rouge.

2. The ECCC's approach to sentencing

Since the ECCC Charter failed to establish sentencing guidelines, the Tribunal in Case 001 decided how to approach multiple convictions in sentencing. In deciding how to proceed, the ECCC looked to multiple sources. Specifically, the ECCC had to decide on whether to follow a national or international

[13] Ibid., paras. 3601–3602.
[14] Ibid., para. 3572.
[15] Ibid., para. 3621.
[16] Ibid., para. 3623.
[17] Ibid., para. 3642
[18] Ibid., para. 3646.

framework or a combination of both. The Tribunal looked at the procedure used by the previous international tribunals and the Rome Statute of the ICC. First, the Court pointed to the early Nuremberg and Tokyo Tribunals' use of a single all-encompassing sentence for every conviction after World War II. Next, they looked to the international criminal tribunals for the former Yugoslavia, Rwanda, and Sierra Leone which all found a single sentence appropriate only where the offenses belonged to one criminal transaction.[19] The Court then quoted the ICC approach found in Article 78(3) of the Rome Statute. Finally, the Court analyzed the varying Cambodian law on the issue. The Cambodian Penal Code allowed for the imposition of one penalty when sentencing a person for multiple penalties of a similar nature.[20] After looking at the sources and explicitly refusing the methods used since the World War II tribunals, the ECCC chose to "impose a single sentence that reflects the totality of the criminal conduct where an accused is convicted of multiple offences."[21] Unlike the other courts, and even its own law, allowing for a single criminal sentence only for several related crimes, the Tribunal chose to deliver one sentence covering all offenses regardless of the similarities or differences. While the Court spent time listing the avenues they could have followed, the ECCC gave no explanation in the judgment as to why they decided to use a single sentence. The Court then followed the precedent set in Case 001 when sentencing multiple convictions in Case 002.

Before sentencing in Case 002/02, the Tribunal spent a significant amount of time analyzing forced marriages. After the evidence of forced marriages and rape discussed earlier, Samphan and Chea attempted to defend the regime's wicked practices. Samphan recognized how historically two families arranged marriages between their children without seeking consent. Chea argued parents sought marriages and children never contested the decision.[22] Taking the debate even further, Chea argued by prosecuting forced marriages and the resulting rapes, the ECCC were "effectively putting the entire practice of arranged marriage on trial."[23] However, the Court rightly did not agree with

19 Case 001, para. 587.
20 Ibid., para. 589.
21 Ibid., para. 590.
22 Case 002/02, para. 3687.
23 Ibid.

Samphan and Chea and found significant differences between traditional arranged marriages and the Khmer Rouge's coercive practice. Arranged marriages lacked any element of force and children entrusted parents to make the best decision for them to ensure future happiness.[24] Further, the traditional practice completely differed from the CPK's reign of terror that ignored familial involvement and stole any semblance of control from the future spouses. These factors quashed the attempted defenses regarding forced marriages.

When sentencing, the ECCC chose to ignore the model adopted by the ICC and to disregard the past jurisprudence before deciding to implement one single sentence. Before abandoning the approaches taken following the World War II tribunals, the Tribunal recognized how previous tribunals viewed multiple convictions as providing "a complete picture of his criminal conduct."[25] Instead of following the approach the ECCC itself admitted provided the most well-rounded judgment, the Court listed all of the crimes charged and issued one broad verdict. As done in Case 001, the ECCC grouped all of the offenses together. On top of multiple grave breaches of the Geneva Conventions and genocide, the Tribunal found Samphan and Chea guilty of

> the crimes against humanity of murder, extermination, deportation, enslavement, imprisonment, torture, persecution on political, religious and racial grounds, and the other inhumane acts through attacks against human dignity and conduct characterized as enforced disappearances, forced transfer, forced marriage and rape in the context of forced marriage.[26]

Both leaders had their life imprisonment convictions for the crimes found in Case 002/01 merged with the life imprisonments imposed for the offenses proven in Case 002/02 into one single term of life imprisonment. The magnitude of the crimes in both cases coupled with the blanket punishment did not allow the criminals to recognize the gravity of each of the crimes

[24] Ibid., para. 3688.
[25] Case 001, para. 560.
[26] Case 002/02, 2230–2231.

committed. Further, the approach to sentencing the ECCC chose did not align with Cambodian principles of punishment.

3. The ICC's Approach to Sentencing

Following years of competing definitions of crimes and ad hoc international criminal tribunals, the UN sought uniformity in international criminal jurisprudence. Almost fifty years after the adoption of the UN Genocide Convention, the General Assembly pushed for the establishment of an international criminal court.[27] After years of debates, 120 countries signed the Rome Statute of the ICC and officially created an international justice system on July 17, 1998.[28] The Statute recognized that grave crimes needed effective prosecution and established the Court to exercise jurisdiction over serious offenses that disturbed the international community.[29] The Statute gave the ICC jurisdiction over violations falling under four categories: genocide, crimes against humanity, war crimes, and the crime of aggression.[30] Significantly, the Statute codified gender and sexual based violence as both a crime against humanity and a war crime.[31]

Aside from the specific crimes recognized, the Rome Statute created an example for punishing and sentencing international crimes. The Rome Statute established its policy for sentencing in Article 78.[32] The Statute called for the delivery of the particular sentence for each specific crime before combining the sentences into one representing the totality of the crimes.[33] While seemingly inconsequential, the individual sentences allow victims and victims' families to see the specific redress for the crimes inflicted on them which could provide closure otherwise unavailable. Further, the Statute established

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27 I. Bantekas, S. Nash, *International Criminal Law*, London 2007, pp. 535–536.

28 Ibid.

29 Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90.

30 Ibid.

31 Ibid., Articles 7–8.

32 Rome Statute, Article 78: "When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment."

33 Ibid., Artcle 78(3).

a trust fund to benefit victims and their families after sentencing.[34] Both the individual sentences and the victim's trust fund assured those who suffered received a comprehensive sense of justice. The ECCC had the ability to follow the ICC's momentous sentencing standards yet chose otherwise.

Years before deciding on an approach to sentencing, Cambodia and the ECCC supported the Rome Statute. Cambodia signed the Rome Statute in 2000 and the Cambodian Head of State ratified the instrument on 11 April 2002 following the unanimous adoption by the National Assembly months earlier.[35] The ICC itself would not have had jurisdiction to try the Khmer Rouge leaders for the crimes committed before the implementation of the ICC. However, Cambodia recognized the importance of the codified international crimes. Six months after ratifying the Statute, Cambodia held a conference and encouraged other countries to also ratify and promote the ideals presented in the in the Statute and "devote their efforts to establishing a viable basis for the Court."[36] While the law establishing the ECCC was signed in 2001, the plenary meeting of the ECCC discussing the internal rules for the Tribunal did not occur until 2007, followed a year later by the first indictment.[37] In the years between the establishment of the ECCC and the first indictments, the Tribunal considered ways for the Court to align with the ICC's ideology and standards and even encouraged other countries to sign. In March 2005, Cambodia contemplated the ICC's relationship to the ECCC in a round table conversation called "Articulation between the International Criminal Court and the Khmer Rouge Tribunal: The Place of Victims."[38] The Court looked to the ICC when deciding how to involve and provide redress for victims. Further, the Tribunal expressly adopted the ICC's approach to the problem of aggravating and mitigating factors when determining a sentence.[39] The ECCC failed to provide an explanation as to why it chose to accept one aspect of the ICC's sentencing model while rejecting

[34] Ibid., Article 79.

[35] International Federation for Human Rights, *Report: Implementation of the Rome Statute in Cambodian Law*, 2006, p. 7, https://www.refworld.org/pdfid/46f146300.pdf.

[36] Ibid., p. 8, quoting the Conference on the International Criminal Court held on 10 Oct. 2002.

[37] ECCC, 'Highlights', https://www.eccc.gov.kh/keyevents#2001 (accessed 8.8.2021).

[38] International Federation for Human Rights, *Report*, p. 5.

[39] Case 002/01, para. 584.

another. Even though the ECCC had the right to diverge from the ICC and set its own approach to sentencing, the Court could have provided a higher sense of justice to victims by following the Rome Statute's sentencing model.

4. The ECCC's Shortcomings in Light of Cambodian Culture

With the widespread destruction and death delivered by the Khmer Rouge, the nation that emerged from Pol Pot's reign became survivors and victims. Hun Sen, the Cambodian Prime Minister, recognized its reach:

> Not a single one of our people has been spared from the ravages brought upon our country during the three years, eight months and twenty days […] under Pol Pot.[40]

It is impossible to ignore the effects of the CPK's control on every Cambodian citizen. Following the atrocities, the Tribunal played a vital role in rectifying the wrongs committed. Hun Sen hoped the ECCC would help Cambodians "feel a load lifted from our backs as we finally bring justice in the name of victims."[41] Even decades later, Cambodia carries pain and fear.

Recognizing the collective agony, the ECCC involved victims in the proceedings to give them a voice in the trial. Victim involvement could take three forms: the visitor, the civil party, and the testifier.[42] In the first two cases, eighty-five Cambodians participated as civil parties.[43] The ECCC's approach to victim involvement similarly aligned with the value the ICC placed on including and respecting victims. For many given the chance to speak before the Court, like the brave women recounting and reliving sexual violence, they gained a voice and opportunity to be heard. Witnesses

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[40] ECCC Public Affairs Section, *An Introduction to the Khmer Rouge Trials*, Phnom Penh 2004.

[41] Ibid.

[42] M. Elander, *Figuring Victims in International Criminal Justice: The Case of the Khmer Rouge Tribunal*, Abington 2018, p. 105.

[43] ECCC, 'Case 001', www.eccc.gov.kh/en/case/topic/90 (accessed 11 Dec. 2019); ECCC, 'Case 002/02', www.eccc.gov.kh/en/case/topic/1298 (accessed 11.12.2019).

involved in the proceedings as civil parties expressed appreciation over their inclusion. More importantly, joining as a civil party fulfilled a duty placed on them to seek justice for their lost relations.[44] Evidence has shown people broadly throughout Cambodia supported the ECCC and its efforts.[45] However, even with the acceptance of the Tribunal and the positivity civil parties felt, only a small fraction of those harmed by the Khmer Rouge gained a sense of justice through their participation in the trials.

Since the vast majority of Cambodians did not gain closure through testifying, it became even more important for the ECCC to deliver judgments providing the victims throughout the nation the same relief felt by civil parties. Cambodians undeniably suffered immense losses at the hands of the Khmer Rouge. The deep-rooted nature of the tragedies inflicted on Cambodians demanded redress as the nation attempted to rebuild its Khmer identity. Rectifying the trauma and lasting effects following forced marriage and rape required justice. However, by delivering one sentence conjoining rape with the other crimes, which did not allow for the understanding of the specific gravity of each crime committed through individual sentences, the ECCC ignored the nature and ideals of Cambodian society and perpetuated a culture of impunity. In Khmer, the word for reconciliation, *phsas phsa*, directly translates to mean "putting broken pieces back together."[46] Fixing broken pieces and making them whole after agonizing losses nationwide was a difficult feat. After widespread dehumanization, ensuring the restoration of dignity became imperative.[47] To provide adequate redress, the ECCC should have implemented Buddhist principles.

Buddhism has played a pivotal role in Cambodian culture and tradition from the nation's beginnings and throughout its history. Ancient Cambodia developed the view of the *buddharāja* or Buddha-king for its monarchs.[48] The Cambodian government cemented Buddhism's centrality in modern

[44] R. Killean, *Victims, Atrocity and International Criminal Justice: Lessons from Cambodia*, New York 2018, p. 167.

[45] Ibid., p. 180.

[46] J. Ciorciari, 'Cambodia's Trek Toward Reconciliation,' *Peace Review*, vol. 23, no. 4, 2011, p. 438.

[47] L. McGrew, 'Pathways to Reconciliation in Cambodia', *Peace Review*, vol. 23, 2011, p. 514, p. 517.

[48] I. Harris, *Cambodian Buddhism: History and Practice*, Honolulu 2005, p. 144.

society in 1947 modifying the previous French arrangement to comport with Cambodian monarchical and Buddhist ideals present in the culture. The new Constitution established Buddhism as the national religion for the first time while still allowing for freedom of religion as long as it did not negatively impact the public order.[49] In the decade following Pol Pot's dictatorship, Heng Samrin, the leader of the Vietnamese backed government, spoke at the Second Congress of 1984 and emboldened Cambodians to fight back against enemies in order to protect the nation and subsequently Buddhism itself.[50] In 1993, Cambodia continued to confirm the religion's importance and established *Nation, Religion, King* as the country's motto and renamed Buddhism as the national religion.[51] The national prominence of the Theravāda Buddhist tradition colors and influences Cambodian's worldview.

Theravāda Buddhism's reach throughout every aspect of Cambodian society is undeniable. The Theravādan practice, most prevalent in Cambodia, Thailand, Sri Lanka, and Laos, is the conservative Buddhist tradition using the original teachings of the Buddha as tools to implement in their lives.[52] Referencing Buddhism's importance, a Khmer-American woman stated, "How can I be a tree without my roots?"[53] Buddhism throughout time influenced how many Cambodians approached life. The religion continues to shape the nation's worldview and collective thoughts about justice, forgiveness, peace, and reconciliation.[54] Further, Buddhist scholar, Dr. Ian Harris, explained the role of Buddhism in governance: "Theravada doctrine considers protection of Buddhism to be the indispensable prerequisite for any properly functioning state."[55] By upholding Buddhist ideals, the king "ensures the uninterrupted continuation of both the physical and moral order (dhamma)."[56] Theravāda doctrine is so important in Cambodian's lives, and the nation's

[49] Ibid., pp. 142–143.
[50] Ibid., p. 198.
[51] Ibid., p. 205.
[52] 'Religions: Theravada Buddhism', *BBC*, 2 Oct. 2002, www.bbc.co.uk/religion/religions/buddhism/subdivisions/theravada_1.shtml.
[53] A. Hansen, 'Khmer Identity and Theravada Buddhism', in J. Marston, E.Guthrie (eds.), *History, Buddhism, and New Religious Movements in Cambodia*, Honolulu 2004, p. 40.
[54] McGrew, 'Pathways', p. 517.
[55] Harris, *Cambodian Buddhism*, p. 227.
[56] Ibid., p. 227.

government, the recognition and protection of the religion is required for a thriving government.

The ECCC should have taken Buddhist beliefs into account when trying the Khmer Rouge's senior officials. As nations often follow specific theoretical principles of punishment reflecting the societal views on retribution and rehabilitation, the importance and prevalence of Buddhist ideals should have been included in the reparations process. Some have said a Buddhist ceremony, separate from the trials, could help put Cambodia's broken pieces back together. The former head of the Khmer Institute of Democracy believed a confession by the Khmer Rouge and a ceremony, with the King and Buddhist monks, would take the requisite step towards reconciliation under Buddhist ideals.[57] Cambodians needed a confession of crimes and recognition of the death and pain the CPK's actions caused to fully heal. This is supported by the text of the Anguttara Nikaya, one of the Buddhist scriptures within the Pali Canon, delineating the importance of confession:

> […] these two are fools. Which two? The one who doesn't see his transgression as a transgression, and the one who doesn't rightfully pardon another who has confessed his transgression […]. These two are wise people. Which two? The one who sees his transgression as a transgression, and the one who rightfully pardons another who has confessed his transgression.[58]

In order to be forgiven, the Khmer Rouge had to acknowledge their crimes. Buddhist notions emphasizing confession and reconciliation become harder to achieve in cases where the perpetrator did not regret his actions.[59] Ideally, the defendant would admit to and apologize for sexual violence inflicted under his authority. In lieu of admission, the Court could have implemented procedures identifying the justice served for each individual crime. Then, while the offender did not directly recognize his transgression, as with both defendants attempting to defend forced marriages in Case 002,

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[57] McGrew, 'Pathways', p. 517.

[58] 'Bala-pandita Sutta: Fools & Wise People', *Access to Insight*, 2002, www.accesstoinsight.org/tipitaka/an/an02/an02.021.than.html.

[59] S. Culbertson, 'Does Noun Chea Still Have No Regrets?', *The Diplomat*, 18 Dec. 2018, https://thediplomat.com/2018/12/does-nuon-chea-still-have-no-regrets.

the sentences would have forced the men to see the amount of time in prison given to them for sexual violence. The sentence could have been an important substitute for the direct recognition of the transgression called for in the Pali Canon. In furtherance of these ideals, the Tribunal needed to follow the ICC's sentencing model. The ECCC took a step forward in prosecuting genocide with its victim involvement. However, in abandoning the ICC approach to sentencing, the Court took victims out of the equation.

Particularized justice for victims of sexual violence is especially important given the heinous nature and long-lasting effects of the crimes. Sexual violence during armed conflicts inflicts psychological and mental trauma and effects societal relationships.[60] Families of rape victims could not speak out or seek justice from the perpetrators for fear of reprisal during the Khmer Rouge period.[61] Similarly, many feared voicing their experiences even after the genocide ended. This was especially true for female victims. For a while, Cambodians even believed that no one raped by the Khmer Rouge survived after an attack.[62] A Cambodian proverb shows the value placed on female purity: "Men are gold while women are white cloth. The former easily cleaned; the latter easily stained."[63] The natural stigma surrounding rape and sexual violence is enhanced in a society where part of a woman's worth is related to the retention of her virginity. As a victim of forced marriage and rape said, "as a Khmer woman, nothing is more important than our body."[64]

In order to be respected members of society based on traditional gender norms, women must remain subservient to men. Traditional gender norms in the nation date back to the 14th century with the *Chbab Srey* or Woman's Code. Schools formally taught the Chbab Srey until 2007 and it is still deeply ingrained in Cambodian culture today. In order to preserve her standing in society, a woman must remain quiet, forgiving, and subservient to her

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[60] C. Koos, 'Sexual Violence in Armed Conflicts: Research Progress and Remaining Gaps', *Third World Quarterly*, vol. 38, no. 9, 1935, p. 1941.

[61] N. Kasumi, *Sexual Violence During the Khmer Rouge Regime: Stories of Survivors from the Democratic Kampuchea (1975–1979)*, Phnom Penh 2008, p. 29.

[62] Ibid., p. 9.

[63] E. Fulu, X. Warner, S. Moussavi, *Why Do Some Men Use Violence against Women and How Can We Prevent it?* Phnom Penh, 2015, available at https://www.partners4prevention.org/sites/default/files/resources/p4p-report.pdf.

[64] Case 002/02, para. 4452

husband.[65] Using the image of *fire in the house*, Buddhism reinforces the gender roles in the Chbab Srey and teaches women they must overcome three possible fires or areas of conflict: husbands, parents, and others.[66] Fire from outside the home should not enter the home just as fire from inside the home should not exit.[67] In suppressing the fires, a Cambodian woman preserves harmony and takes her proper place in society.[68] The overlap between the *Chbab Srey* and Buddhism strengthens gender stereotypes causing men to assert their dominance and woman their silence. As a result, rape and sexual violence is scarcely reported and, when it is, police rarely respond and have even been reported to be hostile towards the women who came forward.[69]

The Tribunal could have championed change in the national discussion on rape and significantly helped victims in a culture where speaking out about violence could destroy a person's standing in society and alter how the community views them. Currently, domestic violence and rape are significant problems plaguing the nation. The UN Special Rapporteur on the situation of human rights in Cambodia in its report from 2016 expressed "great concern over the prevalence of violence against women, which continues to present itself as a pervasive human rights violation."[70] Cambodia's Ministry of Women's Affairs even identified how domestic violence "remains prevalent" in 2019.[71] According to a study, more than one in three men admitted to committing violence against women.[72] The study showed power structures between the genders enable sexual violence linked to *dominant ideas of masculinity* in

[65] S. Hagood Lee, 'Ideological Inequalities: Khmer Culture and Widows' Perception of Remarriage', *Journal of International Women's Studies*, vol. 29, 2018, p. 37.

[66] K. Brickell, *Home SOS: Gender, Violence, and Survival in Crisis Ordinary Cambodia*, Chichester 2020, p. 7.

[67] N. Graham, K. Brickell, 'Sheltering from Domestic Violence: Women's Experiences of Punitive Safety and Unfreedom in Cambodian Safe Shelters', *Gender, Place & Culture*, vol. 26, 2019, p. 111, p. 117.

[68] Brickell, *Home SOS*, p. 7.

[69] CEDAW/C/KHM/CO/6, para. 10; A. Kent, 'Global Change and Moral Uncertainty: Why do Cambodian Women Seek Refuge in Buddhism?' *Global Change, Peace & Security*, vol. 23, 2011, p. 405, p. 411.

[70] UN Human Rights Office of the High Commissioner, 'UN Expert Urges Cambodia to Strengthen Protection of Women and Indigenous Peoples' Rights', 1 April 2016, www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=18552&LangID=E.

[71] Cambodia's Ministry of Women's Affairs, *Cambodia Report* 2019, p. 33.

[72] Fulu et al., *Why Do Some Men*.

the nation.[73] The gender power imbalance has produced a culture of impunity surrounding sexual violence. By not individually recognizing forced marriage and rape in sentencing, the ECCC could have furthered the stigma experienced by victims and failed to disrupt the status quo.

Conclusions

By lumping together the countless crimes in sentencing, the ECCC failed to show the nation the price and consequences of the specific crimes charged. The sheer volume of crimes attributable to Chea and Samphan in Case 002 forced the Court to split the proceedings into two cases. In Case 002/02, the Court joined the numerous and varied crimes together in one breath. In Case 001, an instance of rape was even included as a mere parenthetical in the list of violations. The ECCC approach to sentencing failed to afford a sense of significance for each individual crime, especially with rape. The Tribunal could have championed change in the discussion of the topic which could have monumentally helped victims in a culture where speaking out about sexual violence is disapproved of and could destroy a person's standing in society. Instead, the ECCC enabled the culture of stigma and near silence on the topic.[74]

While the ECCC attempted to bring justice to the countless victims of the Khmer Rouge, the Court could have made more impactful steps forward when sentencing the officials for their crimes. The shortcomings become apparent when considering forced marriage and rape. Rape is an exceptionally heinous crime with unique consequences for individuals and their loved ones. The unique horrors resulting from the theft of bodily autonomy required specific attention and redress by the Khmer Rouge Tribunal. The ECCC could have provided more recognition for victims and rectified the harm in line with the nation's Buddhist beliefs had the Court followed the ICC's approach to sentencing. If individual sentences had been given, the nation would have

[73] Ibid.

[74] E. Anderson, K. Grace, 'From Schoolgirls to "Virtuous" Khmer Women: Interrogating Chbab Srey and Gender in Cambodian Education Policy', *Studies in Social Justice*, vol. 12, no. 215, p. 216.

been forced to see the exact punishment enforced for forced marriage and rape in a culture where violence against women runs rife. The ECCC rightfully recognized how rape has been characterized as "one of the worst sufferings a human being can inflict upon another."[75] As a result, the Tribunal needed to deliver individual sentences to afford greater visibility to the victims of the harrowing crime and provide them with the legitimacy and particularized justice they so necessarily deserve.

[75] Case 001, para. 361.

SHAYANA SARAH VIEIRA DE ANDRADE MOUSINHO,
ARNELLE ROLIM PEIXOTO

Women's Vulnerability at Armed Conflicts and the Biopower: A Study on Korean Sex Slaves of the Pacific War

Introduction

Throughout history women have been seen as the weaker gender. Wars were part of this timeline, too, becoming an element present in the history of most nations. Some conflicts are still studied today, such as the conflicts of the World Wars.

During World War II, many barbarities worthy of the medieval context occurred. One of them was the "comfort stations" in Southeast Asia, a scheme of human trafficking and sexual slavery. The victims were mainly Korean women, used as "comfort" and encouragement of Japanese troops through such violations. All to achieve its internal and external political and military objectives while perpetuating impunity to the present day.

Meanwhile, biopower comes to the scene. It explains that the State no longer takes people's lives whenever it wants to, but it manipulates and conditions them so that they will only have managed impacts. Thus, this theory fits with the theme when we realise that those historical facts involved forced sex work of kidnapped women to give encouragement to soldiers fighting on the front line.

Therefore, can it be said that "comfort stations" represented the sexual instrumentalization of women for Japanese military improvement, helping to configure biopower?

It is worth noting how this historical fact unfolded, whether it can be fitted into Foucault's philosophy of biopower, and how the instrumentalization of the victims' sexuality contributed to impunity.

This article is justified by the study of the civil female figure and its impact on the concept of what the woman is in a socio-historical and legal approach

in a period in which feminist agendas are being raised all around the world. Plus, the legal aspects are based on the instruments that Japan transgressed to achieve total control of soldiers through women's forced prostitution.

This paper relies on outstanding works by Foucault and Giddens in the proposed philosophical analysis of the case in question. Furthermore, this article makes references to customary law and international conventions signed and ratified by Japan.

1. World War II in Southeast Asia: creation of comfort stations

During the first years of the 20th century, Japan practiced an ultra-nationalist policy of extreme right-wing dominance while rushing to take regional hegemony for themselves. This had an aggressive character, usually attributed to positions the monarchy and parliament had at that time, better known as the "Three Alls Policy" (*Sankō-sakusen*), meaning "kill, loot, and burn them all", pursued during World War II.[1] This form of aggression was adopted after the peak of the Meiji Restoration (1867–1912), caused by popular dissatisfaction against foreign rule after the country's reopening, marked by xenophobia.

With the growth of imperialism, they started wars under the pretence of freeing their neighbourhoods from the Western rule. This bothered Russia and China and later brought an armed conflict over control of the Korean Peninsula. Japan won the dispute and transformed Korea into a protectorate, conquering several territories:

> The Japanese press and political opponents of the government would put forth a rhetoric of Asia-wide (pan-Asian) solidarity as they beat the drums on behalf of causes such as Korean independence from China or Asian equality with the West. Their vision of Asian unity placed Japan in charge, as a tutor and

[1] Y. Yoshimi, *Comfort Women: Sexual Slavery in the Japanese Military during World War II*, rev. ed., trans. Suzanne O'Brien, New York 2002.

> military hegemon. The Japanese government would rein in but not repudiate such voices, as it moved more cautiously in a similar direction.[2]

So, this aggressive narrative was fuelled, recognized, and intensified by the Western powers as "yellow peril"[3] in the 1920s, which preached that Japan would dominate Asia and invade Europe. As a result, direct armed conflicts were encouraged more and more. This later led to the Second World War in the East, enabling Japan to enter as an active participant on the Axis, in alliance with Germany and Italy.

Meanwhile, Koreans were growing and modernizing slowly, which is better explained here:

> The timely conjuncture of post-cold war transnational humanitarian feminism and South Korean ethnonationalism further obscures a deeper understanding of the broader historical forces that were transforming colonial Korea from an agrarian male-oriented Confucian dynasty in which women's proper place was delimited within the confines of the family into a capitalist modern industrializing society that offered women unprecedented opportunities to seek autonomy and financial independence by working for wages in the public sphere. Some women freely left home to escape domestic violence, grinding poverty, familial strife, or an arranged marriage; some of these self- motivated women who made life-changing decisions in search of better life chances, however, were deceptively recruited by Japanese and Korean traffickers for the military comfort facilities of imperial Japan.[4]

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[2] A. Gordon, *A Modern History of Japan*: *From Tokugawa Times to the Present*, New York 2003, p. 117.

[3] This racist metaphor was created by the French philosopher Ernest Renan in 1870. It defined that Japanese and Asians, in general, were a danger to Western civility and peace. It was belatedly used to refer to Japan's imperialism and military power; see the online course *Visualizing Japan (1850s–1930s)*, available at https://www.edx.org/course/visualizing-japan-1850s-1930s-westernization-prote.

[4] C.S. SOH. *The Comfort Women: Sexual Violence and Postcolonial Memory in Korea and Japan*, Chicago 2008, p. 2.

Therefore, taking the three Korean factors into consideration was decisive.[5] First, the Treaty of Ganghwa Island (1876), in which Japan used "cannon diplomacy" to open the peninsula. They deceived Koreans into signing an unfair and onerous agreement to take over control faster. Then came the assassination of Empress Myeongseong (1895). She was neutralized by close relations with Russia and represented an element of social cohesion for being a character who kept the country free from Western influences. There was also the Eulsa Treaty (1905), which arose from Japan's victory in the Russo-Japanese War. That guaranteed the peninsula's conversion into a protectorate.

Culturally, their wars lasted for days, and it was common to destroy cities completely – especially those which held some importance and political symbolism – all together with the population, as in the report below:

> Japanese soldiers surrounded the club with a barricade of inflammable material, then put gasoline over this barricade and ignited it. Thus, the fugitives were forced to attempt to escape through the flaming barricade. Most of them were bayoneted and shot by the waiting Japanese soldiers. Some of the women were raped and their infants bayoneted in their arms. After raping the women, the Japanese poured gasoline on their hair and ignited it. The breasts of some of the women were cut off by the Japanese soldiers.[6]

This type of violence was perpetuated broadly so Emperor Hirohito (1926–1989) became concerned about the image his army was having abroad, due to news about the atrocities they practiced spreading fast. The media focused on Nanking Rape (1932) in China, in which 300 thousand[7] people were massacred by the soldiers' brutal conduct, especially against women. That is why the emperor supported the creation of a system of offering women to "encourage" the army, the so-called "comfort stations", according to the testimony of Yasuji Okamura, a Japanese general:

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[5] M.P. Pérez, *La esclavitud sexual como arma de guerra: halmoni, la historia de una mujer confort*, Universidad de Santiago de Compostela, Santiago 2016, p. 39.

[6] U. Dolgopol, S. Paranjape, *Comfort Women: An Unfinished Ordeal: Report of a Mission*, Geneva 1994, p. 26.

[7] Gordon, *A Modern History*.

> There were no ianfus ["comfort women" in Japanese] in former years of military campaigns. To speak frankly, I am an initiator of the comfort women project. As in 1932 during the Shanghai Incident, some acts of rape were committed by Japanese military personnel, I, Vice Chief of Staff of the Shanghai Expeditionary Force, following the example of the Japanese naval brigade, asked the governor of Nagasaki prefecture to send comfort women groups. As a result, rape crimes totally disappeared, which made me very happy. At present, a comfort women group accompanied each army corps, as if the latter constitutes a detachment of its quartermaster corps. However, rape acts did not disappear in the Sixth Division, even though a comfort women group accompanied it.[8]

So, in 1937 the soldiers' sexual satisfaction plan was officially introduced to prevent events such as the Nanking Rape. The first objective was to reduce the number of rapes, and preventing sexually transmitted diseases, which often consumed a lot of government time and money. The second objective was to decrease the number of spies and provide "recreation" facilities to improve soldiers' morale and relieve their stress. Finally, the plan was to curb anti-Japanese sentiment in newly conquered territories to facilitate assimilation.[9]

Although the military destroyed most of the documents that concerned this matter, there were women recruitments, but they did not need consent and were intended only to benefit the Japanese image, especially those who oversaw the task.[10] In the same vein, as we read in the documentation available on the Digital Museum website: "You are notified of the order [from the Minister of War] to carry out this task with the greatest regard for the preservation of the army's honour, seeking to avoid social conflicts."[11]

Several methods of recruitment were used, but abduction was the most popular. Economic suffering, the impossibility of studying, and the lack of food supply prevalent in the colonies and territories under Japanese rule made that easy. It was simple to deceive girls who already worked from an

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[8] See the website *Digital Museum: The Comfort Women Issue and the Asian Women's Fund*, https://www.awf.or.jp/e1/facts-01.html, and the quotation from Okamura Yasuji.

[9] Pérez, *La esclavitud*.

[10] Yoshimi, *Comfort Women*.

[11] *Digital Museum*.

early age promising positions such as nurses, typists, servants, etc. They bought girls from their bankrupt families and gave them employment out of debt. The kidnapping of these young women was common after being demanded as contributions of war, otherwise the town would be destroyed. Many were abducted, too, because of "colluding with the opposition." But all of them were unaware of the nature of the work they were about to perform.[12]

Thus, 200,000 women, mainly from Korea (80% of the total number) and other countries were part of this catastrophic scheme and only 25% survived due to the precarious conditions in which they lived. These women were subjected to total military control and precarious treatment of illnesses.

During the acts, they were tortured, beaten, burnt, etc. If they tried to flee, they were tracked down under threats of being gunned down. In this situation, many died of venereal diseases, and suffered from forced abortions, sterilizations, and malnutrition due to hunger:

> When the soldiers came back from the battlefields, as many as 20 men would come to my room in the early morning. That is why I had to have a hysterectomy (in my twenties). They rounded up little girls still in school. Their genitals were still underdeveloped, so they became torn and infected. There was no medicine except something to prevent sexually transmitted diseases and Mercurochrome. They got sick, and their sores became septic, but there was no treatment.[13]

These victims were often seen as a kind of luxury goods, which is why, when military funds were cut or when they began to lose or withdraw troops, the girls were left to fend for themselves, often being executed to not become witnesses of their crimes.[14]

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[12] Amnesty International, *Japan: Still Waiting After 60 years: Justice for Survivors of Japan's Military Sexual Slavery System*, London 2005, available at https://www.ohchr.org/sites/default/files/lib-docs/HRBodies/UPR/Documents/Session2/JP/AI_JPN_UPR_S2_2008anx_asa220122005.pdf.

[13] Ibid.

[14] J.Y. Okamoto, 'As "mulheres de conforto" da Guerra do Pacífico', *Revista de Iniciação Científica em Relações Internacionais*, vol. 1, no. 1, 2013, pp. 91–108.

When the Pacific War ended, the case of comfort women faded from history with most evidence eliminated. The survivors felt unable to return to their homes, often choosing never to return due to shame, preferring to die in strange lands.

The victimization of these women is not only due to the fact that they were coerced into prostitution but also because of the violence they had to endure even after the war. The Asian patriarchal society has always cherished the pure, idealized, and inert female figure, which only worsened their stigma causing even more ostracism.

If they managed to return to their families, they could not talk about what they had endured. Besides, they were pressured to get married. This made them leave their homes in failed marriages, due to contracted diseases and lack of virginity, as well as the frequent inability to bear children. They often married elderly men just to become widows, as the economic position of women often depended on their husbands.[15]

Most never got to form a marriage, living off informal jobs, suffering from constant financial problems, and demonstrating that the conflict was a point of convergence between Korean patriarchy and colonization. Plus, most found themselves suffering from psychological and psychosomatic disorders caused by their experiences as "comfort women" while having difficulties building intimate relationships to live normally.

Upon gaining freedom, many committed suicide while the rest felt the obligation to maintain a deep resentment for themselves. However, in 1991 Kim Hak-Sol changed history when she decided to reveal her life journey for the first time. This also persuaded others to declare themselves victims and expose their past traumas.[16]

According to the International Commission of Jurists, some of the factors that hushed them for so many years were the precarious living conditions, extinct family ties, and social values that stigmatized them:

> What differentiates "comfort women" from other war victims is the factor that the victims of sexual violence share. It is the difficulty that they face in

[15] Amnesty International, *Still Waiting*.
[16] Okamoto, 'As "mulheres de conforto"'.

> speaking out the whole truth. They tend to catch public attention and curiosity, even though they are not responsible for their experiences. Moreover, there exists a social structure that makes them feel ashamed. The same goes for rape victims.[17]

However, with the help of activists, NGOs, and the women's own union, the case became international. This was essential to make Korea take a stand in line with the activists' movement demanding the Japanese government recognizes that "comfort women" had been taken away forcibly, make a public statement, issue an official pardon, and investigate what happened. Then a monument or memorial to honour the victims should be erected and compensations to victims or surviving heirs paid. And, finally, the government was expected to establish educational programmes to increase the nation's historical knowledge about this case.

2. International law and the search for justice

Although Japan declared[18] that before 1949 rape did not constitute a war crime anywhere before the Fourth Geneva Convention (1949) – mainly to exclude themselves from international responsibility – national laws already existed in the 17th century that prohibited rape during armed conflicts even before the formulation of the Geneva Conventions.

As an example, articles of war were decreed in 1621 by King Gustav Adolph II of Sweden,[19] as Article 88 stipulates: "He that forces any woman to abuse her; and the matter be proved, he shall dye for it." Also, 1863 Lieber Code[20] (also known as General Order No. 100), as the first attempt to codify the

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17 Dolgopol, Paranjape, *Comfort Women*, p. 197.

18 Amnesty International, *Still Waiting*, 4.1.2.

19 K. Ögren, 'Humanitarian Law in the Articles of War Decreed in 1621 by King Gustavus II Adolphus of Sweden', *International Review of The Red Cross*, no. 313, 1996, available at https://www.icrc.org/en/doc/resources/documents/article/other/57jn8d.htm.

20 *Instructions for the Government of Armies of the United States in the Field: Lieber Code*, US Library of Congress, Washington, 24 April 1863, available at https://ihl-databases.icrc.org/ihl/INTRO/110.

rules of war, established the rejection of rape as a weapon of war, as stated by Article 44:

> All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer […], all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.

In addition, Article 37 shows the United Stated acknowledged and protected especially women and the sacredness of domestic relations, the contrary acts should be rigorously punished.

In the same sense, the 1874 Brussels Declaration[21] asserted that the honour and rights of the family must be respected:

> Art. 38. Family honour and rights, and the lives and property of persons, as well as their religious convictions and their practice, must be respected. Private property cannot be confiscated.

The same is stated in Article 46 of the 1907 Fourth Hague Convention[22] – an instrument that was signed and ratified in 1911 by Japan and already was considered customary law in 1937:

> Art. 46. Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.

Nevertheless, the Geneva Convention[23] of 1929 concerning the treatment of prisoners of war established that they have the right to have their person

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[21] Conference of Brussels, *Project of an International Declaration Concerning the Laws and Customs of War*, Brussels, 27 Aug. 1874, available at https://ihl-databases.icrc.org/ihl/INTRO/135.

[22] Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 Oct. 1907.

[23] Convention relative to the Treatment of Prisoners of War, Geneva, 27 July 1929.

and honour respected in the same way as by the 1949 Hague Convention. Article 3 of the former states that "women should be treated with all consideration due to their sex", thus embodying the Hague's notion of family honour:

> Even if it is considered that the 1949 Geneva Conventions are not evidence of customary international law because of *ratione temporis* and the 1929 Geneva Convention is not applicable because Japan was not a signatory, Japan was a party to the Hague Convention and Annexed Regulations concerning the Laws and Customs of War on Land of 1907. The Regulations are not applicable if all belligerents are not parties to the Convention (art. 2), but its provisions would be a clear example of customary international law operating at that time. Article 46 of the Hague Regulations places on States the obligation to protect family honour and rights. Family honour has been interpreted to include the right of women in the family not to be subjected to the humiliating practice of rape.[24]

Following these conventions, even if rape was not a war crime yet, a sexual assault was seen as inhumane and a core violation of rights due to the feminine gender. Because of these previous instruments, there are many more visions today deeply grounded in human rights, also representing a process of crystallization of an international norm in the context of customary law.

Following World War I, mass rape against civilians in regions of war was seen as heinous by the international community, although it was not yet typified. It is no accident that the statutes of the International Military Tribunal at Nuremberg[25] and the International Military Tribunal for the Far East[26] mention slavery, deportation, and other inhumane acts (which implicitly included sexual violence) as such, already stating a kind of jurisprudence about the matter.

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[24] UN Commission on Human Rights, *Special Rapporteur on Violence against Women, its Causes and Consequences*, Report UN Doc. E/CN.4/1996/53/Add.1, 4 Jan. 1996, §101.

[25] Agreement for the Prosecution and punishment of the Major War Criminals of the European Axis, London, 8 Aug. 1948.

[26] Special Proclamation: Establishment of an International Military Tribunal for the Far East, Tokyo, 19 Jan. 1946.

In 2001, the Women's International Tribunal on Japanese Military Sexual Slavery[27] – a people's tribunal that convened to gather victims' testimonies and prosecute groups and individuals for World War II atrocities under international law – though not judicial and created by non-governmental organizations trying to have the issue properly investigated (it was excluded from the International Military Tribunal for the Far East), declared in the final sentence delivered in the Hague:

> The evidence showed that the comfort stations had been systematically instituted and operated as a matter of military policy, that they constituted crimes against humanity under the law then applicable. […] "In terms of the principle of *nullum crimen sine lege*, it is beyond dispute that acts constituting crimes against humanity listed in the Nuremberg and Tokyo Tribunal Charters –murder, extermination, enslavement, deportation, and other inhumane acts – were established crimes during the Asia-Pacific Wars. Thus, the concept of crimes against humanity did not create crimes, but rather applied to conduct, which was already unquestionably criminal, a term which underscored the egregiousness of the crimes. In addition, crimes against humanity embraced crimes parallel to war crimes and extended them to persons, here the women of Korea and Taiwan, presumably 'under the protection' of the offending state."[28]

Although the concept of justice is quite abstract, the social feeling is that it can only be achieved through the law, and punishing offenders is essential for the perpetuation of this belief. But the moral integrity of the injured requires much more than a punishment and material value to be restored: it requires a public and official declaration of repudiation regarding the traumatic events; then, the status of victim and aggressor must be properly settled.[29] Thus, both are directly related to making the case public as a kind of exaltation of humanity inherent in every human being, especially the victim, so that they

[27] Amnesty International, *Still Waiting*.

[28] Ibid., p. 20, with a quote after C.M. Chinkin, 'Women's International Tribunal on Japanese Military Sexual Slavery', *The American Journal of International Law*, vol. 95, no. 2, 2001, p. 338; also p. 20 note 85 citing the Tribunal's oral sentence of 4 Dec. 2001, §74.

[29] Ibid.

feel valued as a state and represented by its legal assets – a concept that is mainly upheld in the East.

Thus, an apology is a palliative act, with the interlocutor's intention, which the recipient must recognize as authentic – precisely because the content and emotional effect are of profound importance to the recipient. From this perspective, the apology has a kind of inherent confession of guilt, which is of primary importance for arriving at the truth.[30]

The perception of justice in these victims is linked to the need to be heard, their wrongs validated, to be vindicated, and the perpetrator's responsibility for them recognized – not constituting a restorative or retributive character of common sense, but a combination of both elements to help re-establish the lost relationships between the victim and its community of origin.

In addition, there is the need to tell the story in a safe way, to be heard and validated with meaningful answers. It is understood that these victims do not want indiscriminate punishment, but the consequence falls on those responsible.

These women also demand recognition of how much they have been hurt and violated mentally and physically; they want to be treated with dignity; they want the freedom to speak openly about what befell them, so they can understand what they have gone through. Further, they want restitution of their reputation, so they can live normal lives in society despite what has happened – and not just as evidence or as eternal victims. Above all, they call for prevention, so the same thing does not happen to others.[31]

After more than 80 years, the matter has not been submitted to the International Military Tribunal for the Far East and has never been judged there. Besides, all attempts to bring the matter before national courts failed, especially in Japan, where courts did not recognize the legal premises for prosecution. At the same time, the Korean courts would often have to deal with diplomatic chaos if stated anything about the case even if it recognized the victims' rights to have their demands satisfied.[32]

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30 M. Foucault, *Microfísica do poder*, 5th ed., Rio de Janeiro 1985, p. 103.
31 Amnesty International, *Still Waiting*.
32 Ibid.

3. Biopower: Improvement at the expense of others' wrongs

Unfortunately, sexual violence is often seen as an inevitable consequence of armed conflicts. Usually, the victims are too scared to report what happened, and the perpetrators enjoy impunity due to their favourable position in the society in which the victims live. This demonstrates part of the women's fragility and how much they are still vulnerable in these situations. Even if sexual abuse does not happen by the victims' will, but due to the mainly masculine social context, which sees female rape as a triumph over the adversary, women are still those to blame.

They lost everything they had for the sake of improvement in the Japanese military. Considered nothing but luxurious war commodities serving to maximize the productivity of soldiers – from this perspective it is pure biopower.

According to Foucault's[33] philosophy, before the modern age, the population knew the sovereign power derived from the Roman *pátria potestas*,[34] which held the right to the life and death of its nationals. However, in the 20th century, there is nothing more reprehensible than the exercise of authority like this.

No longer able to kill indiscriminately, the world knew a power destined to produce forces, improving them for greater efficiency and productivity instead of trying to destroy them. This ability no longer moves as an indiscriminate competence about life, but as a generator and guarantor of them.

From that moment on, power is divided between two poles, as better explained by Foucault:

> One of the poles, the first to be formed, apparently centered on the body as a machine: on its training, optimization of its skills, extortion of its forces, parallel growth of its usefulness and docility, and on its integration in effective and economical control systems. All this is assured by the procedures of power that characterize the disciplines: anatomical politics of the human body.

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[33] M. Foucault, *História da Sexualidade: 1. A vontade de saber*, 13th ed., Rio de Janeiro 1999, p. 130.

[34] *Pátria potestas* was a right granted to the Roman patriarch to dispose of the life of his family nucleus and slaves, being able to sell, kill or allow them to live; see F. de Coulanges, *A cidade antiga*, São Paulo 2006, p. 73.

> The second, which was formed a little later, around the middle of the 18th century, focused on the body species, on the body imbued with the mechanics of life and supporting biological processes: proliferation, births and mortality, level of health, life expectancy and longevity, with all the conditions that can make them vary. Such processes are undertaken through a whole series of interventions and regulatory controls: the biopolitics of the population.[35]

The implementation of these measures started during the classical period and has been internalized since then, with the function of investing in life to focus on the performance of the body or facing the processes inherent in life. This factor contributes economically to the integration of managed individuals in the production apparatus.

From this perspective, sex lies between the two tools of power. It gives rise to a micropower under the body as it belongs to training, adjustment, and energy-saving but also to the regulation of populations. There is room for surveillance, constant controls, endless examinations, etc., but also for large-scale interventions targeting society at large:

> As for us, we are in a society of "sex", or rather, "of sexuality": the mechanisms of power are directed to the body, to life, to what makes it proliferate, to what reinforces the species, its vigour, its capacity of mastering, or its aptitude to be used. Health, progeny, race, the future of the species, the vitality of the social body, and power speak of sexuality and for sexuality. As for this, it is not a mark or symbol, it is an object and target.[36]

On the other hand, it also became the central theme, also seen in history used as an index of the health of society to "reveal" its biological vigour:

> For a long time, it was indeed said that a country should be populated if it wanted to be rich and powerful. But it is the first time that, at least consistently, a society has asserted that its future and its fortune are linked not only to the

[35] Foucault, *História da Sexualidade*.
[36] Ibid., p. 198.

> number and virtue of citizens, or the rules of marriage and family organization but to how each one uses his sex.[37]

In Japanese society, sex was no longer as obscure as before; rather, it was valued – even as a secret that everyone talks about all the time. Soon, it generated adaptation and order to create economically useful and politically conservative sexuality.[38]

Still, in Foucault's thinking,[39] it is necessary to abandon the concept that modern industrial societies created a moment of sexual repression. Instead, there was a profusion of heretical sexualities, giving rise even to legal provisions that ensured the proliferation of specific pleasures. Never before had existed so many centres of power or so many focal points to stimulate the intensity of pleasures. The power insisted on spreading further.

As for biopower, the emperor's intention was to enhance the government's image (eroded by rapes, and anti-Japanese sentiment), contribute militarily (limiting espionage), and increase the morale of the military (avoiding illnesses and providing "recreation"). They promoted and controlled women using techniques aimed at soldiers regardless of the impact on these women's lives and existence, seen as instruments to make the Japanese victory possible.

This system was so ingrained that even if most soldiers realized the girls' inexperience and fear at that time, they accepted it. The arrangement was widely endorsed, fuelling this machine that, despite being focused on optimizing their lives, crushed girls' lives, who would never get over their traumas. This was possible only because:

> Power works and is exercised in a network. Entangled in it, individuals not only circulate but can always exercise this power and suffer from its operation. They are never the inert or reconciled targets of power; they always relay it. In other words, power does not apply to individuals, it passes through them. […] Put differently, the individual is not the other of power: it is one of its first effects. The individual is an effect of power and simultaneously, or by the

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37 Ibid., pp. 28–29

38 *Visualizing Japan (1850s–1930s* (online).

39 Foucault, *História da Sexualidade.*

> very fact of being an effect, is its transmission centre. Power passes through the individual he has constituted.[40]

But this power is not something that can be acquired but exercised through unequal and mobile relationships that are immanent to other links, being the effect of the imbalances and inequalities that occur inside of them. It also comes from below and reverberates from the top of the social pyramid to its depths. It is intentional and not subjective, not resulting from the choice or decision of a single individual. Plus, if there is power, there is resistance.

The relationship between Japanese authorities and its soldiers was based on inequality to the point of reducing them to mobile weapons with a specific aim. Before the direct relationship with the victims, Japan exercised an unbalanced economic and political relationship with their soldiers, that of subordination, making them state-sponsored weapons of war. Thanks to this subservience, the emperor was able to think of improving them as machines. So, it was essentially an intentional connection that arose for a specific purpose and that is why the comfort stations were created so that they could be more likely to be successful.

This was meant to improve Japanese soldiers as machines of destruction while taking advantage of the social, economic, and sexual vulnerability of women who were part of their homeland since they transformed their territory into a protectorate.

If we understand which service these Korean women were forced into and what was its purpose, we can demonstrate how they were instrumentalized and how much judicial inertia meant for them. From the Japanese perspective, it was never a crime because all they did was use girls and women for the "greater good" of the empire that owned the Korean land. But otherwise, the women feel anxious because they still do not know for what purpose they were forced into this scheme while demanding reparations for all they have gone through until now.

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[40] Foucault, *Microfísica do poder*, p. 103.

4. Political instrumentalization of sexuality

From Giddens' perspective, the cognitive capacity of agents contributes to the construction and dissemination of institutional models in structures of power. This demonstrates the importance of the attempts to develop reflexive self-control, even in minority groups. Although it may seem irrelevant, it states that docile individuals are not so desirable, either.

Power can only be understood by individual and group actions in social spaces that have a certain importance in institutional reflexivity. In other words, power is born from various alternatives that the individual subject has, but does not do so, perpetuating the order and helping to sustain it. Thus, human action is a fundamental element to understand initiatives of social change, even though there are limits, obstacles, and the consideration of unintended aspects and phenomena that influence it, directly or not.

> […] it concerns events of which an individual is a perpetrator, in the sense that he could, at any stage of a given sequence of conducts, have acted differently. Whatever happened would not have if this individual had not interfered. Action is a continuous process, a flow, in which the reflective monitoring that the individual maintains is fundamental for the control of the body that actors ordinarily sustain until the end of their daily lives.[41]

Thus, there is an interpretation that goes beyond the state order. First, there is a theoretical shift in the axis of power, with power being gradually replaced by an idea of government and room for freedom. Then, a new concept of politics and resistance to political dominance is elaborated, idealized as ethic that aims to create new forms of subjectivity that escape the simultaneous individualization and totalitarianism of power.[42]

With this triple shift, it may be said that individuality and freedom, even in cases where the balance of power is unbalanced, control everything. So, if one wants to change, then one must keep resisting.

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[41] A. Giddens, *A constituição da sociedade*, 2nd ed., São Paulo 2002, pp. 10–11.

[42] Ibid.

Reflective appropriation of bodily processes and development is a fundamental element in the debates and struggles of life politics. It is important to highlight this point to see that the body has not simply become an inert entity, subject to commodification or "discipline" in Foucault's sense. If that were so, the body would be primarily a place of emancipatory politics – the question might then be one of liberating the body from the oppression to which it would have been subjected. Under the conditions of high modernity, the body is much less "docile" than it ever was to the self since both are intimately coordinated within the reflexive project of self-identity. The body itself – mobilized in praxis – becomes more relevant to the identity that the individual promotes.[43]

In the case of comfort women, the following elements are present. The Japanese state would not have been able to maintain the machine of comfort stations if it were not for the soldiers' docile acceptance and cooperation, plus the entire population who knew what was going on but supported and was passive about it. Added to that, the *ianfus* had nothing to do but act passively to survive, or actively whether trying to escape and risking even more dangers or committing suicide.[44]

If there is no power without refusal or potential disagreement, the game for hegemony necessarily involves the individual, since he or she cannot abstain and confine themselves to his particularity. This happens because the person invokes a reflection on what is happening in the social sphere.

So, the way individuals constitute themselves as the masters of their practices could be characterized as acting upon themselves seeking self-transformation to reach a position or a way of being. This makes the person's life depend on the operation of certain values that correspond to standards that would be[45] an alternative to the subjectification strategies of modern disciplinary power and biopower.

The individual embraces things that are said to be right even if he or she disagrees, not only because it fulfils utilitarian needs, but because it materializes a particular narrative of self-identity.[46] This reflexivity extends to his body, which becomes more integral in making individual decisions about one's life.

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43 Ibid., p. 201.

44 Yoshimi, *Comfort women*.

45 Foucault, *História da Sexualidade*.

46 A. Giddens, *Modernidade e identidade*, Rio de Janeiro 2002.

The Japanese nation during the Pacific War was essentially utilitarian, but not in the Western sense, being much more focused on collectivism than on the strict sense of individualism. The politics of fear brought by war was essential to the rise of utilitarian collectivism, leading most individuals who were aware of what happened in the war fields to accept the comfort stations, not only for satisfying the moment's needs but for being a convenient narrative of national formation. In this way, as well as reconfiguring a state based on sexuality, it influenced the sexual policy of modern Japan.

Hence, the vulnerability of these enslaved women is not only found in the impossibility of doing anything in that situation but fighting. Their resistance and survival carrying this catastrophe, plus the courage they had to tell about what had been done to them proves that the individual can do something in extreme cases of unbalanced power. Similarly, being chosen in a utilitarian and eugenic way to consolidate manoeuvres of a state that only saw them as objects serving to forge victory while staying strong in the post-war era indicates that war might also have the face of a forlorn and deteriorated woman.

Conclusion

This paper deals with the historical concept in which comfort women emerged, from the antecedents of the Second World War to the first report in the 1990s, showing how inhuman the situation was for these women under this system.

The legal and analytic study of the case demonstrates how much evil Japan did to achieve the improvement of her soldiers. This demonstrates one thing: even if these soldiers had been sentenced, this alone would not solve the problem of the institution of this programme. In parallel, we saw how they were forced to serve soldiers to encourage them to fight, improve the army's image, reduce STDs, and stop anti-Japanese sentiment. This demonstrates that the system was created as a public policy for biopolitical improvement and, more importantly, a way of controlling men.

As analysed in the legal section, although the international community did not approve of the institutionalised conduct of Japan, the country still violated what was agreed upon by manipulating its soldiers into extreme

productivity. Until today, the matter has not been resolved legally, and the case of ex-slaves is still a hot issue as they get older day by day.

The analysis of biopower was proposed in equivalence with Japanese nationalist thinking, to prove the vulnerability of victims. Seen as inferior by Japan, the sexual instrumentalization to which they were subjected as objects of political power is another way to demonstrate the Japanese biopolitical understanding of the issue.

Altogether, the system was seen as an attempt to make the army more productive at the expense of the coercive use of sexual work of Korean women as part of the Japanese protectorate at the time. In dialogue with Giddens, it was possible to see that in a situation of control, the individual always has an option, whether it is suicide or resistance, as happened to the comfort women.

In sum, whether in the 20th or 21st century, women and their rights are easily brushed aside in favour of the opposite gender. This explains why there has never been a definitive resolution of the case when all victims wanted was freedom to simply exist, not as an object forced from birth to do what the state or men want, but as an end in themselves. The case analysis from the perspective of biopower has made it clear that the situation was worse than what is told by the media and history: it was essentially a political manoeuvre, planned well in order to destroy "inferior" women while fortifying the "weapons" that would destroy the entire country.

Women's vulnerability in armed conflicts lies in the fact they are part of the "second" gender – the one that can easily be deprived of their rights, being used as a tool for as long as deemed necessary. The gender who was banished from receiving answers from the Japanese justice even 80 years on.

COMPARATIVE STUDIES

KAROLINA AKSAMITOWSKA

The Domestic Legal Framework for the Prosecution of Core International Crimes in Iraq and Ukraine: A Comparative Perspective

Introduction

The conflicts in Eastern Ukraine and Northern Iraq, ongoing in parallel in recent years, ravaged the regions of Donbas and Sinjar among others, with few international accountability efforts undertaken to date to deliver justice to the victims of mass atrocities. Following the Revolution of Dignity, the annexation of Crimea by Russia, and the outbreak of the war in Eastern Ukraine, the Ukrainian government submitted two declarations to the International Criminal Court (ICC) with a request for the ICC to initiate investigations.[1] On 11 December 2020, the Office of the Prosecutor of the ICC announced the conclusion of the preliminary examination in the situation in Ukraine.[2] More than a year after the conclusion of the preliminary examination, eight years after first alleged violations of international criminal law were reported and, most importantly, only after Russia decided to start a full-scale invasion on the entire territory of Ukraine on 24 February 2022, an investigation

[1] Declaration by Ukraine lodged under Article 12(3) of the Rome Statute, 8 Sept. 2015, https://www.icc-cpi.int/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf.

[2] ICC, 'Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine', 11 Dec. 2020, https://www.icc-cpi.int/Pages/item.aspx?name=201211-otp-statement-ukraine.

was finally initiated by the ICC.[3] Nevertheless, it might take years, or even a decade, before the first acquitting or convicting verdicts are pronounced.[4]

With the impeding perspective of lasting impunity – stemming from the lack of initiatives aimed at creation of criminal tribunals at the regional or international level,[5] or the referral to the International Criminal Court by the United Nations Security Council for many years – domestic authorities in Iraq and Ukraine have taken decisive legislative and institutional steps at the domestic level to prosecute perpetrators of core international crimes. These initiatives include the creation of a specialised War Crimes Prosecution Department within the General Prosecutor's Office in Ukraine, and the initiative of the Kurdistan Regional Government in Iraq to establish a hybrid (internationalised) criminal tribunal to try ISIS perpetrators of international crimes.[6] It is suggested that the deteriorating security situation in Sinjar[7] and the full-scale Russian invasion on Ukraine in 2022 might constitute a litmus test of these accountability initiatives.

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[3] ICC, 'Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation', 2 March 2022, https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states.

[4] Wayne Jordash, Anna Mykytenko, 'International Criminal Court is no panacea for Ukraine', *The Atlantic Council*, 17 Dec. 2020, https://www.atlanticcouncil.org/blogs/ukrainealert/international-criminal-court-is-no-panacea-for-ukraine.

[5] A number of accountability options have been explored by different states, however no practical steps were taken to establish a hybrid tribunal or another institution tasked with prosecuting ISIS fighters. See Roger Lu Phillips, 'A Tribunal for ISIS Fighters – A National Security and Human Rights Emergency', *JustSecurity*, 30 March 2021, https://www.justsecurity.org/75544/a-tribunal-for-isis-fighters-a-national-security-and-human-rights-emergency. In the case of Ukraine, initiatives aimed at prosecuting the crime of aggression are being currently explored, see 'PACE calls for the setting up of an ad hoc international criminal tribunal to hold to account perpetrators of the crime of aggression against Ukraine', 28 April 2022, https://pace.coe.int/en/news/8699/pace-calls-for-the-setting-up-of-an-ad-hoc-international-criminal-tribunal-to-hold-to-account-perpetrators-of-the-crime-of-aggression-against-ukraine.

[6] The bulk of this chapter was finalised before the full-scale Russian invasion of Ukraine in 2022, therefore it does not contain the analysis of accountability initiatives that were launched after 24 February 2022, including the proposal for the creation of a Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine.

[7] 'Estimated 3,000 people flee armed clashes in northern Iraq', *Al-Jazeera*, 2 May 2022, https://www.aljazeera.com/news/2022/5/2/thousands-flee-after-clashes-erupt-in-iraqis-sinjar-2.

Building upon the important work undertaken by the civil society organisations,[8] this chapter explores the domestic legal framework(s) for the prosecution of core international crimes in Iraq and Ukraine. To what extent are international crimes recognised in national legislation in Ukraine and Iraq? How does domestic law in Ukraine and Iraq define core international crimes? Are there any alterations of definitions of international crimes and what are the consequences? Are there any inconsistencies between international law and domestic law in the domestic legal frameworks in Ukraine and Iraq? What are the main obstacles related to the prosecution of international crimes in domestic/hybrid proceedings?

It is suggested that despite their shortcomings, the contemporary domestic/hybrid accountability efforts in Ukraine and Iraq have the potential to lead to successful international criminal investigations and prosecutions, as well as to secure convictions for core international crimes, as has been noted in the case study of the Ukrainian domestic war crimes trials. In addition, as a result of the limitations of the domestic legal systems, and the limited implementation of international definitions of crimes, novel investigative practices and prosecutorial strategies can contribute towards the "localisation" of international criminal and humanitarian law.

1. The current legal framework for the prosecution of atrocities and terrorism-related offences in Iraq and Ukraine

Since Iraq does not currently have the legal framework in place that would allow the prosecution of core international crimes *per se*,[9] this section focuses solely on limited possibilities to use certain elements of the Iraqi national criminal legal framework for the purposes of prosecuting alleged international crimes committed by ISIS in Northern Iraq.

[8] See K. Aksamitowska, 'The Counter-Hegemonic Turn to "Entrepreneurial Justice" in International Criminal Investigations and Prosecutions Relating to the Crimes Committed in Syria and Eastern Ukraine', in F. Jeßberger, L. Steinl, K. Mehta (eds.), *International Criminal Law – A Counter-Hegemonic Project?* The Hague 2022, pp. 135–152.

[9] See B. van Schaack, *Imagining Justice for Syria*, Oxford 2020, pp. 279–280.

Unlike the Ukrainian Criminal Code, the Iraq Penal Code does not criminalise core international crimes. However, as noted by Mohamad Ghazi Janaby and Ahmed Aubais Alfatlawi, under the Iraqi Penal Code, universal jurisdiction may be indirectly applicable to certain violations of international humanitarian law,[10] although they are not characterised as such. The authors argue that the reference to crimes perpetrated by ISIS that related to trading in women, children and slaves could be considered as clear violations of IHL if committed with a nexus to the armed conflict in Northern Iraq. The Iraqi Penal Code does not require that the alleged crimes must be committed at a specific time for universal jurisdiction to be applicable. Consequently, the listed crimes could be considered as violations of IHL if they are committed during armed conflicts.[11] In their academic scholarship, Mohamad Ghazi Janaby and Ahmed Aubais Alfatlawi argued that in theory, five types of legislation in Iraq "can assist in drawing a final conclusion as to the position of international crimes in its criminal justice system."[12] They listed the Iraqi Penal Code No 111 (1969), Law of the Iraqi High Criminal Tribunal No. 10 (2005), the Anti-terrorism Law No. 13 (2005), and the Yazidi Female Survivors' Law No. 8 (2021). In addition, the Yazidi Genocide Law and Law Amending the Iraqi High Criminal Tribunal No. 10 (2005) might be considered.[13] It is now worth considering some of the aforementioned initiatives aimed at criminalising (directly or indirectly) core international crimes in the national legal system of Iraq. In close cooperation with the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD), the Iraqi Council of Representatives drafted legislation criminalising ISIS' crimes in Iraq, namely the Yazidi Genocide Law and Law Amending the Law of the Iraqi High Criminal Tribunal.[14] Moreover, UNITAD also has closely

[10] Article 4(2)(f) of the Additional Protocol II to the 1949 Geneva Conventions; Article 8 of the Rome Statute.

[11] M.G. Janaby, A.A. Alfatlawi, 'UN Efforts to Make ISIS Accountable for International Crimes: The Challenges Posed by Iraq's Domestic Law', *International Criminal Law Review*, vol. 21, no. 6, 2021, p. 1113.

[12] Ibid., p. 1112.

[13] Ibid.

[14] Ibid., p. 1118.

collaborated with the Iraqi Kurdistan Regional Government on the Draft Statute of Special Court for ISIS Crimes in the Kurdistan Region of Iraq.[15]

In this context it is worth mentioning the Yazidi Genocide Law drafted by the Iraqi Council of Representatives in 2020. The law, in contrast to the Draft Statute of the Special Court for ISIS Crimes discussed below does not incorporate the Rome Statute definitions, but instead adopted a modified 1948 Genocide Convention definition.[16] This definition refers specifically to the "national, ethnic, racial, or religious group with the intent to destroy or remove it in whole or in part, whether it is committed in peacetime or during the war."[17] Whilst acknowledging that the crimes against the Yazidis qualify as genocide under this definition, the Yazidi Genocide Law does not contain any accountability language, which constitutes a significant legal obstacle to successful investigations and prosecutions of core international crimes in Iraq.

Mohamad Ghazi Janaby and Ahmed Aubais Alfatlawi noted that the *actus reus* listed in the Yazidi Genocide Law is too limited to be an effective tool for the prosecution of ISIS suspects. Furthermore, since the Yazidi Genocide Law does not contain any sentencing provisions, only crimes contained in the Iraqi Penal Code can be prosecuted, however, the Iraqi Penal Code does not cover other crimes such as slavery of women and forcibly separating or transferring children. Although some crimes committed by ISIS, including slavery of women, qualify as crimes that provide for the application of universal jurisdiction by Iraqi courts, they are not dealt with as a separate crime.[18]

As illustrated above, the Yazidi Genocide Law created more legal obstacles to the investigation and prosecution of core international crimes in Iraq.

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15 Ibid.

16 Ibid.

17 Iraqi Parliament, The Draft of the Yazidi Genocide Law (2020).

18 Janaby, Alfatlawi, 'UN Efforts', 1119. See also M. Mulligan, 'Conceptualizing an Internal Conflict: ISIS and International Law', *International Journal of Contemporary Iraqi Studies*, vol. 10, nos. 1–2, 2016, pp. 73–88; C. Gibbons, 'CEDAW, the Islamic State, and Conflict-Related Sexual Violence', *Vanderbilt Journal of Transnational Law*, vol. 51, no. 5, 2018, p. 1424; V. Dakhil, A. Zammit Borda, A.R. Murray, 'Calling ISIL Atrocities Against the Yezidis by Their Rightful Name: Do They Constitute the Crime of Genocide?', *Human Rights Law Review*, vol. 17, no. 2, 2017, pp. 261–283; C. Kenny, 'Prosecuting Crimes of International Concern: Islamic State at the ICC?' *Utrecht Journal of International and European Law*, vol. 33, no. 84, 2017, pp. 120–145; S. El-Masri, 'Prosecuting ISIS for the Sexual Slavery of the Yazidi Women and Girls', *International Journal of Human Rights*, vol. 22, no. 8, 2018, pp. 1047–1066.

What remains a viable alternative is a comprehensive amendment of the Iraqi Penal Code in line with the Rome Statute definitions that would enable swift investigations and prosecutions on the basis of international criminal law and international humanitarian law in Iraqi courts.

The next initiative aimed at bridging the accountability gap with respect to the crimes committed by ISIS against the Yazidis and other minority groups is the amendment of the Law of the Iraqi High Criminal Tribunal in order to allow for prosecutions of ISIS fighters, as well as the admission of evidence from the UNITAD.[19] However, the Iraqi lawmakers propose including a temporal jurisdiction that will be applicable solely to ISIS' crimes and will not extend further in time thus offering no accountability option applicable to possible future atrocities.[20] Moreover, similarly to the Yazidi Genocide Law, the amendment of the Law of the Iraqi High Criminal Tribunal does not provide any law on the practice of sentencing, therefore once again, the Iraqi Penal Code would be applicable. The legal obstacles applicable to the legislative initiatives listed above can be categorised as excessively relying on the "temporal" element, which is removed from, for instance, Law No. 2689 in the amendment of the Ukrainian Criminal Code. The Ukrainian lawmakers did not assume that the armed conflict in Eastern Ukraine (post 2014) would be the only event triggering jurisdiction of the domestic war crimes articles. In line with the legislation implementing international criminal law and international humanitarian law in the EU Member States, the Ukrainian legislation assures protection both in time of peace and war, and most importantly, does not have an expiry date. Conversely, the proposed legislation in Iraq seems fragmented and incomplete, lacking the necessary provisions on sentencing. It is suggested that a legislative solution that could strengthen international criminal investigations and prosecutions in Iraq is an amendment of the Iraqi Penal Code to incorporate the Rome Statute definitions contained in the Draft Statute for the Special Court for ISIS Crimes.

Whilst, as noted above, Iraq does not currently criminalise core international crimes, another proposal to amend the legislation was prepared by the Kurdistan Regional Government in Iraq, in collaboration with UNITAD.

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[19] Janaby, Alfatlawi, 'UN Efforts', p. 1120.

[20] Ibid.

The jurisdiction of the planned Special Court for ISIS Crimes extends to "every natural person, whether Iraqi or non-Iraqi, who is a member of ISIS and is accused of committing one of the crimes stipulated in the proposal, against a citizen of Iraq in the region or anywhere else." The crimes listed include genocide, crimes against humanity, war crimes and "any punishable acts under the Iraqi Penal Code No. 111 of the year 1969 as amended or any another enforced Iraqi Law in the Region."[21]

The Draft Statute provides for individual criminal responsibility as well as superior responsibility under draft Article 13(3): "If the superior knew or had any reasons to know that his subordinate had committed the crime or he was about to commit it, or the superior did not take necessary and appropriate measures to prevent these crimes from committing."[22]

The Court would apply the Criminal Procedure Law No. 23 from 1971, and the Rules of Procedure and Evidence appended to the Draft Statute. Moreover, according to draft Article 14(2) The provisions of the Penal Code shall be applied in a manner which does not contradict the Statute and the relevant international laws. In addition, crimes within the jurisdiction of the Court are not subject to limitations that terminate the criminal responsibility. The Court and the Supreme Court may refer to the relevant judgements of international criminal tribunals.

Draft Article 15(1) envisages that investigations may be "initiated *ex-officio* or based on information obtained from any source, including but not limited to, information from the police, or governmental and non-governmental organizations. It is up to the Investigative Judge to assess the information received and decide whether to commence an investigation."[23]

According to Article 15(4) "the Court can rely on evidence provided/presented by investigative teams working on behalf of the United Nations in order to enhance the strength of the court in order to prosecute members of the aforementioned terrorist organization ISIS/Daesh. This will maintain the integrity of UNSCR 2379 of the year 2017."[24]

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21 Article 12, Special Court for ISIS Crimes in KRI, Proposal, May 2021.
22 Ibid., Article 13.
23 Ibid., Article 15.
24 Ibid.

This provides for the possibility to obtain valuable evidence collected and processed by non-governmental organisations. Moreover, the Court could use evidence stored by UNITAD. This evidence could prove crucial in prosecutions of the highest leaders of ISIS.

The Draft Statute criminalises war crimes, crimes against humanity and genocide in accordance with the Rome Statute. Mohamad Ghazi Janaby and Ahmed Aubais Alfatlawi argued that this has created significant legal obstacles in relation to the conflict classification, "for example, despite the draft statute purporting to regulate crimes committed by ISIS, it also refers to war crimes committed in international armed conflicts. It is not clear why this is the case when the conflict involving ISIS was classified as a non-international armed conflict."[25]

Whilst scholars have argued that the Draft Statute is "needlessly broad",[26] it is argued by the present author that the Draft Statute should be incorporated as an amendment of the Iraqi Penal Code with certain revisions in order to make it compatible with the Iraq Constitution. The temporal jurisdiction should be in any case avoided, as in the case of the Ukrainian Law No. 2689, and the reference to the crimes committed by ISIS is not needed from the legal perspective. Its inclusion is a matter of policy; however, it does not help advance accountability for core international crimes in Iraq. Unsurprisingly, in June 2021, Iraq's Federal Supreme Court rejected calls to establish a criminal court in Erbil to try ISIS suspects.[27] The establishment of the Court was blocked for two reasons. First, it has been argued that "the Kurdistan Regional Government (KRG) cannot employ non-Iraqi judges and public prosecutors."[28] Second, according to Article 95 of the Iraqi Constitution, "the establishment of special or extraordinary courts is prohibited."[29]

A similar situation took place in Ukraine in the early 2000s. The Government of Ukraine initially signed the Rome Statute of the International

[25] Janaby, Alfatlawi, 'UN Efforts', pp. 1121.

[26] Ibid., p. 1122.

[27] K. Jangiz, 'Iraq Rejects Kurdish Attempts to Establish Court for ISIS Crimes', *Rudaw*, 27 June 2021, https://www.rudaw.net/english/kurdistan/270620212.

[28] Ibid.

[29] Article 95 of the Iraq Constitution (2005).

Criminal Court on 20 January 2000,[30] however in 2001 the Constitutional Court of Ukraine ruled that the ratification of the Rome Statute would be unconstitutional.[31] In November 2015, after the Revolution of Dignity, the President of Ukraine submitted Draft Law 3524 to the *Verkhovna Rada* on amending the Constitution to permit the ratification of the Rome Statute.[32] On 2 June 2016, the *Verkhovna Rada* of Ukraine adopted the draft law and it became effective in 2019.[33] Although to date Ukraine has still not officially ratified the Rome Statute, a civil society campaign is ongoing with the aim of advocating for the ratification.

Nonetheless, it is worthwhile to note that due to legislative limitations in both Iraq and Ukraine, domestic courts often rely on counterterrorism laws to prosecute the alleged crimes committed in the context of armed conflicts. The courts in Iraqi and the Kurdistan Regional Government (KRG) often rely on counterterrorism laws to prosecute ISIS suspects, primarily and often exclusively on the charge of membership in ISIS, with no "distinction made for the severity of the charges brought against suspects and no effort to prioritize the prosecution of the worst offenses."[34] According to the Human Rights Watch report from 2017 titled *Flawed Justice – Accountability for ISIS Crimes in Iraq*, "between February and late August 2017, the court had commenced trials against 5,500 ISIS suspects, and convicted and sentenced at least 200."[35] In addition, the authors of the report underlined that the charges against ISIS suspects fail to capture the broad range of crimes ISIS has

[30] Decree of the President of Ukraine No. 313 on Authorisation of V. Yelchenko to Sign the Rome Statute of the International Criminal Court on Behalf of Ukraine, 11 Dec. 1999.

[31] Opinion of the Constitutional Court on the conformity of the Rome Statute with the Constitution of Ukraine, Case N 1-35/2001, N 3-v/2001 of 11 July 2001.

[32] On the Amendments to the Constitution of Ukraine: Draft Law No. 3524 of 25 Nov. 2015.

[33] Law of Ukraine On Amendments to the Constitution of Ukraine (in the Field of Judiciary), No. 1401-VIII of 2 June 2016.

[34] Human Rights Watch, *Flawed Justice: Accountability for ISIS Crimes in Iraq*, December 2017, available at https://www.hrw.org/report/2017/12/05/flawed-justice/accountability-isis-crimes-iraq.

[35] Ibid.

committed.[36] The counterterrorism laws carry harsh sentences, even for mere membership of ISIS: life in prison or the death penalty.[37]

Similarly to the initial efforts by European war crimes units in charging foreign terrorist fighters from Syria and Iraq, the ISIS suspects in Iraq are charged with violating the counterterrorism laws, rather than with other offenses under the Criminal Code. In these cases, authorities have to prove the accused's membership in ISIS, or participation in the ISIS bureaucracy or fighting forces, as grounds to prosecute and sentence ISIS suspects, as opposed to proving specific criminal conduct. However, as also realised by the European authorities several years after the first core international crimes prosecutions in Germany or the Netherlands, reliance on counterterrorism laws is problematic from the perspective of prioritising and punishing the most serious crimes.[38] Prosecuting crimes of ISIS members as terrorism erases the victim perspective from the criminal proceedings and additionally, discounts the harm inflicted on the victim community as a whole. Ultimately, overusing the membership in a terrorism organisation as the 'crime without the victim' in prosecutions of foreign fighters will fail to advance justice for the victims of mass atrocities.[39]

Before the full-scale Russian invasion on Ukraine on 24 February 2022, the legal classification of crimes committed during the armed conflict in Eastern Ukraine posed significant challenges for domestic investigators and prosecutors. The difficulties in accessing the temporarily occupied territories

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[36] Ibid., p. 2.

[37] Iraqi Counterterrorism Law, No. 13 of 2005, Article 2 lists acts considered as terrorism, including:

"4. Use violence or threat to stir up sectarian strife or civil war or sectarian infighting by arming citizens or by encouraging them to arm themselves and by incitement or funding. 5. Assail with firearms army and police offices, volunteer centers, security offices, and assault national military troops or their reinforcement, communication lines or their camps or bases, with a terrorist motive".

Article 4: "1. Any one who committed, as a main perpetrator or a participant, any of the terrorist acts stated in the second & third articles of this law, shall be sentenced to death. A person who incites, plans, finances, or assists terrorists to commit the crimes stated in this law shall face the same penalty as the main perpetrator; 2. Any one, who intentionally covers up any terrorist act or harbors a terrorist with the purpose of concealment, shall be sentenced to life imprisonment."

[38] Ibid., p. 3.

[39] See L. Dolci, *A Victimless Crime? A Narrative on Terrorism Victimization to Build a Case for Support*, Geneva 2017.

in Donbas, as well as the initial lack of training in investigating war crimes, have complicated the process of assessment of the acts committed by representatives of the so-called "Luhansk and Donetsk People's Republics". In practice, most of the suspects were charged under Article 258(1) ("Terrorism"),[40] or Article 258(3) ("Creation of a Terrorist Group or a Terrorist Organization"). This created further significant problems for the prosecution authorities, who had to demonstrate that the suspect "sought to violate public security, intimidate population, provoke an armed conflict, or international tension, or to exert influence on decisions made or actions taken or not taken by government agencies or local government authorities, officials and officers of such bodies, associations of citizens, legal entities, or to attract attention of the public to certain political, religious or any other convictions" with his or her actions.[41] This strict *mens rea* requirement created obstacles for the prosecution of fighters from the temporarily occupied territories. As the conflict progressed and the Ukrainian domestic authorities gained more practical knowledge and experience in investigating war crimes and other offences committed in the temporarily occupied territories, the specialised Department for Supervision of Crimes in the Situation of Armed Conflict within the Office of the Prosecutor General has also increasingly prioritised prosecutions under the war crimes provisions of the Criminal Code as opposed to the counter-terrorism provisions in Article 258 of the Criminal Code.

[40] Criminal Code of Ukraine, Article 258: "1. An act of terrorism, that is the use of weapons, explosions, fire or any other actions that exposed human life or health to danger or caused significant pecuniary damage or any other grave consequences, where such actions sought to violate public security, intimidate population, provoke an armed conflict, or international tension, or to exert influence on decisions made or actions taken or not taken by government agencies or local government authorities, officials and officers of such bodies, associations of citizens, legal entities, or to attract attention of the public to certain political, religious or any other convictions of the culprit (terrorist), and also a threat to commit any such acts for the same purposes, – shall be punishable by imprisonment for a term of five to ten years".

[41] Criminal Code of Ukraine, Article 258.

2. The current framework for the prosecution of core international crimes in Ukraine

Prior to the implementation of the provisions of international humanitarian law into Ukrainian domestic law, the specialised Department for Supervision of Crimes in the Situation of Armed Conflict, that was created within the Office of the Prosecutor General, relied on Article 438 of the Criminal Code of Ukraine in developing core international crimes charges.[42] This article provides for the criminal punishment of "violations of the laws and customs of warfare" which is applicable to the means of warfare prohibited by international law and encompasses international treaties and customary international law, or any other violations of the laws and customs of war recognised by international instruments ratified by Ukraine.

Article 438 encompasses customary international law prohibitions with regards to the violations of the rules related to the means of warfare and does not encompass customary international law prohibitions regulating the methods of warfare. Nevertheless, Article 438 provides for a range of bases for prosecution of core international crimes and may be used for successful prosecutions. For instance, in a case before the Slavyansk City District Court of Donetsk Region from 2017, the fighter of the Donetsk People's Republic (DPR) was charged with ill-treatment of prisoners of war under Article 438(1) of the Criminal Code of Ukraine. In addition, he was charged with participation in a terrorist organisation (pursuant to Article 258-3(1) of the Criminal Code of Ukraine) and being an "accessory in conducting an aggressive war, by prior conspiracy by a group of persons" (pursuant to Articles 27(5), 28(2), 437(2) of the Criminal Code of Ukraine). The accused was found guilty of all charges and sentenced to 10 years and one month in prison.[43]

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[42] "Article 438. Violation of the Laws and Customs of War:

1. Cruel treatment of prisoners of war or civilians, deportation of civilian population for forced labour, pillage of national treasures on occupied territories, use of means of warfare prohibited by international law, or any other violations of laws and customs of warfare recognised by international instruments consented to as binding by the Verkhovna Rada of Ukraine, and also giving an order to commit any such actions, – shall be punishable by imprisonment for a term of eight to twelve years.

2. The same acts accompanied with an intended murder, – shall be punishable by imprisonment for a term of ten to fifteen years, or life imprisonment."

[43] https://reyestr.court.gov.ua/Review/66885637.

In a different case before the Lysychansk City Court of the Luhansk Region from 2020, four fighters of the so-called Luhansk People's Republic (LPR) were charged with "violation of the laws and customs of war, provided by international treaties, expulsion of civilians for forced labour, committed by a group of persons" under Articles 27(2), 28(2) and 438(1) of the Criminal Code of Ukraine.[44] In addition, they were charged with 'participation in a conspiracy aimed at planning and preparation of aggressive war, conducting aggressive hostilities committed by a group of persons by prior conspiracy' (under Articles 27(2), 28(2), 437(2) of the Criminal Code of Ukraine), participation in the activities of an illegal armed group (pursuant to Article 260(2) of the Criminal Code of Ukraine), carrying, storage and acquisition of firearms, ammunition without the permission provided by the law (under Article 263(1) of the Criminal Code of Ukraine), and "illegal confinement and abduction of a person, committed against two or more persons, in a way dangerous to the life and health of the victims, accompanied by the infliction of physical suffering on them, with the use of weapons, carried out for a long time, committed by an organised group" (under Article 146(3) of the Criminal Code of Ukraine).

The accused were found guilty of all charges. One suspect was sentenced to ten years and six months of imprisonment. Three other suspects were sentenced to 10 years of imprisonment each. The Court of Appeal upheld the judgement.[45]

In a more recent case relating to the full-scale Russian invasion on Ukraine (post 24 February 2022) a Russian commander of the 4th Kantemirov Division of the Moscow Oblast was sentenced to life imprisonment. He was found guilty of violating the laws and customs of war, combined with premeditated murder under Article 438 of the Criminal Code of Ukraine.[46] This is the first war crimes conviction after 24 February 2022.

The above cases illustrate that under the current legislative framework it is possible to conduct successful prosecutions for war crimes in Ukraine. However, the contemporary legal framework does not provide the legal basis

[44] https://reyestr.court.gov.ua/Review/89984664.

[45] https://reyestr.court.gov.ua/Review/91997961.

[46] "'The First Trial Against the Russian Soldier" as an Indicator of the State Justice System of Ukraine', *Zmina*, 25 May 2022, https://zmina.info/en/articles-en/the-first-trial-against-the-russian-soldier-as-an-indicator-of-the-state-justice-system-of-ukraine.

for prosecuting crimes against humanity in Ukraine, which is a significant disadvantage of the Ukrainian model for prosecuting international criminal and humanitarian law.

It is suggested that as war crimes units gain experience and expertise in investigating and prosecuting core international crimes, they become more comfortable with charging individuals with a wider spectrum of international crimes. Initial prosecutions for terrorism-related crimes, with time evolve into more developed indictments including war crimes, crimes against humanity or even genocide.[47] The same might be true for Iraq and Ukraine in the future as more expertise in core international crimes cases is concentrated on domestic trials.

3. The Proposal to Amend the Current Legal Framework for the Prosecution of Core International Crimes in Ukraine

Although at the moment of writing, it has not been yet signed by the President of Ukraine, it is worth noting a significant legislative initiative. On 20 May 2021, the *Verkhovna Rada* adopted Law No. 2689 titled "On amendments to certain legislative acts on the Enforcement of International Criminal and Humanitarian Law." The adoption of the Bill, largely mirroring the legal definitions contained in the Rome Statute of the International Criminal Court, represents a historical development equipping the Ukrainian war crimes unit with more legal tools to prosecute core international crimes committed both in Eastern Ukraine and the occupied territory of Crimea in the context of the armed conflict (post-2014) as well as the alleged crimes committed since the start of the Russian invasion on 24 February 2022.[48]

The new legislation largely expands the meaning and scope of the existing Article 438 of the Ukrainian Criminal Code to include the elements contained

[47] See, for instance, https://www.prosecutionservice.nl/topics/international-crimes/what-cases-have-been-prosecuted/syria or https://www.justiceinfo.net/en/45808-yazidi-trial-germany-prove-genocide-single-case.html.

[48] 'The Parliament of Ukraine Adopts Bill to Implement International Criminal and Humanitarian Law', *Parliamentarians for Global Action*, 20 May 2021, https://www.pgaction.org/news/ukraine-adopts-icc.html, accessed 21 May 2021.

the Rome Statute of the International Criminal Court, as well as different categories of armed conflicts (distinguishing between international and non-international armed conflicts) and categories of protected persons. The amended Article 438 places a strong emphasis on fair trial guarantees.

Importantly, the new Law No. 2689 introduces crimes against humanity into the Ukrainian domestic legislation for the first time. This includes sexual and gender-based crimes, such as rape as a crime against humanity in Article 442(1) of Draft Law 2689. This is an important development, because previously the Ukrainian authorities could prosecute rape only as a regular domestic crime under the Criminal Code without acknowledging the full scope of the conduct of the accused in the temporarily occupied territories.

Conclusions and way forward

The enactment of Draft Law No. 2689 is a significant step towards accountability for core international crimes, particularly in the context of the ongoing war in Ukraine. However, its potential for bridging the accountability gap for the crimes committed since 2014 cannot be assessed in a vacuum, but rather should be analysed taking into consideration the totality of the Ukrainian legal system and its procedural (and practical) limitations.

In fact, it may be argued that the potential of Draft Law No. 2689 to contribute towards mitigating legal uncertainty in Ukraine is limited. Whilst the benefit in the introduction of provisions criminalising crimes against humanity is clear, the other amendments, including the broadening of the definition of war crimes in Article 438, are not seen as particularly needed or new in practical terms. In fact, successful prosecutions under the old version of Article 438 have taken place in relation to crimes committed both post-2014, as well as in relation to crimes committed by Russian soldiers in 2022.

Since the conflict in Eastern Ukraine was a shock both for the society and the Ukrainian legal system, the legal system as a whole has managed to adapt to the circumstances, and is functioning even in the circumstances of an ongoing full-scale war.

The approach of the prosecution services has also evolved to accommodate the needs of the situation and provide a viable legal solution to the uncertainty

created by the armed conflict. Now, in the event of entry into force of Law No. 2689, the solution that was carefully developed, will have to be replaced by new elements, derived from an international legal instrument, mostly mirroring the provisions in the old version of Article 438, however at the same time requiring additional resources. This solution would create additional responsibilities and tasks for the practitioners in an already overburdened legal system, in a country struggling with an ongoing armed conflict.

The Iraqi criminal justice system is faced with a similar dilemma. Whilst attempting to accommodate the expectations of the international community and the civil society, as well as to increase the potential for international cooperation and collaboration in the area of investigations of core international crimes, the Kurdish Regional Government is facing significant obstacles in their efforts to establish a hybrid tribunal, including constitutional questions of sovereignty which cannot be resolved quickly.

Both in the case of Ukraine and Iraq, the working definitions of "terrorism" and "war crimes" are not sufficiently delineated to provide for straightforward legal interpretation. However, at the same time, the efforts to "internationalise" the legal framework, are faced with such domestic backlash, in an unstable security situation, that can indeed lead to the weakening of the prosecutorial potential of the state authorities altogether. It is suggested that the advantage of the "internationalisation" of legal definitions is the ability of the domestic authorities to cooperate with international partners and war crimes units from abroad.

It is argued that with the support of the civil society and despite all the shortcomings, the contemporary domestic accountability efforts in Ukraine and Iraq have the potential to lead to successful international criminal investigations and prosecutions, as well as to secure convictions for core international crimes. Increased awareness and expertise in the field of international criminal and humanitarian law among the legal profession in both Iraq and Ukraine, has an impact on the proliferation of novel investigative strategies and unique prosecutorial methods that combine and reconcile both "local" and "international" elements of international criminal justice. In this way, outside of the UN Security Council system and in hostile security environments, international criminal justice becomes embedded in domestic criminal law systems.

RICCARDO VECELLIO SEGATE

Resisting Domestic Courts' Universal Jurisdiction over International Crimes: Comparative Notes on China and Italy

1. Why this study?[1]

1.1 The shortcomings of prosecuting international crimes internationally

The prosecution of international crimes by specialised non-domestic courts and tribunals established either by treaty or through ad hoc arrangements under United Nations (UN) mandate, raises several procedural and substantial concerns which are making the path of international justice tortuous and increasingly contested. Some of those concerns, like those investing privacy rights and equality of arms in evidentiary assessments,[2] are so profound that they appear unresolvable under the current state of affairs; it is thus widely acknowledged that the future of international criminal justice shall

[1] In addition to the conference in Warsaw (held remotely) whose papers are published in this collection, an earlier version of the present work was presented on October 23, 2021, at the online meeting of the Younger Comparativists Committee of the American Society of Comparative Law, hosted by the University of Wisconsin–Madison and chaired by Dr Antonia Baraggia (University of Milan). Most of the research leading to this publication was performed in the author's capacity as the Talent Program PhD Candidate in International Law at the Department of Global Legal Studies (Faculty of Law) of the University of Macau (China), as well as in his role as a Visiting PhD Researcher at the Centre for Law & Technology (School of Law) of the University of California, Berkeley (US). Accuracy of facts, definitions, and doctrines as presented here is only current at the time of last substantive revision (early January 2022) and should *not* be presumed valid at later date – in fact, this is a remarkably fast-evolving field. The author wishes to thank Prof. Patrycja Grzebyk for her insightful comments during the editing process.

[2] See further R. Vecellio Segate, 'Cognitive Bias, Privacy Rights, and Digital Evidence in International Criminal Proceedings: Demystifying the Double-Edged AI Revolution', *International Criminal Law Review*, vol. 21, no. 2, 2021, pp. 278–279.

be gradually relocated to domestic trials by reliance on a specific legal device known as universal jurisdiction (UJ).

UJ is a relatively ancient but still controversial and multifaceted legal device. It mostly refers to the right presumably held by domestic courts worldwide to prosecute alleged criminals for international – rather than domestic – crimes, applying either international criminal law ("ICL") directly, or deemed-equivalent provisions as transposed into the relevant domestic criminal code, with weak to no nationality and/or territorial nexus between the prosecuting jurisdiction and the defendants or their conduct. Nevertheless, one may also speak of UJ with reference to the practice of the International Criminal Court (ICC), insofar as it extends its jurisdiction over citizens of states that did not ratify its founding treaty (also known as the "Rome Statute"), as a corollary to the "complementarity principle" underpinning the latter or as a follow-up to UN Security Council (UNSC) mandate.[3] Both domestic and ICC-practiced manifestations of UJ will be considered for the sake of the present analysis. The no-nexus *domestic* form of UJ will be referred to as its "pure" form, the weak-nexus *domestic* form thereof will be defined as "qualified", while any reference to the "international" (or "global") ICC expression of UJ will be treated separately and thus rendered explicit to the reader. To summarise, I identify three UJ forms: *domestic pure* UJ, *domestic qualified* UJ, and *international* UJ.[4] In most instances, the reader will be able to learn from the textual context what UJ form is being referred to over specific passages.

[3] Refer further to X. Philippe, 'The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?', *International Review of the Red Cross*, vol. 88, no. 862, 2006, pp. 388–389; A. Abass, 'The International Criminal Court and Universal Jurisdiction', *International Criminal Law Review*, vol. 6, no. 3, 2006, pp. 349–385. The reader is advised to note that certain authors define the third form of UJ as the ICC's "international jurisdiction"; see, e.g., C. Ryngaert, 'Universal Jurisdiction in an ICC Era: A Role to Play for EU Member States with the Support of the European Union', *European Journal of Crime, Criminal Law and Criminal Justice*, vol. 14, no. 1, pp. 47–56. While terminology is not definitely settled in scholarship, what matters most is to agree on what it is being pointed to through one's preferred language.

[4] The reader may wish to compare these three forms with those ("unilateral", "delegated", and "absolute") proposed in M. Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Antwerpen–Oxford 2005), pp. 110–121.

Despite the difficulties inherent to any – and particularly this – transition towards a more ordinary recourse to UJ, a few "Western" jurisdictions (including Germany, Sweden, Finland, and The Netherlands) have recently (re-)started to employ this (on-paper long-standing) solution,[5] which provided them with an opportunity to redraft relevant sections of their penal codes consistently with the Rome Statute.[6]

Besides the full allocation of adjudicatory rights and duties to States, UJ might also be introduced in a more hybridised fashion, for instance as a second-stage procedure after prosecutorial activities still centrally conducted by a global prosecutorial authority building upon the better seeds of the ICC's legacy.[7] And yet, the major caveat one shall note with regards to UJ potentially thriving is the actual degree of state participation, signalling very few enthusiastic jurisdictions (like the ones just listed above) accompanied by evident patterns of resistance or "qualitative resizing", so much that someone conjectures a stasis[8] or even an effective *downward* trend – in other regions, but also within Europe itself. Indeed, most "Eastern" and "Global South" jurisdictions have consistently voiced suspicion at this trend, while other Western jurisdictions from the "Global North" seem not yet ready to embrace it, either.

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[5] See, e.g., to K. Aksamitowska, 'Digital Evidence in Domestic Core International Crimes Prosecutions', *Journal of International Criminal Justice*, vol. 19, no. 1, 2021, pp. 189–211; F. Jeßberger, *Towards a 'Complementary Preparedness' Approach to Universal Jurisdiction: Recent Trends and Best Practices in the European Union*', Briefing for the Policy Department for External Relations of the European Parliament's Directorate General for External Policies of the Union (2018), PE 603.878, EP/EXPO/B/COMMITTEE/FWC/2013-08/Lot8/21, p. 4.

[6] Refer, e.g., to the French Code of Criminal Procedure of 2010, Article 689, and the German Code of Crimes against International Law, *Völkerstrafgesetzbuch* (VStGB) of 2002.

[7] This means that rather than having an international criminal court as we have today, which is theoretically global but severely limited in multiple practical respects, we could have an international criminal prosecutorial agency that starts or even completes investigations, to then transfer the case to relevant domestic courts for further adjudicatory handling. This would make sense of those domestic courts' UJ, while ensuring prosecutorial uniformity at the international level.

[8] Check for instance I.B. Wuerth, 'International Law in the Post-Human Rights Era', *Texas Law Review*, vol. 96, no. 2, 2017, p. 293.

1.2 China and Italy

Among those jurisdictions which have already been identified in literature as declaring themselves unwilling or unready to face this relatively new challenge, the People's Republic of China (PRC, hereinafter also "China") and Italy can be deemed to stand out, owing to their regional appeal expressed as geoeconomic might and normative leadership respectively, to their involvement in (genuinely alternative?[9]) discourses on global justice, as much as to the millenary and mutually tied roots of their civilisations[10] and legal traditions.

As for the regional appeal, China's extends not so much into East Asia, but rather across Sub-Saharan Africa, Latin America, Russia, Central Asia, and generally all those regions which do not situate themselves within a neoliberal, US-championed global order; Italy, instead, is naturally projected onto the Mediterranean basin, with political appeal being socialised throughout Mediterranean European and non-European countries alike.

With regards to Sino-Italian ties (both on a general historical level and, perhaps counterintuitively, in terms of legal heritage), one would probably think of the celebre examples of Marco Polo and Matteo Ricci (from Venice and Rome, to – reportedly – Beijing and Macao respectively), first modern venturers in the "Far East", as immediate references. Four centuries later, Italians ruled over an imperialistic concession in Tianjin (天津意租界; *Tiānjīn Yì Zūjiè*: 1901–1943), and then Italian Fascists tried to subjugate part of today's Mainland China, but one should most importantly bear in mind, more recently, several instances of law-termed "rapprochement" between Atlanticism and Communism, culminated with the speech on human rights (HR) by former (communist) Italian President of the Republic, Mr Giorgio Napolitano, in Beijing.

And yet, all these Italo-Chinese exchanges are symbolised most powerfully by evidence that the Ancient Roman and Ancient Chinese civilisations have

[9] Doctrinally speaking, Italy's global-justice discourses are premised upon internationalism, democratisation, and the pursuit of absolute standards of conduct, while Chinese ones primarily emphasise sovereignty and the right to development as a mitigating circumstance for the perpetuation of certain injustices understood as transitional (i.e., as related to a certain stage of development and thus temporarily justified or at least acceptable).

[10] Refer to M. Marinelli, G. Andornino (eds.), Introduction to *Italy's Encounters with Modern China: Imperial Dreams, Strategic Ambitions*, Basingstoke 2014, pp. ix–xix, xii.

been (among) the first to become aware of each other's existence between the "West" and the "East", with the Roman and Han Empires having left tangible trace of mutual curiosity since at least the second century AD. It will not surprise anyone, then, if the newly issued Civil Code of China results from decades of engagement with Italian (and German) scholars on Roman Law, which shaped not only China's civil law, but also some facets of its approach to criminal law. UJ itself, at least as a doctrine, is not confined to criminal law, with interfaces with civil law having risen to prominence, e.g., through the United States' (US) Alien Tort Statute (ATS); in numerous instances, civil law[11] UJ claims of compensation may follow criminal charges. Relevantly here, China submitted *amicus curiae* briefs to American courts in ATS cases, opposing the exercise of civil UJ under the ATS; this is a position that China consistently adopts vis-à-vis UJ moves (no matter the field), and that Italy would have possibly opted for as well (but ultimately refrained from making it explicit owing, I suppose, to geopolitical alliance reasons).

Comparing to Germany, it is exceedingly interesting to observe how similar legal roots built on Roman Law are distorted to such an extent as to originating diametrically opposite responses to UJ, at least on its criminal law side, but this brief work will rather be focusing on Italy. In fact, it will be shown that on top of the obvious differences between China and Italy, these two jurisdictions share a number of commonalities which may prove of relevance for the future of UJ and global justice.

Hence, the present study is premised to investigate these two jurisdictions comparatively, as far as their stances regarding UJ's applicability over international crimes (and practice related thereto) are concerned. Both China and Italy, on their own, have already been identified as UJ-resistant in literature, but are there common concerns underpinning such a choice? And what are the long term systemic consequences of the potential convergence between these two countries and their legal systems over this policy dossier?

[11] Referring here to civil lawsuits rather than to civil law legal systems.

2. Chinese suspicion

To analyse why China refrains from supporting UJ, I will sort potential explanations in two categories: crime specific – i.e., relevant for genocide, crimes against humanity (CAH), war crimes, or the crime of aggression (CA) only – and general ones. The analysis will take stock from the second category.

2.1 General reasons

2.1.1 Political background

To begin with, one shall appreciate the political landscape within which Chinese policymakers assess UJ. Under the flag of stability and growth, which stand as the core Chinese Communist Party's legitimising deliverables to stay in power, China's aim is to avoid tit-for-tat moves, thus preventing vexatious inter-state litigation for political purposes, and political retaliation generally; consistently, it is important for China not to set non-amicable precedents that could be later replicated against itself by courts in other jurisdictions. Spectacularly, this also confers credibility to China's own criticisms against interferences by foreign courts, which have materialised quite vividly, e.g., during the 2013 Spanish ordeal, when the *Audiencia Nacional* convicted Chinese officials (including former president Hú Jǐntāo) over vicissitudes in Tibet. Back then, arrest warrants were issued and passed onto Interpol, but the unprecedented judicial hazard was met with such a grave degree of governmental scepticism and diplomatic condemnation (well beyond China) that the Congress of Deputies amended Spain's UJ law in 2014, with the Supreme Court of Spain taking note of this amendments immediately after, and introducing prerequisites of jurisdictional nexus and inter-State mandatory pre-coordination to turn the previously "pure" UJ into a "qualified" one. Having learnt the lesson, Chinese leaders realised the dangers of endorsing UJ rules, eventually resolving to strengthen their opposition thereto.

More broadly, because most international crimes globe-wide are now documented and/or denounced by non-state actors (NSAs), and the global public opinion is instigated thereby, Chinese leaders' opposition to UJ is coherent with their intention to contest non-governmental organisations' (NGOs) role

in raising HR concerns as well as attempted intrusions by NSAs into China's domestic affairs. This latter stance is observable both internally and vis-à-vis foreign governments, and to a certain degree, it even extends to China's moves in the context of international humanitarianism.[12] What is more, the geographical embeddedness of the ICC within the European sociolegal space might also contribute its share towards extra-European discontent with the Court's jurisdictional reach[13] – "emotion" is a too often dismissed and yet most powerful driver of international relations (IR), though perhaps a controversial one for lawyers to track.

At the domestic level, China expressed its disappointment about Human Rights Watch's insistence on characterising "re-education camps" and other policies in the Xinjiang Autonomous Region as genocide (most recently rephrased by HRW, perhaps more strategically, as CAH allegations).

Internationally, China did not veto the UNSC's referral of Sudan (over Darfur) and Libya to the ICC, while it later vetoed Syria's deferral, not so much for obsequious political kinship with the "allied" Syrian regime, but owing to policy backtracking instigated by prospected Western misuse of the Responsibility to Protect (R2P) framework.[14] In fact, China generally fears that every formal concession made to Western powers will sooner or later be turned by the US and "like-minded coalitions" into abusive interventionism, *which could equally apply in the ICL realm*. It is not just a matter of China's inward-looking interests, but of generally striving for not destabilising IR broadly conceived, under the mantra that political conservation is by definition a virtue for development, and that promoting a post-Cold War mentality implicates dialogue with all actors multilaterally via the disapplication of blocks of "deserving" versus "undeserving" state interlocutors.

From a theoretical perspective, it can be hypothesised that contrasting UJ (an originally Western legal product, after all) is for China a powerful channel

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[12] See, e.g., L. Gong, 'Humanitarian Diplomacy as an Instrument for China's Image-building', *Asian Journal of Comparative Politics*, vol. 6, no. 3, 2021, pp. 242–243.

[13] Read extensively M.J. Christensen, 'Justice Sites and the Fight against Atrocity Crimes', *Law & Social Inquiry*, First View, pp. 1–29, https://doi.org/10.1017/lsi.2022.46.

[14] See further M. Contarino, M. Negrón-Gonzales, K.T. Mason, 'The International Criminal Court and Consolidation of the Responsibility to Protect as an International Norm', *Global Responsibility to Protect*, vol. 4, no. 3, 2012, pp. 287–294; S. Breslin, 'China and the Global Order: Signalling Threat or Friendship?' *International Affairs*, vol. 89, no. 3, 2013, p. 632.

for expressing its dissatisfaction with the wealthy and long nihilist West's sudden and hypocritical HR awakening, after Western powers have "developed" over centuries through exploiting and subjugating populations worldwide (from American Indians to Africans, to South Asians, Aboriginal Australians, and well-settled civilisations in the Middle East), committing countless crimes indeed "against the whole of mankind" all over the globe, then conveniently considered "civilising" and thus "lawful". My hypothesis could have been just speculation, if it were not framed against the overall picture of Chinese championship of legal discourses on south-to-south solidarity, international law ("IL") alternativeness, and "third-worldism". Sceptical nihilism towards UJ shall be read as a symptom of China's broader suspicion at Western doctrinal alliances based on narratives of what is "just", "moral", or "ethical" under the Law of Nations.

At the same time, walking a not-so-fine line between "developing country" and "economic superpower" status, China strives to carve out instances of exceptionalism from its overall low-toned international legal cooperation, as to project itself already as the forthcoming superpower, on the *primus inter pares* style of the US. This process of hopeful replacement is prepared moderately through current IL negotiations across a wide range of dossiers,[15] as to lay the foundations for an independent, unaccountable, US-styled supremacy *later on*, which frequently cooperates in establishing legal frameworks for other jurisdictions to abide to and for itself not to subscribe to (resembling, e.g., the American *ad libitum* path of engagement with – and disengagement from – the ICC).

2.1.2 Legal arguments

Besides the political motives outlined above, one may posit that the overarching reason why China constrains itself from exercising UJ over international crimes rests again with *geopolitical* caution and self-restraint, but expressed *in legal terms* through the respect for third jurisdictions' sovereignty[16] (and,

[15] Check, e.g., R. Vecellio Segate, 'Horizontalizing Insecurity or Securitizing Privacy? Two Narratives of a Rule-of-Law Misalignment between a Special Administrative Region and Its State', *The Chinese Journal of Comparative Law*, vol. 10, no. 1, 2022, p. 85.

[16] See also S. Freeland, 'International Criminal Justice in the Asia-Pacific Region: The Role of the International Criminal Court Treaty Regime', *Journal of International Criminal Justice*, vol. 11, no. 5, 2013, p. 1036.

where applicable, related officials' immunities) in accordance with the well-established principles of sovereign equality of States, non-interference in domestic affairs,[17] as well as state consent[18] in IR, including vis-à-vis international organisations (which are, in turn, understood as expressive of state consent as grounded in treaty stipulations).[19] Normatively, non-interference and non-intervention are of the essence to China, as to (temporarily?[20]) distance itself from the competing world power: the US.

For China, adjudicatory jurisdiction (AJ) can only be territorial, personal, or protective; the latter, framing peace through a lexicon of stability and conservation, traces its historical root to the Tokyo Trials where both US and British allies were deemed collectively immune from prosecution. For China, these are the three only possible forms of AJ, which already represent a step forward compared to the US, whose Restatement on Foreign Relations Law implies that AJ cannot even be considered part of public international law (PIL).[21] In any case, China's preference lies with (more or less traditional) territorial expressions of jurisdiction; to exemplify, in handling the *Gadji-ogly* case about a USSR aircraft hijacked before it entered the aerial space of China in 1986, the Harbin Intermediate People's Court made recourse to the "effect-continuation" doctrine as to circumvent the application of UJ[22] and affirm a derivative of China's "territorial" jurisdiction instead.

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[17] See also E. Wong, 'Australia's Extraterritorial Legislation and the Financial Sector: Challenges and Options in the Asian Century', unpublished MPhil dissertation in Business Law at the University of New South Wales in Sydney, 2019, p. 102.

[18] See also Zhu Dan, 'China, the Crime of Aggression, and the International Criminal Court', *Asian Journal of International Law*, vol. 5, no. 1, 2014, p. 117 (note 147).

[19] Cf. T. Clark, 'The Teleological Turn in the Law of International Organisations', *International and Comparative Law Quarterly*, vol. 70, no. 3, 2021, p. 538 (note 29).

[20] China is currently employing international law to challenge US supremacy, but one plausible expectation is that it will later (that is, once established as a superpower) make recourse to it exactly like the US is availing itself of it now (i.e., through claims revolving around "exceptionalism").

[21] See extensively A.L. Parrish, 'Adjudicatory Jurisdiction and Public International Law: The Fourth Restatement's New Approach', in P.B. Stephan, S. Hull Cleveland (eds.), *The Restatement and Beyond: The Past, Present, and Future of U.S. Foreign Relations Law*, Oxford 2020, pp. 303–318.

[22] Interestingly, some scholars address "the effects principle as a 'slippery slope' towards universal jurisdiction", see Danielle Ireland-Piper, (2013) 'Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine', *Utrecht Law Review*, vol. 9, no. 4, 2013, p. 79.

What is more, in the view of China, UJ has not yet become customary in its purest form, due to it being other from the obligation of *aut dedere aut judicare* in treaties (which upholds the principle of state consent), from the moderate practice of extraterritorial jurisdiction of *relevant* States, and even from the jurisdiction of international judicial bodies under UN or treaty mandate (which, again, stem from direct or indirect state subscription, and thus sovereign consent).

As a result, China could not second the Rome Statute's UJ rules because of their alleged violation of Article 34 of the Vienna Convention on the Law of Treaties (VCLT),[23] which has arguably gained the status of customary law. In fact, China did not join the Statute despite acting as a norm entrepreneur during its entire drafting and development process: as a member of the Preparatory Committee, an active participant of the 1998 Diplomatic Conference in Rome (also serving in the capacity as vice-president, like India), and an observer to the Assembly of States Parties' meetings, especially the Special Working Group on the Crime of Aggression – and despite preferring the ICC solution as treaty-based instead of previous ad-hoc arrangements (ICTY, ICTR, and so forth), regardless of the latter's UNSC mandate.

With respect to the Statute, China shares with Russia and India serious objections to its UJ rule, whereby the consent of the territorial state (the one where the crime was committed) suffices to bring an accused before the ICC, regardless of the state of citizenship of the accused themselves. Even more crucially, China objects to jurisdiction-disjointed UNSC referrals as violating the *pacta tertiis nec nocent nec prosunt* rule as per Articles 34–35 VCLT on non-contracting parties, which acquired customary status. While China does not consider itself bound to it regardless, specific positions from the legal concerns it raised[24] are to be taken seriously and further perused in doctrine, despite scholars seem to believe the whole discussion is exhausted once one underlines the formal (and definitely not *bona fide*) difference between

[23] See H. Deng, 'What Can China Do to Develop International Criminal Law and Justice Further from the Perspective of the International Criminal Court?', *Revista Tribuna Internacional*, vol. 5, no. 9, 2016, pp. 19–27, 21. See also S. Linton, 'India and China *Before*, *At*, and *After* Rome', *Journal of International Criminal Justice*, vol. 16, no. 2, 2018, p. 274.

[24] See also A. Skander Galand, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits*, Leiden 2019, p. 68.

"obligation" and "interest" which premises the ICC's UJ rule to infringe upon non-contracting parties' *interests* without creating strict *obligations* bearing on them (because no international responsibility arises from non-contracting parties' failure to cooperate with the Court).[25]

Scholars further emphasise that in deference to the *Lotus* principle, nothing prevents States from supranationally delegating their territorial jurisdiction to an international judicial body, regardless of the accused's citizenship.[26] All in all, this is a purely legalistic matter (which is not the same as to dismiss it as irrelevant), because in practical terms, China could anyway veto any UNSC referral to the ICC which is issued under Chapter VII of the UN Charter. Nevertheless, the normative dimension of China's uncompromising posture on this issue shall be tributed due weight: by advocating for a UJ rule not entirely dependent on the UNSC's will, China conveyed its diplomatic respect to all those sovereigns which, differently from itself, could not have vetoed any referrals; this is part of its current normative discourse, subsumed under "counterhegemonic" narratives to be defended on the global scale. The eventually upheld compromise on the UJ was not the purest the ICC's parties could have selected: in fact, as retrievable from the *travaux préparatoires*, Germany had proposed an even more absolute UJ reach for the ICC, which will make its generous today's stances towards UJ unsurprising.

Moreover, the PRC objected to the inclusion of war crimes in non-international armed conflicts (NIACs) within the scope of mentioned Statute's provisions, arguing that UJ should be grounded in codification (rather than progressive development) of international customs. The ICC's prosecutorial *motu proprio* placed China at discomfort as well,[27] transforming the ICC's complementarity in even more biased and potentially dangerous a tool in the hands of the prosecution's discretion; for China, international (criminal) tribunals' founding rationale shall always lie with either state-consented explicit complementarity or a codified mandate by States themselves. In any event, rather than an all-comprehensive instrument, China would have preferred

[25] See further D. Zhu, *China and the International Criminal Court*, Berlin 2018, pp. 60–62.

[26] Refer extensively to M. Cormier, *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties*, Sydney 2020, pp. 40–50.

[27] Check A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', *European Journal of International Law*, vol. 10, no. 1, 1999, p. 161.

the pursuance of a crime-by-crime "opt-in" approach, in line with its more general concern over the compulsory jurisdiction of international judicial bodies – a concern which within the Asian region, it shares at least with India.[28]

On a different note, China does not support any violation of *ratione personae* and/or *ratione materiae* immunity of foreign state officials and/or of diplomatic and consular privileges, especially before domestic courts, as a matter of IR comity and deference to other States' sovereignty; Judge Liu Daqun, former vice-president of the International Criminal Tribunal for the Former Yugoslavia (ICTY), lucidly reiterated the conceptual difference between immunities before domestic and international courts (being absolute and potentially restrictive, respectively). Despite this precept, it shall be noted here that there are, in fact, Chinese public order exceptions to this rule domestically, so that not even domestic immunity is truly absolute; still, an explicit treaty provision as *lex specialis* is needed for international adjudicators to side the customary and treaty rules on immunity.

To complete the puzzle of China's general legal approach to UJ internationally, it is crucial to trace its attitude regarding the work on this subject pursued by the United Nations General Assembly's (UNGA) Sixth Committee.[29] China interprets the Committee's lack of agreement as *negative* evidence of international customs – or of desuetude, if one believes consensus around UJ was once stronger among nations. Furthermore, China attempted to withdraw this topic from the Committee's agenda in multiple occasions, exercising political pressure in order to suppress potential agreement which could have encouraged further state practice and/or demonstrated *opinio juris*.

Mirroring its stance vis-à-vis the ICC, China is wary of deferring to UJ both conceptually and operationally even at the domestic level. Indeed, even though Article 9 of China's Criminal Law (CL) – drafted also with a view to bringing the PRC into compliance with its obligations under the

[28] See also G. Ulfstein, 'International Courts and Tribunals and the Rule of Law in Asia', in T. Suami, A. Peters, D. Vanoverbeke, M. Kumm (eds.), *Global Constitutionalism from European and East Asian Perspectives*, Cambridge 2018, p. 526.

[29] All documents pertaining to such work are retrievable from https://www.un.org/en/ga/sixth/73/universal_jurisdiction.shtml.

common criminal jurisdiction clause in the 1949 Geneva Conventions[30] – concedes to the exercise of UJ over those crimes which are listed by treaties China has joined, such a jurisdictional duty will still be fulfilled through the enactment and enforcement of provisions on relevant *domestic* crimes,[31] which means, without necessarily transposing or "applying" *international* criminal law directly – not even ICL's *customary* definitions of international crimes.[32] Nonetheless, fixing the teleological interpretation of this provision might prove remarkably more complicated than it appears at first sight.[33] Article 9 CL reads (roughly translated) as follows:

> This Law shall be applicable to crimes which are stipulated in international treaties concluded or acceded to by the People's Republic of China and over which the People's Republic of China exercises criminal jurisdiction within the scope of obligations, prescribed in these treaties, *it agrees to perform*.

The last segment, emphasised in italics, is the problematic one: it seems to stress that no reservations should have been attached by China to those treaties for the Article to apply thereto, but some scholars claim (probably improperly) it means that China shall have already included those crimes in its 1997 CL.[34] This is perhaps a matter of linguistic indeterminacy, but if the first reading were to be accepted, then such last segment would be somewhat redundant. This seems an open question that Chinese lawmakers are invited to settle.

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[30] See Z. Lijiang [人权研究院], 'The Chinese Universal Jurisdiction Clause: How Far Can It Go?', *Netherlands International Law Review*, vol. 52, no. 1, 2005, p. 93.

[31] See C. Qi, 'Death Penalty Reform in China: International Law Context', unpublished PhD thesis in Law at the University of Central Lancashire, 2018, p. 93.

[32] See also Z. Huo [霍政欣], M. Yip, 'Extraterritoriality of Chinese Law: Myths, Realities and the Future', *The Chinese Journal of Comparative Law*, vol. 9, no. 3, 2021, pp. 13–14.

[33] Check also Liu Daqun, 'Chinese Humanitarian Law and International Humanitarian Law', in L. van den Herik, C. Stahn (eds.), *The Diversification and Fragmentation of International Criminal Law*, Leiden 2012, p. 356 (note 36).

[34] See, e.g., R. White, 'Plugging the Leaks in Outer Space Criminal Jurisdiction: Advocation for the Creation of a Universal Outer Space Criminal Statute', *Emory International Law Review*, vol. 35, no. 2, 2021, p. 365: "China is automatically empowered to *apply its criminal codes* to crimes defined by treaties to which it is a party" (emphasis added).

All in all, Chinese courts are understandably reluctant to initiate cases for *international* crimes under customary UJ without such crimes having been specified in the domestic CL; indeed, this judicial hesitance is particularly widespread in autocracies, where judges are *expectedly or factually* prone to subservience to the executive and legislative powers (which in turn, in the PRC, *de facto* overlap, regardless of the State Council and National People's Congress being formally distinct bodies). It would be insightful to inspect China's Special Administrative Regions' (SARs) reasons for exercising a similar degree of self-restraint, which probably results from a combination of criminal law *substantial* issues, criminal law *procedural* issues, the complex proto-constitutional geometry of the two SARs, and further bureaucratic, administrative, sociopolitical, and possibly even budgetary constraints.

2.2 Crime-specific reasons

As introduced above, China's reluctance to exercise UJ can also be inspected on a crime-by-crime basis; this investigation will be performed *very succinctly* in the sections to follow.

2.2.1 CAH

The first salient exemplification comes from CAH, which are peculiarly understood by China as necessarily related to armed conflicts and contingencies related thereto,[35] and as addressing the gravest and most large-scale instances only, otherwise they would enter the realm of international human rights law (IHRL).[36] International customary law vindicates some support for this claim, but equally tenable is that if confined to armed conflicts, most CAH would become redundant in that already covered by war crimes. Moreover,

[35] See extensively B.B. Jia, 'China and the International Criminal Court: The current situation', *Singapore Yearbook of International Law*, vol. 10, 2006, p. 92; see also L. Jianping, W. Zhixiang, 'China's Attitude Towards the ICC', *Journal of International Criminal Justice*, vol. 3, no. 3, 2005, pp. 615–617.

[36] See D. Zhu, 'China, Crimes Against Humanity and the International Criminal Court', *Journal of International Criminal Justice*, vol. 16, no. 5, 2018, pp. 1035–1036.

the independence of *some* CAH from armed conflicts bears a deeply rooted history, at least in the post-WW2 era (which arguably suffices to make it customary).

Even more cogently though, what is an "armed conflict" today? And who are its "lawful combatants"? Asymmetric and hybrid warfare, private militia and military contractors, automated weapons, randomised treatments of civilians, abuse of "terrorism"-related terminology to hit civilian targets (but also for soldiers to hide therein), cyber-disinformation campaigns, as well as "proxy" and "new" wars generally, are challenging all established legal paradigms[37] to such an extent that traditional war crimes would only end up covering a slight minority of contemporary "war" incidents.

In China's view, armed conflicts, in turn, should be addressed comprehensively by siding the reputedly obsolete Western distinction between *ius ad bellum* and *ius in bello*: in Chinese legal thinking, whether a belligerence purpose is lawful *does* depend on the actual belligerent conduct. For China, "behaving" makes any belligerence lawful: no moral or legal authority can pre-sort "right" (once they would have been called "holy") wars from the others; phrased differently, the honourable way in which an army acts makes the purpose of its conduct lawful, and not vice versa, because actual war is "a moral duty of a belligerent which is eager to prove its justness under *ius ad bellum*; refusing to undertake such a duty leads to the forfeiture of its moral standing."[38] An *ad bellum* act can, of course, be deemed unlawful *retroactively*, depending on its consequences: in the case of Pearl Harbour, the Japanese aggression would have not been per se unlawful because it violated the duty to declare war, but it would have *become* so due to the massacre of China's civilians it allowed Japan to continue perpetrating in its aftermath.[39] Mentioned alternative "applied philosophy", which is to be taken seriously, might

[37] Check, for instance, A.L. Paulus, M. Vashakmadze, 'Asymmetrical War and the Notion of Armed Conflict: A Tentative Conceptualization', *International Review of the Red Cross*, vol. 91, no. 873, 2009, pp. 95–125.

[38] Z. Liang, 'Chinese Perspectives on the *ad bellum*/*in bello* Relationship and a Cultural Critique of the *ad bellum*/*in bello* Separation in International Humanitarian Law', *Leiden Journal of International Law*, vol. 34, no. 2, 2021, p. 317.

[39] In this sense, refer also to Y. Totani, 'The Case against the Accused', in Y. Tanaka, T. McCormack, G.J. Simpson (eds.), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited*, Leiden 2010, pp. 151–152.

partly address the obsolescence of war crimes codification when confronted with contemporary conflicts, but would arguably still not call for a complete dismissal of CAH.

2.2.2 Genocide

With regards to genocide, political arguments from the Chinese standpoint can be posited both against and in favour of a deeper engagement with UJ. Against it, the argument goes that China would solicit other jurisdictions to scrutinise its own alleged genocidal acts (namely in Xinjiang and Tibet) by means of UJ, after having endeavoured to avoid this by attaching a reservation to Article 9 – on the jurisdiction of the International Court of Justice (ICJ) – of the Convention on the Prevention and Punishment of the Crime of Genocide when it joined the latter in 1983.

And yet, proving China's "technical" ability and "genuine" willingness to prosecute *génocidaires* would shield it from the ICC's complementary jurisdiction over non-parties under Article 17(1) of the Rome Statute[40] (which China, however, does not legally recognise nor should practically be concerned about, owing to its geoeconomic weight and relatively few troops deployed for "humanitarian" missions abroad). Most notably, there is no need for a jurisdiction to enact provisions on *international* crimes in its criminal code in order to prove genuine prosecutorial will. At the same time, little incentive is placed on China to prosecute domestically, as the ICC – under its Statute's Article 17(2) – was granted the prerogative to "review" domestic courts' verdicts regardless, as to ascertain states' genuine willingness to prosecute.

In any case, because the ICJ's jurisdiction is disapplied, China is urged to decide how to comply with Article 6 of the Genocide Convention: it can either introduce the crime of genocide in its CL or accept the ICC's or foreign domestic courts' jurisdiction. This urgence holds even truer as punishing genocide is a peremptory norm (*ius cogens*) in Article 53 VCLT's sense (*a fortiori* so because China has ratified the VCLT, thus accepting at least the existence of peremptory norms, whose identification is practically delegated

[40] See W. Zhu, B. Zhang, 'Expectation of Prosecuting the Crimes of Genocide in China', in R. Provost, P. Akhavan (eds.), *Confronting Genocide*, Berlin 2011, p. 188.

to the ICJ). Indeed, the ICTY has affirmed a duty to criminalise genocide under general international law,[41] and the ICJ itself has ruled (e.g., in *Bosnia-Herzegovina v. Yugoslavia* 1996 or *Barcelona Traction* 1970) that punishing genocide falls even beyond conventional obligations as an obligation *erga omnes*.[42] Hence, it is quite remarkable that China insists with its official assertion that applying UJ stands as *ius cogens* only vis-à-vis piracy[43] (and not to punish e.g. torture, slavery, apartheid, forced transfer, narcotraffic, terrorism, forced disappearance, compelled medical experiments, biological degradation, despite condemning them all – and many other – verbally in multiple occasions) – in fact, two out of five cases of piracy-related UJ since 1705 are Chinese, and confined to piracy,[44] China even (informally) accepts inter- or supra-State *delegated* UJ!

One could summarise as follows. Allegations of genocidal acts committed within the PRC (including the two SARs due to the declaration China attached to the Genocide Convention) will be handled by Chinese domestic courts relying on the same Convention and Article 9 CL, but under the definition of ordinary domestic crimes only (such as homicide, rape, extorting confession through torture, or incitement to ethnic hatred) – in compliance with Article 3 CL (*nullum crimen, nulla poena sine legem*) – because CL features no "crime of genocide". In a system that still lacks proper checks and balances

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[41] Cf. D. Amoroso, 'The Duties of Criminalization under International Law in the Practice of Italian Judges: An Overview', *International Criminal Law Review*, vol. 21, no. 4, 2021, p. 643 (note 10).

[42] Read further J.M. Florent Wouters, S.I. Verhoeven, 'The Prohibition of Genocide as a Norm of *Ius Cogens* and Its Implications for the Enforcement of the Law of Genocide', *International Criminal Law Review*, vol. 5, no. 3, 2005, pp. 401–416; P. Urs, 'Obligations *Erga Omnes* and the Question of Standing before the International Court of Justice', *Leiden Journal of International Law*, vol. 34, no. 2, 2021, pp. 505–525; G.I. Hernández, 'A Reluctant Guardian: The International Court of Justice and the Concept of "International Community"', *Yearbook of International Law*, vol. 83, no. 1, 2013, pp. 13–60.

[43] The same stance is shared by India; refer to K.Y. L. Tan, ed., *The Asian Yearbook of International Law*, vol. 19, 2013, p. 333. UJ has been consistently applied to – or at least doctrinally provided for – cases of piracy in PIL, even though the convenience of this legal device vis-à-vis piracy is being challenged nowadays; see M. Gavouneli, *Functional Jurisdiction in the Law of the Sea*, Leiden 2007, pp. 25–26.

[44] Refer to S.P. Shnider, 'Universal Jurisdiction over Operation of a Pirate Ship: The Legality of the Evolving Piracy Definition in Regional Prosecutions', *North Carolina Journal of International Law and Commercial Regulation*, vol. 38, no. 2, 2013, p. 494.

and whose highest political leaders seem factually unaccountable before the courts, this internal process is obviously reduced to a purely fictional scenario; it is further problematic because genocide is premised upon a *dolus specialis* which cannot be captured by common-crime definitions.

For those alleged genocidal acts which are committed outside the PRC's territory, instead, the implementation of China's conventional (Genocide Convention) and *ius cogens* obligations is still pending. On international crimes prosecuted in China as ordinary ones, beyond genocide, one may mention the 2003 *Atan Naim et al.* case decided by the Shantou Intermediate People's Court, holding that plundering and controlling ships by illegally boarding on other countries' ships was prosecutable under the domestic crime of robbery although only the arrest (and not the criminal act) occurred within Chinese territorial waters.[45]

Another lesson to learn from China's approach to genocide-related UJ is that the *nullum crimen sine praevia lege poenali* principle is deemed to apply even when China did join a convention, but the latter does not specify the penalty to be imposed for the crime and/or is not transposed domestically.

2.2.3 War crimes

China's position is that only *international* armed conflicts should fall within the ICC remit,[46] while NIACs could be most properly addressed through domestic trials, under ordinary-crime definitions.

Besides this, "war crimes" as codified in the Rome Statute are considered overbroad, stretching the progressive development of international customary law too far.[47]

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[45] Refer to C.ongyan Cai [蔡从燕], 'International Law in Chinese Courts during the Rise of China', in A.E. Roberts, P.B. Stephan, P.-H. Verdier, and M. Versteeg (eds.), *Comparative International Law*, Sydney 2018, p. 315; *idem*, *The Rise of China and International Law: Taking Chinese Exceptionalism Seriously*, Beijing 2019, p. 262.

[46] Refer, e.g., to D. Momtaz, 'War Crimes in Non-international Armed Conflicts under the Statute of the International Criminal Court', *Yearbook of International Humanitarian Law*, vol. 2, 1999, pp. 177–192, 179 (note 15).

[47] See S.W. Becker, 'The objections of larger nations to the International Criminal Court', *Revue internationale de droit pénal*, vol. 81, no. 1–2, 2010, p. 58.

2.2.4 CA

In compliance with Article 39 of the UN Charter, only the UNSC can determine *the existence of* a "threat to peace"; thus, in China's view, a UNSC mandate is needed before prosecuting domestically for this crime. Indeed, declarations of war are the most long-standing, paradigmatic, and supreme acts of sovereign States, therefore the identification of what represents "aggression" among those acts cannot be left to subjective world-politics, including politicised supranational judicial bodies. If war per se can be disciplined and made lawful (as its conduct is in fact, by definition, in international humanitarian law), then waging war should be ordinarily lawful as well (also by virtue of the *in bello*/*ad bellum* recomposition illustrated before), with "aggression" representing *the rare exception* thereof. Considering that China has proven to be one of the least externally belligerent countries over the last few centuries, this war-friendly stance is fairly curious (…or worrisome, depending on one's standpoint!).

In any case, China commented that because the ICC shall observe a 6-month deadline for the UNSC to formally determine the occurrence of an aggression (Article 15 *bis* of the Rome Statute), and it might be further instructed by the UNSC to halt its investigations for 12 months (Article 16), even this international mechanism could prove unserviceable. It is also a matter of shame and "face" (by its proper sociological meaning in Chinese culture): if an ICC's judgement eventually contradicts a UNSC's stance (thus necessarily China as a P5 member – not to mention potential individual Chinese judges sitting on the ICC bench…), the credibility and standing of both representatives of the PRC is likely to be compromised.

Not secondarily, CA is an act of state *par excellence*, so that no individual official is responsible for it alone, except formally for the head of State, who is in turn, for China, automatically immune from prosecution (also *post bellum*, and especially before benches in foreign jurisdictions). Slightly simplistically, one might conclude that for China, CA should not be prosecuted through AJ at all – neither domestically, nor internationally.

3. Italian inefficiency

Contrary to China, Italy's lack of *domestic* UJ practice can be explained through the lenses of its overenthusiastic support for the ICC as the most appropriate forum for prosecuting international crimes. Not only was Italy the fourth ratifier of the Rome Statute, but the latter's denomination itself speaks volumes about Italy's rhetorical endorsement of international criminal justice mechanisms, within a broader support for West-led PIL-humanisation trends.[48]

Other diplomatic reasons may rest in the background, too. For instance, Italy has long advocated for democratising UNSC reforms, and the more States are parties to the Rome Statute, the less influence UNSC veto powers will exercise over non-party referrals. The latter's concern is shared with China, but the response (higher or lower support for jurisdictions joining the Statute) is diametrically different in light of all other concerns which concur to shaping said response.

It is also salient to assess Italy's views before UN fora. For instance, it declared that UJ can be operated through extradition treaties when relevant, but if one had to consider scholarly reactions to the (admittedly succinct) resolution of the 2005 Institute of International Law in Kraków,[49] that seems an inaccurate understanding of the "true" UJ on the part of Italian authorities. Compare this approach to China's historical one: in adjudicating a 1956 case on the crime of trafficking opium committed *by aliens against aliens* within China, the Supreme People's Court held that "in the cases that the Chinese

[48] On these trends, refer further to L. Pasquet, 'Litigating the Immunities of International Organizations in Europe: The "Alternative-Remedy" Approach and its "Humanizing" Function', *Utrecht Journal of International and European Law*, vol. 36, no. 2, 2021, pp. 192–205; E. Lieblich, 'The Humanization of *Jus ad Bellum*: Prospects and Perils', *European Journal of International Law*, vol. 32, no. 2, 2021, pp. 579–612; G. Oberleitner, '*Human Rights in Armed Conflict: Law, Practice, Policy*, Cambridge 2015, pp. 232–238.

[49] The text of the resolution is available online at https://www.idi-iil.org/app/uploads/2017/06/2005_kra_03_en.pdf. It emphasises the importance of extradition, but scholars have cautioned about this approach. See, e.g., J. d'Aspremont, 'Multilateral Versus Unilateral Exercises of Universal Criminal Jurisdiction', *Israel Law Review*, vol. 43, no. 2, 2010, p. 307: "It must be made clear that the I mechanism of try-or-extradite does not necessarily provide for the empowerment of domestic courts to exercise universal jurisdiction. Indeed, the obligation to prosecute or extradite can possibly also apply to situations where judges have been seized of a matter for which they exercise a non-universal jurisdiction that is a case which is directly linked to the public order which they protect."

courts cannot try while the defendants are in the PRC, the organs of foreign affairs may deal with it *if* the Korean government requests the extradition of them" (emphasis added); such non-prosecution might have embodied a genuine anti-imperialist, anti-hegemony positioning of the Court against the snobbish "bourgeois class", but would have extradition worked with more "enemy" governments compared to the Korean one? Attempting to reply would be tantamount to speculating, but Chinese textbooks supported the Court's take, which is also interestingly in line with contemporary scholarly approaches to the so-called "comparative IL." Italy's official position could further be contrasted with the Statement by Mr Xiang Xin at the UNGA in 2013:

> universal criminal jurisdiction is different from both the jurisdiction exercised by international criminal judicial organs and the obligation of a State to extradite or prosecute as a means of exercising jurisdiction.[50]

Furthermore, Italy is concerned about the criteria jurisdictions would adopt to "rank" competing jurisdictional claims to prosecute international crimes through domestic UJ.

Potentially enlightening parallelisms have been drawn in literature with the Belgian, British, and Spanish experiences, which have abandoned any "pure" reception of UJ in favour of a softer – and factually dismissed – version thereof, following the establishment of the ICC, the fragmentation of interpretative scholarly communities, as well as relevant ICJ pronouncements on sovereign immunities.[51]

In any case, the upcoming two sections will dig deeper into the specificity of Italy's inefficiencies, that impair its ability to conduct UJ trials *even if it wanted to*. Those lacunae are sorted, by way of simplicity, in two wide

[50] Available at http://chnun.chinamission.org.cn/eng/chinaandun/legalaffairs/sixthcommittee1/t1091531.htm.

[51] See A. Panetta, 'L'immunità dalla giurisdizione penale degli organi costituzionali in carica accusati di crimini internazionali', unpublished PhD thesis in International and EU Law at Sapienza University of Rome, 2012, pp. 112–122, 161–169.

categories: substantial, and procedural. Needless to specify, the two are nearly always interlinked in practice.[52]

3.1 Substantial shortcomings

On the whole, Italian legislation, as it stands today, does not satisfactorily cater for international crimes, with legislative shortcomings on the substance being traceable in both its *Codice Penale*'s (CP) *parte generale* (applicable to all crimes, or "crime" in general) and *parte speciale* (providing for each crime).

As for the first, one (not-so-)trivial exemplification could be the minimal age for criminal liability: 18 under the Rome Statute, 14 under the CP – this proves decisive in cases involving young terrorist combatants or child soldiers, with Italy being prevented from drawing accurate inferences from ICC's jurisprudence tailored to slightly older young defendants (e.g. on their mental maturity). Other general misalignments between the Statute and the Italian CP concern the treatment of *mens rea*, joint criminal enterprise, extenuating circumstances (e.g., *responsabilità del superiore*), the *estinzione degli effetti penali (prescrizione) della condotta criminogena*,[53] and arcane provisions such as that on the *concorso omissivo in reato commissivo con dolo anche eventuale*, which I only mention but refrain from examining here.

As for the *parte speciale*, there are no satisfactory provisions on international crimes in the CP, namely for genocide (e.g. the "intent to destroy a group" is missing) and CAH (such as a missing reference to "extensive

[52] I will offer a humble overview only, to fulfil my comparative aim between Italy and China. Most recently, other authors have inspected Italy's substantial and procedural shortcomings in far greater detail. The reader may want to refer to Special Issue 21(4) of the *International Criminal Law Review*, entitled "Italy's Legal Obligations to Criminalise" and available at https://brill.com/view/journals/icla/21/4/icla.21.issue-4.xml. In particular, the reader might appreciate the articles by Giulio Bartolini (on war crimes) and Luigi Prosperi (on crimes against humanity and genocide), retrievable from https://doi.org/10.1163/15718123-bja10069 and https://doi.org/10.1163/15718123-bja10058, respectively.

[53] And indeed, statutes of limitations are frequent sources of frustration when it comes to dual criminality as relevant for extradition procedures, as well; refer e.g. to I. Milazzo, 'Justice for desaparecidos: Italian Court grants extradition of former Pinochet military officer', *Extradando*, 2020, available at https://www.extradando.com/post/justice-for-desaparecidos-italian-court-grants-extradition-of-former-pinochet-military-officer.

and systematic attack[s] against civilian populations", e.g., beyond "ordinary" sexual violence), but also on war crimes – the Italian Criminal Military Code for Wartime is extremely outdated, so that, for instance, only military personnel is listed as potential agent of war crimes, and pillage (looting) is only addressed in relation to a conflict. On top of all this, while Italy has just ratified the 2010 Kampala Amendment regarding crime of aggression, domestic legislation criminalising the crime of aggression has not yet been enacted, and there are not even draft laws pending to that end.[54] In a more general fashion, one could concede to speculations that Italian enthusiasms towards UJ might have further dampened significantly, by analogy, after the 2012 ICJ's adverse ruling on the *Jurisdictional Immunities of the State (Germany v. Italy)*, which confirmed the usual conservative approach by the Court towards extending UJ over acts by foreign state officials – although this time the judgement concerned state responsibility rather than individual criminal liability.[55] In this respect,

> a strong argument can be made that any rule permitting the exercise of universal jurisdiction with respect to war crimes committed in international armed conflicts will clearly contemplate the prosecution of state officials and is, thus, practically co-extensive with immunity *ratione materiae*.[56]

Interfaces are indeed sound.

[54] Read further L. Prosperi, 'Legal Effects of the Ratification by Italy of the Amendments to the ICC Statute on Aggression', *The Italian Review of International and Comparative Law*, vol. 2, no. 1, 2022; A. Lanciotti, 'La punibilità per il crimine internazionale di aggressione', *Federalismi.it*, 2022, no. 17.

[55] See further N.M. Saputo 'The *Ferrini* Doctrine: Abrogating State Immunity from Civil Suit for *Jus Cogens* Violations', *University of Miami National Security & Armed Conflict Law Review*, vol. 2, no. 1, 2018, pp. 6, 20–22.

[56] D. Akande, S. Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts', *European Journal of International Law*, vol. 21, no. 4, 2011, p. 843.

3.2 Procedural shortcomings

Article 88 of the Rome Statute features no statutory-reform obligations: it only requires State parties to "ensure that there are procedures available under their national law for *all of the forms of cooperation*" (emphasis added): What does this truly mean? Of course, it means, for example, that State parties should cooperate in arresting suspects; regrettably, Italy seems unready to cooperate in this sense,[57] as demonstrated by similar forms of cooperation which would have been due at the EU level. To exemplify, the European Center for Constitutional and Human Rights has filed a complaint before the European Commission on 28 June 2017 because Italy did not arrest Mr Ali Mamluk, a Syrian intelligence chief who travelled to Italy, despite UJ was specifically called for in the European Parliament resolution of 15 March 2018 on the situation in Syria. In fact,

> it is possible that Italy is bound to adopt some criminal provisions to implement international instruments which, as such, do not embody obligations of domestic criminalisation. The best example is that of the ICC Statute. Under this treaty, [S]tates do not have a legal duty to enact domestic criminal legislation in relation to the crimes punished therein […]. However, the lack of incorporation of the crimes in the Italian legal system may make it difficult for Italy to comply with some of its obligations of cooperation under Part 9 of the Statute, which may require, for instance in the case of surrender of suspects, that the charges are criminalised at [the] domestic level.[58]

Law no. 237/2012 on procedural cooperation with the ICC attempted to fill some gaps, but necessary professional operative norms are still missing from the Italian CP;[59] these are of the essence, as they would endow Italian

[57] However, a few positive exceptions do exist. Refer, e.g., to J. Rikhof, 'Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity', in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes*, Oslo 2010, p. 60.

[58] M. Longobardo, 'The Italian Legislature and International and EU Obligations of Domestic Criminalisation', *International Criminal Law Review*, vol. 21, no. 4, 2021, p. 637.

[59] See M. Crippa, 'Sulla (perdurante?) necessità di un adeguamento della legislazione interna in materia di crimini internazionali ai sensi dello Statuto della Corte Penale

magistrati ordinari with the competence to prosecute *sua sponte* alleged international criminals regardless of the *locus commissi delicti*.

To be true, Italian authorities' general stance is not totally unsupportive of UJ through domestic courts, for instance as far as compliance with the Geneva Conventions is concerned;[60] the problem lies with countless (and apparently endless) bureaucratic impediments, worsened by judicial hurdles, parliamentary deficits, and administrative inertia. Beyond empty proclaims, the exercise of UJ by Italian domestic courts is hindered *inter alia* by the fact that courts shall be authorised by the Ministry of Justice on a case-by-case basis.[61] All of this still holds true as of early May 2022 (by the time of writing), despite multiple legislative efforts over the decades – some of these endeavours being, in truth, quite sophisticated – directed at filling this void,[62] which have consistently resulted in a *nulla di fatto*. Italy's *bicameralismo perfetto* to approve/amend laws is not helpful, either, resulting in ping-pong parliamentary games which are in turn pejorated by exceedingly disempowered and short-living governments (even by Western-democracy standards). So far, Italian judges' expected *collaborazione fattiva e leale* with national political and diplomatic authorities[63] – particularly those overseeing justice and foreign affairs – over the institution of potential UJ proceedings

Internazionale', *Diritto Penale Contemporaneo*, https://archiviodpc.dirittopenaleuomo.org/upload/CRIPPA_2016a.pdf, p. 17.

[60] Refer to Amnesty International, 'Italy: Law reform needed to implement the Rome Statute of the International Criminal Court', 2005, pp. 30–34, https://www.amnesty.org/download/Documents/84000/eur300092005en.pdf.

[61] See D. Hovell, 'The Authority of Universal Jurisdiction', *European Journal of International Law*, vol. 29, no. 2, 2018, p. 435 (note 34).

[62] Refer, e.g., to Senato della Repubblica Italiana, XV Legislatura, Disegno di Legge "Bulgarelli" N. 528, 31 May 2006, http://www.senato.it/service/PDF/PDFServer/DF/177838.pdf. Among other legislative proposals ended up in the void, are those by *Commissione Conforti* (2002); *Commissione Kessler* (2002) and related *Progetti Iovene e Pianetta*; *Progetto Cariplo* (2015). On March 22, 2022, the former Italian Minister of Justice, Professor Marta Cartabia, instituted a Ministerial Committee to be chaired by Professors Francesco Palazzo (University of Florence) and Fausto Pocar (University of Milan), aimed at drafting an Italian code for transposing international crimes into Italy's domestic legal order (Decreto Ministeriale istitutivo di una Commissione per l'elaborazione di un progetto di Codice dei Crimini internazionali). The development of this initiative deserves to be closely kept monitored, starting with the first proposal to be submitted by the Committee by May 30, 2022.

[63] For context, read extensively F. Mégret, 'The Independence of Justice in the Cauldron of International Relations', *Modern Law Review*, vol. 85, no. 2, 2022, p. 380.

has led to a prolonged season of prosecutorial lethargy rather than in fruitful and proactive institutional synergy.[64]

By now, the reason why Italy's over enthusiasm for supranational UJ solutions might also be interpreted as an ungenuine delaying strategies aimed at discharging itself from domestic-UJ burdens, especially as far as updates to its codes on the substance (particularly when it comes to genocide and CAH) would be concerned, should appear clear.[65]

3.3 A European symptom?

Prima facie, one might be tempted to align Italy's experience to other post-ICC-establishment and then post-ICJ-pronouncements European experiences, but that would be short-sighted a conclusion.

True, Belgium abrogated Article 7 of its *Loi du 10 février 1999* in the aftermath of the ICJ's Arrest Warrant holding (although the Court opted for a *non liquet* on UJ, as it confined itself to examining the remaining *ratione personae* submission by the DRC). Similarly, as recounted above, Spain replaced its *Ley orgánica 6/1985 del poder judicial* into its *Ley orgánica 1/2009*, and since 2011, subserviently to Israeli grievances,[66] the UK has been requiring the expressed consent of the Director of Public Prosecutions of England and Wales for domestic courts to prosecute under UJ.[67]

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[64] A few exceptions shall be duly taken note of, including the sentence no. 10/2017 by the *Corte d'Assise di Milano*, as confirmed at the appeal stage through the sentence no. 31/2020 (officially released on January 21, 2021) as well as by the Italian Supreme Court of Cassation through the sentence no. 480/2020 (officially released on March 4, 2021).

[65] See further L. Paredi, 'Problemi di adeguamento degli ordinamenti interni al diritto internazionale in tema di crimini internazionali', unpublished PhD thesis in International Law at the University of Milan, 2015, pp. 46–54.

[66] L. Prosperi, 'Giurisdizione universale, Corte Penale Internazionale e principio di complementarietà: Una triangolazione possibile?', *Federalismi.it – Rivista di diritto pubblico italiano, comunitario e comparato*, 20 Dec. 2013, Human Rights no. 4, p. 18.

[67] It is crucial to note here that in deciding whether to prosecute foreigners, domestic courts weigh all potential institutional costs of acting against ICC's non-compliant states, and this has been studied also with reference to the UK more specifically. See N.T. Carrington and C. Sigsworth, 'Home-State Interest, Nationalism, and the Legitimacy of the International Criminal Court', *Law & Social Inquiry*, vol. 47, no. 2, 2022.

Are these choices comparable to Italy's experience? Not quite so. In fact, the Belgian, British, and Spanish turns represented "softening processes" following initial legislation which had brought such jurisdictions in line with the Rome Statute, while Italy has never fully accommodated the latter.

4. …Any common threads?

Relevantly for the present work, China and Italy showcase a few immediate dichotomies; for instance, those between stable and unstable governmental powers, and between monist (China)[68] and dualist (Italy)[69] approaches to IL, respectively (also aided by China's executive and legislative powers factually coinciding, as reported above).

This notwithstanding, commonalities are numerous and should never be dismissed. First, both jurisdictions currently feature no "pure" UJ domestically, but only qualified (and anyway theoretical) forms thereof. Second, courts display worrying degrees of techno-administrative unpreparedness (and perhaps even independence deficiencies), although evidence that international ones are not any better should be factored in as well.

Moreover, both Italy and China have demonstrated consistent reluctance to bringing their codes in line with international crime specifications, while insisting on the problematic separation between military and civilian laws. In fairness, both countries' lawmakers have recently reiterated their concern over obsolete war-crime definitions, although China has expressed it in terms of inapplicability to NIACs, while Italy has envisioned to address

[68] If one has to maintain the Western scholarship distinction between monism and dualism, then China is definitely closer to monism; see, e.g., D.L. Sloss, 'Domestic Application of Treaties', in D.B. Hollis (ed.), *The Oxford Guide to Treaties* (2nd ed.), New York 2020, pp. 358–362. However, Chinese scholars reject both approaches as inaccurately depicting the relationship between PRC law and PIL. See further Z. Keyuan, 'International Law in the Chinese Domestic Context', *Valparaiso University Law Review*, vol. 44, no. 3, 2010, pp. 937–938; F. Leah, 'Summary', in B. Ahl (ed.), *Die Anwendung völkerrechtlicher Verträge in China*, Berlin 2009, p. 356.

[69] On the legal relevance of Italy being a dualist system for the purpose of assessing its international obligations to criminalise certain conducts, refer extensively to B.I. Bonafè, 'Constitutional Judicial Review and International Obligations of Criminalization', *International Criminal Law Review*, vol. 21, no. 4, 2021, pp. 661–670.

the conducts relevant for the two types of conflicts interchangeably (e.g., in *Progetto Cariplo*). At any rate, neither jurisdiction considers *in absentia* UJ trials acceptable – even though *in absentia* extraterritorial trials are deemed acceptable.

Lastly, both countries are concerned with the politicisation of jurisdictional claims' "rankings" and maintain a record of poor implementation of international judgements and awards (just to exemplify, one may refer for China to the South China Sea arbitral award, and for Italy to the non-compliance rate with the judgements of the Council of Europe's European Court of Human Rights, only slightly less severe than Russia's or Turkey's).

Ultimately, although today's geopolitical projections of China and Italy could not have been more uneven (Western and Atlanticist the latter, Global-South-oriented the former), their HR value-based discourses self-evidently diverge, and the immediate reasons why they resist UJ in theory and practice differ, too, this very concise study has confirmed that on a deeper foundational level, these two jurisdictions' approaches to international justice in fact converge around a number of core "historical" preoccupations. The latter surround an obsolete UN system, worsened by overzealous politics of international justice built on domestic adjudicators in competition with each other to advance jurisdictional claims (especially neo-imperialistic ones focused on prosecuting African and Middle Eastern leaders and militias[70]), while simultaneously disclosing a certain degree of mistrust in their own technical preparedness.

This work has briefly discussed the currently accepted four international crimes (genocide, war crimes, crimes against humanity, and crime of aggression), but several understudied threads could have been developed further. *Inter alia*, whether the potentially "fifth international crime", also known as "ecocide", will further discourage these two countries from establishing their domestic UJ practice or, to the contrary, will renew their interest for and ambition about this controversial legal device, remains to be ascertained, and

[70] On this same "regionalized" aspect of prosecutorial politics, but with reference to the ICC, refer to O. Dovgalyuk, R. Vecellio Segate, 'From Russia and beyond: The ICC Global Standing, while Countries' Resignation is Getting Serious', *FiloDiritto*, 2017, pp. 5–6, https://www.filodiritto.com/sites/default/files/articles/documents/0000002222.pdf.

warrants future research.[71] The role of public opinion across the "East" and the "West" would deserve closer inspection, too: studies have been published on, e.g., the ICC's legitimacy before the public in specific jurisdictions,[72] but no socio-political implications for the future of UJ as a legal device have been drawn therefrom.

To conclude, borrowing from a rather celebre description of the objective of ICL more generally, UJ's purpose seems that of socialising "a system of symbols […] that gives reason to believe that the 'international community' […] can be submitted to a similar kind of rational governance as that of a national [S]tate."[73] The overarching takeaway point from this essay shall be that fishing into a somewhat shared history of thought and civilisational backdrop, Chinese and Italian jurists and legislators appear to read the risks and potentialities inherent in mentioned symbology through dissimilar-*yet-not-too-much-so* legal and geopolitical prisms.

[71] On international environmental crimes and universal jurisdiction, check generally A. Greene, 'The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?', *Fordham Environmental Law Review*, vol. 30, no. 3, 2019, p. 19 (note 85); R. Killean, 'The Benefits, Challenges, and Limitations of Criminalizing Ecocide', New York 2022, https://theglobalobservatory.org/2022/03/the-benefits-challenges-and-limitations-of-criminalizing-ecocide.

[72] Check, e.g., N.T. Carrington, C. Sigsworth, 'Home-State Interest, Nationalism, and the Legitimacy of the International Criminal Court', *Law & Social Inquiry*, vol. 47, no. 2, 2022, pp. 449–477.

[73] I. Tallgren, 'The Sensibility and Sense of International Criminal Law', *The European Journal of International Law*, vol. 13, no. 3, 2002, p. 594.

Authors

AKSAMITOWSKA KAROLINA – Lecturer of International Law at Tallinn University in Estonia and the Head of Curriculum of the Bachelor programme in International and European Law that is taught on Tallinn University campuses in Tallinn and Helsinki. Karolina's recent report titled 'War Crimes Units: Legislative, Organisational and Technical Lessons' written for the T.M.C. Asser Instituut/Global Rights Compliance MATRA project on 'Strengthening Ukraine's Capacity to Investigate and Prosecute International Crimes' provides an overview of best practices drawn from domestic war crimes units. She has published on a variety of international criminal and humanitarian legal topics, including in the *Journal of International Criminal Justice, Journal of International Humanitarian Legal Studies, Annotated Leading Cases of International Criminal Tribunals (ALC), Oxford Reports on International Law*, the Opinio Juris blog and several edited collections. Recent publications include: 'The Counter-Hegemonic Turn to "Entrepreneurial Justice" in International Criminal Investigations and Prosecutions Relating to the Crimes Committed in Syria and Eastern Ukraine' and 'Digital Evidence in Domestic Core International Crimes Prosecutions: Lessons Learned from Germany, Sweden, Finland and the Netherlands'. ORCID: 0000-0001-9396-4420.

CHAKRABARTY ISHITA – Research Officer at Quill Foundation, India. She is an MA in International Law student, at the Graduate Institute of International and Development Studies (IHEID), Geneva. Her previous

work and research experience was in matters concerning citizenship, counter-terrorism legislations, minority rights, and discrimination.

FAROOQ SADIA – a transactional advisor at Ali Khan Law Associates, where her practice focuses on projects and infrastructure, and specifically energy projects. She regularly advises clients on matters involving public-private partnerships, project financing and assists clients in obtaining the requisite licenses, consents and waivers. She has authored a thesis on foreign arbitral awards and their enforcement in Pakistan and has formerly been a part of the adjunct faculty at Blackstone School of Law.

GACKA PATRYK – PhD Candidate at the University of Warsaw (Poland) where he pursues a PhD project concerning the status of victims in the proceedings before international criminal tribunals. Patryk's academic interests are in the field of international and comparative criminal law. He has recently published the paper on 'Remote Victimisation and the Proximate Cause. Transgenerational Harms before the International Criminal Court' in the *International Criminal Law Review*, vol. 22, no. 3, 2022, pp. 438–474. ORCID: 0000-0002-0762-7418.

GRZEBYK PATRYCJA, DR. HAB. IUR. – Associate Professor (University of Warsaw), an expert in international humanitarian law, international criminal law and use of force law, a co-editor of the *Journal of International Humanitarian Action* (Springer) and a member of the editorial board of the journal *ESIL Reflections*. She is the author of numerous publications, including monographs: *Human and Non-Human Targets in Armed Conflicts* (CUP 2022) or *Criminal Responsibility for the Crime of Aggression* (Routledge 2013); and articles/chapters, e.g. *Key Risks and Difficulties of Aggression Trials* (Springer 2021); *Emil Stanisław Rappaport. His Road from Abolition to Prosecution of Nations* (CUP 2020); *Authorising Attacks in Response to Terrorist Attacks* (OUP 2019); *Impact of Western military interventions on the evolution of law on use of force* (Routledge 2019). ORCID: 0000-0003-4022-7018.

GUERREIRO ALEXANDRE – Associate Researcher at the University of Lisbon School of Law, an expert in international criminal law, international justice and law of armed conflicts. A speaker and participant in numerous conferences and courses (e.g. Crimes against Humanity in Times of Peace and the International Criminal Court) as well as author of monographs (e.g. *Interstate Relations without Consent: Intervention under International Law*, Almedina 2021; *Islam, DAESH and the Refugees: Breaking Myths and Unveiling Mysteries*, Quimera, 2016) and articles/book chapters (e.g. International Law and the fight against Terrorism and Cyberterrorism, AAFDL, 2018). ORCID: 0000-0002-7000-7190.

HOFFMANN TAMÁS, PHD – Senior Research Fellow at the Centre for Social Sciences Institute for Legal Studies (Hungarian Academy of Sciences Centre of Excellence) and Associate Professor at Corvinus University of Budapest. He obtained his law degree from the ELTE Budapest Faculty of Law, and an LLM in Public International Law from King's College London. He received his doctorate in Public International Law from the ELTE Budapest Faculty of Law and a Diploma in International Humanitarian Law from the International Committee of the Red Cross. He was an intern at the Appeal Section of the Office of Prosecutor of the International Criminal Tribunal for the former Yugoslavia in 2004 and has taught international law at various universities in Hungary and abroad, including the NATO Defense College in Rome. He is the author of numerous publications, both in Hungarian and English, in various areas of public international law, in particular international humanitarian law and international criminal law, e.g. 'The Crime of Genocide in Its (Nearly) Infinite Domestic Variety' in Marco Odello, Piotr Łubiński (eds.) *The Concept of Genocide in International Criminal Law – Developments after Lemkin* (Routledge 2020) 67–97. His current research focuses on the impact of international criminal law on national criminal law norms.

JANUSZ-POHL BARBARA – Associate Professor at Department of Criminal Procedure (Adam Mickiewicz University), an expert in Criminal Law and Procedure and General Theories of Law. Visiting Professor at

Sulayman Demirel University 2020–2021 with a lecture on international criminal law. She has authored numerous publications, including 5 monographs (e.g. *Definitions and Typologies of Acts in Criminal Procedure. Perspective of Conventionalisation and Formalisation*, Adam Mickiewicz Law Books, no. 4, 2017; *Juvenile Justice Systems* (as editor) (Peter Lang 2021) and about 100 articles/chapters. Editor of the series of books by Peter Lang: Ius, lex et Res Publica (the publications most recently published: *Dopuszczalności wykorzystania w postępowaniu przed Komisją odpowiedzialności konstytucyjnej nagrania audialnego uzyskanego w toku kontroli procesowej (art. 237 k.p.k.)*, https://doi.org/10.31268/ZPBAS.2019; *O zasadach obliczania terminów procesowych*, https://doi.org/10.32041/pwd.4102; Uwagi o doniosłości koncepcji domniemań relewantnych prawnokarnie, https://doi.org/10.32041/pwd.4302). ORCID: 0000-0002-7135-4960. Head of the project Effective Justice-International and Comparative Approaches www.effective-justice.com.

JAWAD AYESHA – Assistant Professor of law in Pakistan. Currently she heads the only female law school in Punjab, at Kinnaird College for Women, Lahore, Pakistan. She holds an LLM in International Law with International Relations form University of Kent, UK. Jawad has over 13 years of experience in academics and research. She is also a consultant and trainer in the fields of *Human Rights, International Law, Mediation and Business Human Rights*. She has authored research papers on 'Rule of Law and Access to Justice in Pakistan: Responsibility of the Judiciary as Custodian of their Fundamental Rights and 'Rationalizing The Concept of Alternative Dispute Resolution in Relation to Mediation Laws in Pakistan'. Her work focuses on, *inter alia*, human rights, business human rights, international law, alternative dispute resolution and contract law.

KRZAN BARTŁOMIEJ – Associate Professor at the Department of International and European Law, Faculty of Law, Administration and Economics, University of Wrocław, and a lecturer at the German-Polish Law School at the Humboldt University Berlin. He holds a Ph.D. in international law (2008) and a habilitation in law (2014). He has made severa research trips abroad including at the Lauterpacht Centre

for International Law, University of Cambridge (2010) and Walther Schücking Institut für Internationales Recht, Kiel (2011–2012). He was a visiting professor at the University of Regensburg (2013), with guest lectureships in Austria, Lithuania, the Netherlands and UK. His interests include: international criminal law, the law of international organizations (esp. UN), external relations of the EU. ORCID: 0000-0003-3964-114X.

KUMAR AMAN – Assistant Professor of International Law at the IFIM Law School, Bengaluru. He is an alumnus of National Law University and Judicial Academy, Assam (B.A.LL.B.) and South Asian University (LL.M.). He has published on various issues of international criminal law, including his paper titled 'Resolving the "Dispute" under Article 119(1) of the Rome Statute' (*Asian Journal of International Law*). His latest publication is 'Trial as a tool of Colonialism: the 1858 trial of Bahadur Shah Zafar' (*International Criminal Law Review*). His forthcoming works include 'The Question of Interest of Justice and of Global Battlefield in the Afghanistan Situation at the ICC', 'Henry Maine and the Revision of Indian Civilising Mission'. He writes regularly on his Indian Blog of International Law. ORCID: 0000-0002-4363-2994.

MOUSINHO SHAYANA SARAH VIEIRA DE ANDRADE – Bachelor in Law at Regional University of Cariri (URCA), Brazil, specializing in Constitutional Law. Part of the studying and research Studies on Human Fundamental Rights Group (GEDHUF-URCA), as organizer and researcher since 2019 to nowadays. She has also been a researcher of the Study Group on Law and International Affairs (GEDAI-UFC) since 2021. She gained honorable mention in 2020 at the VII Symposium on International Law promoted by GEDAI-UFC. She also has advanced knowledge of English and French, participating in the research program initiated by the scholarship PIBIC-URCA titled "COMBATING PROCEDURAL IMPROPRIETY." ORCID: 0000-0002-5188-7700. Lattes: http://lattes.cnpq. br/1370166309982751.

NEDŽAD SMAILAGIĆ – PhD candidate in Criminal Law (University of Zagreb) and external member of the Centre for Criminal Law and Criminal Justice at the Durham Law School. He has authored numerous publications on (international) criminal law, constitutional law, and human rights, including monographs (e.g. *Criminal Law of Bosnia and Herzegovina*, co-authorship, Kluwer Law International, Revised edition 2022), encyclopedic entries (e.g. Constitutional Court of Bosnia and Herzegovina, MPECCoL, OUP 2020), and articles/chapters (e.g. *Rethinking Amnesty and Clemency in Countries in Transition: A Comparative Analysis of Laws and Practices in Countries of the Former Yugoslavia*, Routledge 2020; *Negationism and Atrocity Crimes Committed in the Former Yugoslavia: Criminal Law and Transitional Justice Considerations*, Institute of Justice 2020). ORCID: 0000-0002-6431-0038.

ROLIM PEIXOTO ARNELLE – Guiding Professor at GEDAI-UFC on the International Human Rights Law line, Professor at Uninassau, postdoctoral student in Law at Federal University of Ceara (UFC), Brazil; postdoctoral student in Social Rights at the University of Salamanca, Spain. He holds a Ph.D. in Law from the University of Salamanca, Spain. He is a member of the Observatory of Nationalities at the State's University of Ceará (UECE), Brazil, of the Centro de Estudios de la Mujer (Cemusa) at University of Salamanca (Spain), of International Law without Borders. ORCID: 0000-0002-6173-218X. Lattes: http://lattes.cnpq. br/8388142696323733.

SIKORA KAROLINA – PhD candidate in Criminal Law at Jagiellonian University in Cracow and an Assistant in the Faculty of Criminal Law at Jagiellonian University. She specializes in criminal law and criminal procedure, especially relations between criminal law and culture; currently she is working on a doctoral dissertation about multiculturalism and culturally motivated crimes in Poland. She is a member and Coordinator of the Legal Team at Civic Initiative Association "Pro Civium", a non-governmental organization specializing in resocialization and human rights in criminal procedure.

VECELLIO SEGATE RICCARDO – A specialist in law & technology, bioethics, as well as public international law, especially from an East/South-East Asian perspective. Currently, he is a postdoctoral researcher (School of Science and Engineering) and lecturer (School of Law) at the University of Dundee, as well as a BSc Candidate in Industrial Production Engineering at the Polytechnic University of Milan. Former visiting research positions at Tsinghua Law School in Beijing, the Law & Technology Centre of the University of Hong Kong, the Center for Law & Technology at UC Berkeley Law, and ISLC at the University of Milan. Beyond his Music degrees, he gained a PhD in International Law from the University of Macau (highest university-wide scholarship awardee; unanimously without corrections); a postgraduate diploma in European and Global Governance from the University of Bristol; an LLM in Public International Law from Utrecht University. He holds diplomas in European Affairs, Development Cooperation, and Humanitarian Emergencies from ISPI Milan. He trained at the European Commission (DG CNECT), volunteered with UNESCO, and worked for Qatar University, Rouse & Co International LLP, EXPO2015, and Oxford University Press. He has published over 40 research articles, review essays, and chapters for, *inter alia*, the *Columbia Journal of Asian Law*, *Art Antiquity and Law*, *Maastricht Journal of European and Comparative Law*, *UCLA Pacific Basin Law Journal*, *Journal of Intellectual Property Law & Practice*, *International Criminal Law Review, Nordic Journal of Youth Research*, *The International Journal of Human Right*s, *Chinese Journal of Comparative Law*, *North Carolina Journal of International Law*, *Hastings Environmental Law Journal*, *Journal of International Dispute Settlement*, *Nordic Journal of Human Rights*, *Loyola University Chicago Journal of Regulatory Compliance*. He sits on the International Advisory Board of the *International Journal for the Semiotics of Law* and regularly serves as a peer-reviewer for renowned publishers. He has delivered over 150 invited talks at universities, think-tanks, and institutions worldwide, and was awarded the Best Paper Prize at the Algorithms Conference held at Kyushu University (Fukuoka) in November 2019.

WRIGHT BRADEY – Attorney, a graduate of the University of Notre Dame Law School and a note editor for the *Notre Dame Journal of International and Comparative Law*. The paper titled "Vietnam, Cambodia, and International Law" was presented at the Conference on Faith and History at Regent University. His degrees also include a Bachelor of Arts in History from Huntington University and a Master of Science in History from the University of Edinburgh.

The analysis of national systems shows that states do not follow a single legislative model to govern criminal responsibility for international crimes at the national level, and often face doubts as to how far they are only expected to copy international constructions, and how far they should modify treaty or customary international law solutions to adapt them to their specific needs or legal culture. In the presented texts, the reader will find a range of commentaries on the definition of crimes, the rules of jurisdiction, the rules of responsibility, as well as difficulties in the framing of specific crimes within a judgement. The texts refer to the practice of national courts as well as international and internationalized courts. The authors of this publication hope that showing various national perspectives, political and – at times – cultural impacts on certain legal solutions will both facilitate understanding of the doubts as to the current form of international law norms and the system of international justice now in operation, and enable learning lessons for the future directions of amendments to national legislations, so that errors or difficulties once encountered in some countries could be turned into more robust legal constructions in others.

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