



UNIVERSITAS  
GADJAH MADA

GADJAH MADA UNDERGRADUATE RESEARCH ANTHOLOGY VOL. 1

# **Recent Developments in International Criminal Law**

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**EDITED BY**

Fajri Matahati Muhammadin, S.H., LL.M., Ph.D

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Gadjah Mada Undergraduate Research Anthology Vol. 1

**RECENT DEVELOPMENTS IN  
INTERNATIONAL CRIMINAL LAW**

**Edited By:**

Fajri Matahati Muhammadin, S.H., LL.M., Ph.D

Kay Jessica, S.H., M.Jur.

Fakultas Hukum  
Universitas Gadjah Mada  
2022

**Gadjah Mada Undergraduate Research Anthology Vol. 1  
Recent Developments in International Criminal Law**

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## **FOREWORD**

It is always good to understand different issues in the field one is in the pursuit of excelling in from many perspectives, especially in international law. However, with its many developments and breakthroughs, international criminal law is a specialized subject whose landscape is rapidly changing and may serve as a challenge to study in depth.

This book is timely as it is a solid contribution to the existing literature of international law, containing an interesting variety of discussions of issues that need to be urgently addressed. There are contributions about the International Criminal Court, which is related to the institutions in international criminal law. There are also contributions related to armed conflicts and other types of international crimes such as genocide or crimes against humanity, as well as discussions regarding gender violence in the midst of armed conflicts.

I wholeheartedly welcome this book entitled “Gadjah Mada Undergraduate Research Anthology Vol. 1: Recent Developments in International Criminal Law”, containing a collection of amazing works compiled and edited by Fajri Matahati Muhammadin, S.H., LL.M., Ph.D and Kay Jessica, S.H., M.Jur. This book is a must read for all international criminal law enthusiasts.

Yogyakarta, 15 November 2021

Prof. Dr. Agustinus Supriyanto  
Head of the International Law Department  
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## ACKNOWLEDGEMENT

The reason why we initiated this project is because we vividly remember how, as undergraduate students, we worked really hard to write our theses. We spent weeks or even months working tirelessly in the library, nearby coffee shops or *burjos* (Jogja's lower class coffee shop), reading numerous literature, stressing over revisions and relentlessly asking ourselves "*will I be able to complete my thesis and graduate this year?*" This is not to mention the thesis defense, where we ought to present the result of our research in front of a panel of examiners who will often mercilessly attack our legal arguments and bombard us with questions.

Surely an undergraduate thesis would not typically be as difficult as a Master or Ph.D thesis. Yet, many have wept tears and blood (figuratively, but sometimes even literally) during the process. The thesis defense, to many, is yet another set of tears and blood—especially noting that the fate of our four-year (or more) dedication to study law, will be determined solely by whether or not we pass the thesis defense. You can clearly imagine how ghastly it was for us back then.

This makes us think to ourselves "*would it not be a waste if all the hard work and effort that we did were only read by ourselves and three examiners, then rot in the library?*" Indeed, it would be nice for a wider range of students, practitioners, or even academics to benefit from the hard work of these students. Therefore, students have been encouraged to publish their theses whether as a journal article or even a book.

One thing us editors (Fajri and Kay) share in common is that we wrote our undergraduate thesis on international criminal law. We also saw many students come and go (especially Fajri, who is currently in the academia) writing their thesis in international criminal law. Many of the students wrote intriguing topics on international criminal law and humanitarian law, some also valiantly criticised a judgment issued by international tribunals. From that the idea came like an epiphany: we should make a chapter book collecting international criminal law theses.

Frankly, it was not an easy thing to try to approach students who have graduated (some longer than others) about something that some have actually moved on from. Therefore, when we successfully

managed to complete this project (first of its kind in the Department of International Law, Faculty of Law, Universitas Gadjah Mada), it was such a huge relief. It must be noted that the support of many people was essential to make this happen.

Hence, we would firstly thank Herliana Omara S.H., M.Comm. Law., Ph.D. as the Vice Dean of Administration, Human Resources and Finance as well as her staff. Thank you for being very helpful and accommodating throughout the making of this book. Secondly, we would like to thank Professor Dr. Agustinus Supriyanto, S.H., M.Si. as the Head of the International Law Department, for supporting us and contributing a foreword in this book chapter.

Further, we are beyond grateful for our amazing technical editing team, thank you for making this book chapter eminently better than it otherwise might have been. Indeed, we would not be able to complete this project without continual support and assistance from all of you guys: Aqshal M. Arsyah, Balqis Fauziah, Christina Clarissa Intania, and Fairuz El-Mechwar. Certainly, we would also like to express our thank to all the contributors who are willing to contribute their piece of writings to this book chapter, in spite of their busy working schedule: Brigita Gendis, Fitrahanita Ramadhani, Judith Gracia, Muhammad Awfa, Muhammad Farhan Fauzy, Rabita Madina, and Tasya Marmita Irawan. Undoubtedly, this book chapter would not have been possible without the involvement of each and everyone of you.

Last but not the least (and in fact the most), our deepest gratitude goes to our thesis supervisor back then, Professor Dr Sigit Riyanto, S.H., LL.M. who has always been very supportive and cooperative. Perhaps what makes an undergraduate thesis possibly more difficult than a Master or Ph.D thesis is because of how young and lacking in experience we were. With all our shortcomings as an undergraduate student, our thesis would perhaps be exponentially worse than what it would have been without the guidance from our lecturers. This gratitude, naturally, extends to all of our dedicated teachers.

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## LIST OF ABBREVIATIONS

ALC	Armée de Libération du Congo
ASP	Assembly of State Parties
AU	African Union
BiH	Bosnia and Herzegovina
CAR	Central African Republic
CIA	Central Intelligence Agency
CIHL	Customary International Humanitarian Law
Common Article 3	Common Article 3 of Geneva Convention of 1949
DCT	Direct Criminalization Thesis
Dioxin TCDD	2,3,7,8-Tetrachlorodibenzodioxin
DRC	Democratic Republic of Congo
ECtHR	European Court of Human Rights
EU	European Union
FPLC	Patriotic Forces for the Liberation of Congo
Global Compact	United Nations Global Counter-Terrorism Coordination Compact
HIV/AIDS	Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome
IAC	International Armed Conflicts
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Community of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
IRMCT	The International Residual Mechanism for Criminal Tribunals

MLC	Movement de libération du Congo
NATO	The North Atlantic Treaty Organization
NCT	National Criminalization Thesis
NGO	Non-Governmental Organisation
NIAC	Non-International Armed Conflicts
OTP	Office of the Prosecutor
PTSD	Post-traumatic Stress Disorder
Re-education Camp	Xinjiang Re-education Camp
SCSL	Special Court of Sierra Leone
STL	Special Tribunal of Lebanon
TPB-UNODC	Terrorism Prevention Branch-United Nations Office for Drugs and Crime
UK	United Kingdom
UN	United Nations
UNCAT	United Nations Convention against Torture and Other Forms of Cruel, Inhumane or Degrading Treatment or Punishment
UNCTED	United Nations Counter-Terrorism Executive Directorate
UNCTITF	United Nations Counter Terrorism Implementation Task Force
UNGA	United Nations General Assembly
UNGCTS	United Nations Global Counter-terrorism Strategy
UNOCT	United Nations Global Counter-Terrorism Coordination Compact
UNSC	United Nations Security Council
UPC	Union des Patriotes Congolais
US	United States of America
XUAR	Xinjiang Uyghur Autonomous Region

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**Judith Gracia Adha** graduated from the International Law Department of the Law Faculty, Universitas Gadjah Mada in 2021. Judith was a student activist for gender equality who co-founded HopeHelps LC UGM (an Indonesian based group of on-campus sexual violence fast response). During her 4 years of study as a law student, she also managed to achieve numerous awards from Mediation, MUN, and Writing competitions. She is currently working for Wedu Global in Thailand.

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**Tasya Marmita Irawan** graduated from the International Law Department of the Law Faculty, Universitas Gadjah Mada in 2020. She has always been particularly passionate about the study of international human rights law and its application to bettering the legal system in Indonesia. During her studies, she was one of the recipients of Outstanding Student Awards by the Law Faculty in 2018. Tasya is currently an Associate at Hutabarat, Halim & Rekan (HHR Lawyers) Law Firm in Jakarta.

## Introduction

### International Criminal Law in the Minds of Our Student

*Fajri M. Muhammadin and Kay Jessica*

International criminal law is a body of public international law designed to prohibit certain categories of conduct viewed as serious crimes and to make the perpetrator criminally accountable for the commission of such crime. Prior to the emergence of the International Criminal Tribunal, international law lacked sufficient mechanisms to hold individuals accountable for the most serious international crimes under international criminal law.<sup>1</sup> The core crimes under international criminal law includes genocide, war crimes, crimes against humanity, as well as the crime of aggression.

Naturally, like any other crimes, punishment for these crimes depend on national courts. However, the problem is that most of serious crimes such as those committed in the Germany during World War II, Yugoslav Wars, Rwandan Civil War, Libyan Civil War, Sudanese Civil War occurred and regrettably, the national courts were least willing or able to act due to the involvement of state and the government in the commission of those crimes.<sup>2</sup> Thus, in order to prevent impunity in those situations, it is necessary to enforce international justice that applies when national courts are unwilling or unable to punish the perpetrator of the most serious crimes.

In 1945, the IMT or Nuremberg Trials was established by the victorious Allies through the London Charter. Nuremberg Trials was the pioneer of international criminal tribunals, where the perpetrator of international crimes were held responsible for the crimes they committed during World War II. Later in 1946, the IMTFE or Tokyo Trials was convened to try Japanese leaders for crimes against peace and other serious international crimes. Regrettably, after the success

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1 Philippe Kirsch, "The Role of the International Criminal Court in Enforcing International Criminal Law", *American University International Law Review* 22, no. 4, 2007, p. 539.

2 Ibid, p. 540.

## INTRODUCTION

of these two international criminal tribunals, there was a forty years period of slow progress in the development of international criminal law until the beginning of 1990, where the world was shocked by ethnic cleansing in Yugoslavia and genocide in Rwanda—could the UN take any action? Will these criminals be punished? Will the victims get justice that they deserved?

Fortunately, for the first time since the Nuremberg and Tokyo Trials, an ad hoc international criminal tribunal known as the ICTY was swiftly established by the UNSC in accordance with Article 41 of the U.N Charter,<sup>3</sup> to prosecute heinous crimes committed during the Yugoslav Wars.<sup>4</sup> This also led to a speedy creation of the ICTR to deal with genocide and crimes against humanity that occurred in Rwanda,<sup>5</sup> as a result of prolonged conflict between the Hutu and Tutsi. As a result, these two tribunals successfully prosecuted hundred individuals and provided the victims an opportunity to voice the extreme frightful that they witnessed or experienced. Additionally, the victims will also be able to seek compensation for damages incurred as a result of the crimes.<sup>6</sup>

Afterwards, the international community thought that it would be ideal to have one permanent, independent, international criminal tribunal whose task is to investigate and prosecute the most serious crimes when national courts are unwilling or unable to do so. Provoked by such an idea, the UNGA then requested the ILC to create a draft statute for a permanent international criminal court in 1994. After years of relentless work and effort, the promise of justice has come to reality through the ICC that was established by the Rome Statute as a permanent, independent, treaty-based international criminal tribunal seated in Den Haag, Netherlands.

To date, the ICC has tried 30 cases with some cases having more than one suspect. Although there are many criticisms and shortcomings of the ICC, however, the ICC also contributed to shaping international criminal law, through its decisions and judgments—some of them will be thoroughly discussed here in this book chapter. Further, the ICC has also been striving endlessly to investigate situations that allegedly involved commissions of the

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3 Article 41 of Charter of the United Nations.

4 The United Nations Security Council Resolution 827, 1993.

5 The United Nations Security Council Resolution 955, 1994.

6 The United Nations Security Council Resolution 827, 1993.

crimes under its *ratione materiae*, despite its failure to intervene and exercise its jurisdiction in a number of grave situations throughout the world. Well, after all, the ICC is still a treaty-based court that has limited power and authority, it would not be able to exercise its jurisdiction without consent and cooperation from the relevant state.

Coming back home, Asia is the region with the most significant lack of state participation in the ICC, with China, India, Indonesia, and Myanmar being noticeably absent. Nevertheless, Indonesia has its own HRC established under Law No. 26 of 2002 regarding Human Rights Court that has jurisdiction to cases of gross human rights violations, namely genocide and crimes against humanity.<sup>7</sup> Indonesia even partially adapted the provisions regarding genocide and crimes against humanity existing in the Rome Statute into this law. The existence of the HRC in Indonesia has undeniably brought new hopes for people or groups of people who have suffered and severely traumatised by the atrocities that occurred in the past, prior and during the New Order regime.

What one may easily overlook is how many students actually have strong interest or at least opinions on international criminal law. Granted, as undergraduate students surely what they know would usually be limited compared to that of masters or Ph.D students. Nonetheless, even from undergraduate students, interesting observations could be found.

For example, just a few months ago, as part of a human rights law mid semester exam, we asked our third-year students what they thought of the Indonesian HRC. As a result, the students' answers show mixed feelings about the court. On one hand, some students like Mohammad Nasseem Athalla pointed out how the establishment of the HRC was a welcomed innovation, after many terrible crimes being committed by the previous New Order regime. That regime had just been toppled down two years prior to the HRC establishment. After all, as another student Abraham Rishad answered, the Indonesian HRC is the only one of its kind in ASEAN. Another student, Yonathan Brian King, added that the court can apply retroactively, potentially giving justice to victims of heinous crimes perpetrated prior to the establishment of the court.

On the other hand, however, the aforementioned small 'plus

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7 Law No. 26 of 2002 regarding Human Rights Court

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points' sounded like a mere courtesy because they were then met with a 'but' proceeded with a shower of criticism of the reality of how it operates. One student named Stephanie Kristina shot a bomb at the HRC, arguing that it is dysfunctional for two reasons : First, procedural requirements were easily used to delay the initiation of proceedings, making all cases in the past fifteen years go nowhere. Second, the few proceedings eventually initiated (this was before the fifteen year vacuum) were met with weak prosecutorial efforts, indictments, and political interference, resulting in 'minimum' convictions towards the defendants. Stephanie saying 'minimum' was probably a little sarcastic, as the conviction rate was literally zero.<sup>8</sup> Many other students offered similar criticism, and we are sure they were not peeking at each other's answers.

These students do not stop at criticising. They also offer solutions, like another student named Tiffany Rosemary suggested *inter alia* that the HRC's jurisdiction be expanded to include other human rights violations. These exams are hoped to be a culmination of what the student has learned, forcing them to critically analyse problems and offer solutions, hopefully helping to shape the way they think as a future lawyer. However, as far as the exams go, the fruits of their thoughts will soon be lost in time.

The students, though, do not stop at exams. Some of them go beyond what is directly required to complete their course, and participate in research projects. For example, our students named Kirana Anjani and Muhammad Awfa took part in a lecturer's research team on a project again critically examining the HRC judges references to customary international law and offers solutions from Islamic law theory. This research was presented in an international conference (and won a gold medal for best paper!), and eventually published in a reputable journal.

Other than research projects, enthusiastic students also participate in international moot court competitions simulating international criminal law cases. The aforementioned Stephanie participated in the Nuremberg Moot Courts (2021), Kirana and Awfa participated in the ICRC's international humanitarian law moot court while Tiffany

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8 Ken Setiawan, "The Human Rights Courts Embedding Impunity," in Melissa Crouch (ed), *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia*, Cambridge: 2019, Cambridge University Press, 301-302.

participated in both, all of them simulating the ICC.<sup>9</sup>

The point made is that there is quite a strong interest towards international criminal law among students. In fact, many of these students eventually wrote and defended their thesis as a requirement for graduation, in the field of international criminal law. As mentioned in the Acknowledgements, it would be such a shame if these students have spent so much of their time and energy for their thesis only for it to end up lost in history like their exam sheets. Therefore, this research anthology presents a selected few of these undergraduate theses as introduced in the following passages.

First we have Rabita Madina who writes about the situation of Afghanistan. An issue that might otherwise be forgotten due to the current international spotlight being all on the Taliban re-taking power: **Towards Prosecuting United States Nationals for Alleged Crimes Committed in the Situation in Afghanistan**. The case is rather delicate due to the US being both very actively participating in armed conflicts, while at the same time not being a member state of the ICC.

Nonetheless, the ICC's jurisdiction was indeed constructed in a way that might affect non-members and members alike, potentially requiring their cooperation if such jurisdiction were to be effectively exercised. This brings us to the second contribution titled **The Challenges for the International Criminal Court in Securing Cooperation from States** written by Kay Jessica.

The third contribution is by Brigita Gendis Kandisari. Titled **Crimes Without Convict: Examining The Merits of Command Responsibility Through The Bemba Case** she critically analyzes this landmark (and highly criticized) judgement at the ICC that explores the notion of Superior Responsibility.

Farhan Fauzy takes us back over half a century to the Vietnam war to consider a topic not often at the center of international criminal law discourse: the environment. With our fourth contribution titled **The One That Got Away: Assessing Ecocide During the Vietnam War**, Farhan shows us how the world does not always revolve around humankind.

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9 Fajri Matahati Muhammadin, Kirana Anjani, and Muhammad Awfa, "Applying Customary International Law in the Indonesian Human Rights Court: An Islamic Solution Towards the Conundrum," *Al-Shajarah* 24, no. 2 (2019): 209–37.

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The fifth and sixth contributions discuss terrorism and radicalism. Acts of terrorism, often fueled by radicalism, can amount to international crimes.<sup>10</sup> However, these contributions bring a different angle. Fitrahanita Ramadhani, with the fifth contribution, explores the case of the Uyghurs, where the Chinese government justifies its internment camps by claiming to be combating terrorism. Fitrahanita critically analyzes the situation and examines what the victims could possibly do, with her contribution titled **Justice for Genocide Victims in International Criminal Law: What Can the Uyghurs Do?**

Meanwhile, Tasya Marmita Irawan with the sixth contribution makes us question how far different we are from the (sometimes, alleged) terrorists we claim to be fighting against. She brings us home with her contribution titled **Human Rights Protection Concerns in the Indonesian Antiterrorism According to International Law.**

The final contributions seventh and eighth are last but not least. They explore how international criminal law navigates and develops the concepts of sex-related crimes. The previously mentioned Muhammad Awfa critically analyzes an important ICC case law where serious crimes are met with the issue of technical classifications, with his contribution titled **Prosecutor v. Ntaganda and Rape of Non-Opposing Armed Forces: Addressing the Scope of War Crimes.** At the very end, our anthology ends with Judith Gracia Adha rigorously examining the role of the ICTY in developing criminal justice in relation to sex-related crimes, through her contribution titled **A Critical Examination on ICTY's Role Concerning The Crime of Sexual Violence: Putting Victims At The Center.**

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10 See *inter alia* Michael Lawless, "Terrorism: an international crime," *International Journal* 63, no. 1 (2008): 139–59; Johan D. Van der Vyver, "Prosecuting terrorism in international tribunals," *Emory Int'l L. Rev.* 24 (2010): 527; Fajri Muhammadin, "Terrorism and the Crime of Aggression Under the Rome Statute," *Jurnal Mimbar Hukum* 27, no. 1 (2015).

## Towards Prosecuting United States Nationals for Alleged Crimes Committed in the *Situation in Afghanistan*

*Rabita Madina*

States Parties to the Rome Statute have the general obligation to cooperate with the ICC. Since its inception, the Article 98 Agreements have undermined ICC's objective of ending impunity by limiting States Parties' abilities to cooperate in exercising jurisdiction over US nationals. The ICC's recent authorization on investigation in the *Situation in Afghanistan* confirms that the Prosecutor intends to investigate members of the CIA and US Military Forces for alleged crimes committed in Afghanistan, Romania, Poland, and Lithuania. The decision also touched upon the possibility of issues in regards to conflicting treaty obligations to be raised by interested States. This legal research finds that first, the existence of the Article 98 Agreements have become the ICC's biggest roadblock to prosecute US nationals in the *Situation in Afghanistan*. Because the Article 98 Agreements create conflicting treaty obligations with the Rome Statute, the ICC is unable to pursue a request for the arrest or surrender of US nationals. Alternatively, the ICC could issue a request for arrest or surrender to States Parties that have not entered into Article 98 Agreements with the US. Furthermore, the ICC should address the issue of conflicting treaty obligations by rendering the Article 98 Agreements to be unlawful or invalid under the VCLT to fulfill its mission of ending impunity.

**Keywords:** ICC, Article 98 Agreement, Treaty Conflicts, VCLT.

### **I. Introduction to Article 98 Agreements: The Loophole to Extend Impunity**

On 5 March, 2020, the OTP of the ICC received approval to open an investigation following a 10-year preliminary examination over the situation in Afghanistan.<sup>1</sup> The OTP provided the ICC with information relating to alleged war crimes of torture and cruel treatment, outrages upon personal dignity, and rape and other forms of sexual violence committed by members of the CIA.<sup>2</sup> The alleged crimes include those

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1 *Situation in the Islamic Republic of Afghanistan*, International Criminal Court, Judgement on the Appeal against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, No. ICC-02/17 0A4, 5 March 2020.

2 *Situation in the Islamic Republic of Afghanistan*, International Criminal Court, Request for Authorisation of an Investigation pursuant to Article 15, No. ICC-02/17-7-Conf-Exp, 20 November 2017.

committed in Afghanistan, as well as those committed in other States Parties that have a nexus to the Afghan conflict. Notwithstanding the fact that the US is not a party to the Rome Statute, US nationals might find themselves subject to the ICC's jurisdiction. The possibility that the ICC could investigate and prosecute US nationals without the approval of their government has been a frustrating event for the US. Considering that the US will indicate a robust opposition to any attempt by the ICC to investigate US nationals, it is paramount to determine whether there is a legal basis to exercise such jurisdiction.

According to Article 12(a) of the Rome Statute, if a situation has been referred to by the OTP through the exercise of *proprio motu*, the ICC may exercise jurisdiction over crimes that are alleged to have been committed on the territory of a State Party.<sup>3</sup> Hence, it is possible, by virtue of Article 12(a) of the Rome Statute, for a US citizen as a third State national to be tried before the ICC. However, exercising such jurisdiction may violate the fundamental rule of the law of treaties, particularly the principle of *pacta tertiis nec nocent nec prosunt*, which stipulates that a treaty may not affect the rights of Non-State Parties.

Since the ICC is under the Rome Statute, which the US is not a party to, the rise of a jurisdictional problem is inevitable. Further, even if the ICC manages to establish jurisdiction over the US as a third State, the existence of Article 98 Agreements between the US and Afghanistan might prevent the surrender of US nationals to the ICC. Article 98 Agreements are bilateral non-surrender agreements aimed to ensure that no US national would be subjected to the jurisdiction of the ICC.<sup>4</sup> Today, the US has concluded over 90 Article 98 Agreements with States Parties of the Rome Statute, including with Afghanistan.<sup>5</sup>

When Afghanistan entered into the Article 98 Agreements with the US, Afghanistan agreed to not extradite individuals to the ICC, and Article 98(2) of the Rome Statute prohibits the ICC from requesting Afghanistan to do so. This is clearly against one of the biggest objectives of the establishment of the ICC, which is to end impunity.

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3 The Rome Statute, 1998, Article 12(3).

4 John Bolton, Under Secretary for Arms Control and International Security at the Romanian Foreign Ministry, August 1, 2002, available at <http://www.state.gov/t/us/rm/12491.htm>

5 US Department of State. US Department of State. Accessed June 1, 2021. <https://2001-2009.state.gov/t/pa/prs/ps/2003/24331.htm>.

Hence, this legal research focuses on the implications of prosecuting US nationals, namely the jurisdiction of the ICC over nationals of a Non-State Party and conflicting treaty obligations between the Rome Statute and Article 98 Agreements under the law of treaties and in the means the ICC can proceed with the investigation of US nationals.

## II. Challenges for the ICC to Prosecute US Nationals

In this first section, the Author elaborates the main obstacles that the ICC might face when investigating and prosecuting US nationals. The *Situation in Afghanistan* does not only concern the status of the US as a Non-State Party but also, the existing bilateral immunity agreements between the US and Afghanistan that might hinder the ICC from prosecuting US nationals. Hence, the first section focuses on addressing the above mentioned concerns.

There is no generally accepted definition of what constitutes a conflict between treaties under international law. States might encounter situations where not only are they concerned with when it is impossible to abide by two treaties but also when one treaty frustrates the goal of another treaty.<sup>6</sup> In a broad sense, treaty conflicts can be understood as when a State is party to two or more treaties in which the actual performance under one treaty will frustrate the purpose of another treaty.<sup>7</sup> These circumstances will give rise to problems regarding the validity or enforceability of State obligations.<sup>8</sup>

It is to be noted that the ICC had previously issued a request for arrest and surrender of a Non-State Party national, namely in cases related to the *Situation in Dafur*, *Sudan* and the *Situation in Libya*.<sup>9</sup> However, in the *Situation in Afghanistan*, the existence of Article 98 Agreements might prevent the ICC from issuing a request of surrender of US nationals due to conflicting treaty obligations.

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6 Christopher J. Borgen, "Resolving Treaty Conflicts", *George Washington International Law Review* 37 (2005): 757.

7 *Ibid.*

8 Femi Elias, "Methods of Resolving Conflicts between Treaties", *International and Comparative Law Quarterly* 54, no. 1 (2005): 277.

9 *Prosecutor v. Omar Hassan Ahmad Al Bashir*, International Criminal Court Registrar, Request to all State Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir, ICC-02/05- 01/09, 6 March 2009 and *Prosecutor v. Saif Al-Islam Gaddafi*, Decision on the Non-Compliance by Libya with Requests for Cooperation by the Court and Referring the Matter to the United Nations Security Council, International Criminal Court, ICC-01/11-01/11-577, 11 December 2014.

The *Situation in Afghanistan* is an opportunity to address the incompatibility of agreements entered between Afghanistan and the US that might hinder the ICC from exercising jurisdiction over US nationals. This part assesses the existing conflicting treaty obligations for Afghanistan between its obligations under the Rome Statute and the Article 98 Agreements. Therefore, any implication arising from such conflicting treaty obligations requires an analysis of the relevant provisions of the Rome Statute and Article 98 Agreements.

### **1. Under the Rome Statute**

The first relevant provision is Article 89(1) of the Rome Statute which states that:

“the Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in Article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this part and the procedure under their national laws, comply with requests for arrest and surrender.”

This provision allows the ICC to request any State Party to arrest or surrender a suspect to the ICC if the suspect is located at the territory of such State Party. Parties of the Rome Statute are under the obligation to comply with such a request for arrest and surrender.

An exception to Article 89(1) can be seen under Article 98(2) of the Rome Statute which stipulates that:

“the Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent of the surrender.”<sup>10</sup>

Article 98(2) was drafted to negate the situation where a State would find itself with conflicting treaty obligations—one to the ICC

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10 The Rome Statute, 1998, Article 98(2) and Rules of Procedures and Evidence, 1998, Rule 195(2).

and one to another State.<sup>11</sup> This article could serve as a potential impediment for the ICC to obtain custody of individuals. It requires the ICC to refrain from requesting the surrender of an individual from a State if by doing so would require the requested State to act inconsistently with its obligations under international agreements.

It is paramount to determine the scope of “international agreements” stipulated under Article 98(2) of the Rome Statute. As mentioned in the *travaux préparatoires* of the Rome Statute, the US’ representatives made it clear that their intent towards the conclusion of Article 98(2) of the Rome Statute was to protect the validity of SOFAs entered between the US and States Parties of the Rome Statute, which covers immunity for military personnel and non-military analogous stationed in the receiving State.<sup>12</sup> This intention was also endorsed by the German delegates, emphasizing the need to solve conflicts that might arise due to an existing SOFA.<sup>13</sup> However, the German delegates were of the view that Article 98(2) should only refer to existing agreements and not agreements concluded after a State has become a State Party to the ICC.<sup>14</sup> During the negotiation, the US also argued that Article 98(2) would only be applicable to SOFAs in which US nationals have actually been sent to relevant States, and not to SOFAs in which US nationals have not been sent on a mission to the receiving State.<sup>15</sup> However, the view of the US on this has been inconsistent as it can be seen one year subsequent to the negotiation that the government of the US argued that “the Rome Statute does not impose any obligation on States Parties to refrain from entering into non-surrender agreements that cover all their persons, while those who insist upon a narrower interpretation must, in effect, read language into Article 98(2) that is

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11 Hugh King, “Immunities and Bilateral Immunity Agreements: Issues Arising from Articles 27 and 98 of the Rome Statute”, *New Zealand Journal of Public and International Law* 4 (2006): 288.

12 *Ibid.*

13 Kimberly Prost and Angelika Schlunck, “Article 98 Cooperation with Respect to Waiver of Immunity and Consent to Surrender” in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 1999, 2119.

14 Amnesty International, *International Criminal Court: US Efforts to Obtain Impunity for Genocide, Crimes Against Humanity and War Crimes*, AI Index IOR 40/025/2002, August 2002, 19-22.

15 *Ibid.*

not contained within the text of that provision.”<sup>16</sup>

This is confirmed by opinions from a number of scholars who hold the view that no time limit exists when it comes to the conclusion of international agreements referred under Article 98(2). Hence, it is understood that the scope of Article 98(2) might be beyond current existing agreements and can encompass, for example, re-extradition treaties or other agreements concluded subsequent to the conclusion of the Rome Statute.

Despite the above-mentioned drafting history, on its terms, Article 98(2) is reasonably broad. The wording of “obligations under international agreements” provides no reason to believe that Article 98(2) only covers SOFAs or existing agreements. Further, no ICC precedent to date could serve as a clear enlightenment to determine the applicability of Article 98(2) when a treaty conflict is present. It is worth highlighting the issue of refusing to comply with the cooperation requests for the arrest of President Al Bashir in *Prosecutor v. Al Bashir* was solely assessed under the context of Article 98(1), not Article 98(2).<sup>17</sup>

Despite the existence of various AU resolutions prohibiting member States to cooperate with the ICC, there is no clear analysis in regards with any existing conflicting obligations between the Rome Statute and the African Union resolutions. However, this is expected as an in-depth analysis on whether a resolution constitutes as international agreements or not would be required as a prerequisite, and such approach might not be the most favorable. Hence, to clarify the exact scope of Article 98(2), one must look at the treaty’s object and purpose<sup>18</sup> and determine the legality of a State Party’s actions to enter into such international agreements, which will be discussed below.

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16 John Bolton, Under Secretary for Arms Control and International Security“, U.S. Department of State, accessed June 1, 2021, <https://2001-2009.state.gov/t/index.htm>.

17 *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision Pursuant to Article 87(7) of the Rome Statute in the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, International Criminal Court, ICC-02/05-01/09-140-tENG, 13 December 2011.

18 Vienna Convention on Law of Treaties, 1961, Article 31(1).

## 2. Under the Article 98 Agreement

Article 98 of the Rome Statute consists of two provisions—Articles 98(1) and 98(2)—in which both address situations where States Parties’ obligations could potentially conflict with other agreements with another State. As an effort to keep US nationals protected from ICC jurisdiction, the Bush administration successfully approached States Parties to sign the Article 98 Agreements. The Article 98 Agreements are named after the broad interpretation of the latter provision, which is Article 98(2). Article 98 Agreements are agreements entered between the US and States Parties of the Rome Statute which oblige Parties to refuse to cooperate with any request of arrest or surrender issued by the ICC.

There are three types of Article 98 Agreements, which generally reflect: (a) reciprocal agreements when both Parties agree not to surrender each other’s nationals to the ICC without their consent; (b) unilateral agreements where the receiving State agrees not to hand over US nationals to the ICC without the consent of the US; however, the US are able to hand over nationals of the receiving State to the ICC; and (c) agreements for a State that are not members to the Rome Statute, to the effect that they agree not to cooperate as a third state to surrender nationals to the ICC. The Article 98 Agreement entered between the US and Afghanistan reflects the first type in which both States agreed to not cooperate with a request of arrest and surrender of each other’s nationals to the ICC.<sup>19</sup>

Despite the existence of other bilateral immunity agreements between the US and Afghanistan, the Article 98 Agreement is the biggest roadblock for the ICC to request the surrender of US nationals. Unlike the SOFA between the US and Afghanistan, which only covers military personnel and state officials, Article 1 of the Article 98 Agreements sets out that the scope of “persons” protected under this agreement includes all nationals of one party, meaning that any US nationals cannot be surrendered to the ICC for any purpose.<sup>20</sup> This unlimited scope of persons would specifically be problematic when assessing the possibility of investigating and prosecuting US nationals that have not been previously covered under any existing

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19 International Criminal Court Article 98 Agreement between the United States and Afghanistan, 20 September 2002, Article 1.

20 *Ibid.*

bilateral immunity agreement, such as members of the CIA which is currently subjected to investigations and are not covered under the protection of SOFA.

Many States expressed their position against the favor of the US when it came to the conclusion of Article 98 Agreements. The EU, whose all member States are parties to the Rome Statute, developed a set of principles as guidelines for member States' negotiations with the US concerning Article 98 Agreements. The guideline highlights the requirement that Article 98 Agreements require any accused person of committing crimes within the jurisdiction of the ICC to be investigated by the US' authorities and prosecuted by the US authorities.<sup>21</sup> Further, several provisions imposed an obligation onto Parties negotiating Article 98 Agreements to oppose efforts by any other State to fulfill extradition requests to the ICC.<sup>22</sup>

Hence, if the ICC issued a request for surrender of US nationals to Afghanistan for the purpose of investigation, the ICC may not, under Article 98 of the Rome Statute, proceed with the request. If the ICC, nevertheless, proceeds with such a request, Afghanistan would automatically be required to act inconsistently with its obligation under the Article 98 Agreements. On the other hand, Afghanistan is also bound by its obligation under Art. 89(1) to surrender the requested individuals to the ICC. Fulfilling Afghanistan's obligation to refuse the surrender of US nationals under Article 98 Agreements would clearly constitute a violation of Article 89(1) of the Rome Statute.

The outcome for Afghanistan by being a party to the Article 98 Agreement is simple: by concluding this agreement, Afghanistan will be faced with conflicting obligations under the Rome Statute and the Article 98 Agreement. This highlights one important distinction between Article 98 Agreements and SOFAs: Article 98 Agreements do not establish any criminal jurisdiction, which makes impunity much more likely to occur.<sup>23</sup> Hence, the Article 98 Agreement also

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21 *Ibid.*

22 Attila Bogdan, "The United States and the International Criminal Court: Avoiding Jurisdiction Through Bilateral Agreements in Reliance on Article 98", *International Criminal Law Review* 8, no. 1–2 (2008): 33.

23 Amnesty International, *International Criminal Court: US Efforts to Obtain Impunity for Genocide, Crimes Against Humanity and War Crimes*, AI Index IOR 40/025/2002, August 2002, 19–22.

creates the risk of Afghanistan violating treaty norms by undermining their ability to comply with a request of surrender for US nationals.

As a consequence of being a party to the Rome Statute and Article 98 Agreement, it can be clearly concluded that conflicting treaty obligations exist for Afghanistan and such conflicting treaty obligations will inevitably be faced when the OTP is requests the surrender of US nationals to Afghanistan for the purpose of the investigation of the alleged war crimes committed in Afghanistan. The US expresses its objective within the Article 98 Agreement to investigate and prosecute serious international crimes “where appropriate.” The Author is of the view that the phrase “where appropriate” contains much ambiguity and discretion to determine the US’ true intention on investigating and prosecuting an accused.

The wording of the Article 98 Agreements initially creates the presumption that Parties are willing and able to act in cases where US nationals are alleged to have committed crimes within the jurisdiction of the ICC. However, the current progress in the *Situation in Afghanistan* demonstrates that, in practice, such presumption is predicted to be false as the US is unwilling to investigate, or further prosecute, their own nationals.

This is evident through numerous occasions where President Barack Obama was reluctant to conduct a broad inquiry into the Bush administration’s “War on Terror” program, despite the immense pressure to do so. He was unlikely to authorize such an inquiry and for a prosecution to take place unless initiated by the Justice Department had enough evidence been found.<sup>24</sup> The biggest effort that the US Government had shown was to limit his inquiry into CIA interrogations that were taking place beyond what was authorized by the agency, but this inquiry did not include investigating the conditions suffered by the victims nor did it include any recommendation to reduce unauthorized methods.<sup>25</sup> As mentioned by President Obama, he desired to “look forward, as opposed to looking backward.”<sup>26</sup> Moreover, President-elect Joe Biden does not deny that unauthorized

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24 David Johnston and Charlie Savage, “Obama Reluctant to Look Into Bush Programs.” The New York Times. The New York Times, January 12, 2009. <https://www.nytimes.com/2009/01/12/us/politics/12inquire.html>.

25 Kenneth Roth, “The CIA Torturers Should Be Prosecuted”, December 13, 2014. <https://www.hrw.org/node/265444/printable/print>.

26 *Ibid*.

interrogation methods took place. However, he is of the view that the rendition program should not be repeated. Yet, any commitment towards effective prosecution has not been shown thus far.<sup>27</sup>

### III. Investigating US Nationals Protected Under the Article 98 Agreements

The *Situation in Afghanistan* involves not only Afghanistan as a State in which the alleged war crime is committed but also several other relevant States in which alleged crimes were committed, such as Romania, Poland, and Lithuania.<sup>28</sup> The subjects of investigation are divided into two classifications, namely US military forces and members of the CIA. The former group is accused of committing crimes in the territory of Afghanistan, whereas the latter group is accused of committing crimes in detention facilities located in Poland, Lithuania, and Romania. It is to be noted that the Office of the Prosecutor did not only seek authorization to investigate only in respect of the alleged crimes in Afghanistan but also to conduct investigations of other alleged crimes within the scope of the authorized situation committed outside of Afghanistan.<sup>29</sup>

Under Article 54(1)(a) of the Rome Statute, the Prosecutor shall “extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally.” The Prosecutor is also required to “take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court.” The Pre-Trial Chamber has made it clear that the authorized investigation should not be restricted to the incidents specifically committed in the territory of Afghanistan, but also incidents that are closely linked to those described to happen in Afghanistan.<sup>30</sup> Hence, one approach that

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27 *Ibid.*

28 *Situation in the Islamic Republic of Afghanistan*, Judgement on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, International Criminal Court, ICC-02/17-138, 5 March 2020, 32., para. 72.

29 *Situation in the Islamic Republic of Afghanistan*, Request for Authorization of an Investigation Pursuant to Article 15, International Criminal Court, ICC-02/19-7, 20 November 2017, para. 38.

30 *Situation in the Islamic Republic of Afghanistan*, International Criminal Court, Judgement on the Appeal Against the Decision on the Authorisation of an Investi-

the ICC could resort to is by extending the scope of investigation and requesting for an arrest or surrender of US nationals from a State Party that is not bound by the Article 98 Agreements.

### **1. Extending the Scope of Investigation Outside of Afghanistan**

Under this section, the Author highlights the possibility of investigating alleged crimes committed in other relevant States outside of Afghanistan, namely Poland, Romania, and Lithuania.<sup>31</sup> Prior to discussing the incidents that were allegedly committed in the territory of other relevant States, it is paramount to ensure that these States are able to legally cooperate with the ICC investigation without being hindered by any conflicting treaty obligations. As a point of departure, neither Poland, Lithuania, nor Romania has entered into Article 98 Agreements with the US.

Romania entered into a SOFA with the US on 1 August, 2002, and this remains to to be the only bilateral immunity agreement that is valid between the two States today. The entry into this SOFA was a mere extension of a pre-existing SOFA that was entered before the establishment of the ICC. The scope of immunity provided under the SOFA includes US personnel that are sent to Romania and is not reciprocal to provide immunity for Romanian personnel that are sent to the US. Due to the non-reciprocal nature of the SOFA, Romania has shown intention to negotiate an amendment with the US due to its inability to unilaterally amend the terms. However, the EU had communicated its disappointment to Romania for entering into the SOFA with the U.S. and Romania's Foreign Minister has also expressed regret regarding such entry.<sup>32</sup>

Lithuania has not entered into any bilateral immunity agreement with the US. The Lithuanian Government issued a press statement which shows their commitment to following the EU's position on rejecting to execute any bilateral immunity agreements with the US.<sup>33</sup> The US approached Lithuania intensively and had withdrawn several diplomatic commitments due to Lithuania's reluctance on signing the offered bilateral immunity agreements. Similar to Lithuania, it

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gation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17-138, 5 March 2020, p. 32., para. 62

31 *Ibid*, para. 72.

32 Human Rights Watch, *Bilateral Immunity Agreements*, 20 June 2003.

33 *Ibid*.

is believed that Poland was under intense pressure from the US but nonetheless have never entered into an Article 98 Agreement despite the US' rigorous approach.<sup>34</sup>

It can be concluded that the Office of the Prosecutor can alternatively arrange investigation on members of the CIA—even possibly a request of arrest and surrender of such subject of investigation, to either Poland, Romania, or Lithuania, in which all are States Parties to the Rome Statute and are free from any form of conflicting treaty obligations under Article 98 Agreements with the US. There is nothing unusual about US nationals being subjected to the investigation for alleged incidents that have occurred in other relevant States.

The Office of the Prosecutor submitted information regarding alleged war crimes committed by US nationals, both in Afghanistan and detention facilities on the territory of other relevant States outside of Afghanistan. The Office of the Prosecutor also included a list of detainees that were forcefully interrogated for their knowledge of Taliban and Al-Qaeda planned attacks and other intelligence information about each organization.<sup>35</sup> The place of capture of those victims would only serve as one among many relevant factors and thus, would not necessarily justify the non-cooperation from Non-State Parties in which detainees are captured in the territory of. Even if such a place of capture has yet to be determined, the Pre-Trial Chamber established that the investigation shall not be limited for this matter.<sup>36</sup> Despite the lack of clarity on where the tortured individuals were captured, the act of mistreatment was alleged to have happened in the territory of State Parties, namely in Romania, Poland, and Lithuania.<sup>37</sup>

These US nationals are accused of committing torture, deprivation

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<sup>34</sup> *Ibid.*

<sup>35</sup> *Situation in the Islamic Republic of Afghanistan*, Request for Authorization of an Investigation Pursuant to Article 15, International Criminal Court, ICC-02/19-7, 20 November 2017, para. 95.

<sup>36</sup> *Situation in the Islamic Republic of Afghanistan*, Judgement on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, International Criminal Court, ICC-02/17-138, 5 March 2020, 33., para. 77.

<sup>37</sup> *Situation in the Islamic Republic of Afghanistan*, International Criminal Court, Request for Authorization of an Investigation Pursuant to Article 15, International Criminal Court, ICC-02/19-7, 20 November 2017, para. 249.

upon personal dignity, and sexual violence against detainees that were members of the Taliban and Al-Qaeda.<sup>38</sup> The Pre-Trial Chamber was under the impression that alleged crimes attributed to the members of the CIA fell outside of the ICC jurisdiction because the victims were captured and tortured outside of Afghanistan. However, the Appeals Chamber concluded otherwise, endorsing that as long as the nexus requirement is applied, the investigation of alleged crimes happening outside of Afghanistan is within the authorized scope of investigation.

The Author believes that limiting the scope of investigation merely to alleged crimes committed by US military forces in the territory of Afghanistan would hinder the possibility to establish a crystallized factual background and proper evidence required to proceed with the case. This view is established in the investigation of Myanmar/Bangladesh when discussing the authorization to investigate conducts committed in the territory of Bangladesh, which states that:

“limiting the Prosecutor in the investigation to the incidents identified in the request would have a negative impact on the efficiency of the proceedings and the effectiveness of the investigation. It would require the Prosecutor to request authorization every time she wishes to add new incidents to the investigation, making the Article 15 procedure highly cumbersome.”<sup>39</sup>

Hence, it would be unreasonable for the investigation to exclude alleged crimes committed in Poland, Lithuania, and Romania, and the exclusion of victims that were tortured within those territories would deny their right to justice.<sup>40</sup> It is suggested for the ICC to not adopt a strict territorial scope that might limit an investigation to occur for alleged crimes committed by members of the CIA outside of the territory of Afghanistan. In order to investigate US nationals who are allegedly committing crimes in the territory of other relevant States,

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38 *Ibid*, para 191

39 *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, International Criminal Court, ICC-01/19-27, 14 November 2019, para. 130.

40 *Situation in the Islamic Republic of Afghanistan*, Amicus Curiae Observation, International Criminal Court, ICC-02/17, 15 November 2019, para. 45.

the next detrimental step is to conclude that incidents committed in the territory of other relevant States are indeed closely-linked to incidents committed in Afghanistan.

## **2. The Nexus Between the CIA Secret Rendition Program and the Conflict in Afghanistan**

The alleged crimes committed outside of Afghanistan revolve around CIA activities in torturing detainees under secret detention sites that were established in various geographical areas. The Extraordinary Rendition Program, or commonly referred by the CIA as “the Rendition, Detention and Interrogation Program” is a program in which the CIA establishes a global network of secret prisons, or commonly known as “black sites,” for the purposes of detaining and interrogating suspects of terrorism under the most extreme conditions.<sup>41</sup> Established as part of the Bush administration’s “War on Terror,” the program uses brutal interrogation techniques, which amounted to torture and resulted in multiple violations of international law.

It is integral to bring attention to black sites located in the territory of Poland, Romania, and Lithuania in which members of the CIA brutally interrogated high value detainees in the context of and associated with the ongoing armed conflict in Afghanistan. Based on the submission of facts presented by the legal representative of victims to the ICC, Abdul Al Rahim Hussayn Muhammad Al-Nashiri is one out of the many victims that has been placed for detention in black sites located in Poland, Romania, and Lithuania.<sup>42</sup> Consequently, those black sites run under the code name of “Blue” (Stare Kiejkuty, Poland), “Bright Light” (Bucharest, Romania) and “Violet” (Antaviliai, Lithuania).<sup>43</sup>

In “Blue,” members of the CIA are accused of performing unauthorized interrogation techniques upon Abdul Al Rahim Hussayn Muhammad Al-Nashiri, which includes intentional induction of pain, dislocating of arms, threat of sodomy and sexual abuse, and various

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41 Ruth Blakeley, Sam Raphael and Crofton Black, “CIA Torture Unredacted”, 1.

42 *Situation in the Islamic Republic of Afghanistan*, Submissions in the general interest of the Victims on the Prosecution’s Request for Leave to Appeal the “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, International Criminal Court, ICC-02/17-59, 12 July 2019, para. 9.

43 *Ibid.*

stress positions for days.<sup>44</sup> In “Bright Light,” the victim was subjected to incommunicado, solitary confinement, and disorientation the victim for the purpose of hiding the layout of the facility.<sup>45</sup> However, factual establishments on the events that occurred in “Violet” remain unclear, but at a minimum, it was confirmed that the victim was transferred to “Violet” despite the lack of evidence on the exact conduct that was committed within such a facility.<sup>46</sup> To date, no investigation into crimes committed within these territories in the context of the conflict in Afghanistan had occurred.

When first established, the US Department of Justice had provided the CIA with a legal opinion consisting of specific enhanced interrogation techniques that was meticulously designed to not violate the prohibition of torture.<sup>47</sup> However, the CIA was under pressure to take every necessary measure to gain intelligence on planned terrorism attack, forcing the agents to resort to unauthorized interrogation techniques.<sup>48</sup> For example, as a high value detainee, Abdul Al Rahim Hussayn Muhammad Al-Nashiri, firstly, went through a debriefing process-which is in contrast to interrogation. The debriefing process was part of a method authorized under the legal opinion issued by the CIA and did not involve aggressive interrogation techniques. Instead, it consisted of the means of obtaining information through non-coercive interviews.<sup>49</sup> Eventually, he was subjected to, at least, multiple waterboarding sessions, confinement in a box, exposure to cold temperature, and food deprivation.<sup>50</sup> Such treatments were described as “the harshest, where compliance was secured by the

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44 *Ibid*, para. 16.

45 *Abd al Rahim Husseyn Muhammad Al Nashiri v. Romania*, European Court of Human Rights Judgement, Application No. 333234/12, 31 May 2018, para 547.

46 *Situation in the Islamic Republic of Afghanistan*, Submissions in the general interest of the Victims on the Prosecution’s Request for Leave to Appeal the “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, International Criminal Court, ICC-02/17-59, 12 July 2019, para. 10.

47 Central Intelligence Agency, *Special Review Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003) (Redacted)*, 7 May 2004, para. 36.

48 *Ibid*, para. 4.

49 *Husayn (Abu Zubaydah) v. Poland*, Judgement, European Court of Human Rights, Application No. 7511/13, 24 July 2014, para. 505.

50 International Committee of the Red Cross, *Report on the Treatment of Fourteen ‘High Value Detainees’ in CIA Custody*, February 2007, p. 8.

infliction of various forms of ill-treatment.”<sup>51</sup> Despite the fact that an investigation into the secret black site facility in Poland had occurred, experts were concerned that the published documents lacked transparency into the investigation. Two of the most questionable aspects were on whether Polish officials had created “extraterritorial zone” in Poland and whether Polish officials were aware that the interrogation regime amounted to torture.<sup>52</sup> In response to this concerns, the UN published a joint study with concludes:

“International law clearly prohibits secret detention which violates a number of human rights and humanitarian law norms that may not be derogated under any circumstances. If secret detentions constitute enforced disappearances and are widely or systematically practiced, this regime might even amount to crimes against humanity [...] In times of armed conflict, the location of all detention facilities should be disclosed to the International Committee of the Red Cross and any action by intelligence services should be governed by law, which in turn should be in conformity with international norms.”<sup>53</sup>

Referring to the case of *Abu Zubaydah v. Poland*, the ECHR tried to assess whether unauthorized interrogation techniques which amounted to torture were actually committed in “Blue,” assuming that the conduct could have taken place in other black sites outside of Poland and no *actus reus* was committed in the territory of Poland.<sup>54</sup> However, the European Court of Human Rights concluded that even if the most physically aggressive techniques were not committed in “Blue,” the victim’s condition—by the time he was detained in “Blue” —amounts to the infliction of mental suffering due to the bodily assault that was committed under an extremely harsh detention

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51 *Ibid.*

52 Central Intelligence Agency, *Special Review Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003) (Redacted)*, 7 May 2004, para. 118.

53 United Nations Human Rights Counsel, *Joint Study On Global Practices In Relation To Secret Detention In The Context Of Countering Terrorism Of The Special Rapporteur On The Promotion And Protection Of Human Rights And Fundamental Freedoms While Countering Terrorism*, Thirteenth Session, A/HRC/13/42, 20 May 2010, para. 283.

54 *Husayn (Abu Zubaydah) v. Poland*, Judgement, European Court of Human Rights, Application No. 7511/13, 24 July 2014, para. 501.

regime.<sup>55</sup> Hence, it is conclusive that the members of the CIA performed deliberate inhumane treatment, causing very serious and cruel suffering beyond what was legally authorized by the CIA. The question then shifted to whether the torture committed in black sites outside of Afghanistan suffices the nexus requirement. That being said, the interrogations committed in Poland, Romania, and Lithuania must have taken place in association with the conflict in Afghanistan. Knowing that the main objective of these interrogations were to gain intelligence on future planned attacks against the US, it is paramount to assess whether the black site interrogations were just a matter of national security or in association with the ongoing armed conflict in Afghanistan.

For alleged war crimes of torture and related crimes, the elements of crimes require the conduct to take place in the context of and was associated with an armed conflict.<sup>56</sup> Thus, the nexus requirement is fulfilled when the conduct committed outside of the territory of Afghanistan is closely linked to the hostilities taking place in any part of the territories controlled by the parties to the conflict.<sup>57</sup>

Even if the members of the CIA captured and tortured victims outside of the territory of Afghanistan, establishing that such captivation and torture was committed in relation to the ongoing conflict in Afghanistan should satisfy the nexus requirement. The objective of applying the nexus requirement is to differentiate “war crimes, e.g., the killing or rape of a prisoner of war, from “ordinary” or “common” crimes under domestic law—such as the common crime of murder and rape.”<sup>58</sup> This objective can also be found in the *Kunarac* case before the International Criminal Tribunal for the former Yugoslavia, which was endorsed in the *Ntaganda* case, which states:

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<sup>55</sup> *Ibid.*, para. 202.

<sup>56</sup> Rome Statute Elements of Crimes Article 8(2)(c)(i)-4, War Crime of Torture, para. 5.

<sup>57</sup> *Prosecutor v. Germain Katanga*, Judgement Pursuant to Article 74 of the Statute, International Criminal Court, ICC-01/04-01/07, 7 March 2014, para. 1176; reiterated by *Prosecutor v. Jean-Pierre Bemba Gombo*, International Criminal Court, Judgement Pursuant to Article 74 of the Statute, ICC-01/05-01/08, 21 March 2016, para. 142.

<sup>58</sup> Cottier and Grignon, “Article 8” in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 1999, para 37-42.

“What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established [...] that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict. In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, inter alia, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator’s official duties.”

Hence, it is correct to assume that a non-international armed conflict may spill over from the territory of the State in which it began into the territory of a neighboring State not party to the conflict itself.<sup>59</sup> Under this view, the crimes committed in the territory of other relevant States outside of Afghanistan would not possibly have taken place if it is not associated with the conflict in Afghanistan. It is entirely possible to conclude that the crimes committed in the territory of “Blue,” “Bright Light,” and “Violet” were under the context of and associated with the armed conflict in Afghanistan.

Referring to the last two thresholds mentioned in *Ntaganda*, the Author focuses on the assessment that the victim is a member of the opposing party and the crime is committed as part of or in the context of the perpetrator’s official duties. The Afghan National Security Forces, supported by the US, are two States Parties to the conflict in Afghanistan. Their opposition, the Taliban and the Islamic State Group’s Khorasan province branch, are Non-States Parties entities. The victims in discussion, namely Al Nashiri and Abu Zubaydah, were both members of Al-Qaeda.

However, since the status of Al-Qaeda in the conflict is still

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59 International Committee of the Red Cross, *Commentary of 2016 on Article 3: Conflicts Not of An International Character*, para 474.

undefined, it is detrimental to prove that these victims were associated with the parties involved in the conflict in Afghanistan. The best possibility is to conclude that because the Taliban provides persistent support to Al-Qaeda, any interrogation conducted towards Al-Qaeda suspects is closely linked to the conflict in Afghanistan due to the Taliban being a party to the conflict. Otherwise, what the CIA did to these victims would not be considered as part of the conflict and jurisdiction could not be established for members of the CIA.

Looking from the current factual findings, along with the evidentiary threshold applicable during the current stage of the proceeding, the Author believes that the existing factual establishment is sufficient to prove the fulfillment of the nexus requirement for crimes committed by members of the CIA outside of Afghanistan.

#### **IV. Invalidating Afghanistan's Article 98 Agreement with the US to Avoid Impunity**

The Article 98 Agreement has been in force until today because the ICC had never encountered any case in which the existence of the Article 98 Agreement would hinder their establishment of jurisdiction. The *Situation in Afghanistan* provides the opportunity to permanently invalidate Article 98 Agreements as they stifle the ICC's ability to act. Considering that the Article 98 Agreement is the most serious roadblock to prosecute US nationals in the *Situation in Afghanistan*, it is paramount to determine whether Article 98 Agreement could be invalidated. With this perspective, the Author provides two possible grounds of treaty invalidation, which are first, the unlawfulness of the Article 98 Agreement and second, the coercive nature of the Article 98 Agreement.

##### **1. The Unlawfulness of the Article 98 Agreements**

Having established that there are conflicting treaty obligations for Afghanistan, the next question to be asked is whether Afghanistan's mere entry to the Article 98 Agreement itself would render the agreement to be unlawful in the first place. The Rome Statute does not prohibit any State Party to enter into Article 98 Agreements or other agreements of a similar content. On the other hand, Article 18 of the VCLT stipulates that:

“A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.”<sup>60</sup>

Considering that the Rome Statute was entered into force for Afghanistan prior to the entry into force of Article 98 Agreements, this part will assess whether Afghanistan’s entry into the Article 98 Agreement would defeat the object and purpose of the Rome Statute, hence making such entry unlawful under Article 18 of the VCLT.

The obligation to act consistently with the object and purpose of the Rome Statute also reflects the general rule of *pacta sunt servanda*. Under the context of treaty law, this principle is established in the *Nicaragua* case in which a State has the obligation to not defeat the object and purpose of a treaty and should refrain from acts depriving the object and purpose of a treaty.<sup>61</sup> However, the *Nicaragua* case also differentiates between a conduct that is expressly prohibited within a treaty that would surely defeat its object and purpose compared to those who are not expressly prohibited,<sup>62</sup> in which under this legal research, the latter prohibition would be the relevant discussion.

It is essential to understand the object and purpose of the Rome Statute in order to reach the conclusion on whether Afghanistan’s entry into the Article 98 Agreement is unlawful or not under the VCLT. The object and purpose of the Rome Statute can be seen in the preamble and Article 1 of the Rome Statute which focuses on the establishment of a permanent court complementary to national jurisdictions over the most serious international crimes.

Without any indication of defeating the object and purpose of the Rome Statute, the preamble of the Article 98 Agreement indeed reiterates the object and purpose of the Rome Statute by recalling that the ICC is intended to complement national jurisdiction. It expresses

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60 Vienna Convention on the Law of Treaties, 1961, Article 18.

61 Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), International Court of Justice, Judgement on Merits, 27 June 1986, para. 270.

62 *Ibid*, para. 272.

that the US and Afghanistan have the intention to investigate and prosecute crimes within the jurisdiction of the ICC committed by US or Afghanistan nationals, as mentioned in the preamble of the Article 98 Agreements which stipulates, “considering that the Parties have expressed their intention to investigate and to prosecute where appropriate acts within the jurisdiction of the ICC alleged to have been committed ....”

Hence, it is difficult to conclude that Afghanistan’s entry into the Article 98 Agreement defeats the object and purpose of the Rome Statute, despite the existing conflict of treaty obligations for Afghanistan. Alternatively, the *Nicaragua* case provides a lower threshold to render the agreement unlawful. Not only is a State obliged not to defeat the object and purpose of a treaty, but a State also has the obligation not to impede the due performance of a treaty.<sup>63</sup>

The concept of impeding the due performance of a treaty could be significantly different from defeating the object and purpose of a treaty. Arguably, any act that might prevent the compliance to a treaty obligation might constitute as an act of impeding the due performance of a treaty. If the ICC takes this approach, it can be concluded that Afghanistan’s mere entry into Article 98 Agreement would be unlawful. Considering that “unlawfulness” does not curtail invalidity, what legal effect does this circumstance trigger?

In this regard, little state practice is shown to determine the legal effects of breach of Article 18 of the VCLT. The nearest conclusion can be drawn from Russia’s judicial practice. The Russian Constitutional Court rendered a decision on 19 November, 2009 in regards to their approach towards the possible impediment of the Additional Protocol No. 6 of the ECHR.<sup>64</sup> Russia signed such Additional Protocol on 16 April, 1997.<sup>65</sup>

According to the Russian Constitution, the death penalty is reserved only for the most serious crime against human life,<sup>66</sup> and such a sentence requires a jury trial. The Supreme Court of Russia

63 International Criminal Court Article 98 Agreement between the United States and Afghanistan, 2002, Preamble.

64 Clarification on Paragraph 5 of the Decision of the Constitutional Court of the Russian Federation dated 2 February 1999 on the Constitutionality Review of Article 41 and 42 of the Russian Federation Criminal Procedural Code, Constitutional Court of Russian Federation, 19 November 2009.

65 *Ibid*, para 4,2.

66 Russian Constitution, 1993, Article 20.

rendered a decision which imposes capital punishment but the execution was suspended.<sup>67</sup> Russia then adopted the Jury Trial Act in 2010, which consists of the imposition on capital punishment. The Russian Constitutional Court was of the view that despite the promulgation of the Jury Trial Act, which possibly allows the execution of death penalty for perpetrators of the most serious crime against human life under the Russian Constitution, this would breach Article 18 of the VCLT as it would defeat the object and purpose of the Additional Protocol. The Constitutional Court concluded that Russia is not precluded from its human rights obligations under the Additional Protocol, and therefore any executive authorities are not allowed to enforce death penalties to safeguard the fulfillment of duties under Article 18 of the VCLT.<sup>68</sup> This exact approach was also adopted in the case of *Ocalan v. Turkey* before the ECHR.<sup>69</sup>

Acknowledging the aforementioned state practice by Russia and the ECHR, it can be drawn that the legal effects of breach of Article 18 of the VCLT in the *Situation in Afghanistan* would be to not exercise the obligation entailed under the Article 98 Agreement but not necessarily invalidating the agreement.

## 2. Coercion as Grounds of Invalidity under Article 52 of the VCLT

The Bush administration successfully negotiated with over 100 States to enter into Article 98 Agreements. It is believed that the Bush administration coerced States Parties to enter into Article 98 Agreements using predatory negotiation tactics.<sup>70</sup> Critics have been raised to accuse the Bush administration of “blackmailing” developing countries.<sup>71</sup> A majority of States Parties who have entered into Article

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67 Clarification on Paragraph 5 of the Decision of the Constitutional Court of the Russian Federation dated 2 February 1999 on the Constitutionality Review of Article 41 and 42 of the Russian Federation Criminal Procedural Code, Constitutional Court of Russian Federation, 19 November 2009.

68 *Ibid*, para 12.

69 *Ocalan v. Turkey*, European Court of Human Rights, Judgement, Application No. 4622/99, ECHR, 12 March 2003, para. 185.

70 Jean Galbraith, “The Bush Administration’s Response to the International Criminal Court,” *Berkeley Journal of International Law* 21 (2003): 686.

71 Nicholas Kristof, “Schoolyard Bully Diplomacy,” *The New York Times*, *The New York Times*, October 16, 2005, <https://www.nytimes.com/2005/10/16/opinion/schoolyard-bully-diplomacy.html>.

98 Agreements are States that are dependent on US aids—whether it is military, economy, health, or border security programs.<sup>72</sup>

The one-sided, coercive nature of the predatory negotiation tactics could possibly serve as grounds to invalidate the Article 98 Agreements. Article 52 of the VCLT provides that “a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.”<sup>73</sup> In other words, it can be concluded that the validity of a treaty can be challenged when consent is gained by means of coercion. What is paramount to invoke Article 52 of the VCLT is that a coercion must be illegal and aggressive to the extent that it renders the absence of free will of the State whom the Bush administration negotiated with during the conclusion of the Article 98 Agreement.

Opposing views were taken at the VCLT to conclude the exact scope of illegal and aggressive coercion, and this interpretation debate is inseparable from the interpretation of the UN Charter, mainly Article 2(4) on the prohibition of use of force.<sup>74</sup> There is no single definition of the scope of coercion that is sufficient to trigger Article 52 of the VCLT. However, bearing in mind that there exists no indication of a military coercion imposed by the Bush administration when negotiating Article 98 Agreements with States Parties of the ICC, it is otherwise indicated that the Bush administration imposed non-military coercion that affects the free will of the States Parties of the ICC when agreeing to enter into Article 98 Agreements.

Even if the scope of “threat or use of force” under Article 2(4) of the UN Charter does not include political or economic force,<sup>75</sup> coercion, in its simplest form, manifests not limited to military conduct related to armed conflict. A particular threat imposed through coercion may range from ones such as barring economic aid or acceptance of certain limitations of freedom of decision-making. Similarly unequivocal to such concept is the wording of a resolution

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72 Peter Beattie, “The US, Impunity Agreements and the ICC: Towards the Trial of a Future Henry Kissinger”, *Guild Practitioner* 62, no. 4 (2005): 203.

73 Vienna Convention on the Law of Treaties, 1961, Article 52.

74 Taslim Olawale Elias, “Problems Concerning the Validity of Treaties”, in Oliver Dörrand and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary*, Springer Heidelberg, 2012 87.

75 Oppenheim, *International Law*, 1997, 641.

from 1969, which provides that “the United Nations Conference on the Law of Treaties solemnly condemns the threat or use of pressure in any form, whether military, political, or economic, by any State, in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent of States.”

Mere influence or pressure cannot be equated with the concept of severe coercion because pressure of one sort or another is inevitable in treaty negotiations.<sup>76</sup> Commentators agreed that the illegality of non-military coercion shall be based on the degree of coercion that one State imposed to affect the economy or politics of another State.<sup>77</sup> Hence, in order for the Article 98 Agreements to be invalidated, the OTP must prove that the coercion imposed during the predatory negotiation tactics is of a sufficient degree to trigger Article 52 of the VCLT.

Article 52 of the VCLT implies a universally recognized principle of international law, which is the principle of free consent.<sup>78</sup> The reason coercion can serve as grounds of invalidity is that because the sufficient degree of coercion renders the free will of a State from entering into treaties.<sup>79</sup> The lack of consent of at least one State party to a treaty makes the treaty void or at least voidable. The free will of a State is certainly lacking when a State has been forced to give its consent under duress. Even if the use of coercion is determinative towards the validity of treaties, it is generally not enough to impeach the validity of a treaty for merely this reason. Only when coercion leads to an absolute defect of consent that it can be used as grounds for invalidity. When coercion merely decreases a State’s willingness to accept a treaty, it does not bear any significance.

To establish the degree of coercion imposed by the Bush administration to States Parties in order to reach a conclusion of an Article 98 Agreement, the US’ sanctions on Latin America could serve as a point of departure. In 2003, pursuant to the adoption of American

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76 *Dubai-Sharjah Border Arbitration*, Ad Hoc Court of Arbitration, Awards in Maritime Boundary Delimitation Disputes, 19 October 1981, para. 571.

77 Martin Domb, “Defining Economic Aggression in International Law: The Possibility of Regional Action by the Organization of American States”, *Cornell International Law Journal* 11, no. 1 (1978): 97.

78 Oliver Dörrand and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary*, Springer Heidelberg, 2012, 872.

79 Alan Wertheimer, *Coercion*, Princeton University Press, 1978, 32.

Servicemembers' Protection Act, the Bush administration terminated military assistance to governments of countries that had not agreed to sign an Article 98 Agreement.<sup>80</sup> Only NATO members or NATO allies are exempted from such military restrictions. During the same period, sanctions to US military and economic aid were imposed to Latin American countries—which are Barbados, Bolivia, Brazil, Costa Rica, Ecuador, Mexico, Paraguay, Peru, St. Vincent, Trinidad, Uruguay, and Venezuela—in which all have entered the Rome Statute but have not entered into an Article 98 Agreement.<sup>81</sup> Argentina serves as an example of exemption due to their position of being a NATO ally. Until today, Mexico is the last Latin American country who has entered into the Rome Statute and is in the prospect of losing military and economic aid from the US.<sup>82</sup>

Not much has been discovered by the OTP in regards to any indication of coercion performed by the US to force Afghanistan to enter into the Article 98 Agreement. However, it is indisputable that Afghanistan had been and still is an aid-dependent State. In 2002, at the same time during the conclusion of the Article 98 Agreement, Afghanistan was highly dependent on foreign assistance. Among others, the US was clearly the single most important foreign actor to provide assistance during this period.<sup>83</sup> The US military assistance was presumably intended to support the concept of state-building, yet it had contradictory effects by providing a coercive presence that Afghanistan lacked in providing to fight insurgency.

The US clarified their intention on conducting military operations in Afghanistan as President Bush pointed out by stating that “the US will consult with Afghanistan if it perceives its territorial integrity, independence or security is at risk.”<sup>84</sup> In addition to the military assistance, the economic dependency during this time period was also strong. In early 2002, when building the Afghanistan National Army, such a development program was almost entirely funded by the US with an approximate amount of USD 618 million.<sup>85</sup>

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80 Clare M. Ribando, “Article 98 Agreements and Sanctions on US Foreign Aid to Latin America,” CRS Report for Congress, 2006, 5.

81 *Ibid.*, 6.

82 *Ibid.*

83 Astri Suhrke, “When More is Less: Aiding Statebuilding in Afghanistan,” 4.

84 *Ibid.*, 14.

85 United States Department of State, *International Military Education and Training, Foreign Military Financing and Peacekeeping Operations*, n.d., 26.

With the main goal of defeating terrorism, the US' strategy of providing the most aid to Afghanistan seems to align with their initial interest. If the Afghanistan National Army is built, trained, equipped, and financed by the US, this program would be subject to US influence, possibly adding more troops to serve the US interest in combating Al-Qaeda and the Taliban.<sup>86</sup> It is possible that the US might take advantage of these military dependencies coupled with the pressure that the Afghanistan Government was experiencing due to the attacks committed by the Taliban and Al-Qaeda, to press the Afghanistan government to enter into the Article 98 Agreement.

Would a State taking advantage of the military dependency of another State for the purpose of pressing the conclusion of a treaty be considered as coercion? To answer this, the International Court of Justice made it clear that the charge of coercion is an important matter which cannot be satisfied by a vague assumption. Clear and compelling evidence to support the existence of coercion and its direct effect to the conclusion of a treaty must be present.<sup>87</sup> Further, taking into account that the coercion in question must violate Article 2(4) of the UN Charter, the conclusion of the treaty must have been procured by an intentional unlawful use of force.

This means that the coerced State must prove a direct causal relationship between the coercion and the conclusion of the treaty, and the coerced State must have no true choice to accept or to refuse.<sup>88</sup> This high threshold of coercion is also established in the case of the *Government of Kuwait v. American Independent Oil Company* where the Arbitration Tribunal found that "it is not just pressure of any kind that will suffice to bring about nullification. There must be a constraint invested with particular characteristics ... in terms either in the absence of any other possible course than that to which the consent was given, or of the illegal nature of the object in view or of the means employed."<sup>89</sup> Hence, the prosecution is burdened to prove not only the directness of the coercion but also the degree of coercion that must be sufficient to constitute a violation of Article 2(4) of the UN Charter.

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86 Astri Suhrke, "When More is Less: Aiding Statebuilding in Afghanistan," 16.

87 Fisheries Jurisdiction (*UK and Northern Island v. Iceland*), International Court of Justice, Judgement, 25 July 1973, para. 14.

88 Robert Kolb, *the Law of Treaties*, 2016, Edward Elgar Publishing, 201.

89 Peter Muchlinski, *Multinational Enterprise and the Law*, 585.

## **V. Circumstances for Possible Invalidation of Article 98 Agreements**

### **1. Reiterating the Circumvention of Accountability in Afghanistan**

The *Situation in Afghanistan* gives opportunity for the ICC to strengthen its commitment in fulfilling its mission to fight impunity by investigating and prosecuting nationals of the US, which is not a State Party to the Rome Statute. However, even if the ICC may exercise its jurisdiction over nationals of a Non-State Party for crimes committed in the territory of a State Party, it is politically and practically difficult for the ICC to gain custody over any accused that is a national of the US. To keep its own nationals from the ICC's jurisdiction, the US has to demonstrate a degree of willingness and ability to prosecute allegations involving US nationals in its own domestic courts, which is very unlikely in the present case. Conclusively, there are two points to be highlighted before providing recommendations on how to prosecute US nationals for alleged crimes committed in the situation in Afghanistan.

Firstly, Article 98 Agreement is the biggest challenge that the ICC will encounter when trying to proceed with the investigation of the situation in Afghanistan. While Afghanistan is under the obligation under Article 89 of the Rome Statute to cooperate with any request of arrest or surrender issued by the ICC, the Article 98 Agreement between the US and Afghanistan prohibits Afghanistan to arrest or surrender any US nationals to the ICC. Therefore, if the OTP decides to charge any US national, the ICC under Article 98 of the Rome Statute is unable to request Afghanistan to arrest or surrender any US nationals to the ICC for this purpose.

Secondly, to allow Afghanistan to cooperate with the ICC's request, the Article 98 Agreements must be invalidated. To address this matter, the Author is of the view that by invalidating the Article 98 Agreements, Afghanistan will be released from its obligations under the Article 98 Agreements and the ICC could pursue the issuance of a request of arrest or surrender towards any accused that are nationals of the US.

## 2. Enabling ICC's Functions as International Judicial Body

In the *Situation in the Afghanistan* judgement,<sup>90</sup> the ICC recognized that issues pertaining to the jurisdiction of the Court were raised due to certain agreements entered between the US and Afghanistan, namely the Article 98 Agreement. However, the ICC emphasized that these issues may be raised and will be addressed, if required, by interested States.<sup>91</sup> Hence, if Afghanistan refuses to transfer an accused to the ICC because of conflicting obligations under certain agreements with the US, the ICC will examine such agreements. In conjunction with conducting investigations towards US military forces for alleged crimes committed in Afghanistan, the ICC could conduct investigations towards members of the CIA for alleged crimes committed outside of Afghanistan but is still related to the conflict in Afghanistan.

This investigation would be free from the question of conflicting treaty obligations between obligations under the Rome Statute and under the Article 98 Agreements. It is confirmed that other States Parties, namely Poland, Lithuania, and Romania, have not entered into any Article 98 Agreements with the US that prevent those States Parties from cooperating with the investigation of the ICC. In this vein, the ICC could pursue a request of arrest and surrender to other European States that have not entered into any Article 98 Agreements with the US.

The investigation of the situation of Afghanistan would not be limited to conducts committed by the US military forces in the territory of Afghanistan. Any conduct committed by members of the CIA in the territory of other States Parties, so long as it is still related to the conflict in Afghanistan, could be subjected to investigation. As such, it is possible for the ICC to expect cooperation from other States Parties that have not entered into any bilateral non-surrender agreement with the US for this matter. Despite such alternative arrangement, solving the conflicting treaty obligations between the Rome Statute and Article 98 Agreements is of an urgency to the ICC to ensure that all accused can be brought into ICC proceedings to end

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90 *Situation in the Islamic Republic of Afghanistan*, Judgement on the Appeal against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, International Criminal Court, No. ICC-02/17 0A4, 5 March 2020, para. 32.

91 *Ibid.*

impunity.

As for investigations toward crimes allegedly committed in Afghanistan, unless the ICC makes a definitive determination of the validity of Article 98 Agreements, the Author believes that issues on solving conflicting treaty obligations will remain in question, and they will remain to be the main obstacle that hinders the ICC from investigating and prosecuting US nationals unless the ICC makes a definitive determination of the validity of Article 98 Agreements.

### **3. Usage of Shaky Legal Interpretation under the VCLT**

Critiques of Article 98 Agreements show a degree of support to doubt the legitimacy of the agreements. In addressing such issue, the Author finds several articles contained within the VCLT to provide a potential solution. First, it is possible to conclude that the conclusion of the Article 98 Agreements between Afghanistan and the US constitutes a breach of Article 18 of the VCLT. For the conduct in question to constitute as a breach, the threshold established in the case of *Nicaragua* affirms that for the conduct in question to defeat the object and purpose of a treaty under Article 18 of the VCLT, the conduct is not required to have been done in a manner that actually defeats the object and purpose of a treaty so much as there is a mere impediment of treaty obligation to trigger a violation of Article 18 of the VCLT. In other words, impeding the due performance of a treaty would be sufficient to render an agreement unlawful.

Presently, Afghanistan is bound by its commitment to fulfill its treaty obligations under the Rome Statute as a State Party, one of them being to cooperate with a request of arrest and surrender should the ICC issue such a request. The conclusion of the Article 98 Agreements clearly hinders Afghanistan from performing its treaty obligations under the Rome Statute. Hence, the act of concluding the Article 98 Agreement if interpreted carefully, could constitute a violation of Article 18 of the VCLT.

However, merely concluding the Article 18 Agreements to be unlawful would not serve as strong grounds to allow the ICC to pursue a request of arrest or surrender due to the vague legal effects that entails a breach of Article 18 of the VCLT. Observing the limited state practice, a formal judicial procedure would be required to conclude the unlawfulness of the Article 98 Agreements. Even if such judicial procedure could not entirely conclude Article 98 Agreements

to be unlawful, at the very least, it could conclude that Afghanistan's obligations under the Rome Statute superseded Afghanistan's obligations under the Article 98 Agreements.

By stating that the existence of the Article 98 Agreements is "not pertinent to the issue of authorisation of an investigation" at this current stage of the proceeding, the ICC is signaling that the Article 98 Agreement possibly lacks legitimacy due to their rejection in considering the potential effects of the Article 98 Agreements on States Parties in the situation in Afghanistan.

The ICC, as an international institution, holds the power to influence the behavior of States Parties as to how they should approach a situation that conflicts with their obligation under the Article 98 Agreements. If the ICC concludes that the Article 98 Agreement between Afghanistan and the US is invalid under Article 52 of the VCLT, this could serve as a strong basis to render other Article 98 Agreements to be invalid over time. The Author believes that this approach of acculturation will help advance towards permanently delegitimizing the performance of Article 98 Agreements.

As mentioned under Section C.2 of this legal research, this would require the ICC to prove that an act of direct coercion was present during the conclusion of the Article 98 Agreement, leaving Afghanistan with no choice other than to conclude the Article 98 Agreement. Not only would invalidating the Article 98 Agreements under Article 52 of the VCLT solve the issue of conflicting treaty obligations, but it would also provide more certainty as to how the ICC should deal with any future conflicting treaty obligations rather than resorting to Article 18 of the VCLT, which provides ambiguity in the legal effect when it comes to curtailing violations. Resorting to this solution would broaden the possibility of the international community viewing the ICC as a strong authoritative source for international justice. This bold decision would render the ICC to be a credible and compellingly effective permanent court that holds a strong influence toward the behavior of the international community.

#### **4. Gaining Leverage at the Political Forum**

As last resort, in cases like the *situation in Afghanistan* where commonalities of Parties are nowhere to be seen or expected, it is admittedly acknowledged that neither the VCLT nor any customary laws on treaty conflicts offer a ready solution to this issue. It may be

required, under extreme circumstances, where the only solution is for Afghanistan to resort to a bold political decision in favor of the ICC to respect Afghanistan's obligations under the Rome Statute over its obligations to the US.

Under these circumstances, if the US refuses to comply with the ICC, it will tarnish its reputation before the international community as a State that is willing to participate in efforts to uphold human rights norms and preserve the rights of victims of the most serious international crimes. Further, considering that the ICC's investigation includes a variety of actors, and not solely limited to US nationals, the possibility of non-compliance shown by the US will not hinder the ICC from conducting thorough investigations and prosecutions.

Mirroring the *Situation in Darfur, Sudan*, despite a strong resistance shown by the Sudanese Government, the ICC managed for the first time to conduct investigation over third-state nationals. Even without access to the American soil, the Author would like to cite an opinion by Alex Whiting, professor at Harvard Law School and former senior Prosecutor, which States that even if investigations were highly resisted, "it is not impossible as evidence leaves the country and witnesses leave the country too."<sup>92</sup>

The *Situation in Afghanistan* would be the second case before the ICC that involves States outside of Africa. Establishing a strong precedent in the situation in Afghanistan will determine the ICC's legitimacy and willingness to take on powerful States that politically influence the international community, such as the US. Hence, an overwhelmingly important job awaits the ICC in addressing the situation in Afghanistan.

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92 Lisa Clifford, "Afghanistan and the ICC: a 'Brave' First Step, but a Long Road Ahead." *The New Humanitarian*, April 16, 2019. <https://www.thenewhumanitarian.org/analysis/2018/01/23/afghanistan-and-icc-brave-first-step- long-road-ahead>

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## The Challenges for The International Criminal Court in Securing Cooperation from States

*Kay Jessica*

The ICC was established in July 2002, upon the entry into force of the Rome Statute. The cooperation from states highly determines the success of the ICC since it does not have an appropriate enforcement mechanism to exercise its jurisdiction *ratione materiae*. Without essential cooperation from states, the ICC will encounter great difficulties to conduct investigations and prosecutions of the crimes. The obligation of the State Party and Non-State Party to cooperate with the ICC is different. State Parties are obligated to fully cooperate with the ICC, as dictated by Article 86 of the Rome Statute. Contrarily, Non-State Parties to whom the Rome Statute does not bind are only encouraged to cooperate and assist the ICC. Nevertheless, in practice, it is often difficult to obtain state cooperation, not only from Non-State Parties but also from State Parties. Such non-cooperation has been a major factor preventing the ICC from fully delivering its mandate. This article will explore the obligation of states to cooperate with the ICC under international law as well as the ICC's legal and non-legal responses to non-cooperation. Ultimately, the article argues that to successfully ensure state cooperation and support the effective functioning of the ICC, it would be important to modify certain provisions in the Rome Statute and alter the way the ICC and the ASP dealt with non-cooperation.

**Keywords:** International Criminal Court, International Criminal Law, State Cooperation, United Nations Security Council

### **I. Background: The Importance of State Cooperation to the ICC**

In July 1998, a five-week diplomatic conference was convened by the UNGA with an aim to finalise and adopt the convention on the establishment of the ICC as a permanent international criminal tribunal.<sup>1</sup> The creation of the ICC as the first independent international criminal tribunal is considered one of the most significant events in the history of international criminal law. When the Rome Statute of the International Criminal Court ('Rome Statute') entered into force in July 2002, and the ICC began its function,<sup>2</sup> the primary practical

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1 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/CONF.183/13 (Vol.I), 15 June – 17 July 1998.

2 Rome Statute.

issue discussed was whether it may operate effectively to perform its historic mission to implement international criminal justice.<sup>3</sup>

The ICC possesses substantial power to issue indictments and pursue the criminal responsibility of international criminals who allegedly committed heinous crimes under its jurisdiction.<sup>4</sup> However, unlike domestic courts with their own law enforcement tools such as police and armed forces, the ICC does not have its own enforcement mechanism to take judicial action, such as executing arrest warrants for the defendants or acquiring evidence located in certain states. The ICC has to rely upon state cooperation in completing its investigation, prosecution, and execution of judgment. Therefore, the effectiveness and key to the success of the ICC will be highly dependent on the cooperation provided by states.

The ICC eminently hopes to acquire prominent cooperation from both State Party and Non-State Party. Considering that not all of the situations and cases handled by the ICC took place in the territory of the State Party thus, cooperation from the Non-State Party will be required under certain circumstances. The importance of state cooperation to the ICC has been stressed in the UNGA on its meetings,<sup>5</sup> the UNSC Resolutions,<sup>6</sup> and numerous scholars' opinions.<sup>7</sup> Accordingly, state cooperation with the ICC is a concrete way to support the ICC's effective functioning and end impunity for the perpetrator of the most serious crimes.

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3 Zhu Wenqi, "On Cooperation by State Non-Party to the International Criminal Court," *International Review of the Red Cross* 88, no. 861 (2006): 87-110.

4 Rome Statute, Article 1.

5 Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, A/67/L.1, 19 September 2012; United Nations General Assembly Plenary Seventy-Fifth Session, GA/12280, 2 November 2020; United Nations General Assembly Plenary Seventy-First Session, GA/11850, 31 October 2016.

6 The United Nations Security Council Resolution 1593, S/Res/1593, 31 March 2005; The United Nations Security Council Resolution 1970, S/Res/1970, 26 February 2011.

7 Rita Mutyaba, "An Analysis on the Cooperation Regime of the International Criminal Court and its Effectiveness in the Courts' Objective in Securing Suspects in its Ongoing Investigations and Prosecutions", *International Criminal Law Review* 12 (2012): 962; William A. Schabas, "The International Criminal Court and Non-Party States," *Windsor Yearbook of Access to Justice* 28, no. 1 (2010): 1-21; Wenqi, "On Cooperation by State Non-Party to the International Criminal Court," 87-110.

## II. The Role of the United Nations Security Council within the International Criminal Court

The ICC is an independent judicial institution. However, it recognises essential roles for the UN, particularly the UNSC. A framework for cooperation with the UNSC is provided in the Rome Statute to ensure the ICC's effectiveness in exercising its jurisdiction. To date, there are still many states that did not ratify the Rome Statute, and hence, the ICC deeply hopes that it can rely on the UNSC to access situations where it would otherwise not have jurisdiction.

The role of UNSC at ICC is limited to the jurisdictional and cooperation scope based on Rome Statute<sup>8</sup> and the Agreement between the UN and the ICC ("the Agreement").<sup>9</sup> Under Article 13 of the Rome Statute, the UNSC is empowered to refer situations to the ICC if the crimes under its jurisdiction appear to have been committed in a certain region. Such referrals extend to those situations found within the territories of the Non-State Party.<sup>10</sup> To date, the UNSC has referred two situations to the ICC, namely *Situation in Darfur* that centred on a guerrilla conflict that took place in Darfur, Sudan, from 2003 until 2010 and *Situation in Libya* concerning the Libyan Civil War that occurred in 2011. In this sense, referral by the UNSC would bind the Non-State Party to the Rome Statute for that particular case only.<sup>11</sup>

In terms of the enforcement for cooperation, by virtue of Article 87 (5) of the Rome Statute, the UNSC may take action towards referred states that fail to cooperate with the ICC.<sup>12</sup> In this context, the Agreement sets forth that the ICC may report such non-cooperation to the UNSC together with relevant information regarding the case in question. At this point, the UNSC shall inform the ICC of its actions under the circumstances through the Secretary General.<sup>13</sup> Therefore,

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8 Rome Statute, Article 13 (b) & Article 87 (7).

9 The Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 7 June 2004.

10 Rome Statute, Article 13 (b).

11 The United Nations Security Council Resolution 1593, S/Res/1593, 31 March 2005, par. 2; The United Nations Security Council Resolution 1970, S/Res/1970, 26 February 2011, par. 5.

12 Rome Statute, Article 87 (5) (b).

13 The Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 7 June 2004, Article 17(3).

with such significant power, the UNSC is expected to take decisive measures that are likely to enhance state cooperation with the ICC.<sup>14</sup>

### III. The Issue of State Cooperation in the ICC

The success of the ICC is highly determined by cooperation from states. As has been stressed above, the ICC lacks an enforcement mechanism, and it has to rely on the cooperation of the State Party and Non-State Party in the arrest and surrender of the perpetrators of crimes under its jurisdiction *ratione materiae*. It is undeniable that without state cooperation, the ICC will encounter great difficulty to conduct its proceedings. Although the UNSC possesses an exceptional role in the enforcement of state cooperation to the ICC, however, such role is very limited, and even ineffective, since the ICC is a treaty-based International Criminal Tribunal, meaning that it is independent, and it shall not bound a Non-State Party without its consent.

To compare, state cooperation in the ICTY and the ICTR with the ICC is strikingly different. The UNSC has issued Resolutions establishing the ICTY in 1993<sup>15</sup> and ICTR in 1994.<sup>16</sup> The ICTY and ICTR were implemented due to serious violations of international law and human rights committed during the former Yugoslavia and Rwanda conflicts. The UNSC was certainly aware of the fact that the success of the Tribunals would highly depend on the cooperation of the states with these Tribunals.<sup>17</sup> The contributions of states to the Tribunals' investigations and national assistance to international court proceedings were considered a key factor in fulfilling the Tribunals' mandate, which is to prosecute the persons responsible for grave crimes committed during the conflicts in former Yugoslavia, and Rwanda decades ago.

Fortunately, the UNSC possesses an enforcement mechanism, a power to impose an obligation for the states to cooperate with ICTY

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14 Dapo Akande, Talita de Souza Dias, "Cooperation with the ICC: What the Security Council and ASP must do," *Institute for Security Studies*, Africa Portal (2019): 1-16.

15 The United Nations Security Council Resolution 827, S/Res/827, 25 May 1993.

16 The United Nations Security Council Resolution 955, S/Res/955, 8 November 1994.

17 Dagmar Stroh, "State Cooperation with the International Criminal Tribunals for the former Yugoslavia and for Rwanda," *Max Planck Yearbook of United Nations Law* 5 (2001): 249-250.

and ICTR by virtue of Article 25 of the UN Charter, which states that “the Members of the UN agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”<sup>18</sup> It can be concluded that the aforementioned International Criminal Tribunals relied on the UNSC in enforcing their mechanisms, specifically in the context of state cooperation.

This was because all Member States of the UN are obliged to accept and carry out any decisions made by the UNSC.<sup>19</sup> The statutes of ICTY and ICTR were also adopted and amended by the UNSC. These resolutions did not differentiate between the obligations of different states, implying that all Member States of the UN, which includes almost all sovereign states in the world, are obliged to cooperate with these *ad hoc* Tribunals.<sup>20</sup> Such hefty power is absent in the ICC’s regime, and *ergo*, it becomes the main challenge of the ICC in carrying out its primary function.

As a treaty-based tribunal, in principle, only states ratifying the Rome Statute can be bound by provisions therein. This is in accordance with the principle of *pacta tertiis nec nocent nec prosunt* enshrined under Article 34 of the Vienna Convention of the Law of Treaties (‘VCLT’), which dictates that a treaty binds the parties and only the parties, it does not create obligations for third states without its consent.<sup>21</sup> Similarly, Rome Statute’s provisions on the obligation to cooperate differ for State Party and Non-State Party. The cooperation demanded by the ICC is broad in nature. It is written in Article 86 of the Rome Statute that only State Parties are obligated to fully cooperate with the ICC in its investigation and prosecution of crimes.<sup>22</sup> This obligation to cooperate is accompanied by Article 89 (1) of the Rome Statute, which regulates that the ICC may transmit a request for the arrest and surrender of a person, together with material supporting that request to a state on the territory of which that person may be found.<sup>23</sup> Additionally, cooperation requests for State Party can also be notified to an international organisation of which the State

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18 Charter of the United Nations 1945, Article 25.

19 *Ibid.*

20 Germany’s Law on Cooperation with the International Criminal Tribunal for the former Yugoslavia, 10 April 1995, Article 1; Switzerland’s Decree on Cooperation with the International Tribunals Act, 1995.

21 Vienna Convention on the Law of Treaties 1969, Article 34.

22 Rome Statute, Article 86.

23 Rome Statute, Article 89 (1).

Party is a member of.<sup>24</sup>

Therefore, it can be seen that the Rome Statute is very clear in conveying the obligation of the State Party upon receiving such request of cooperation—they must comply.<sup>25</sup> Nevertheless, in practice, it is quite a laborious task to secure state cooperation, this primarily because (1) some State Parties are reluctant to cooperate with the ICC, and (2) Rome Statute does not bind Non-State Parties, and this simply means they are not under treaty obligation to cooperate with the ICC.

### 1. State Parties' Reluctance to Cooperate with the ICC

As for the first issue, it is very regrettable that states, although they are parties to the ICC, do not guarantee that they will cooperate with the ICC according to Article 86 of the Rome Statute. This is indeed problematic, seeing that the ICC may not function effectively without cooperation from states. To date, many State Parties from African regions such as Chad, Djibouti, Jordan, Kenya, Malawi, South Africa as well as Uganda have explicitly rejected the request for cooperation issued by the ICC and ultimately failed to fulfil their treaty obligation.

First, the African continent has the highest number of State Parties to the Rome Statute and has played a significant role in strengthening the Rome Statute legal regime over the years. Initially, the AU vigorously supported the establishment of the ICC, however, the relationship between these two institutions is now fraught.<sup>26</sup> This discord was mainly caused by the warrants of arrest for the former President of Sudan, Omar Al-Bashir, based on the UNSC Resolution 1593 in 2005<sup>27</sup> and repeated calls for his arrest for numerous State Parties in Africa, which unfortunately ended in non-cooperation.

It all started in July 2010 when the ICC issued the second warrant

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24 Rome Statute, Article 87 (1) (b); The Agreement between the International Criminal Court and the European Union on Cooperation and Assistance, ICC-PRES/01-01-06, 1 May 2006.

25 Rome Statute, Article 89 (1); Valerie Oosterveld, *et al*, "The Cooperation of States With the International Criminal Court", *Fordham International Law Journal* 25, no. 767 (2001): 767-768.

26 Priya Pillai, "The African Union, the International Criminal Court, and the International Court of Justice: At the Fault Lines of International Accountability", *American Society of International Law* 22, no. 10 (2018).

27 The United Nations Security Council Resolution 1593, S/Res/1593, 31 March 2005.

of arrest for Al-Bashir with regards to the *Situation in Sudan*,<sup>28</sup> directly before he visited Chad, a State Party to the Rome Statute. The Former President of Sudan was charged with three counts of genocide, two counts of war crimes, and five counts of crimes against humanity.<sup>29</sup> The ICC, the EU, Human Rights Watch and Amnesty International called on Chad to immediately arrest Al-Bashir and surrender him to Den Haag. However, the AU has issued a Resolution calling all of its Member States not to cooperate with the ICC, as it believed that the indictments made by the ICC against Al-Bashir has deliberately sabotaged the peace process in Sudan and undermined the ongoing efforts to resolve the conflict.<sup>30</sup> Chad finally refused to cooperate, ignoring its treaty obligation under the Rome Statute.<sup>31</sup>

Later in August 2010, Al-Bashir travelled to Kenya, also a State Party to the Rome Statute.<sup>32</sup> He came to Kenya to attend a signing ceremony to honour the enactment of Kenya's new constitution.<sup>33</sup> Again, the Kenyan Government did not cooperate with the ICC to arrest and surrender Al-Bashir due to the instruction made by the AU towards its Member States to defy the ICC and not to participate in

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28 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Second Warrant of Arrest for Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09-95, 12 July 2010.

29 *Ibid.*

30 AU Assembly, 13th Ordinary Session, *Decision On The Meeting Of African States Parties To The Rome Statute Of The International Criminal Court (ICC) Doc. Assembly/AU/13(XIII)*, AU Assembly Doc. Dec.245 (XIII) Rev.1, ¶ 10 (July 1–3, 2009).

31 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-140-tENG, 13 December 2011.

32 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya, ICC-02/05-01/09-107, 27 August 2010.

33 Jody Clarke, "Kenya's Historic Day Overshadowed by the Presence of Sudanese Leader Bashir", Irish Times, 28 August 2010, <http://www.irishtimes.com/news/kenya-s-historic-day-overshadowed-by-presence-of-sudanese-leader-bashir-1.643696> (accessed on 30 September 2021); Julian Borger, "Commonwealth Chief Admonished by the ICC over War Crimes Remarks: Row Began over Kenya Refusal to Arrest Bashir", The Guardian, London, 27 October 2010, <https://www.theguardian.com/world/2010/oct/27/commonwealth-international-criminal-court-bashir> (accessed on 30 September 2021).

the arrest and surrender Al-Bashir. As a Member State of both the AU and Rome Statute, Kenya eventually chose to obey the order made by the AU to disrespect the ICC.

Additionally, the Government of South Africa also threatened to withdraw from the ICC amid controversy over its refusal to enforce the ICC's arrest warrant against visiting Al-Bashir in June 2015. As a State Party, South Africa is consequently under an obligation to arrest Al-Bashir and surrender him to the ICC.<sup>34</sup> The Pretoria High Court<sup>35</sup> and even South Africa Supreme Court<sup>36</sup> have officially issued decisions confirming that the Government of South Africa has ignored the principles of the rule of international law and its constitutional obligations by not arresting and surrendering Al-Bashir to the ICC despite the arrest warrant, Al-Bashir has travelled to many countries within the continent—and outside—with no legal consequences, at all.

A similar situation can also be found in the *Situation in Kenya*, where the ICC charged the President of Kenya, Uhuru Kenyatta and other state officials for masterminding crimes against humanity in the post-election violence in late 2007 which resulted in over 1,100 lives and forced nearly 400,000 people to flee from their homes.<sup>37</sup> Although the charges were dropped and the case was terminated due to insufficient evidence, the Government of Kenya was enraged as they thought that the ICC maliciously interfered in their internal affairs and hindered the political and democratic process in Kenya.

In 2016, Kenya proposed to withdraw from the ICC as Uhuru Kenyatta argued that the ICC is a tool of western imperialism that intentionally aims to harm the sovereignty, security, and dignity

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34 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir, ICC-02/05-01/09, 13 June 2015.

35 *The Southern Africa Litigation Centre v. The Minister of Justice and Constitutional Development of South Africa*, Judgment of High Court of South Africa, Pretoria, 27740/2015, 23 June 2015, par. 37.

36 *The Minister of Justice and Constitutional Development of South Africa v. The Southern Africa Litigation Centre*, Judgment of the Supreme Court of Appeal of South Africa, 867/15, 15 March 2016.

37 *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation in the Situation in the Republic of Kenya, ICC-01/09-19, 31 March 2010.

of African states. This is also done by other African states such as Gambia, South Africa, and Uganda, who intended to follow Burundi footsteps as the first state to withdraw its membership from the ICC. These states are convinced that the ICC blatantly targets Africans for prosecution.

Ultimately, the ICC issued decisions following the non-cooperation committed by the State Parties mentioned above, Chad,<sup>38</sup> Congo, Djibouti,<sup>39</sup> Jordan,<sup>40</sup> Malawi,<sup>41</sup> South Africa<sup>42</sup> and Uganda.<sup>43</sup> Within the decisions mentioned above, the ICC found that State Parties are under an international law obligation to cooperate with it. This is also affirmed in the *Prosecutor v. Uhuru Kenyatta Case*, where the ICC held that Kenya is under a statutory obligation to cooperate with the ICC and that non-cooperation is a breach of customary international law, specifically those enshrined in the Rome Statute and VCLT,<sup>44</sup> in

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- 38 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir. ICC-02/05-01/09-151, 26 March 2013.
- 39 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute, ICC-02/05-01/09, 11 July 2016.
- 40 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision under article 87(7) of the Rome Statute on the non compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir, ICC-02/05-01/09, 11 December 2017.
- 41 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-139-Corr, 15 December 2011.
- 42 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, ICC-02/05-01/09-302, 06 July 2017.
- 43 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute, ICC-02/05-01/09, 11 July 2016.
- 44 *The Prosecutor v. Uhuru Muigai Kenyatta*, Second decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute,

particular, *pacta sunt servanda* as the most fundamental principle of law.<sup>45</sup> The Trial Chamber, in that case, further stressed that the lack of *bona fide* cooperation by a State Party might have a serious impact on the functioning of the ICC in future proceedings.<sup>46</sup>

Moreover, the Pre Trial Chamber in the *Prosecutor v. Omar Hassan Ahmad Al Bashir Case* also explained that the cooperation regime established in Part IX of the Rome Statute could not in any way be equated with the inter-state cooperation regime that exists between sovereign states.<sup>47</sup> The Rome Statute itself clearly distinguishes the term ‘extradition’ and ‘surrender’ as seen in Article 91 and 102, respectively.<sup>48</sup> Extradition refers to an inter-state relationship, while surrender means delivering a person by a State to the ICC as a legal obligation set forth by the Rome Statute for its State Party.<sup>49</sup> In this regard, any state that cooperates with the ICC acts as instrument enforcement of the *jus puniendi* of the international community whose exercise has been entrusted to the ICC.

The ostensibly blatant breaches of States Parties’ obligations to cooperate with the Court will be resulted in the ICC’s decisions informing the UNSC and the ASP on that non-cooperation, as they possess the power to conduct any action, they may deem appropriate in accordance with Article 87 (7) of the Rome Statute. Regrettably, up until now, there is no sanction or concrete action given for State Parties that failed to comply with its obligation to cooperate—which patently creates a bad precedent for other State Party and Non-State Party, as they will possibly underestimate request of cooperation made by the ICC in the future and feel less inclined to cooperate with the ICC.

Noting that the ICC is entirely dependent on state cooperation

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ICC-01/09-02/11, 19 September 2016.

45 Vienna Convention on the Law of Treaties 1969, Article 26.

46 *The Prosecutor v. Uhuru Muigai Kenyatta*, Second decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute, ICC-01/09-02/11, 19 September 2016, par. 35.

47 *The Prosecutor v. Omar Ahmad Hassan Al Bashir*, Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, 13 December 2011

48 Rome Statute, Article 91 & 102.

49 Rome Statute, Article 102.

in order to fulfil its mandate thus, decisive measures must be taken by it to ensure that the Rome Statute system is not slow-punctured by recalcitrant State Party. If the majority of the State Party remain uncooperative, the value and deterrent effect of the ICC will significantly diminish.

## **2. The Absence of Treaty Obligation for Non-State Parties to Cooperate with the ICC**

As for the second issue, Article 34 of VCLT provides that “a treaty does not create either obligations or rights for a third state without its consent.”<sup>50</sup> Hence, in theory, the Non-State Party shall not be bound by any provisions under the Rome Statute, including the obligation to cooperate with the ICC except under three particular circumstances. *Firstly*, in the case where a Non-State Party, by way of lodging a declaration, has accepted the exercise of jurisdiction by the ICC, therefore automatically necessitates that particular state to cooperate without any delay or exception.<sup>51</sup> *Secondly*, if there is an appropriate basis such as an *ad hoc* arrangement or agreement between the ICC and Non-State Party with regard to cooperation with the ICC.<sup>52</sup> *Lastly*, in a certain situation or case that the UNSC refers to the ICC, then the UNSC imposes the obligation for the Non-State Party to cooperate with the ICC, by way of issuing the UNSC Resolution, which is binding towards all Member States of the UN.<sup>53</sup> In the last situation, any state’s defiance towards the ICC’s order or request would tantamount to defying orders of the UNSC, and consequently, sanctions can be imposed by the UNSC on the defiant state.<sup>54</sup> Therefore, compliance to the ICC’s cooperation request can somehow be actualised if mandated by the UNSC and clearly expressed in its Resolution.<sup>55</sup>

By referring a case to the ICC and issuing a Resolution urging Non-State Parties to cooperate, the UNSC is undergoing an enforcement

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50 Vienna Convention on Law of Treaties 1969, Article 34.

51 Rome Statute, Article 12 (3).

52 Rome Statute, Article 87 (5).

53 Charter of the United Nations 1945, Article 25.

54 Dapo Akande, “The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir’s Immunities,” *Journal of International Criminal Justice* 7, no. 2 (2009): 333-352.

55 The Charter of the United Nations 1945, Article 41 pursuant to Rome Statute Article 87 (5)(a).

measure under Chapter VII of the UN Charter to maintain and restore international peace and security.<sup>56</sup> This is supported by the UNSC Resolutions as well as the Report of the Secretary General.<sup>57</sup> Moreover, in the case of *Prosecutor v. Tihomir Blaskic Case*, the Chamber also held that when international courts or tribunals request cooperation to a state, particularly through the issuance of Resolution by the UNSC, then the relevant state is under *erga omnes partes* to cooperate with it.<sup>58</sup>

*Erga omnes* obligation holds that state has a duty to prosecute the perpetrator of the international crimes that achieved the status of *jus cogens*<sup>59</sup> since the violation of such norms will likely harm the entire international community.<sup>60</sup> Cooperation with the ICC is interpreted as a way of helping and supporting the prosecution of international criminals. Further, considering that all of the crimes under the jurisdiction of the Rome Statute have obtained *jus cogens* status, thus as its implication, *erga omnes* is a duty under international law and not of optional rights.<sup>61</sup> This is also supported by a well-known principle under international law, *aut dedere aut judicare* principle, which means to extradite or to prosecute.<sup>62</sup> The same notion was also raised by an international convention,<sup>63</sup> precedent,<sup>64</sup> and the

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56 The Charter of the United Nations 1945, Chapter VII.

57 The United Nations Security Council Resolution 978, S/Res/978, 27 February 1995; The United Nations Security Council Resolution 1031, S/Res/1031, 15 December 1995; Report of the Secretary General, S/25704, 3 May 1993.

58 *Prosecutor v. Tihomir Blaskic*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, IT-95-14, 29 October 1997.

59 Vienna Convention on the Law of Treaties 1969, Article 53.

60 *Case concerning the Barcelona Traction, Light, and Power Company Limited (Belgium v. Spain)*, Judgment, 5 February 1970, ICJ Reports 1970, par. 33-34.

61 M. Cherif Bassiouni, "International Crimes: Jus Cogens and Obligation Erga Omnes", *Law and Contemporary Problems* 59, no. 4 (1997): 63-74.

62 Final Report of the International Law Commission, 2014, The Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare), United Nations: International Law Commission, Yearbook of the International Law Commission, Volume II, 16; Bassiouni, M. Cherif. *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Leiden: Martinus Nijhoff Publishers, 1995), 82.

63 Geneva Convention on Wounded and Sick in Armed Forces in the Field of 12 August 1949, Article 1.

64 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. the United States of America)*, Judgment, 27 June 1986, ICJ Reports 1986, p. 114, par. 220.

UNSC Resolutions,<sup>65</sup> where they argue that all states have to ensure and respect the general principles of international law that prohibits violation of *jus cogens*. This becomes an indication that states, regardless of whether or not they are parties to the Rome Statute, are expected to cooperate with the ICC, or at least to make an effort not to block actions taken by the ICC to punish the perpetrator of crimes under the ICC *ratione materiae*.<sup>66</sup> This is due to the fact that the ICC deals with the most egregious crimes that shock the conscience of humanity, starting from genocide, crimes against humanity, war crimes, and an act of aggression.<sup>67</sup>

To date, the UNSC has issued two Resolutions imposing an obligation for Non-State Parties to cooperate with the ICC. The *first* one is the UNSC Resolution 1593 issued in 2005, related to the request for the Government of Sudan to cooperate with the ICC in the arrest and surrender of Al-Bashir.<sup>68</sup> *Secondly*, the UNSC Resolution 1970 year 2011 was made for the Government of Libya, requiring them to cooperate in cases involving Muammar Gaddafi and his allies during the Libyan Civil War in 2011.<sup>69</sup> In the said Resolutions, the UNSC is very clear about the legal obligation for both Sudan and Libya to fully cooperate with the ICC. While imposing an obligation on parties to the conflict to cooperate fully with the ICC, the Resolutions merely urged states other than Sudan and Libya to cooperate with the ICC, noting that they were under no obligation to do so.

#### **a. Situation in Libya**

As dictated by the UNSC Resolution 1970, Libyan authorities shall cooperate fully and provide any necessary assistance to the ICC and the Prosecutor.<sup>70</sup> However, the case against Muammar

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65 The United Nations Security Council Resolution 681, S/Res/681, 20 December 1990, para. 5; The United Nations General Assembly Resolution 10/2, A/RES/ES-10/2, 25 April 1997; The United Nations General Assembly Resolution 10/3, A/RES/ES-10/3, 15 July 1997; The United Nations General Assembly Resolution 10/6, A/RES/ES-10/6, 9 February 1999.

66 Zhu Wenqi, "On Cooperation by State Non-Party to the International Criminal Court," 87-110.

67 Rome Statute, Article 5.

68 The United Nations Security Council Resolution 1593, S/Res/1593, 31 March 2005.

69 The United Nations Security Council Resolution 1970, S/Res/1970, 26 February 2011.

70 The United Nations Security Council Resolution 1970, S/Res/1970, 26 February 2011, par. 5.

Gaddafi was terminated as an immediate result of his tragic death in 2011.<sup>71</sup> While the case for Abdullah Al-Senussi as the former intelligence chief and brother-in-law of Muammar Gaddafi was declared inadmissible in 2014 due to the existence of domestic proceedings in Libya.<sup>72</sup> Fortunately, the ICC's Appeals Chamber in March 2020 has confirmed that the proceeding against the second son of Muammar Gaddafi, Saif Al-Islam Gaddafi and Tohami Khaled remains admissible due to alleged violation of due process law during their proceedings in Libya.<sup>73</sup> Unfortunately, Khaled passed away in 2021, while Saif has been freed from prison under an amnesty law since 2017. Saif remains at large without any sign of cooperation from Libya to surrender him to the ICC. Saif even suggested that he would run for the presidential election that would be held in December 2021.

#### **b. Situation in Darfur, Sudan**

In accordance with the UNSC Resolution 1593, Sudan is under international law obligation to fully cooperate with the ICC in the arrest and surrender of Al-Bashir. Although Sudan is not a Party to the Rome Statute, it is obliged to cooperate with the ICC by virtue of UNSC Resolution 1593, which referred the situation in Darfur to the ICC. As the Pre-Trial Chamber points out, in paragraph 2 of that Resolution, "the Security Council decided that the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution".<sup>74</sup> In virtue of Article 25 of the UN Charter, Sudan, as the Member State of the UN, is obliged to accept and carry out decisions of the UNSC.<sup>75</sup> Nevertheless, after

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71 *The Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi, and Abdullah Al-Senussi*, Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi, ICC-01/11-01/11, 22 November 2011.

72 *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi", ICC-01/11-01/11-565, 24 July 2014.

73 *The Prosecutor v. Saif Al-Islam Gaddafi*, Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled 'Decision on the "Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute"' of 5 April 2019', ICC-01/11-01/11, 9 March 2020.

74 The United Nations Security Council Resolution 1593, S/Res/1593, 31 March 2005.

75 The Charter of the United Nations 1945, Article 25.

more than a decade since the UNSC made such a referral, Sudan has not yet complied with any of the ICC's cooperation requests as Al-Bashir has never been surrendered to the ICC.

In the effort to pursue Al-Bashir between 2005 until 2019, the ICC has virtually invited numerous Non-State Parties to arrest Al-Bashir in the event he enters their territory and surrender him to the Court, reminding them of the UNSC Resolution 1593.<sup>76</sup> This includes China,<sup>77</sup> Egypt,<sup>78</sup> Ethiopia,<sup>79</sup> India,<sup>80</sup> Kuwait,<sup>81</sup> United Arab Emirates,<sup>82</sup> and many other Non-State Parties to the Rome Statute. None of the mentioned Non-State Parties has complied with the cooperation request from the ICC. Nevertheless, similar to the previous case, even though such non-cooperation is reported as findings to the ASP, no further action has taken place, whilst indeed, this hampers the ICC in conducting its proceedings and exercising its function.

As of now, after the 2019 Sudanese *coup d'état* by the Sudanese Army in 2019, Al-Bashir was immediately placed under house arrest and later imprisoned in Khartoum's Kobar prison for money laundering and corruption convictions<sup>83</sup>— sadly not for the alleged

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76 The United Nations Security Council Resolution 1593, S/Res/1593, 31 March 2005.

77 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Report of the Registry on Omar Al-Bashir's travels to the Islamic Republic of Mauritania, the Federal Democratic Republic of Ethiopia, the People's Republic of China and the Republic of South Sudan, ICC-02/05-01/09-251, 23 October 2015.

78 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Prosecution's Notification of Travel of Suspect Omar Al Bashir in the Case of The Prosecutor v Omar Al Bashir, ICC-02/05-01/09-210, 14 October 2014.

79 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision Regarding the Visit of Omar Hassan Ahmad Al Bashir to the Federal Republic of Ethiopia, ICC- 02/05-01/09-199 29 April 2014.

80 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Request for Arrest and Surrender for Omar Hassan Ahmad Al Bashir to the Republic of India, ICC-02/05-01/09, 26 October 2015.

81 *The Prosecutor v. Omar Hassan Ahmad Bashir*, Decision regarding Omar Al-Bashir's potential travel to the State of Kuwait, ICC-02/05-01/09-169, 18 November 2013.

82 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision Regarding Omar Al-Bashir's Travel to the United Arab Emirates and his Potential Travel to the United Arab Emirates and his Potential Travel to the Kingdom of Saudi Arabia, the State of Kuwait, and the Kingdom of Bahrain, ICC-02/05-01/09-169, 24 February 2015.

83 Abdi Latif Dahir, "Sudan's Ousted Leader Is Sentenced to Two Years for Corruption", The New York Times, 13 December 2019, <https://www.nytimes.com>.

atrocities that he sparked.

In 2020, Sudan's ruling Military Council agreed to transfer the ousted Al-Bashir to the ICC to face charges of crimes against humanity in Darfur.<sup>84</sup> At this point, the ICC was convinced that it could finally investigate and prosecute crimes allegedly committed during the war in Darfur after years of relentless pursuit. Nevertheless, in October 2020, the former ICC Chief Prosecutor Fatou Bensouda visited Sudan to discuss with the Government about Al-Bashir's indictment and the prospect of his surrender to the ICC. It was revealed that the Government of Sudan has agreed on a peace deal with rebels to set up a special court of war crimes for Al-Bashir.<sup>85</sup> Consequently, the case within the ICC will be deemed inadmissible in accordance with Article 17 (1) (a) of the Rome Statute.<sup>86</sup>

From the above illustration, it is reasonable to conclude that the binding force of the Charter of the United Nations ('UN Charter') and the UNSC Resolutions are 'supposedly' sufficient to impose a legal obligation for the Non-State Party to fully cooperate with the ICC. The UNSC Resolution will elevate the status of that Non-State Party as if they are State Parties to the Rome Statute.<sup>87</sup> In a case or a situation that was brought by referral of the UNSC pursuant to Article 13 of the Rome Statute,<sup>88</sup> the ICC may even ask the UNSC's assistance to encourage a Non-State Party to cooperate with the ICC pursuant to Article 87(5) of the Rome Statute.<sup>89</sup> This is theoretically effective since the UNSC is empowered to impose sanctions and measures towards non-complying states. Further, as governed under Article 103 of the UN Charter, obligations under the UN Charter shall

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com/2019/12/13/world/africa/sudan-bashir-trial-verdict.html (accessed on 02 October 2021).

84 Jason Burke and Zeinab Mohammed Salih, "Sudan signals it may send former dictator Omar al-Bashir to ICC", 11 February 2020, <https://www.theguardian.com/world/2020/feb/11/sudan-says-it-will-send-former-dictator-omar-al-bashir-to-icc> (accessed on 02 October 2021).

85 BBC News, "Omar Bashir: ICC delegation begins talks in Sudan over former leader", 17 October 2020, <https://www.bbc.com/news/world-africa-54548629>.amp (accessed on 03 October 2021).

86 Rome Statute, Article 17 (1) (a).

87 Dapo Akande, "The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC", *Journal of International Criminal Justice* 10 (2012): 304-307.

88 Rome Statute, Article 13.

89 Rome Statute, Article 87 (5)(a).

prevail if a conflicting obligation exists between the UN Charter and other international agreements.<sup>90</sup>

However, in practice, even a Resolution issued by the UNSC cannot compel or persuade a Non-State Party to cooperate with the ICC. For instance, although Sudan's and Libya's non-cooperation were reported a few times to the ASP and even to the UNSC,<sup>91</sup> no concrete action was given to ensure Sudan and Libya cooperation with the ICC. The absence of follow up and sanctions mechanism by the UNSC and in the ICC's regime is why the non-State Party and the State Party ignore and refuse the request of cooperation made by the ICC.

#### **IV. Possible Effort to Ensure State Cooperation to the ICC**

The ICC provides formal and informal mechanisms in its effort to ensure state cooperation. The formal mechanism, although supposed to be more persuasive, however only come in the form of (1) Report to the ASP as a judicial finding of non-cooperation, which is proven to be unsuccessful with the absence of follow up and action or sanction given to the recalcitrant state, and (2) Formal letter from the President of the ASP that will be sent to the Government of the defiant state,<sup>92</sup> which often is neglected when the Government intentionally tries to shield the person in question or simply did not want to cooperate with the ICC. A mere judicial finding of non-cooperation to the ASP will result in nothing—since it will only produce an annual report of the

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90 The Charter of the United Nations 1945, Article 103

91 Report of the Bureau on Non-Cooperation, ICC-ASP/13/40, Assembly of States Parties of the ICC Thirteenth Session, 5 December 2014; Report of the Bureau on Non-Cooperation, ICC-ASP/14/30, Assembly of States Parties of the ICC Fourteenth Session, 18 November 2015; Report of the Bureau on Non-Cooperation, ICC-ASP/15/31, Assembly of States Parties of the ICC Fifteenth Session, 8 November 2016; Report of the Bureau on Non-Cooperation, ICC-ASP/16/36, Assembly of States Parties of the ICC Sixteenth Session, 4 December 2017; Report of the Bureau on Non-Cooperation, ICC-ASP/17/31, Assembly of States Parties of the ICC Seventeenth Session, 28 November 2018; Report of the Bureau on Non-Cooperation, ICC-ASP/18/23, Assembly of States Parties of the ICC Eighteenth Session, 02 December 2019. Report of the Bureau on Non-Cooperation, ICC-ASP/19/23, Assembly of States Parties of the ICC Nineteenth Session, 10 December 2020.

92 University of Nottingham Human Rights Law Centre (HRLC), "Expert Workshop on Cooperation and the International Criminal Court: Report," HRLC, 18-19 September 2014.

ASP of the ICC.

After such referrals, there might be two responses conducted by the ASP. The formal response can include an Emergency Bureau meeting regarding the non-cooperation or, further, an open letter from the President of the ASP to the state concerned.<sup>93</sup> Further, it can also begin with informal responses that might include a diplomatic approach to that defiant state. The President of the ASP often approaches the diplomatic agents of the concerned state, such as its Foreign Minister and its representatives, to informally discuss the non-cooperation and encourage them to fully cooperate with the ICC.<sup>94</sup> However, as anticipated, even judicial findings of non-cooperation triggering a formal or informal response procedure have resulted in only a reasonably timid response from the ASP.<sup>95</sup> Practically speaking, the ASP did not take the non-compliance any further, as it ought to be political and non-judicial in nature. Therefore it cannot force the state to cooperate with the ICC.

The UNSC enforcement mechanism has not yet lived up to its expectation, considering the fact that approaches through diplomatic channels or referrals to the ASP are not binding. Hence, the UNSC is the last chance the ICC can seek to enforce state cooperation. Even though neither the Rome Statute nor the Agreement elaborates on the types of response that the UNSC may take. Nonetheless, as the UNSC's role at the ICC is in virtue of acting under Chapter VII of the UN Charter, as affirmed by both the Rome Statute and Agreement, therefore the responses that would be available would be those provided under Article 41 of the UN Charter.<sup>96</sup> To end, if the ICC or the UNSC successfully obtain cooperation from Non-State Party, the final measure that will be needed is to enact a national law by way of issuing a regulation, decree, or procedure that supports such arrest and surrender of the person who allegedly committed the most serious international crimes under the jurisdiction of the ICC.

## V. Conclusion and Recommendation

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93 *Ibid.*

94 Report of Bureau on Non-Cooperation, ICC-ASP/12/34), Assembly of States Parties of the ICC Twelfth Session, 7 November 2013.

95 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al Bashir's Arrest and Surrender to the Court, ICC-02/05-01/09-159, 5 September 2013, par. 14.

96 The United Nations Charter 1945, Article 41.

The ICC's function has been severely hampered due to the lack of cooperation from both the State Party and the Non-State Party. Non-cooperation of State Party to the Rome Statute constituted a serious violation of an international obligation, especially those enshrined in the VCLT and Rome Statute. Whereas for the Non-State Party, although in theory, it does not have any obligation to fully cooperate with the ICC, certain circumstances give rise to the existence of legal obligation for them to cooperate with the ICC to punish and prevent the most serious crimes concerning the international community. This legal obligation applied particularly when the UNSC issued a Resolution and requested that the Non-State Party cooperate with the ICC.

Regrettably, the basis mentioned above to impose a binding obligation for Non-State Party to cooperate with the ICC does not suffice to ensure Non-State Party cooperation to the ICC. Although the international community strives to manifest the above grounds in practice, the absence of follow up and sanction makes states feel less inclined to cooperate with the ICC. It applies only as legal theory rather than practice so far. To conclude, the basis mentioned above to oblige Non-State Party to cooperate with the ICC will become futile without any existence of enforcement measure by the ASP or the UNSC.

To date, the ICC has two formal mechanisms to ensure states' cooperation. The first mechanism is by making judicial findings that will be discussed in the ASP, and for the situation or case referred by the UNSC, the ICC may report or hand over that non-cooperation to the UNSC for its further action. Nonetheless, the responses given by the ASP and even the UNSC to the defiant state are vague and unpersuasive, as the way exemplifies it Chad, Djibouti, Jordan, Kenya and South Africa completely ignored their legal obligation to fully cooperate as State Party to the Rome Statute. This way, other State Party and Non-State Party of the Rome Statute would underrate the ICC's power and easily disregard any request of cooperation, considering that even their State Parties escaped from their legal obligation to cooperate without sanctions being imposed upon it. Finally, the mechanism for non-cooperation that the Court has designed is not adequate—or even tenuous, because the judicial findings and report to the UNSC are meaningless without any admonition and concrete measure to force them to comply.

In this particular situation, a few recommendations may be beneficial to support the ICC's effective functioning. First of all, it is necessary to modify the Rome Statute to include sanctions for a State Party who refused to cooperate so that the concerned states are aware that their breach will have consequences. Moreover, for the UNSC, the lack of follow up for the case referred to the ICC is also the main problem that caused states to quickly flee from their legal obligation to cooperate with the ICC. In order to encourage state cooperation, there should be concrete provisions setting up a standard of sanctions that the UNSC can impose within the Rome Statute.

There are a few forms of sanction that might be imposed upon the defiant state, for instance in the form of political sanction, such as suspension or expulsion from the UN. By incorporating this provision to the Rome Statute, the State Party or the Non-State Party that has been asked to cooperate by way of the UNSC will fear to ignore such requests of cooperation—because they understand that such non-compliance will result in political sanction by the UN. If that still does not work out to urge them to cooperate with the ICC, the UNSC may also give concrete action or sanction according to Chapter VII of the UN Charter.

The UNSC may only impose sanctions under Article 41 of the UN Charter if the UNSC decides that a threat or breach of peace or act of aggression exists pursuant to Article 39—a prerequisite for Article 41. The non-compliance of Sudan to arrest and surrender Omar Al-Bashir may be considered a threat to peace. According to the Black Law Dictionary, 'threat' is defined as "a communicated intent to inflict harm or loss of another or on another's property" or as "an indication of an approaching menace."<sup>97</sup> While 'peace' is referred to as "a state of public tranquillity; freedom from civil disturbance or hostility".<sup>98</sup> Therefore, a threat to peace can be defined as the intention to injure, damage or endanger the freedom from public disturbance or tranquillity. The terms of threat to peace can be interpreted into various situations, from military threat<sup>99</sup> to civil

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97 Bryan A. Garner, 2014, *Black's Law Dictionary 8th Edition*, (Baton Rouge: Claitors Publishers, 2014).

98 *Ibid*.

99 Robert Cryer, "The Security Council and Article 39: A Threat to Coherence?" *Journal of Conflict & Security Law* 1, no. 2 (1996): 161-195.

wars,<sup>100</sup> lack of democracy,<sup>101</sup> anti-terrorist interventions,<sup>102</sup> and serious human rights violations.<sup>103</sup> However, it is not limited to those events. In this sense, it depends on whether a delay of justice—through non-cooperation by states, can be regarded as a threat to peace. The absence of the definition of the threat of peace in Article 39 of the UN Charter indicates that the UNSC is empowered with the discretion to determine which situations fall under the said article.

Nevertheless, to avoid *legibus solutus*, there is a consensus that the scope of discretion is limited by Article 24 (2) of the UN Charter, which requires the UNSC to act according to the purposes and principles of the UN and the provisions within the UN Charter. Imposing sanctions for Sudan or Libya would not be the first time for the UNSC. In the case of *Lockerbie*, the UNSC was forced to pass sanctions against Libya for its lack of cooperation. It was held in that case that the failure of Libya to respond fully and to effectively cooperate constituted a threat to international peace and security.<sup>104</sup> Similar Resolutions were adopted when the UNSC obliged Sudan to extradite suspects who were allegedly involved in the assassination attempt to Ethiopia.<sup>105</sup> Even in the case of *Taylor*, the UNSC went far as to apply the use of force to execute warrants.<sup>106</sup> Such application of force was after the UNSC determined that force is needed to effectuate arrest and was considered a last resort. In which a resolution was passed and given to the authorities to apprehend and detain Taylor to be transferred to Sierra Leone for the prosecution before the Special Court.

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100 The United Nations Security Council Resolution 733, S/Res/733, 23 January 1992

101 The United Nations Security Council Resolution 841, S/Res/841, 16 June 1993.

102 The United Nations Security Council Resolution 748, S/Res/748, 31 March 1992.

103 The United Nations Security Council Resolution 688, S/Res/688, 5 April 1991

104 Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v. United Kingdom*), Application, 3 March 1992, ICJ Reports 1992.

105 The United Nations Security Council Resolution 1044, S/Res/1044, 9 January 1996 ; The United Nations Security Council Resolution 1054, S/Res/1054, 26 April 1996.

106 The United Nations Security Council Resolution 1638, S/Res/1638, 11 November 2005.

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## Crimes Without Convict: Examining the Merits of Command Responsibility Through the *Bemba* Case

*Brigita Gendis Kandisari*

In June of 2018, the ICC Appeals Chamber overturned the Trial Chamber's decision in the case against Jean-Pierre Bemba, a commander-in-chief of the military group which allegedly perpetrated international crimes in the Central African Republic. A key determination of the acquittal revolved around command responsibility as a mode of liability, which constitutes as a tool of the prosecution of international crimes used to hold military commanders accountable for the gross crimes of their subordinates. However, with Bemba's acquittal, many doubts arise as to command responsibility's true nature and whether such nature can really be useful in convicting military commanders. Two findings can be concluded out of this research: 1) command responsibility remains an essential tool in the prosecution of international crimes; and 2) through the Appeals Chamber's interpretation of the "necessary and reasonable measures," it can be inferred that there exists a long-standing dilemma within the concept of command responsibility that vacillates between inculcating the commander directly for the crimes of his subordinates or for the omission of his duty to prevent or punish.

**Keywords:** Bemba, Command Responsibility, International Criminal Court, Modes of Liability.

### I. Background

In June 2018, the ICC Appeals Chamber, overturned its' Trial decision in the *Bemba Case*,<sup>1</sup> where Jean-Pierre Bemba, the former Vice President of Democratic Republic of Congo and Commander-in-Chief of the ALC, who was previously sentenced for crimes committed in the CAR from 2002 to 2003.<sup>2</sup> Prior to the Appeals decision, the Trial decision on the *Bemba* case was regarded to have set a progressive jurisprudence on the matter of sexual crimes and modes of liability under international criminal law.<sup>3</sup> As such, the Appeals decision garnered many objections from legal practitioners and scholars alike.

The Trial decision was unprecedented since it was the first time a commander was convicted for a crime committed by his subordinates through command responsibility as a mode of liability, which is a concept of individual criminalization based on a commander's failure

to take measures in preventing or punishing the commission of crimes perpetrated by his subordinates. This concept is based on the acknowledgement that state actors must exercise extra duty of care in leading others on military endeavours, in which the failure to do so should warrant for criminalisation.

Despite seemingly founded at first glance, command responsibility is not without criticism. For one, there is the question of precisely what a commander should be responsible for: his dereliction of duty and/or the principal crime committed by his subordinates. Debates on the nature and validity of command responsibility are exacerbated by the differing case laws and academic opinion on the mode of liability.<sup>4</sup>

As a response to said crises, this article shall examine the merits of command responsibility as a mode of liability under the international criminal law as well as the Rome Statute in particular. Such examinations shall include the mode of liability's rationale and necessity. Further, this article shall examine the possible shortcomings of the mode of liability based on its application within the Appeals decision of the *Bemba* case. Said case is chosen as the source material due to its novelty and significant representation in the ICC's treatment of cases involving prominent state actors.

## **II. Modes of Liability and Individual Criminal Responsibility under the Rome Statute**

Before delving into command responsibility itself, it must first be understood the origin and function of modes of liability and the reason why it is only burdened onto individuals. At the inception of the ICTY, lawyers in the Secretariat of the UN were instructed to draw on relevant fundamental principles of customary international law and draft the ICTY Statute based on them.<sup>5</sup> Apparently, when it comes to attribution of penal responsibility, individual criminal responsibility is proven to be one of international criminal law's long-standing rules.<sup>6</sup>

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4 Linnea Kortfält, "Article 28", Lexitus, <https://cilrap-lexsitus.org/clicc/28/28>. (accessed June 12, 2019).

5 Security Council Resolution 808 (1993), United Nations Security Council, UN Doc. S/RES/808; Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), United Nations, UN Doc. S/25704.

6 Gideon Boas, *International Criminal Law Practitioner Library Volume 1: Forms of Responsibility in International Criminal Law* (Cambridge: Cambridge University Press, 2010), 315-16.

As a result, all international or hybrid courts or tribunals that are established subsequent to the ICTY contain the concept of individual responsibility in their statutes or constitutive legal instruments, particularly within the provisions on modes of liability utilised under their respective jurisdictions.<sup>7</sup> These laws recognise the purpose of modes of liability under international criminal law: to incorporate all of the means and methods by which an individual can participate in the commission of a crime under international criminal law in order for that person to be held responsible for said crime.<sup>8</sup>

Similarly, the Rome Statute also contains many of its predecessors' modes of liability in addition to other new and more specified modes of liability through which an individual can participate in the commission of crime.<sup>9</sup> These modes of liability are expounded under Article 25. Appropriately, the first paragraph of the Article states that ICC will only have jurisdiction over natural persons, as previous *ad hoc* tribunals often reiterate that international crimes can only be "committed by men not by abstract entities".<sup>10</sup> The next paragraph further underscores the principal of individual responsibility by spelling out the four crimes that are recognised and prosecutable by the ICC: genocide, crimes against humanity, war crimes, and crimes of aggression.

### III. Command Responsibility under the Rome Statute

Unlike other modes of liability, command responsibility—along with superior responsibility—falls under Article 28. The phrase "other grounds of criminal responsibility" in the first line of Article 28 refers to the other modes of liability listed under Article 25.<sup>11</sup> Said phrase renders command responsibility and superior responsibility as separate modes of liability aside from those under Article 25.<sup>12</sup> An important cause of this distinction is the fact that the modes under Article 25 are characterised by the perpetrators' active contribution

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7 *Ibid.*

8 Kirsten Bowman, "Article 25", Lexitus, <https://cilrap-lexsitus.org/clicc/25/25> (accessed June 12, 2019).

9 *Ibid.*

10 Kai Ambos, *Individual Criminal Responsibility* (Oxford: Hart Publishing, 2008), 477.

11 Kortfält, *Article 28*.

12 *Ibid.*

to the crimes, whereas under Article 28, the commanders or superiors are actually reprimanded for their lack of action in preventing or punishing the crimes of their subordinates.<sup>13</sup>

Command responsibility (Article 28(a)) and superior responsibility (Article 28(b)) are included under one article as both share a requirement for a superior-subordinate relationship, which is indicated by the commander's or superior's ability to hold effective "command and control" or "authority and control", which would give the commanders or superiors the ability to prevent and punish the crimes of their subordinates.<sup>14</sup>

Interestingly, this requirement is also the point where both modes of liability differ. Command responsibility deals with "military commander(s) or person(s) effectively acting as (a) military commander(s)", which may encompass members of armed forces with *de jure* positions to police officers who are responsible for military or paramilitary units.<sup>15</sup> As long as the officer has the power to issue orders that are compliable and enforceable, that person can be said to possess "effective command and control" or "effective authority and control", thus holding the position of a *de facto* commander.<sup>16</sup> On the other hand, superior responsibility is applicable to persons who are not military commanders or effectively acting as military commanders. The Rome Statute made a clear separation of requirements between commanders and superiors since there were controversies surrounding the applicability of the superior responsibility concept to civilians.<sup>17</sup>

Further, as has been briefly mentioned before, a significant question arising from the concept is regarding the commander's relation to the principal crime. Should the commander be convicted strictly on his dereliction of duty or for the principal crime as well? The answer to this inquiry will not merely affect the concept's theoretical

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13 *Prosecutor v. Jean-Pierre Bemba Gombo* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08, 2009, par. 405.

14 Linnea Kortfält, "Article 28(a) – Military commander", Lexitus, <https://cilrap-lexsitut.org/clicc/28-a/28-a-military-commander>. (accessed August 18, 2019).

15 WJ Fenrick, *Article 28: Responsibility of Commanders and Other Superiors* (Baden-Baden: Nomos Verlagsgesellschaft, 1999), 517.

16 *Ibid*, 518.

17 Greg R. Vetter, "Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)", *Yale Journal of International Law* 25, no. 1 (2000): 96.

basis but will also have practical consequences, such as sentencing considerations, evidentiary demands and the interpretations of the mode of responsibility's elements.<sup>18</sup> While the literal interpretation of Article 28 would lead to the conclusion that the commander should be responsible for the principal crime,<sup>19</sup> there is yet a generally accepted interpretation of what exactly triggered the commander's criminal responsibility. However, there are generally three schools of thought on this matter.

The first school of thought sees the commander as a participant in the commission of the principal crime, ultimately making him responsible for said principal crime through the theory of "commission of omission".<sup>20</sup> This interpretation is based on the understanding that where there is a duty prescribed by the law—in this case, the commander's duty to prevent or punish the commission of crime perpetrated by his subordinates—criminal responsibility falls onto the person who failed to fulfil such duty.<sup>21</sup>

The second interpretation is similar to the previously mentioned interpretation in the way that it sees the commander as a participant in the commission of the principal crime. However, where the first interpretation censures the commander through the theory of "commission by omission", the second interpretation virtually dismisses such theory and straightforwardly recognises the commander as an accessory to the principal crimes committed by his subordinates,<sup>22</sup> ultimately making command responsibility a "mode of participation" aside being a mere mode of liability.<sup>23</sup>

The third and most widely accepted interpretation of command responsibility is that the commander's criminal responsibility is confined only to his failure to act in regards to the principal crime.<sup>24</sup> Unlike the previous interpretations, the commander is not seen as a participant of the principal crime. Consequently, this interpretation measures the commander's culpability by evaluating the commander's graveness of responsibility and the severity of the principal crime

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18 Kortfält, *Article 28(a) – Military commander*.

19 *Ibid.*

20 *Ibid.*

21 *Ibid.*

22 *Ibid.*

23 *Ibid.*; *Prosecutor v. Naser Orić*, The Prosecution's Appeal Brief, IT-03-68-A, (2006) para. 162.

24 Kortfält, *Article 28(a) – Military commander*

itself.<sup>25</sup> This interpretation views command responsibility as a distinct and incomparable mode of liability within national or international criminal law.<sup>26</sup> It should be noted that, particularly relevant to this article, the Trial decision also adopted this interpretation.<sup>27</sup>

#### **IV. Rationale and Urgency of Command Responsibility under the Rome Statute**

For the sake of clarity and in order to obtain a holistic understanding of the rationale and necessity of command responsibility, the discussion under this section shall be divided into five parts: I) purpose of modes of liability; II) development of command responsibility; III) types of command responsibility; IV) legal basis of command responsibility; and lastly V) purpose of command responsibility.

##### **1. Purpose of Modes of Liability**

*Firstly*, we should note that international criminal law recognises the moral agency of every person,<sup>28</sup> meaning that international criminal law adopts a brand of moral responsibility that believes every person is responsible for his own intentional acts.<sup>29</sup> This reasoning on moral motivation leads to the culpability principle which measures a person's criminal responsibility through the proportion of his participation in the crime.<sup>30</sup>

However, not less important is the fact that a vast majority of international criminal conducts are committed in a collective manner,<sup>31</sup> meaning that these crimes are committed by multiple actors with differing roles.<sup>32</sup> The collaboration between these actors results

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25 *Ibid.*

26 Chantal Meloni, *The Evolution of Command Responsibility in International Criminal Law* (Brussels: Torkel Opsahl Academic EPublisher, 2015), 714.

27 Bemba Trial, paras. 171, 173-174.

28 Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge: Cambridge University Press, 2000), 3-4.

29 John Gardner, "Complicity and Causality," *Criminal Law and Philosophy* 1, no. 2 (2007), 132.

30 Miles Jackson, "International Criminal Courts and Tribunals: the Attribution of Responsibility and Modes of Liability in International Criminal Law", *Leiden Journal of International Law* 29, no. 3 (2016), 893.

31 Mark Osiel, *Making Sense of Mass Atrocity* (Cambridge: Cambridge University Press, 2009); Mark A. Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press, 2007).

32 Jackson, *International Criminal Courts and Tribunals: the Attribution of*

in a chronological order of perpetration of crime: orders are issued, plans are designed, victims are determined, and finally, the crimes are performed.<sup>33</sup>

Through such “macro-criminal” dimensionality of international crimes then,<sup>34</sup> it can be understood that international criminal law is paradoxical in the sense that it is an individual-oriented legal system dealing with collective—if not state—misconducts.<sup>35</sup> As such, attributing the precise criminal responsibility to each participant in a group of perpetrators often proves to be difficult, as each participant’s extent of execution of the *actus reus* (guilty act)<sup>36</sup> and possession of the *mens rea* (guilty mind)<sup>37</sup> differ from each other.

This is where the modes of liability system come into play. All modes of liability recognise the collective nature of the perpetration of international crimes while also accommodating considerations arising out of the culpability principle.<sup>38</sup> This results in a differentiated system of criminal responsibility, one that adopts varied culpability between each actor of crime based on their respective attribution of responsibility.<sup>39</sup> Finally, in the practical sense, the mode of liability system may manifest in the dissimilar convictions between each actor of crime.

Thus, command responsibility in particular is one of the modes

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*Responsibility and Modes of Liability in International Criminal Law*, 891.

33 Miles Jackson, *Complicity in International Law* (Oxford: Oxford University Press, 2015), 17.

34 Meloni, “The Evolution of Command Responsibility in International Criminal Law”, 683.

35 Beatrice Bonafé, “Command Responsibility Between Personal Culpability and Objective Liability: Finding a Proper Role for Command Responsibility,” *Journal of International Criminal Justice* 5, no. 3 (2007), 600.

36 HC Black, “Actus Reus,” Black’s Law Dictionary, [http://blacks\\_law.enacademic.com/641/actus\\_reus](http://blacks_law.enacademic.com/641/actus_reus), (accessed September 1, 2019).

37 HC Black, “Mens Rea,” Black’s Law Dictionary, [http://blacks\\_law.enacademic.com/641/mens\\_rea](http://blacks_law.enacademic.com/641/mens_rea), (accessed September 1, 2019).

38 Allison Marsten Danner and Jenny S. Martinez, “Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law,” *California Law Review* 93, no. 1 (2005); Jens David Ohlin, “Joint Intentions to Commit International Crimes,” *Chicago Journal of International Law* 11, no. 2 (2011); Neha Jain, *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for International Crimes* (Oxford: Hart Publishing, 2014).

39 Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press, 2012), 70-72.

of liability applied to commanders; in inculcating commanders, it considers their authority, capacities and duties in conflicts and measures their contribution through the fatality of the performance—or rather, the non-performance of—such duties in the perpetration of international crimes.

## 2. Development of Command Responsibility

In determining the rationale and necessity of command responsibility, it could be helpful to look into the origins and history of the doctrine itself in order to identify the changes made within the concept, such as how departures from its former conceptions are intended to serve particular needs of contemporary international criminal law and shape command responsibility in the context of our *status quo*. Moreover, by tracking its development, we can determine the capacity of command responsibility as a rule of customary international law, which if proven, can render the mode of liability to be binding to most—if not all—States,<sup>40</sup> since in the words of the ICJ, customary international law constitutes “international custom, as evidence of a general practice accepted as law”.<sup>41</sup>

Despite often being deemed as a relatively novel concept of international criminal law, there has been numerous evidence that showcases the existence of earlier forms of command responsibility in ancient history. For example, Hugo Grotius stated that “a community or its rulers may be held responsible for the crime of a subject if they knew it and do not prevent it when they could and should prevent it” and that “he who knows of a crime, and is able and bound to prevent it but fails to do so, himself commits a crime”.<sup>42</sup> Sun Tzu, in what is considered as the first military manual, wrote “when troops flee, are insubordinate, distressed, collapse in disorder or are routed, it is the fault of the general”.<sup>43</sup> Similarly, Charles VII d’Orléans made it imperative for his commanders to hold accountable the subordinates that violate laws, otherwise he “shall be deemed responsible for the offence as if he had committed it himself and be punished in the same

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40 Hugh Thirlway, *The Sources of International Law* (Oxford: Oxford University Press, 2010), 106.

41 Statute of the International Court of Justice (1946), Art. 38.

42 Hugo Grotius, *De Jure Belli Ac Pacis, Libri Tres. The Translation, Books I, II, and III* (Indianapolis: Bobbs-Merrill, 1925), 523.

43 Sun Tzu, *The Art of War* (Oxford: Clarendon Press, 1963), 125.

way as the offender would have been”.<sup>44</sup> All of these anecdotes imply that the notion that commanders are both responsible and can be culpable for the offences perpetrated by their subordinates have been well-established in world history.

Eventually, along with the development of international law, the explicit inclusion of command responsibility in international instruments became more apparent as warfare evolved. Some of the first codifications of command responsibility are included in the Hague Convention. For instance, Article 1 of the Annex of the Hague Convention No. IV 1907 required lawful belligerents to be “commanded by a person responsible for his subordinates”. Further, Article 43 of the same Annex also required commanders to “take all measures in his power to restore and ensure, as far as possible, public order and safety”. Although these articles are less about imposing personal liability and more about describing the authorities of the commanders, due to the fact that the Hague Convention is recognised as part of customary international law, these articles were to some extent enforceable so as to give substantive application to the concept of command responsibility.<sup>45</sup>

Afterwards, command responsibility was immortalized through a clear and express codification in the Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (‘Additional Protocol’), particularly under Article 86. Since this codification, States are bound to treaty obligations that require them to perform their due diligence pertaining to the mode of liability. This would explain the handful of landmark international case laws that contribute to the development of command responsibility under the Rome Statute as is known now.<sup>46</sup>

The first-ever judicial decision that pertains to command responsibility within the realm of international criminal law was the *Yamashita Case*,<sup>47</sup> which despite its invaluable contribution to the

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44 William H. Parks, “Command Responsibility for War Crimes”, *Military Law Review* 62, no. 1 (1973), 5.

45 Weston Burnett, “Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra”, *Military Law Review* 107, no. 1 (1985), 80.

46 Chantal Meloni, *Command Responsibility in International Criminal Law* (The Hague: Asser Press, 2010), 52.

47 Leslie C. Green, “Command Responsibility in International Humanitarian Law”, *Transnational Law and Contemporary Problems* 5, no. 2 (1995), 320-321.

mode of liability, was unfortunately widely regarded as producing an open-ended and obscure interpretation of command responsibility, particularly on its mental as well as command and control requirements.<sup>48</sup> Such controversy was because the Commission that adjudged over the case decided that “[the] crimes were so extensive and widespread both as to time and area they must either have been wilfully permitted by the accused or secretly ordered by the accused”,<sup>49</sup> despite being widely argued that Yamashita did not have actual command over the perpetrators and most likely did not have the means to have known of the perpetrators’ crimes.<sup>50</sup> Consequently, the *Yamashita* case left an impression that command responsibility is based on the strict liability theory,<sup>51</sup> which believes that a person can be culpable of a crime without any intention or other mental element.<sup>52</sup> This contradicts the general principle of law that requires a person to have a mental element or a “guilty mind” for him to be proven guilty of a crime.<sup>53</sup>

The confusion surrounding the nature of command responsibility post the Yamashita case eventually resulted in the clarification, delineation and application of command responsibility by the Nuremberg and Tokyo tribunals into various different forms.<sup>54</sup> The Nuremberg tribunals, in particular, contains a notable discovery of two modes of liability that can be subjected to a commander or a superior: direct and indirect command responsibility, which introduces a definite framework on the specific criminal acts (*actus reus*) and the mental element (*mens rea*) that are required for a commander or a superior to be held accountable for a crime.

Finally, there were the *ad hoc* tribunals of ICTY and ICTR,

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48 Curt Hessler, “Command Responsibility for War Crimes”, *Yale Law Journal* 82, no. 1 (1973), 1283.

49 Andrew Hood, *The Doctrine of Command Responsibility and the International Criminal Court* (Quebec: McGill University, 2001), 49.

50 Christopher N. Crowe, “Command Responsibility in the Former Yugoslavia: The Chances of Successful Prosecution”, *University of Richmond Law Review* 29, no. 1 (1995), 200-203.

51 *Ibid.*

52 William Schabas, “Mens Rea and the International Criminal Tribunal for the Former Yugoslavia,” *New England Law Review* 37, no. 4 (2002), 1015.

53 *Ibid.*

54 Hood, *The Doctrine of Command Responsibility and the International Criminal Court*, 49.

which are considered as being the precursors in applying the contemporary concept of command responsibility to modern warfare.<sup>55</sup> In fact, the *Blaškić* case and the *Čelebići* case are said to have greatly influenced the inclusion of Article 28 of the Rome Statute.<sup>56</sup> However, while the judicial decisions of ICTY and ICTR should be considered as landmarks in the development of the concept of command responsibility, their respective statutes—along with the Hague Convention and Additional Protocol I—do not give rise to unprecedented laws but rather codify and apply those that are already existing within customary international law.<sup>57</sup> In fact, it would be reasonable to infer that the notion of command responsibility as a customary international law rule would explain its incorporation under various treaties, international instruments, or even UN practice.<sup>58</sup>

It should be noted that command responsibility's capacity as a rule under customary international law can be deduced by examining the two elements of customary international law: 1) the existence of state practice as a general practice; 2) *opinio juris*.<sup>59</sup> In this context, state practice refers to the constant and regular practice of a particular issue by States,<sup>60</sup> while *opinio juris* refers to the belief that certain state practice has binding power and therefore should be regarded as law.<sup>61</sup> In determining the sufficiency of state practice to establish a certain rule as customary international law, the context of the relevant field of international law should be taken into account.<sup>62</sup>

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55 Ilias Bantekas, "The Contemporary Law of Superior Responsibility," *The American Journal of International Law* 93, no. 3 (1999), 575.

56 *Ibid.*

57 L. D. Johnson, *The International Criminal Tribunal for Rwanda* (New York: Transnational Publishers, 1999), 553; Burnett, *Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra*, 80; Legality of the Threat or Use of Nuclear Weapons (1996), International Court of Justice, *Advisory Opinion of 8 July 1996*, paras. 79, 82.

58 Carolin Alvermann, Angela Controneo, Antoine Grand and Baptiste Rolle, *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005), 559.

59 Thirlway, "The Sources of International Law," 102-104.

60 *Ibid.*

61 *Ibid.*

62 Bader Mohamed Alsharidi, "The Consistency of Implementing Command Responsibility in International Criminal Law," *Eyes on the ICC* 12, no. 1 (2016), 84.

In regards to international criminal law, customary international law rules are formed through judicial decisions of international tribunals instead of common state practice.<sup>63</sup> The role of judicial decisions is incredibly significant under international criminal law because it has many functions: declare the existence of a certain rule, identify the applicable law,<sup>64</sup> as well as establish “the most appropriate interpretation” for an unclear rule.<sup>65</sup> In fact, some have claimed that judicial decisions should not be considered as a mere subsidiary source to international criminal law.<sup>66</sup> Hence, within international criminal law, it would be fair to depend on judicial decisions to provide evidence of a customary international law rule.<sup>67</sup>

Therefore, as has been explicated above, command responsibility can be said to be a valid rule under customary international law, as it has been corroborated through numerous judicial decisions of international tribunals—such as but not limited to, the *Yamashita* case, the Nuremberg tribunals, the Tokyo tribunals, ICTY and ICTR—as well as included under international conventions like the Hague Convention and Additional Protocol I.

Finally, the codification of command responsibility under the Rome Statute is completely justifiable—if not essential—as the enforcement of command responsibility through ICC should serve as the substantive application to the mode of liability and the developments of command responsibility produced from the ICC’s interpretation of the concept shall greatly contribute to its clarification.

### 3. Types of Command Responsibility

As has been discussed briefly in the section above, the Nuremberg trials recognise two types of command responsibility: direct and

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63 Florian Jessberger and Gerhard Werle, *Principles of International Criminal Law* (The Hague: T. M. C. Asser Press, 2009), 58-59.

64 Noora Arajärvi, *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals* (New York: Routledge, 2014), 100.

65 Antonio Cassese and Paola Gaeta, *Cassese’s International Criminal Law* (Oxford: Oxford University Press, 2013), 18.

66 Kenneth S. Gallant, “International Criminal Courts and the Making of Public International Law: New Roles for International Organizations and Individuals”, *John Marshall Law Review* 43, no. 3 (2010), 603.

67 Alsharidi, *The Consistency of Implementing Command Responsibility in International Criminal Law*, 77-78.

indirect. Such types have also existed under various other jurisdictions of international criminal law throughout history.<sup>68</sup> This section will analyse the emergence and divergence of the two types of command responsibility as well as the transformation of one of those types into the concept of command responsibility under the Rome Statute as is known now. Finally, from such deliberations, the rationale and necessity of command responsibility under the Rome Statute can be concluded.

There has been a rich history on the application of the command responsibility concept, both nationally and internationally, prior to the conclusion of the Rome Statute. Such examples, however, indicate that out of the two types of command responsibility, earlier versions of its application exhibit the characteristics of direct command responsibility—which is based on the notion that persons of authority who issue orders that trigger the perpetration of crimes—despite personally not committing such crimes himself should be held accountable for such crimes.<sup>69</sup>

However, as international criminal law started to develop, international law practitioners identified a new exigency in their struggle of prosecuting war crimes: due to limited investigative resources, identifying large groups of individual perpetrators proved to be impractical, much less to prosecute each one of them.<sup>70</sup> Indirect command responsibility was born in response to this concern. This mode of liability was mainly utilised in cases where the unidentified perpetrators are a part of organised armed groups, to which the commanders of said organised armed groups are held accountable for the crimes of their subordinates.<sup>71</sup>

Under contemporary international criminal law, the divergence of command responsibility into two types was firstly displayed in the Nuremberg trials. In its precedent pertaining to command

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68 Burnett, *Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra*, 89-90; the Israeli Commission of Inquiry into Events at the Refugee Camps in Beirut, “Final Report”, *International Legal Materials* 22, no. 473 (1983), 25-26.

69 Hood, *The Doctrine of Command Responsibility and the International Criminal Court*, 38-39.

70 Bakone Justice Moloto, “Command Responsibility in International Criminal Tribunals,” *Berkeley Journal of International Law* 3, no. 1 (2009), 12.

71 *Prosecutor v. Tihomir Blaškić*, Judgement, IT-95-14-A, 2004 par. 217; *Prosecutor v. Alex Tamba Brima et al.*, Judgement, SCSL-04-16-T, 2007, par. 790.

responsibility, the Nuremberg trials established two types of modes of liability that can be imposed upon superiors or commanders: direct command responsibility and indirect command responsibility. Direct command responsibility was utilised to inculcate senior military commanders and administrators who issued orders that resulted in the perpetration of crimes by their subordinates. However, there was still a niche to bring accountability to Nazi political leaders who participated in the atrocities in a more covert manner. On this front, the tribunal applied indirect command responsibility on the basis that despite the lack of issuance of order, those superiors and commanders had knowingly allowed the perpetration of crimes by their subordinates.<sup>72</sup>

After much development within international criminal law history, the two types of command responsibility take the form of different modes of liability under the Rome Statute. Although possessing a number of differences, parallels can be drawn between direct command responsibility and “ordering” under Article 25(b) the Rome Statute since both require a superior-subordinate relationship that would allow a person of authority to “convince (or coerce)” his subordinates to commit crimes.<sup>73</sup> On the other hand, the essence of indirect command responsibility is captured within the scope of Article 28, which includes command responsibility as is recognised under the jurisdiction of ICC.<sup>74</sup>

Thus, the rationale that acted as the basis of indirect command responsibility—which was to bring accountability to commanders who possessed authority over the perpetrators of crime, despite not ordering the performance of such crimes himself—also becomes the rationale of command responsibility under the Rome Statute.

#### 4. Legal Basis of Command Responsibility

Aside from being a rule under customary international law, command responsibility is principally based on a particular duty imposed on commanders. Such duty is derived from various

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72 Green, *Command Responsibility in International Humanitarian Law*, 330.

73 *Prosecutor v. Jean-Paul Akayesu*, Judgement, ICTR-96-4-T, 1998 par. 483; *Prosecutor v. Radislav Krstić*, Judgement, IT-98-33/T, 2001, par. 601; *Prosecutor v. Milomir Stakić*, Judgement, IT-97-24-T, 2003, par. 445.

74 *Prosecutor v. Zlatko Aleksovski*, Judgement, IT-95-14/1-T, 1999, par. 67. (‘Aleksovski’).

instruments under international law, such as the Hague Convention No. IV 1907 and the Third Geneva Convention 1949.<sup>75</sup> It is then further elaborated under Article 87 *juncto* Article 43(1) Additional Protocol I, along with other positive conducts stipulated under the Additional Protocol.<sup>76</sup> Under this rule, the presupposition of a commander's duty renders him as a "supervising guarantor" (*garantenstellung und-pflicht*),<sup>77</sup> meaning that he is obliged to observe and control his subordinates who constitute a potential source of danger or risk.<sup>78</sup> Consequently, commanders must prevent, and suppress and report violations of the Geneva Conventions and Additional Protocol I in the case where such violations are committed under their command and control.<sup>79</sup>

The commander's crucial duty is not unfounded, as under military schemes and structures, military commanders hold great power and influence over their subordinates, creating a hierarchy that renders their subordinates to heed their orders and instructions.<sup>80</sup> In fact, the obedience of subordinates is so socially enforced that it extends beyond those of their professional obligations and into all aspects of daily life.<sup>81</sup> By virtue of this institutionalised obedience, commanders can subject training and disciplinary procedures (or any other types of orders and instructions) and expect to see them implemented.<sup>82</sup>

75 The Hague Convention of 1907, Art. 1; The Third Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, Art. 4(A)(2).

76 Kai Ambos, *Command Responsibility and Organisationsherrschaft: Ways of Attributing International Crimes to the 'Most Responsible'*, ed. André Nollkaemper and Harmen van der Wilt (Cambridge: Cambridge University Press, 2009), 133; Jean de Preux, *Commentary on Articles 86 and 87 of Protocol Additional I*, ed. Yves Sandoz, Christopher Swinarski and Bruno Zimmerman (Geneva: Martinus Nijhoff Publishers, 1986), par. 3536.

77 Ambos, "Command Responsibility and Organisationsherrschaft: Ways of Attributing International Crimes to the 'Most Responsible,'" 132.

78 *Ibid.*; Héctor Olásolo, *Unlawful Attacks in Combat Situations* (Leiden: Martinus Nijhoff Publishers, 2008), 193.

79 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Art. 87(1).

80 Kate Neilson, "Ending Impunity: Bringing Superiors of Private Military and Security Company Personnel to Justice," *New Zealand Yearbook of International Law* 9, no.4 (2011), 126.

81 *Ibid.*

82 Lou Ann Bohn, "Proceeding with Caution: An Argument to Exempt Non-Governmental Civilians from Prosecution on the Basis of Command Responsibility," *Eyes on the ICC I*, no. 1 (2004), 8.

Through this context then, it is justifiable to assume that a commander's command and control shall be sufficient to prevent and punish the commission of international crimes by his subordinates.<sup>83</sup>

Furthermore, owing to the command and control of the commander, the mental element of command responsibility under the Rome Statute—which requires the commander's actual or constructed knowledge of the crime—is fully logical. This is because common military schemes and structures prescribe clear lines of communication that require subordinates to submit regular reports to their commanders.<sup>84</sup> It then could be presumed that under regular circumstances, among other officers within a military scheme, commanders hold the utmost leverage in receiving or accessing information regarding the subordinates under his command and control, including those pertaining to the perpetration of international crimes. The existence of command responsibility as a mode of liability can then pressure commanders to intently supervise the activities of their subordinates and based on the information he obtained and collected, take the measures necessary to prevent or repress violations.<sup>85</sup>

It can then be concluded that the commander's responsibility as a supervising guarantor is one of “intensified legal obligation”, which is commonly subjected to people who engage in inherently dangerous activities.<sup>86</sup> This is due to the fact that the commander holds command and control over belligerents who have extensive access to gross violence (such as training and weaponry), rendering such persons as threats to public safety.<sup>87</sup> Command responsibility recognises the importance of this particular duty of the commander; due to the commander's command and control over persons who constitute as threats to public safety, the non-performance of his duty as a supervising guarantor should constitute as a sufficiently blameworthy ground of culpability.<sup>88</sup>

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83 Neilson, *Ending Impunity: Bringing Superiors of Private Military and Security Company Personnel to Justice*.

84 *Ibid*.

85 Cassese, *et al.*, Cassese's International Criminal Law, 200-211.

86 Darryl Robinson, “How Command Responsibility Got So Complicated: A Culpability Contradiction, its Obfuscation, and a Simple Solution,” *Melbourne Journal of International Law* 13, no. 1 (2012), 11.

87 *Ibid*.

88 *Ibid*, 12; Ambos, “Command Responsibility and Organisationsherrschaft: Ways of

## 5. Purpose of Command Responsibility

After a lengthy discussion on the diverse aspects of command responsibility, it is worth maintaining that aside from its legal basis or its customary international law nature, command responsibility has been intended to hold specific roles within the scheme of international criminal law enforcement. The general purposes of command responsibility in international criminal law can be classified into two types: specific and broad.

The specific purpose of command responsibility—which is often also considered as its primary intention—is, in fact, to emphasise the commander's accountability for the crimes committed by his subordinates on the basis of the dereliction of his ever-crucial duty as a supervising guarantor.<sup>89</sup> As has been expanded before, command responsibility links the moral accountability of the commander's failure to prevent harm with that of the subordinates' active causation of harm.<sup>90</sup> This purpose can be practically reflected through the decisions issued by international criminal tribunals, as the sentence meted out against the commander will be proportional to the gravity and nature of the crime committed by the subordinates.<sup>91</sup>

Meanwhile, command responsibility's broad purpose is indeed much more overarching. According to this view, command responsibility is deemed to be one of the most effective means in encouraging overall compliance of international humanitarian law,<sup>92</sup> as the commander holds sufficient power and authority that renders him the most capable of ensuring the safety of civilians and other non-belligerent from crimes committed by his subordinates.<sup>93</sup> Under command responsibility, commanders are obliged to utilise everything within their power and authority in making certain of their subordinates' compliance with international humanitarian law. It is

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Attributing International Crimes to the 'Most Responsible,' 132.

89 Yoram Dinstein, "Command Responsibility" in *Max Planck Encyclopedias of Public International Law*, ed. Anne Peters and Rüdiger (Oxford: Oxford University Press, 2015).

90 Kai Ambos, "General Principles of Criminal Law in the Rome Statute," *Criminal Law Forum* 10, no. 1 (1999), 19.

91 Jamie Allan Williamson, "Some Considerations on Command Responsibility and Criminal Liability," *International Review of the Red Cross* 90, no. 870 (2008), 303.

92 Moloto, 13.

93 *Prosecutor v. Sefer Halilović*, Judgement, IT-01-48-T, 2005, par. 39.

sensible to rationalise that due to the commanders' command and control over belligerents, any measures that he mandated under the context of his duty as a supervising guarantor would be enough to ensure overall compliance of international humanitarian law in situations of conflict. This relation between the commander's negligence or wilful ignorance of their duty and violations of international humanitarian law is notably expressed in the *Martić* case, which held that "more so than those just carrying out orders", persons of significant position or military authority have more inclination to "undermine international public order."<sup>94</sup>

In short, the two purposes of command responsibility are to put an emphasis on the commander's duty as a supervising guarantor (specific purpose) and to promote overall compliance to international humanitarian law (broad purpose).

## V. Shortcomings of Command Responsibility Through *Bemba* Case

Finally, the discussion arrives at scrutinising the deficiencies of command responsibility through the Bemba Appeals decision. As has been previously mentioned, prior to its Appeals decision, the Trial Chamber in the *Bemba* case constitutes as the ICC's first successful conviction of a high-ranking military leader through command responsibility as a mode of liability. The conviction played a substantial role in the clarification of the concept of command responsibility, such as in its nature and requirements as well as its capacity as a rule of customary international law.<sup>95</sup>

The *Bemba* case's Trial decision was significant not just within ICC's jurisprudence but also to the whole international criminal law realm, as many had put hope on the ICC to establish consistency to the interpretation of command responsibility. This is because while in the past the *ad hoc* and special international criminal tribunals depended on the principle of interpretation to clarify the nature and requirements of command responsibility (which resulted in the

<sup>94</sup> *Prosecutor v. Milan Martić*, Decision, IT-95-11-R61, 1996, par. 21.

<sup>95</sup> "Statement attributable to the Spokesperson of the Secretary-General on judgement of the International Criminal Court regarding Jean-Pierre Bemba", United Nations, <https://www.un.org/sg/en/content/sg/statement/2016-03-22/statement-attributable-spokespersonsecretary-general-judgement>, (accessed November 24, 2019).

varied interpretations of the mode of liability),<sup>96</sup> the ICC is instead required to apply the Rome Statute “in the first place”,<sup>97</sup> compelling it to implement somewhat consistent interpretations of legal concepts within its decisions. Aptly enough, the Rome Statute is deemed to contain the most comprehensive codified understanding regarding command responsibility.<sup>98</sup> Under Article 28, command responsibility is also said to display conformities to its customary form.<sup>99</sup>

It is understandable then, that lawyers, scholars, and international law observers alike show general disapproval of the Appeals Chamber’s acquittal of the *Bemba* case’s conviction. The verdict has been said to show erroneous interpretations of command responsibility, principally on the issue of the “necessary and reasonable measures” that had to be taken by a commander to prevent or repress the crimes committed by his subordinates before he can be free of the said crime.

As a straightforward response to such allegations as well as to build a well-rounded analysis, it should be helpful to revisit the *ad hoc* and special international criminal tribunals’ past interpretations of necessary and reasonable measures. Due to it being virtually unprecedented in domestic law and practice, command responsibility is founded on the jurisprudence of international criminal courts. Thus, in answering questions regarding its purpose, scope, and elements, it is imperative to examine the mode of liability through its development. Through revisiting past international criminal courts’ interpretations of necessary and reasonable measures, the intent and threshold of the requirement can be inferred.

Generally speaking, past international criminal court jurisprudence held that the measures which are “necessary” are those which are “appropriate for the [commander] to discharge his obligation” to

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96 Bowman, *Article 25*.

97 Rome Statute of the International Criminal Court, Art. 21(2)(A).

98 Robert Cryer, Darry Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2014), 395; Douglas Guilfoyle, *International Criminal Law* (Oxford: Oxford University Press, 2016), 332; Alejandro Kiss, “Command Responsibility under Article 28 of the Rome Statute” in *The Law and Practice of the International Criminal Court*, ed. Carsten Stahn (Oxford: Oxford University Press, 2015), 609-610; William Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2012), 233.

99 Alsharidi, *The Consistency of Implementing Command Responsibility in International Criminal Law*, 94.

prevent or punish his subordinates' crimes,<sup>100</sup> yet also demonstrate that the commander is genuine in his efforts to prevent or punish his guilty subordinates.<sup>101</sup> On the other hand, "reasonable" measures are those "reasonably falling within the material powers of the [commander]"<sup>102</sup> or measures that he was in a position to perform given the situation at hand.<sup>103</sup> This means that extra care must be taken by the international criminal courts within their assessment to ensure that the commander is only required to carry out measures that are feasible, realistic, and practical given the relevant conditions faced by the commander.<sup>104</sup>

It is important to highlight the commander's material powers which are intended to prevent command responsibility under the Rome Statute from constituting as a form of strict liability, as the provision recognised that commanders cannot be obliged to perform the impossible.<sup>105</sup> Assessment on the sufficiency of such measures are dependent on the commander's *de jure* (legal competence) and *de facto* ("actual" possibility) position of command and control over his subordinates.<sup>106</sup> Still, it is difficult to formulate the preciseness of which measures should constitute as necessary and reasonable, as there are still numerous other circumstances to be considered. The material possibility of a commander should not be considered abstractly but instead approached on a case-by-case basis by calculating the given circumstances in the particular case.<sup>107</sup>

Despite the complexity, the *ad hoc* and special international criminal tribunals remained adamant in prosecuting blameworthy commanders. In fact, within some cases, the international criminal

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100 *Prosecutor v. Radovan Karadžić*, Public Redacted Version of Judgement Issued on 24 March 2016, 2016, IT -95-5/18-T, par. 588, ('Karadžić').

101 *Prosecutor v. Sefer Halilović*, Judgement, IT-01-48-A, 2007, par. 63, ('Halilović Appeals').

102 Karadžić, par. 588.

103 *Prosecutor v. Ignace Bagilishema*, Judgement, ICTR-95-1AT, 2001, par. 47, ('Bagilishema').

104 *Prosecutor v. Vujadin Popović et al.*, Judgement, IT-05-88-A, 2015, par. 1928, ('Popović').

105 *Prosecutor v. Tihomir Blaškić*, Judgement, IT-95-14-T, 2000, par. 335; *Prosecutor v. Zejnil Delalić Zdravko Mucić et al.*, Judgement, IT-96-21, 1998, par. 395.

106 Linnea Kortfält, "Article 28(a)(ii) – All necessary and reasonable measures within his or her power", Lexitus, <https://www.casematrixnetwork.org/cmn-knowledge-hub/icccommentary-elicc/commentary-rome-statute/commentary-rome-statute-part-3/>, (accessed October 15, 2019).

107 Aleksovski, par. 81.

courts' scrutiny on the commander's integrity to his duty went as far as investigating the effectiveness of each measure taken by the commander in preventing or punishing crimes. For instance, a commander should not be said to have performed necessary and reasonable measures if he initiated criminal proceedings with authoritative bodies he knew are incompetent because the report produced "would not be sufficient to fulfil the obligation to punish offending subordinates."<sup>108</sup>

Before diving into the *Bemba* Case Appeals decision, it must be understood that there have always been fundamental contentions surrounding command responsibility,<sup>109</sup> some of which come down to the matter of striking a balance between affirming the commander's precarious duty as a supervising guarantor while also adhering to the axiom that command responsibility is not a form of strict liability. This concern is further heightened since in many cases the conditions relevant to the commander's ability in taking necessary and reasonable measures are often more complex than those of other conflicts. Such complexities can be partly attributed to the nature of the conflicts that the ICC deals with, such as the magnitude and gravity of the crimes as well as the possible trans-national nature of the conflict.<sup>110</sup>

Indeed, such complexities are also present in the *Bemba* case. To start off, Bemba was the former Vice President of the DRC, who is also the founder of a political party called MLC as well as the Commander-in-Chief of its military branch ALC.<sup>111</sup> Complexities arose, however, when in 2002 to 2003 ALC operated in the CAR on the behest of CAR's then-President Ange-Félix Patassé to stamp out the attempted coup led by General François Bozizé against Patassé's

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<sup>108</sup> Popović, par. 1929.

<sup>109</sup> Mirjan Damaška, "The Shadow Side of Command Responsibility," *The American Journal of Comparative Law* 49, no. 3 (2001); Arthur Thomas O'Reilly, "Command Responsibility: A Call to Realign Doctrine with Principles," *American University International Law Review* 20, no. 1 (2004); James Stewart, "The End of 'Modes of Liability' for International Crimes," *Leiden Journal of International Law* 25, no. 1 (2012).

<sup>110</sup> Christopher L. Blakesley, "Jurisdiction Ratione Personae or the personal reach of the court's jurisdiction" in *The Legal Regime of the International Criminal Court*, ed. Jose Doria, Hans-Peter Gasser and M. Cherif Bassiouni (Leiden: Martinus Nijhoff Publishers, 2009); Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge: Cambridge University Press, 2003).

<sup>111</sup> Bemba Trial, par. 1.

government.<sup>112</sup> Throughout this period, ALC militias allegedly committed international offences such as pillaging, rape, and murder in the CAR territory.<sup>113</sup> The conflict exemplified trans-territorial and trans-jurisdictional features typical of conflicts with gross international law violations. Predictably, in multiple of his defences, Bemba cited difficulties arising from being a commander overseeing an operation in a foreign country remote from his location as well as the limits of the mandate, execution, and results of the measures he commissioned due to jurisdictional differences.<sup>114</sup>

Despite acknowledging that the measures taken by Bemba have to be “established on a case-by-case basis,”<sup>115</sup> the Trial Chamber still deemed Bemba’s claim of difficulties to be irrelevant and unpersuasive.<sup>116</sup> In fact, the Trial Chamber listed a number of hypothetical measures that Bemba could have taken instead that would have sufficed the “necessary and reasonable” requirement.<sup>117</sup> Another notable part that garners most contention is when the Appeals Chamber responded to this by arguing that commanders may instead employ a “cost/benefit analysis” in deciding which measures to take, which includes:

“[...] consideration [of] the impact of measures to prevent or repress criminal behaviour on ongoing or planned operations and may choose the least disruptive measure as long as it can reasonably be expected that this measure will prevent or repress the crimes.”<sup>118</sup>

The Appeals decision’s “cost/benefit analysis” is observed by many to have compromised the purposes of command responsibility due to it being unsuitably lax for the concept of command responsibility.

However, with all things considered, it bears reminding that the “cost/benefit analysis” should also be inspected as a part of the Appeals Chamber’s entirety of necessary and reasonable measure analysis. In keeping with the effort of reviewing the Appeals Chamber’s observance of past jurisprudence, the “cost/benefit

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112 Bemba Trial, par. 379-381.

113 *Ibid.*

114 Bemba Appeals, par. 145-147.

115 Bemba Trials, par. 197.

116 Bemba Trials, par. 732.

117 Bemba Trials, par. 729.

118 Bemba Appeals, par. 170.

analysis” does not seem to present any unprecedented notion within the conception of necessary and reasonable measures, save for the novelty of its nomenclature. In fact, the Appeals Chamber opened its reasoning of the “cost/benefit analysis” by stating that “in assessing reasonableness, the ICC is required to consider other parameters, such as the operational realities on the ground at the time faced by the commander.”<sup>119</sup> The “cost/benefit analysis” can be understood as the Appeals Chamber’s way of acknowledging the commander’s assessment of his situation—which may include complications that he was currently facing—and simultaneously his obligation to take the measures that were available to him given the relevant circumstances, so long as such measures are deemed to be effective in preventing or punishing crimes committed by his subordinates. It can then be inferred that the “cost/benefit analysis” constitutes as a part of the Appeals Chamber’s determination of the “reasonable” prong and is still in line with the definitions as notably held in the Halilovic and Bagilishema cases,<sup>120</sup> among others.

Moreover, when observed from the entirety of the decision, the “cost/benefit analysis” reflects the Appeals Chamber’s impression that the Trial Chamber’s was partial to the “necessary” prong of the necessary and reasonable measure’s requirement. On this point, Miles Jackson proposed that in cases of “perceived over-inculpation, judges tend to seek a limiting device.”<sup>121</sup> Indeed, in its effort to offset such perceived error, the Appeals decision displayed a repeated emphasis in its analysis on the “reasonable” prong.

Aside from the “cost/benefit analysis,” the Appeals Chamber also dismissed the Trial Chamber’s list of hypothetical measures that Bemba could have taken that would have instead sufficed the “necessary and reasonable” requirement. The Appeals Chamber argued that such a list cannot be regarded as a fair and realistic method of assessing what should constitute as necessary and reasonable measures since, unlike Bemba, the Trial Chamber had “the benefit of hindsight.”<sup>122</sup>

Another widely contested part of the decision is regarding the Appeals decision on Bemba’s claim of limitations of a commander

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119 *Ibid.*

120 Halilović Appeals, par. 63; Bagilishema, par. 47

121 Miles Jackson, “Geographical Remoteness in Bemba”, EJIL: Talk!, <https://www.ejiltalk.org/commanders-motivations-in-bemba/>, (accessed September 1, 2019).

122 Bemba Appeals, par. 170.

who operates from a remote location from the conflict and other limitations caused by jurisdictional and logistical differences. Generally, in regard to these claims, the Appeals Chamber held that “the Trial Chamber paid insufficient attention to the fact that the MLC troops were operating in a foreign country with the attendant difficulties on Mr. Bemba’s ability, as a “remote commander” to “take measures.”<sup>123</sup> The Appeals Chamber cited a witness testimony stating that within said investigative measures, “MLC’s investigative efforts were dependent on the Central African authorities for access, movement, and contact with civilians” and that the measures had a mixed composition of officials from CAR as well as DRC.<sup>124</sup> Such composition was intended to overcome logistical difficulties—such as differences in language, geographical unfamiliarity, and lack of relationship with fellow Central Africans—that would otherwise be more severe if it were only conducted by MLC officials.<sup>125</sup> The Appeals Chamber also cited limitations to Bemba’s command and control as a result of the mixed composition of the contingent armed group and authorities that operated in CAR throughout 2002-2003,<sup>126</sup> as well as the fact that besides Bemba, other CAR officials also enjoyed “some” authority over his troops.<sup>127</sup> On these grounds, the Appeals Chamber rebutted the Trial Chamber’s “unrealistic assessment”,<sup>128</sup> which stated that Bemba had a “wide range of available measures at his disposal”<sup>129</sup> and that he “and the MLC had ultimate disciplinary authority” over the contingent armed group.<sup>130</sup>

This determination from the Appeals Chamber received a handful of inquiries and criticisms from commentators which can be summed up in four points. *First*, the repeated mention of Bemba as a “remote commander” has led some to question whether the Appeals Chamber has introduced a new legal distinction within the necessary and reasonable measure’s requirement.<sup>131</sup> This is because readers of the Appeals decision may be left to infer that any commander located in a

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123 Bemba Appeals, par. 171.

124 Bemba Appeals, par. 172.

125 *Ibid.*

126 Bemba Appeals, par. 173.

127 *Ibid.*

128 *Ibid.*

129 Bemba Trial, par. 731.

130 Bemba Trial, par. 448.

131 Jackson, *Geographical Remoteness in Bemba*.

position remote from the conflict will always be faced with difficulties in performing his duties as a supervising guarantor.<sup>132</sup>

*Second*, the Appeal Chamber's validation on possible difficulties arising out of being a "remote commander" may work against the crucial duty of the commander as a supervising guarantor. Indeed, the status of being remote may be used by commanders to dodge their responsibility and accountability through separating or isolating themselves, geographically, or politically.<sup>133</sup>

*Third*, Jackson proposed that being a "remote commander" bears no generalizable or definitive effect that would warrant limitations for the commander in taking certain measures. He held that the relevance of geographical remoteness is capricious and dependent on the different measures and specific circumstances that the commander may be facing.<sup>134</sup> Many commentators contended that especially in today's world, a commander does not need to be physically present on the ground to have fully intact command and control over their subordinates, as there exists advanced communication technology specifically designed for military operations.<sup>135</sup>

*Finally*, legal observers have also identified a similar case where geographical proximity played a factor in determining culpability. Within ICTY's *Perišić* case, an element of "specific direction" was added to determine a culpable link between an aider or abettor and a crime.<sup>136</sup> Unsurprisingly and similarly to the current *Bemba* case, the *Perišić* case received much controversy and the newly added element was largely deemed "morally irrelevant".<sup>137</sup> A possible explanation for

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132 *Ibid.*

133 Beth van Shaack, "Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson," *American University Journal of Gender, Social Policy & the Law* 17, no. 09-02 (2009), 361-393.

134 Jackson, *Geographical Remoteness in Bemba*.

135 Frédéric Foka Taffo, "Analysis of Jean-Pierre Bemba's Acquittal by the International Criminal Court," Accord, accessed December 13, 2018, <https://www.accord.org.za/conflict-trends/analysis-of-jean-pierre-bembas-acquittal-by-theinternational-criminal-court/>.

136 Miles Jackson, "What does the decision of the ICC Appeals Chamber in Bemba say about the motivations and geographical remoteness of commanders in determining superior responsibility under Article 28 of the Rome Statute?," ICC Forum, <https://iccforum.com/responsibility#Amann>, (accessed September 1, 2019).

137 James Stewart, "Guest Post: The ICTY Loses its Way on Complicity – Part 1", *OpinioJuris*, <http://opiniojuris.org/2013/04/03/guest-post-the-icty-loses-its-way-on-complicity-part-1/>, (accessed September 1, 2019).

this would be because the notion that distinguishes the accountability of potential accomplices based on their geographical proximity has apparently lost its footing in most domestic jurisprudence.

However, at the same time, it would be imprudent to dismiss the Appeals Chamber's analysis on Bemba's imputed limitations as completely misguided or baseless. On the other hand, there also exists compelling opinions that would support the Appeal Chamber's conviction on difficulties arising from being a "remote commander," as there are presumptions that geographical remoteness may frustrate a commander's *de facto* effective command and control and therefore limits his material abilities. The Appeals Chamber validated Bemba's claim of limitations in conducting and managing effective investigations due to many difficulties, like MLC officials' illiteracy of CAR's systems, language, and people.<sup>138</sup>

Furthermore, the fact that geographical proximity has been removed from domestic criminal legal systems is inconsequential to its relevance under command responsibility, since the mode of liability itself does not reflect traditional norms of culpability that is present in domestic criminal legal systems.<sup>139</sup> Determining the relevance of geographical proximity under command responsibility through the lens of domestic criminal legal systems would be unsuitable, as the concept of command responsibility is absent within the system in the first place.

To conclude the analysis, two points must be maintained. *First*, the analysis within this article is not meant to defend the Appeals Chamber's interpretation on the "necessary and reasonable measures" requirement under command responsibility. Rather, through analysing the debate on the necessity and reasonableness of measures taken by Bemba, this article illuminates equally compelling arguments from two opposing perspectives—one that attaches importance to the commander's accountability over his subordinates (emphasis on the "necessary" prong) and another which take pains to consider the possible limiting circumstances faced by the commander (emphasis on the "reasonable" prong). Through the ICC's decisions of the *Bemba* case, this dilemma manifested as the polarising views on the interpretation of "necessary and reasonable measures". The dilemma

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138 Bemba Appeals, par. 172-173.

139 Linnea Kortfält, "Article 28(a) – Military commander", Lexis, <https://cilrap-lexis.org/clicc/28-a/28-a-military-commander>, (accessed September 30, 2019).

was also intensified with the inherently uncertain nature of conflicts that ICC answers to.

*Second*, it is important to acknowledge the narrow scope of this article. There are plenty of inquiries and criticisms surrounding the perceived inadequacies of the Appeals Chamber in interpreting the “necessary and reasonable” requirement itself that are not tackled here. This article does not attempt to measure the sufficiency of Bemba’s measures or identify errors of judgement within the Appeals decision. Instead, the extensive foregoing analysis is intended to objectively zero in on a particular feature of command responsibility that may be seen as a weak link to the concept, so that said weak link can be properly identified and resolved in the future.

## **VI. Conclusion**

Command responsibility constitutes an indispensable tool of international criminal law in which its purpose is to bring accountability to the commander, who by virtue of his command and control as a military superior, can be seen as the most responsible person for the gross violence committed by his subordinates. The incorporation of command responsibility under the Rome Statute can secure the concept’s implementation and substantiation, which is expected to act as an admonition for commanders to perform their duty as a supervising guarantor accordingly.

Unfortunately, through analysing the decisions of the *Bemba* case, it can be concluded that the “necessary and reasonable measures” requirement under command responsibility can pose as a major obstacle for prosecutors in their attempt to inculcate those who are deemed most responsible for the collective perpetration of international crimes. The controversies surrounding the Appeals Chamber’s determination of necessary and reasonable measures in the *Bemba* case can be attributed to the fact that the requirement embodies an age-old fundamental dilemma of the concept, which is to strike the balance between upholding the commander’s crucial duty as a supervising guarantor and avoiding strict liability by way of over inculcation.

Although the vacillation reflected a quandary that existed on a broader level than the *Bemba* case, the general confusion on the concept of command responsibility can be summed up into one question: exactly how intensified is the duty of the commander?

While in theory, it might seem clear that command responsibility under the Rome Statute is not one of strict liability, in reality, the dilemma has apparently persisted into the *status quo*, since legal practitioners and scholars have yet to arrive at an agreement of where the concept actually stands.

Additionally, such a dilemma is further intensified with the fact that the nature of situations that are dealt with by ICC are irregular, making it difficult to formulate a standard to which the commander's measures can be held against, even on a case-by-case basis. The bizarre and perilous conditions of the conflicts result in the polarising and somewhat subjective assessment of the "necessary and reasonable measures" requirement.

It is also worth pondering whether the source of this dilemma runs deeper than what is apparent from the vantage point adopted in this article. Despite the Rome Statute's establishment of unprecedented certitude of the concept of command responsibility, there persists fundamental contentions surrounding it, all of which stem from the scepticism surrounding a mode of liability that inculcates a person for a crime that he did not commit. Many prominent scholars have argued against the conception of command responsibility as is now embedded under the Rome Statute as well as in international criminal law history. Arthur O'Reilly and Mirjan Damaška, for instance, similarly opined that from the perspective of the deontological retributive theory of law, command responsibility poses a dissonance to basic principles of criminal law, as the imputed commander lacks the moral element that is normally a requirement for the inculcation of the crime in question.<sup>140</sup> In the same vein, Stewart questioned if the commander can still be rightfully incriminated despite the lack of a substantial causal link between the commander's omission of his duty and the harm done by his subordinates' crimes.<sup>141</sup> Indeed, as has been argued by Anika Bratzel, when seen from this perspective, command responsibility can give the impression of further worsening the recurring theme of detachment of the accused and the crime.<sup>142</sup>

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140 Damaška, *The Shadow Side of Command Responsibility*; O'Reilly, *Command Responsibility: A Call to Realign Doctrine with Principles*.

141 James Stewart, "The End of 'Modes of Liability' for International Crimes", *Leiden Journal of International Law* 25, no. 1 (2012).

142 Anika Bratzel, "The Use of Command Responsibility in the Prosecution of Sexual and Gender-Based Crimes in Non-International Armed Conflict" (LL.M. thesis,

Unfortunately, whether the Appeals Chamber's preoccupation with the "reasonable" prong of the requirement is an effort to offset the possible over inculcation against Bemba is still unclear. The debate on what suffices as necessary and reasonable measures can be seen as a symptom of the high duty/non-strict liability dilemma. The next quest for legal practitioners and scholars of international criminal law is then to clarify the borderlines of the "necessary and reasonable measures" requirement so as to strike a balance between two prongs of the requirement.

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## The One That Got Away: Assessing Ecocide During the Vietnam War

*Farhan Fauzy*

In 1970, the term “ecocide” was voiced at an academic convention, addressing the effects of the warfare waged in the vicinity of Vietnam. Until today, the efforts to recognize “ecocide”—or the deliberate destruction of the environment—remains the topic of several historical events. Although, there are no formal international legal instruments that criminalize the act of ecocide. The absence of such an instrument posed another question of whether, by nature, ecocide is an international crime. Moreover, numerous environmental disasters had occurred up until now. This includes the infamous usage of herbicides during the Vietnam War. This article finds that (1) ecocide is not an international crime according to the parameter of “universally criminal.” This is because there is no international treaty that criminalizes ecocide, not enough states that deem ecocide as a crime, and no UNGA Resolution that obliged the state to criminalize ecocide. Furthermore, (2) the environmental destruction in the Vietnam War fulfils the elements of ecocide pursuant to Article 26 of the 1991 Draft Code of Crimes Against Peace and Security of Mankind, due to its willful nature on the widespread, long-term, and severe damage to the natural environment.

**Keywords:** Ecocide, International Crimes, Universally Criminal, Vietnam War.

### I. The Forgotten Specter of Vietnam

We all know the Vietnam War as the clash between 2 (two) major ideologies at that time—the communist and the capitalist—which rooted from decades of conflict, started in 1954 with US-backed Southern Vietnam clashing with Communist-aligned Northern Vietnam. Both sides intend to unify Vietnam, but with different ideologies.<sup>1</sup> The involvement of the US in this war is due to the administrations<sup>2</sup>—which consist of several periods during the war—fear of the so-called “domino effect” of communism (a fear if one state in Southeast Asia falls into the communist ideology, then the rest of the surrounding states may also become a communist state). Then-President of the US, Eisenhower predicted that nationalist-communist North Vietnam’s leader Ho Chi Minh will win the election of the newly independent Vietnam, thus the US-backed, armed, and financed South Vietnam’s autocrat Ngo Dinh Diem to prevent such a

thing from happening.<sup>2</sup>

What comes into mind if we hear “Vietnam War” was perhaps the loss of lives, the *viet cong*, or even Spike Lee’s war-drama “Da 5 Bloods” and that one arc from “Forrest Gump.” The deliberate environmental destruction that also caused major problems were being unheeded. Why actually it was overlooked is beyond this article’s scope, but one notable thing we know is that there were no international rules that incriminate deliberate destruction of the environment—also known as ecocide. Considering the environmental deterioration we are currently facing, the perhaps absence of international criminal regulation is excruciating.

This chapter seeks to figure out—in a non-consecutive order—what is ecocide? Does that concept of ecocide can be included as an international crime? How would that concept be applied in the Vietnam War, should it be enacted at that time?

## II. International Crimes: Approaching a Definition

This chapter will attempt to seek the definition of international crime. It is necessary to do so before we seek the criminality aspect of ecocide in the regime of international criminal law.

### 1. The Problem with Defining International Crime and An Effort to Define One

One could look at the discipline of “international criminal law” and see not fully developed theories of international crimes.<sup>3</sup> This implicates the difficulties in defining ‘international crimes’ itself, as the various definitions given by many scholars have no single, unified, and authoritative source to look up to. Cherif Bassiouni mentions that the scholars have not clearly defined the criteria justifying the establishment of crimes under international law.<sup>4</sup> It does not mean that all acts incriminated in international law—crimes under the

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2 H. Patricia Hynes, “The Legacy of Agent Orange in Vietnam,” *Peace Review* 28, no. 1 (2016): 114.

3 Chehtman Alejandro, “A Theory of International Crimes: Conceptual and Normative Issues,” in ed. Heller, Kevin Jon *et al.*, *The Oxford Handbook of International Criminal Law* (Oxford: Oxford University Press, 2020); in Carsten Stahn, *A Critical Introduction to International Criminal Law*, (Cambridge: Cambridge University Press, 2018), 18.

4 M. Cherif Bassiouni, *Introduction to International Criminal Law (Second Revised Edition)* (Leiden/Boston: Martinus Nijhoff Publishers, 2014), 142.

jurisdiction of the ICC, for instance—lose their foothold. Here, we can try to seek references from international tribunals, bodies, (draft) conventions, and scholars.

The practices of international criminal tribunals, states, ILC, and various scholars have provided several—but rather similar—concepts of international crimes.<sup>5</sup> At the end of the Second World War, the victorious Allied Powers established the IMT to prosecute the German's top officials and the IMTFE for Japan's top officials for the atrocities they had committed during the war. The crimes contained in the IMT Charter (London Charter) and IMTFE Charter were simply crimes that “quite literally crossed borders”.<sup>6</sup>

Moreover, the IMT's *Hostage* case<sup>7</sup> and STL *Interlocutory Decision on Applicable Law*<sup>8</sup> both prescribe international crimes as a crime that is so severe, they are deemed universally criminal. Aside from that, the landmark case of *Eichmann* by the District Court of Jerusalem invokes the ‘universality of the crimes’ as a basis to prosecute crimes against humanity.<sup>9</sup> The chamber of the UK House of Lords in *Pinochet* also notes that “there are some categories of the crime of such gravity that they shock the conscience of mankind and cannot be tolerated by the international community. Any individual who commits such action offends against international law.”<sup>10</sup>

Further, the ILC's 1984 Draft Code indicates that international crime contains an international dimension that affects “peoples, races, nations, cultures, civilizations and mankind when they conflict with universal values.”<sup>11</sup>

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5 Kevin Jon Heller, “What Is an International Crime? (A Revisionist History),” *Harvard International Law Journal* 58, no. 2 (2017): 357-361.

6 Alexander K.A. Greenawalt, “What Is an International Crimes?,” in *The Oxford Handbook of International Criminal Law*, ed. Kevin Jon Heller et al. (Oxford: Oxford University Press, 2020), 296.

7 XI Law Reports of Trials of War Criminals, United States of America v Wilhelm List et al. (*Hostage*) (1949), p. 1241.

8 Special Tribunal for Lebanon, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, Appeals Chamber (STL-11-01/I) (2011), para. 134.

9 District Court of Jerusalem (Israel), Criminal Case No. 40/61 Attorney General v. Adolf Eichmann (1961), para. 11.

10 House of Lords (UK), *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte* (No. 3) [2000] 1 A. C. 147 (1998), p. 100.

11 Yearbook of the International Law Commission, Second Report on the Draft Code of Offences against the Peace and Security of Mankind (A/CN.4/377 and Corr.1)

Scholars also provide their definition of international crimes. Carsten Stahn elaborated that one way to define international crime is to see the nature of the criminality, which leans to “mass atrocities” that are tied to conflicts.<sup>12</sup> Another way to define international crime is by virtue of the community whose interests are violated. This view was embodied in the Prosecutor of IMT’s opinion on *Eichmann*, where he stated that international crimes “is not committed only against the victim, but primarily against the community whose law is violated.”<sup>13</sup> Antonio Cassese, on the other hand, notes that international crimes possess “international dimension, in that they breach values recognized as universal in the world community and enshrined in international customary rules and treaties.”<sup>14</sup>

Generally, there exist 2 (two) theories to define international crimes, namely the evil nature of the offence (*Malum in se*) and prohibited evil (*Malum Prohibitum*). The former defines international crimes based on the nature of the offence, regardless of the existence of regulations that govern the action. It took consideration of the following factors: the evil intent, its gravity and scale, existence of international dimension; and/or the perception. Examples of international crimes following this theory is the crimes of aggression and crimes against humanity that were initially enumerated in the IMT Charter and IMTFE Charter. Those crimes existed without a prior treaty that regulates them, rather it comes from the evil nature of the conduct.<sup>15</sup>

On the other hand, *malum prohibitum* defines international crimes as an act that is criminalized directly by international law.<sup>16</sup> The source for such criminalization can come from, for instance, treaty

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- by Mr. Doudou Thiam, Special Rapporteur, vol. II, 1984. par. 8.
- 12 Stahn, *A Critical Introduction to International Criminal Law*, 16-17.
- 13 Telford Taylor, “Large Questions in the Eichmann Case; One Who Prosecuted Nazi War Criminals at Nuremberg Considers the Coming Trial in Israel and Asks If It Will Contribute to the Growth of International Law and Justice. Questions in the Eichmann Case,” New York Times, <https://timesmachine.nytimes.com/times-machine/1961/01/22/118892775.html?pageNumber=220>, (accessed 11 November 2021).
- 14 Antoniso Cassese, *International Criminal Law 2nd Edition* (New York: Oxford University Press, 2008), 54.
- 15 Stahn, *A Critical Introduction to International Criminal Law*, 17-22.
- 16 Gerhard Werle, *Principles of International Criminal Law*, 2nd ed. (The Hague: T. M. C. Asser Press, 2009), 20.

or customary international law. Genocide is one of the instances of international crime under this theory, as it has been embodied under the Genocide Convention. Consequently, the crimes under *jurisdiction materiae* of the ICC (i.e., the crimes of genocide, crimes against humanity, war crimes, and crimes of aggression) were also, for an obvious reason, included as international crimes under *malum prohibitum* theory.

From those precedents and theories, we can take the hypothesis that international crimes were determined by their nature and scope—extraordinarily evil in nature and affect people across the globe. How would we, then, extract more concrete elements of an international crime?

## 2. The Extracted Characteristic of International Crime

The various definitions and theories are given by State, international tribunal, and ILC above can be extracted to a distinctive feature of international crime. Heller points out that the distinctive feature that differentiates international crimes from domestic or other crimes is the involvement of the international law that deems such act as universally criminal.<sup>17</sup> The underlying question would be what is “universally criminal”?

Heller points out that there are 2 (two) theses that define “universally criminal” and thus, define international crimes. Those theses are DCT and NCT. DCT categorizes an act as universally criminal because they are directly criminalized by international law, regardless of what the national law of a state prescribed. On the other hand, NCT takes the position that an act is universally criminal because international law requires every state to criminalize such an act. In essence, NCT rejects the idea that international law bypasses the national law.<sup>18</sup> Stahn also prescribed these ideas that are similar in character, namely the ‘narrow view’ and ‘inclusive view.’<sup>19</sup>

Which thesis to be used, either DCT or NCT, is dependent on whether international law uses positivism or naturalist approach. For the purpose of this article, positivism is the focus of the analysis because the practice of every international criminal tribunal in the world stresses that international crimes are a positivist phenomenon,

17 Heller, *What Is an International Crime? (A Revisionist History)*, 354.

18 Heller, *What Is an International Crime? (A Revisionist History)*, 354-355.

19 Stahn, *A Critical Introduction to International Criminal Law*, 21.

not a naturalist phenomenon.<sup>20</sup> This can be seen in many instances, among others are the Prosecution of IMTFE's lean-to positivistic arguments,<sup>21</sup> the strong Dissenting Opinion by Judge Robertson at the **SCSL** case of *Norman* that supports the idea of a positivistic school of thought,<sup>22</sup> and the ICC's strict understanding of *nullum crimen sine lege* (legality principle) in the Rome Statute.<sup>23</sup>

From the positivistic point of view, DCT seems to have a more credible basis by providing more empirical evidence than naturalist does. However, it is merely theoretical. In proving such a thesis' applicability in international law, the existence of a universally applicable treaty that affirms DCT is needed. Such a treaty has not yet existed until this chapter is written.

Even if we recourse to justifying the DCT by virtue of customary international law or even as a *jus cogens* norm, the problem of 'persistent objector' on the creation of customary international law—a generally recognized concept in international law that can be used by an unwilling state to not comply with the established customary international law—will defeat the core feature of DCT that prohibits a domestic law to allow a universally criminalized act to be done in their respective territory.

Further, the “exceedingly unlikely” chance of making DCT a *jus cogens* norm also hinders the acceptance of DCT as a basis for determining the “universally criminal” act in international law. Therefore, even in the view of positivistic, DCT fails to present a sufficient basis to criminalize an act universally. It even seems to favour a different definition of “universally criminal” from DCT.<sup>24</sup>

Conversely, the NCT possess a stronger backing from a positivist point of view—a school of thought that is favoured in defining international crimes or “universally criminalized act”. Schwarzenberger<sup>25</sup> and Bassiouni<sup>26</sup> affirms this idea.

These foundations can be found in both multilateral treaties and customary international law. For instance, the Geneva Convention IV obliges the parties to criminalize war crimes in their domestic legislation.<sup>27</sup> A similar obligation to criminalize certain conduct in the domestic legal system is also contained in Apartheid Convention,<sup>28</sup> which is considered as a crime against humanity; and Genocide

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27 Geneva Convention IV, Art. 146.

28 Apartheid Convention, Art. IV.

Convention.<sup>29</sup> Moreover, the UNGA Resolution 96(1) also “Invites the Member States to enact the necessary legislation for the prevention and punishment of this crime (genocide)”.<sup>30</sup>

From the passage above, we can proceed to use Heller’s NCT in determining what is universally criminal. Would then ecocide join the band of infamous atrocities towards humankind—also known as an international crime?

### III. A Quest to Put “Crime” before the Word “Ecocide”

We have seen the extracted definition of “international crime” from various, if not scattered, sources and extracted its essence. It is now time to see whether ecocide (as defined below) passed the threshold of “universally criminal” hence possess the title of “international crime.”

#### 1. A Glance and Historical Roadmap

Ecocide has come a long way since its first introduction—and it has not reached the end of the tunnel yet. This is perhaps one of the pieces put in the ever-growing regime of international criminal law.

Ecocide was initially coined out by Prof. Galston, a biologist whose discoveries were used by the US military to destroy the environment in the Vietnam War.<sup>31</sup> His speech compares the wilful destruction of people and their culture in World War II with the destruction of the environment in the Vietnam War. Arguably, this oration is the one that sparks the debate in the UN as well as in the academic community.

Following that, in the 1972 Stockholm Conference, Olof Palme (then Prime Minister of Sweden) explicitly points out that the US had committed an act of ecocide, by means of “indiscriminate bombing, large-scale use of bulldozers and herbicides,” known as ecocide. Several states’ delegations had also denounced such environmental destructions.<sup>32</sup> In spite of his unproven claim, this is perhaps the first recorded statement by a state leader in an international forum that explicitly mentioned “ecocide.”

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29 Genocide Convention, Art. V.

30 United Nations General Assembly Res. 96(1), par. 6.

31 Anastacia Greene, “The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?,” *Fordham Environmental Law Review* 30, no. 3 (2019): 8.

32 Tord Bjork, “The Emergence of Popular Participation in World Politics - United Nations Conference on Human Environment 1972” (Stockholm, 1996), 22-23.

Further, in 1973, an effort to concretely define ecocide was made by Professor of International Law, Richard A. Falk. He proposed an International Convention on the Crime of Ecocide. In there, he defines ecocide as a crime that any of the listed acts, committed with intent to disrupt or destroy, in whole or in part, a human ecosystem. The acts comprise the use of weapons of mass destruction, the use of chemical herbicides to defoliate and deforest natural forest for military objectives, the use of bombs and artillery that impairs the quality of soil, bulldozing forest or cropland for military purposes, weather modification as a weapon of war, and forced removal of human or animals for industrial or military objectives. The proposed convention also includes the modes of liability in ecocide.<sup>33</sup> At a glance, the wording and structure of Falk's proposal possess similarities with the Genocide Convention. Falk's proposal was enumerated in the UN Genocide Study. The Special Rapporteur, Mr. Ruhashyankiko, also quoted Fried. It says that even though no legal definition of ecocide exists, its essential meaning can be understood as "various measures of devastation and destruction which have in common that they aim at damaging and destroying the ecology of geographic areas to the detriment of human life, animal life and plant life."<sup>34</sup>

Several years after, a new Special Rapporteur, Mr. Benjamin Whitaker, was assigned to make a Revised UN Genocide Study. The Revised UN Genocide Study notes that some members of the Sub-Commission propose that the definition of genocide shall also include ecocide and ethnocide. Here, ecocide is defined as "adverse alterations, often irreparable, to the environment—for example through nuclear explosions, chemical weapons, serious pollution and acid rain, or destruction of the rain forest—which threaten the existence of entire populations, whether deliberately or with criminal negligence." However, the question regarding ecocide in this study did not reach a consensus, nor have a follow-up investigation.<sup>35</sup>

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33 Richard A. Falk, "Environmental Warfare and Ecocide — Facts, Appraisal, and Proposals," *Bulletin of Peace Proposals* 4, no. 1 (1973): 93-95.

34 John H. E. Fried, "War by Ecocide: Some Legal Observations," *Bulletin of Peace Proposals*, no. 1 (1973); Nicodème Ruhashyankiko, "Study of the Question of the Prevention and Punishment on the Crimes of Genocide (E/CN.4/Sub.2/416)," *Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities* (1978): par. 462.

35 Damien Short, *Redefining Genocide: Settler Colonialism, Social Death and Ecocide* (London: Zed Books, 2016), 48.

The peak debate on the effort to criminalize ecocide occurred at the drafting of the Draft Code, which later will become the draft of the Rome Statute of the ICC. Most notably, in its 43<sup>rd</sup> session, the ILC added the “wilful and severe damage to the environment” on Article 26 of the 1991 Draft Code, which prescribes: “An individual who **wilfully causes or orders** the causing of **widespread, long-term and severe damage** to the **natural environment** shall, on conviction thereof, be sentenced [to...].”<sup>36</sup> The ILC deemed the protection of the environment is important and classified the destruction of the environment as a “fundamental interest of mankind.”<sup>37</sup>

In regard to this proposed crime, the ILC established a working group to discuss the feasibility to include Article 26 in the final Draft Code. The report curated by Christian Tomuschat provides 3 (three) options on this proposed crime against the environment, which are: to be considered as a war crime, a crime against humanity, or as a standalone crime against peace and security of mankind. The ILC voted the proposed crime of wilful and severe damage to the environment of the 1991 Draft Code as a war crime,<sup>38</sup> as seen in the present day’s Article 8(2)(b)(iv) of the Rome Statute.

The near-miss opportunity to criminalize crimes against the environment—or ecocide—were the result of a wrong timing to include this crime among other crimes against peace and security of mankind, even though the ILC had viewed this issue as an “indispensable element” on the protection for such crimes against peace and security of mankind. Tomuschat noted that the role of nuclear arms “played a decisive role” to exclude this crime into the final Draft Code.<sup>39</sup>

In the present day, it is argued that the act of environmental destruction, in general, could not be punished under international criminal law. What is left that resembles ecocide, particularly in the Rome Statute, is the widespread, long-term, and severe damage to the natural environment resulting from an attack in the time of war, as seen in Article 8(2)(b)(iv) of the Rome Statute. It is deemed the

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36 43<sup>rd</sup> Session ILC Report, 97.

37 43<sup>rd</sup> Session ILC Report, 108., par. 1.

38 Tomuschat ILC Report; in 48<sup>th</sup> Session ILC Report, 16., par. 44.

39 Christian Tomuschat, “Crimes Against the Environment,” *Environmental Policy and Law* 26, no. 6 (1996), 243.

condition contained in the Article will almost never be met<sup>40</sup> due to the remarkably high standard of intent.<sup>41</sup> Indeed, no individuals have been prosecuted under this Article as of now.<sup>42</sup>

## 2. Finding the Definition

### a. The Politics Along the Way

As has been generously elaborated previously, there are several definitions of ecocide. Among others, there are definitions from Galston,<sup>43</sup> Sweden's Prime Minister Olof Palme,<sup>44</sup> Falk,<sup>45</sup> Fried,<sup>46</sup> Gray,<sup>47</sup> and the more recent Higgins.<sup>48</sup> Some of them were incorporated in the UN Genocide Study,<sup>49</sup> Revised UN Genocide Study,<sup>50</sup> and the 1991 Draft Code.<sup>51</sup> This poses a dilemma as there are no authoritative sources to be looked up to.

What perhaps can be taken into consideration is that although there is no legal definition of ecocide back then (and unfortunately until now), its essential meaning can be understood. Along with the handful of definitions of ecocide provided by scholars and diplomatic

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40 Tomuschat, 243.

41 Greene, "The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?", *Fordham Environmental Law Review* 30, 3 (2019), 19.

42 Ryan Gilman, "Expanding Environmental Justice after War: The Need for Universal Jurisdiction over Environmental War Crimes," *Colorado Journal of International Environmental Law and Policy* 22 (2011), 453.

43 Anja Gauger *et al.*, "The Ecocide Project: Ecocide Is the Missing 5th Crime Against Peace", *Human Rights Consortium School of Advanced Study University of London* (London, 2012), 5.

44 Bjork, "The Emergence of Popular Participation in World Politics - United Nations Conference on Human Environment 1972," 15.

45 Falk, "Environmental Warfare and Ecocide — Facts, Appraisal, and Proposals," 93.

46 Fried, "War by Ecocide: Some Legal Observations," para. 462.

47 Mark Allan Gray, "The International Crime of Ecocide," *California Western International Law Journal* 26 (1996), 1–58.

48 Polly Higgins, 2010, *Eradicating Ecocide: Exposing the Corporate and Political Practices Destroying the Planet and Proposing the Laws Needed to Eradicate Ecocide*, Shephard-Walwyn, London; in Anastacia Greene, "The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?", *Fordham Environmental Law Review*, Vol. 30, no. 3 (2019): 2.

49 Nicodème Ruhashyankiko, par. 462.

50 Benjamin Whitaker, Revised and Updated Report on The Question of The Prevention and Punishment of The Crime of Genocide (E/CN .4/Sub .2/1985/ 6), 1985, par. 33.

51 43<sup>rd</sup> Session ILC Report.

conferences, that passage shows that “ecocide” is a political terminology. It is a term used to express the conveyer’s agenda to criminalize environmental destruction.

It is no question that only one definition will be used in this discourse. In determining which definition of ecocide will be used, it is important to analyze the degree of credibility that such definition possesses from the perspective of sources of international law.

The existing definitions of ecocide can be categorized into 2 (two) types: the one that came from scholars’ opinions and the one that was in the form of a draft convention or treaty. The latter is Article 26 of the 1991 Draft Code while the former covers the rest.

It needs to be noted that, even if a treaty obtains primacy over the scholar’s opinion, the existing definition of ecocide is not a treaty. Rather, it only serves as a draft treaty and perhaps does not bear any significant, if any, legal weight. Its status as preparatory works also only serves as a secondary source in international law.

For this discourse, Article 26 of the 1991 Draft Code is opted as the concerned “ecocide” for 2 (two) reasons. *Firstly*, it is the closest that we can get into the international law on ecocide. The 1991 Draft Code was discussed in a conference held by the ILC as a follow up from the mandate by UNGA to form a Draft Code of Crimes Against the Peace and Security of Mankind.<sup>52</sup> It suggests some degree of credibility and representativeness. *Secondly*, considering it is the closest international law on ecocide that almost become a positive law, it will demonstrate how such laws will be applied should it become a binding international convention. This is in harmony with the aimed benefit of this treatise.

With that being said, the analysis will revolve around Article 26 of the 1991 Draft Code not because of the legal weight it possesses, but because of the nature of the Draft Code that has the highest credibility and representativeness among the other definition of ecocide that comes from scholar’s opinion.

#### **b. Connecting the Dots: Vietnam War and concept of ecocide**

Although it does not explicitly use the term “ecocide”, Article 26 of the 1991 Draft Code contains 3 (three) elements. Firstly, there should be “damage to the natural environment”. The natural environment shall be perceived broadly as to cover the environment

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52 Greene, “The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?”, 15.

of the human race and where they develop, including the preservation of which is of fundamental importance in protecting the environment. This can include sea, atmosphere, climate, forest, flora, fauna, and other biological elements.<sup>53</sup>

The drafting history (document) of the 1991 Draft Code provides few explanations on what constitutes a “natural environment.” It stated that the natural environment shall be perceived in its broadest scope so that it includes the environment of human and where human develops, as well as the area in which its preservation is fundamentally important in protecting the environment. In that sense, it covers the seas, atmosphere, climate, forest and other plant covers, fauna, flora, and other biological elements.<sup>54</sup> The 1991 Draft Code also refers to the The Environmental Modification Convention (‘ENMOD’) that indirectly provides the definition of an environment as “[...] earth, including its biota, lithosphere, hydrosphere, and atmosphere, or of outer space.”<sup>55</sup>

Further, if we see the Rome Statute, Article 8(2)(b)(iv) is per chance the Rome Statute version of ecocide—but with 1 (one) feature that defeats the essence of ecocide itself: the requirement of “wartime.” Nevertheless, the Rome Statute, in defining “natural environment,” also refers to ENMOD and the Additional Protocols to the Geneva Conventions of 1977 (‘Additional Protocol I’).<sup>56</sup>

Article 35 of Additional Protocol I’s version of “natural environment” was defined in its *travaux préparatoires* as an inseparable interrelation between the living organism and the non-living environment.<sup>57</sup> On the other hand, Article 55 of Additional Protocol I’s “natural environment” is to be read in its widest sense, meaning it shall cover all biological environments in which a population is living. This can include foodstuffs, agricultural areas,

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53 43<sup>rd</sup> Session ILC Report, p. 107., para. 3-4.

54 43<sup>rd</sup> Session ILC Report, p. 107., para. 4.

55 ENMOD, Art. II.

56 Roberta Arnold and Stefan Wehrenberg, “Article 8 War Crimes,” in *The Rome Statute of the International Criminal Court: A Commentary*, ed. Kai Ambos and Otto Triffterer (2016), 378.

57 International Committee of the Red Cross, “Additional Protocol (I) to the Geneva Conventions, 1977 - 35 - Basic Rules - Commentary of 1987,” <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=2F157A9C651F8B1DC12563CD0043256C>., para. 1451, (accessed 23 November 2021).

drinking water, livestock, forest, other vegetation, fauna, flora, and other biological or climatic elements.<sup>58</sup> These 2 (two) interpretations of each Article's do not differ substantially from each other—and the drafters affirm this.<sup>59</sup>

We can take a step back to the 1960s during the Vietnam War. Firstly, all the definitions from the *travaux préparatoires* of the 1991 Draft Code, the ENMOD, and the Additional Protocol I can be extracted into 1 (one) common feature between them: the living and non-living biological environment in the earth that is to be perceived to its greatest extent.<sup>60</sup> Further, the damage that occurred in the Vietnam War is threefold: to the flora (i.e., the forest, the soil, etc.),<sup>61</sup> to the human (i.e., the grossly deformed fetuses, the cycle of poverty, etc.),<sup>62</sup> and to the fauna (i.e., loss of biodiversity).<sup>63</sup>

Flora and fauna are inarguably a natural environment. The damage to the human aspect is also considered as damage to the natural environment as well, considering that is how the *travaux préparatoires* of the 1991 Draft Code also defines “natural environment.”<sup>64</sup> Applying this logic, it can be said that the use of herbicides, the destroying of the forest, the use of incendiary, among others in Vietnam War is

58 International Committee of the Red Cross, “Additional Protocol (I) to the Geneva Conventions, 1977 - 55 - Protection of the Natural Environment - Commentary of 1987,” <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=open-Documents&documentId=7B82DFCC11FAE4C5C12563CD00434DBC>, para. 2126. (accessed 23 November 2021).

59 International Committee of the Red Cross, “Additional Protocol (I) to the Geneva Conventions, 1977 - 35 - Basic Rules - Commentary of 1987,” para. 1444. (accessed 23 November 2021)

60 43<sup>rd</sup> Session ILC Report, 107., para. 3-4; International Committee of the Red Cross, “Additional Protocol (I) to the Geneva Conventions, 1977 - 55 - Protection of the Natural Environment - Commentary of 1987,” para. 2126. (accessed 23 November 2021)

61 D. C. G. Muir et al., “Laboratory and Field Studies on the Fate of 1,3,6,8-Tetrachlorodibenzo-p- Dioxin in Soil and Sediments,” *Journal of Agricultural and Food Chemistry* 33 (1985), 518-523; in Kenneth Ray Olson and Lois Wright Morton, “Long-Term Fate of Agent Orange and Dioxin TCDD Contaminated Soils and Sediments in Vietnam Hotspots,” *Open Journal of Soil Science* 09, no. 01 (2019), 21; United States Agency for International Development (USAID), 2016, *Environmental Assessment of Dioxin Contamination at Bien Hoa Airbase. Environmental Assessment in Compliance with 22 CFR 216-Final*; in Olson and Morton, 25-26.

62 Hynes, “The Legacy of Agent Orange in Vietnam,” 118.

63 *Ibid.*

64 43<sup>rd</sup> Session ILC Report, 107., para. 4.

indeed a “damage to the natural environment.” This is not surprising, rather a clear-cut hypothesis, considering the means and method of warfare used by the US is not unconventional.

Secondly, the damage shall be “**widespread, long-term, and severe.**” This element indicates the seriousness of the damage, in which 3 (three) cumulative factors must be considered, which are the intensity, the duration, and the size of the affected geographical area.<sup>65</sup> This threshold is similar to what is written on the AP I and ultimately the Rome Statute but is different from the lower, alternative requirement provided by ENMOD.<sup>66</sup> The commentary of the 1991 Draft Code provides a minimum explanation on what constitutes “widespread,” “long-term,” and “severe” damage. That is why resorting to other sources to seek clarity is necessary.

If we see the Rome Statute, it appears that a referral was made to the ENMOD and Additional Protocol I. The notion of “widespread” under Additional Protocol I and ENMOD may be perceived as more than the hundred square kilometres.<sup>67</sup>

On the other hand, the notion of “long-term” possess a divided interpretation among the referred sources. AP I define it as a period of decades,<sup>68</sup> while ENMOD describe it as a period of months or approximately a season.<sup>69</sup> This requirement for “long-term,” particularly the high threshold from AP I, were affirmed through various doctrines.<sup>70</sup> Consequently, if Rome Statute applies such a high threshold, it will render Article 8(2)(b)(iv) a “virtual nullity” due to its “nearly impossible to meet” standard.<sup>71</sup> An illustration of these deficiencies can be seen in the *NATO Bombing Campaign in Kosovo*, where the damages of environment caused by heavy shelling during

65 43<sup>rd</sup> Session ILC Report, 107., paras. 3-5.

66 Arnold and Wehrenberg, “Article 8 War Crimes,” 378.

67 Arnold and Wehrenberg, “Article 8 War Crimes,” 379.

68 Matthew Gillett, “Environmental Damage and International Criminal Law,” *Sustainable Development, International Criminal Justice, and Treaty Implementation*, 2011, 80.

69 United Nations, “Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD), Understanding Relating to Article I,” 1978, <http://disarmament.un.org/treaties/t/enmod/text>. (accessed 23 November 2021)

70 Arnold and Wehrenberg, “Article 8 War Crimes,” 379.

71 J. C. Lawrence and Kevin Jon Heller, “The Limits of Article 8(2)(b)(iv) of the Rome Statute, the First Ecocentric Environmental War Crime,” *Georgetown International Environmental Law Review* 20, no. 61 (2007): 68.

World War I would not be able to be subjected to this provision, as the damage would not last that long.<sup>72</sup>

As for the “severe” element, the AP I describe it as “prejudicing of the continued survival of the civilian population or involving the risk of major health problems.” The Rome Statute was based on this interpretation.<sup>73</sup> Another interpretation was specified in the ENMOD as “involving serious or significant disruption or harm to human life, natural and economic resources or other assets.”<sup>74</sup>

To give an additional source and perspective, there is also a study issued by the UN Environmental Programme which recommends several definitions of “widespread, long-term, and severe damage” in international law. They recommend these definitions of them: “Widespread” encompasses an area on the scale of several hundred square kilometres; “Long-term” is a period of months, or approximately a season; and “Severe” involves serious or significant disruption or harm to human life, natural economic resources or other assets.<sup>75</sup>

These recommendations were a resonance, or perhaps an accommodation, of the pre-existing interpretation to those terms. It is quite the same with ENMOD’s interpretation. Perhaps, the UN Environment Programme realized the deficiencies of Additional Protocol’s version of these terms—particularly the high threshold of time in “long-term”—thus favouring the interpretation of ENMOD.

Be that as it may, these cumulative criteria are still considered problematic. Mainly, because of its imprecise definition.<sup>76</sup> Further study and harmonization perhaps shall be conducted.

We can now turn the page into the Vietnam War. Starting with the first element of “widespread,” which generally refers to the extent of the affected geographical area. Studies have shown that the destruction of the forest alone amounted to 1,2 million hectares, contributed by the herbicides’ aerial war, the bulldozing, and other

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72 Arnold and Wehrenberg, “Article 8 War Crimes,” 379.

73 *Ibid.*

74 United Nations, “Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD), Understanding Relating to Article I.”

75 United Nations Environmental Programme, *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law* (Nairobi: United Nations Environment Programme Publication, 2009), 52.

76 United Nations Environmental Programme, 51.

means of war used during the Vietnam War.<sup>77</sup> Moreover, 20,000 hectares of mangrove forest and thousands of hectares of cropland were destroyed by the defoliation campaign.<sup>78</sup> Not only the direct tangible effect was felt, but also the indirect effect such as the millions of hectares of cropland and forest were also turned unproductive due to Agent Orange's byproduct, dioxin TCDD.<sup>79</sup>

Both AP I and ENMOD use a numerical threshold of what damage constitute as "widespread". It requires the damage for at least hundreds of square kilometres of damage.<sup>80</sup> The case at hand shows that it clearly passes the threshold given by AP I, ENMOD, and consequently the Rome Statute. Therefore, it is safe to say that if such destruction of millions of square kilometres (hectares) happened in the present time, the applicable law would find it "widespread" damage.

As for the element of "long-term", the damage to the natural environment lasted a long time. It is not measured by the duration of the Vietnam War in general that lasted a decade *per se*, but rather how long the effect was felt. This was inferred from the 1991 Draft Code's wording of long-term "damage," which would be illogical if it was restricted to the mere act of destruction itself and not the effect of such actions.

The infamous "Agent Orange" herbicide does not possess a long half-life for it to cease to exist. However, on the contrary, the dioxin TCDD contained therein can last up to centuries. It was found that even in 12 years after the war had ended, the soils sprayed by the herbicides remained unproductive due to the very long half-life of dioxin TCDD.<sup>81</sup> The hotspot for this contamination, the Bien Hoa

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77 E. W. Pfeiffer and Aurthur H. Westing, "Land War. Three Reports," *Environment: Science and Policy for Sustainable Development* 13, no. 9 (1971): 12.

78 Olson and Morton, "Long-Term Fate of Agent Orange and Dioxin TCDD Contaminated Soils and Sediments in Vietnam Hotspots," 17.

79 Muir *et al.*, "Laboratory and Field Studies on the Fate of 1,3,6,8-Tetrachlorodibenzo-p- Dioxin in Soil and Sediments," *The Journal of Agricultural and Food Chemistry* 33, no. 5, 518-523.

80 Arnold and Wehrenberg, "Article 8 War Crimes," 379.

81 Muir *et al.*, "Laboratory and Field Studies on the Fate of 1,3,6,8-Tetrachlorodibenzo-p- Dioxin in Soil and Sediments," *The Journal of Agricultural and Food Chemistry* 33, no. 5, 518-523.; in Olson and Morton, "Long-Term Fate of Agent Orange and Dioxin TCDD Contaminated Soils and Sediments in Vietnam Hotspots," *Open Journal of Soil Science* 9, no. 1, 21.

Air Force Base, even had a perimeter set outside of its fence for 45 years after the war had ended, resulting in a ban to raising and selling fish for consumption within the area due to the contaminated aquatic life.<sup>82</sup>

Notwithstanding the criticisms on the temporal threshold set by the AP I due to its high standard (which it requires decades in time),<sup>83</sup> the damage suffered by the environment does meet the high threshold. This means that it also met the lower standard of months or seasons set by ENMOD and the UN Environmental Programme recommendations. Thus, the damage imposed to the natural environment during the Vietnam War was “long-term” if it were to happen today by virtue of the 1991 Draft Code.

The final element is the “severe” damage to the natural environment, which generally refers to the extent or intensity of the damage.<sup>84</sup> The damage to the natural environment also affects the livelihood of the local citizens, for instance, the cycle of poverty occurred there.<sup>85</sup>

It is true that the provisions of ecocide, particularly Article 26 of the 1991 Draft Code, was meant to be eco-centric rather than anthropocentric due to its concern for the environment. However, it shall be noted that generally, international criminal law contains more of the anthropocentric laws rather than the former. This is not to say the anthropocentric laws do not protect the environment,<sup>86</sup> it is actually the contrary.<sup>87</sup> Therefore, analyzing the “severe” elements, which contained in a provision about the environment, from the effects it did to human lives is perchance not a hindrance.

Unfortunately, there is no clear-cut explanation on what it means by “severe.” The only explanation given by the existing laws is the interpretation mentioned above, hence there is nothing that specifies

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82 United States Agency for International Development (USAID), 2016, *Environmental Assessment of Dioxin Contamination at Bien Hoa Airbase. Environmental Assessment in Compliance with 22 CFR 216-Final*; in Olson and Morton, 25-26.

83 Lawrence and Heller, “The Limits of Article 8(2)(b)(iv) of the Rome Statute, the First Ecocentric Environmental War Crime,” 68.

84 43<sup>rd</sup> Session ILC Report, 107., para. 5.

85 Hynes, “The Legacy of Agent Orange in Vietnam,” 118.

86 Gillett, “Environmental Damage and International Criminal Law,” 98.

87 Tara Weinstein, “Prosecuting Attacks That Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?,” *Georgetown International Environmental Law Review* 17 (2005): 698.

what is “serious or significant disruption or harm” and “prejudicing of the continued survival of the civilian population or involving the risk of major health problems.” The deeper interpretation will perhaps be elaborated by a concerned judicial institution—if this provision becomes a positive law in the future. Just like the other elements, this is a “high, uncertain, and imprecise” threshold.<sup>88</sup>

However, the study issued by UN Environmental Programme suggests that according to the Additional Protocol I, the scorched-earth tactic cause severe environmental destruction.<sup>89</sup> It is a “military strategy of burning or destroying crops or other resources that might be of use to an invading enemy force.”<sup>90</sup> Both the defoliation campaign and the scorched-earth tactics share the same feature: they both intended to deny the safe haven of their adversaries in a way that it is not easily reversible and affect the livelihood of civilians, among others.<sup>91</sup> The existing poverty,<sup>92</sup> the deformed children on Vietnam,<sup>93</sup> physical and psychological traumas suffered by children and veterans,<sup>94</sup> etc. caused by the defoliation campaign and other means of environmental destruction also prejudice to the continued survival of civilians, involvement of major health problems, and disruption to the human life and natural resources. Therefore, even with the limited means of analysis and by comparing it with another instance of “severe,” it can be affirmed that the environmental destruction in the Vietnam War is severe.

Lastly, the crimes must be committed “**willfully**.” It refers to the express aim or specific intent of producing damage. Without the aim or specific intention to cause damage, it cannot be constituted as a crime under Article 26 of this Draft Code. Article 26 of the 1991 Draft Code’s usage of “willfully” suggest that it includes an

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88 United Nations Environmental Programme, “Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law,” 11.

89 United Nations Environmental Programme, 18.

90 Oxford Reference, “OVERVIEW Scorched Earth Policy,” <https://www.oxfordreference.com/view/10.1093/oi/authority.20110823092610617> (accessed January 4, 2021)

91 Arthur H Westing, “Ecological Effects of Military Defoliation on the Forest of South Vietnam,” *BioScience* 21, no. 17 (1971): 893–98.

92 Hynes, “The Legacy of Agent Orange in Vietnam,” 118.

93 Peter Sills, *Toxic War: The Story of Agent Orange*, Vanderbilt University Press (Nashville: Vanderbilt University Press, 2014), 232.

94 Hynes, “The Legacy of Agent Orange in Vietnam,” 120.

“express aim or specific intention of causing damage” or intent, as well as negligence.<sup>95</sup> There are no other requirements of *mens rea* in the 1991 Draft Code, unlike the Rome Statute which have a dedicated provision on the mental element.

It shall be analyzed on how the state of mind from the Party is responsible for the use of herbicides and other means of environmental destruction—in which it was the US. However, it also shall be noted that the *mens rea* analysis only relies on secondary sources, such as literatures and minutes of speech or statements from the concerned authorities, among others.

The plan started when President John F. Kennedy initiated a plan to counter the insurgent movement in early 1961, which includes the development of herbicides as a weapon in guerilla warfare.<sup>96</sup> By the time the herbicides were ready to be used, he was reluctant to use them.<sup>97</sup> Despite the hesitation, he eventually authorized the spraying of the colour-coded herbicides to South Vietnam’s forest a year after its development started.<sup>98</sup> All of those is to deny them safe haven and cover of the *Viet Cong*,<sup>99</sup> among others.

From the fact given above, it is evident that President Kennedy, who at that time held the command in the military,<sup>100</sup> had the specific intent to use the dioxin-contaminated herbicides to destroy the environment in Southern Vietnam. The destruction was intended to defeat their (human) adversaries, but nevertheless, it was directed towards the natural environment—not the people. His administration also clearly states that by using the herbicides, they are not targeting the human.<sup>101</sup> Therefore, the requirement of “willful” is met.

For the sake of completeness, the recent precedents set by international criminal tribunals shall be seen. There are several precedents that define what “willful” means. In ICTY’s Appeals Chamber *Strugar*, “willful” *mens rea* refers to an act that is done

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95 43<sup>rd</sup> Session ILC Report, 107., para. 6.

96 Olson and Morton, “Long-Term Fate of Agent Orange and Dioxin TCDD Contaminated Soils and Sediments in Vietnam Hotspots,” 15.

97 Sills, *Toxic War: The Story of Agent Orange*, 36.

98 R. Scott Frey, “Agent Orange and America at War in Vietnam and Southeast Asia,” *Human Ecology Review* 20, no. 1 (2013): 3.

99 Westing, “Ecological Effects of Military Defoliation on the Forest of South Vietnam,” 893.

100 US Constitution, Art. II Sect. 2.

101 Hynes, “The Legacy of Agent Orange in Vietnam,” 116.

in wrongful intent, or recklessness, but not mere negligence.<sup>102</sup> The deliberateness and recklessness threshold of “willful” also dubbed in *Galić*.<sup>103</sup> This poses a different threshold from what was set in the 1991 Draft Code, as the latter allows the negligence to be incorporated under the “willful” *mens rea*. After all, environmental destruction in the recent days was a result of a non-intended action.<sup>104</sup>

### 3. The “universally criminal” Aspect of Ecocide

In defining what is “universally criminal,” Heller provides 2 (two) theses, which are DCT and NCT. In the positivistic regime of international criminal law, NCT is more favoured rather than DCT for reasons provided in the previous section. Thus, the analysis of whether Article 26 of the 1991 Draft Code *in casu* ecocide constitutes an international crime is, although not limited, focused on the NCT.

The main idea of NCT is that an act deemed universally criminal does not come from international law, rather it comes from states’ (domestic law) that recognize such act as universally criminal. The justification of an act as “universally criminal” can be found in the following forms or bases. *Firstly*, the existence of a multilateral treaty that obligates its parties to criminalize a particular act in their domestic law. This treaty may include a widely ratified law-making treaty. *Secondly*, the numerous states that criminalize such acts domestically by virtue of their national laws. *Thirdly*, the affirmation contained in the UNGA Resolution for states to domestically criminalize a specific act. To answer whether ecocide is an international crime, it needs proving of the existence of at least 1 (one) of the mentioned justifications above.

#### a. International treaty that incriminates ecocide

*Firstly*, about the existence of a multilateral treaty that obliges to criminalize ecocide. If we see Article 26 of the 1991 Draft Code, it is perhaps apparent that no such treaty exists up until this chapter was written, as it is not enumerated into a binding and in force treaty. Article 26 of the 1991 Draft Code shows a *prima facie* fact that it does not serve as a multilateral treaty, hence not satisfying the first justification.

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102 Strugar, par. 270.

103 Galić, par. 54.

104 Greene, “The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?”, 33.

However, as ecocide does not only cover Article 26 of the 1991 Draft Code, but it is also worth discussing whether other definitions of “ecocide” or its “close relative” can fulfil this first justification. Essentially, ecocide means “various measures of devastation and destruction which [...] aim at damaging and destroying the ecology of geographic areas to the detriment of human life, animal life and plant life.”<sup>105</sup>

Several, if not many, international environmental treaty possesses a provision that requires its State Parties to criminalize a certain act within their national law, for instance, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (‘Basel Convention’), Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (‘Oslo Convention’),<sup>106</sup> Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter (‘London Convention’),<sup>107</sup> and Convention for the Prevention of Marine Pollution by Dumping from Land-Based Sources (‘Paris Convention’).<sup>108</sup>

Those international environmental treaties clearly exhibit the existence of an obligation for State Parties to criminalize a certain environmental action. However, as close as these environmental treaties with ecocide (due to the similar “environmental destruction” nature), they are not *per se* the same. Ecocide is broader and most importantly, the said environmental treaties only cover a specific regime (i.e., dumping prohibition, waste, etc.). Therefore, even though several environmental prohibitions had fulfilled the first justification of “universally criminal,” ecocide does not.

#### **b. Ecocide on domestic law**

*Secondly*, regarding the justification on the basis of states’ national laws that criminalize ecocide. Several states had incorporated the crimes of ecocide, or environmental destruction in general, into their national law. These states, among others, are Vietnam,<sup>109</sup> Russian

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105 John H. E. Fried, “War by ecocide: some legal observations,” *Bulletin of Peace Proposals*, no. 1, (1973): 43.; in Ruhashyankiko., par. 462.

106 Oslo Convention; in Byung-Sun Cho, “Emergence of an International Environmental Criminal Law?,” *UCLA Journal of Environmental Law and Policy* 19, no. 1 (2000): 15.

107 London Convention; in Cho., 15-7.

108 Paris Convention; in Cho., 15-7.

109 Vietnam Penal Code, Art. 342.

Federation,<sup>110</sup> Armenia,<sup>111</sup> Belarus,<sup>112</sup> Tajikistan,<sup>113</sup> and several others former Uni Soviet States.<sup>114</sup> In its English translation, Vietnam, Russian Federation, and Armenia even used the word “ecocide”. Article 342 of the Vietnam Penal Code stated that:

Those who, in **peacetime** or **wartime**, commit acts of annihilating en-mass population in an area, destroying the source of their livelihood, undermining the cultural and spiritual life of a country, upsetting the foundation of a society with a view to undermining such society, as well as other acts of genocide or acts of **ecocide or destroying the natural environment**, [...].<sup>115</sup>

Further, Article 358 of the Russian Federation 1996 Criminal Code defines ecocide as “Massive destruction of the animal or plant kingdoms, contamination of the atmosphere or water resources, and also commission of other actions capable of causing an ecological catastrophe[...]”. Moreover, Article 394 of the 2003 Armenia Criminal Code defines ecocide as “Mass destruction of flora or fauna, poisoning the environment, the soils or water resources, as well as the implementation of other actions causing an ecological catastrophe [...].”

The question that may arise is on how these available national laws justify ecocide as an international crime, considering its definition of ecocide is not identical. To address this question, it needs to see how other international crimes are in the same case.

If we see the crimes against humanity, it was defined differently even among the international criminal tribunals. For instance, the ICTY Statute defines crimes against humanity as “[...] crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population [...]”.<sup>116</sup> The striking differences between ICTY’s definition and the crimes against humanity enshrined in the Rome Statute are the conditions must be in an armed conflict, where the Rome Statute version does not require so (i.e., it can occur in peacetime). The ICTY’s version of crimes against

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110 Russian Federation 1996 Criminal Code, Art. 358.

111 Armenia Criminal Code, Art. 394.

112 Belarus Criminal Code, Art. 131.

113 Tajikistan Criminal Code, Art. 400.

114 Sailesh Mehta and Prisca Merz, “Ecocide – a New Crime against Peace?,” *Environmental Law Review* 17, no. 1 (2015): 5-6.

115 Vietnam Penal Code.

116 ICTY Statute, Article 5.

humanity also does not require the crimes to be committed in either a widespread or systematic manner, contrary to what the Rome Statute requires.

Such differences, however, does not negate the fact that crimes against humanity are an international crime—even justified under NCT.<sup>117</sup> This is perhaps because they still possess the same core: a crime violating human rights directed towards the civilian population.

If we apply the same logic to the current issue of ecocide, the existence of states that criminalize ecocide in their respective legislation might fulfil this justification. The differentiated definitions of ecocide provided by states, in essence, address the destruction of the natural environment. The differences with Article 26 of the 1991 Draft Code lies in the terms used, conditions, and mental elements—for instance, Article 26 of the 1991 Draft Code requires the conduct to be done in a willful manner, while the rest does not specify the intent elements.

However, the number of states that criminalize ecocide shall also be taken into consideration. In determining that, it is related to how many states needed to create a customary international law. This is because the justification basically sees how a certain act is universally criminal by virtue of state's domestic law or practice—one of the requirements for the creation of customary international law.<sup>118</sup>

The practice of states need not be universal,<sup>119</sup> but it must be extensive<sup>120</sup> or widespread.<sup>121</sup> This is not a *per se* quantitative test that must be passed, rather it put primacy on representativeness.<sup>122</sup> It is dubbed in the Dissenting Opinion of Judge Lachs in the *North Sea Continental Shelf* which stated that “[...] essential factor in the formation of a new rule of general international law is to be taken into account: namely that states with different political, economic and legal systems, states of all continents [...]”<sup>123</sup>

In the case of ecocide, the states that has incorporated ecocide as a crime in their respective domestic legislation are not widespread nor

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117 Heller, “What Is an International Crime? (A Revisionist History),” 399.

118 CIL Report, par. 34.

119 ICJ Barcelona Traction, 330.

120 North Sea Continental Shelf, 43, par. 74.

121 ICJ Maritime Delimitation, 102, par. 205.

122 CIL Report, par. 52.

123 Dissenting Opinion of Judge Lachs in the North Sea Continental Shelf, 227.

representative. As noted by Mehta and Merz, states that already did such thing mainly are the former Soviet states.<sup>124</sup> Those states only covers so little geographical representativeness. Despite the rising trends to recognize the right of nature or ecosystems, it does nothing but stress the change in environmental criminal law regime.

Therefore, even with several states having criminalized ecocide under their domestic legislation without a conventional international obligation to do so (i.e., obligation from treaties), the second justification is not fulfilled as the number of states that do so does not cover representativeness.

### **c. Involvement of UNGA**

*Thirdly*, the justification of universally criminal based on the existence of UNGA Resolution that affirms state obligation to criminalize a certain act *in casu* ecocide. To be blatantly said, there is no UNGA Resolution that contains such affirmation and/or obligation. In comparison, for the crimes of genocide, the UNGA Resolution 96(1) obligates all State parties to criminalize genocide in their respective domestic law.<sup>125</sup> As for ecocide, the available UNGA Resolution that is closely related to environmental destruction concerns are rather vague and/or does not explicitly affirm the obligation to criminalize a willfully inflicted widespread, long-term, and severe damage to the natural environment (ecocide). For instance, the UNGA Resolution “Towards a Global Pact for the Environment” creates and mandates an *ad hoc* open-ended working group to “report and discuss possible options to address possible gaps in international environmental law and environment-related instruments” as well as assessing “the scope, parameters and feasibility of an international instrument.”<sup>126</sup> In June 2019, the report produced several recommendations, among others are to affirm the role of the UN Environmental Programme as the leading environmental authority in the scope of implementation, calls members to renew the efforts of implementing the available environmental framework, promoting coherent environmental policy, and strengthening environmental regulations for the betterment of its implementation.<sup>127</sup> Such reports were then endorsed by the UNGA.<sup>128</sup>

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124 Mehta and Merz, “Ecocide – a New Crime against Peace?”

125 UNGA 96(1), par. 6.

126 UNGA Global Pact Resolution, 2.

127 UN Ad Hoc Global Pact Report, 9-11.

128 UNGA Res. 73/333, par. 2.

This UNGA-endorsed report, as apparent in the previous paragraph, does not concretely address the need for an international environmental criminal framework, let alone obligate Member states to criminalize ecocide. There is, in fact, other product from other UN bodies that recommends states to adopt domestic legislation that permits lawsuits against “deliberate, reckless or negligent assaults on the environment that cause or create imminent risks of serious damage, harm or injury.”<sup>129</sup> This was considered at the meeting of the UN Economic and Social Council’s Commission on Crime Prevention and Criminal Justice.<sup>130</sup>

At first glance, this might be the occurrence needed to justify ecocide as a universally criminal act, thus making it an international crime. This Draft Resolution and Report, however, also fails to satisfy the third justification. *Firstly*, it is because the fact the documents did not come from the UNGA, nor does it possess the status of “resolution” (it only serves as a “draft”), which is what it needs for it to be justified in the first place. *Secondly*, the Draft Resolution and Report only “recommends” the states to adopt such domestic legislation. It is important to remember that one of the basic aspects of NCT is for international law to obligate the criminalization of a certain act. Merely recommending or authorizing such criminalization does not suffice the basic aspect of NCT.<sup>131</sup>

Therefore, the absence of UNGA Resolution that obligates the state to criminalize ecocide also effectively rejects the status of international crimes of ecocide—particularly according to the NCT—as none of the 3 (three) justifications was fulfilled. The reasons why states or actors in the international community does not act in accordance with those justifications are beyond the scope of this chapter.

It needs to be pointed out that the conclusive statement above is based on one theory or thesis, which is Heller’s NCT. There are other, more general theories that may justify ecocide as an international crime. For instance, the general theory of *malum in se* (evil nature of the offences) classify an international crime as an act that is inherently wrong due to its evil nature.<sup>132</sup> Using this theory, ecocide is indeed

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129 UN Draft Resolution on Environmental Crime, par. 4-5.

130 Gray, “The International Crime of Ecocide.”, 54.

131 Heller, “What Is an International Crime? (A Revisionist History).”, 391.

132 Stahn, *A Critical Introduction to International Criminal Law*, 19.

an international crime, considering it is a “serious attack against this fundamental interest of mankind.”<sup>133</sup> However, as simple as it may seem, using this general theory is somewhat an unsatisfactory threshold. The theory, which relies on the nature of the conduct or offence, is too arbitrary and subjective.<sup>134</sup> This is also the reason why this chapter uses the NCT threshold, as it provides more certainty and objectivity.

#### **IV. Remembering Vietnam War All Too Well: Concluding Statement**

We could all see now how international criminal law—then and now—treated the overlooked aspect of the Vietnam War. It is indeed uneasy knowing that up until this chapter is written, ecocide has not yet obtained its legality. Consequently, it also denies ecocide as a current member of the infamous group of international crime. If only it was, Vietnam War could be the first major world tragedy that can be adjudicated under the crime of ecocide.

What this chapter hope to do is to keep ecocide from being lost in translation, because perhaps it was a masterpiece that was being torn apart over a disagreement in the treaty-making process (among others). Hence, Vietnam War might need to be a constant reminder to us all what willful destruction of a natural environment that is widespread, long-term, and severe could do if left unchecked.

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133 43<sup>rd</sup> Session ILC Report, 107, par. 1.

134 Stahn, *A Critical Introduction to International Criminal Law*, 19.

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# The Extent of Legal Measures For Victims of Genocide Committed By A Non-Party State of The ICC Under International Criminal Law: The Case Study Of The Uyghurs In Xinjiang, China

*Fitrahanita Ramadhani*

In 2017, the Chinese Government established premises called “Re-Education Camps,” where allegedly Uyghur and other Muslim ethnic minorities – allegedly – voluntarily attend to be given education to improve their skills and employment rate. However, it is reported by numerous human rights organizations that the Chinese Government implemented harsh treatments to the Uyghurs and other Muslim ethnic minorities to give up on their religion and to adhere to China’s communist idealism. Despite the overarching implication, this research seeks to analyse that the conducts of the Chinese Government constitute as Genocide against a religious group, as well as to map the extent of legal measures that can be taken to prevent impunity. This research comes to a conclusion that *firstly*, the actions committed by the Chinese Government towards the Uyghurs constitute as Genocide and *secondly*, even though a number of legal measures are available under international criminal law (i.e. referring the situation to the ICC; exercising conditional universal jurisdiction; and invoking the UNGA’s), the enforcement of said measures is politically charged since China is a state that holds a considerable amount of political power.

**Keywords:** Genocide, ICC, Uniting for Peace Resolution, Universal Jurisdiction, Uyghur.

## I. Introduction

International criminal law is a branch of international law that focuses on combating impunity concerning international crimes.<sup>1</sup> It is relatively new as it first gained the attention of the international community post-World War II<sup>2</sup> and is developing rapidly, as seen from the increasing jurisprudence of various international tribunals designated for international criminal law.<sup>3</sup>

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1 Payam Akhavan, “Can International Criminal Justice Prevent Future Atrocities?” *The American Journal of International Law* 95, (2001): 31.

2 Gerry Simpson, *Law, War and Crime: War Crimes, Trials and the Reinvention of International Law* (Cambridge: Polity Press, 2007), 53.

3 Robert Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wilmhurst, *An Intro-*

Despite its rapid development, international criminal law's main focus remains the same, which is prosecuting the perpetrators<sup>4</sup> and protecting the victims<sup>5</sup> of international crimes. These are crimes that are not only grand in terms of scale but also affect and draw the most concern from the international community. The past international criminal tribunals<sup>6</sup> and the ICC have categorised four types of international crimes, namely: Genocide, Crimes against Humanity, War Crimes, and Crimes of Aggression.<sup>7</sup>

This legal research will try to assess a situation in China that may fall under the ambit of Genocide. It asks whether China's aggressive actions towards an ethnic group constitute Genocide and what is the parameter for its settlement according to international criminal law.

Said aggressive behaviour by the Chinese Government is their discriminating and often inhumane treatment of an ethnic group called the Uyghurs. This dates back as far as 1949<sup>8</sup> until today. Though there have been many policies issued by the Chinese Government throughout the years, this research narrows its focus on the increasing tension caused by the Re-education Camp, highlighting the forced transfer, detention, and the horrendous conducts of the Chinese Government inside the Re-education Camp that are directed towards the Uyghurs.

From 2017 onwards, the Chinese Government is undertaking a series of actions towards the Uyghurs – basing them off of the Uyghur's ethno-religious identities.<sup>9</sup> These actions include mass-

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*duction to International Criminal Law and Procedure 2nd Edition* (New York: Cambridge University Press, 2010), 3.

4 M. Cherif Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Court," *Harvard Human Rights Journal* 10, (1997): 11 – 15.

5 Article 64 of the Rome Statute; Michael Bachrach, "The Protection and Rights of Victims under International Criminal Law," *The International Lawyer* 34 (2000): 17.

6 Article 1 - 5 of the ICTY Statute and Article 2 - 4 of the ICTR Statute.

7 Article 5 of the Rome Statute.

8 Thierry Kellner, "China: The Uighur Situation from Independence for the Central Asian Republics to the Post 11 September Era," *WRITENET*, (2002): 1; Dru C. Gladney, "China: Prospects for the Uighur People in the Chinese Nation-state: History, Cultural, Survival, and the Future," *WRITENET*, (1999): 2.

9 Human Rights Watch Report, "Eradicating Ideological Viruses: China's Campaign of Repression Against Xinjiang's Muslims," <https://www.hrw.org/>

detention,<sup>10</sup> torture,<sup>11</sup> and mass indoctrination for the Uyghurs to abandon their Uyghur and Muslim identity<sup>12</sup> at the Re-education Camp. The Re-education Camp allegedly holds captive over hundreds of thousands to one million Uyghurs.<sup>13</sup> Admittedly, there is no official report or information on the exact number of Uyghur detainees, but many reports by international organisations and international media indicate that the number of victims is increasing yearly.<sup>14</sup> Further, there are reports of missing detainees<sup>15</sup> and some were reported dead in detention.

Due to the aforementioned facts, various publications had responded by stating that the situation concerning the Uyghurs is very massive in scale; referring to it as ‘the next most extensive ethno-religious cleansing, possibly amounting to the crime of Genocide’.<sup>16</sup> However, China has declared what it has done in the past two years are not Genocidal acts, but counter-terrorism policies, as there had been terrorist attacks happened in Xinjiang fueled by religious campaigns held and/or led by what was so-called “extremists”.<sup>17</sup>

Seeing the degree of seriousness of this situation concerning the Uyghurs, it is imperative that the international community mobilise every possible means of stopping this horrendous phenomenon that is

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- report/2018/09/09/eradicatingideological-viruses/chinas-campaign-repression-against-xinjiangs (accessed 10 February 2019).
- 10 Amnesty International, “China: Families of up to one million detained in mass “re-education” drive demand answers,” <https://www.amnesty.org/en/latest/news/2018/09/chinaxinjiang-families-of-up-to-one-million-detained-demand-answers/>, (accessed 10 February 2019).
  - 11 World Uyghur Congress, “Uighur Crackdown: ‘I Spent Seven Days of Hell in Chinese Camps.’” <https://www.uyghurcongress.org/en/?p=37409>, (accessed 11 February 2019).
  - 12 LapYan Kung, “National identity and ethno-religious identity: A critical inquiry to Chinese religious policy, with reference to the Uighurs in Xinjiang”, *Religion, State & Society* 34, no. 4 (2006): 377.
  - 13 Amnesty International, “China: Families of up to one million detained in mass “re-education” drive demand answers.”
  - 14 Human Rights Watch Report, “Eradicating Ideological Viruses: China’s Campaign of Repression Against Xinjiang’s Muslims.”
  - 15 Nodirbek Soliev, “Uyghur Violence and Jihadism in China and Beyond.” *Counter Terrorist Trends and Analyses* 1, no. 1 (2019): 73.
  - 16 Haiyin Yang, “When the World Wasn’t Looking, China Built the ‘Perfect Dictatorship’ Japan Forward, <https://special.sankei.com/f/seiron/article/20181225/0001.html>. (accessed 23 February 2019).
  - 17 *Ibid.*

taking place in China. For this research, it is to research and analyse the situation and come up with a number of possibilities of settling the chaos.

It is vital to first establish the existence of Genocide before discussing the extent of protection the victims are entitled to. Hence, this research seeks to analyse whether the situation concerning the Uyghurs constitutes a crime of Genocide in the first place and whether China's "anti-terrorism" policies argument could withstand the test of Genocide and serve as a justification.

Unfortunately, to what extent international law could facilitate justice for the Uyghurs remains a dilemmatic question. As it is a branch of law with limited institutions, the forum to which this matter could be brought to is fairly limited – in number and incapacity.

In terms of numbers, the only judicial bodies under international law's scope available to hear matters concerning atrocities such as this are the ICC and, to some extent, the ICJ. In terms of capacity, both the ICC and the ICJ have a limit(s) in their capacity to hear a case. An example of the institutions' incapability in providing solutions is how far the ICC could adjudicate this situation as an international crime. Even if China's conduct falls under one or more of ICC's definitions of international crimes, it may be barred from adjudicating China as it is a Non-Party State of ICC's Rome Statute. Here, though ICC is able to recognise this situation as an international crime, it is not capable of fully resolving the issue at hand.

Having said all the above, this research pursues the situation concerning the Uyghurs in the Xinjiang region in the hope that it contributes to the studies of international criminal law, with emphasis on the studies of Genocide within ICC's legal framework.

With its aforementioned purpose in mind, this research has one main research question it aims to answer: what is the extent of protection available for the victims of the crime of genocide committed by China, a Non-Party State of the ICC.

In the attempt of answering the aforementioned main research question, this research divides its analysis into three sub-questions, namely: (1) how does the current situation concerning the Uyghurs fulfil the threshold to be considered as Genocide and (2) what is the parameter of legal remedies available for the Uyghurs under international criminal law.

## 1. The Situation in Uyghur as a crime of Genocide

Before discussing the forms of legal remedies available for victims of Genocide under international criminal law, it is imperative that the crime in question exists to ensure the atrocities concerning the Uyghurs is indeed a subject matter of international criminal law in the first place to ensure its basis under the international legal system. Having said that, the facts and situations surrounding the Uyghur must satisfy a certain threshold that establishes the crime of Genocide.

The analysis on whether or not the situation concerning the Uyghur falls under the ambit of Genocide is not only beneficial to gauge how ICC's role as a provider of legal remedies, but also to determine the outcome of another alternative such as the exercise of universal jurisdiction.

Under this subsection, we will dive deeper into (a) the definition of Genocide under international criminal law and (b) the situation in Uyghur and whether it falls under the ambit of Genocide.

### a. The Crime of Genocide: History, Development, and Definition under International Criminal Law

Along with Crimes against Humanity, War Crimes, and Crimes of Aggression, Genocide is considered as the world's most heinous crime in the course of humanity's history, later on, dubbed as "international crimes". As to its heinous nature, we need to look back at how the crime of Genocide played out throughout history.

The crime of Genocide is a twentieth-century concept, but the types of destructive behaviours it referred to go far back in time.<sup>18</sup> Throughout the years of its existence, the crime of Genocide carries with it its variety of forms – from the omission of indigenous community's poor living conditions due to starvation, forced labour, or them contracting disease(s) on the basis of this particular group being viewed as "backwards" or "savage"<sup>19</sup> to the annihilation of certain undesirable groups within a particular society.<sup>20</sup>

The concept of Genocide as one form of international crime was first brought to the international community's attention by Polish

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18 Alexander Laban Hinton, *Annihilating the difference: The Anthropology of Genocide* (Los Angeles: University of California Press, 2002), 7.

19 Nicole Rafter, *The Crime of All Crimes: Towards a Criminology of Genocide* (New York: New York University Press, 2016) 3-4.

20 *Ibid*, 132.

jurist Raphaël Lemkin in 1944,<sup>21</sup> considerably far before ICC was established in 2002. He mostly defined Genocide primarily as a “technique in German occupation practice during the Second World War,” and put forth that government should no longer be allowed to destroy its own citizen with impunity.<sup>22</sup>

As international criminals entered the era of codification, international crimes and the prosecution thereof developed rapidly. The idea of international codification was sparked in 1946 when the UNGA passed a resolution proclaiming that Genocide deprived the right to existence of a group, and viewed Genocide generated losses to humanity in terms of culture and other possible contributions.<sup>23</sup> From this era forward, codifications of the definition and elements of international crimes can be found, Genocide included. Today, the crime of Genocide is widely known to be codified under the Genocide Convention and most recently, the Rome Statute of the International Criminal Court (‘Rome Statute’).

**b. The Situation in Uyghur and Whether It Falls under the Ambit of Genocide**

Currently, the crime of Genocide is governed under two separate entities – the Genocide Convention and the Rome Statute. As this part of the research aims to determine the proper definition of Genocide, it is important to assess whether the two regimes – the Genocide Convention and the ICC’s Rome Statute – are able to co-exist.

After considering all the relevant legal instruments, and doctrines on the crime of Genocide, in terms of definition, this research utilizes Rome Statute’s when discussing the crime of Genocide, but put into use both the Rome Statute and the Genocide Convention when analyzing the legal remedies available under international criminal law.

Under the Rome Statute, the definition of Genocide can be found under Article 6. The definition is as follows:

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21 Kunz, “The United Nations Convention on Genocide,” *The American Journal of International Law* 43 (1949): 738.

22 Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, (Washington: Carnegie Endowment for International Peace, 2008), 50.

23 UN General Assembly. The Crime of Genocide, A/RES/96, 11 December 1946.

“For the purpose of this Statute, “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- i. killing members of the group;
- ii. causing serious bodily or mental harm to members of the group;
- iii. deliberately inflicting on the group conditions of life calculated to
- iv. bring about its physical destruction in whole or in part;
- v. imposing measures intended to prevent births within the group;
- vi. forcibly transferring children of the group to another group.”

When analyzing the ICC, it is specially endorsed to first and foremost utilise the Rome Statute. This can be found under Article 21 of the Rome Statute on the applicable laws of the ICC, stating that the ICC shall apply as its main source of law the Rome Statute and other supporting documents such as the Elements of Crime and the Rules of Procedure and Evidence. Hence, the provisions containing the definition of the crime of Genocide contained under Article 6 of the Rome Statute shall be this research’s basis in analysing said crime.

As the rule of thumb, the organs of ICC (e.g. the OTP)<sup>24</sup> and Member States are bound by the Rome Statute—ICC’s and the Member States are bound by the Rome Statute—ICC’s constitutive treaty.<sup>25</sup> It covers the definitions of crimes and the court’s procedure and is the primary source of law for the ICC in adjudicating a case.<sup>26</sup> Going forward, the definition that will be used in interpreting whether the situation in Uyghur falls under the ambit of Genocide.

As previously discussed, this research utilises the Rome Statute as well as other supporting ICC documents such as the Elements of Crime. Considering that the Rome Statute is in the form of a treaty methods of treaty interpretation apply in the analysis.

Under general international law, rules on treaty interpretation can be found under Articles 31 and 32 of the 1969 Vienna Convention on

24 The Office of the Prosecutor, “Statement to the United Nations Security Council pursuant to UNSC 1593 (2005) – 5 June 2008,” <https://www.icc-cpi.int/NR/rdonlyres/71FC0D56-11FC-41B9-BF39-33FC54F2C2A1/223633/ICCOTP-ST20080605ENG6.pdf>. (accessed 13 April 2019).

25 Sylvia Ngane, “Should States Bear the Responsibility of Imposing Sanctions on Its Citizens Who as Witnesses Commit Crimes before the ICC?” in *Exploring the Boundaries of International Criminal Justice*, ed. Ralph Henham and Mark Findlay (London: Routledge, 2011), 143.

26 Article 21 (1) (a) of the Rome Statute.

the Law of Treaties ('VCLT'). Essentially, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purposes.<sup>27</sup> If, after implementing the rules contained under Article 31, a particular part of the treaty remains ambiguous, obscure, or leads to an unreasonable result, supplementary means may be applied in the interpretation, such as the preparatory work of the treaty or the circumstance surrounding the conclusion of the treaty.<sup>28</sup>

Under ICC's regime, provisions on how to interpret the Rome Statute is stipulated under Article 21(3). The Rome Statute and other sources of law must be interpreted consistently with internationally recognised human rights, and be without any adverse distinction founded on grounds such as gender, age, race, colour, language, religion or belief, political or other opinions, national, ethnic or social origin, wealth, birth or another status.<sup>29</sup>

With rules of interpretation in mind, upon reading ICC's definition of Genocide stipulated under Article 6 of the Rome Statute, two distinct criteria can be found: the special intent (*dolus specialis*) and genocidal acts (*actus reus*). The *dolus specialis* and *actus reus* of Genocide are further elaborated in the ICC's Elements of Crimes. However, the detailed criteria depend on the genocidal acts contained acknowledged by the Rome Statute, namely: Genocide by killing; causing serious mental or bodily harm; deliberately inflicting to the [protected] group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures to prevent birth, and forcibly transferring children of the [protected] group to another group.

As this research aims to analyse a situation that involves forcible deportation of the Uyghurs to so-called Re-education Camps and the alleged organ harvesting, the mode of Genocide that is further discussed under this is Genocide by causing serious bodily or mental harm. Hence, the detailed elements of said form of genocide are: (i) There is serious bodily or mental harm or more persons; (ii) the targeted persons belong to a particular national, ethnical, racial, or religious group; (iii) the perpetrator intended to destroy, in whole or in part, that particular protected group; and (iv) the conduct took

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27 Article 31 (1) of the VCLT.

28 Article 32 (a) and (b) of the VCLT.

29 Article 21 (3) of the Rome Statute.

place in a manifest pattern of similar conduct directed against that group or conducted that could itself affect such destruction.

**i. There is serious bodily or mental harm or more persons**

This first requirement is the *actus reus* of Genocide. This research aims to further dissect Genocide by causing serious bodily or mental harm to members of the protected group as this action is the most evident in the situation concerning the Uyghurs. It is important to note that the bodily or mental harm needs to be significant in order to satisfy this element. Previous international tribunals have held that the harm must go “beyond temporary unhappiness, embarrassment or humiliation” and result “in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.” However, the harm need not be permanent and irreversible.”<sup>30</sup>

A number of conducts that inflict serious bodily or mental harm that has been cited by international criminal tribunals are: acts of torture, rape,<sup>31</sup> sexual violence, and inhuman or degrading treatment.<sup>32</sup> This is not an exhaustive list - other conducts may be able to satisfy this threshold since the seriousness of the harm caused by said conducts must be assessed on a case-by-case basis and with due regard for the circumstances at hand.<sup>33</sup>

In situations concerning the Uyghurs, a number of the recognised conducts have been observed in various human rights reports. Detainees in the Re-education Camps were reported experiencing acts of torture and rape in the event they show resistance to communist indoctrination.<sup>34</sup> Further, other inhumane treatments that have not been discussed in the international criminal tribunal is the force-feeding of non-halal food and alcoholic beverages<sup>35</sup> to detainees, to

30 Claudia Card, “Genocide and Social Death” in *Genocide and Human Rights: An Philosophical Guide*, ed. John K. Roth (London: Palgrave Macmillan, 2005), 67-69.

31 Lisa Sharlach, “Rape as Genocide: Bangladesh, the Former Yugoslavia, and Rwanda,” *New Political Science* 22, (2000): 92.

32 Art. 6(b)(1) of the ICC Elements of Crimes.

33 *The Prosecutor v. Krstić*, Judgement, IT-98-33-T, 2 August 2001, par. 513; *The Prosecutor v. Radovan Karadžić*, Public Redacted Version of Judgement, IT-95-5/18-T, 24 March 2016, par. 543- 545.

34 The New York Times, “You Can’t Force People to Assimilate: So Why Is China at It Again?,” <https://www.nytimes.com/2019/07/16/opinion/china-xinjiang-repression-uyghurs-minoritiesbackfire.html/> (accessed 20 November 2019).

35 Radio Free Asia, “Kazakh and Uyghur Detainees of Xinjiang ‘Re-education Camps’ Must ‘Eat Pork or Face Punishment,’” <https://www.rfa.org/english/news/>

further indoctrinate detainees to abandon their religious beliefs.

Considering the number of reports on genocidal acts committed by the Chinese Government towards the Uyghurs, this research affirms that the requirement of *actus reus* or genocidal acts is fulfilled. To support a conviction for Genocide, the bodily or mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part.<sup>36</sup> Therefore, a mere commission of genocidal acts, regardless of its brutality and number of victims, cannot satisfy the elements of genocide as a whole if it is not committed in line with *dolus specialis* or special intent. The following elements of genocide shall be discussed in light of this.

**ii. The targeted persons of the measures concerned belong to a religious group**

One of the characteristics that differentiate Genocide from other types of crimes is the existence of a target that belongs in the recognized protected groups – national, ethnic, racial or religious group. This research contends that the Chinese Government targets a specific protected group – its Muslim citizens in Xinjiang, China.

As established in *Akayesu Case*<sup>37</sup> as well as in *Kayishema and Ruzidana*<sup>38</sup> determining the existence of a religious group can be done by detecting “a group whose members share the same religion, denomination, or mode of worship.” Since 2017, various measures and/or policies implemented by the Chinese Government are specially designed to “re-educate Muslims to prevent religious extremism”.<sup>39</sup> From this vision alone, it can be deduced that the main target of the measure is their Muslim citizens.

Further, there have been numerous reports on how people in Xinjiang can be transferred and detained in the Re-education Camp’s establishment if the Chinese Government detects any activities indicating the practice of belief, *inter alia* owning a Quran or prayer rugs, and committing acts of prayer (e.g. shalat, fasting). There are also

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uyghur/pork-05232019154338.html. (accessed 20 November 2019).

36 *The Prosecutor v. Nzabonimana*, Judgement and Sentence, ICTR-98-44D-T.31 May 2012, par. 1703.

37 *The Prosecutor v. Akayesu*, Judgement, ICTR-96-4-T, 2 September 1998, par. 514.

38 *The Prosecutor v. Kayishema and Ruzidana*, ICTR-95-1-T, 21 May 1999, par. 98.

39 Mimi Lau, “How China defines religious extremism and how it justifies Xinjiang re-education camps for Muslims,” South China Morning Post, 13 October 2018. <https://www.scmp.com/news/china/politics/article/2168412/how-china-defines-religious-extremism-and-how-it-justifies> (accessed 30 October 2019).

reports on people getting interrogated by local authorities for drastic lifestyle changes such as stopping alcohol and pork consumption.<sup>40</sup> The suspected activities are unique to people practising Islam as their religion.

As far as this research goes, there has been no in-depth analysis on whether the atrocities in Xinjiang is Genocide, let alone analysis on the target of such Genocidal acts. However, it has been cited by a number of reports that what is happening in Xinjiang, China is Genocide towards the Uyghurs as an ethnic group. This research emphasizes that such a view may not be completely wrong, but to see this as Genocide towards an ethnic group may lead to narrowing down the scope of Genocide itself.

Although the Uyghurs are the main casualties of the measures implemented by the Chinese Government, they are not the only ethnic subjected to such policies. Other ethnicities, such as the Kazakhs,<sup>41</sup> Kyrgyzl,<sup>42</sup> and Hui<sup>43</sup> are also reported detained within the Re-education Camps. Further, the Re-education policy and all measures revolving around it are aimed to quash religious extremism, and there is no mention of targeting their cultural heritage.

### **iii. There is the intention to destroy, in whole or in part, the protected group concerned**

The intention to destroy in whole or in part a protected group is the specific intent or *dolus specialis* that distinguishes Genocide from war crimes and crimes against humanity. Even though it is the most difficult to prove explicitly,<sup>44</sup> *dolus specialis* can be inferred

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40 Rachel Harris, "Securitization and mass detentions in Xinjiang: How Uyghurs became quarantined from the outside world, Quartz, 5 September 2018. <https://qz.com/1377394/securitization-and-mass-detentionsin-xinjiang-how-uyghurs-became-quarantined-from-the-outside-world/> (accessed 30 October 2019).

41 Emily Feng, "Illegal Superstition: China Jails Muslims for Practicing Islam, Relatives Say," Jefferson Public Radio, <https://www.wprl.org/post/china-has-begun-moving-xinjiang-muslim-detainees-formal-prisonsrelatives-say>. (accessed 26 February 2020).

42 Gene A. Bunin, "Kyrgyz Students Vanish Into Xinjiang's Maw," Foreign Policy, <https://foreignpolicy.com/2019/03/31/963451-kyrgyz-xinjiang-students-camps/> (accessed 31 March 2019).

43 Joshua Lipes, "Expert Says 1.8 Million Uyghurs and other Muslim Minorities Held in Xinjiang's Internment Camps," Radio Free Asia, <https://www.rfa.org/english/news/uyghur/detainees-11232019223242.html>, 24 (accessed November 2019).

44 *Prosecutor v. Kayishema*, par. 93.; Cecile Aptel, "The Intent to Commit Genocide

from a number of factors surrounding the case. Under this segment, circumstances that are evident in the Uyghur conflict shall be addressed in the attempt of proving the existence of *dolus specialis*.

*Firstly*, *dolus specialis* or special intent can be inferred from the actions and circumstantial evidence, such as words, deeds, or a pattern of purposeful action.<sup>45</sup> High-ranking political figures in Xinjiang, namely Chen Quanguo and Zhu Hailun are tasked to quash the alleged religious extremism in Xinjiang, China. Leaked documents showed that Mr. Chen was the one approving many of the current heavy surveillance and detainment policies directed towards the Uyghurs with Mr. Zhu as the man that is the architect behind said policies.<sup>46</sup> None of the two high-ranking officials in Xinjiang condemns what is happening within the supposed Re-education Camps.

Additionally, intent can be inferred from the existence of a policy or plan to commit Genocide acts. In *Jelisić*, the court held that even though the plan or policy is not a legal ingredient of Genocide, its existence can be used to infer that *dolus specialis*.<sup>47</sup> Said plan or policy does not have to explicitly mention Genocide, but its content should match the circumstances at hand.

In late November of 2019, a number of media companies received 400 pages' worth of leaked documents from the Chinese Government.<sup>48</sup> This document contains the detailed measures down to the guidelines for every layer of officials that deal with the detainees in the Re-education Camp and their family members.

The document also revealed an extensive target screening through a heavy internet surveillance system. In Nizeyimana, genocidal intent was established when the court was presented by facts on soldiers

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in the Case Law of the International Criminal Tribunal for Rwanda", *Criminal Law Forum* 13, (2002): 285.

45 *The Prosecutor v. Nyiramasuhuko et. al.*, Judgement, ICTR-98-42-T. par. 5746-5747.

46 Chun Han Wong, The Wall Street Journal, "China's Hard Edge: The Leader of Beijing's Muslim Crackdown Gains Influence," <https://www.wsj.com/articles/chinas-hard-edge-the-leader-of-beijings-muslim-crackdown-gains-influence-11554655886> (accessed 30 November 2019)

47 *Prosecutor v. Jelisić*, Appeals Judgement, IT-95-10-A, 5 July 2001, par. 48.

48 Austin Ramzy and Chris Buckley, The New York Times, 16 November 2019, "‘Absolutely No Mercy’: Leaked Files Expose How China Organized Mass Detentions of Muslims," <https://www.nytimes.com/interactive/2019/11/16/world/asia/chinaxinjiang-documents.html>.

using lists to separate the Tutsis in Butare University Hospital.<sup>49</sup> In the situation concerning the Uyghurs, the Chinese Government monitors Uyghurs' internet activities via a surveillance system and transfers persons suspected of suspicious religious activities.<sup>50</sup> Even though the situation concerning the Uyghurs happens in a more technologically advanced era, the use of lists and the use of the internet as a method of surveillance both lead to a manifest target screening. This further points to the existence of genocidal intent.

The second layer to this element is “destroying in whole or in part.” Contrary to widespread belief, a perpetrator of genocide does not have to completely destroy the entire protected group. In fact, the ICTY and ICTR upheld that genocidal genocide acts towards just a part of a protected group constitute genocide, as long as the targeted portion must be “a significant enough to have an impact on the group as a whole.”<sup>51</sup> Additionally, the degree of prominence of a targeted portion of the protected group has been a useful consideration in past practices. If a specific targeted part of the group is emblematic or is essential to its survival, the threshold of “destroying in whole or in part” is satisfied.<sup>52</sup>

Applying this to the situation at hand, a significant question rises – what is needed for a religious group to survive? Simply put, a religion, or a group that exercises a certain religion in a given area, practising members<sup>53</sup> as well interaction with the society at large to further spread the teaching itself.<sup>54</sup> As of November 2019, it is estimated that more than two million Muslim Uyghur are detained in the Re-education Camp<sup>55</sup> out of less than 10 million Uyghurs and other Muslim ethnic

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49 *The Prosecutor v. Nizeyimana*, Judgement and Sentence, ICTR-2000-55C-T, 19 June 2012, par. 1512.

50 Rebecca Clothey, and Emmanuel F. Koku, “Oppositional consciousness, cultural preservation, and everyday resistance on the Uyghur Internet.” *Asian Ethnicity* 18, (2017): 360-362.

51 *Prosecutor v. Radovan Karadžić*, par. 555.

52 *The Prosecutor v. Krstić*, Appeals Judgement, IT-98-33-T, 19 April 2004, par. 12-13.

53 Tsering Topgyal, “The Securitisation of Tibetan Buddhism in Communist China,” *Politics and Religion Journal* 6, (2012): 271-273.

54 Fenggang Yang, *Religion in China: Survival and Revival under Communist Rule*, (New York: Oxford University Press, 2011), 23-25.

55 Ben Westcott and Haley Byrd, “US House passes Uyghur Act calling for tough sanctions on Beijing over Xinjiang camps,” CNN, <https://edition.cnn.com/2019/12/03/politics/us-xinjiang-bill-trumpintl-hnk/index.html> (accessed 4

minorities in Xinjiang, China.<sup>56</sup> Although the Re-education Camp allegedly aim to only give “vocational training” for Muslims to avoid religious extremism<sup>57</sup>, what is reported by Human Rights Watch shows that detainees are being forced to completely give up religion and put communism as their way of life. The further report indicated that beatings, torture, rape, and other degrading treatments are given to detainees that show signs of resisting.

Since a considerable number of Uyghur Muslims are detained in the Re-Education Camps to give up their religion, and will certainly receive punishment if they show resistance, their survival as a religious group is undoubtedly at stake. If a person is indoctrinated and tortured up to a point they give up their religion, even if the torture does not lead to death, it will endanger the survival of a religious group’s nonetheless.

In conclusion, considering that the current circumstances infer the existence of genocidal intent and the genocidal actions have been aimed towards a significant number of the Uyghur as a religious group, this research suggests that the elements of *dolus specialis* are satisfied.

#### **iv. The conduct took place in a manifest pattern of similar conduct directed against that group**

This is a contextual element in the crime of Genocide. If read in conduction with other requirements constituting the crime of Genocide, it follows that the commission of one single act (i.e. one torture, one forcible transfer) may amount to an act of Genocide if that single act takes place in a specific context.<sup>58</sup>

In proving the crime of genocide, this contextual requirement is significantly related to the *actus reus* requirement. It must be evident that each of the genocidal acts must take place in the context of a manifest pattern of similar conduct. In *Al Bashir*, it was established that the magnitude, consistency, and planned nature of the crimes are sufficient to demonstrate that the *actus reus* in question is done

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December 2019)

56 Xinjiang Uyghur Autonomous Region Bureau of Statistics, [http://www.xjtj.gov.cn/sjcx/tjnj\\_3415/2016xjtjnj/rkgy/201707/t20170714\\_539450.html](http://www.xjtj.gov.cn/sjcx/tjnj_3415/2016xjtjnj/rkgy/201707/t20170714_539450.html), (accessed 1 December 2019).

57 Amnesty International, 12.

58 H. Von Hebel and M. Kelt, “Some Comments on the Elements of Crimes for the Crimes of the ICC Statute,” *Yearbook of International Humanitarian Law* 3, (2000): 282.

contextually.<sup>59</sup>

Following the analysis mentioned above, this research suggests that the magnitude, consistency, and planned nature of the situation concerning the Uyghurs fulfils this requirement. In terms of magnitude, the situation concerning the Uyghurs has, so far, given rise to more than two million victims and the statistics on victims have only gone up in the past 6 months.<sup>60</sup>

Further, the treatment and goal of the Chinese Government's so-called Re-education Camps have been consistent; the use of Re-education Camp and the tortures within is not only implemented in indoctrinating Uyghurs and other Muslims ethnic minorities to abandon Islam but also to Tibetan Buddhists in the Tibetan Autonomous Region. Tibetan Buddhists have fallen victims to the exact same method, compelling them to abandon religion and "live life as a full-fledged communist believer".<sup>61</sup>

Last but not least, the indoctrination and torture by the Chinese Government are no doubt planned and is detailed. More than 400 pages' worth of manual shed light on the instructions given to officials by the Communist Party, the method of selecting the detainees, and how to deal with detainees' family members.

Having elaborated the ICC's Elements of Crimes on Genocide, this research affirms that the situation concerning the Uyghurs in XUAR, China falls under the ambit of Genocide as prescribed under Article 6 of the Rome Statute. Since the existence of Genocide has been established this research will further analyse the measures available under international criminal law for the victims of the situation in China.

## II. The Available Measures under International Criminal Law

In an ideal international legal system, if there are atrocities

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59 *Situation in Darfur*, Pre-Trial Chamber I, Public Redacted Version of the Prosecutor's Application Under article 58, ICC-02/05 14 July 2008, par. 209. Prosecutor's Application under Article 58, 14 July 2008, par. 209.

60 Uyghur Human Rights Project, "Demolishing Faith: The Destruction and Desecration of Uyghur Mosques and Shrines," [https://docs.uhrp.org/pdf/UHRP\\_report\\_Demolishing\\_Faith.pdf](https://docs.uhrp.org/pdf/UHRP_report_Demolishing_Faith.pdf). (accessed 1 December 2019).

61 Yeshe Dorje, "Tibetan Re-Education Camp Journal Tells of China's Tactics Now Used on Uighurs," VOA News, <https://www.voanews.com/south-central-asia/tibetan-re-education-camp-journal-tells-chinastactics-now-used-uighurs>. (accessed 25 December 2019).

tantamount to any of the four international crimes, ICC should be able to exercise its jurisdiction. Unfortunately, such is true if the ICC does not have any restraints to its jurisdiction. After all, it does not possess universal jurisdiction that enables it to exercise pure jurisdiction over members of the international community.

Under this sub-question, this research aims to measure how far can international criminal law combats impunity by providing legal measures that the Uyghurs and other concerned parties can take. The analysis on the legal measures is laid down in two folds: strictly legal analysis and the applicability of the legal measure, which incorporates possible political aspects surrounding the said measure.

The first legal measure is (1) the ICC, as it is the main institution international criminal law currently has under its legal system. However, other means such as (2) the exercise of Universal Jurisdiction and (3) the invocation of the UNGA's Uniting for Peace Resolution are also discussed as alternatives to ICC.

### **1. ICC as an institution of international criminal law legal framework**

Ever since its establishment, ICC is intended to operate as the international judicial body that international crimes are referred. Its status as the only permanent international criminal tribunal is strengthened by the fact that ICTY and ICTR have finished their mandates. By the time this research is written, ICC is the only remaining active international criminal tribunal that has the authority to try persons who allegedly committed international crimes.

To determine whether the ICC has the authority to try the persons responsible, this research needs to determine whether the atrocities concerning the Uyghurs falls under the ambit of Genocide and whether ICC has the jurisdiction to adjudicate this situation. In the first sub-question, this research has established that the situation concerning the Uyghurs fulfils all the necessary threshold of the test of Genocide prescribed under previous practices of the courts. Under this part of the analysis, this research aims to assess whether ICC has the necessary jurisdiction.

Provisions on ICC's jurisdiction are contained under Article 13 and 12 of the Rome Statute. Hence, this sub-section seeks to analyze ICC's trigger mechanism and its prerequisite. Furthermore, this research also aims to apply the current practice and theories on ICC's

jurisdiction to the situation concerning the Uyghurs to see whether it is possible for the ICC to be able to exercise its jurisdiction.

According to Article 13(a) of the Rome Statute, State Parties have a right to bring the prosecutor's attention by means of a referral. Once a referral is made, ICC's jurisdiction is activated over all the crimes that may have been committed.<sup>62</sup>

Originally, with this right, State Parties of the ICC are expected to be watchdogs against any crime under ICC's jurisdiction. However, diplomatic discomfort and a State's national political agenda have proven to be a hindrance.<sup>63</sup> This is also the main reason why Referrals have only been made by State Parties with regards to international crimes that occurred within their own territory, and never the territory of other States.<sup>64</sup> This practice is what is referred to as 'self-referrals.'

Under Article 13(b) of the Rome Statute, the UNSC enjoys a referral, just like State Parties. However, from reading both Article 13 and 12 of the Rome Statute, it can be inferred that the UNSC enjoys a broader referral right compared to States Parties; its referrals do not have to underlie any pre-condition, unlike State Parties' that must be done in accordance with the precondition to the exercise of jurisdiction stipulated under Article 12.

So far, the UNSC only used its power twice in the *Situation in Darfur* as well as in the *Situation in Libya*. Unfortunately, the referral generated a lot of criticism that praise since the referral might possibly be driven by the UNSC members' political interests.<sup>65</sup> Further, UNSC's referral on the *Situation in Darfur* highly disappoints the victim as it offered no measure for the victims to obtain compensation.<sup>66</sup> Whereas the *Situation in Libya* was terminated due to the passing of Muammar Gaddafi and inadmissibility of the remaining cases due to the cases being handled by Libya's judicial system.

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62 *Situation in the Democratic Republic of the Congo*, Decision requesting clarification on the Prosecutor's Application under Article 58, ICC-01/04-575, 11 October 2010, par. 6-8.

63 William A. Schabas, *An Introduction to International Criminal Court 4th Edition* (New York: Cambridge University Press, 2011), 159.

64 Mauro Politi, *The International Criminal Court and National Jurisdictions* (Hampshire: Ashgate Publishing, 2008), 49.

65 Luigi Condorelli and Annalisa Ciampi, "Comments on the Security Council Referral of the Situation in Darfur to the ICC," *Journal of International Criminal Justice* 3, (2005): 595.

66 *Ibid*, 598-599.

The OTP is an organ independent from the ICC and State Parties. Its independent nature can be seen from the considerable amount of power that it is bestowed to by the Rome Statute.<sup>67</sup> The one that was highly debated among drafters of the Rome Statute was the prosecutor's *proprio motu* power, enabling them to initiate an investigation based on their official capacity as ICC's prosecutor.

From all the three trigger mechanisms, Referral by State Parties and the prosecutor's *proprio motu* power is subject to pre-requisite stipulated under Article 12(2) of the Rome Statute. It calls for referrals by State Parties and the exercise of *proprio motu* power to adhere to objective territorial or personal jurisdiction. This prerequisite under Article does not apply to UNSC Referral. Hence, if the circumstances surrounding a particular situation (e.g. the perpetrator and the location where the situation took place) fail to fulfill the prerequisite prescribed by Article 12(2), the ICC relies solely on UNSC referral to be able to exercise its jurisdiction.

Despite not adopting universal jurisdiction as its jurisdictional concept, ICC has the UNSC Referral as a tool to exercise its jurisdiction in a Non-Party State. However, Security Referrals, especially in cases related to "powerful" Non-Party States such as China, depend almost exclusively on international politics and may not be available in near future. In other words, ICC as the institution to settle the situation is very unlikely.

At the time when this research is being written, the genocidal acts committed by the Government happened strictly within the Chinese territory. The internment-like Re-education Camps are scattered within the Xinjiang area, and the ones being detained are Chinese citizens that embrace Islam as their religion. So far, none of the Chinese Government's genocidal acts is executed towards Uyghurs outside the Chinese borders.

Therefore, although the actions taken by the Government constitute Genocide, the ICC still cannot exercise its jurisdiction by either the prosecutor's *proprio motu* power or State Party referrals as both of these measures rely on territorial and personal pre-requisite stipulated under Article 12(2) of the Rome Statute. Unfortunately, the ICC has to rely solely on referral from the UNSC to reach a Non-

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67 Article 15 of the Rome Statute; Nidal Nabil Jurdi, *The International Criminal Court and National Courts: A Contentious Relationship* (London: Routledge, 2016), 97.

Party State such as China.

UNSC Referral is no doubt a powerful trigger mechanism. However, it may only be effective towards States that do not impede the Permanent Members' political agenda. *In case*, there has been no referral by the UNSC, but it is almost canon that the UNSC will not be able to issue a referral as this situation involves China, a State that is both a Non-Party State of the ICC and Permanent Member of the UNSC. Unless China's national political agenda on anti-terrorism shifts significantly, a referral from UNSC is highly unlikely.

## 2. The exercise of universal jurisdiction by States

Universal jurisdiction in criminal matters, as an additional ground of jurisdiction, is defined as the competence of a State to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or other grounds of jurisdiction recognized by international law.<sup>68</sup>

Universal jurisdiction is not a new concept: it dates back even before the four core international crimes were established. After the conclusion of the Second World War, universal jurisdiction found a basis in other offences, namely: Genocide, Crimes against Humanity and War Crimes, crimes that are now frequently cited as the "core international crimes".<sup>69</sup> It is observed that, after the Second World War, the invocation of universal jurisdiction revolved around the crimes of Crimes against Humanity, and War Crimes.<sup>70</sup>

The opinion on universal jurisdiction's legitimacy under international law is split - it has garnered much support as a tool to combat impunity, but the criticism it reaped cannot be denied. Under international law itself, the support on universal jurisdiction can be found under many case laws, such as the infamous *Eichmann*<sup>71</sup> and

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68 Institut de Droit International, "Resolution on Universal Criminal Jurisdiction with Regards to the Crime of Genocide, Crimes against Humanity, and War Crimes," [www.idi-il.org/idiF/resolutionsF/2005\\_kra\\_03\\_fr.pdf](http://www.idi-il.org/idiF/resolutionsF/2005_kra_03_fr.pdf). (accessed 12 October 2019).

69 *Rex v Kidd* (1701) 14 How St Tr 123, 3.

70 Mark Chadwick, "Modern Developments in Universal Jurisdiction: Addressing Impunity in Tibet and Beyond," *International Criminal Law Review* 9 (2009): 4.

71 *Attorney General v. Adolf Eichmann*, Judgement, District Court of Jerusalem Criminal Case No. 50/61, 11 December 1961, 76.

*Pinochet* as well as international treaties.<sup>72</sup> As it is an attractive tool, starting from the late '90s to the early 2000s, more states started prescribing laws enabling them to exercise universal jurisdiction.<sup>73</sup>

Despite more practices in universal jurisdiction, to say that universal jurisdiction is a commonly understood concept by states around the world would be hopeful. As recent as 2009, it was discovered that the vast majority of member states do not fully comprehend the concept of universal jurisdiction.<sup>74</sup> This lack of mutual understanding leads to the high tendency of abuse universal jurisdiction is known for.

In certain points of the early 2000s, many States deemed that the doctrine of universal jurisdiction is heavily abused and misunderstood. The opinion got stronger support after Belgium and Spain implement unconditional or pure universal jurisdiction. In response, many scholarly works promoting a more "limited" or "constrained" version of universal jurisdiction emerged.<sup>75</sup>

To counter further abuse of the doctrine, the requirements of exercising conditional universal jurisdiction are established, namely: (i) the prosecuting State recognises exercise of universal jurisdiction and Genocide as a crime under their national legal system and (ii) the presence of the perpetrator of the said international crime(s) within the territory of the prosecuting State.

For a State to be able to exercise universal jurisdiction in relation, the fundamental requirement is that it has to recognise the exercise of universal jurisdiction and the international crime in question under its national legal system, with the term "recognises" referring to the codification of law(s).<sup>76</sup>

Hence, in situations concerning the crime of Genocide committed

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72 Mitsue Inazumi. *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes Under International Law*. (Utrecht: Intersentia, 2005), 84.

73 *Ibid.*

74 Sienho Yee, "Universal Jurisdiction: Concept, Logic, and Reality" in *Research Handbook on Jurisdiction and Immunities in International Law*, ed. Alexander Orakdelashvili (Cheltenham: Edward Elgar Publishing Ltd, 2015), 76-77.

75 General Assembly, "Universal Jurisdiction Principle Must Be Defined to Avoid Abuse, Endangerment of International Law, Sixth Committee Hears as Debate Begins," <https://www.un.org/press/en/2014/gal3481.doc.htm>. (accessed 10 November 2019).

76 Inazumi, "Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes Under International Law," 214.

towards the Uyghurs, States that are eligible to exercise universal jurisdiction are the ones that incorporate laws on the recognition of universal jurisdiction and on the recognition of the crime of Genocide as a crime under their national legal system.

In terms of the recognition of Genocide as a crime under the national legal system, how the national legal system defines Genocide as a crime must not stray away from the one adopted under the international legal standard.<sup>77</sup> As an example, a State cannot prosecute atrocities that fall within the ambit of genocide or crimes against humanity under a mere murder charge.<sup>78</sup> Simply put, it has to charge the atrocities concerned with its respective domestic counterpart instead of charging it with regular domestic crimes.

From a 2012 survey conducted by Amnesty International, there are at least 118 (approximately 61.1%) the UN Member States have recognised Genocide as a crime under their domestic legal system and around 94 Member States have incorporated clauses on universal jurisdiction in prosecuting Genocide under their national laws.<sup>79</sup> Considering that the requirement calls for the recognition of both universal jurisdictions, there are 64 States that can exercise universal jurisdiction. The snapshot of candidate States and the relevant provisions on their respective domestic laws on universal jurisdiction and the crime of genocide can be found under Annex I of this research.

From the report, it can be concluded that there are more than 50 candidate States that are able to exercise universal jurisdiction with respect to the alleged genocide that is currently happening in Xinjiang, China. Two of which are states that are in geographic proximity to Xinjiang, where the atrocities towards the Uyghurs are taking place.

In terms of practicality and evidence gathering, universal jurisdiction is best exercised by China's neighbouring States, especially those in Xinjiang's proximity (i.e. Kyrgyzstan, Kazakhstan). Not only do these two States have the geographical advantage, these States are also where a number of Uyghurs have fled to seek shelter.<sup>80</sup>

77 A. Hays Butler, "The Doctrine of Universal Jurisdiction: A Review of the Literature," *Criminal Law Forum* 11, (2000): 56.

78 Anthony J Colangelo, "The Legal Limits of Universal Jurisdiction," *Virginia Journal of International Law* 47, (2007): 38.

79 Amnesty International, "Universal Jurisdiction: A Preliminary Survey of Legislation around the World – 2012 Update," <https://www.amnesty.org/download/Documents/24000/ior530192012en.pdf>. (accessed 1 December 2019).

80 Jeff Sahadeo and Russeil Zanca, *Everyday Life in Central Asia: Past and Present*,

The exercise of universal jurisdiction is not limited only to States that are in proximity to where the core international crimes are perpetrated. In line with the advancement of technology, technicalities to investigation and proceeding do not hamper States further away to exercise universal jurisdiction. According to recent practices, States such as France,<sup>81</sup> Germany<sup>82</sup> and Finland<sup>83</sup> have been successful in investigating the perpetrators of Genocide, Crimes Against Humanity, and War Crimes that are present within their jurisdiction. All 50 candidate States may exercise universal jurisdiction if the following requirement on the presence of the accused is fulfilled.

The second of universal jurisdiction's requirements is the presence of the perpetrator within the prosecuting State's territory. This requirement is what distinguishes the early form of universal jurisdiction and the modern one that is still practiced by States. Previously, States who sought to exercise universal jurisdiction did not have to ensure that the perpetrator is not within their jurisdiction. This form of jurisdiction is called to 'pure' universal jurisdiction, an earlier form of universal jurisdiction that enables a State to exercise universal jurisdiction even though there is no link that connects that State to a particular situation.<sup>84</sup>

The timing of said presence thus deserves a more in-depth discussion. A number of scholarly works suggest that the perpetrator's presence may not be short (e.g. brief visit for medical or vocational purposes) as there would be no time to conduct preliminary criminal proceedings leading to the issuance of an indictment.<sup>85</sup> In Switzerland, the perpetrator does not have to be present all the time – they only need to be present at the opening of the proceedings.<sup>86</sup> In Canadian legislation, the perpetrator only needs to be present "at some time in Canada" after the commission of the offence and that he or she is

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(Bloomington: Indiana University Press, 2007), 339 – 341.

81 Trial International, "Tito Barahira," <https://trialinternational.org/latest-post/tito-barahira/#section-4>. (accessed 10 December 2019).

82 Trial International, "Universal Jurisdiction Annual Review 2018," <https://trialinternational.org/wp-content/uploads/2018/03/UJAR-Make-way-for-Justice-2018.pdf>. 50.

83 Trial International, "Universal Jurisdiction Annual Review 2018," 20.

84 Cryer, *et. al.*, 45.

85 Antonio Cassese, 593.

86 A v. Ministère Public de la Confédération, Decision of the Swiss Federal Criminal, B and C. Federal Criminal Court, Switzerland, BB.2011.140. 25 July 2012, 31.

present at trial.<sup>87</sup> This Canadian model is similar to the South African model, where the presence of the perpetrator is only required in later stages of the proceedings.<sup>88</sup>

From a strictly legal point of view, the situation concerning the Uyghurs can be settled via conditional universal jurisdiction. As elaborated above, there are a considerable number of candidates that can exercise conditional universal jurisdiction in the event the head(s) of the communist party that is in charge of overseeing Xinjiang is present within their territory.

Hence, from the observation of the gravity of the crime, the situation concerning the Uyghurs in Xinjiang, China is one that warrants the exercise of universal jurisdiction. From a legal perspective and assuming that the requirements mentioned above are satisfied, the exercise of universal jurisdiction is feasible to ensure that the perpetrators will not go unpunished.

The doctrine of universal jurisdiction, as ideal as it seems, is laden with difficulties, one of which is international politics. This is especially true if it is to be applied in the situation concerning the Uyghurs in Xinjiang, China. Even if there is a State that satisfies all the criteria to exercise conditional universal jurisdiction, said State's political agenda with China highly determines whether or not universal jurisdiction will take place in the first place. Considering China's strategic international politics, be it in affairs concerning the economy or security with its neighbouring States,<sup>89</sup> universal jurisdiction can only be possible if done by States that rely heavily on China in their international affairs.

If applied against the Chinese Government, universal jurisdiction's reliance on the host State's national authorities complicates the implementation of universal jurisdiction against China. By nature, the Chinese Government is heavily censored, especially in state policy that is often highly confidential. In this case, the gathering of information, evidence, and commencement via universal jurisdiction

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87 Robert J. Currie, *International and Transnational Criminal Law* (Toronto: Irwin Law, 2010), 236.

88 South African Litigation Centre and Others v. the National Director of Public Prosecutions and Others, High Court of South Africa. unreported case 77150/09, 8 May 2012, 87-88.

89 Hongyi Lai and Yiyi Lu, *China's Soft Power and International Relations* (New York: Routledge, 2012), 21-22.

is highly ineffective.

In conclusion, assuming the requirements to universal jurisdiction are fulfilled, invoking it in the effort of settling the atrocities committed towards the Uyghurs is, legally, possible. However, despite legally fulfilling all the requirements, the exercise of universal jurisdiction is laden with issues caused by political agenda.

### **3. Invoking the UNGA's Uniting for Peace Resolution via an emergency special session**

Currently, the news on China allegedly committing Genocide has alerted some of the most trustworthy Non-Governmental Organizations such as the Amnesty International<sup>90</sup>, China Tribunal<sup>91</sup>, and Human Rights Watch.<sup>92</sup> Despite the uproar of the international community, there is little to no official response from bodies of the UN dedicated to maintaining international peace and security, especially the UNSC.

The invocation of UNGA's Uniting for Peace Resolution is useful to address situations in which the UNSC failed to appropriately act on its duties under Chapter VII of the UN Charter on International Peace and Security. In most of the cases where the Emergency Special Session was invoked, the UNSC faced a deadlock in producing a resolution.

The deadlock in UNSC is commonly caused by its Permanent Members' veto; it is the ability of the five permanent members of the UNSC to quash any non-procedural matter with their negative vote, irrespective of its level of international support.<sup>93</sup> The power of veto is not necessarily a hindrance in itself, but it is used to put forth national agenda first before international concerns. Unfortunately, the veto is mostly done to defend the concerned member(s)' national interest.<sup>94</sup>

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90 Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation around the World – 2012 Update*.

91 China Tribunal, "China Tribunal: Final Judgement and Report Hearing 17th June 2019," <https://chinatribunal.com/china-tribunal-final-judgement-and-report-17th-june-2019/> (accessed 30 October 2019).

92 Human Rights Watch, 7.

93 Okhovat Sahar, "The United Nations Security Council: Its Veto Power and Its Reform," *CPACS Working Paper* 15, no. 1, (2011): 3.

94 Security Council, "Research Report on the Veto," [https://www.securitycouncil-report.org/att/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research\\_report\\_3\\_the\\_veto\\_2015.pdf](https://www.securitycouncil-report.org/att/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research_report_3_the_veto_2015.pdf). (accessed 12 November 2019)

From the establishment of the UN in 1946 until today, there has been a considerable amount of veto in the UNSC. Among the concerns the core international crimes, such as Draft Resolution S/2019/756 on the Situation in the Middle East (concerning the Northwestern Syrian offensive);<sup>95</sup> Draft Resolution S/2018/516 on the Situation in the Middle East (concerning the 2018 Gaza Border Protests);<sup>96</sup> and Draft Resolution S/2018/321 on the Situation in the Middle East (concerning the use of Chemical Weapons in the Syrian Civil War).<sup>97</sup>

This practice by the UNSC has sparked a lot of criticism from scholars and law enforcers. Since a reformation on the UN' system (i.e. Amendment of the UN Charter) is unlikely to occur in the near future, invoking the UNGA's Uniting for Peace Resolution has been sought as the way of partially resolving the defect in the current UN's system of upholding international justice and maintaining international peace and security.

Under the Uniting for Peace Resolution, the UNGA may address the matters the Security had failed to act on. However, there are requirements that must be fulfilled. The requirements are stipulated under Part A of the resolution. The relevant passage is as follows:

“If the UNSC, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat of peace, breach of the peace or act of aggression... the UNGA shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures ... to maintain or restore international peace and security... if not in session, the UNGA may meet in emergency special session within twenty-four hours of the request...”<sup>98</sup>

From the reading of the passage above, a number of preconditions must be met before the UNGA can proceed to invoke the resolution, namely: the UNSC must have failed “to exercise its primary responsibility for the maintenance of international peace and

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95 UN Security Council Draft Resolution S/2019/756

96 UN Security Council Draft Resolution S/2018/321

97 UN Security Council. Draft Resolution S/2018/321. [https://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2018/321](https://www.un.org/en/ga/search/view_doc.asp?symbol=S/2018/321). (accessed 15 November 2019).

98 UN General Assembly. Uniting for Peace Resolution. 1950. 377 (V) A, 3 November.

security”; the UNSC’s failure must be occasioned by one reason: the lack of unanimity; and the existence of “a threat of peace, breach of the peace or act of aggression.”

The first precondition is the failure of the UNSC to exercise its primary responsibility for the maintenance of international peace and security. Since the main feature of this requirement is the UNSC’s failure, the word “failure” itself must be properly defined.

The term “failure” is not elaborated further within the Uniting for Peace Resolution or anywhere in the UN Charter. In theory, “failure” is commonly understood as the inaction by the UNSC that leads to the neglect of its Chapter VII duties.<sup>99</sup>

However, “failure” can also refer to the actions of the UNSC that are considered inadequate or inappropriate, to a point that doing said action is regarded as the UNSC discharging its responsibility.<sup>100</sup> An example of this was when the UNSC simply issued a warning to the People’s Republic of China to desist and withdraw from Korea in the late 1950s while the UNGA believed a stronger action was required.<sup>101</sup>

The second requirement is that UNSC’s failure must be due to one reason: lack of unanimity. According to a number of practices in which the Uniting for Peace Resolution is invoked, the lack of unanimity is best described as the UNSC not being able to agree on a draft resolution due to a negative vote cast by one or more permanent members.<sup>102</sup>

This requirement shows that the Uniting for Peace Resolution is formed with the permanent members’ veto power in mind, as it explicitly mentions “lack of unanimity.” The wording of this requirement infers that, if the UNSC unanimously agree that the best course of action is non-interference or inaction, this precondition is not fulfilled and the UNGA has no recourse under the Uniting for Peace Resolution, even if “inaction” is considered as failure.<sup>103</sup>

The last requirement to the invocation of the Uniting for Peace

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99 Harry Reicher, “The Uniting for Peace Resolution on the Thirtieth Anniversary of its Passage,” *Columbia Journal of Transnational Law* 20, (1981): 10; Larry D. Johnson, “‘Uniting for Peace’: Does it Still Serve Any Useful Purpose?,” *American Journal of International Unbound* 108, (2014): 107.

100 Lester H Woolsey, “The ‘Uniting for Peace Resolution of the United Nations’,” *The American Journal of International Law* 45, (1951): 132.

101 Reicher, 10.

102 Johnson, 107.

103 Reicher, 11.

Resolution is the existence of a threat of peace, breach of peace, or act of aggression. The term “threat to the peace, breach of peace, or act of aggression” was borrowed verbatim from Article 39, Chapter VII of the UN Charter, under which it states that the duty of the UNSC is “to determine the existence of any threat to the peace, breach to the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken...”<sup>104</sup>

When analyzed in the context of Chapter VII of the UN Charter, these borrowed phrases create a definite limitation; it is only when a problem reaches the gravity and magnitude contemplated in Chapter VII that the UNGA may invoke the Uniting for Peace Resolution. A situation that merely reaches the point of dispute (such as the ones elaborated under Chapter VI) cannot be used as the basis to Uniting for Peace.<sup>105</sup>

Under the Uniting for Peace Resolution, it is stated that, if not in session, the UNGA may meet in emergency special session within twenty-four hours of the request.<sup>106</sup> If Article 20 of the UN Charter and the Uniting for Peace Resolution are read in conjunction, the resolution can be invoked in UNGA’s annual meeting or it may give rise to what is called ‘Emergency Special Session’.

This requirement is significant to this research. This research suggests the invocation of Uniting for Peace Resolution in an emergency special session rather than the UNGA’s annual meeting. The reason being is that UNGA only meets annually. Considering the long interval between annual meetings, arranging for an Emergency Special Session may serve as a much faster solution.

Historically, UNGA has successfully invoked the Uniting for Peace Resolution in a number of instances. Since 1950, the Uniting for Peace Resolution has been invoked twelve times, and in ten out of those twelve instances, the Uniting for Peace Resolution was invoked via an Emergency Special Session.<sup>107</sup> The invocation of Uniting for Peace is considered a rare occurrence, but it serves well in situations

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104 Article 39 of the UN Charter.

105 Reicher, 12.

106 General Assembly. Uniting for Peace Resolution.

107 Security Council Report, “Security Council Deadlocks and Uniting for Peace: An Abridged History,” [http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Security\\_Council\\_Deadlocks\\_and\\_Uniting\\_for\\_Peace.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Security_Council_Deadlocks_and_Uniting_for_Peace.pdf). (accessed 18 December 2019).

that concern gross violation of human rights and core international crimes.

In the event where the Uniting for Peace Resolution is invoked, the circumstances surrounding the invocation are those involving acts of aggression (in Egypt),<sup>108</sup> illegal occupation (in Namibia),<sup>109</sup> widespread human rights violations (in Hungary),<sup>110</sup> and it has even discussed the right to self-determination (Palestine).<sup>111</sup>

Recurring patterns can be observed in all instances where the UNGA successfully invokes the Uniting for Peace Resolution: *Firstly*, there had been previous actions taken by the UNSC but said actions were deemed inadequate to settle the situation<sup>112</sup> or due to veto by one or more of the permanent member(s).<sup>113</sup>

*Secondly*, in the resolutions on the basis of Uniting for Peace, the UNGA takes measures it deemes appropriate to settle a certain situation. The measures that the UNGA has taken so far are: demanding that troops illegally sent into the territory of a particular State be withdrawn;<sup>114</sup> call upon other States to sever economic, diplomatic, military and cultural assistance and/or dealings with the problematic State;<sup>115</sup> requesting other States to extend humanitarian relief assistance;<sup>116</sup> reaffirming certain rights of the victims of atrocities.<sup>117</sup>

Invoking the UNGA's Uniting for Peace Resolution has a couple of advantages. The single most significant is that deadlocks due to

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108 General Assembly, 1st Emergency Special Sessions, 1956. (A/3354), 10 November, 2.

109 General Assembly, 8th Emergency Special Sessions, (A/RES./ES-8/2), 14 September 1981, 1.

110 General Assembly, 2nd Emergency Special Sessions, (A/3355), 4 to 10 November 1956, 2.

111 General Assembly, 7th Emergency Special Session, (A-ES7/14), 29 July 1980, 3.

112 General Assembly, 9th Emergency Special Session, (A/ES-9/7), 5 February 1982, 3.

113 General Assembly, 6th Emergency Special Session, (A-ES-6/7), 14 January 1980, 2; General Assembly, 7th Emergency Special Session, 29 July 1980, 3

114 General Assembly, 6th Emergency Special Session, (A-ES-6/7), 14 January 1980, 2.

115 General Assembly, 9th Emergency Special Session, (A/ES-9/7), 5 February 1982, 3.

116 General Assembly, 6th Emergency Special Session, (A-ES-6/7), 14 January 1980, 2.

117 General Assembly, 7th Emergency Special Session, (A-ES7/14), 29 July 1980, 3.

the politics of the UNSC's Permanent Members can be avoided. As discussed above, UNSC tends to use their power of veto to defend their respective national interests while forsaking the international community's concern. Invoking the UNGA's Uniting for Peace allows the UN Members to adopt measures that can be taken to settle the situations concerned. In the event the UNGA decided to invoke the Uniting for Peace Resolution, it has managed to adopt concrete and specific measures in the effort of settling the atrocities in question.

As with every solution to a problem, they're are bound to be a couple of downfalls in invoking the UNGA's Uniting for Peace Resolution via an emergency special session. Immediately, the one downfall that can be predicted from this practice is the fact that it is not a speedy solution. As with all things that concern politics and law enforcement, time is not a strong suit. It may take a long time and much effort to get the UNGA, which consists of more than 150 States, to enter into an Emergency Special Session.

This research found that invoking the UNGA's Uniting for Peace Resolution is theoretically possible, but it may not be available in the near future. This is because two out of three requirements underlying the invocation of the Uniting for Peace Resolution is not fulfilled as far as the situation goes.

*Firstly*, this research put forth that the situation concerning the Uyghur amounts to "threat of the peace" or "breach of the peace". The Uyghur conflict in Xinjiang is massive, as seen from the number of victims that have reached an astonishing 2 million people.<sup>118</sup> Furthermore, the Government is proven to have organised all the horrendous treatments the Uyghurs have received. These grave circumstances, as have been elaborated in the previous research question, amount to the offence of Genocide as per the practice of international criminal tribunals and the ICC.

However, at the time when this legal research was written, situations concerning the Uyghurs had not made it to the UNSC's agenda.<sup>119</sup> This warrants the said situation short of fulfilling the first

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118 Ivan Watson and Ben Westcott, "Uyghur refugee tells of death and fear inside China's Xinjiang camps", CNN. <https://edition.cnn.com/2019/01/18/asia/uyghur-china-detention-center-intl/index.html>, 30 November 2019, (accessed 21 January 2019).

119 Security Council Report, "December 2019 Monthly Forecast," <https://www.securitycouncilreport.org/> (accessed 17 December 2019).

and second requirement of the Uniting for Peace Resolution, namely the existence of “failure” and the “lack of unanimity of the UNSC.” The two requirements above revolve around the fact that the UNSC faces a deadlock due to the veto system. If any of the requirements are not fulfilled, the UNGA cannot find a basis in invoking the Uniting for Peace Resolution.

Having considered all the rules and facts above, invoking the UNGA’s Emergency Special Session for the situation concerning the crime of Genocide committed towards the Uyghurs by the Chinese Government remains an open possibility, but not in the near future. The reason being is that invoking the Uniting for Peace Resolution requires a failure of the UNSC, meaning that the UNSC must have already deliberated on the issue. At the time of this research, the situation concerning the Uyghurs has not found its way into the UNSC’s agenda.

To conclude the second part of the research question, it is true that under international criminal law, there are a number of legal measures that can be taken. As far as the research goes, the measures include referring the case to the ICC; invoking conditional universal jurisdiction; and last but not least, invoking the UNGA’s Uniting for Peace Resolution. However, the question of which means to take must be assessed in a case-by-case approach.

In the current case study, it can be observed that every means under international criminal law offers its advantages and can be taken, but there are certain political issues for each measure. Unfortunately, the Uyghur case is yet another textbook example of how politics that involve a powerful State may hamper the enforcement of international criminal law.

### **III. Conclusion and Recommendation**

After conducting meticulous research on the situation concerning the Uyghurs, this research comes to a conclusion that (1) the situation concerning the Uyghur falls under the ambit of Genocide and (2) the legal measures available under international criminal law that are analyzed under this research are theoretically possible, but political hindrance is guaranteed to hamper each measure.

From the legal point of view, this research recommends a reform of the international legal framework. This reform to international law has been called for by scholars, and this research is another voice that

supports such a notion.

The reason behind this is the fact that situations concerning international crimes are known for their massive victims and if let be without any meaningful international sanction, the situation may escalate to a global crisis.<sup>120</sup> This was the essence of how the two World War(s) came to being – atrocities that flourished due to the lack of enforcement, and how enforcement came into play when it was too late.<sup>121</sup>

This recommendation may seem like a stretch, considering that multiple attempts have been made under international law to create a powerful enforcement institution (e.g. the debate on whether or not ICC should have universal jurisdiction during the drafting of the Rome Statute). Despite all that, legal reform is still an urgent need. If a reform of the current workings of international law is delayed, soon it will only be mere bodies with instruments without any meaningful legal effect.

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## Human Rights Protection Concerns in the Indonesian Antiterrorism According to International Law

*Tasya Marmita Irawan*

This research is conducted to analyse Indonesia's compliance to its international human rights obligation set forth under the ICCPR, UDHR and other relevant international instruments, through the analysis of human rights protection provided by the Government of Indonesia for the accused in terrorism cases. Additionally, this research will also examine on whether Indonesia has adhered to its international law obligations to promote and protect human rights in terrorism cases and whether Indonesian judicial system has provided adequate protection of human rights in its counter-terrorism measures.

The conclusion of this research is that Indonesia has been quite successful in respecting and ensuring the protection of the human rights of the accused in terrorism cases in accordance with its international obligations. Nevertheless, there are a number of provisions that shall be altered or improved in order to fully protect the rights of the accused and deter human rights violation within the criminal process.

**Keywords:** Human rights, antiterrorism, protection measures.

### I. Introduction

Terrorism is an increasingly urgent issue in Indonesia as it is in other parts of the world, and it is currently one of the biggest challenge and threat to Indonesia's national security. Indonesia has been deemed as a 'fertile' land for terrorism, due to its geographical factor which encompasses a huge area across many islands, making terrorists' mobility harder to detect.<sup>1</sup> In order to eradicate terrorism completely, it is then up to the states to create their own counter-terrorism strategy in the form of law, setting forth policies specifically seeking to eliminate terrorist environment and groups.<sup>2</sup>

As a result of growing terrorism, Indonesia became the spot of various terrorist attacks located in numerous cities, causing many deaths of civilians as well as police officers. These rampant terrorism

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1 Zulfi Mubarak, "Fenomena Terorisme di Indonesia: Kajian Aspek Teologi, Ideologi dan Gerakan," *Jurnal Studi Masyarakat Islam* 15, no. 2 (2012).

2 Jordan Sebastian Meliala, "Counter Terrorism in Indonesia". *Brawijaya Law Journal* 2(S), no. 1 (2015).

attacks include the ‘Jakarta Attacks’ in January 2016,<sup>3</sup> suicide bomb in the Solo Police Headquarters in July 2016,<sup>4</sup> suicide bomb in a Catholic church in Medan<sup>5</sup> and Samarinda<sup>6</sup> in August and November 2016, bomb attacks in 2017,<sup>7</sup> church bombings in Surabaya in 2018,<sup>8</sup> and many more. These events had urged the Government of Indonesia to enact Law No. 5 of 2018 regarding Anti-Terrorism (‘Anti-Terrorism Law’) which amends the previous Law No. 5 of 2003 regarding Eradication of Terrorism (‘Eradication of Terrorism Law’).

“Effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and reinforcing,” said Fateh Azzam, Regional Representative of the UN Human Rights office in the Middle East.<sup>9</sup> As a State Member to the The International Covenant on Civil and Political Rights (‘ICCPR’), adopter of The Universal Declaration of Human Rights (‘UDHR’), and also having adopted various other international human rights treaties, Indonesia has a responsibility to protect the human rights of all individuals in Indonesian soil, and it is the state’s responsibility to apply international human rights law regulation to the Antiterrorism Law.

Additionally, Indonesia has played an active role in various international efforts and framework to counter terrorism, with the

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3 BBC Indonesia, “Polri: Korban ledakan di Sarinah 7 tewas, 5 adalah pelaku”, [https://www.bbc.com/indonesia/berita\\_indonesia/2016/01/160114\\_indonesia\\_jumlah\\_korban](https://www.bbc.com/indonesia/berita_indonesia/2016/01/160114_indonesia_jumlah_korban) (Accessed on 25 August 2019).

4 BBC Indonesia, “Ledakan Bunuh Diri di Mapolres Solo,” [https://www.bbc.com/indonesia/berita\\_indonesia/2016/07/160705\\_indonesia\\_solo\\_bom](https://www.bbc.com/indonesia/berita_indonesia/2016/07/160705_indonesia_solo_bom) (Accessed on 25 August 2019).

5 Fiddy Anggriawan, “Bom Bunuh Diri Terjadi di Sebuah Gereja di Medan,” <https://news.okezone.com/read/2016/08/28/340/1474984/bom-bunuh-diri-terjadi-di-sebuah-gereja-di-medan/> (Accessed on 25 August 2019).

6 Indopos, “Gereja di Samarinda di Lempar Bom Molotov,” <https://indopos.co.id/gereja-di-samarinda-di-lempar-bom-molotov/> (Accessed on 25 August 2019).

7 BBC Indonesia, “Ledakan di Kampung Melayu, Jakarta, diduga ‘bom bunuh diri’,” <https://www.bbc.com/indonesia/indonesia-40035376> (Accessed on 25 August 2019).

8 BBC Indonesia, “Serangan bom di tiga gereja Surabaya: Pelaku Bom Bunuh Diri ‘Perempuan yang Bawa Dua Anak’,” <https://www.bbc.com/indonesia/indonesia-44097913> (Accessed on 25 August 2019).

9 United Nations Human Rights of the High Commissioner, “Ensuring the right to fair trial for terrorist suspects,” <https://www.ohchr.org/EN/NewsEvents/Pages/Ensuringtherighttofairtrialforterroristsuspects.aspx> (Accessed on 25 August 2019).

government underlining the importance of international law in overcoming international terrorism.<sup>10</sup> Among them, Indonesia has adopted the UN Global Counter-terrorism Strategy ('UNGCTS') which is the universally-accepted framework of global cooperation in counterring terrorism.<sup>11</sup>

The UNGCTS contains measures ranging from strengthening state capacity to counter terrorist threats to better coordinating UN system's counter-terrorism activities, also identifying respect for human rights for all and the rule of law as one of its four pillars and as the fundamental basis of the fight against terrorism.<sup>12</sup> Among the steps written in the resolution, it includes a guidance to "provide member states with legal and practical guidance to assist them in ensuring that counter terrorism measures comply with international human rights law".<sup>13</sup>

Accordingly, as a civilised state, Indonesia has an obligation to uphold and respect human rights and fundamental freedoms, even in the process of arrest, detainment and prosecution of terrorist suspects. Indonesia shall guarantee the due process rights for those suspected of committing terrorism, in order to prove that it respects the rule of law and demonstrates fairness with no exception.<sup>14</sup>

Taking into consideration all of these factors, therefore, the domestic law regarding anti-terrorism should ensure promotion of human rights, fundamental freedoms, and fair trial rights. In cases where there are credible allegations of violation of human rights towards individuals involved in terrorism, the state is obligated by international law to guarantee human rights protection by providing

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10 Ministry of Foreign Affairs Republic of Indonesia, "Indonesia and the Counter-Terrorism Efforts," [https://kemlu.go.id/portal/en/read/95/halaman\\_list\\_lainnya/indonesia-and-the-counter-terrorism-efforts](https://kemlu.go.id/portal/en/read/95/halaman_list_lainnya/indonesia-and-the-counter-terrorism-efforts) (Accessed on 25 August 2019).

11 Ministry of Foreign Affairs Indonesia, "Agenda Item 107 Measures to Eliminate International Terrorism," <https://kemlu.go.id/newyork-un/en/read/agenda-item-107-measures-to-eliminate-international-terrorism/2504/etc-menu> (Accessed on 25 August 2019).

12 Martin Scheinin, "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism," Human Rights Committee A/HRC/16/51, 2010. para. 12.

13 United Nations Counter-Terrorism Implementation Task Force, *Right to a Fair Trial and Due Process in the Context of Countering Terrorism*, New York: CTITF Publication Series, 2014.

14 United Nations Human Rights of the High Commissioner, "Ensuring the right to fair trial for terrorist suspects."

access to effective remedy as well as to give appropriate reparation and compensation.

Compliance to human rights protection obligations while countering terrorism represents a best practice because “not only is this a legal obligation of states, but it is also an indispensable part of a successful medium-and long-term strategy to combat terrorism”.<sup>15</sup> As a civilised state, Indonesia should ensure that its antiterrorism law does not violate human rights, as a successful and effective counter-terrorism strategy is at stake.

Hence, there is an understanding that human rights should have been an important factor for Indonesian lawmakers in establishing its antiterrorism system, as well as to provide effective legal remedy towards any case of violation as a human rights protection measure, due to basic human rights principles as well as Indonesia’s international human rights obligations. But in reality, to what extent has this been done?

Therefore, this research will enclose the human rights protection measures provided by Indonesia for the accused or the defendant in terrorism cases based on the Anti-Terrorism Law, and will be able to serve as a great measurement tool for Indonesia’s adherence to its international law obligations.

## **II. Regulatory Overview: International Human Rights Law and the Anti-Terrorism Law**

International human rights law deals with the protection of individuals and groups against violations of their internationally guaranteed rights.<sup>16</sup> It lays down the obligations for states to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.

By becoming a state member to international human rights treaties, member states are bound to respect as well as protect and fulfil the human rights as required by international human law.<sup>17</sup> Hence, as

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15 Scheinin, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, para. 12.

16 Thomas Buergenthal, Dinah L. Shelton, and David P. Stewart, *International Human Rights in a Nutshell* (Washington: West Publishing Company, 2002).

17 Tawhida Ahmed & Israel de Jesús Butler, “The European Union and Human Rights: An International Law Perspective,” *The European Journal of International*

a civilised nation, it is the obligation of a state to create a system of law that upholds and protects the human rights of its citizens against abuses. States shall ensure that their domestic legislation is compatible with their treaty obligations to provide legal protection of human rights, as guaranteed by international law.<sup>18</sup>

In practice, there are times when states are faced with a dilemma whether to fully comply with international human rights law or to disobey it in order to resolve ongoing internal matters.<sup>19</sup> When states choose the latter, there will be criticism or even condemnation from other states which may potentially jeopardise their bilateral relationship. Such international pressure is deemed quite effective to urge states to comply with human rights standards set forth by international law.<sup>20</sup>

Despite the existing rules and pressure from states, it is inevitable that there will be a time in which individuals or groups criticise domestic courts for abuse of rights or failure to protect their human rights. In that situation, there should be mechanisms and procedures for individual and group complaints available at the regional and international levels, to help ensure that international human rights standards are indeed respected, implemented, and enforced at the local level.<sup>21</sup>

As a state that adopts the UDHR, and a State Party to both ICCPR and The International Covenant on Economic, Social and Cultural Rights ('ICESCR'), Indonesia has enacted a domestic law of its own that provides human rights protection. Law No. 39 of 1999 regarding Human Rights sets forth all human rights recognised in Indonesia as well as the establishment of the National Commission of Human Rights (*Komisi Nasional Hak Asasi Manusia*).

Further, Indonesia has also incorporated elements of human rights in its constitution, as written in the Articles 28 A-J of the 1945 Constitution of the Republic of Indonesia ('Indonesian 1945 Constitution'). These rights include the right to freedom of expression,

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Law 17, no. 4 (2006).

18 United Nations, "Foundation of International Human Rights Law," <https://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> (accessed on 25 August 2019).

19 Sonia Cardenas, *Conflict and Compliance: State Responses to International Human Rights Pressure* (Philadelphia: University of Pennsylvania Press, 2010) 1.

20 *Ibid.*, 12.

21 United Nations, "Foundation of International Human Rights Law."

freedom from torture, right to legal protection, and more. Article 28I(4) of the Indonesian 1945 Constitution also guarantees that the protection, promotion, enforcement, and fulfilment of human rights is the responsibility of the state, mainly the Government. Hence, the citizens of Indonesia are guaranteed basic human rights, as written in the constitution and other relevant laws. Indonesia as a state has both constitutional and international law obligations to ensure the fulfilment of human rights of its citizens.

The crime of terrorism are defined as violence or threat of violence that causes a situation of terror, or systematic fear, and/or damage towards strategic vital object, environment, public facility, or international facility, driven by ideology, politics, or security motives. These crimes have frequently occurred in Indonesia and it endangers the state ideology, state security, state sovereignty, human values, and various aspects of life of the people, nation and state.<sup>22</sup> Therefore, in order to fully protect the people, Indonesia has to create a stronger legal foundation as a means to guarantee legal protection and certainty in the eradication of the crime of terrorism. This is the primary reason behind the enactment of Anti-Terrorism Law that replaced the previous Eradication of Terrorism Law.

The Anti-Terrorism Law is based on three spirits, which are the spirit of enforcement of law, spirit of protection of human rights, and spirit of eradication of terrorism.<sup>23</sup> The formulation of Anti-Terrorism Law reflects the desire of the legal authority to attain more power in the process of arrest, detainment, criminalisation of speech, and other conducts.<sup>24</sup>

Nevertheless, in practice, the counter-terrorism system that exists often violate the rights of the accused or defendant. In many states, measures taken by the Government for the fight against terrorism infringe basic standards of fair trial and due process.<sup>25</sup> It is also believed to have a disproportionate and excessive negative impact on human rights.<sup>26</sup>

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22 Anti-Terrorism Law, Article 1.

23 House of Representative of the Republic of Indonesia, "Risalah Rapat Panitia Khusus Tindak Pidana Terorisme," *Official Document of House of Representative of the Republic of Indonesia*, 2016-2018, 524.

24 *Ibid.*, 282.

25 United Nations Human Rights of the High Commissioner, "Ensuring the right to fair trial for terrorist suspects."

26 *Ibid.*

In the establishment of national law concerning counter-terrorism, to ensure a successful counter-terrorism strategy, states should also take into account their obligations under international law to protect human rights,<sup>27</sup> as an essential aspect to the effectiveness of the strategy itself and also to comply with international law in general.

### **III.Obligations Under International Law and Human Rights Protection Measures within the Indonesian Legal System**

Terrorism is a big problem in all states and due to escalating terrorism activity, states have to develop their domestic regulations to be able to appropriately eradicate terrorism. However, in practice, there are various challenges that states face in creating an efficient and fair antiterrorism law, and in such case, international counter-terrorism framework and bodies will assist states to effectively combat the problem.

One of the biggest challenges for many states in their fight against terrorism is the fact that disproportionate and excessive measures often take place in the course of doing so. This has resulted in the violation of fundamental rights of the accused or defendant, including the rights of fair trial and due process.<sup>28</sup> Hence, coordinated international efforts and strong international framework would be a vital support to ensure the implementation of human rights throughout all processes of global counter-terrorism.

Indonesia is an active player on the international frameworks on counter-terrorism. In fact, the Government of Indonesia has always been involved in various efforts to counter terrorism under the framework of the UN.<sup>29</sup> Additionally, Indonesia has also played an active role in cooperating with the CTITF which later renamed to UNOCT Coordination Compact, TPB-UNODC, the UNCTED, and adopted the United Nations Global Counter-Terrorism Strategy ('UNGCTS').<sup>30</sup>

As previously mentioned, Indonesia has cooperated in a number

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27 Scheinin, "*Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*," para. 12.

28 United Nations Human Rights of the High Commissioner, "Ensuring the right to fair trial for terrorist suspects."

29 Ministry of Foreign Affairs Republic of Indonesia, "Indonesia and the Counter-terrorism Efforts."

30 *Ibid.*

of UN generated international efforts in combatting terrorism. It also strongly promotes the UNGCTS, which was adopted by consensus by all Member States at the UNGA on 8 September 2006.<sup>31</sup> The UNGCTS is a global instrument on counter-terrorism strategy which aims to enhance national, regional, and international cooperation efforts. The adoption of this resolution stands as the landmark international framework for Member States in a common strategy to fight terrorism, committing to take practical steps individually and collectively to prevent and combat it.<sup>32</sup>

Those practical steps include a plethora of measures, ranging from the strengthening of state capacity to counter terrorist threats to a strategic coordination with the UN system's counter-terrorism activities. The UNGCTS underlines the obligation for states to respect and uphold human rights throughout all steps within the counter-terrorism strategy, as dictated by international law. UNGCTS also strongly encourages states to develop and maintain an effective and rule of law-based national criminal justice system, to ensure that the persons responsible for committing acts of terrorism will be brought to justice with fairness and due respects for human rights.

In reality, the counter-terrorism system that exists in national level frequently violates human rights of individuals in the accused or defendant position.<sup>33</sup> The UN High Commissioner for Human Rights in its report even confirmed that measures taken by states to fight terrorism often infringe basic standard of fair trial and due process, which ultimately has negative impacts on human rights.<sup>34</sup> Therefore, there has to be a threshold within the international framework to ascertain that states fully respect human rights in the fights against terrorism, as mandated by international law.

In 2014, under concerns for human rights aspects of counter-terrorism, the UNGCTS established the guide references "Right to a Fair Trial and Due Process in the Context of Countering Terrorism" and "Conformity of National Counter-Terrorism Legislation with

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31 United Nations Office of Counter-Terrorism, "UN Global Counter-Terrorism Strategy," <https://www.un.org/counterterrorism/un-global-counter-terrorism-strategy> (Accessed on 30 November 2019).

32 *Ibid.*

33 United Nations Human Rights of the High Commissioner, "Ensuring the right to fair trial for terrorist suspects."

34 *Ibid.*

International Human Rights Law”, both guides are dedicated for the state legislators, state authorities, law enforcement, national & international NGOs, as well as other groups or individuals that involved in the efforts to ensure protection and promotion of human rights within counter-terrorism.<sup>35</sup>

Both guides were established for the same objective, which is to “assist states in strengthening the protection of human rights in the context of countering terrorism, and to ascertain that the measures taken by states in combatting terrorism comply with international human rights law”,<sup>36</sup> as well as aiming to “provide guidance on how states can adopt human rights-compliant measures in a number of counter-terrorism areas”.<sup>37</sup>

Essentially, these reference guides are established to assist states in ensuring that the fulfillment of human rights within their domestic counter-terrorism strategy is in line with international human rights law. Hence, it is expected that the state legislators will use these guides as reference for the creation of their domestic laws, because human rights protection in counter-terrorism can only be guaranteed if they are codified in domestic law and properly executed in the national judicial system.

Each of the reference guides provides a set of principles, followed by specific guidance for states in accordance to universal principles and standards in the form of explanatory text. The guidance is composed based on relevant prevailing international human rights treaties, internationally accepted standards and norms set forth by the UN, general comments, case laws from human rights courts, and other binding materials.

Beside pinpointing all the relevant rights and principles that shall be upheld, the reference guides also thoroughly elaborates on how states shall implement their counter-terrorism system. This part is specifically made to promote and protect human rights in the domestic counter-terrorism system.

In connection with this research, there are a number of crucial

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35 United Nations Counter-Terrorism Implementation Task Force, *Right to a Fair Trial and Due Process in the Context of Countering Terrorism*, iii.

36 *Ibid.*

37 United Nations Counter-Terrorism Implementation Task Force, *Conformity on National Counter-Terrorism Legislation with International Human Rights Law*, iii.

points regarding human rights protection measures elaborated in the reference guides, that will be valuable and relevant with the objectives of this research. The content set forth may be applicable in strengthening the human rights protection measures for the accused or defendant in the counter-terrorism system in Indonesia.

Therefore, it will be prudent to first analyse all provisions and measures that should be made available to ensure protection of human rights within counter-terrorism, according to the relevant international framework. Further, this section will also analyse on whether the current Indonesian judicial system has fully accommodated the obligations and standard set forth by international human rights law. This will later be used to determine whether Indonesia has provided adequate measures to ensure protection of rights to the accused or defendant in terrorism cases, from the perspective of international law.

### **1. The Right to Appoint Legal Counsel of Their Choosing, or to Self-Representation**

First and foremost, in ensuring that the accused or defendant receives fair treatment in all stages of the criminal process, we need to see if they have access to either appoint a legal counsel or to represent themselves during the legal proceedings. This is solemnly because all persons have the right to be represented by a competent and independent legal counsel of their choosing, or to also have a choice of self representation.

This right is protected under the ICCPR Article 14(3)(d), which states that:

“Everyone shall be entitled to [...] defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.”

Indeed, the fulfillment of this essential right is applicable for the accused in terrorism cases.<sup>38</sup> The representation should apply, *mutatis*

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38 United Nations Counter-Terrorism Implementation Task Force, *Right to a Fair Trial and Due Process in the Context of Countering Terrorism*, para. 63.

*mutandis*, to all stages of the criminal process including the Pre-Trial Stage, and any restrictions imposed on the right to communicate privately and confidentially with legal counsel must be proportionate and have legitimate purposes.

In *Al-Khawaja and Tahery v. the United Kingdom Case*, the ECtHR held that the right to legal assistance is one crucial element of the concept of a fair trial in criminal proceedings, as guaranteed by Article 6 of the European Covenant of Human Rights ('ECHR').<sup>39</sup> Further, access to legal assistance should, as a rule, be provided from the very beginning of the criminal process without undue delay.<sup>40</sup> In the case of *Salduz v. Turkey Case*, the ECtHR found that there had been a violation of the right to legal assistance of one's own choosing, because the accused, who was a minor at the time, did not have any access to have legal counsel when he was in the police custody.<sup>41</sup>

In cases where the accused opted for self-representation, Article 14(3)(d) of the ICCPR requires the accused to be fully informed about the right to be represented by a legal counsel.<sup>42</sup> In cases where the accused does not have sufficient means to pay for legal assistance, they are entitled to receive free legal aid.<sup>43</sup> These provisions are purposely regulated to protect the accused from unfair trial as well as to ensure that the accused fully understands about the allegations or charges brought against them.

Nevertheless, in cases of legal aid, the right to appoint their counsel of choice may be limited, depending on two conditions.<sup>44</sup> Firstly, in the situation where the accused does not have sufficient means to pay for the legal counsel and secondly, in cases where the interest of justice requires legal counsel to be assigned to represent the

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39 *Al-Khawaja and Tahery v. the United Kingdom*, European Court of Human Rights, Application No. 26766/05 and 22228/06, 2011, para. 145.

40 *Ibrahim and Others v. the United Kingdom*, European Court of Human Rights, Application No. 50541/08, 50571/08, 50573/08 and 40351/09, 2016, paras. 208-209.

41 *Salduz v. Turkey*, European Court of Human Rights, Application No. 36391/02, 2008, ('Salduz v. Turkey') paras. 54-55.

42 United Nations Congress on the Prevention of Crime and the Treatment of Offenders, "United Nations Basic Principles on the Role of Lawyers", Havana, 1990. para. 6.

43 *Yoldaş v. Turkey*, European Court of Human Rights, Application No. 27503/04, 2010. para. 52.

44 *Lagerblom v. Sweden*, European Court of Human Rights, Application No. 26891/95, 2003. para. 54.

accused.<sup>45</sup> The latter usually occurs in situations where the accused is either unable to attend the proceeding or when the accused disrupts or disrespects the proceeding.

With regard to the fulfillment of this right in terrorism cases, evidently, many states had imposed limitations to the right to appointment of representation by way of either excluding or delaying the availability of the counsel, secretly monitoring or sending police officers to overhear the consultation, or appointing counsel chosen by the state to replace the counsel that has been chosen by the accused in the first place.<sup>46</sup>

The aforementioned limitations are sometimes imposed out of fear that legal counsel would inappropriately act as the vehicle for the flow of improper information between the accused and terrorist organisation.<sup>47</sup> Despite this, it has been reiterated that any alterations in the right to choose one's counsel must have a reasonable and objective basis, that is capable of being challenged through judicial review.<sup>48</sup>

An important matter that is addressed under this right is the right of the accused to communicate with the legal counsel as well as the right to have private communication. The right to communicate with legal counsel is explicitly protected under Article 14(3)(b) of the ICCPR.<sup>49</sup> Although the right to have private communication is not clearly stated within Article 14, however, it has been established that a private meeting with the legal counsel considering full respect of confidentiality of their communication must also be upheld.<sup>50</sup>

The Human Rights Committee had stressed that any rules requiring the presence of investigators during meetings between the accused and the legal counsel violates the right to communicate

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45 Article 14(3)(d) of ICCPR.

46 Martin Scheinin, "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism," General Assembly (A/63/223), 2008, para. 38.

47 Ben Saul, *Terrorism*, Oxford: Hart Publishing Ltd, 2012, para. 38.

48 Scheinin, "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism," 2008, para. 40.

49 ICCPR, Article 14(3)(d).

50 UNHRC General Comment No. 32, (CCPR/C/GC/32), [http://ccprcentre.org/doc/ICCPR/General%20Comments/CCPR.C.GC.32\\_En.pdf](http://ccprcentre.org/doc/ICCPR/General%20Comments/CCPR.C.GC.32_En.pdf) (Accessed on 25 November 2019), para. 34.

with legal counsel elaborated in Article 14(3)(b) of the ICCPR.<sup>51</sup> Undoubtedly, it also infringes the privacy between the accused and the legal counsel as elaborated in Article 14(3)(d).<sup>52</sup> Hence, respect to confidentiality and private communication between the accused is one essential measure that should be upheld by states, in accordance with international law.

The allegation or prosecution of someone for an act of terrorism should not be invoked by states as a reason to exclude or limit their confidential communication with the legal counsel.<sup>53</sup> In *Castillo Petruzzi et al. v. Peru Case*, all the four claimants were members of Tupac Amaru terrorist organisation. A military tribunal tried the claimants and sentenced each of them to life imprisonment. However, the IACtHR found a violation of the right of the accused to communicate freely and privately with the legal counsel, as each of them was unable to confer with his counsel in private prior to the trials.<sup>54</sup>

Similar situation can be found in *Brennan v. the United Kingdom Case*, concerning the applicant who was arrested on terrorism offences. *In casu*, the ECtHR found that the presence of a police officer during the consultation between the applicant and his counsel was a violation of Article 6(3)(c) of the ECHR. The ECtHR concludes that the applicant's right to an effective defence was impaired, as the presence of the police officer would have inevitably prevented the applicant from speaking frankly to his lawyer and given him reason to hesitate before broaching questions of potential significance to the case against him.<sup>55</sup>

Nevertheless, restriction to the right to confidential and private communication in a terrorism case has been found acceptable by the

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51 *Khomidova v. Tajikistan*, Communication No. 1117/2002, UN Doc CCPR/C/81/D/1117/2002, 2004. para. 6.4.

52 *Arutyuniantz v. Uzbekistan*, Communication No. 971/2001, UN Doc CCPR/C/83/D/971/2001, 2005. para. 6.3.

53 Scheinin, "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism," 2008, para. 39.

54 *Castillo Petruzzi et al. v. Peru*, Judgment Inter-American Court of Human Rights, 30 May 1999 ('*Castillo Petruzzi et al. v. Peru*'), paras. 143-149.

55 *Brennan v. the United Kingdom*, European Court of Human Rights, Application No. 39846/98.

ECtHR, provided that it is for a reasonable and logical cause.<sup>56</sup> The restriction must be necessary, proportional, and it shall not deprive the accused of an overall fair trial.<sup>57</sup> Hence, it can be concluded that a justifiable monitoring should be examined on a case-to-case basis, to ensure that monitoring by police on investigator for the accused in terrorism case will only be conducted in exceptional circumstances.<sup>58</sup> Further, if such monitoring is justified, communication between lawyer and client should be witnessed in sight and it should not be heard directly by the authorities.<sup>59</sup>

In Indonesia, this matter is addressed in the Law No. 8 of 1981 regarding Criminal Procedure Code Article ('Indonesian Criminal Procedure Code'), specifically through Article 54 and 55. Article 54 states that:

"For the purpose of defense, the Accused or Defendant has a right to have legal representation by one or more legal counsel during and in the period and through each stage of examination, in accordance with the procedures explained in this law"

Additionally, Article 55 reads that:

"In order to get legal representation as mentioned in Article 54, the Accused or Defendant has a right to appoint a legal counsel of their own choice".

From the above articles, it can be seen that Indonesia fully recognises the right of the accused to appoint a legal counsel of their own choice and the chosen legal counsel will provide legal assistance in all stages of the criminal process. Article 69 and 70 of the Indonesian Criminal Procedure Code also assure that the legal counsel has the right to assist the accused through every stage of the criminal process.

Another crucial part of the implementation of this right is the right of the accused to be informed about the right to be represented by a

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56 *Salduz v. Turkey*, para. 52 and 54.

57 *S v. Switzerland*, European Court of Human Rights, Application Nos. 12629/87, 13965/88, 1991, para. 48.

58 Scheinin, "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism," 2008, para. 39.

59 *Ibid.*

legal counsel throughout all the criminal process as well as the right to have access for legal aid if the accused has no sufficient funding to afford legal assistance.

In Indonesian law, these rights are governed in the Indonesian Criminal Procedure Code, specifically in Article 56 and Article 114. Article 56 states that:

- “(1) In the event that the Accused/Defendant is suspected or convicted of doing a criminal Action that is punishable by death penalty or fifteen years imprisonment or more, or for those who are needful that is punishable with five years or more and do not have his own legal counsel, the related officer at any stage of the judicial process is obligated to appoint a legal counsel for them  
(2) Every legal counsel appointed to Law as meant by Article (1), will give their assistance for free.”

Additionally, Article 114 also emphasizes:

“In the event that a person is suspected to do a criminal action before the examination is started by the investigator, the investigator must inform the person about their right to get legal assistance, or that in the said case they are obligated to be assisted by a legal counsel as meant by Article 56.”

From the above explanation, it can be concluded that Indonesia recognises the right for the accused to have a legal counsel prior to conduct of any criminal examination, as set forth in the Indonesian Criminal Procedure Code. Certainly, such right applies to the accused in terrorism cases as well.

In the context of terrorism case, a person convicted with any crime under the antiterrorism law is punishable by a range of imprisonment up to 5 years,<sup>60</sup> 7 years,<sup>61</sup> 12 years,<sup>62</sup> 15 years,<sup>63</sup> 20 years,<sup>64</sup> as well as life imprisonment<sup>65</sup> and capital punishment.<sup>66</sup> Due to the punishment of terrorism criminal action ranging from five years and above, the

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60 Antiterrorism Law, Article 13A and 12B(4).

61 Antiterrorism Law, Article 10A(2) and 12A(2).

62 Antiterrorism Law, Article 10A(4), 12A(1), 12A(3), 12B(3).

63 Antiterrorism Law, Article 12B(1), 12B(2).

64 Antiterrorism Law, Article 6 and 10A(1).

65 *Ibid.*

66 Antiterrorism Law, Article 6 and 10A(1).

accused in terrorism cases who have no sufficient funding will have access to legal aid that will grant them legal assistance for free. This is also regulated under the Law No. 16 of 2011 regarding Legal Aid.

The last pivotal part that shall be addressed is the right of the accused to communicate with the legal counsel as well as the right to have private communication. While private communication is not expressly stated within Article 14(3)(b) of ICCPR, however, it has been established that private meetings between the accused and the chosen legal counsel and the confidentiality of their communication shall be fully respected by the authorities.<sup>67</sup>

In Indonesia, the regulation regarding monitoring of communication between the accused and the legal counsel is governed by the Indonesian Criminal Procedure Code, specifically in Article 71, which states:

“(1) The legal counsel, in accordance with the stage of examination, in communication with the Accused is monitored by the investigator, prosecutor or penitentiary officer without hearing the content of the conversation

(2) In the context of crimes against State security, the relevant officer in Article (1) may hear the content of the conversation.”

In Indonesia, the act of terrorism falls under crime against state security.<sup>68</sup> Due to the gravity and sensitivity of terrorism in Indonesia, the communication between the accused in terrorism case and the legal counsel may be monitored by the investigator, prosecutor, or even penitentiary officer. As stated in the above article, the relevant officer may even listen directly to the content of their conversation.

## **2. The Right to be Presumed Innocent until Proven Guilty**

Everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to the law.<sup>69</sup> Presumption of innocence is a right that is guaranteed under Article 14(2) of the ICCPR and Article 11 of the UDHR, and it is the duty of the state to protect this right, without any exception, including those

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67 UNHRC General Comment No. 32, para. 34.

68 Antiterrorism Law, Consideration (a).

69 United Nations Counter-Terrorism Implementation Task Force, *Right to a Fair Trial and Due Process in the Context of Countering Terrorism*, para. 46.

who involved in terrorism cases.

As the person charged with a criminal offence should be presumed innocent, the burden of proof is imposed on the side of the prosecution who must prove the guilt of the accused, beyond reasonable doubt.<sup>70</sup> This principle should be implemented from the initial suspicion of the person committing an act of terrorism up until the conviction from the court. In *Grayson and Barnham v. the United Kingdom Case*, the ECtHR declares that a person's right to be presumed innocent is part of the general notion of a fair trial.<sup>71</sup> The presumption of innocence guarantees that unless the criminal charge has been proved beyond reasonable doubt, the accused should be presumed with no guilt and has the benefit of doubt. Consequently, states have to treat the accused fairly and accordingly, without any prejudice.<sup>72</sup>

Nevertheless, states are often found to detain those who allegedly involved in terrorism case during the investigation process, for a prolonged period. This is often called 'incarceration without conviction' and this may result in a violation of the presumption of innocence, particularly when it involves torture, coercion, or unjustified punishment.<sup>73</sup> These kinds of action shall not be justified, even if the relevant officers argue that it is conducted solely for the purpose of investigation.

Lastly, this right is automatically violated if the judge shows any prejudice towards the accused and reflects in any way that the accused is guilty towards the crime charged, prior to the issuance of any verdict.<sup>74</sup> Such action implies that the court has shown bias towards the accused and it fails to uphold due process as well as fair trial rights.

An example of the enforcement of this right is in the Military Commissions of the USA, towards the terrorists detained in Guantanamo Bay, Cuba. *In casu*, the judges repeatedly remind the jurors of the presumption of innocence principle prior to the

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70 UNHRC General Comment No. 32, para. 30

71 *Grayson and Barnham v. United Kingdom*, European Court of Human Rights, Application No. 19955/05 and 15085/06, 2008, paras. 37-39.

72 *Ibid.*

73 Human Rights Council, "Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism", Twenty-Second Session A/HRC/22/26, 2012. para. 35

74 *Minelli v. Switzerland*, European Court of Human Rights, Application No. 8660/79, 1983. para. 37.

deliberations.<sup>75</sup> The burden of proof is on the prosecution to prove each and every element of the charges brought against the accused, beyond a reasonable doubt. Further, Military commission jurors who express a definite opinion as to the guilt of the accused are not eligible to serve and will be dismissed accordingly.<sup>76</sup>

Hence, the implementation of presumption of innocence is essential in order to ensure there is no bias and prejudice towards the accused and that the Court is acting impartially in order to reach a fair conviction regarding the case. This principle is equally applicable in terrorism cases, in all the stages prior to the conviction. The accused has the right to be presumed innocent until proven otherwise and shall be treated impartially at any stage of the criminal process.

In Indonesian law, presumption of innocence principle in the national justice system is recognised by the Indonesian Criminal Procedure Code and the Law No. 48 of 2009 regarding Judiciary ('Judiciary Law'), which reaffirm that the accused has the right to be presumed innocent and to have the benefit of the doubt, until they are officially convicted guilty of the crime, at the appropriate stage of the procedural process.

The Elucidation of the Indonesian Criminal Procedure Code Article 3(c) and the Judiciary Law Article 8(1) acknowledges the presumption of innocence using the same wording, which states:

"Everyone who is suspected, arrested, detained, prosecuted and or appeared before a court trial hearing, must be presumed innocent until a court decision that has a binding legal force, confirms his guilt."<sup>77</sup>

As seen above, In Indonesia, the treatment of the accused at any stage of criminal process shall be based on the presumption of innocence principle. It should be noted that the accused is not the subject of the investigation, but rather, the crime that they allegedly committed. Therefore, they shall be treated fairly with the benefit of the doubt until there is a final and binding decision from the Court.<sup>78</sup>

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75 David J. R. Frakt, "Applying International Fair Trial Standards to the Military Commissions of Guantanamo," *Southern Illinois University Law Journal* 37, (2013): 576.

76 *Ibid.*

77 Indonesian Criminal Procedure Code, Elucidation of Article 3.

78 M. Yahya Harahap, *Pembahasan Permasalahan Dan Penerapan KUHAP Penyidikan Dan Penuntutan* (Jakarta: Sinar Grafika, 2006) 34.

As part of the implementation of the presumption of innocence, the accused does not bear the burden of proof. The burden of proof is placed on the prosecution who must demonstrate that the accused is guilty of the charges brought against him, as affirmed by Article 66 of the Indonesian Criminal Procedure Code.<sup>79</sup> This is in line with the suggested measure set forth by the strategy<sup>80</sup> as part of fulfilment of the presumption of innocence principle.

Last but not least, the judges assigned for one particular case should perform the duties of judicial office, without any prejudice or bias. Any appearance of bias or prejudice towards the accused prior to the verdict shall be considered as a violation of presumption of innocence as regulated under Judiciary Law as well as the Code of Ethics of the Judge of 2009. As a consequence, the judge who shows prejudice or any appearance of bias may be dismissed from the case or even sanctioned. Therefore, it can be concluded that Indonesia recognises presumption of innocence as a protection towards the accused as they deserve to be tried fairly and impartially, without any bias.

### **3. The Right to a Timely Hearing, Trial ‘Without Delay’ and a ‘Timely Judgment’**

It is the state’s obligation to ensure that the judicial proceedings for terrorism cases are conducted in a timely manner.<sup>81</sup> In international law, the right to a timely hearing is protected under Article 14(3)(c) of the ICCPR which entitles the accused, as a minimum guarantee, to be tried without undue delay.

Further, Article 9(3) of the ICCPR complements the previous article, stating that:

“Anyone arrested or detained on a criminal charge shall be brought immediately before a judge or other officer authorised by law to exercise judicial power, and following that they are entitled to trial within a reasonable time or they are to be released”.

From therein it can be concluded that the existence of delays

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<sup>79</sup> Indonesian Criminal Procedure Code, Article 66.

<sup>80</sup> United Nations Counter-Terrorism Implementation Task Force, Right to a Fair Trial and Due Process in the Context of Countering Terrorism, para. 46.

<sup>81</sup> *Ibid.*, para. 55.

in the trial process could result in a violation of the rights of the accused to a timely hearing, as protected under the ICCPR. After the arrest and detainment, the accused has a right to proceed to trial without unnecessary delay, or otherwise to be released. Further, legal proceedings shall also be conducted in a speedy process, including any appeal that may arise, shall also be handled promptly by the relevant court.<sup>82</sup> The same rights also applies for terrorism cases, the accused shall be tried in an expeditious manner, without any undue delay.<sup>83</sup>

In *Vernillo v. France Case* as well as in *Scordino v. Italy Case*, the ECtHR held that cases shall be tried within a ‘reasonable time’, emphasizing the importance of administering justice without delays which might jeopardise its effectiveness and credibility.<sup>84</sup> Moreover, *Robins v. the United Kingdom Case* also underlines that the reasonable-time requirement applies to all stages of the legal proceedings, not excluding stages subsequent to the judgment on the merits.<sup>85</sup> These precedents affirm that any stage of trials shall be conducted expeditiously, without excessive delay.

The right to a timely hearing without undue delay is exercised alongside the right to a timely judgment, meaning that a Court’s decision must also be pronounced without undue delay.<sup>86</sup> The judgment must be publicly pronounced and based on “the essential findings, evidence and legal reasoning”.<sup>87</sup> An example of the enforcement of this right is at the Military Commissions of the USA towards the accused who were detained in Guantanamo Bay, Cuba. The Military Commissions have ensured compliance to the requirements for a timely and public judgment, through the deliberations of the jury which immediately starts after the closing of evidence, and continues until a verdict is

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82 UNHRC General Comment No. 32, para. 35.

83 United Nations Counter-Terrorism Implementation Task Force, *Right to a Fair Trial and Due Process in the Context of Countering Terrorism*, para. 55.

84 *Vernillo/Siciliano v. France*, European Court of Human Rights, Application No. 11889/85, 1989; *Scordino v. Italy*, European Court of Human Rights, Application No. 36813/97, 2007.

85 *Robins v. United Kingdom*, European Court of Human Rights, Application No. 22410/93, 1997.

86 *Gonzalez v. Republic of Guyana*, Communication No. 1246/2004, UN Doc CCPR/C/98/D/1246/2004, 2010. para. 14.2.

87 UNHRC General Comment No. 32, para. 29.

reached.<sup>88</sup> Lastly, the verdict will be immediately announced in an open session of the Court with the presence of the accused.<sup>89</sup>

In Indonesia, the right to be tried in a timely manner without delay is protected under Article 50 of the Indonesian Criminal Procedure Code. It states that the accused has the right to immediately be examined by the investigator, to be later submitted for the prosecutor and put on a trial.<sup>90</sup> Inevitably, this right applies to all cases, including terrorism cases. Moreover, the Elucidation of Article 3(e) of the Indonesian Criminal Procedure Code further affirms that “the trial has to be conducted quickly, simply, and at a low cost [...] which must be applied consistently at all levels of the court”.

Therefore, the accused in terrorism cases in Indonesia has to proceed to trial without unnecessary delay. The trial process must be conducted in an expeditious manner, which then leads to the judgment that will be pronounced in a timely manner.<sup>91</sup> These protection measures are in line with the international human rights law obligation set forth under ICCPR and hence, the right to be tried in a timely manner without undue delay is adequately protected in the Indonesian judicial system.

#### **4. Effective Investigations to Allegations of Human Rights Violations during Counter-Terrorism Operations**

During the operations of domestic counter-terrorism, human rights of any persons involved in terrorism shall not be violated by law enforcement official or intelligences services. Regrettably, data from the UNCTITF shows that violation of rights of those involved in terrorism occurred frequently.<sup>92</sup> It is also considered as one of the main issues that the international framework on counter-terrorism is trying to tackle. To get to the bottom of this matter, firstly, states shall provide an effective protection system towards individuals. In situations where there are allegations regarding violations of human rights, states are obliged to launch effective and immediate

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88 Frakt, “Applying International Fair Trial Standards to the Military Commissions of Guantanamo,” 575.

89 *Ibid.*

90 Indonesian Criminal Procedure Code, Article 50.

91 Indonesian Criminal Procedure Code, Article 195.

92 United Nations High Commissioner for Human Rights, “Human Rights, Terrorism and Counter-terrorism Flaw Sheet no. 32,” <https://www.ohchr.org/Documents/Publications/FLawsheet32EN.pdf> (Accessed on 30 November 2019).

investigations into the allegations.<sup>93</sup>

The duty to investigate is explicitly referred to in the Convention against Torture and Other Forms of Cruel, Inhumane or Degrading Treatment or Punishment ('UNCAT'), specifically Article 12, which states:

"Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction".

Further, investigation is treated as the very first step in ensuring the right to an effective remedy under Article 2(3) of the ICCPR. A rigorous investigation of the case is detrimental for the determination of the right to an effective remedy.<sup>94</sup> Thus, the state's failure to investigate such case will automatically result in failure of ensuring the right to an effective remedy.

The duty to investigate had been stressed in various UN Declarations and Bodies of Principles.<sup>95</sup> Additionally, the duty to investigate is reaffirmed by the Human Rights Committee, which has expressed the failure "by a State Party to investigate allegations of violations could give rise to a separate breach of the Covenant".<sup>96</sup> Hence, as part of fulfilling international human rights law obligations, and to ensure the protection of human rights in counter-terrorism system, states should undertake efficient measures to investigate allegations of human rights violations.

To conclude, in order to ensure human rights protection towards the the accused in terrorism cases, the state should provide an

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93 United Nations Counter-Terrorism Implementation Task Force, *Conformity on National Counter-Terrorism Legislation with International Human Rights Law*, para. 72.

94 Louis Joinet, "Report of the Special Rapporteur on the question of impunity of perpetrators of human rights violations (civil and political)," E/CN.4/ Sub.2/1997/20/ Rev.1, 1997. para. 26.

95 Declaration on Human Rights Defenders, Article 9(5).

96 UNHRC General Comment No. 31, (CCPR/C/21/Rev.1/Add. 1326), <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPr-CAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2Bfud3cPVrcM9YR0i-W6Txxg3f9kUFpWoq%2FhW%2FTpKi2tPhZsbEJw%2FGcZRASjdFuujQRnbJEaUhby31WiQPl2mLFDe6ZSwMMvmQGVHA%3D%3D> (Accessed on 30 December 2019), para. 15 and para. 8.

investigation mechanism readily available to be appropriately conducted towards alleged human rights violations. In order to make it more effective, it shall not require the accused to file a formal complaint, instead, a thorough investigation shall be immediately launched to figure out whether violation of the rights of the accused has taken place.

Unfortunately, Indonesian Criminal Procedure Code does not have any provision which specifically regulates procedures for the accused to report in cases where violation of their rights of the accused occur during the criminal process. There is no specific mechanism available in the Indonesian judicial system that regulates legal procedure to investigate allegations of violation of the rights of the accused.<sup>97</sup>

However, there is a Pre-Trial stage, where the accused may rightfully claim for reparations for any unlawful action conducted by the officials or legal enforcers towards them during the criminal process. If it is proven to be true, the Court will grant a remedy for the accused in various forms, depending on the circumstances. The remedy might be given in the form of early release from arbitrary detention,<sup>98</sup> termination of the investigation, monetary compensation,<sup>99</sup> return of objects obtained as evidence,<sup>100</sup> or even a reparation for the accused.

The main purpose of the Pre-Trial stage as explained by Article 77 of the Indonesian Criminal Procedure Code is to evaluate the legality of the criminal process, whether it is conducted in accordance with prevailing laws and regulations. Nevertheless, it is not specifically intended to punish the officials or legal enforcers who have clearly violated the rights of the accused.<sup>101</sup> Therefore, this particular Pre-Trial stage fails to comply with the international law obligation that requires states to launch a thorough investigation into the allegations which may include punishment or criminal charges for the officials or

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97 Cynthia Claudia Matindas, "Akibat Hukum Terhadap Pelanggaran Hak-Hak Tersangka Dalam Penyidikan Menurut KUHAP," *Lex Crimen* III, no. 4 (Ags-Nov 2014): 35.

98 Indonesian Criminal Procedure Code, Article 82(3)(a).

99 Indonesian Criminal Procedure Code, Article 82(3)(c).

100 Indonesian Criminal Procedure Code, Article 82(3)(d).

101 Agus Raharjo & Angkasa, "Penyidikan dari kekerasan penyidik di kepolisian Resort Banyumas," *Mimbar Hukum* 23, no 1 (2011): 91; T Nasrullah, "Tinjauan Yuridis Aspek Hukum Materil Maupun Formil Terhadap UU no. 15/2003 Tentang Pemberantasan Tindak Pidana Terorisme," *Jurnal Kriminologi Indonesia* 4, no. 1 (2005): 72.

legal enforcers who have abused their powers and violated the rights of the accused.

Even so, the Pre-Trial mechanism in Indonesia has been criticised and proven to be ineffective in reaching its objective.<sup>102</sup> The reason behind this is because in the Pre-Trial stage, the burden of proof is placed on the accused and it is not always an easy task for them to prove a violation of rights committed by the officials or legal enforcers, especially in the case of coercion, mistreatment, threats, or intimidation.<sup>103</sup> Thus, many believe that this method is not in accordance with international law standards, since it will not deter and suppress the violations of the rights of the accused.

Despite so, a big leap can be seen in the Anti-Terrorism Law which may pave the way to bring perpetrators of human rights violation in counter-terrorism operation to justice. The new Anti-Terrorism Law strongly promotes the protection of human rights—a huge progress from the previous terrorism law which failed to address this matter. Article 25 of Anti-Terrorism Law emphasizes that the execution of counter-terrorism operation shall be done with utmost respect of human rights. Further, Article 28 also underlines that every investigator or officials and legal enforcers that fail to uphold human rights of the accused during the criminal process, will be criminally charged in accordance with prevailing laws and regulations.

The human rights protection is further guaranteed through Article 43A of the Anti-Terrorism Law which requires the Government of Indonesia to take continual precautionary steps, based on human rights and carefulness principle. Hence, it can be concluded that the new law provides more protection and certainty for the rights of the accused in terrorism case. Firstly, because the new law punishes and sanctions those who have violated the rights of the accused and secondly, it also strongly encourages the Government to actively participate in the promotion and protection of human rights in cases of terrorism.

Dossy Iskandar, a member of the executive committee who drafted the Anti-Terrorism Law, opined that Anti-Terrorism Law was designed to be a 'progressive law' which aims to prevent the abuse of power by officials or legal enforcers and guarantee the protection of

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102 Matindas, "Akibat Hukum Terhadap Pelanggaran Hak-Hak Tersangka Dalam Penyidikan Menurut KUHAP," 35.

103 *Ibid.*

the rights of the accused.<sup>104</sup> To elaborate, progressive law is defined as “a series of radical actions intended to change the legal system so that the law is more useful, especially in ensuring human dignity as well as guaranteeing happiness and human prosperity”.<sup>105</sup>

The Anti-Terrorism Law sets forth provisions to criminally charge and punish any officials or legal enforcers who violated the rights of the accused. This provision did not exist in the previous terrorism law and thus, this brings a glimpse of hope for the progression of human rights in Indonesia. Therefore, the Anti-Terrorism Law signifies a definite improvement and provides more guarantee towards protection of human rights compared to the Pre-Trial stage as previously mentioned. This way, certainty and protection of the human rights of the accused in terrorism cases will be strengthened.

### **5. Effective Remedies and Compensation in Cases of Violation of Human Rights, Fundamental Freedoms, or Fair Trial Rights**

In practice, during counter-terrorism operations, human rights and fundamental freedoms of the accused are blatantly violated, including due process and fair trial rights. In such cases, states have the obligation to provide access to effective remedies such as compensation or reparations for those whose rights are violated.<sup>106</sup> The right to access effective remedies and compensation for human rights and fundamental freedoms are protected by international law through Article 8 of the UDHR as well as Article 2(3)(a) of the ICCPR. Article 8 of the UDHR states that:

“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”.

UDHR is the first international human rights framework that guaranteed right to an effective remedy, and later on the same notion is elaborated further by Article 2(3) of ICCPR, stating that:

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104 House of Representative of the Republic of Indonesia, “Risalah Rapat Panitia Khusus Tindak Pidana Terorisme,” 19.

105 Satjipto Rahardjo, *Membedah Hukum Progresif* (Jakarta: Kompas, 2007).

106 United Nations Counter-Terrorism Implementation Task Force, *Conformity on National Counter-Terrorism Legislation with International Human Rights Law*, para. 78; United Nations Counter-Terrorism Implementation Task Force, *Right to a Fair Trial and Due Process in the Context of Countering Terrorism*, para. 93.

- “(a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.”

Hence, states have the obligation to provide access to effective remedies for individuals whose rights and freedoms are violated, even in cases when the perpetrator of the violations are acting in their official capacities. The remedies shall be provided by states and the form of remedies shall be legally determined by a competent tribunal or authority.

This access to remedy will enable individuals to punish those responsible for the violations of human rights of the accused. If it is proven that there is a violation of human rights conducted at any stage of the counter-terrorism operation, it is also the responsibility of the state to ensure there is adequate, effective, and immediate reparations and compensation will be given in the case.<sup>107</sup> Thus, in making the domestic law and national justice system, states shall ensure that it provides legal remedies, including reparations or compensation for the victims in respect of all violations of human rights.<sup>108</sup>

The reparation for violations of due process rights is regulated under Article 14(6) of the ICCPR, which requires that the convicted person shall be compensated according to the law. Hence, domestic law shall create special provision for compensation, based on considerations of the severity of the impact of the violation, and allow payment of appropriate compensation within a reasonable time.<sup>109</sup>

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107 United Nations General Assembly, “*Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*,” Resolution A/RES/64/168, 2010. para. 6(n).

108 General Assembly, “*Basic Principles and Guidelines on the Right to a Remedy and Reparation*,” Resolution A/RES/60/147, 2006. para. 2(c).

109 UNHRC General Comment No. 32, para. 52.

The law regarding compensation in Indonesia is regulated in the Indonesian Criminal Procedure Law, more specifically Chapter XII on the First Section, Article 95 which states:

“(1) A suspect, defendant or convict has the right to demand compensation for him being arrested, detained, prosecuted and convicted or subjected to other measures, without lawful reasons or because of lawful mistakes or mistakes as regards the person or the law applied.”

From the above article, it can be concluded that the accused has a right to demand compensation to the state, if at any stage of the criminal process, if their right is being unrightfully violated during the criminal process. Further, the next part of the article explains about the procedure for the accused to obtain compensation from the violation of their rights, it says:

“(2) A demand for compensation from a suspect or his heir for the arrest or detention or other measures without lawful reasons or because of a mistake as regards the person or the law applied as intended in section (I) whose case has not been submitted to the court of first instance, shall be decided in a pretrial session as intended in Article 77.”

From the provisions above, it can be seen that the legal remedy provided by the state for the accused to receive compensation is through the Pre-Trial stage which will give the final decision through the form of a decree.<sup>110</sup> Further, states shall also provide the remedies that are compatible with the complexity and the nature of each case.<sup>111</sup> In Indonesia, the remedies that are available will vary depending on the case. It may be given in the form of release from arbitrary detention,<sup>112</sup> monetary compensation,<sup>113</sup> return of objects obtained as evidence,<sup>114</sup> and more.

As mentioned above, the nature of the Pre-Trial stage is to evaluate whether there is any wrongdoing committed by any officials

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110 Indonesian Criminal Procedure Code, Article 96(1).

111 Scheinin, “Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism,” 2010, para. 22.

112 Indonesian Criminal Procedure Code, Article 82(3)(a).

113 Indonesian Criminal Procedure Code, Article 82(3)(c).

114 Indonesian Criminal Procedure Code, Article 82(3)(d).

or legal enforcers during the criminal process, in order to determine the appropriate amount of compensation. The Pre-Trial stage will not give the right for the accused to criminally charge the officials or legal enforcers who have violated their rights during the criminal process.<sup>115</sup>

Nevertheless, many scholars believe that the Pre-Trial stage is ineffective in reaching its objective,<sup>116</sup> due to the difficulty of the burden of proof for the accused in proving the violation of their rights by the officials or legal enforcers, particularly in the case of coercion, pressure, mistreatment, and threats of intimidation committed against them during the criminal process.<sup>117</sup>

Therefore, although there exists an access to remedy or compensation for those whose rights are violated during the criminal process through the Pre-Trial stage, still, it is deemed ineffective in guaranteeing compensation or reparations towards the victims of human rights violation that occur during the criminal process due to the difficulty to prove it.

### **6. Right to Genuine Review of the Conviction by a Higher Court**

As soon as there is a conviction in the judicial process, the person convicted shall have the right for a genuine review of the conviction by a higher court. This is one of the rights that equally applicable to all persons convicted by a Court, including in terrorism cases.<sup>118</sup> The right for everyone to have their conviction reviewed by a higher court is protected by Article 14(5) of the ICCPR, which states:

“Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”

The right to appeal is equally applicable to persons convicted by a Court, including in terrorism cases. Hence, the state has an obligation to ensure that its national justice system provides a genuine and fair review of a conviction, whenever a convicted person feels there is a need to. It is important to note that a mere existence of a higher

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115 Raharjo & Angkasa, “Penyidikan dari kekerasan penyidik di kepolisian Resort Banyumas,” 91.

116 Matindas, “Akibat Hukum Terhadap Pelanggaran Hak-Hak Tersangka Dalam Penyidikan Menurut KUHAP,” 35.

117 *Ibid.*

118 United Nations Counter-Terrorism Implementation Task Force, para. 89.

court than the first instance of where the accused was convicted is not sufficient in fulfilling this right.<sup>119</sup> The review of conviction must be proven to be genuine, with the judges being able to conduct a reasoned, thorough analysis or examination of all the issues debated and analysed in the lower court.<sup>120</sup>

Essentially, it is the obligation of the state to protect the right to genuine review of conviction, even in terrorism cases. The fact that a higher court exists to function as an appellate body is not enough, the review also has to be reasoned and thorough, and taking into consideration all fair trial and due process rights during the appeal process. The right to get a review of the conviction from a higher court is available in the Indonesian Judicial system, the right to review of conviction is addressed in Article 67 of the Indonesian Criminal Procedure Code, as part of the ordinary legal remedy which is elaborated in Chapter XVII of the Indonesian Criminal Procedure Code. This right applies to all cases including terrorism cases.

In Indonesia, the ordinary legal remedy can be done through an appeal and cassation. The procedure for an appeal is regulated under Article 244 of the Indonesian Criminal Procedure Code. The appeal will be handled by a higher court, with a bench that is composed of at least three judges who will review the case handed by the District Court.<sup>121</sup> The authority to review the files, determine the detainment of the convicted, and the necessity of obtaining more information will be in the hands of the higher court.

The case review will be conducted by the judges and it will be determined if there is any error of law, error of facts, improper implementation of the procedural law, or insufficient evidence and documents.<sup>122</sup> After all necessary considerations, the High Court has the authority to issue a decision, whether to affirm, alter, or overturn a decision that was previously made by the District Court.<sup>123</sup> The time frame and procedure for the appeal is specifically stated in the law, therefore respecting due process as it is conducted in a timely manner.

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119 Castillo Petruzzi *et al.* v. Peru, para. 161.

120 Scheinin, "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism," 2010, para. 15.

121 Indonesian Criminal Procedure Code, Article 238.

122 Indonesian Criminal Procedure Code, Article 240.

123 Indonesian Criminal Procedure Code, Article 241.

Whereas, the procedure for cassation is regulated under Article 244 of the Indonesian Criminal Procedure Code, it is a process of review of the conviction that is requested to the Supreme Court, for the purpose of final review. During the cassation, the Supreme Court will thoroughly analyse the case and observe if there is a wrong interpretation or incorrect implementation of law within the previous decision. Further, the Supreme Court will also decide whether the previous court has jurisdiction over the case and whether the trial process is completed in accordance with prevailing laws and regulation.<sup>124</sup>

A cassation can be requested towards any decision issued by any Court beside the Supreme Court, including the District Court and High Court. Cassation may apply for any criminal cases including terrorism cases. The process of cassation begins with submission of request for a cassation to the first Court, within 14 days after the issuance of decision. The appointed judges will thoroughly review the evidence, facts, as well as the decisions from the first Court or the last Court.<sup>125</sup> The authority to review the files, determine the detainment of the convicted, and the necessity of obtaining more evidence or information will be in the hands of the Supreme Court.<sup>126</sup>

When a request of cassation is approved by the Supreme Court, the previous decisions made by the lower court will be automatically overturned.<sup>127</sup> The procedure and time frame of cassation is also specifically stated in the law, respecting due process and ensuring that it is being conducted in a timely manner. Hence, the access for a review of the conviction is available within the judicial system of Indonesia, in accordance with Article 14(5) of the ICCPR. Consequently, if a person being convicted of terrorism charges in Indonesia intends to have their convictions reviewed by the higher court, the appropriate procedures are available within the law.

Further, as established in the previous segment, to determine whether the review of the conviction is ‘genuine’, it is important to note that the mere existence of a higher court is not sufficient to fulfill this right, there has to be a reasoned and thorough analysis of

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124 Indonesian Criminal Procedure Code, Article 253(1).

125 Indonesian Criminal Procedure Code, Article 253(2).

126 *Ibid.*

127 Indonesian Criminal Procedure Code, Article 256.

the decision issued by the lower court.<sup>128</sup> The High Court and the Supreme Court will be the ones that conduct the review towards the decision. Both of the Courts will review all documents and evidence related to the case and if necessary, they can obtain more information through summoning the convicted, the witness or even the public prosecutor, in order to hear their testimony.<sup>129</sup>

Therefore, it can be concluded that Indonesia's current legal system provides adequate protection to individuals who want to have their convictions reviewed by a higher court. The obligation to provide genuine review for cases where the person is convicted on terrorism charges is thereby fulfilled in the national justice system of Indonesia.

To sum up, international human rights law dictates states to fulfill and protect all the rights listed above within their national justice systems. All of these rights shall also be protected even in terrorism cases, in order to ensure that the counter-terrorism measures are in line with international human rights law obligations. By assuring the rights of the accused in terrorism cases, states will be able to reach the goals of strengthening the protection of human rights in its counter-terrorism system, complying with international human rights law obligations and consequently successfully securing an indispensable part of counter-terrorism strategy.<sup>130</sup>

#### **IV. The Gap between International Law Obligations and the Existing Human Rights Protection Measures**

The above research has elaborated the international framework on counter-terrorism strategy, including all measures that states shall undertake to ensure human rights protection towards the accused in terrorism cases. Moreover, an assessment towards Indonesian judicial system has also been made in order to see whether Indonesia has adequately provided human rights protection in its counter-terrorism system. The next section will further identify the gap between

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128 Scheinin, "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism," 2010, para. 15.

129 Indonesian Criminal Procedure Code, Article 239 and 253.

130 Scheinin, "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism," 2010, para. 12.

international law protection of human rights in counter-terrorism system emanated from treaties and other international instruments, to the existing human rights protection measures provided in Indonesia.

### **1. The Right to Appoint Legal Counsel of Their Choosing, or to Self Representation**

As established by international treaties and other international instrument, the accused in terrorism cases has the right to self-representation or to appoint legal counsel to represent themselves during all stages of criminal process including the Pre-Trial stage. They also have the right to communicate freely and privately with their legal counsel.

To date, Indonesia has been quite successful in guaranteeing this right, however there are certain aspects that need to be rectified. Firstly, it is worthy to note that Indonesian law fully protects the rights of the accused to self-representation or to choose legal counsel to represent them during the proceeding. The legal counsel will be able to provide legal assistance in all stages of the examination for the interest of the defence, including the Pre-Trial stage, and therefore fulfilling the international standard in this matter.

Moreover, Indonesian law also guarantees the right of the accused to be informed of their right to be represented by legal counsel of their own choosing, at the time of their arrest and before any examination process is being conducted. This shall be protected by the state to ensure effective enjoyment of this right, from the very start of the criminal process.

The right for free legal assistance or legal aid is also guaranteed by Indonesian law and it is applicable for terrorism cases as well—especially taking into account that the death penalty is a real possibility when it comes to terrorism cases in Indonesia. Consequently, any accused in terrorism cases in Indonesia who does not have sufficient means to afford legal counsel to represent them in the criminal proceeding will be entitled for free legal assistance.

Last but not least, it is crucial to mention that the right for the accused to have private communication with legal counsel is also part of the international standard of the protection of the accused. Any exchanges of information and communication between the accused and their legal counsel shall remain confidential. The presence of officials or legal enforcers during meetings between the accused and

their legal counsel constituted a violation of the right to communicate with legal counsel which is regulated under ICCPR.

Nevertheless, in Indonesia, the act of terrorism falls under the crime against national security and as a consequence, the communication between the accused in terrorism case and their legal counsel will be closely monitored by the investigator, prosecutor, or even penitentiary officer. The law allows these officials or legal enforcers to be directly present during their meeting and to listen to their conversation as well.

While a restriction to the right to confidential and private communication in a terrorism case had been found acceptable by the ECtHR, it is the general notion that it should be examined on a case-to-case basis and may only be imposed when exceptional circumstances justify in a specific case, while in Indonesia it is not a case-to-case basis but all cases are automatically monitored due to the nature of the act of terrorism in Indonesia as a crime against national security.

## **2. The Right to be Presumed Innocent until Proven Guilty**

The presumption of innocence is a guiding principle in criminal trials that becomes the most important principle that shall be guaranteed by any laws, to give protection to the human rights of the accused throughout the legal process. The implementation of this right requires the Court to impose the burden of proof on the prosecution, giving the benefit of the doubt to the accused. The judges assigned to adjudicate the case must be neutral; they shall treat the accused fairly without bias, prejudice, or presumption of guilt prior to the verdict.

In line with the measure set forth by the international treaties and instruments, Indonesia has imposed the burden of proof to the prosecution who must prove the guilt of the accused, beyond reasonable doubt. Further, Indonesia also strongly upholds the presumption of innocence principle in its Indonesian Criminal Procedure Code, Code of Ethics for the Judges, and Judiciary Law, therefore ensuring that substantive essence of any criminal procedure regulation to be based on this principle.

The presumption of innocence covers a wide array of rights such as the right for the accused to not be presumed guilty, the right for the accused to be treated with the benefit of doubt, the right to remain

silent and not to testify during the proceedings. It also protects the accused from any form of abuse, coercion, or mistreatment.

### **3. The Right to a Timely Hearing, Trial ‘Without Delay’ and a ‘Timely Judgment’**

The right to a timely hearing, trial without delay, as well as a timely judgment is protected by international law. As previously established, this right entitles the accused to be put on trial within a reasonable time, without any unnecessary delay. It also requires the trials and the appeals process to be conducted efficiently, for a timely judgment that shall be pronounced in public.

In Indonesia, the right to a trial without delay is protected under the Indonesian Criminal Procedure Code and it applies to all criminal cases. This simply means that the adjudication of terrorism cases shall be completed in a timely manner to ensure efficiency and certainty for the accused. Further, in Indonesia, the judgment of criminal cases shall also be announced publicly, in order to create a binding power. Therefore, by way of regulation, Indonesia has complied to the obligation set forth by international treaties and instruments.

### **4. Effective investigations to allegations of human rights violations during counter-terrorism operations**

As elaborated before, international law dictates states to conduct effective investigations to credible allegations of human rights violations towards the accused and punish those responsible for such violations. This mechanism shall be regulated under domestic law in order to protect the rights of the accused throughout the criminal process. It is expected that the state will conduct a thorough investigation towards the allegation, identify the officials or legal enforcers who violated the rights of the accused, and upon finding sufficient evidence, it shall institute criminal proceedings against them—to ascertain the deterrent effect of criminal sanction.

Regrettably, in Indonesia, there is no specific mechanism specifically to investigate allegations of human rights violations of the accused during the criminal process. One available recourse is through the Pre-Trial stage, which aims to evaluate the legality of the criminal process, whether it is conducted in accordance with prevailing laws and regulations. Nevertheless, the pre-trial stage is not specifically intended to punish the officials or legal enforcers who

have clearly violated the rights of the accused.<sup>131</sup> Therefore, the Pre-Trial stage available in our criminal justice system fails to comply with the international law obligation that requires states to launch a thorough investigation into the allegations which may include punishment or criminal charges for the officials or legal enforcers who have abused their powers and violated the rights of the accused.

### **5. Effective remedies and compensation in cases of violation of human rights, fundamental freedoms, or fair trial rights**

In the practice of countering terrorism, human rights, fundamental freedoms and fair trial rights are often neglected. It is the duty of the state to ensure protection of these rights for the accused, through every stage of the process. Hence, the state is expected to provide access to remedy and compensation for those whose rights have been violated, even if such violations were conducted by officials or legal enforcers. The remedies and compensation will be determined by a competent judicial authority, depending on each case.

In Indonesian law, the access to remedy and compensation is stipulated in the Indonesian Criminal Procedure Code through the pre-trial stage. The Pre-Trial stage aims to investigate and decide on whether a violation of rights has occurred in the criminal process. If the allegations turn out to be true, the Court will determine the appropriate remedy and compensation. Nevertheless, it is important to note that the purpose of the pre-trial stage is solely to evaluate any wrongdoing or violation of rights that occur during the criminal process, not to personally charge the involved officials or legal enforcers.

The Pre-Trial stage will be handled by the District Court which has jurisdiction over the case. The District Court will be acting as the competent judicial authority that will determine the right of the accused to receive a remedy or compensation in case of an alleged violation of rights. Indonesia provides several remedies depending on the circumstances of the case, such as a release from arbitrary detention, monetary compensation, return of objects obtained as evidence, and more. A combination of remedies may also be given

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131 Raharjo & Angkasa, "Penyidikan dari kekerasan penyidik di kepolisian Resort Banyumas," 91; Nasrullah, "Tinjauan Yuridis Aspek Hukum Materil Maupun Formil Terhadap UU no. 15/2003 Tentang Pemberantasan Tindak Pidana Terorisme," 72.

depending on the circumstances of the case.

Despite this, the mechanism to ensure protection of the right to receive remedy and compensation in Indonesia has been proven to be ineffective since the burden of proof is placed upon the accused. Inevitably, it is difficult for the accused to prove any coercion, pressure, mistreatment, and threats of intimidation committed by officials or legal enforcers during the criminal process.<sup>132</sup> The stigma of being the accused in a terrorism case will undeniable render negative impression in the eyes of the judges as well as public. Undoubtedly, most of them will not believe any statement made by the accused and this is quite problematic.

Although the access to remedy and compensation is available, however, there is no appropriate mechanism to investigate possible human rights violations towards the accused. Hence, Indonesia needs to improve this mechanism, in order to fully protect the rights of the accused and deter human rights violation.

### **6. Right to Genuine Review of the Conviction by a Higher Court**

After a conviction in the court of law, the person convicted has the right for a genuine review of the conviction by a higher court. This right is protected by international law and this applies to terrorism cases as well. This right obliges states to provide access for a genuine review of conviction by a higher court that is competent to function as an appellate body. The appointed higher court shall be able to conduct a genuine review of conviction with a reasoned, thorough analysis and examination of issues analysed in lower court.

As priorly established, access to a review of conviction exists in the Indonesian law, as elaborated in the Indonesian Criminal Procedure Code. Indonesian Criminal Procedure Code offers two forms of legal remedy, through an appeal or cassation. The High Court deals with all appeals from District Courts, whereas the Supreme Court is the final court of appeal in Indonesia. Both of the Courts will review all documents and evidence related to the case and if necessary, they can obtain more information through summoning the convicted, the witness or even the public prosecutor, in order to hear their testimony.

The obligation to provide a genuine review of the conviction by a higher court is fulfilled in the Indonesian judicial system, through

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<sup>132</sup> *Ibid.*

the existence of the procedure of appeal and cassation. Therefore, it can be concluded that Indonesia's current judicial system is in line with the international human rights obligation to provide access for individuals who want to have their conviction reviewed by a higher court, including those convicted in terrorism cases.

## **V. Conclusion**

After conducting a thorough analysis regarding human rights protection of the accused in terrorism cases in Indonesia, it can be concluded that Indonesia has been quite successful in complying with international obligation to provide and ensure protection of the human rights of the accused in terrorism cases. Anti-Terrorism Law, the Indonesian Criminal Procedure Code, Judiciary Law, and other relevant laws set forth provisions that guarantee the human rights of the accused. These provisions are proven to be in line with the international obligations to fully protect and respect the human rights of the accused in terrorism cases, as dictated by treaties and other relevant international instruments.

However, there are some ineffectual provisions that need to be altered or amended, in order to ensure full compliance to the international human rights law obligations. Firstly, Indonesia fails to respect the right of the accused in terrorism cases, to have private communication with their legal counsel—due to the severity of the act of terrorism that falls under crimes against national security in Indonesia. Nevertheless, the right of the accused to have private and confidential communication with the legal counsel shall be fulfilled as part of fair trial rights.

Secondly, a mechanism for effective investigations towards credible allegations of human rights violations shall be set up immediately, without requiring the individual to make a formal complaint. Thus, whenever there exists credible allegations of human rights violation, an investigation shall be conducted. Further, if the allegations turn out to be true, any officials or legal enforcers who violated the human rights of the accused in terrorism cases shall be punished.

Lastly, in Indonesia, the accused whose rights are violated may only receive remedy and compensation through the Pre-Trial stage. However, the Pre-Trial mechanism has been criticised since the burden of proof is placed upon the accused and as expected, it is not

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an easy task to prove any coercion, pressure, mistreatment, and threats of intimidation committed by officials or legal enforcers during the criminal process. Ideally, Indonesia shall rectify these ineffectual provisions, in order to fully protect the rights of the accused and deter human rights violation.

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## *Prosecutor v. Ntaganda* and Rape of Non-Opposing Armed Forces: Addressing the Scope of War Crimes

*Muhammad Awfa*

The general view regarding IHL is that the scope of war crimes does not include acts perpetrated among armed forces, not on the opposing sides. This view was challenged in the case of *Prosecutor v. Ntaganda* before the ICC, which among other charges, concerns the war crime of rape committed among combatants within the same side, charged under Article 8(2)(e)(vi) of the Rome Statute. The defendant subsequently appealed, arguing that the scope of war crimes is limited as to not including conducts committed not against the adversary. Nevertheless, the ICC persisted with its view to expand the scope of war crimes. The ICC's judgment on the matter was considered a legal breakthrough by many legal experts. However, a further examination of the provisions of the governing instruments of IHL, mainly the four Geneva Conventions of 1949, the two Additional Protocols of 1977, as well as the Rome Statute showed that a status requirement of victims and perpetrators of a war crime exists, thus limiting the scope of a war crime. Therefore, the Judgment of *Ntaganda* might show an error in legal interpretation and, possibly, violation of the principle of legality.

**Keywords:** war crime, rape, Ntaganda, principle of legality, IHL

### I. Introduction

Anywhere it may occur in the world, war comes with various atrocities: destruction, poverty, death, and human rights violations. Due to the conditions during warfare, human rights violations are expected to occur in alarming frequency. Such violations require immediate action by the international community, including through the need for a specific law regulating the conduct of war and prohibiting such violations during warfare. Such law has actually existed since ancient times in many different civilizations, cultures, and religions,<sup>1</sup> but it is now commonly known as IHL. According to the ICRC, IHL is defined as:<sup>2</sup>

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1 Jacques Meurant, "Inter Arma Caritas: Evolution and Nature of International Humanitarian Law", *Journal of Peace Research* 24, no.3 (1987): 239. See also: Amanda Alexander, "A Short History of International Humanitarian Law", *The European Journal of International Law* 26, no. 1 (2015): 111-112.

2 International Committee of the Red Cross (ICRC), "War and International

“Part of the body of international law that governs relations between States. It aims to protect persons who are not or are no longer taking active part in hostilities, the sick and wounded, prisoners and civilians, and to define the rights and obligations of the parties to a conflict in the conduct of hostilities.”

As a body of law, IHL aims to mainly mitigate the adverse effects of warfare and limit the means and methods used during warfare. Through the enforcement of IHL, perpetrators of war crimes may be prosecuted and brought to justice, all while ensuring that the protected persons may continue enjoying the protections entitled to them by the four Geneva Conventions of 1949 (‘Geneva Convention’), and further enhanced by the two Additional Protocols to the Geneva Conventions, 1977 (‘Additional Protocols’).

In enforcing the IHL and bringing justice to the perpetrators of gross violations of human rights during armed conflicts, numerous international tribunals were established. The Nuremberg Trials prosecuted German war criminals, the prosecution of the perpetrators of the massacre of the Tutsi tribe in Rwanda was handled by the ICTR, the crimes committed during the conflicts in the Balkans was tried by the ICTY, and the latest institution to prosecute international crimes and enforce ICL was done by the ICC. Those tribunals dealt with numerous crimes occurring during their respective cases—genocide, crimes against humanity, and war crimes. The repeated pattern of war crimes throughout history shows a particular type of crime that is so commonly committed yet remains an “invisible” crime,<sup>3</sup> which is sexual violence, especially rape.

Several researches identified the main reasons as to why armed forces resort to sexual violence, including rape; to exert power over certain territory and resources, ethnic cleansing, terrorizing, obtaining information, and retaliation.<sup>4</sup> Therefore, it is highly common for rape to occur during armed conflicts. The Nuremberg Trials’ official

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Humanitarian Law,” [www.icrc.org/eng/war-and-law/overview-war-and-law.html](http://www.icrc.org/eng/war-and-law/overview-war-and-law.html), (accessed 6 June, 2018).

3 Gloria Gaggioli, “Sexual violence in armed conflict: A violation of international humanitarian law and human rights law,” *International Review of the Red Cross* 96, no. 894 (2014): 504.

4 Vincent Bernard and Helen Durham, “Sexual violence in armed conflict: From breaking the silence, to breaking the cycle,” *International Review of the Red Cross* 96, no. 894 (2014): 433.

records contained numerous pieces of evidence describing cases of rape committed by the Nazi Germany forces<sup>5</sup> and the establishment of brothels.<sup>6</sup> The landmark case of *Akayesu* in the ICTR dealt with—among others—a rape charge.<sup>7</sup> Several cases of rape during the conflict in Bosnia-Herzegovina and Croatia described the use of rape in a systematic, policy-like nature as part of the war strategy.<sup>8</sup> In modern days, rape is still committed in relation to armed conflicts.<sup>9</sup>

However, one particular case stood out. The *Bosco Ntaganda* case of the ICC<sup>10</sup> seemed to offer a unique form of the war crime of rape; while most cases show civilians and adversaries as the victims,<sup>11</sup> the Ntaganda case deals with rape committed internally. The war crime of rape was committed by the UPC, also known as FPLC, against their own child soldiers. In the said case, the defendant argued that the elements of crime and the nexus of the conduct to constitute a war crime are not satisfied, while the ICC decided otherwise. The case then went through several proceedings and decisions to address such specific issues, from the pre-trial chamber, trial chamber, and appeals chamber. Ultimately, in their appeals judgment, the judges of the ICC asserted that the conduct nevertheless constitutes a war crime, citing that protection over war crimes should include members of armed forces as the current framework of international law contains no limitation on the protection. The judges also mentioned that the nexus requirement should be the determining factor for the alleged rape to

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5 International Military Tribunal Nuremberg, Trial of the Major War Criminals Before the International Military Tribunal, vol. VI (Nuremberg: 1947), 40; International Military Tribunal Nuremberg, Trial of the Major War Criminals Before the International Military Tribunal, vol. VII (Nuremberg: 1947), 457 and 467.

6 International Military Tribunal Nuremberg, Trial of the Major War Criminals Before the International Military Tribunal, vol. VII, 467.

7 Prosecutor v. Jean-Paul Akayesu, Trial Judgement, ICTR-96-4-T, 1998.

8 Beverly Allen, *Rape Warfare: The Hidden Genocide in Bosnia-Herzegovina and Croatia*, (Minnesota: University of Minnesota Press, 1996), 47.

9 Dara Kay Cohen and Ragnhild Nordås, “Sexual violence in armed conflict: Introducing the SVAC dataset, 1989-2009,” *Journal of Peace Research* 51, no. 3 (2014): 423.

10 Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06.

11 See for example, Prosecutor v. Jean-Paul Akayesu; Prosecutor v. Anto Furundzija, Trial Judgement, IT-95-17, 10 December 1998; and Prosecutor v. Jean-Pierre Bemba Gombo, Judgement pursuant to Article 74 of the Statute, ICC-01/05-01/08, 21 March 2016 (‘Bemba Judgement’).

constitute a war crime, not the status of the victims.

Therefore, the unique nature of the *Ntaganda* case and the complicated legal discussion contained within the proceedings demands a deeper analysis.

## II. Understanding the Scope War Crimes under IHL and ICL

The main conventions that govern IHL—The four Geneva Conventions and its two Additional Protocols—do not specifically stipulate the definition of war crimes. The only mention of what constitutes war crimes is contained under Article 85(5) of the Additional Protocol I, which states that the grave breaches of the Geneva Conventions and their Additional Protocols shall be “regarded as war crimes.” However, it is important to note that such instruments stipulate specific acts committed to specific groups of people. For example, Geneva Conventions I and II protect combatants, medical personnel, as well as dead persons,<sup>12</sup> where the protection shall be given and respected in all circumstances.<sup>13</sup> The protected persons include “members of the armed forces of a party to the conflict,”<sup>14</sup> without any requirements of them being a part of the opposition or not.

This provision is affirmed by Pictet’s commentary to the Geneva Conventions, which mentioned that the obligation to respect the wounded exists whether when they are “in their own army or in no man’s land as when they have fallen to the hands of the enemy.”<sup>15</sup> Additionally, protections were required to be provided without any “adverse distinction,” such as those founded on sex, race, nationality, religion, political opinions or other similar criteria.<sup>16</sup> The commentary to the Geneva Conventions elaborated that the term “other similar criteria” was added during the Diplomatic Conference of 1949 (Geneva Convention IV) to “strengthen the prohibition and make it more general,” to the extent that it would not matter whether the wounded are “friend or foe.”<sup>17</sup>

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12 Geneva Convention I and II, Article 4.

13 Geneva Convention I and II, Article 12 .

14 Geneva Convention I and II, Article 13(1).

15 Jean Pictet, Commentary: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, (Geneva: International Committee of the Red Cross, 1952), 135.

16 Geneva Convention I and II, Article 12.

17 Pictet, Commentary: Geneva Convention for the Amelioration of the Condition of

However, the issue is addressed differently in Geneva Convention III. The third Geneva Convention—which concerns prisoners of war—limits the scope of protection to those who have “fallen to the power of the enemy.”<sup>18</sup> Likewise, Geneva Convention IV defines the ‘protected persons’ as those who found themselves “in the hands of a Party to the conflict or occupying power of which they are not nationals.”<sup>19</sup> The commentary to the Geneva Conventions explained that the definition of protected persons contained in this article is viewed as “a very broad one which includes members of the armed forces—fit for service, wounded, sick or shipwrecked—who fall into enemy hands.”<sup>20</sup> Therefore, under Geneva Convention III and IV, war crimes may not be committed to non-opposing armed forces.

What about NIACs? Common Article 3, which applies to NIACs, regulates the fundamental guarantees to protect persons from certain acts (including rape) but even if it is guaranteed “at all times,” the protection is nevertheless strictly limited to those not taking an active part in hostilities.<sup>21</sup>

As a supplementary instrument to the Geneva Conventions,<sup>22</sup> it is therefore essential to look into how the provisions contained under the Additional Protocols view war crimes and the protection for the victims. It should be noted that the Additional Protocol I stipulates that the grave breaches of the Geneva Conventions and their Additional Protocols shall be regarded as war crimes.<sup>23</sup> The acts that constitute ‘grave breaches’ to those instruments are enumerated under several articles of the Additional Protocols,<sup>24</sup> yet none covers attacks or acts directed to combatants who belong to the same armed forces. The only act that might cover non-opposing armed forces is the act of “making a person the object of the attack in the knowledge that he is *hors de*

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the Wounded and Sick in Armed Forces in the Field, 138.

18 Geneva Convention III, Article 4A.

19 Geneva Convention IV, Article 4.

20 Jean Pictet, Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War, (Geneva: International Committee of the Red Cross, 1958), 50.

21 Geneva Convention, Common Article 3.

22 Jean Pictet, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Geneva: Martinus Nijhoff Publishers, 1987), 20.

23 Additional Protocols I, Article 85(5).

24 Additional Protocols I, Article 11, 85(3), and 85(4).

*combat*.”<sup>25</sup> Therefore, while this article provides the possibility for the grave breaches (which constitutes war crimes) to be committed to non-opposing armed forces, such people are still required to fill the criteria of *hors de combat*. However, this act does not seem sufficient to extend the understanding of war crimes as to the acts directed to non-opposing armed forces, as the Additional Protocols themselves define the term “attack” as “acts of violence against the adversary, whether in offense or in defense.”<sup>26</sup>

It is then apparent that there exists a legal vacuum addressing the scope of war crimes in the regime of IHL itself. The Geneva Conventions all guarantee protection for persons from the adversities caused by armed conflict, but the entirety of such protection is categorized for specific acts directed to specific groups of persons. Moreover, while the protection is being categorized, it is clear that such protection does include members of armed forces (Geneva Convention I and II), regardless of which side they are affiliated to. However, not every violation of IHL constitutes war crimes. Thus, the act of violating the protection mentioned above does not automatically amount to war crimes. The definition of war crimes is provided in the Additional Protocols as the grave breaches of the Geneva Conventions and its Additional Protocols.

Furthermore, Additional Protocol I explicitly prescribes acts that constitute grave breaches,<sup>27</sup> none of which covers the act of violence among non-opposing armed forces. The only act that may cover crimes committed towards non-opposing armed forces is contained under Article 85(3)(e), which reads “making the person the object of attack in the knowledge that he is *hors de combat*.”

There are two important things to note from this article. *First*, the attack may only be directed with the knowledge to those *hors de combat*. Therefore it does not include combatants who are taking an active/direct part in hostilities. *Second*, the act is done in the form of “attack,” a term defined by the Additional Protocols themselves as “acts of violence against the adversary.”<sup>28</sup> The commentary to the Additional Protocols did mention that the wording “against the

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25 Additional Protocols I, Article 85(3)(e).

26 Additional Protocols I, Article 49(1).

27 Additional Protocols I, Article 11, 85(3), and 85(4).

28 Additional Protocols I, Article 49(1).

adversary” gave rise to controversy during the drafting.<sup>29</sup> However, the issue lies on how some parties in the drafting committee wished the words “against the adversary” to be deleted, as the Additional Protocols should apply to the “civilian population of all parties to the conflict, including the civilian population of the party concerned.”<sup>30</sup> However, they did not dispute whether or not the acts of violence should be limited to the “adversary” to cover violence directed against non-opposing armed forces.

Conclusively, acts of violence committed among non-opposing armed forces do not amount to war crimes, evidencing a legal vacuum that disconnects how IHL intended to protect even non-opposing armed forces (as shown by the scope of protection under Geneva Conventions I and II). However, the acts of grave breaches that constitute war crimes as defined by the Additional Protocols do not offer the same scope as the intended protection.

The issue is addressed differently in ICL. As elaborated *supra*, the Rome Statute categorizes war crimes into four different categories, two of which are applicable under IACs<sup>31</sup> and the other two under NIACs.<sup>32</sup> In IACs, Article 8(2)(a) of the Rome Statute provides the jurisdiction for the ICC to prosecute war crimes that stem from the grave breaches of the Geneva Conventions. As previously mentioned, the Geneva Conventions I and II both protect wounded, sick, and shipwrecked persons without any distinction to which side they were affiliated with. However, Geneva Convention III—which concerns prisoners of war—limits the scope of protection to those who have “fallen to the power of the enemy.”<sup>33</sup> Likewise, Geneva Convention IV defines the ‘protected persons’ as those who found themselves “in the hands of a party to the conflict or occupying power of which they are not nationals.”<sup>34</sup> Therefore, under Geneva Conventions III and IV, war crimes may not be committed to non-opposing armed forces.

Under Article 8(2)(b), the ICC may exercise its jurisdiction over other serious violations of the laws and customs applicable in IAC.

29 Claude Pilloud, *et al.*, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, (Geneva: Martinus Nijhoff Publishers, 1987), 602-603.

30 *Ibid.*

31 Rome Statute, Article 8(2)(a) and (b).

32 Rome Statute, Article 8(2)(c) and (e).

33 Geneva Convention III, Article 4A.

34 Geneva Convention IV, Article 4.

There are crimes listed under this paragraph that do not preclude members of non-opposing armed forces. For example, Article 8(2)(b)(vi) stipulates the war crime of “killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at his discretion.” Another similar provision is contained under Article 8(2)(b)(xi), which lists the war crime of “killing or wounding treacherously individuals belonging to the hostile nation or army.” The words “surrendered” and “belonging to the hostile nation or army” show how the crimes require the victims to belong to the opposing side.<sup>35</sup>

However, other articles may suggest otherwise. For instance, such Article 8(2)(b)(xxi) prohibits the war crime of “committing outrages upon personal dignity, in particular inhuman and degrading treatment” and Article 8(2)(b)(xxii) prohibits the war crime of “committing rape, sexual slavery, enforced prostitution, forced pregnancy [...] enforced sterilization, or any other form of sexual violence also constituting a breach of the Geneva Conventions.” Those two articles do not explicitly regulate how the victims are only those from the opposing side. Therefore, it does not limit the possibility of war crimes being committed among non-opposing armed forces.

Moreover, under NIACs, the crimes are listed under two paragraphs of the Rome Statute, mainly Article 8(2)(c) for serious violations of Common Article 3, which are specifically acts that are committed against “persons taking no active part in the hostilities.” It includes members of an armed force who have laid down their arms and those *hors de combat* and Article 8(2)(e) for “other serious violations of the laws and customs applicable in armed conflicts not of an international character within the established framework of international law.”

From the wording of the articles, it is apparent that Article 8(2)(c) allows the crimes to be committed between non-opposing armed forces. Common Article 3—the basis of Article 8(2)(c)—stipulates that in NIACs, the parties to the conflict shall ensure humane treatment to persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those

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35 Joanna Nicholson, “Can War Crimes be Committed by Military Personnel Against Members of Non-Opposing Forces?,” *International Crimes Database Brief* 16 (2015): 11.

placed *hors de combat*.<sup>36</sup> Such treatment shall be ensured without any ‘adverse distinction.’<sup>37</sup> Therefore, it is possible for the crimes listed under Article 8(2)(c) to be committed to members of non-opposing armed forces, as Common Article 3 allows.

However, while Article 8(2)(e) does not expressly provide any category of the persons who are the potential victims of the crimes listed within, it is important to remember that the “established framework of international law” would require looking into the instruments under international law that deals with the definition and scope of war crimes—the Geneva Conventions and their Additional Protocols. As established previously, the scope of war crimes under the said instruments are limited and does not cover crimes committed against non-opposing armed forces.

### III. War Crime of Rape in the *Ntaganda*

The issue of war crime of rape in *Ntaganda* case differs from most cases of rape as a war crime, in which the issue was addressed in several proceedings due to the parties involved in it. This case was also considered as a breakthrough in the regime of ICL concerning the prosecution of rape.<sup>38</sup>

This section will discuss and analyze the three issues based on the approach of the appeals chamber’s judgment: 1) the ordinary meaning, context, and drafting history of the provisions; 2) the “established framework of international law;” and 3) the existence of status requirements under “established framework of international law.” However, before going further into the aforementioned main issues, it is necessary to address whether or not the victims of the war crime of rape in the *Ntaganda* case are child soldiers as it bears a certain weight in the determining the acts that constitute a war crime.

The issue of the victims being child soldiers was first raised in the pre-trial chamber. The pre-trial chamber viewed that to determine whether or not the child soldiers under the age of 15 years of the UPC/FPLC soldiers are entitled to protection against rape. It is necessary to assess whether or not they were taking a direct/active part in hostilities

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36 Geneva Convention I-IV, Common Article 3.

37 *Ibid.*

38 Yvonne McDermott, “International Criminal Court Expands the Purview of War Crimes,” *The Wire*, <https://thewire.in/world/international-criminal-court-expands-the-purview-of-war-crimes> (accessed 25 January, 2017).

while they were victims of rape and/or sexual slavery.<sup>39</sup>

In the Chamber's view, children under the age of 15 lose the protection under IHL only "during their direct/active participation in hostilities."<sup>40</sup> The Pre-Trial Chamber found that the victims cannot be considered to have taken part in hostilities during the "specific time when they were subject to acts of sexual nature, including rape, as defined in the relevant elements of crimes."<sup>41</sup> This finding is due to the sexual character of the crimes involving elements of force, coercion, or exercise of rights of ownership, which precludes active participation in hostilities at the same time.<sup>42</sup> Therefore, the chamber concluded that the child soldiers enjoy protection under IHL for the war crime of rape.<sup>43</sup>

Subsequently, the issue of the alleged victims being child soldiers was not the ICC's main focus in determining whether rape is a war crime, as it is not the issue that was raised by the defense when they challenged the ICC's jurisdiction over the crime. This appears to be supported by the fact that the prosecution has defined the child soldiers as being 'members' of the same armed forces as the perpetrators, as such they lose the protection as they no longer retain the civilian status.<sup>44</sup> Instead, the defense instead argued that as Article 8(2)(e)(vi) of Rome Statute, which lists the war crime of rape and sexual slavery, is subject to the "established framework of international law" and that Common Article 3 does not allow war crimes to be committed by members of the same armed forces as the perpetrators.<sup>45</sup>

In response to the challenge, the trial chamber noted several issues, some of which require technical examination on the formulation of the article of the Rome Statute. There were two main arguments that the court presented. *First*, the statutory framework of the ICC does not require the victims of the crime contained in Article 8(2)(e)

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39 Prosecutor v. Bosco Ntaganda, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Bosco Ntaganda, ICC-01/04-02/06, 6 June 2014 ('Ntaganda PTC'), para. 77.

40 *Ibid.*, para. 79.

41 *Ibid.*

42 *Ibid.*

43 *Ibid.*, para. 80.

44 Prosecutor v. Bosco Ntaganda, Second decision on the Defence's challenge to the jurisdiction of the Court in respect to Counts 6 and 9, ICC-01/04-02/06, 4 January 2017 ('Ntaganda Trials'), para. 27.

45 *Ibid.*

(vi) to be protected persons in the limited sense of grave breaches of Common Article 3 (the so-called ‘status requirements’). *Second*, the chamber considered that there is no such limitation arising from the “established framework of international law.”

In elaborating its first argument, the chamber noted that the categorization of war crimes under Article 8 into four categories is evidence that the statutory framework of the Rome Statute did not intend rape and sexual slavery to only be prosecuted as grave breaches or serious violations of Common Article 3. The chamber also noted that the *chapeaux* of paragraphs 2(b) and (e) do not include any particular status of victims, unlike paragraph 2(a) and (c). The chamber further elaborates that academic commentary and drafting history of the Rome Statute and its elements of crimes shows an intention to introduce status requirements for the victim of the crimes. Lastly, even though the issue has never been specifically litigated in previous cases, the ICC case laws do not require any status requirement in analyzing rape as a war crime.

As for their second argument, the Chamber looked into a broader scope of the international legal framework considering how the *chapeaux* of paragraph 8(2)(e) refer to the “established framework of international law.” As elaborated in the previous section of this research, the chamber made numerous interpretations regarding how the protection over war crimes, especially rape under IHL, should not be limited in a way that would not include conducts between non-opposing armed forces. For example, the chamber did recognize that most of the express prohibitions on rape and sexual slavery under IHL appear in the context of protecting civilians and persons *hors de combat*. However, such provisions were not considered to “exhaustively define or indeed limit the scope of the protection against such conduct.”<sup>46</sup> The chamber supported this view by citing the Martens Clause and the fundamental guarantees contained within the Additional Protocols where the prohibited acts (including rape) shall remain prohibited at any time and place.<sup>47</sup>

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<sup>46</sup> *Ibid.*, para. 47.

<sup>47</sup> According to the Chamber, if the protection is limited in such a way, that it would contradict the rationale of IHL. However, as have discussed in the previous section, the violations of the provided ‘protections’ under the Geneva Conventions and the Additional Protocols does not automatically amount to war crimes. The question is whether or not the rape may amount to war crimes – thus requiring the act to fulfill

The chamber also considered that while combatants' active participation in hostilities may allow them to be the target of attacks, it is not justified to engage in sexual violence.<sup>48</sup> The ICRC's updated commentary supports this view on the Geneva Convention I, which addressed that sexual abuse among non-opposing armed forces "should not be a ground to deny such persons the protection of Common Article 3."<sup>49</sup> Lastly, rape and sexual slavery have attained the *jus cogens* status under international law. Therefore, the conduct is prohibited at all times and against all persons irrespective of any legal status.<sup>50</sup>

The problematic issue of the scope of the war crime of rape *in casu* was ultimately addressed further in the appeals chamber. In their submission, the defense reiterates their argument that members of an armed force may not commit war crimes against fellow members of the same armed force due to how Common Article 3 prohibits "specifically and solely" acts committed in NIAC against "persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those place *hors de combat*." According to the defense's submission, the language of Common Article 3 has three necessary implications:<sup>51</sup>

- "(i) that there are "armed forces" even in non-international armed conflicts,
- (ii) that there are "members" of these armed forces, and (iii) that these "members" may be victims of war crimes, but only if they have "laid down their arms or are otherwise *hors de combat*."

The defense then noted the CIHL definition of *hors de combat*, which requires a person to fall into "the power of an adverse party," or defenceless because of unconsciousness, shipwreck, wounds or sickness, or those who "clearly expresses an intention to surrender"<sup>52</sup>

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the criteria of 'grave breaches', a criterion that was not fulfilled *in casu*.

48 Ntaganda Trials, para. 49.

49 *Ibid.*, para. 50.

50 *Ibid.*, para. 52.

51 Prosecutor v. Bosco Ntaganda, Consolidated submissions challenging jurisdiction of the Court in respect of Counts 6 and 0 of the Updated Document containing the charges, ICC-01/04-02/06, 7 April 2016, ("Defense consolidated submissions"), para. 18.

52 Jean-Marie Henckaers and Louise Doswald-Beck, Customary International

—which also “necessarily involves surrender to an adverse party.”<sup>53</sup> This argument is not baseless—there are supporting views coming from scholarly writings and case laws. For example, Antonio Cassese observed that:<sup>54</sup>

“War crimes may be perpetrated by military personnel against enemy servicemen or civilians, or by civilians against either members of the enemy armed forces or enemy civilians (for instance, in occupied territory). Conversely, crimes committed by servicemen against their own military (whatever their nationality) do not constitute war crimes.”

Another writing from ICRC review agreed with such view;<sup>55</sup>

“In the context of a non-international armed conflict, if a military commander rapes a subordinate soldier in a military barracks as a form of punishment—as he may have done already in peacetime—without this act having any link to the armed conflict situation, IHL would not apply to the act. This rape would/should however be prohibited under domestic law.”

Additionally, several case laws endorsed the view that war crimes may not be committed against non-opposing armed force<sup>56</sup> and that IHL is concerned with “conduct directed towards those external to a military force.”<sup>57</sup> The defense also mentioned<sup>58</sup> several ICTR cases that have described the “characterization of the identity of the victim” as a “threshold requirement.”<sup>59</sup>

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Humanitarian Law, vol. 1 (Geneva: International Committee of Red Cross, 2004), 164.

53 Defense consolidated submissions, para. 20.

54 Antonio Cassese, *International Criminal Law* (New York: Oxford University Press, 2008), 82.

55 Gaggioli, “Sexual violence in armed conflict: A violation of international humanitarian law and human rights law,” 515.

56 See for example, *In re Pilz*, Special Court of Cassation, District Court of The Hague (Special Criminal Chamber), 5 July 1950; *Trial of Susuki Motosuke*, Judgement, Netherlands Temporary Court-Martial at Amboina, 28 January 1948.

57 *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Trial Judgement, SCSL-04-15-T, 2 March 2009, para.1451-1453.

58 Defense consolidated submissions, para. 22.

59 See for example, *Prosecutor v. Ndindiliyimana et al.*, Judgement and Sentence, ICTR-00-56-T, 17 May 2011, para. 2129; *Prosecutor v. Bagosora et al.*, Judgement and Sentence, ICTR-98-41-T, 18 December 2008, para. 2229; *Prosecutor v.*

Furthermore, the defense submitted that the notion of “taking no active part in hostilities” is incompatible with the fact that the alleged victims were “members” of an armed force until they ceased to be members, had laid down their arms, or were *hors de combat*.<sup>60</sup> As elaborated *supra*, the latter two conditions require the members to fall into the power of the adversary.

The appeals chamber’s response, however, disagreed with the defense’s submission based on three main arguments. *First*, the chamber viewed that the ordinary meaning, context, and drafting history of the provisions under Article 8(2)(e)(vi) of Rome Statute do not limit the victims of war crimes of rape to “protected persons in the (limited) sense of the grave breaches of Common Article 3.”<sup>61</sup> The chamber noted that Article 8(2)(e)(vi) does not expressly provide that the victims of war crimes of rape should be the persons mentioned above, in contrast with the *chapeaux* of Article 8(2)(a) and (c) which expressly mentioned status requirements.<sup>62</sup> The Chamber also noted that while the drafting history was silent as to whether or not Article 8(2)(e)(vi) should be subject to Status Requirements, it is clear that the drafters intended those crimes to be “distinct war crimes” as opposed to “merely illustrations of grave breaches of the Geneva Conventions or violations of Common Article 3.”<sup>63</sup> Furthermore, the Appeals Chamber mentioned that it was not aware of any debate during the drafting on whether or not the provision should be limited to protected persons under the Geneva Conventions of persons who no longer take an active part in hostilities under Common Article 3.<sup>64</sup>

*Second*, the chamber argued that the “established framework of international law” permits, in principle, the introduction of additional elements to the crimes listed in Article 8(2)(e). In the lengthy elaboration, the chamber came to the conclusion that it is possible to introduce an additional element—the status requirement—under the “established framework of international law.” However, the question is whether or not such status requirements exist within the “established framework of international law.”

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Semanza, Judgement and Sentence, ICTR-97-20-T, 15 May 2003, para. 512.

60 Defense consolidated submissions, para. 31.

61 Ntaganda Appeals, para. 51.

62 *Ibid.*, para. 46.

63 *Ibid.*, para. 48.

64 *Ibid.*, para. 50.

*Third*, the chamber found that there is no need to introduce status requirements under Article 8(2)(e)(vi) based on the “established framework of international law.”<sup>65</sup> The chamber agreed that the scope of protection might be limited, as evidenced by Geneva Conventions III and IV (since valid to its subject matter, Geneva Conventions III and IV concern and limit their scope of protection to prisoners of war and civilians, respectively). However, Geneva Conventions I and II do not apply the same limitation, thus allowing violations to be committed by members of one’s own armed forces and not having a “general rule that categorically excludes members of an armed group from protection against crimes committed by members of the same group.”<sup>66</sup> In regards to the different case laws used by the defense, the chamber argued that the circumstances are different for the cases, thus, the judgments are not compatible *in casu*.<sup>67</sup>

Regarding whether or not the so-called status requirements that exist under IHL, especially for the war crimes of rape, the chamber did recognize that the protection from such crimes under IHL generally appears in the context of protecting civilians and those *hors de combat*.<sup>68</sup> However, the chamber argued that there is no “conceivable reason” to conclude that such explicit protection suggests any limits on who may or may not be victims of war crimes.<sup>69</sup> Reasserting the trial chamber’s view, the chamber stated that there is never a justification to engage in sexual violence, whether not they may be targeted or killed under international law.<sup>70</sup>

To distinguish the conduct in question as a war crime from ordinary crimes, the chamber viewed that it is sufficient to rely on the nexus requirement—mainly by establishing that the alleged

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<sup>65</sup> *Ibid.*, para. 66.

<sup>66</sup> *Ibid.*, para. 63. This is one of several instances throughout the proceedings where the Court has failed to address the legal vacuum within the provisions of the Geneva Conventions and its Additional Protocols.

<sup>67</sup> For example, in paragraph 61 the Chamber pointed out how the SCSL judgment was based on Geneva Convention III (which has a limited scope as a “*result of of the subject-matter of the convention and not an expression of a general rule*”).

<sup>68</sup> Ntaganda Appeals, para. 64.

<sup>69</sup> *Ibid.* In fact, there are numerous “conceivable reason” to limit who may be victims of war crimes. Excluding the legal vacuum previously discussed, numerous scholars and precedents seem to agree on such limitation – see *supra* note no. 68.

<sup>70</sup> *Ibid.*, para. 65.

rape “took place in the context of and was associated with an armed conflict.”<sup>71</sup> As such, the appeals chamber rejected Ntaganda’s ground for appeal and reasserted that the court has jurisdiction over the war crime of rape as charged under Count 6.

There is no doubt that this judgment is ambitious and groundbreaking in nature—it expanded the general view on the scope of war crimes by allowing the war crime of rape to be committed towards members of non-opposing armed forces. However, it does not hide the fact that the ICC overlooked several crucial details that might render its judgment invalid.

The judges of the *Ntaganda* case mentioned on several occasions how they were not convinced that the current “established framework of international law” limits the scope of war crime (especially rape), thus excluding conducts committed among members of non-opposing armed forces. In their view, the protection over such crimes should be ensured irrespective of one’s status, as the so-called status requirements do not exist. This is, of course, not a convincing argument in itself. The “established framework of international law” as mentioned expressly under the *chapeaux* of Article 8(2)(e) definitely requires us to looking into the main instruments of IHL—the four Geneva Conventions and their two Additional Protocols. Within such instruments, it will be found that the so-called status requirement exists.

Let us look at the alleged victims’ status and see whether or not they are entitled to protection over war crimes. As the armed conflict in the Ntaganda case is categorized as NIAC, the provisions of Common Article 3 apply. Even then, the provisions specifically prohibit acts against persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those *hors de combat*.<sup>72</sup> The alleged victims were given various tasks in the camp, such as cooking. These tasks, even if it means that they are not directly engaging in combat on the battlefield, still entails direct participation in hostilities. According to the *Lubanga* case, those who are considered to take active participation in hostilities may be involved in a wide range of roles and tasks, ranging from “those on the front line (who participate directly)” to the “boys or girls who are

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<sup>71</sup> *Ibid.*, para. 68.

<sup>72</sup> This very issue was addressed within the Defense’s submission as elaborated in the previous section. See *supra* note no. 265.

involved in a myriad of roles that support the combatants.”<sup>73</sup> This is highly similar to the circumstances surrounding the alleged victims of rape where they were cast to supportive roles in the camp—the very roles that prove their active participation in hostilities. Conclusively, the alleged victims are not protected under Common Article 3.

Additionally, as elaborated in Section A of this chapter, a legal vacuum exists within the provisions of the Geneva Conventions and their Additional Protocols, resulting in a limited scope of war crimes. The ICC has overlooked how the Additional Protocols define war crimes—it requires specific acts of grave breaches, none of which include the war crime of rape committed among non-opposing armed forces.

The appeals chamber’s reassertion of the trial chamber’s on the argument that “there is never a justification to engage in sexual violence against any person; irrespective of whether or not this person may be liable to be targeted and killed under international humanitarian law”<sup>74</sup> to an extent, is correct. The fundamental guarantees from atrocities in NIACs (such as rape) shall be ensured at all times.<sup>75</sup> However, even the fundamental guarantees stipulated by Additional Protocol II is limited to not including acts directed towards non-opposing armed forces.<sup>76</sup>

Conclusively, the “established framework of international law” as the basis of Article 8(2)(e)(vi) limits the scope of war crimes as not to include crimes committed towards non-opposing armed forces, including rape.

In its justification, the ICC decided to rely on the nexus requirement instead of the status requirement to determine whether or not the act of rape amounts to a war crime. It is then necessary to see whether or not this requirement is satisfied. This nexus requirement refers to the third element of the war crime of rape, which requires the conduct to take place “in the context and was associated with an armed conflict not of an international character.”<sup>77</sup> To constitute as a war crime, the conduct

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73 *Prosecutor v. Lubanga*, Judgement pursuant to Article 74 of the Statute, ICC-01/04-01/06, 14 March 2012, para. 62.

74 *Ibid.*, para. 65.

75 Additional Protocols II, Article 75.

76 *Ibid.*, Article 72.

77 Article 8(2)(e)(vi)-I Elements of Crimes.

must be “sufficiently linked to an armed conflict”<sup>78</sup> by considering *inter alia*, a victim’s non-combatant status and membership of the opposing party and whether that the act “serve[s] the ultimate goal of a military campaign” and is “committed as part of the perpetrator’s official duties”.<sup>79</sup>

In the *Ntaganda* case, the alleged victims were neither non-combatants nor part of the opposing party. Additionally, the act of rape committed by fellow UPC/FPLC soldiers would not contribute to the ultimate goal of their military campaign – it does not provide them with any military advantage. Thus, even the nexus requirement itself is not established.

Another crucial issue is that judgments of the *Bosco Ntaganda* case may violate one of the most important principles recognized by ICL—the principle of legality. According to the Rome Statute:<sup>80</sup>

- a. A person shall not be criminally responsible under this statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the court.
- b. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted, or convicted.

The above provision bars the ICC to extend its interpretation by analogy. The ambiguity of any provision shall also be interpreted in a way that would favor the person being questioned before the ICC. This principle was upheld in several ICC cases.<sup>81</sup> With respect to the unique and unusual dynamics of the *Ntaganda* case, it is inevitable to notice ambiguities, to a certain degree regarding the provisions under Rome Statute, the Geneva Conventions and their Additional Protocols. However, even this principle has its own loophole. The exception to this principle is contained under the International Covenant on Civil and Political Rights, where it is possible to circumvent the principle

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78 Bemba Judgement, para. 143.

79 *Prosecutor v. Kunarac*, Judgment (Appeals Chamber), IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 59; *Prosecutor v. Boškoski et al.*, Judgment, IT-04-82-T, 10 July 2008, para. 293.

80 Rome Statute, Article 22 .

81 See for example *Prosecutor v. Al Bashir*, Decision on prosecution’s application for a warrant of arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, 4 March 2009, para. 156; *Prosecutor v. Katanga*, Judgment pursuant to article 74 of the Statute, ICC-01/04-01/07 2014, 7 March 2014, para. 51-53.

if, “at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”<sup>82</sup>

Regardless, the alleged war crime of rape *in casu* does not amount to such an exception. It is no doubt that rape is a crime, it has even attained a *jus cogens* status under international law.<sup>83</sup> The issue is the rape *as a war crime* committed towards non-opposing armed forces in the *Ntaganda* case is unprecedented. The current frameworks of IHL and ICL do not cover such conduct. Therefore it does not fall under the exception of this principle.

Lastly, the uniqueness of the war crime of rape in *Ntaganda* may entail another matter. The ICC noted that its statute is a “multilateral treaty and the crimes regulated under it have been subject to prior criminalization to a treaty or customary international law.”<sup>84</sup> The appeals chamber even agreed on the “seemingly unprecedented nature” of their conclusion.<sup>85</sup> Thus, due to its unprecedented and non-customary nature, rape committed among non-opposing armed forces in the *Ntaganda* case may have yet be a war crime under the Rome Statute.

#### IV. Conclusion

At first glance, one may think that the Geneva Conventions include members of non-opposing armed forces in its scope of protection. However, upon delving deeper, that is not the case. Such protection requires the fulfillment of certain conditions—no direct participation in hostilities and *hors de combat* status. The very notion of ceasing to take part in hostilities means the combatant loses their status, and *hors de combat* requires the combatants to fall into an adverse power or express a clear intention to surrender—both statuses are not established *in casu*.

Furthermore, violation of IHL and disregard of such protection do not automatically amount to war crimes. The Additional Protocols define war crimes as grave breaches of the Geneva Conventions and

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82 ICCPR, Article 15(2).

83 United Nations Economic and Social Council, *Contemporary Forms of Slavery: Systemic rape, sexual slavery, and slavery-like practices during armed conflict*, E/CN.4/Sub.2/1998/13. Additionally, the Court have recognized that rape has attained the *jus cogens* status – see *Ntaganda* Trials, para. 52.

84 *Ntaganda* Trials, para. 36.

85 *Ntaganda* Appeals, para. 67.

their Additional Protocols. The acts that constitute grave breaches were prescribed explicitly, and by definition, none of the acts included violence directed towards non-opposing armed forces. Such provisional disparities are evidence of the existence of a legal vacuum—the Geneva Conventions protect combatants irrespective of whose side they are fighting for. Nevertheless, the Additional Protocols do not include violence towards non-opposing armed forces as acts of grave breaches of the Geneva Conventions and its Additional Protocols and thus, do not constitute as war crimes. Additionally, as the *chapeaux* of Article 8(2)(e) refer to the “established framework of international law,” it is therefore affected by the aforementioned legal vacuum existing in the main instruments which regulate IHL.

However, the judges of the *Ntaganda* case offered a different point of view. In respect to the war crime of rape committed among the UPC/FPLC soldiers in the *Ntaganda* case, the judges of the ICC viewed that the alleged rape constitutes a war crime under Article 8(2)(e)(vi) of the Rome Statute and therefore, fell under their jurisdiction. It was the court’s view that the ordinary meaning, context, and drafting history of the provisions of Article 8(2)(e)(vi) did not limit the victims of war crimes of rape to the protected persons in the sense of the grave breaches of Common Article 3.

The ICC also argued that there is no need to introduce status requirements to the provisions, as there is no general rule that categorically excludes members of an armed group from protection against crimes committed by members of the same group. As such, the ICC’s judgments may be considered a breakthrough in the ICL regime—it introduced an expanded understanding that war crimes (especially rape) may be committed towards non-opposing armed forces.

Therefore, the ICC’s judgments have misaligned with the provisions of IHL and ICL due to overlooking several crucial details. The *chapeaux* of Article 8(2)(e) of Rome Statute refer to the “established framework of international law,” which requires the ICC to look into other relevant instruments which concerning war crimes—the Geneva Conventions and their Additional Protocols. The victims’ supportive role in the camp entails active participation in hostilities. Therefore they are not entitled dthe protection under such instruments. Furthermore, the ICC has failed to address the legal vacuum existing in such instruments in relation to the charges

brought against the defendant. Therefore, the war crime of rape under Article 8(2)(e)(vi) is not established.

Lastly, due to the ICC's failure to address the problems in the ambiguous provisions of the Geneva Conventions and its Additional Protocols regarding the scope of war crimes, their judgments contained ambiguous and analogous interpretation, which by itself is a violation of the principle of *nullum crimen sine lege* or the principle of legality recognized by Article 22 of Rome Statute. Even with exceptions to the principle as stipulated by ICCPR, the circumstances surrounding the rape in the *Ntaganda* case was unique and did not fall under the exceptions mentioned above.

As such, it is crucial to consider addressing further the legal vacuum in the provisions regarding the limited scope of war crimes as it affects the general view regarding war crimes, as well as departing from the judgments of the *Ntaganda* case due to its deviation from the recognized principle of IHL and ICL, especially the principle of legality.

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## A Critical Examination of the ICTY's Role Concerning the Crime of Sexual Violence: Putting Victims at the Center

*Judith Gracia Adha*

Judicial decisions are significant in contributing to the international legal and policy framework about the importance of addressing sexual violence in armed conflicts. Justice for victims can be achieved by integrating victims' participation in legal proceedings, prosecuting the perpetrator, and providing them reparation. However, due to the lack of legal precedent, the gradual progress of acknowledging victims' right to reparation indicates the perpetual struggle for victims to claim reparation. Fortunately, the existence of the UN Principles on Reparation spark hope for the victims to demand specific reparation proportional to the harm they suffered. This legal research finds that first, ICTY landmark cases affect international law and its development in navigating the problem of sexual violence in armed conflict. Second, specific social context and individual needs should be considered to provide justice for victims of sexual violence. Third, the UN Principles on Reparation should be a follow-up effort to provide reparation for victims during armed conflicts.

**Keywords:** ICTY, Legal Precedent, Sexual Violence, UN Reparation Guideline, War Crime.

### I. Identifying Sexual Violence as a War Crime

Although international attention for sexual violence in armed conflict has increased, two aspects remain. First, sexual violence occurs routinely in almost every armed conflict and always occurs on a large scale. Second, perpetrators of sexual violence continue to enjoy near-perfect impunity. Sexual violence is no longer foreign in armed conflict, where even mass sexual violence is considered a “strategy” to carry out oppression against civil society. In addition to disrupting economic activity and civil society security, armed conflicts also place women at risk of sex trafficking and at the probability of engaging in sex to survive threatening conditions.<sup>1</sup>

Rape and sexual violence perpetrated against women and girls leave a permanent mark even after the end of wars and conflict—both

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1 LaShawn R. Jefferson, “In War as in Peace: Sexual Violence and Women’s Status,” Human Rights Watch World Report, 2004.

physically and psychologically—through unwanted pregnancies, sexually transmitted diseases including HIV/AIDS, victim shaming, stigmatization, and the ostracizing of women. Sexual violence may also persist following a conflict, often as a consequence of impunity or due to government and societal instabilities.<sup>2</sup>

One of the main breakthroughs made during the development of a sexual violence related crime in international law is the recognition of sexual violence as a “weapon of war” by the ICTY. This helped shift the narrative of sexual violence from being seen only as a “natural atrocity of war” to “a crime worth prosecuting.” However, in proceedings before the ICTY tribunal, the case against the perpetrators was, again, the primary focus of attention while victims had a limited role and could only appear as witnesses.<sup>3</sup> This leaves the victims at the mercy of their own national courts to find reparation for the harm they suffered.

Regardless of all the formal rules and ICTY judgments that played a huge role in the developing recognition of rape as a form of crime against humanity and a “weapon of war,” one thing that was not discussed enough was how to tailor to the victim’s specific needs based on the severity of the damage and circumstances surrounding the environment, social context, financial background, among others. Assistance and support for victims of sexual exploitation and abuse should be provided in a holistic, integrated manner with the support of a designated case manager and/or service provider with the necessary expertise and capacity. The assistance should be provided on a case-by-case basis, in accordance with the needs of the victim.<sup>4</sup>

In 2005, the UN Commission on Human Rights adopted, after some 15 years of drafting negotiations, the UN Basic Principles on

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2 Larissa Peltola, “Rape as a Weapon of War and Genocide: An Examination of its Historical and Contemporary Tactical Uses, Effects on Victims and Societies and Psychological Explanations,” *Claremont Colleges Scholarship Thesis* 1965 (2018): 6-10.

3 UNODC, “Victims and international human rights law :State responsibility for human rights violations.University Module Series: Crime Prevention and Criminal law,” <https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-11/key-issues/8--victims-of-crime-and-international-law.html>, (accessed on April 21, 2021).

4 United Nations Protocol on The Provision of Assistance to Victims of Sexual Exploitation and Abuse.

Reparation.<sup>5</sup> They aim to merge international humanitarian and human rights law and stress the importance of the obligation to implement domestic reparations for victims of conflict. In March 2006, the UN Principles on Reparation were adopted by the UNGA, further strengthening their status even though they are formally non-binding. Reparations come in the form of, namely, restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.<sup>6</sup> This ignited hope for the victims of sexual violence during armed conflicts to receive restorative justice in the form of reparations.

This legal research aims to better the understanding of how sexual violence in war crimes is viewed by international humanitarian law. In this matter, as can be seen by the effects on victims of sexual violence and society, the research expounds on the historical and contemporary tactical use of sexual violence as a weapon of war that exploits socio-cultural narratives and serve as a basis for the creation of social norms and institutions. Additionally, this research elaborates on the role of UN Principles on Reparation as the extension of protection provided by international humanitarian law specifically for the case of rape, enslavement, and torture of Bosnian Muslim women in the Foča region.

## II. ICTY's Contribution to International Law and Navigating Issues of Sexual Violence in Armed Conflict

Sexual violence in conflict is not a new phenomenon. The saying goes that “rape is as old as war itself” can imply the many centuries in which women’s bodies have been subjected to being the battlefield that is being played out on.<sup>7</sup> Some scholars even argue that to further the aim of effect from sexual violence, the military makes use of the notion of rape as a result of biological heterosexual urges, thereby excusing and normalizing violence against civilians as a regrettable, unintended effect. Seifert, in his book titled *War and Rape: A Preliminary Analysis*, explains that by using words like “unforeseen” or “inadvertent,” civilian victims are reduced to insignificance in the

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5 Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (New York: Cambridge University Press, 2012), 6.

6 *Ibid.*

7 Nobel Women’s Initiative, “War on Women: Time for Action to End Sexual Violence in Conflict,” <https://nobelwomensinitiative.org/wp-content/uploads/2013/09/war-on-women-web.pdf?ref=218>, (accessed on July 1, 2021).

context of the conflict, and their suffering is disparaged.<sup>8</sup> From an analytical point of view, such an approach obscures the fact that in reality, the suffering of the civilian population, which consists, as must be emphasized again, largely of women, constitutes a crucial element of war.

### 1. The Recognition of Sexual Violence as a “Weapon of War”

The wars in Bosnia–Herzegovina (“BiH”) in the 1990s marked a shift in bringing about the term “rape as a weapon of war” as rape was systematically carried out and strategically used as a war tactic.<sup>9</sup> For centuries, rape has been used as to gain spoils of war and as is used as a weapon, possibly the most brutal of all weapons, in order to exercise power and dominance over women and undermine the social fabric of society.<sup>10</sup> It is a method of torture, both physical and psychological and is a crime. Just like murder, as in many cases, women may be “raped to death.”<sup>11</sup> In this case, the oppressors hope that by creating fear, opposition groups will be dissuaded from joining or providing aid to opposition members.<sup>12</sup>

The physical and psychological violence unleashed during conflicts serves to cause damage and wreak havoc on individuals and entire communities. Sexual violence and rape are tactics that target the most vulnerable members of a community to achieve their goal of sending a frightening message. Rape serves as a tool to demoralize, dehumanize, and punish “enemies of the state.”<sup>13</sup> The function of rape in Herzegovina and Rwanda was to destroy women as child-bearers and/or increase sexually transmitted infections amid enemy

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8 R. Seifert, *War and rape: a preliminary analysis*. Stiglmeier; *Mass Rape: The war against women in Bosnia-Herzegovina* (Lincoln: University of Nebraska Press, 1994).

9 *Ibid.*

10 United Nations Economy & Social Council, Common on Human Rights, Special Rapporteur on Torture, Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

11 Carol Rittner and John K. Roth, *Rape: Weapon of War and Genocide* (Minnesota: Paragon House, 2021), 13.

12 Larissa Peltola., *Rape as a Weapon of War and Genocide: An Examination of its Historical and Contemporary Tactical Uses, Effects on Victims and Societies and Psychological Explanations*, 6.

13 *Ibid.*

groups.<sup>14</sup> The widespread use of rape in these two conflicts brought international attention to the issue of sexual violence due to the perpetuation of rape as part of, rather than as a consequence of war.<sup>15</sup>

The ICTY, in judging the conflict of the Balkans, brought unprecedented recognition of rape as a weapon of war, especially due to extensive media coverage.<sup>16</sup> Ever since then, sexual violence has been punishable as a crime against humanity if it is committed as part of a widespread or systematic attack against a civilian population.<sup>17</sup> Reports indicate that abuses against women, such as rape, have been widespread in the conflict in Bosnia-Herzegovina. All sides have committed these abuses but members of the Serbian armed forces have been the main perpetrators and Muslim women have been the main victims.<sup>18</sup>

After Foča was overrun by the Bosnian Serb forces in 1992, the conquerors instituted drastic measures to reduce the non-Serb population as part of a broader campaign of ethnic cleansing in regions of BiH claimed by Serbia. To effectuate this policy, the Bosnian Serb leaders in charge of Foča murdered most of the non-Serb men.<sup>19</sup> The women however, were not immediately killed. Instead, they, including some as young as 12, were sent to “rape camps” where they were forced to perform sexual services for the Bosnian Serb soldiers. Many of the women were gang-raped and forced into sexual slavery.<sup>20</sup>

The ICTY trial decisions demonstrate that rape will not be accepted as an intrinsic part of the war.<sup>21</sup> Rather, it is a crime against humanity and may be a part of torture. The tribunal sent a message that it would prosecute cases of sexual violence vigorously.<sup>22</sup> The widespread embrace of this narrative has undoubtedly been important for breaking

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14 Nobel Women's Initiative, *War on Women: Time for Action to End Sexual Violence in Conflict*, 12.

15 *Ibid.*

16 Michelle Jarvis, *Prosecuting Conflict Related Sexual Violence at the ICTY* (Britain: Oxford University Press, 2016), 2

17 *Prosecutor v. Tadic*, Judgement, No. IT-94-I-A, July 15, 1999, par. 248; ICC Statute, Art. 7(1)

18 Morris, Madeleine, “By Force of Arms: Rape, War, and Military Culture,” *Duke Law Journal* 45, no. 4 (1996): 651-779.

19 Human Rights Watch, “A Closed Dark Place: Past and Present Human Rights Abuses in Foča,” 1998.

20 *Ibid.*

21 *Ibid.*

22 *Ibid.*

the misconception of rape as a tragic but inevitable outcome of the war.<sup>23</sup> As a result, the international community has finally recognized conflict-related sexual violence as an important global security problem. Indeed, the notion that rape is a weapon of war that warrants global attention has become commonplace in media reporting and policy analysis.<sup>24</sup> This narrative shifts the position of sexual violence, equating it to be as big as other war crimes and as something worth prosecuting. The ICTY proved that effective prosecution of wartime sexual violence is feasible and provided a platform for the survivors to testify against perpetrators, which ultimately helped to break the silence and the culture of impunity surrounding these terrible acts.<sup>25</sup>

## 2. Consent-Approach in ICTY Decision in *Prosecutor v Kunarac* and its Impact on International Law in Navigating Issues of Sexual Violence

The first decision issued by the ICTY condemned male sexual violence, and although Tadić was tried on various charges of rape against women, those charges were dropped as the proceedings evolved.<sup>26</sup> The *Prosecutor v Furundžija* was the first prosecution of the war crime of rape in ICTY, which is also one of the landmark cases in the development of the ICC decisions on rape. In the *Furundžija* case, the tribunal considered that both vaginal rape of women and the coercion of the female victims to perform fellatio fall under the category of rape.<sup>27</sup>

According to the *Furundžija* judgment, it consists of “coercion or force or threat of force against the victim or a third person.”<sup>28</sup> While the Trial Chamber II of *Kunarac et al* agreed with the first element of the *actus reus* of rape as held in *Furundžija*, it explicitly opposed

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23 Maria Eriksson Baaz, and Maria Stern, *Sexual violence as a weapon of war? Perceptions, prescriptions, problems in the Congo and beyond* (Sweden: Zedd Books, 2013), 48

24 *Ibid.*

25 ICTY, “Crimes of Sexual Violence,” <https://www.icty.org/en/features/crimes-sexual-violence> (accessed on September 21, 2021.)

26 Kimi Lynn, and Megan Greening. “Gender Justice or Just Gender? The Role of Gender in Sexual Assault Decisions at the International Criminal Tribunal for the Former Yugoslavia,” *Social Science Quarterly* 88, 5, (2007): 10-56.

27 Pike, D. Wingeate, *Crimes against woman* (New York: Nova Science Publishers, 2011), 15.

28 *Prosecutor v Furundžija*, Judgement, IT-95-17, 1998, par. 185(ii)

the formulation of the second one as provided in it. The judgment of the *Foča* case argued that by focusing on coercion or force or threat of force, the definition of rape was more narrowly stated than is required by international law. In the chamber's view, there are factors other than force, which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim. For instance, the victim is put in a state of inability to resist because of physical or mental incapacity or induced into the act by surprise or misrepresentation.<sup>29</sup> Thus, the appropriate manner in which the element of conduct is to be understood constitutes a lack of genuine and voluntarily given consent, regardless of the presence or absence of use of force.

In the *Kunarac* case, where rape was prosecuted as a crime against humanity, it was defined as "the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim."<sup>30</sup> Dragoljub Kunarac was charged with crimes committed against at least 14 victims, who were referred to in the indictment by code names and initials. These victims were subjected to almost constant rape and sexual harassment, torture, and other violations.<sup>31</sup> The indictment states that "the physical and psychological health of many female detainees have deteriorated greatly as a result of these sexual assaults. Some women experience complete fatigue, vaginal discharge, bladder problems, and irregular menstrual bleeding. The prisoners continue to live in fear. Some women who are sexually abused become suicidal. Others become indifferent about what will happen to them and suffer from depression ...."<sup>32</sup>

The Trial Chamber of *Kunarac et al* on February 22, 2001 mentioned that there are several elements of the crime that need to be

29 *Prosecutor v Kunarac et al.*, Judgement, IT-96-23-T & IT-96-23/I-T, 2001, par. 438.

30 *Prosecutor v Kunarac et al.*, Judgement (Appeals Chamber), IT-96-23 & IT-96-23/I-A, 2002, par.129.

31 ICTY Press Release, "Dragoljub KUNARAC is the first accused of rape and torture of Bosnian Muslim women to turn himself in" <https://www.icty.org/en/press/dragoljub-kunarac-first-accused-rape-and-torture-bosnian-muslim-women-turn-himself>, (accessed on September 21, 2021).

32 *Ibid.*

fulfilled. The trial chamber of *Kunarac et. Al.* on February 22, 2001 mentioned that in addition to the statutory requirement of an armed conflict, the following sub-elements are necessary:

“(i) There must be an attack. (ii) The acts of the perpetrator must be part of the attack. (iii) The attack must be directed against any civilian population. (iv) The attack must be widespread or systematic. (v) The perpetrator must know of the wider context in which his acts occur and know that his acts are part of the attack.”<sup>33</sup>

The definition in the *Kunara* case adds another element necessary for conduct to constitute rape that was not recognized from previous case laws.<sup>34</sup> The tribunal argued that the:

“relevant act of sexual penetration will constitute rape only if accompanied by coercion or force or threat of force against the victim or a victim or a third person [and] the *Furundžija* definition does not refer to other factors which could render an act of sexual penetration non-consensual or non-voluntary on the part of the victim.”<sup>35</sup>

The use of force, the threat of force, or any other circumstance, which makes the victim particularly vulnerable or negate their ability to make an informed refusal, namely, the first two sub-elements discussed above, “are matters which result in the will of the victim being overcome or in the victim’s submission to the act being non-voluntary.”<sup>36</sup> In other words, the essential elements of the force, the threat of force or taking advantage of a person who is unable to resist is evidence that the sexual autonomy of such a person has been violated, as there was no agreement, but they are not necessarily elements which need to be proven for the crime of rape.<sup>37</sup> Due to this argument, consent became a *mens rea* held in the *Kunarac* case.

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33 *Kunarac*, Trial Judgement, par. 410

34 *Prosecutor v Kunarac et al.*, Judgement (Appeals Chamber), IT-96-23 & IT-96-23/I-A, 2002, par.129.

35 *Ibid.*

36 *Kunarac*, Trial Judgement, par. 457.

37 Matteo Fiori, “The Foča Rape Camps: A dark page read through the ICTY’s jurisprudence. The Hague Justice Portal.” <https://www.asser.nl/upload/documents/20120614T121359-Fiori%20Foca%20Rape%20Camps%20Final.pdf>, (accessed on June 15, 2021).

The case encompasses “the intention to affect this sexual penetration and the knowledge that it occurs without the victim’s consent,”<sup>38</sup> indicating that the trial recognizes the act of sexual violence did not necessarily only happen for the Serbian army’s pleasure. It was also done to intentionally attack the victim’s psychological side by violating their consent.

However, the definition in *Kunarac* removed “coercion or force or threat of force” from the definition in *Furundžija* and instead adopted “lack of consent” as an element.<sup>39</sup> At trial, the Prosecutor argued that lack of consent was not an element of the crime of rape but force and coercion were.<sup>40</sup> The Trial Panel disagreed with the Prosecutor based on its survey of major legal systems, stating that “the basic underlying principle common to them was that sexual penetration would constitute rape if it is not truly voluntary or consensual on the part of the victim.”<sup>41</sup> The Trial Chamber identified elements of consent that had to be given “voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances.”<sup>42</sup>

The Trial Chamber also redefined rape. Previous definitions of rape in tribunals included force and coercion as elements of consent. In other words, to convict a defendant of rape, the Prosecution had to prove there was direct physical force or coercion of the victim.<sup>43</sup> The justices in the *Kunarac* trial decided that the definition did not fit the scope of the atrocities committed in the Foča region. They argued other factors have constrained a woman’s ability to consent to sexual acts. Thus, the prosecution does not need to prove that the woman resisted, merely that the woman was in a situation in which she had no ability to choose.<sup>44</sup>

This definition of rape given by the Trial Chamber was challenged on appeal. Specifically, the Appellants argued that, in addition to penetration, two further elements must be proven: the force or threat

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38 *Kunarac*, Trial Judgement, par. 127-128.

39 *Ibid.*

40 *Ibid.*, par. 416.

41 *Ibid.*, par. 419-421.

42 *Ibid.*

43 Lindsey Shook, “Complicating Consent: A Study of the Rhetorical Strategies Employed to Interrupt Rape Myths in the Prosecutor v. Kunarac,” *Submitted dissertation for University of Kansas* (2011): 31.

44 *Kunarac*, Trial Judgement, par. 442.

of force and the victim's "continuous" or "genuine" resistance.<sup>45</sup> In other words, according to this interpretation, the victim must show resistance throughout the sexual intercourse to make it known to the perpetrator that their conduct is not welcome.<sup>46</sup> The Tribunal established Rule 96 to prevent defense strategies that attempt to blame the victim, whereas it is clearly stated that "the consent shall not be allowed as a defense if the victim." Rule 96 provides that in sexual assault cases:

- i. No corroboration of the victim's testimony shall be required;
- ii. The consent shall not be allowed as a defense if the victim:
  - a. Has been subjected to or threatened with or has reason to fear violence, coercion, detention or psychological oppression, or
  - b. Reasonably believed that if the victim did not submit, another might be so subjected, threatened, or put in fear;
- iii. Before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;
- iv. The victim's prior sexual conduct of the victim shall not be admitted into evidence.<sup>47</sup>

The Trial Chamber in *Kunarac* justifies this standard of evidence by focusing on consent as absence of consent unless each woman freely gives her consent to each sexual act.<sup>48</sup> It could be seen that the Trial Chamber was trying to use the best out of this definition in favor of the victims. Hence, the justification of Rule 96 to avoid the victim-blaming narrative brought by the Appellants goes to prove that the Trial Chamber was progressive enough to acknowledge that the victims did not take part in the sexual act by navigating "the absence of consent." The inclusion of "the absence of consent" as part of the definition of rape was a good breakthrough because it recognized the intention to force sexual penetration and the knowledge that it had occurred without the victim's consent.

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45 Matteo Fiori, *The Foča Rape Camps: A dark page read through the ICTY's jurisprudence*, *The Hague Justice Portal*, 11-2.

46 *Ibid.*

47 *Ibid.*

48 *Ibid.*

### III. The ICTY's Rationale for Not Granting Reparations for Victims of War Crimes

Many scholars argue that ICTY lacks jurisdiction to deal with compensation for victims. The victims of crimes within the jurisdiction *ratione materiae* of these tribunals have no basis to stand before these tribunals as victims as they only serve as witnesses.<sup>49</sup> Nevertheless, the basic principle that victims have rights was recognized in Resolution 827 of 25 May, 1993 ("Resolution 827"), which adopted the Statute of the ICTY. The UN Security Council decided that "the work of the international tribunal shall be carried out without prejudice to the right of victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law."<sup>50</sup>

Resolution 827 states that the ICTY was established not only for "the sole purpose of prosecuting persons responsible for serious violations" yet also to "contribute to ensuring that violations are halted and effectively redressed."<sup>51</sup> Resolution 827 was made to show the severity of the continuous reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, especially in BiH, including reports of mass killings; and massive, organized, and systematic detention and rape of women. In addition, there is the continuance of the practice of "ethnic cleansing," including for the acquisition and the holding of territory.<sup>52</sup> Resolution 827 gives no indication of what the term "through appropriate means" refers to, but it is worth noting that at the time, it was considered a possibility that the UNSC had established another body for restitution claims.<sup>53</sup>

Hence, regardless of being given the legal basis to provide compensation, the judges of the ICTY argued that the tribunal's aim

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49 Liesbeth Zegveld, "Remedies For Victims Of Violations Of International Humanitarian Law," *IRRC* 85.85 (2003): 498-499.

50 *Ibid.*

51 Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, (New York: Cambridge University Press, 2012), 3

52 Updated Statute of The International Criminal Tribunal For The Former Yugoslavia: Resolution 827/1993.

53 V. Morris and M. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (New York :Transnational Publishers, 1995), 283-289.

had consistently been to minimize the length of preventive detention, which is a fundamental right of the accused, by shortening trials.<sup>54</sup> It appears as if the rights of the accused are given priority as they must be “fully respected,” whereas, for victims, the proceedings are merely required to show “due regard.”<sup>55</sup> Article 105 in the Rules of Procedure and Evidence of the ICTY and International Criminal Tribunal for Rwanda (“ICTR”) stipulates that the request for restitution cannot be initiated by the victim but must be presented by the prosecutor or the chamber.<sup>56</sup> The difficult balancing of rights of the accused versus victim has caused significant controversy in the tribunals, and protective measures in favor of witnesses, especially victims of sexual violence, have been challenged by the defense and criticized by human rights lawyers for their inadequacy.<sup>57</sup>

The ICTY attempted to redirect the responsibility of granting reparations to the national courts. Rule 106 of the Rules of Procedure and Evidence of the ICTY stipulates that victims seeking compensation must apply to a national court or another competent body.<sup>58</sup> This approach thus results in indirect discriminatory treatment of victims depending on their nationality and origins.<sup>59</sup> Leaving victims at the mercy of their domestic legal systems renders them dependent on whether national legislations foresee the possibility of compensation claims.<sup>60</sup> Domestic legislations and policies thus determine whether victims have access to present their claims. As a consequence, redress may be available to some victims but not others.<sup>61</sup>

As rape victims continue to be taboo subjects in BiH and survivors of this crime are stigmatized by society, other impacts follow. Despite the fact that the war in BiH ended more than 20 years ago, many perpetrators of war crimes of sexual violence continue to enjoy

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54 Liezbeth Zegveld, *Remedies For Victims Of Violations Of International Humanitarian Law*, 326.

55 Chistine Evans., “The Right to Reparation in International Law for Victims of Armed Conflict,” 4.

56 ICTY’s Rules of Procedure and Evidence, Rule 105.

57 Chistine Evans., “The Right to Reparation in International Law for Victims of Armed Conflict,” 4.

58 ICTY’s Rules of Procedure and Evidence, Rule 106.

59 Chistine Evans., “The Right to Reparation in International Law for Victims of Armed Conflict,” 5.

60 *Ibid*

61 *Ibid*.

impunity and often live in the same communities as their victims. Many survivors of those crimes suffer PTSD and other psychological and physical problems.<sup>62</sup> Psychological support is often not available, and access to health services is limited, especially for women living in remote areas of the country.<sup>63</sup> Many survivors are unemployed, often for reasons related to the physical and psychological injuries they have suffered.<sup>64</sup> With the cultural attitude where the rape victims are viewed as “damaged” and less worthy, deepening feelings of humiliation, self-blame, guilt, and shame become more toxic.<sup>65</sup>

In the social context of the BiH conflict, raped women were treated as unmarriageable, thus, becoming a target of societal ostracism<sup>66</sup> as rape constitutes an especially humiliating assault. One of the purposes of the military campaign was to cleanse the municipality of Muslims, especially through a campaign of terror targeting Muslim women.<sup>67</sup> It is safe to assume that social repercussions was one of the effects intended by Kunarac when targeting the women in the Muslim community. In spite of the establishment of the ICTY and the fact that mass war rape that happened in the 1992-1995 war in BiH is recognized as a crime against humanity, the Bosnian patriarchal society still views rape as a matter of honor and shame, and it seems that misconceptions that result in victim-blaming are socially accepted.

Fearing stigma, ostracism, and rejection, even 20 years after the weapons fall silent, women survivors of war rape in BiH still face the lack of institutional and social support, insecurity, and a slow pace of justice.<sup>68</sup> Not only are the victims treated like “property”

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62 Amnesty International, “Annual Country Report: Whose Justice? Bosnia and Herzegovina’s Women Still Waiting,” 2009, 3-4.

63 *Ibid.*

64 *Ibid.*

65 Amra Delic, and Esmina Avdibegović, “Shame and Silence in the Aftermath of War Rape in Bosnia and Herzegovina: 22 years later,” *Conference Proceedings : Interdisciplinary perspectives on Children Born of War – from World War II to current conflict settings* (2016): 15.

66 Askin, Kelly D, “Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles,” *Berkeley Journal of International Law* 21, no. 2 (2003): 288-300.

67 Press Release, International Criminal Tribunal for the Former Yugoslavia, Judgment of Trial Chamber II in the Kunarac, Kovac and Vukovic Case, 22 February 2001.

68 Amra Delic and Esmina Avdibegović, “Shame and Silence in the Aftermath of War

during the assault, but they also still have to carry the pain of being stigmatized afterwards. Consequently, it often carries traumatic social repercussions, which may be worsened by a woman's cultural origins or social status. Such factors may affect her ability to bear the trauma of rape, much less the time it may take for her to come to terms with the emotional distress and physical effects of rape.<sup>69</sup>

The persistence of stigmatization and ostracism from society also needs to be addressed as part of their right to reparation. The devastating effects of systematic rape—such as shame, distrust, and the lack of social acknowledgement and support—also exacerbated by the victim's sense of societal neglect and personal insecurity lead to perceiving the world as a more threatening place to live in the aftermath of rape. Withdrawal, isolation, and forced silence result in their reluctance to seek help and would in turn, inhibit the recovery process.<sup>70</sup> Given the socio-cultural context, it is proven that the situation makes it harder for victims to recover. In addition, they still face constant stigmatization and limited access to justice due to the unsupportive environment of their community.

This approach has become the precedent that has failed to prioritize victims during trial, up until the ICTY was disbanded. After the ICTY was disbanded, there was a follow up by the International Residual Mechanism for Criminal Tribunals ("IRMCT"). The IRMCT is mandated to perform a number of essential functions previously carried out by the ICTR and the ICTY. In carrying out these essential functions, the IRMCT maintains the legacies of these two pioneering UN *ad hoc* international criminal tribunals.<sup>71</sup> The IRMCT includes:

1. The supervision of prison sentences;
2. The determination on pardons and commutations;
3. The potential review of earlier convictions;
4. The continued protection and support of victims and witnesses; and
5. The determination on referrals and deferrals with regard to national proceedings and the arranging of residual trials of

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*Rape in Bosnia and Herzegovina: 22 years later;* 19.

69 Amnesty International, "Annual Country Report "Bosnia-Herzegovina: Gross abuses of human rights," 1992, 3-5.

70 *Ibid.*

71 Preamble of UNSC Resolution 1966 (adopted 2010) Statute of the International Residual Mechanism for Criminal Tribunals.

at-large indictees caught after the courts' closures.<sup>72</sup>

However, granting reparation for victims is still not part of the function of the IRMCT. Article 20 of the UN Security Council Resolution 1966 only mentions that it would provide for the protection of victims and witnesses who have testified before either the tribunal in cases that will be completed at that particular time or witnesses who will testify before the tribunal.<sup>73</sup> Once again, such a role views victims solely as a "witness" during the trial, instead of victims who are deserving of reparation.

Fortunately, the ICC is generally described as victim-friendly, particularly when compared to the *ad hoc* tribunals that preceded it.<sup>74</sup> Under the Rome Statute of the ICC, bringing justice was conceived to cover not only the prosecution and punishment of perpetrators of international crimes but also cover the provision of justice to victims through participation and reparations.<sup>75</sup> However, in situations with typically large numbers of victims, only a very small number of them would finally receive reparation.<sup>76</sup> Therefore, the ICC will probably have to envisage collective reparations rather than individual ones. Otherwise, a large and costly mass claims administration would need to be set up.<sup>77</sup> This leaves an even smaller room for socio-cultural context to be taken into consideration. However, since precedence does not even provide room for any form of reparation, this collective mechanism becomes acceptable, even when it could have been better.

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72 Gabriël Oosthuizen and Robert Schaeffer, "Complete justice: Residual functions and potential residual mechanisms of the ICTY, ICTR and SCSL," *Journal Judiciaire De La Haye* 13, no.1 (2008): 48-67.

73 *Ibid.*

74 Luciano Catani, "Victims at the International Criminal Court: Lessons Learned from the Lubanga Case," *Journal of International Criminal Justice* 90, no. 870 (2012): 905-922.

75 Moffett, "Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and the Hague," *Journal of International Criminal Justice* 13, no. 2 (2015): 281-311.

76 Elisabeth Baumgartner, "Aspects of victim participation in the proceedings of the International Criminal Court," *International Review of The Redcross* 90, no. 870 (2008): 430-438.

77 Marc Henzelin, Veijo Heiskanen and Guénaél Mettraux, "Reparations to victims before the International Criminal Court: lessons from international mass claims processes," *Criminal Law Forum* 17 (2006): 317.

#### **IV. Proportional Reparations for Victims of Sexual Violence During the Bosnia and Herzegovina War**

Amnesty International has found that the victims' perceptions of the justice process (and their well-being in general) are influenced not only by what happens in the justice system but also by how the authorities and society respond to their needs.<sup>78</sup> Support for victims through reparation for past injustices cannot be separated from the right of access to justice since the two are linked.<sup>79</sup>

##### **1. Providing Justice by Tailoring to Specific Individual Needs of Bosnian Muslim Women**

In landmark decisions, developing international humanitarian law of sexual violence and enslavement, the ICTY issued several convictions for the mass rape of women during conflicts in the former Yugoslavia.<sup>80</sup> During the trial of the *Kunarac* case, protection was provided for the victims to a certain extent. During the trial, the OTP in *Kunarac* was, at the very least, aware of the sensitive nature of gathering evidence about rape and attempted to make accommodations for potential witnesses.<sup>81</sup> In the ICTY, prosecutors work with investigators to find evidence and witnesses to help them make decisions about who to prosecute and which witnesses are credible.<sup>82</sup>

Rule 96 of the ICTY lists various derogations from normal evidentiary rules specifically for sexual assault cases. In *Kunarac*, many of these policies were brought into practice.<sup>83</sup> Minor discrepancies in testimonies regarding time and date were allowed, in recognition of the oppressive and traumatic experiences of victims due to PTSD and their young age—a common defensive tactic—were rejected both on trial and appeal.<sup>84</sup>

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78 Amnesty International 2009, *Annual Country Report "Bosnia-Herzegovina: Gross abuses of human rights*, 4.

79 *Ibid.*

80 Richard P. Barrett and Laura E. Little, "Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals," *Minnesota Law Review*, (2003). 30-31.

81 Lindsey Shook, *Complicating Consent: A Study of the Rhetorical Strategies Employed to Interrupt Rape Myths in the Prosecutor v. Kunarac*, p.33.

82 *Ibid.*

83 *Kunarac*, Trial Judgement, par. 564

84 *Ibid.*, 564; *Prosecutor v. Dragoljub Kunarac, Radomir Kovać and Zoran Vuković*

Arguments relating to the unreliability as testimonies of such victims were not “necessarily inaccurate” on trial and appeal.<sup>85</sup> Additionally, the no-collaboration clause of Rule 96(i) was upheld, even with respect to the young and/or traumatized witnesses.<sup>86</sup> Nevertheless, *Kunarac* has, like all important judgments, not escaped critique; many believe victims are denied catharsis by the lack of opportunity to share their story or claim compensation.<sup>87</sup> The fact that sexual violence was used as a weapon of war shows that the perpetrator fully acknowledged the effect that it could have on the victims—both the psychological and social impact. In his capacity as commander, Kunarac had been responsible for the acts of the soldiers subordinate to him and have known or had reason to know that those subordinates were engaged in the sexual assault of detained Muslim women.<sup>88</sup>

It is essential to note that Muslim women were assaulted in many different ways. In the case of *Furundžija*, his subordinate was the soldier who raped the woman in front of a laughing audience of other soldiers. Nevertheless, as the unit’s commander, Furundžija was found guilty as a co-perpetrator and as an aider and abettor.<sup>89</sup> Meanwhile, in the case of *Kunarac*, thousands of Bosnian Muslims and Croat civilians were detained at the Omarska camp, where many were sexually assaulted. Some of them were forced to dance naked on a table while he watched them. The Trial Chamber found that Kovac, one of Kunarac’s soldiers, knew that this was a painful and humiliating experience for the three girls, mainly because of their young age.<sup>90</sup> Kunarac also threatened to kill one of the victims and her son while he tried to obtain a confession concerning her alleged sending of messages to the Muslim forces and information about the whereabouts of her valuables.<sup>91</sup>

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(Appeals judgment) IT-96-23 & IT-96-23/1-A (12 June 2002) 279-281.

85 *Ibid.*

86 *Kunarac*, Trial Judgement, par. 566.

87 Rosalind Dixon, “Rape as a Crime in International Humanitarian Law: Where to from Here?” *European Journal of International Law* (2002): 697-699.

88 United Nations, “Case Information Sheet: Kunarac, Kovac and Vukovic Case (IT-96-23-PT) (IT-96-23/1-PT)” <http://fwww.un.org/icty/glance/kunarac.htm>, (accessed on July 14, 2021)

89 *Prosecutor v. Anto Furundžija*, Judgment (Trial Chamber), para. 185.

90 *Ibid.*

91 *Kunarac* was found guilty of the following counts in Indictment IT-96-23: Count

Given the fact that the victims were of various ages and were abused in different ways, those differences impacted them differently. There is no single way a sexual assault victim should look and act after being abused.<sup>92</sup> A range of factors can influence the effects of sexual assault, including:

- The victim/survivor's relationship to the perpetrator;
- The extent and severity of any accompanying psychological or physical abuse;
- The severity of the abuse, the extent of physical harm, the length of time over which the abuse occurred;
- The responses of family and friends of the victim/survivor;
- The woman's experience of the various systems (e.g., health, police, courts) with which she may have contact following the assault and the personal history of the victim/survivor.<sup>93</sup>

The different impact resulted in different needs for reparation that need to be granted. The need for reparation should never be generalized because the effect of sexual assault is not only psychological or emotional but also impacts physical, social, interpersonal, and financial domains.<sup>94</sup> Social context-wise, victims also need to be empowered to work functionally again in society, not being labelled as "rape victims" or "unmarriageable." The victim's participation in the decision-making process is critical in ensuring that the measures adopted and initiatives promoted will be respectful of their wishes and concerns, and will ultimately do them no harm. It is the victim's decision, after having been explained to them all the potential risks they may face, to decide whether their identity should be protected

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1 (crime against humanity (torture)); Count 2 (crime against humanity (rape)); Count 3 (violation of the laws or customs of war (torture)); Count 4 (violations of the laws or customs of war (rape)); Count 9 (crime against humanity (rape)); Count 10 (violation of the laws or customs of war (rape)); Count 11 (violation of the laws or customs of war (torture)); Count 12 (violation of the laws or customs of war (rape)); Count 18 (crime against humanity (enslavement)); Count 19 (crime against humanity (rape)); Count 20 (violation of the laws or customs of war (rape)).

92 Cameron Boyd, "The impacts of sexual assault on women," *Australian Study Centre for The Study of Sexual Assault (ASCA) Resource Sheet* (2011): 1-2.

93 Daane, D. M., *The ripple effects: Secondary sexual assault survivors*. In F. P. Reddington & B. W. Kreisel (Eds.), *Sexual assault: The victims, the perpetrators and the criminal justice system* (pp. 113–131). (Durham, NC: Carolina Academic Press, 2005)

94 *Ibid.*

and how.<sup>95</sup>

Meanwhile, even after the *Kunarac* trial, BiH is still struggling with the legacy of the crimes committed during the 1992-1995 war. One of the least visible, but most keenly felt, injustices is the ongoing failure to provide survivors of wartime rape and other forms of sexual violence with the reparation they desperately need and are entitled to under international law.<sup>96</sup> In BiH, there is no central government body responsible for the social welfare system.<sup>97</sup> The BiH authorities have for the last 14 years ignored the rehabilitation needs of the survivors of war crimes of sexual violence.<sup>98</sup> They have failed to provide them with adequate measures of rehabilitation, including access to physical and mental health services. Even in 1993, when the war in BiH was still ongoing, the UN Special Rapporteur on the situation in the former Yugoslavia, Tadeusz Mazowiecki, recommended to the UN Commission on Human Rights that “all victims of rape, whether or not they are refugees, should have access to the necessary medical and psychological care. Such assistance should be provided within the framework of programs to rehabilitate women and children traumatized by war.”<sup>99</sup>

This responsibility is discharged at the entity-level, including the introduction and implementation of legislations, the allocation of resources, and the delivery of services. The social welfare system is organized at the entity-level by the government of the Republika Srpska and delivered through municipal departments of social welfare, which provide services directly to beneficiaries.<sup>100</sup> This system makes it especially hard to tailor even to the basic needs of the victims, such as medical help, let alone tailoring to their specific needs. This is truly

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95 OHCHR Workshop Report, “Protection of victims of sexual violence: Lessons learned,” 2019, para.7.

96 Amnesty International, 2012. *When everyone is silent: Reparation for survivors of wartime rape in Republika Srpska in Bosnia and Herzegovina.*, AI Index: EUR 63/012/2012, <http://amnesty.org/en/library/info/EUR63/012/2012/en>, accessed on June 18, 2021.

97 *Ibid.*

98 *Ibid.*, 52.

99 Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 1992/S-1/1 of 14 August 1992. Commission on Human Rights. 49<sup>th</sup> session. 10 February 1993. E/CN.4/1993/50. Annex II, 63. par. 6.

100 *Ibid.*

unfortunate, considering providing specific reparations for the victims could be the key to providing justice for survivors of BiH's sexual violence. Respect for the survivor's right to reparation for the crimes committed against them is required in international law because it is important to assist the victims in dealing with the past and in moving on with their lives.<sup>101</sup>

## **2. UN Reparation Guidelines as a Follow-Up Effort for Providing Specific Reparations**

The recent codification of international criminal law has significantly influenced the discourse on post-conflict justice, while legal research on post-conflict justice has been inspired by the rapid developments in international justice mechanisms.<sup>102</sup> As a result, there has been a huge focus on the accountability of perpetrators, in particular, in the application of universal jurisdiction.<sup>103</sup> Victims have largely remained in the background, analogous to their position in municipal criminal law, where reparations are seen as part of civil law, and victims are still primarily perceived according to their capacity as witnesses. Practitioners, academics, and victims' advocates criticized the ICTY and the ICTR for this approach.<sup>104</sup> They claimed that the tribunals had failed those that had envisioned serving the victims of the atrocities.<sup>105</sup>

It is generally recognized that victims of serious human rights violations have a right to reparation. For example, Article 14 of the UN Convention Against Torture, a widely ratified instrument, establishes that victims should obtain "redress and have an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible."<sup>106</sup> All major human rights instruments establish similar provisions.<sup>107</sup> However, the details and applicability

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101 Amnesty International, *Annual Country Report "Bosnia-Herzegovina: Gross Abuses of Human Rights*, 4.

102 Christine Evans, "The Right to Reparation in International Law for Victims of Armed Conflict," 3.

103 *Ibid.*

104 FIDH, "Victims in the Balance : Challenges ahead for the International Criminal Tribunal for Rwanda," *Worldwide Movement for Human Rights*: 2-3.

105 *Ibid.*

106 Convention against Torture and other Cruel Inhuman and Degrading Treatment.

107 Gabriela Echeverría. "The UN Principles and Guidelines on Reparation: is there an Enforceable Right to Reparation for Victims of Human Rights and Internation-

of the right to reparation for victims remain rather vague.<sup>108</sup>

The ICTY's provide little, beyond prosecuting suspects, to implement the rights of victims and survivors of crimes under its jurisdiction to a remedy, the right to know the truth about the crimes, and the right to full and effective reparations.<sup>109</sup> Survivors can only participate in ICTY trials taking place in The Hague if they are selected to be witnesses. Prior to the establishment of the ICC, survivors are to be represented throughout the trial and where their personal interests are affected, they may present their views and concerns if it is considered appropriate by the ICTY and does not prejudice the rights of the accused.<sup>110</sup> Moreover, the ICTY Statute does not provide for the tribunal to make reparation orders for victims and survivors. This issue was reviewed by the judges in 2000, who concluded that "it is neither advisable nor appropriate that the tribunal be possessed of such a power, in particular, for the reason that it would result in a significant increase in the workload of the chambers and would further increase the length and complexity of trials."<sup>111</sup>

Fortunately, the UN Principles on Reparation were created to affirm the importance of addressing the question of remedies and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law in a systematic and thorough way at the national and international levels.<sup>112</sup> The UN Principles of Reparation covers several types of reparation, including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.<sup>113</sup> Under international human rights law, the normative basis for the right to a remedy and reparation is well established, as attested by several international

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al Humanitarian Law Violations?." *Submitted Thesis for the degree of Doctor in Philosophy Department of Law, University of Essex*, (2017): 6.

108 *Ibid.*

109 Amnesty International, "Bosnia-Herzegovina: Gross Abuses of Human Rights," Annual Country Report 2009, 9.

110 *Ibid.* 14

111 Parliamentary Assembly of the Council of Europe, Resolution 1670, Sexual violence against women in armed conflict, par. 10.5.

112 The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Preamble.

113 The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Section IX.

human rights instruments.<sup>114</sup> The establishment of the right to a remedy and reparation is confirmed, not only doctrinally but also in practice.<sup>115</sup> As a result, there is no contention over the fact that victims of human rights violations and abuses have a right to effective remedy and reparation.<sup>116</sup>

While this right is a recognized consequence of state responsibility for human rights violations, its modalities are often neglected.<sup>117</sup> Soft law has historically been relegated to the fringes of academic international law discourse, notwithstanding its importance in the actual practice of States.<sup>118</sup> In the context of state accountability, responsibility pertains to the degree that officials adhere to the norm and laws guiding their actions; it is effective where there are clear lines of control, fair apportionment of liability, and accurate reporting of bureaucratic actions.<sup>119</sup> International laws and standards identify States as the primary actors with accountability for protecting human rights and bear responsibility to establish appropriate accountability mechanisms.<sup>120</sup> Therefore, it is particularly important for governments to have the willingness to provide for reparation, considering that the government holds power over the financial resources of the state.

Humanitarian law primarily contains provisions relating to the protection of victims, that is, civilians during conflict, but also affirms

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114 Among them are: UDHR, Article 8; ICCPR, Article 2; CERD, Article 6; CAT, Article 14; and CRC, Article 39. In addition, both international humanitarian law and international criminal law are relevant in this context, including, in particular: the Hague Convention respecting the Laws and Customs of War on Land (Article 3); the Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts (Article 91); and the Rome Statute of the International Criminal Court (Articles 68 and 75).

115 Office of the High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict States, Reparations programmes, HR/PUB/08/1, 2008, 8, <http://www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf>. (accessed November 29, 2021).

116 *Ibid.*

117 *Ibid.*

118 Andrew Guzman and Timothy Meyer, International Soft Law. *Journal of Legal Analysis* 2, no. 1. (2010): 171-225.

119 JG Koppell, "Pathologies of accountability: ICANN and the challenge of 'multiple accountabilities disorder'," *Public Administration Review* (italic) 65, no. 1 (2005): 94-108.

120 Emmanuel O. Nuesiri, "Social And Environmental Accountability". *Working Paper for International Union for Conservation Of Nature Commission On Environmental, Economic And Social Policy* (2016): 9.

the duty of responsible parties to pay compensation.<sup>121</sup> Historically, the doctrine in international law on inter-state reparations has, to a large extent, impeded the ability of victims of conflict to seek reparations.<sup>122</sup> States have the discretion to claim reparations against other States for injuries to their nationals.<sup>123</sup> States still bear the primary responsibility for providing reparation to victims of human rights violations within their jurisdictions.<sup>124</sup> There is an express legal obligation for the States to provide reparation when violations are committed.<sup>125</sup>

The UN Principles on Reparation covered compensation that should be provided for any economically accessible damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case,<sup>126</sup> resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

1. Physical or mental harm;
2. Lost opportunities, including employment, education, and social benefits;
3. Material damages and loss of earnings, including loss of potential earnings;
4. Moral damage;
5. Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.<sup>127</sup>

Although it is difficult to place monetary value on the harm caused by sexual assault, it is important to recognize that there are financial costs shouldered by the victim/survivor and the impacted communities that give aid to the victims.<sup>128</sup> These include:

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121 Ian Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press, 2001), 426-427.

122 *Ibid.*

123 *Ibid.*

124 Amnesty International 2009, *Annual Country Report "Bosnia-Herzegovina: Gross abuses of human rights*, 36.

125 *Ibid.*

126 Article 20 Section IX of The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

127 *Ibid.*

128 Mayhew, P., & Adkins, G. "Counting the costs of crime in Australia," *Trends & Issues Paper Australian Institute of Criminology* 247, (2003).

1. Loss of actual earnings;
2. Loss of future earning capacity;
3. Medical expenses;
4. Intangible costs (e.g., loss of quality of life, pain, and suffering); and
5. Counselling expenses.<sup>129</sup>

The UN research conducted in 2017 into the socio-economic obstacles survivors face in conflict-related sexual violence in BiH showed that 62 percent of survivors were unemployed, 64 percent had no social support, and more than half of them lived under the poverty line.<sup>130</sup> Among its recommendations, the UN reported the case of a victim who wishes to remain anonymous; her report has never been investigated and the case file thrown away after 10 years. Experts observed that this is a common experience shared by many victims of war crimes and rapes committed at the time. The statement released after the UN examined the case points out the physical and psychological harm the victim has suffered, including trauma, personality disorder, and genital infection. Unfortunately, the victim could not afford the necessary treatment.<sup>131</sup>

The UN Committee urged the Government of BiH to ensure that survivors of wartime sexual violence has full access to national remedies, effective relief, and reparations based on equality before the law.<sup>132</sup> The data from the 2017 UN research proves the necessity of the Government BiH to provide the protection covered by the UN Principles on Reparation because without the compensation by the government, victims can not afford recovery by themselves.

The UN Principles on Reparation also covers rehabilitation, including medical and psychological care, as well as legal and social services.<sup>133</sup> When talking about rehabilitation, it is often linked with medical and psychological care, such as going to a mental hospital and undertaking medication that help with depression and PTSD, when in

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<sup>129</sup> *Ibid.*

<sup>130</sup> UN News, *Bosnia and Herzegovina should recognise sex crime survivors' rights, say experts*, <https://news.un.org/en/story/2020/08/1070522>, (accessed on June 19, 2021)

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*

<sup>133</sup> Article 21 Section IX of The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

fact, this might not cover all the victim's needs. There should be space for a different spectrum of rehabilitation, tailored according to what the victims think they need to restore their mental health. While traditional approaches to addressing sexual assault—conversational therapy and crisis intervention, remain critical services for many survivors—research and experience clearly demonstrate that healing sexual trauma must holistically include the mind, body, and spirit.<sup>134</sup> As Peter Levine points out, efforts to address the trauma that fail to recognize the physiological and non-verbal aspects of the survivor's experience will ultimately be unsuccessful.<sup>135</sup>

There is not any specific definition of “psychological care” according to the UN Principles on Reparation, which leaves huge room for alternative psychological care (other than medical) to be given and create betterment for “holistic healing.” Emotion and memory of sexual assault live in the body as well as the brain, and holistic healing approaches help to heal and empower the whole person.<sup>136</sup> Rehabilitation could also be done with the help of cultural or religious communities the victims can find comfort in. Community collaboration can be as simple as joining together for events. This allows for the content, pacing, and other aspects of the session to be designed specifically for survivors with the greater degree of comfort, sharing, or bonding, as they know that the room is filled with people who care for the survivors.<sup>137</sup>

It is also crucial to restore the dignity and reputation of the victims, as many survivors of sexual violence may not have reported the sexual crimes they were subjected to for a number of reasons, including possible feelings of shame and stigma attached to being a victim of rape as well as mistrust towards the criminal justice system.<sup>138</sup> This right is also included in Article 22 (d) Section IX of the UN Principles on Reparation—where it is noted that reparation should include satisfaction—which could be done by an official declaration or a judicial decision, restoring the dignity, the reputation,

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134 Terri Poore, Toby Shulruff, and Kris Bein, “Holistic Healing Services for Survivors,” *SASP White Paper for National Sexual Assault Coalition* (2013), 3.

135 Levine. P.A. *Waking the Tiger: Healing Trauma*. (Berkely, CA: North Atlantic Books, 1997)

136 *Ibid.*

137 Terri Poore, Toby Shulruff, and Kris Bein, *Holistic Healing Services for Survivors*, p. 8.

138 Amnesty International, *Old Crimes, Same Suffering*, 6.

and the rights of the victim and persons closely connected with the victim.<sup>139</sup> Since Article 20(b) Section IX also covers lost opportunities of social benefits,<sup>140</sup> the label of being a “rape victim” and being “unmarriageable” could be included as a loss of social benefits, especially in a conservative environment. Therefore, it should also be compensated by restoring the dignity and reputation of the victims. Reparations must not be perceived as a humanitarian gesture, but rather as a rights-based framework for redress.<sup>141</sup> They should be based on effective consultation with the victims and should be based on the status as and needs of victims. The underlying principle of reparation programs should be that victims are entitled to specific rights in addition to all other rights they have—those who suffered specific crimes require special remedies.<sup>142</sup>

#### **V. The Uphill Battle to Deliver Justice to Victims of Sexual Violence During Armed Conflicts: The Determination of Proportional Reparations**

It is without a doubt that the ICTY had contributed to the recognition of sexual violence during the war. Numerous judgments of completed cases at the ICTY contain findings and new theories in relation to sexual violence committed against civilians in the relevant armed conflicts. However, the ICTY approach—based on Resolution 827 on the updated ICTY Statute—was still too focused on the criminalization of the crime, regardless of the legal basis that existed to take on the matter of reparations. Regardless of numerous chances to make progress, the approach leaves victims of sexual violence in the position to only serve as witnesses to move along the process of the ongoing trial so that the trial would not “last too long.”

Since they are dependant on their own national courts to be granted reparations for the harm they suffered, this creates a specific challenge from the victims to seek reparation due to many stereotypes caused by the socio-cultural context surrounding women who are

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139 Article 22 (d) Section IX of The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

140 *Ibid.*

141 Amnesty International 2009, *Annual Country Report “Bosnia-Herzegovina: Gross abuses of human rights,”* 37.

142 *Ibid.*

victims of rape during war. Regardless of the positive contribution of the ICTY, the approach taken does not recognize the gravity of the atrocities faced by the victims, and without the trial's recognition, the victims might never be able to recover.

The UN Principles on Reparation have sufficiently regulated the various needs of the victims of sexual violence, and thus, leaves much room for different ranges of reparation needed by the victims, creating the possibility for tailoring to the specific individual needs of reparation. The UN Principles on Reparation can be implemented as soft law, which is not necessarily binding but works as standardized procedures of providing specific reparation for each victim on a case-by-case basis. It is important to highlight that the need for reparation is different for every victim. One might need economic empowerment, and the other might need counselling to help with their PTSD. When investigating the need for reparations, it is also important to consider the socio-cultural context surrounding the victims. This helps determine the approach for determining the appropriate reparation so it could be done without running on a victim-blaming narrative and can maximize the utilization of resources surrounding the community has been providing the victims with to improve aid.

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