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Judicial Interpretation and *Nullum Crimen Sine Lege* at the International Criminal Court: An Exercise in Utilizing ‘Other Inhumane Acts’ under Crimes Against Humanity

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Abstract

This PhD aims to explore how the International Criminal Court (ICC) can inject elements of judicial creativity when expansively interpreting the contents of the crimes under which it has jurisdiction without violating the principle of legality (more specifically *nullum crimen sine lege*). This has been of key interest to the scholarly community, especially in regard to the development of international criminal law. While prior international criminal tribunals have contributed a great deal to the expansion of the body of international criminal law, they were crafted with this specific task in mind. Their statutes and accompanying crimes were broad, encouraging them to creatively interpret their contents. This coupled with lack of reference to the principle of *nullum crimen sine lege* permitted them to adopt a generic definition of it which, in turn, enabled them to more easily define or include new crimes within their jurisdiction. The Rome Statute which binds the ICC, on the other hand, is a much more specific document, devised to reflect the stricter standards for interpretation that is often seen in civil law legal systems. It includes a detailed set of definitions of crimes, as well as explicit reference to the principle of *nullum crimen sine lege*. This indicates that the ICC will not be able to expansively interpret the Rome Statute in the same way as was done at other international criminal tribunals.

The dichotomy between the ICC and other international criminal tribunals becomes clearer when considering the inclusion of ‘other inhumane acts’ under crimes against humanity. This residual clause was constructed with the intent to provide a means for adapting the Rome Statute for the inclusion of novel criminal acts. However, due to the fact that these acts have not been formally codified within the Rome Statute itself, the provision runs risk of violating the principle of *nullum crimen sine lege* (without established law an individual cannot be held criminally accountable for their acts). The objective of this research was then to identify how the ICC can creatively interpret its statute to include novel criminal acts under ‘other inhumane acts’ without violating the principle of *nullum crimen sine lege*.

This PhD implements a novel method for judicial interpretation at the ICC by combining the concept of ‘judicial creativity’ as detailed by Shane Darcy with statutory restrictions placed within the Rome Statute and a contemporary understanding of *nullum crimen sine lege*. This is then applied to a number of acts which have not been codified within the Rome Statute, namely: forced marriage, ‘ethnic cleansing’ and terrorist acts, to identify how the principle impacts the ICC’s ability to exert judicial discretion.

This PhD finds that indeed, the court can actively utilize ‘other inhumane acts’ under crimes against humanity to include novel abhorrent acts without violating the principle of *nullum crimen sine lege*. The principle itself, when applied through the above methodology, acts as a sifting agent, syphoning out acts which are incompatible with the Statute and promoting judicial consistency. In doing so, it also aids in highlighting the key tenets of the acts being examined and forces the unique aspects of them to the forefront. As such, the principle serves a threefold purpose; it protects the accused from arbitrary application of the law, it aids in better representing victims through highlighting the unique aspects of the act committed and it provides others with a deeper understanding of the act being examined.

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List of Key Acronyms and Abbreviations

ACPHR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AFRC	Armed Forces Revolutionary Council
AP	Additional Protocol
AU	African Union
ASEAN	Association of South East Asian Nations
ASP	Assembly of States Party (to the Rome Statute)
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Committee on the Elimination of All Forms of Racial Discrimination
CIL	Customary International Law
CRC	Convention on the Rights of the Child
CTC	Counter-Terrorism Committee
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECOSOC	Economic and Social Council
ECtHR	European Court of Human Rights
EoC	Elements of Crimes
GA	General Assembly
GC	Geneva Conventions
HRL	Human Rights Law
IACtHR	Inter-American Court of Human Rights
IAC	International Armed Conflict
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law
ICCPR	International Covenant on Civil and Political Rights

ICESCR	International Covenant on Economic Social and Cultural Rights
ICRC	International Committee 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 (at Nuremburg)
IMTFE	International Military Tribunal for the Far East
LRA	Lord's Resistance Army
NATO	North American Treaty Organization
NGO	Non-Governmental Organization
NIAC	Non-International Armed Conflict
OAS	Organization of American States
OAU	Organization of African Unity
OTP	Office of the Prosecutor
PIL	Public International Law
PCIJ	Permanent Court of International Justice
PTC	Pre-Trial Chamber
Res	Resolution
RPE	Rules of Procedure and Evidence
SC	Security Council
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
TC	Trial Chamber
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCESCR	United Nations Committee on Economic Social and Cultural Rights
UNESCO	United Nations Educational, Scientific and Cultural Organization

UNHRC	United Nations Human Rights Council
USC	United States Code
WHO	World Health Organization

Chapter 1: Introduction

1.1. Overview: Object and Purpose of the Thesis

This thesis aims to explore whether and, if so, to what extent, the international judicial dealing with international criminal law can inject some elements of interpretive ‘creativity’ in elaborating detailed elements of crimes that are considered (in strict legal sense of the continental/civil law system) yet to be specifically spelt out by relevant legal instruments (namely, the statutes of international criminal tribunals). The possible conflict between the principle of legality (which is not exactly equivalent to, but still summarized in the symptomatic principle of *nullum crimen sine lege*) and the leeway of ‘judicial creativity’ in which the international judiciary can be considered allowed to engaged in the sphere of international criminal law has been one of the fundamental questions that has attracted some scholarly interest.¹ Indeed, the operation of three *ad hoc* UN war crimes tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL), have produced relatively refined jurisprudence of international criminal law. Their work in ‘fleshing out’ the enriching body of jurisprudence of international criminal law has been complemented by the jurisprudence of various ‘mixed’ criminal tribunals (the war crimes panels in East Timor, Kosovo, the Extraordinary Chambers in the Courts of Cambodia (ECCC), as well as by the nascent case-law of the Special Court for Lebanon. The evolution of such relatively sophisticated bodies of case-law on international criminal law, which has been rather ‘dormant’ since the conclusion of the Allied *ad hoc* war crimes tribunals, the International Military Tribunal at Nuremberg (IMT) and the International Military Tribunal for the Far East (IMTFE) in the wake of WWII, have contributed to both the enlargement of the notion of international crimes and to the elaboration of their specific elements. Yet, the question still remains what role is assigned to the judges of international or internationalized criminal tribunals in striking a delicate equilibrium between the time-honored principle of *nullum crimen sine lege* and the extent of judicial discretion. The question has been particularly intertwined with differences in underlying rationales between the common law countries (which tend to give more discretion to judges in ‘finding’ and the

¹ See, for instance, Darcy, Shane, and Joseph Powderly. *Judicial Creativity at the International Criminal Tribunals*. Oxford: Oxford UP, 2010, to which reference is frequently made throughout this thesis.

formation of new law) and Romano-Germanic civil law countries that have traditionally adhered to stringent code-based systems that have leant toward straight-jacketing judicial discretion.

Since the publication of the edited volume by Shane Darcy and Joseph Powderly in 2010, there have been fantastic developments in the case-law of international and internationalized criminal tribunals. This is of special relevance to the Special Court for Lebanon which is the first tribunal of an international character that is purported to prosecute the crime of terrorism. Hence, this thesis argues that there are many areas of ‘innovative’ scholarly contributions that can be made to the existing scholarship of both law and legal policies in light of the extensive empirical and doctrinal research that the present writer has undertaken for the past four years.

In this introductory chapter, this thesis will start with making a brief historical tour of the evolution of international criminal law to provide a background against which more in-depth analyses will be undertaken in the ensuing ‘body chapters.’ The brief substantive examinations in this introduction will then turn to the question of differences in underlying rationales of common law and civil law systems, and to the meaning of the principle of *nullum crimen sine lege*. At the end of this introduction, this thesis will provide succinct explanations on the chapter structures that will follow.

1.2. Brief Historical Account of International Criminal Law

International criminal law developed at the intersection of international law and domestic criminal law. Its origins can be traced back at least to the times of ancient Greece, however the trial of Peter von Hagenbach in 1474 is generally accepted as the first international trial for wartime atrocities.² While there were a number of similar instances which occurred after this, these early exercises in delivering justice at the international level were crude and lacked structure. As such, they did little to further the development of international criminal law. Especially with the signing of the Treaty of Westphalia in 1648 and the emergence of the notion of state sovereignty, it became increasingly clear that States viewed themselves as the sole entity with the right to adjudicate upon their own nationals. This was reflected within international treaty law, such as in the adoption of the Hague Conventions of 1899 and 1907. While the treaties themselves were primarily concerned with regulating conduct and protecting civilians during times of war, they were limited in the sense that, as treaties, they only placed obligations on States for ensuring adherence to and holding its

² Schabas, William. *An Introduction to the International Criminal Court*. Cambridge: CUP 2007. pp. 1.

own nationals accountable for violating its provisions. It wasn't until the end of the First World War and the signing of the Treaty of Versailles that attempts to establish a formal international criminal tribunal began to emerge.³ However, even this was stalled due a disagreements and lack of acceptance of such a tribunal by Germany. As a result, attempts to form a tribunal to address war crimes were eventually abandoned in favor of national proceedings.⁴ While the proposed tribunal never came to fruition it did serve as a catalyst, enticing states to pursue the creation of an international criminal court. This proved itself to be a long and arduous process, with various attempts eventually failing due to lack of sufficient support.⁵ It was not until after the Second World War that the first international criminal tribunals were formed. These were the International Military Tribunal at Nuremburg (IMT) and the International Military Tribunal for the Far East (IMTFE).

The IMT and IMFE have been recognized as the first successful international criminal tribunals. However, the tribunals themselves did not come without their faults and have been routinely criticized for lacking impartiality and retroactively applying the law.⁶ Whereas their faults were undeniably present, the mere establishment of these tribunals sent a message throughout the world that even sovereignty had its limits. For the first time, those who had committed the most egregious acts against human kind, including state representatives, could no longer hide behind the State to escape prosecution.⁷ While the IMT and IMTFE have been considered as the first formal international military tribunals it wasn't until much later that the development of a distinct international criminal legal regime began to form. This is generally associated as beginning in the 1990's with the adoption of the statutes for the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR).⁸ Their formal establishment occurred through Security Council resolutions which differed from the IMT and IMTFE. However, the rationale behind their establishment was

³ *Treaty of Versailles*. 28 June 1919. Art. 227.

⁴ These are more commonly referred to as the 'Leipzig Trials'

⁵ *Note: The League of Nations proposed the creation of an International Criminal Tribunal to adjudicate on offences of terrorism. While a convention was drafted for this purpose it lacked sufficient ratifications to enter into force and was eventually abandoned. See: League of Nations, *Committee for the International Repression of Terrorism*. Report to the Council Adopted by the Committee on January 10th, 1936.

⁶ Finch, George. "The Nuremberg Trial and International Law." *American Journal of International Law*, 41(1). 1947. pp. 28-29.

⁷ Cassese, Antonio, et al. *Cassese's International Criminal Law*. 3rd ed. Oxford: Oxford UP, 2013. pp. 40.

⁸ Cryer, Robert. *An Introduction to International Criminal Law and Procedure*. 4th ed. Cambridge: CUP. 2019. pp.1.

the same, the international community deemed that the acts committed within Rwanda and the former Yugoslavia exemplified the gravest and most abhorrent violations of international humanitarian law and human rights law. As such, the tribunals we established in order to reaffirm the principles under which international law was founded and to show that the international community was unified in the opinion that such violations would not be tolerated, regardless of who committed them. It was precisely this position and the occurrence of the violations of many of the above norms that led to the expansion of international criminal law. Various other *ad hoc* tribunals began to emerge, established to deal with specific violations which occurred. Others, and of the greatest concern for this dissertation, were designed to be permanent in nature, namely the International Criminal Court (ICC). Even with the widespread development of such a regime and the recognition that over the past 20 years international criminal law has developed both successfully and substantially, the body of law itself is far from uniform. It is precisely this lack of uniformity which causes a degree of confusion and disagreements, amongst scholars, practitioners and politicians alike over what the exact contents of international criminal law is and how it should be applied in practice.

Whereas the intentions behind the creation of international criminal law still prevail to this day, its contents and application have been in a constant state of flux. Starting from the rudimentary beginnings of its practice with the IMT and the IMTFE to the more recent adoption of the Rome Statute for the International Criminal Court, the rules which international criminal tribunals apply, as well as the practices and principles to which they adhere, have not been wholly uniform. Many of the convergences and differences between these tribunals have been attributed to underlying principles which are commonly represented in different types of legal systems throughout the globe. In this respect, the two most influential systems can be considered as common and civil law. In order to better understand the two systems, it would be prudent to provide a degree of background on them and the differences between them.

1.3. Attempt to Synthesize the difference between Common and Civil Law

The two most influential legal systems in terms of the development of international criminal tribunals have been that of common and civil law. As such, in order to understand the differences in how these tribunals render their decisions and what principles they rely on it is essential to have at least a rudimentary understanding of the two systems themselves. This section will provide a brief background of each legal system and the core differences between

them. After doing so the section will follow with an explanation of the principle of *nullum crimen sine lege*, a legal principle which has become prevalent in both systems but has been interpreted somewhat differently. To begin, it would be prudent to address common law, as it has had a great deal of impact on how the regime of international criminal law developed in its earlier stages at the ICTR and ICTY.

Common law can be considered as originating around the 11th Century after the Norman conquest in England. The practice of common law would later spread to countries such as the United States, Australia, India and other members of the British commonwealth. More so than its historical origins, this dissertation is concerned primarily with the contents or key tenets of what constitutes common law. In this sense, it developed as distinct from its civil law counterpart. It does not require prohibited acts to be explicitly defined through statutory definition. Instead, the onus is on the court and its judges to extrapolate the contents of a prohibited act such as murder, rape, assault, etc. As this is the primary means of rendering a decision, a high degree of importance is placed upon prior jurisprudence to guide judges in the decision-making process. This is known as *stare decisis*, a decision which binds the court and guides its future decisions despite not being included within legislation. One should note that even within common law systems the notion of *stare decisis* can differ slightly. Within the United States, it entails that only lower courts are required to adhere to a decision, while higher courts may contest or override it. In English law *stare decisis* has the ability to modify existing law.⁹ In addition, while a high degree of emphasis is placed on prior decisions, they are no longer considered as binding upon courts when rendering a decision.¹⁰ In any case, common law places a higher degree of emphasis on judicial discretion. Judges are expected to take the case facts and compare them with similar definitions and concepts as clarified through prior decisions before rendering a decision on a given matter.

Even then, the above accounts may be seen as reflecting a more formal obligation, or procedural method to interpreting the law in a common law system. How this is accomplished in a way which is still understandable to the common people and reflects the core values from which the law was devised is still of concern. After all, the law is gradually modified by a select

⁹ Although this is limited to adherence to the principle of *nullum crimen sine lege*

¹⁰ Pejovic, Caslav. "Civil Law and Common Law: Two Different Paths Leading to the Same Goal." *Victoria University Wellington Law Review*. Vol. 32 2001. pp. 821-822.

number of individuals. In this case, it is the judges themselves who are expected to adhere to a certain set of values. Hohmann asserts that this must be done through three distinct goals: social congruence, systemic consistency and doctrinal stability. Social congruence would be best described as the process by which the applicability of a rule is compared with other alternatives in an attempt to identify the rule best suited for the given situation being examined. Systemic consistency is a natural extension of the process of testing for social congruence. It entails that every rule must be compatible with all others in to form a “unified whole.”¹¹ In other words, judges are expected to examine the alternative rules available to them and identify the best one for application. The rule chosen should exhibit compatibility with the case, fact set and social context. In furtherance of this, decisions should also aim for a level of doctrinal stability. Hohmann describes this as examining the text of a law through a grammatical and historical lens in order to prevent deviation from what the law was intended to encompass when enacted.¹² One should note that meeting all three aims equally is not always achievable and the situation and fact set may dictate a stronger reliance on social congruency and systemic consistency than doctrinal stability. Regardless, these tenets show that aside from the formal requirements of relying on established law and case law, common laws systems also tend to rely on a set of other informal criteria when rendering decisions.

In contrast to common law the origins of civil law are often associated with Roman law, in particular the *Corpus Juris Civilis* of Emperor Justinian I. It flourished predominantly within Europe, most notably France, Germany and Austria. It is primarily distinguished from other legal systems in that laws are clearly delineated within a “systematic, authoritative, and guiding statute.”¹³ The statute, or civil code is intended to serve as the text from which courts derive their authority. In this sense, the code itself is intended to be paramount and exhaustive, encompassing all potential violations the legislature intended to criminalize. Many of the main tenets, or elements of a crime may be included within the provision prohibiting the act itself; meaning there is less of an emphasis on judicial discretion than what is observed within common law. As such, the court’s duty is to interpret the facts of a given situation and assess whether they fit

¹¹ Hohmann, Hans. “The Nature of the Common Law and the Comparative Study of Legal Reasoning.” *The American Journal of Comparative Law*. Vol. 38, No. 1. 1990. pp.151.

¹² *Ibid.* pp. 152.

¹³ Pejovic, Caslav. “Civil Law and Common Law: Two Different Paths Leading to the Same Goal.” *Victoria University Wellington Law Review*. Vol. 32 2001. pp. 821-822.

within the ambit of the defined provision. Prior decision still have an impact on the decision-making process, but this is secluded to breadth or representation and similarity in case facts. Even so, prior decisions are not binding upon the court, but rather serve as a guideline for judges. In other words, the courts are bound within the specific confines of the statute which they are interpreting, and cannot expand, or alter the contents of the statute itself.

While the above provides a general overview of the concept of civil law and what it is, the criminal codes of all civil law systems do not overlap. What may be considered as murder or torture in one State may not be considered as such in another. This is particularly due to the restrictions placed upon jurists and the need for them to interpret the law solely within the confines of the statute from which they derive their authority. However, that is not to say that there is no overlap between civil law legal systems in terms of content. There are certain legal principles and rules which are mostly present between both civil and common law legal systems. Of particular interest to this study is one such principle, *nullum crimen sine lege*.

1.4. *Nullum Crimen Sine Lege*

The principle of *nullum crimen sine lege* is a widely recognized as a fundamental legal principle enshrined within most legal systems. On the surface level it can be understood as a person cannot be held criminally accountable for an act which was not criminalized at the time the act was committed. In order to identify if a crime was criminalized at the time of commission it is not enough to simply examine the statute itself, but rather take into consideration if the act in question meets a certain set of criteria. That means that it must show adherence to four different principles: *lex scripta*, *lex certa*, *lex praevia* and *lex stricta*. The principle of *lex scripta* requires that the law which is to be applied must have previously be based on written law. Within civil law legal systems, the understanding of this extends to what has been formally codified within the law. In other words, the legislature specifically acknowledged the criminal nature of the act within writing before the act itself was committed. The nature of common law systems indicates that such formal written acknowledgement may not be necessary to fulfill the *lex scripta* requirement. In the past, this was certainly the case and judges were tasked with defining the contents of prohibited acts, such as murder, rape, assault, etc. However, most common law legal systems now expressly recognize and criminalize prohibited acts through written form, and it is generally accepted that this is necessary in order to be considered as meeting the requirement of *lex scripta*. However, the definitions or

clarification of certain aspects of a crime still rely on prior judicial decision and interpreting the law through these means is not considered as running counter to the *lex scripta* requirement.

The second element which must be taken into consideration is *lex certa*. The principle of *lex certa* requires that the act in question be clearly defined and criminalized. The understanding of this requirement naturally flows from the *lex scripta*. Within civil law legal systems, the crime is expected to not only be written, but its definition and contents must also be included within the statute itself. This ensures that there is consistency in rulings and that the public can be reasonably certain of what the crime itself entails. The notion of *lex certa* in common law tends to also differ somewhat from what is expected within civil law systems. Even though a crime may be written in statutory law, and its contents defined, these definitions may be either vague or inconsistent with their general meanings. For example, in the United States murder requires a specific intent of ‘malice aforethought.’ The meaning of this phrase has developed over countless cases and now represents not only premeditated murder, but also cases of extreme recklessness. As such, even though the contents of the crime itself may not be clearly understandable to the populous, it must be extensively defined, and its contents clearly criminalized through prior judicial decisions

The third requirement is that of *lex praevia*. This element requires that it be foreseeable that a crime was specifically criminalized before the act that was committed took place. There is not a great deal of differentiation between this element at the civil and common law level. However, one should note that on many occasions it has been asserted that despite not being formally written in legislation and recognized as a criminal offence, it can be reasonably conceived that an act would entail individual criminal responsibility. This can sometimes be based on moral or social developments. Such was the case in *C.R. v United Kingdom*¹⁴ at the European Court of Human Rights. While marital rape was not considered as within the ambit of the definition of rape under UK law, it was deemed that such a defense was no longer socially acceptable. Resultantly, it was reasonably foreseeable that the law had developed to include marital rape under the scope of rape and thus was not in violation of the *lex praevia* principle.

The fourth and final element is *lex stricta*. Within civil law legal traditions this is usually interpreted as the law must be narrowly construed and not extended by analogy. In order for an act

¹⁴ European Court of Human Rights, *C.R. v. United Kingdom*, Judgment, 22 November 1995.

to be included within the scope of the law it must be sufficiently similar, and the connection between it and acts which have been specifically criminalized must be easily identifiable. Expansion of the law beyond this, by way of analogizing is prohibited. This ensures a higher degree of adherence with the statute from which the courts derive their authority and differs from what is seen within common law systems. Within common law this element is usually applied more generally in the sense that it the law should be strictly adhered to. This means that it should not be applied in a manner which is detrimental to the accused. While the differences between the two understandings of the requirement of *lex stricta* are more nuanced, in either case it is adhered to in both legal systems.

Even though there are some differences between the understanding and representation of the principle of *nullum crimen sine lege* between common and civil law legal systems, it has been recognized as a fundamental and necessary principle. As such, it has also been recognized and widely endorsed at the international level. For international criminal tribunals it has served as an invaluable tool, both for ensuring the rights of the accused and the consistency of court rulings. However, at the former *ad hoc* tribunals, the principle was never formally introduced within their statutes. Moreover, the contents of the crimes included within their statutes lacked explanatory definitions. As a result, the judges themselves were tasked with providing definitions for such crimes through their decisions. This method of judicial interpretation is highly reminiscent of what has been described within common law legal systems. In fact, the ICTY and ICTR were provided with an even higher level of discretion due to the lack of jurisprudence guiding them. As a result, they were forced to adjudicate on acts through the use of different sources such as customary international law. Reliance on such sources and the reasoning adopted in the *ad hoc* tribunals' decisions drew attention from the international community. Their flexibility when attempting to identify and apply the law led to assertions that they had violated the principle of *nullum crimen sine lege*. This coupled with the aggressive and extensive expansion of criminal law prompted States to be more cautious when drafting the Rome Statute.

The greater emphasis placed on the principle of *nullum crimen sine lege* will undoubtedly have an impact on how the Court renders (or should render) its decision in the future. This entails that the decisions it makes and the rationale behind those decisions will inevitably differ from past decisions made at the *ad hoc* tribunals. However, it becomes more difficult to ascertain exactly

how the principle will impact its decisions, due to the need for strict adherence to other factors such as the Elements of Crimes. Some have asserted that due to the fact that this document extensively details the content of each crime under which the court has jurisdiction and the inclusion of the principle of *nullum crimen sine lege* under Art. 22 of the Rome Statute of the International Criminal Court (hereinafter, the Statute, the Rome Statute or the ICC Statute), the Court will in fact not be able to expansively interpret the crimes under which it has jurisdiction at all. This argument finds itself best suited within Art. 8 of the Rome Statute regarding war crimes. A great deal of scholars believe that Art. 8 ICC Statute sits as a black box, under which no changes or alterations can be made by the judges themselves. Instead, any narrowing or expansion of the content of the crimes included under Art. 8 of the ICC Statute would be limited solely to amendment to the Statute. This provision largely consists of four ‘core’ bodies of war crimes: (1) the grave breaches of the Geneva Conventions (GCs) of 1949; (2) the ‘serious violations’ of laws and customs applicable to international armed conflict (IAC); (3) ‘serious violations’ of Article 3 common to the GCs; and (4) ‘serious violations’ of laws and customs applicable to non-international armed conflict (NIAC). Each of the subparagraphs of Art. 8(2) corresponding to those ‘core’ category includes a number of war crimes that are spelt out in a very detailed manner. Regarding the crime of genocide laid out in Art. 6 of the Rome Statute, its constitutive acts are limited to those detailed in the 1948 Genocide Convention.¹⁵ In essence, any change to the Rome Statute would have to be agreed upon and an amendment implemented by the Assembly of States Party to the Statute. The above, arguably seems to be somewhat true, except there are other areas within the statute itself which encourage expansive interpretation. This would be more associated with Art. 7 of the Rome Statute which addresses crimes against humanity.

Similar to Art. 8, Art. 7 of the Rome Statute and the various crimes listed within it is extensively detailed within the Elements of Crimes (EoC). As such, similar arguments have formed around it asserting that the EoC and the principle of *nullum crimen sine lege* prohibit the expansive interpretation of the Statute by its judges. However, unlike war crimes, crimes against humanity includes a list of 11 different prohibited acts including: murder, extermination, enslavement, forced displacement, severe deprivation of physical liberty, torture, gender crimes, persecution, enforced

¹⁵ These acts are limited to five specific acts: (a) ‘Killing members of the group’; (b) ‘Causing serious bodily or mental harm to members of the group’; (c) ‘Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part’; (d) ‘Imposing measures intended to prevent births within the group’; (e) ‘Forcibly transferring children of the group to another group.’

disappearances, apartheid, and ‘other inhumane acts.’ Just as war crimes this list is intended to be exhaustive; the Court cannot adjudicate on any other acts under crimes against humanity. However, just as intended by the drafters a residual, or catch all clause was integrated within this list of prohibited acts, to permit the Court to deal with novel, or recent criminal developments as long as they are of similar gravity to the other acts listed under Art. 7. As such, crimes against humanity was derived to be unique in the sense that it can be expanded upon unlike Art. 8 on war crimes.

The inclusion of a residual clause under crimes against humanity is not a new or novel development for international criminal tribunals. It was included within the prior *ad hoc* tribunals as well. Many have taken this as an indication that the court can borrow from prior jurisprudence on the matter and thus acts which were already deemed as fitting within the scope of ‘other inhumane acts’ by these other tribunals would also be applicable under the Rome Statute. However, others have asserted that this is in fact not the case and the residual clause is inoperable, specifically due to the systemic differences between the ICC and the prior *ad hoc* tribunals. As will be explored in subsequent chapters, this is specifically due to the systemic differences between the ICC and the ICTY and ICTR. With the latter their respective statutes relied much more heavily on practices usually adhered to within common law legal systems. Prohibited acts were broadly construed and judges were encouraged to creatively interpret the law, through the use of international custom and general principles of law. It was through these processes that the court came to develop its own definitions of what prohibited acts such as, for example, rape or torture entail. Moreover, while general principles of law dictate that the court must take into consideration the principle of *nullum crimen sine lege*, it was not explicitly provided for within their statutes. As such, over time the *ad hoc* tribunals’ reference to this principle could be considered as mixed in the sense that it was not always adhered to. Instances which it made reference to the principle, the degree of importance it placed on tenets such as *lex scripta* and *lex certa* varied. Moreover, due to its nature the content of the principle was vaguely defined and ran more akin to the common law equivalent. As such, the decisions rendered in the past by the *ad hoc* tribunals may not fall in line with the statutory restrictions placed upon the ICC. The ICC cannot formulate its own definitions of crimes as they are already clearly provided for within the Elements of Crimes. Moreover, the explicit inclusion of the principle of *nullum crimen sine lege* and the greater degree of similarities it shares with civil law legal systems entails that it not only must always make reference to the principle, but that the content of the principle it would run in line with its more strict understanding under civil law legal

systems. In summary, one cannot automatically assume that prior decisions regarding the inclusion of acts under ‘other inhumane acts’ will be the same for the ICC as they were with the previous *ad hoc* tribunals.

The above brings to light a puzzling issue, both for those interested in the development of international criminal law and for the court itself. If the principle of *nullum crimen sine lege* differs at the ICC from what was observed at the ICTY and ICTR and the drafters intended to limit the Court’s ability to expansively interpret the law, what does this mean in terms of the Court’s ability to utilize the residual clause included under crimes against humanity? More succinctly put ‘How does the principle of *nullum crimen sine lege* impact the International Criminal Court’s ability to include acts which have yet to be explicitly included within the Rome Statute under Art. 7(1)(k)?’ It has been shown that the inclusion of this provision was done for the exact reason that the court be able to adjust and include contemporary acts within its jurisdiction. However, stringent adherence to the principle of *nullum crimen sine lege* entails that it will be much more restricted in terms of what it can include when comparing it to the prior decisions of the *ad hoc* tribunals. This puzzle sits at the crux of the question which this dissertation seeks to answer. In order to find an answer to the above question, this dissertation will take a unique approach in the sense that it will: 1) examine the formal restrictions placed on the court when interpreting its provisions and; 2) apply those restrictions to contemporary acts to understand :1) whether or not the court can include these acts under Art. 7(1)(k) and 2) how the principle of *nullum crimen sine lege* at the ICC impacts the ability to include these acts and our understanding of them. The following section will serve to provide a breakdown of the different chapters and how each will aid in providing an answer to the central research question of this dissertation.

1.5. Chapter Breakdown

The dissertation itself will be broken down into a total of six chapters; Introduction, Judicial Creativity, Forced Marriage, ‘Ethnic Cleansing’, Terrorism and Conclusions. The chapter on judicial creativity will better expand upon the restrictions placed upon the Court when exercising judicial discretion. In other words, it will draw upon concepts of judicial creativity developed as a result of jurisprudence at the *ad hoc* tribunals (something more in line with common law systems) and identify the statutory restraints imposed upon the Court (reflective of civil law systems) in order to clearly show what guides the Court when identifying applicable sources and when it can deviate/exercise its own discretion without running in conflict with the rules under which it is

bound. This will serve as the framework that will guide the logic implemented throughout the remainder of the thesis, but will also attempt to elucidate to the reader the unique aspects of the court as a hybrid court, one which was devised to reflect civil law legal systems, but also still retains aspects of common law.

After this the dissertation will then follow by examining three potential acts for inclusion under Art. 7(1)(k), and how the principle of *nullum crimen sine lege* has impacted their potential for inclusion. Before delving into each specific act, it is important to clarify that there are a large number of potential acts which could have been chosen for inclusion within this study. However, to ensure manageability and taking into consideration spatial limitations, only three acts have been chosen for examination. Each was assessed and chosen due to their adherence to a set of criteria, which will aid in better assessing their potential for inclusion under Art. 7(1)(k). The first is that each act must have been dealt with to some degree by one of the ad hoc tribunals to date. The reason for this is, not only will utilizing their decisions provide for a more thorough analysis, it will also aid in identifying the key differences in the understanding of *nullum crimen sine lege* and ‘other inhumane acts’ between them. Second, each act must exhibit enough recognition at the international level, directly or indirectly through treaty law, UN GA and/or SC resolutions, and scholarly debate for potential criminalization at the international level. As the project aims to identify how the principle of *nullum crimen sine lege* impacts the ICC’s ability to include acts under Art. 7(1)(k) it would be counterproductive to examine an act which has no or little recognition for criminalization at the international level. Thirdly, they must exhibit, at least at the surface level, a degree of overlap, or similarity with the crimes listed in Art. 7. Doing so aids in establishing the core aspects of the act being analyzed, the similarities and differences between it and other crimes listed under Art. 7. Fourth and finally, each must be a contemporary act, one which is continuously being addressed at the international level and ongoing calls for its criminalization are present. This helps in narrowing down potential candidates and ensures that each potential act will be both manageable and relevant to the current state of international affairs.

As for the acts themselves, forced marriage, particularly its incarnation as a byproduct of prolonged internal armed conflict, was chosen for chapter three. This was chosen as it has been dealt with by the Special Court for Sierra Leone in the past. The decision to include the act under ‘other inhumane acts’ is particularly valuable, as it provides insight into some of the core aspects

of the crime and will also give significant dearth in terms of source material. In addition, the act itself has been condemned on a number of occasions through SC and GA resolutions, as well as by a number of NGOs such as Human Rights Watch and Amnesty International. Some of the constitutive elements, at least at the surface level, draw similarities with other crimes included within the Art. 7 of the Rome Statute, for example, rape, severe deprivation of physical liberty and other gender-based crimes. Moreover, its current commission in Uganda by the Lord's Resistance Army, and the suggestion for its inclusion under Art. 7(1)(k) by the prosecution ensures that this would be the best starting point for the study and therefore chosen for the first empirical chapter.

Chapter four will address the act of 'ethnic cleansing.' While no formal decision on its inclusion under 'other inhumane acts' has been rendered by an international tribunal to date, it has been a prevalent issue, especially within the ICTY and ICTR. It has in, particular been associated with other crimes under crimes against humanity, such as forced displacement. As such, decisions by the prior *ad hoc* tribunals on clarifying the differences between 'ethnic cleansing' and forced displacement will serve as invaluable to understand some of the core aspects of the act itself. In addition, 'ethnic cleansing' has routinely and consistently been condemned by the international community, to the extent that it has been labeled as an international crime. This dichotomy between hesitance by the prior *ad hoc* tribunals to deal with the act and the stance of the international community that it is, in fact, a crime which must entail individual criminal responsibility makes it an ideal candidate for the study. Its inclusion will aid in not only providing insight into how the principle of *nullum crimen sine lege* impacts the possibility for inclusion of crimes under Art. 7(1)(k) but will also serve to sift through misconceptions surrounding the crime itself, aiding in a better understanding of the act and differentiating between its legal and political characteristics. While all of this contributes to its inclusion within the above examination, it is its alleged commission in Sudan which has made it a contemporary and important issue which the ICC should address.

The third and final empirical chapter will examine terrorist acts for potential inclusion under Art. 7(1)(k). It is of no surprise that acts of terrorism have been consistently condemned by the international community. As will be examined below, the development of the Counter Terrorism Committee by the Security Council and the ever-growing number of anti-terrorist laws at the domestic level shows that it is indeed an act which is of the highest concern to the

international community. Moreover, the attempted inclusion of the act during the drafting stages of the Rome Statute ensures that the act itself has a connection with the ICC. In addition to this, the commission of terrorist acts has been dealt with at the international level, by the Special Tribunal for Lebanon. Unique to this decision was the assertion that the act has been deemed as a violation of customary international law and can be adjudicated upon at the international level. Approaching the act from this position will provide for an avenue of inclusion through means which are more contentious at the ICC, customary international law. This will provide a much needed and particularly valuable insight into the degree to which the principle of *nullum crimen sine lege* restricts the Court's ability to expansively interpret its Statute. It will provide a key distinction between how the use of customary international law was utilized at the *ad hoc* tribunals and how it can be utilized at the ICC. As such, the chapter will serve to not only identify if the court is capable to address terrorist acts under art. 7(1)(k) of the ICC Statute but also how the principle of *nullum crimen sine lege* impacts the ICC's ability to utilize unwritten forms of international law when attempting to expansively interpret its Statute.

In all, each empirical chapter will serve to highlight what must be taken into consideration when assessing if an act can or cannot be included under Art. 7(1)(k) and how the principle of *nullum crimen sine lege* impacts the possibility for inclusion. Each will touch upon a different aspect of statutory interpretation under which the ICC is bound. Chapter three will address general principles of law, chapter four will examine the use of applicable treaties and chapter five will examine customary international law. Each empirical chapter, analyzed in light of the methodological framework for statutory interpretation outlined in chapter two will bring to light what acts can be included within Art.7(1)(k) and how the principle of *nullum crimen sine lege* acts to highlight the core aspects of the most contentious acts.

Chapter 2: Judicial Creativity and Art. 21 of the Rome Statute of the International Criminal Court

Introduction

In order to clarify exactly what the scope of Art. 22 of the Rome Statute of the International Criminal Court is and how the court can creatively interpret its substantive rules without violating the principle of *nullum crimen sine lege* it is necessary to set forth a methodology which complements the Statute. As such, this chapter will be dedicated to fleshing out the tenets of the doctrine of judicial creativity. Judicial creativity is the process by which judges extend beyond the mere application of the rules under which they are bound and instead creatively interpret them in a way which aids in the further development of, in this case international criminal law.¹⁶ One must not confuse this concept with that of judicial legislation, a process under which judges create new laws for application. The latter has come under a high degree of scrutiny for compromising the judicial independence of a court and, on occasion, running contrary to established principles of human rights.¹⁷ Judicial creativity on the other hand, when properly applied, provides clear justification for the expansion of the law while taking into consideration human rights norms and the processes under which the judges are bound.¹⁸ It is precisely these considerations which make it an ideal approach to use when assessing if the Court can include acts such as forced marriage, ‘ethnic cleansing’ or terrorist acts under the residual clause of Art. 7 of the Rome Statute. The provision itself was drafted in a way which was inherently vague in order to allow the court to include new developments in international criminal law within its jurisdiction. Moreover, the key restrictions of judicial creativity are already included within the Rome Statute. The Court must not interpret the Statute in a way which runs counter to international human rights law.¹⁹ Also, the principle of legality and, specifically, *nullum crimen sine lege* sits at the core of both the Rome Statute and the doctrine of judicial creativity. With this in mind, the chapter aims at identifying the key restrictions placed upon the Court through, mainly, its applicable law and point out how these sources and the rules

¹⁶ Darcy, Shane, and Joseph Powderly. *Judicial Creativity at the International Criminal Tribunals*. Oxford: Oxford UP, 2010. pp. 2.

¹⁷ *Ibid.* pp. 327-330.

¹⁸ *Ibid.* pp.1-13.

¹⁹ United Nations General Assembly. *Rome Statute of the International Criminal Court*. (17 July 1998) (last amended 2010). Art. 21(3).; *hereinafter *Rome Statute*.

regulating them can be used by the judges to creatively interpret Art. 7(1)(k) for the inclusion of acts which have not been formally introduced into the Statute.

With the UN *ad hoc* tribunals there existed a large degree of criticism that, in many cases the court overextended its judicial authority by legislating new procedural and substantive rules which, in turn, violated the defendants' rights. The Rome Statute was devised with this in mind, and Art. 21 and 22 were included within the Statute specifically to aid in mitigating such issues from arising within jurisprudence at the Court in the future. However, the nature of Art. 21 relating to applicable law and the extensive rules permitted for it under the Elements of Crimes and Rules of Procedure and evidence bring to question to what extent, if at all, the Court will be able to creatively interpret its substantive law utilizing its secondary and tertiary sources without coming into conflict with the Statute or violating the principle of *nullum crimen sine lege*. As such, this chapter will seek to provide an answer to these questions by first identifying the exact content of Art. 21. It will first begin by providing an understanding of the primary sources within Art. 21(1)(a) and establish not only the internal hierarchy in place between the Statute, Rules of Procedure and Evidence and Elements of Crimes, but also the relationship between them. It will show that when interpreting the rules included within the Statute it is indeed important to take into consideration the Rules of Procedure and Evidence and Elements of Crimes. However, one must first comprehensively analyze the content of the rules included within the Statute itself prior to referencing the Rules of Procedure and Evidence or Elements of Crimes. Doing so may bring to light conflicts within the Elements of Crimes and Rules of Procedure and Evidence, but also will adhere more closely to the intent of the drafters when including specific rules within the Statute. Specifically, in regards to judicial creativity, it also partially addresses concerns of overreliance on the above two sources by recognizing that conflict between them can occur, which in turn, provides a greater degree of flexibility in allowing one to reference the secondary and tertiary sources listed under Art. 21(1) without coming into conflict with the hierarchy in place within it.

The second part will address the Court's ability to utilize treaty law and 'general principles and rules of international law' under Art. 21(1)(b). This section will highlight the formal limitations placed upon the Court when utilizing international conventions. It shows that there is uncertainty over what treaties can be utilized within the provision. As such, one can only adopt the position that the Court is restricted only to the most widely recognized universal conventions and

treaties which it is party for direct application to the Statute. Reference to other human rights conventions can only be used as material in support of either customary international law or a general principle of international law. Taking this ‘conservative’ approach ensures that the court can still have recourse to the entire corpus of international human rights law to progressively interpret its rules without coming into conflict with the literal meaning of the text of the provision. The second part of this section details the confusion which has arisen through the phrase ‘general rules and principles of international law’ and identifies that despite conflicting opinions within scholarship, this is a reference to general principles of international law and customary international law. While there has been a degree of hesitance towards their use by the Court they can still be utilized, but one must be wary of mechanical transposition of these rules to the Statute. Instead, the mere existence of these norms does not entail that the Court can readily adopt them, in some cases they may need to be altered to fall in alignment with the Statute or, must be disregarded entirely in favor of other, less widely recognized principles or rules. This means that when creatively interpreting the Statute the Court does in fact have a degree of leeway in how it adopts a general principle or customary norm as long as it does not run in conflict with its primary sources.

Finally, the third section addresses Art. 21(1)(c) relating to general principles as derived from the national legal systems of the world. This being the most contentious element included within Art. 21 it has been broken down into three parts. The first provides a historical development of the concept of general principles, as there is some degree of a disagreement over what this means in Art. 21(3) within scholarship. Then, it delivers a method for identifying these principles that ensures compliance with Art. 22 of the Statute. Finally, it provides examples from the *ad hoc* tribunals to show how proper application can amount to acceptable means of judicial creativity, while improper application of this method lacks transparency and sufficient support from required sources which would amount to judicial legislation.

2.1. Clarifying a Questionable Hierarchy

Art. 21(1)(a) states that the Court shall apply “In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence.”²⁰ The inclusion of the Statute, Elements of

²⁰ *Rome Statute* Art. 21(1)(a).

Crimes and Rules of Procedure and Evidence under Art. 21 (1) (a) was done in order to limit the interpretative powers of the Court and prevent it from legislating on new rules or laws. That being said, it does not entail that there cannot, and has not been questions which have emerged as to the internal relationship between these three sources. Unlike paragraphs two and three of the provision there is no sequential or other phrase which indicates if, or to what extent, one source supersedes the other in cases of conflict or incompatibility. Between the Elements of Crimes and Rules of Procedure and Evidence there is not expected to be much, or any, conflict to occur in the future as they deal with different aspects of the Court; the former substantive rules and the latter procedural ones. However, their relationship with the Statute itself is one of question and utmost importance, for it dictates whether the Court can utilize its secondary and tertiary sources for interpretation. Moreover, as will be seen below, if they were to be considered of equal importance it could very well prohibit or force the Court to narrowly and digressively interpret its rules. While the topic of this research is primarily concerned with the substantive rules of the Court and resultantly, the interactions between the Statute and the Elements of Crimes, currently there is still debate on the actual relationship between the two.²¹ In order to clarify this, this part will first delve into the relationship between the Statute and Rules of Procedure and Evidence (RPE) as there has been much more clarification on the matter. This will be used as a benchmark to assist in assessing if the Rome Statute sits atop the internal hierarchy of Art. 21(1)(a) and, how this impacts the Court's ability to cope with internal confliction and utilize its secondary and tertiary sources to creatively interpret its rules.

2.1.1. Rules of Procedure and Evidence (RPE)

The relationship between the Statute and the Rules of Procedure and Evidence (RPE) is one which was taken into consideration during the drafting stages of the Rome Statute.²² Art. 51(4) of the Rome Statute provides: "The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute."²³ In addition, paragraph five states: "In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail."²⁴ This was reiterated in an explanatory note with the adoption of the Rules of Procedure and Evidence in which they were clearly stated as an instrument of the Court for use in

²¹ Stahn, Carsten. *The Law and Practice of the International Criminal Court*. Oxford: OUP, 2015. pp. 420-421.

²² *Ibid.* pp. 419-420.

²³ *Rome Statute* Art. 51(4).

²⁴ *Ibid.* Art. 51(5).

interpretation and “subordinate in all cases” to the Statute.²⁵ The Court has subsequently acknowledged this relationship between the Statute and The Rules of Procedure and Evidence in this regard. In the *Decision on the Applications for Participation in the Proceedings* the Pre-Trial Chamber stated: “the Rules of Procedure and Evidence is an instrument that is subordinate to the Statute.”²⁶ Moreover, scholars are well in agreement that under no circumstances can the Rules of Procedure and Evidence trump the Statute.²⁷ All of the above clarifies and removes any concerns over the internal hierarchical relationship between the Rules of Procedure and Evidence and the Statute.

The perceived issue of internal hierarchy has developed more from the Court’s recourse to and heavy emphasis on the Rules of Procedure and Evidence. It has opted to take a literal approach to the text of Article 21(1), by claiming that it must utilize either the Statute or the Rules of Procedure and Evidence when assessing a given issue.²⁸ It must be applied even if there is not a perceived gap or uncertainty within the text of the Statute itself. The above decision has led some to assert that the two sources are a complete codification of all the relevant rules before the Court and thus are to be considered as an extension of it.²⁹ This claim derives itself mostly from how the Court has often denied any application of materials which are not included within, especially, the Rules of Procedure and Evidence. For example, in *the Situation in Uganda* the Pre-Trial Chamber refused to accept the prosecution’s request to reconsider the redaction of dates and locations of attacks when issuing an arrest warrant.³⁰ The reason for this was based primarily on the fact that neither the Statute nor the Rules of Procedure and Evidence acknowledged the submission of ‘positions’ or opinions as acceptable means of communication with the Court during official

²⁵ *Rules of Procedure and Evidence*. explanatory note *.

²⁶ *Situation in the Democratic Republic of the Congo (Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS5 and VPRS 6)*, (ICC-01/04-101-tEN-Corr). 17 January 2006. par. 47.

²⁷ Sluiter, Goran and Stahn, Carsten. *The Emerging Practice of the International Criminal Court*. Martinus Nijhoff: Leiden, 2009. pp. 290.

²⁸ *Situation in Darfur, Sudan (Prosecutor v Omar Hassan Ahmad Al Bashir) (Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir)*, (ICC-02/05-01/09). 4 March 2009. par. 128.

²⁹ Schabas, William. *The International Criminal Court: A Commentary on the Rome Statute*. 2nd Edition. OUP: Oxford, 2016. pp. 518.

³⁰ *Situation in Uganda (Decision on the Prosecutor’s Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration and Motion for Clarification)*, (ICC-02/04-01/05) 28 October 2005. par. 8-9.

proceedings.³¹ Additionally, in *Decision on the Requests of the Legal Representative of Applicants on Application Process for Victims' Participation* the Pre-Trial Chamber was requested to disseminate a report it had received from the registry to the prosecutor and Office of Public Council for the Defense, as it would clarify information and expedite proceedings.³² However, the Pre-Trial Chamber denied this request due to the fact that neither the Statute nor the Rules of Procedure and Evidence included a provision obligating the Court to transmit such documents to them.³³

The above examples do not, however, answer whether or not the Rules of Procedure and Evidence is considered as an extension of the Statute. Textually, Art. 51 of the Rome Statute provides nothing which would affirm nor deny such a relationship with the Statute. In addition, the Court has indicated that the Rules of Procedure and Evidence is to be perceived as a distinctly separate document. In *Decision on the Applications for Participation in the Proceedings*, the prosecution questioned the permissibility of victim participation during the investigation stages. The argument posed was that Rule 92 of the Rules of Procedure and Evidence limited the participation of victims listed provided for under Art. 68 of the Rome Statute in that it only referred to certain stages of trial proceedings.³⁴ However, Art. 68 is included within part six of the Statute labeled *The Trial*, which also lists a number of other rules relating to, for example, the submission of evidence, sanctions and offences against the Court.³⁵ Not all of these operate solely during the trial stages of proceedings. As such, utilizing the specific text of Rule 92 of the Rules of Procedure and Evidence to interpret Art. 68 of the Rome Statute to make it operational only during the trial stages would narrow the scope of the provision. The Court responded by reiterating that the Rules of Procedure and Evidence are subordinate to the Statute and are merely meant to assist the Court in interpretation. They therefore can never be used to narrow the scope of the Statute.³⁶ In cases

³¹ *Situation in Uganda (Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration and Motion for Clarification)*, (ICC-02/04-01/05) 28 October 2005. par. 13.

³² *Situation in the Democratic Republic of the Congo (Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation)*, (ICC-01/04-374). 18 August 2007. par. 32-34.

³³ *Ibid.* par. 36-38.

³⁴ *Situation in the Democratic Republic of the Congo (Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS5 and VPRS 6)*, (ICC-01/04-101-tEN-Corr). 17 January 2006. par. 39-41.

³⁵ *Rome Statute* Art. 62-76.

³⁶ *Situation in the Democratic Republic of the Congo (Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS5 and VPRS 6)*, (ICC-01/04-101-tEN-Corr). 17 January 2006. par. 48.

such as the above, it follows that the Rules must be either interpreted in a way which falls in line with the Statute, or deemed as in conflict and thus non-applicable. If this is applied to the relationship between the two sources one can see that the above decisions merely served to emphasize the importance of the Rules of Procedure and Evidence and need for the defense and prosecution to strictly rely on it rather than adopt less formal means such as was done with the *ad hoc* tribunals.³⁷ In other words, the Rules of Procedure and Evidence are not to be considered as an extension of the Statute. Just as was initially intended by the drafters they are merely an instrument which is to be utilized for guiding the Court on procedural matters.

2.1.2. *Elements of Crimes*

Taking the above on the Rules of Procedure and Evidence into consideration better aids in understanding the relationship between the Elements of Crimes and the Statute. While the Elements of Crimes does not have a direct counterpart to Art. 51 of the Rome Statute, Art. 9 of the Rome Statute does include a number of similar elements within it. Paragraph one states the Elements of Crimes ‘shall assist’ the Court in interpretation and application of its substantive rules.³⁸ Moreover, paragraph three provides that they ‘shall be consistent with the Statute.’³⁹ Interestingly enough, there is not anything directly indicating the supremacy of the Statute over the Elements of Crimes contained within Art. 9. Some authors have asserted that this was unnecessary, and that if read in conjunction with Art. 51 of the Rome Statute, the term ‘shall be consistent’ indicates that in cases where the Elements of Crimes ‘conflicts’ with the Statute, it would be overridden.⁴⁰ Others, however, have posed the argument that the actual definitions of the acts prohibited are included within the Elements of Crimes and, thus, the Statute itself is merely a statement of prohibited acts.⁴¹ Their definitions are included within the Elements of Crimes and therefore they cannot come into conflict with the Statute itself. This would then pose two different issues; whether or not the Statute enjoys the same level of superiority over the Elements of Crimes

³⁷ Schabas, William. *The International Criminal Court: A Commentary on the Rome Statute*. 2nd Edition. OUP: Oxford, 2016. pp. 515.

³⁸ *Rome Statute* Art. 9 (1).

³⁹ *Ibid.* Art. 9 (3).

⁴⁰ Triffterer, Otto and Ambos, Kai. *The Rome Statute of the International Criminal Court: A Commentary*. 3rd Edition. C.H. Beck 2015. pp. 643.

⁴¹ Sadat, Leila Nadya. *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*. Martinus Nijhoff: Leiden. 2002. pp. 177.

as it does with the Rules of Procedure and Evidence, and how their actual relationship is relevant to the definitions of the listed crimes.

To begin, one must establish that the Elements of Crimes are indeed subordinate to the Statute. While textually there is less present indicating this, Art. 9 still includes the phrase ‘shall be consistent’ indicating that it must be in alignment with the Statute. Aside from this, textually, there is little else indicating the hierarchical relationship between the two sources. However, the Pre-Trial Chamber in *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir* clearly established that the Statute indeed enjoys supremacy over the Elements of Crimes.⁴² While it has stated its position on the matter the Court has seldom made statements on the actual relationship between the two sources. Some of the reasons it is not discussed is assumed to be: 1) because the Court has yet to recognize an internal conflict between the two and 2) it places a high emphasis on utilizing the two sources in tandem. As will be discussed hereinafter, this latter point has led to a degree of confusion causing the Court to overlook actual areas of conflict between the two by simplifying their relationship.

In furtherance of the above, the decision in *Al-Bashir* left the exact relationship present between the Elements of Crimes and the Statute in question. In the limited instances under which the Court has commented on this they have caused just as much controversy as clarity. A more in-depth analysis of the *Al-Bashir* decision will provide greater insight into why this is the case. In it the prosecution requested the Pre-Trial Chamber to issue and arrest warrant for Sudanese head of State Omar Al-Bashir. Among other allegations the Court was tasked with identifying if there was sufficient evidence to reasonably believe that Al-Bashir had contributed to genocide against the Fur, Masalit and Zaghawa ethnic groups under paragraphs one, two and three of Art. 6.⁴³ Initially, the Pre-Trial Chamber denied the prosecution’s request to include genocide within the arrest warrant as the required intent to destroy the ethnic groups in question, in whole or part, was not the only conclusion that could be drawn from the evidence it was provided with and, therefore, did

⁴² *Situation in Darfur, Sudan (Prosecutor v Omar Hassan Ahmad Al Bashir) (Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir)*, (ICC-02/05-01/09). 4 March 2009. par. 128.

⁴³ *Ibid.* par. 110.

not establish “reasonable grounds to believe” he had committed such an offence.⁴⁴ This aspect of the decision was subject to heavy criticism as the standards applied by the Pre-Trial Chamber to identify the presence of ‘reasonable grounds’ was unusually high.⁴⁵ The Appeals Chamber later recognized this fault and overturned the decision to permit the inclusion of genocide on the basis that ‘reasonable ground’ for the issuance of an arrest warrant indicated a lower threshold to that of ‘substantial grounds’ which is required for the confirmation of charges.⁴⁶ Regardless, focus here should not be placed on whether or not the Court issued the arrest warrant, but their perceived understanding of the relationship between the Statute and Elements of Crimes. As such, what is most important is the Pre-Trial Chamber’s claim that the “Elements of Crimes and the Rules *must be applied unless* the competent Chamber finds an *irreconcilable contradiction* between these documents on the one hand, and the Statute on the other hand.”⁴⁷ While this reaffirms the Court’s position on the need to place a strong emphasis on the Elements of Crimes, similar to that which was asserted to be in place between the Rules of Procedure and Evidence in the *Decision on the Requests of the Legal Representative of Applicants on Application Process for Victims’ Participation*, it also alluded to the idea that the Elements of Crimes was to be considered as more than just an assistive tool for Statutory interpretation.

Aside from the emphasis placed upon the sources by the Pre-Trial Chamber, the decision in *Al-Bashir* brings up two main issues. The first and most apparent is the Court’s use of the term ‘irreconcilable contradiction’ rather than ‘conflict’ which is provided under Art. 51(5) of the Rome Statute for the Rules of Procedure and Evidence. To start, one must recognize the debate surrounding Art. 51(5) and inclusion of the term ‘conflict.’ It has generally been perceived by scholars to be an unfortunate side effect of the process of negotiations, as the term ‘conflict’ does not necessarily reflect what is provided in Art. 51(4) requiring ‘consistency’ with the Statute.⁴⁸

⁴⁴ *Situation in Darfur, Sudan (Prosecutor v Omar Hassan Ahmad Al Bashir) (Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir)*, (ICC-02/05-01/09). 4 March 2009. par. 205-206.

⁴⁵ Cryer, Robert. “The Definitions of International Crimes in the Al Bashir Arrest Warrant Decision.” *Journal of International Criminal Justice*, Vol.7 (2009). pp. 289.

⁴⁶ *Situation in Darfur, Sudan (Prosecutor v Omar Hassan Ahmad Al Bashir) (Judgment on the appeal of the Prosecutor against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”)*, (ICC-02/01-09/05-OA). 3 February 2010. par. 30-39.

⁴⁷ *Situation in Darfur, Sudan (Prosecutor v Omar Hassan Ahmad Al Bashir) (Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir)*, (ICC-02/05-01/09). 4 March 2009. par. 128. emphasis added.

⁴⁸ Triffterer, Otto and Ambos, Kai. *The Rome Statute of the International Criminal Court: A Commentary*. 3rd Edition. C.H. Beck 2015. pp. 1344.

Instead, it would have been better to utilize the term ‘inconsistency’ in Art. 51(5) rather than conflict as, in accordance with the plain meaning of the text, an inconsistency may not always be perceived as amounting to a conflict. Regardless, the *Decision on the Applications for Participation in the Proceedings* renders this difference in terminology moot as it recognized that interpreting the Rules of Procedure and Evidence in such a way as to narrow the scope of Art. 68 of the Rome Statute would not be consistent with the Statute.⁴⁹ This decision, coupled with the subordinate character of the Rules of Procedure and Evidence indicates that the term ‘conflict’ present in Art. 51(5) should be deemed as not limited to the plain textual meaning, but also include inconsistencies between the Rules of Procedure and Evidence and the Statute.⁵⁰

Bearing the above in mind one can re-examine the Court’s use of the phrase ‘irreconcilable contradiction’ in *Al-Bashir*. If adhered to, reliance on this phrase would further restrict the Court’s interpretive powers. It would not only be required to utilize the Elements of Crimes at all times when referencing the Statute but also read it as an extension of it. Furthermore, the decision hints that the Court is only to examine the literal meaning of the text of the Statute prior to the Elements of Crimes.⁵¹ The above, if accepted, would place an even greater degree of linkage between the Statute and Elements of Crimes than exists between the Statute and Rules of Procedure and Evidence. However, this runs at odds with the drafter’s intent to make the Elements of Crimes a non-binding guideline used to assist the Court in statutory clarification.⁵² Judge Usacka rightfully pointed out these flaws in her dissenting opinion, asserting that reference to the Elements of Crimes is not required and the operative definition of all crimes are espoused within the Statute alone.⁵³ While this issue has not been further addressed by the Court, taking Judge Usacka’s opinion into consideration in *Decision on the Applications for Participation in the Proceedings*, one can infer that the Pre-Trial Chamber overemphasized the relationship between the Statute and Elements of

⁴⁹ *Situation in the Democratic Republic of the Congo (Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS5 and VPRS 6)*, (ICC-01/04-101-tEN-Corr). 17 January 2006. par. 48.

⁵⁰ Triffterer, Otto and Ambos, Kai. *The Rome Statute of the International Criminal Court: A Commentary*. 3rd Edition. C.H. Beck 2015. pp. 1344.

⁵¹ *Situation in Darfur, Sudan (Prosecutor v Omar Hassan Ahmad Al Bashir) (Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir)*, (ICC-02/05-01/09). 4 March 2009. par. 129.

⁵² Cryer, Robert. “Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources.” *New Criminal Law Review*, Vol. 12 (2009). pp. 396-7.

⁵³ *Situation in Darfur, Sudan (Prosecutor v Omar Hassan Ahmad Al Bashir) (Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir) (Separate and Partially Dissenting Opinion of Judge Anita Usacka)*, (ICC-02/05-01/09). 4 March 2009. par. 17-18.

Crimes. Instead, it is not the case that they must be used unless there is an ‘irreconcilable contradiction,’ rather they shall be used to assist the Court. When inconsistency between the Statute and the Elements of Crimes emerges, the Statute would prevail.

Building off of the above, the decision also faulted in its method of interpreting the Statute itself, by limiting it to only examining the literal meaning of the text. This brings forth a second issue which requires an understanding of the difference between the text of the Statute and Elements of Crimes relating to genocide. The definition provided in the Elements of Crimes has been widely criticized as a digressive step in the understanding of the act.⁵⁴ This is due to the inclusion of an additional element which extends beyond the scope of its long accepted *dolus specialis*. That is ‘the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.’⁵⁵ It has been widely claimed that this element does not exist within the current or past customary definition of genocide.⁵⁶ However, if the Rome Statute is read literally and in accordance with its plain text, this additional element, as stated by the Pre-Trial Chamber, would not be deemed as inconsistent with the Statute. Bearing this in mind one must take into account that the Court has consistently utilized the Vienna Convention on the Law of Treaties in order to guide its interpretation of the Statute itself.⁵⁷ The Convention dictates that the Court is not limited to only examining the literal or plain text when attempting to interpret the Statute, but also must consider its object, purpose and the preparatory works of the convention. When utilizing the Art. 31 and 32 of the Convention to interpret the Statute, it comes to light that the Pre-Trial Chamber’s view and the additional element included within the Elements of Crimes does not coincide with the definition of genocide provided under Art. 6 of the ICC Statute. In support of this one only need to examine the preparatory works of the Statute. Throughout the entirety of the drafting stages Art. 6 was one of the least controversial acts considered for inclusion, with only limited suggestions made to expand the

⁵⁴ Cryer, Robert. “Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources.” *New Criminal Law Review*, Vol. 12 (2009). pp. 396-7.

⁵⁵ The International Criminal Court. *Elements of Crimes*. (2011) Art. 6(a)(4), 6(b)(4), 6(c)(5), 6(d)(5)6(e)(7).; hereinafter *Elements of Crimes*.

⁵⁶ Werle, Gerhard and Jessberger, Florian. *Principles of International Criminal Law*. 3rd Edition. OUP: Oxford. 2014. pp. 204-205.; Triffterer, Otto. “Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such.” *Leiden Journal of International Criminal Law*. Vol. 14 (2001) pp. 407-408.

⁵⁷ *Situation in the Democratic Republic of the Congo. (Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal)* (13 July 2006) ICC Case No. ICC-01/04-168 par. 33-40.

definition to include, for example, social and political groups.⁵⁸ These suggestions were quickly met with opposition by a majority of States, as they fell outside the customary definition of the act. Discussions surrounding the need to include clearer, or more detailed definitions for elements such as ‘intent to destroy’ were also in a small minority and short lived. Specifically, the drafters were in agreement that they wanted to adopt the customary definition of the crime as it is for two reasons. Firstly, they believed it would be counter-productive and against the aims of including genocide within the convention if it did not provide a definition in the Statute which was not universally accepted and included within both international and national law.⁵⁹ Second, they wanted to ensure that, in the future if there were instances when, for example, the ICC and the ICJ were dealing with the same situation, their understandings of the crime of genocide would be based off of the same definition.⁶⁰ In fact, the drafters expected a degree of uncertainty for the Court when attempting to clarify certain aspects of the crime and expected that it would look towards the upcoming decisions of the ICJ, which would reflect custom, to guide it in the matter.⁶¹ In other words, the drafters were opposed to expanding, narrowing or otherwise altering the elements of the crime in any way. This is why the definition of genocide under Art. 6 mirrors that which is in the Genocide Convention.

It was only after the formal text had been adopted and work had begun on the Elements of Crimes when suggestions for clarifying the crime came to the forefront. This was spearheaded by the United States, which claimed that an additional element for ‘plan or policy’ should be added within the Elements of Crimes.⁶² The proposal was met with mostly negative reception, as it had no basis in the *travaux préparatoires* of the Statute, was not included in the Genocide Convention nor was it readily acknowledged through case law.⁶³ It was only after a delegate from Israel asked if it was indeed possible for genocide to be committed without a plan or policy did opinions begin to change.⁶⁴ It spurred concerns over interference in random killings committed by individuals which might fit within the customary definition of genocide, a matter which should be delegated

⁵⁸ United Nations General Assembly. *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*. A/50/22. 6 Sept. 1995. A/50/22. Par. 61.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* par. 62.

⁶¹ *Ibid.*

⁶² Preparatory Commission for the International Criminal Court. *Proposal Submitted by the United States of America ‘Draft Elements of Crimes’*. PCN/ICC/1999/DP.4. 4 February 1999.

⁶³ Triffterer, Otto and Ambos, Kai. *The Rome Statute of the International Criminal Court: A Commentary*. 3rd Edition. C.H. Beck 2015. pp. 130.

⁶⁴ *Ibid.*

to national courts.⁶⁵ It is perplexing as to why this was perceived as a potential issue, as it is clear that the gravity requirement and the principle of complementarity were included within the Statute to prevent such occurrences. Nonetheless, taking this argument into consideration, the delegation could not reasonably envision an instance when the Court could adjudicate on a case of genocide committed without a plan or policy that would not encroach on State sovereignty. Thus, they considered restricting the definition of genocide within the Elements of Crimes. While the exact phrasing of the proposed element was altered through discussions, it was eventually included within the Elements of Crimes as ‘manifest pattern of similar conduct...’

The problem that has arisen from the above is that the drafters of the Elements of Crimes were in fact misguided when considering the scope of genocide within the Genocide Convention. It has indeed been recognized that, it is difficult to envision a scenario under which genocide can be committed by an individual without the support of a State or organization. Even so, genocide can occur on an individual level without a plan or policy.⁶⁶ In fact, the preparatory works of the Genocide Convention show that the element of a plan or policy was cognizantly omitted as it would have unduly raised the threshold to show burden of guilt.⁶⁷ This is why it has consistently been considered as an aspect which is supportive but not a requirement of genocide.⁶⁸ As such, if one were to analyze the Rome Statute in light of Art. 31 and 32 of the Vienna Convention on the Law of Treaties prior to referencing the Elements of Crimes it becomes evident that the additional element narrows the scope of the crime. As was stated above, the narrowing of a provision in the Statute by the Elements of Crimes and Rules of Procedure and Evidence is considered as impermissible. While the Court’s reasoning may have been logical in *Al-Bashir*, it erred in its methodological approach to the interpretation of the Statute. By placing a higher emphasis on asserting the importance of the Elements of Crimes it neglected to properly examine the Statute through all available methods. Doing so would have highlighted an inconsistency between the two sources (ICC Statute and the Elements of Crimes), forcing the Court to refer to its secondary

⁶⁵ Lee, Roy S. *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*. Transnational Publishers. 2001. pp. 44-46.

⁶⁶ International Criminal Tribunal for the Former Yugoslavia. *Prosecutor v Goran Jelusic (Trial Judgement)* IT-95-10-T. 14 December 1999. par. 100.; International Criminal Court for the Former Yugoslavia. *Prosecutor v Goran Jelusic (Appeals Judgement)* IT-95-10-A. 5 July 2001. par. 48.

⁶⁷ *Ibid.* par. 100.

⁶⁸ International Criminal Tribunal for Rwanda. *Prosecutor v Clement Kayishema and Obed Ruzindana (Trial Judgement)* ICTR-95-1-T. 21 May 1999. par. 93-94.

sources for clarification. This would, in turn, have dictated that Art. 6 under the Statute must be defined in accordance with its broader customary counterpart, or the definition provided under the Genocide Convention.

The above issue to date has not been discussed further by the Court but highlights an essential aspect of the relationship between the Statute and the Elements of Crimes and the methods for properly utilizing the Court's primary sources. The Statute does sit atop the internal hierarchy within Art. 21(1)(a) of the Rome Statute. However, the Court has taken a mixed approach to the understanding and application of this relationship. In some instances, it has held steadfast in as much as the Elements of Crimes should be read in tandem, but also not considered as an extension of the Statute itself. In other cases, it has veered away from the established notion that the definition of a crime is enshrined within the Statute itself in favor of mechanical reference to the Elements of Crimes. However, just as is the case with the Rules of Procedure and Evidence, the Elements of Crimes are intended to merely be a guideline for the Court. By treating the Elements of Crimes as a binding document of similar or the same authority it has neglected to take the necessary steps to interpreting the text of the Statute. This means going beyond the literal and textual meanings of its provisions. To properly interpret the Statute, it is essential to also take into consideration the object, purpose and preparatory works relevant to the provisions in question. Doing so may, as seen above, bring to light conflicts between the Statute and the Elements of Crimes. However, it may also prevent unnecessary and unintentional restrictions which the Elements might place upon the Statute. This, in turn, would provide the judges with a greater degree of discretion when interpreting its provisions as it would have more opportunities to refer to its secondary and tertiary sources of applicable law.

2.2. Recourse to Treaty and Principles and Rules of International Law

As was clarified above, interpretation of the Statute must adhere to a strict approach; it must begin with reference to the sources listed in paragraph 1(a) of Article 21 of the Rome Statute. The non-inclusion of a particular principle or rule in the ICC Statute alone is insufficient for one to refer to the secondary sources under Art. 21. However, in doing so one must respect the internal hierarchy in place and analyze the contents of the Statute in accordance with the Vienna Convention on the Law of Treaties prior to utilizing the Rules of Procedure and Evidence or the Elements of Crimes. Only after doing so, and only if a gap within the Statute which needs to be

filled is found, can one then move on to examine secondary sources of applicable law.⁶⁹ This position runs in parallel with early draft stages of the Statute as, what is now Art. 21 paragraph two was one of the more contentious elements. In Doudou Thiam's commentary on the ILC Draft Statute of 1993 he noted that while the inclusion of treaty law was relatively unquestioned, the following clause dealing with general principles and custom were included in brackets due to controversy over how to restrict or curtail the Court's ability to utilize these sources.⁷⁰ This issue was prevalent throughout the drafting stages as there were numerous alterations made to the provision.⁷¹ Arguments centered around two points: 1) ensuring consistency in the court's rulings and 2) restricting it from legislating or unduly altering the content of the Statute based on general principles of international law and custom.⁷² This eventually culminated into now what is seen under Art. 21(b) '*In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.*'⁷³ What persists then is how, or to what degree can the Court still utilize these provisions to creatively include acts which have yet to be formally included within the Statute without overextending its bounds and become vulnerable to critiques of judicial legislation. This section will deal with this issue by examining the two main elements of paragraph two, that is: firstly, treaty law and secondly the more controversial 'principles and rules of international law.'⁷⁴

2.2.1. *Applicable Treaties*

Providing the Court with resort to the use of treaty law was never a point of contest, but the wording in the Statute was intentionally written to limit when, how and what treaties could be examined by it. Initially, the paragraph utilized the term 'relevant' in reference to international

⁶⁹ *Situation in the Democratic Republic of the Congo (Prosecutor v Thomas Lubanga Dyilo) (Judgement on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defense Challenge to the Jurisdiction of the Court Pursuant to Article 19 (2) (a) of the Statute of 3 October 2006)*. (ICC-01/04-01/06-772). 14 December 2006. par. 34.

⁷⁰ Thiam, Doudou. "Eleventh report on the draft Code of crimes against the peace and security of mankind, by Mr. Doudou Thiam, Special Rapporteur." A/CN.4/449 and Corr.1. *Yearbook of the International Law Commission* Vol. II(1), 1993. par. 25-27.

⁷¹ Note: in the 1996 report alone a total of 6 very different proposals for the provision were provided. See: United Nations General Assembly. *Report of the Preparatory Committee on the Establishment of an International Criminal Court Volume II*. A/51/22. 13 September 1996. pp. 104-107.

⁷² *Ibid.*

⁷³ *Rome Statute*. Art. 21(1)(b). emphasis added.

⁷⁴ Note: the specifics on how to actually identify a general principle of international law and customary international law for the sake of application will be dealt with in detail in the following chapters. Notably Chapter 3 on Forced Marriage for General Principles of international law and Chapter 5 on Terrorist Acts for Customary international law.

treaty law. This was eventually switched to the term ‘applicable’, as the drafters wanted to prevent fragmentation in jurisprudence by allowing it to selectively choose which treaties it could examine.⁷⁵ The UN *ad hoc* tribunals had frequently been subject to criticism of overzealous use of treaty law which led to violations of the principle of legality and thus amounted to judicial legislation; something which the drafters wished to avoid.⁷⁶ Bearing this in mind, the alteration of wording brings one to the question of which treaties the court has recourse to and which ones it does not, particularly for the purpose of clarifying its substantive rules. Sadat has hinted that the switch over from the use of the term ‘relevant’ to ‘applicable’ may potentially have wider ranging implications than it initially seems. That is, it potentially prevents the Court from using treaties outside of those which are listed within the Statute and to which it is bound to under international law.⁷⁷ In respect to these sources there is little debate that the Court can take them into consideration, both when interpreting gaps within the Statute and even when interpreting the Statute itself. The Negotiated Relationship Agreement with the United Nations and the Headquarters Agreement with the Netherlands have both been recognized as binding upon the Court and as applicable secondary sources.⁷⁸ As a functioning international organization within the international legal system it is generally accepted that the Court is also bound to the Charter of the United Nations. Most notably Art. 103 of the Charter which would entail that if there is conflict between the Statute and the Charter the Court would have the obligation to interpret its provisions in favor of the Charter.⁷⁹ Also, as stated previously, the Court has recognized and placed a high degree of importance on the Vienna Convention on the Law of Treaties, in particular Art. 31 and 32.⁸⁰ It is interesting to note here that this is a somewhat unique source similar to that of the Charter of the United Nations in that it must be taken into consideration when interpreting the Statute. In other words, these two sources are not only considered as ‘applicable’ but their consideration is

⁷⁵ Sadat, Leila Nadya. *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*. Martinus Nijhoff: Leiden. 2002. pp.177-178.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ Triffterer, Otto and Ambos, Kai. *The Rome Statute of the International Criminal Court: A Commentary*. 3rd Edition. C.H. Beck 2015. pp.30.

⁷⁹ Schabas, William. *The International Criminal Court: A Commentary on the Rome Statute*. 2nd Edition. OUP: Oxford, 2016 pp. 521.

⁸⁰ *Situation in the Democratic Republic of the Congo (Prosecutor v Thomas Lubanga Dyilo) (Judgement on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defense Challenge to the Jurisdiction of the Court Pursuant to Article 19 (2) (a) of the Statute of 3 October 2006)*. (ICC-01/04-01/06-772). 14 December 2006. par. 34.

mandatory and they dictate how the Statute is to be interpreted and, in select cases, if there is a gap or discrepancy within it.

Despite the recognition of the above treaties as applicable sources they would not be useful in interpreting the substantive rules of the ICC. Regarding this the Court has been hesitant towards utilizing other international conventions. As an extension of Sadat's comment some have claimed that recourse to other conventions, especially human rights conventions such as the ICCPR or ECHR, could be rejected outright by the ICC as they are only relevant and not applicable in a given situation.⁸¹ This position is not and cannot be adopted for two main reasons. The first is that it would prevent the Court from utilizing the entire corpus of law under which international criminal law has been established, something which the drafters had intended to provide the Court with since the early drafting stages of the statute.⁸² The second is that under Art. 21(3) of the ICC Statute the Court must ensure that its "application and interpretation of law... must be consistent with internationally recognized human rights."⁸³ In order to do so it must have recourse to, at the very least, universally accepted human rights conventions. In support of this, the Court has indeed recognized that a number of human rights instruments do fall within the scope of 'applicable' for the sake of Art. 21(1)(b). Of those it has recognized including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the American Convention of Human Rights,⁸⁴ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁸⁵ and the Genocide Convention.⁸⁶ While these tend to be the most widely accepted of international conventions relating to

⁸¹ Zeegers, Krit. *International Criminal Tribunals and Human Rights Law: Adherence and Contextualization*. Springer: The Hague, 2016. pp. 68.

⁸² United Nations General Assembly. *Yearbook of the International Law Commission 1994*. Vol. 2 Part 2. A/CN.4/SER.A/1994/Add.1 (Part 2). pp. 51.

⁸³ *Rome Statute* Art. 21(3).

⁸⁴ *Situation in the Democratic Republic of the Congo (Prosecutor v Thomas Lubanga Dyilo) (Decision reviewing the Registry's decision on legal assistance for Mr. Thomas Lubanga Dyilo pursuant to Regulation 135 of the Regulations of the Registry)*, (ICC-01/04-01/06) 30 August 2011. para. 41.; Note: While the Universal Declaration of Human Rights is not a binding treaty, it has been referred to as an applicable secondary source by the court in the above decision. It has therefore been included within here as an 'applicable treaty despite it only being a General Assembly resolution.

⁸⁵ *Situation in the Democratic Republic of the Congo (Prosecutor v Thomas Lubanga Dyilo) (Redacted Decision on the request by DRC-DOI-WWWW-0019 for special protective measures relating to his asylum application)*, (ICC-01/04-01/06), 5 August 2011, par. 60.

⁸⁶ *Situation in Darfur, Sudan (Prosecutor v Omar Hassan Ahmad Al Bashir) (Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir)*, (ICC-02/05-01/09). 4 March 2009. para. 117-118.

international human rights, the question remains as to whether or not the ICC does in fact have recourse to other international human rights conventions, or if it is limited to only widely recognized or universal instruments.

While the above human rights instruments are without a doubt included under the scope of ‘applicable’ for the sake of Art. 21(1)(b) it is highly unlikely that the provision is limited to only those sources. After all, the ICC was designed to strictly adhere to the tenets of the Statute itself but also be flexible enough to address novel issues.⁸⁷ This was the entire reason for the inclusion of Article 7(1)(k) on ‘other inhumane acts’ and the drafters had no intention of preventing the court from referencing only a limited number of international conventions. Instead, the switch from the term ‘relevant’ to ‘applicable’ is not as wide ranging as some initially perceived it to be. Even if the above stances on the term ‘applicable’ are accepted as true, the ICC can freely utilize other treaties in its decisions. However, these are to be used in asserting the existence of a general principle or rule of international law as expressed under Art. 21(1)(b). So, one can say the court does, in fact, have recourse to the entire corpus of international human rights law. The change over from relevant to applicable then can be perceived as a means to limit the ICC’s interpretive discretion without wholly blocking its recourse to the bulk of sources which international criminal law relies on, treaty law. It also rightly serves to alleviate some of the potential factors which could lead to fragmentation within its decisions. Furthermore, it serves to strengthen its resolve towards the furtherance of the principle of legality. For if the ICC is not simply applying relevant treaties to a given situation, but rather utilizing those for the sake of identifying a general principle of international law or customary international law, there would be no doubt that certain aspects of the principle of legality would have to be fulfilled in order to meet those standards, such as *lex scripta* and *lex praevia*. Overall, the switch from relevant to applicable law may have indeed limited the Court’s recourse to treaty law, but still permits its use in a way which prevents arbitrary or rouge decisions amounting to judicial legislation.

2.2.2. Principles and Rules of International Law

The second portion of Art. 21(1)(b) of the ICC Statute permits the ICC to utilize the ‘principles and rules of international law.’⁸⁸ Many have taken this as an indication that the phrase

⁸⁷ Sadat, Leila Nadya. *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*. Martinus Nijhoff: Lieden. 2002. pp. 177.

⁸⁸ *Rome Statute* Art. 21(b).

is a reference to Art. 38 of the ICJ Statute.⁸⁹ If this were so, it would permit the ICC to utilize international conventions, general principles and customary international law.⁹⁰ This in and of itself is somewhat misleading as the first part of Art. 21(1)(b) already permits the use of treaty law. Moreover, general principles as recognized at the ICJ and other international tribunals is a phrase used to refer to comparative criminal law.⁹¹ If taken in this way it would instate a level of redundancy within the paragraph as well as create a degree of hierarchical instability in Art. 21, by allowing general principles to be applied both in the second and third place of statutory interpretation. This has caused a degree of confusion amongst scholars as to actually what is included within the understanding of ‘principles and rules of international law’ with some going as far as to state that general principles as understood within the context of the ICJ should be considered within Art. 21(1)(b) and not 21(1)(c) of the Statute.⁹² However this is, in fact, not the case as general principles are to be considered as a tertiary source, not secondary. Instead, ‘principles and rules of international law’ are to be considered as including two main sources. The first is that of general principles of international law. Ambos has claimed that rather than referring to comparative criminal law it would adhere more to the use of *opinio juris* or a predominant opinion present amongst the international community coupled with existing treaty law. This would differ somewhat from customary international law as domestic laws, practice and legal systems do not need to be taken into account.⁹³ This modern understanding of general principles of international law also provides that customary international law, while not explicitly provided for in the paragraph, can also be utilized by the Court in its decisions.⁹⁴ As a result, the court is able to utilize general principles of international law and customary international law under Art. 2(1)(b) of the ICC Statute.

One should take note at this stage that prior decisions of international tribunals are not mentioned within the text of Art. 21. It would be easy to simply assert that they can be resorted to

⁸⁹ Zeegers, Krit. *International Criminal Tribunals and Human Rights Law: Adherence and Contextualization*. Springer: The Hague, 2016. pp. 70.

⁹⁰ Ambos, Kai. *Treaties on International Criminal Law. Volume 1: Foundations and General Part*. OUP: Oxford, 2013. pp. 78.

⁹¹ Schabas, William. *The International Criminal Court: A Commentary on the Rome Statute*. 2nd Edition. OUP: Oxford, 2016. pp 521.

⁹² This will be discussed more in the section on general principles below. See Schabas, William. *The International Criminal Court: A Commentary on the Rome Statute*. 2nd Edition. OUP: Oxford, 2016. pp. 521.

⁹³ Ambos, Kai. *Treaties on International Criminal Law. Volume 1: Foundations and General Part*. OUP: Oxford, 2013. pp.76.

⁹⁴ *Ibid*.

under Art. 21(1)(b) as a representation of a principle or rule of international law. However, other more recent tribunals have listed the decisions of *ad hoc* tribunals as authoritative sources for aiding in interpreting their procedural and substantive law.⁹⁵ In addition to this, if the drafters intended for the court to follow the decisions of the *ad hoc* tribunals why would they have gone through such lengths to provide detailed descriptions of the crimes and procedures the Court must adhere to when there is a plethora of jurisprudence from which it could rely on? This question was addressed by the Pre-Trial Chamber in *Kony* in which it stated: "...Accordingly, the rules and practice of other jurisdictions, whether national or international, are not as such 'applicable law,' before the Court beyond the scope of article 21 of the Statute. More specifically, the law and practice of the *ad hoc* tribunals... cannot per se form a sufficient basis for importing into the Court's procedural framework remedies other than those enshrined in the Statute."⁹⁶ Initially it might seem that the Court was denying any use of the *ad hoc* tribunals' decisions under Art. 21(1). This was, in fact, not the case. The decision merely expressed that, the prosecution's argument for the Court to accept his application to reconsider the redaction of facts within the arrest warrants it issued for, among others Joseph Kony, was inadmissible. Regardless of whether such an act was permitted at the *ad hoc* tribunals, the Statute and Rules of Procedure and Evidence did not permit such an act and, therefore, their decisions were not deemed as 'applicable law' for that given issue. Such a position was reaffirmed in *Lubanga* in which the ICC permitted and thoroughly considered the permissibility of witness proofing. The decision made it clear that, while there was, albeit very limited, jurisprudence at the *ad hoc* tribunals which permitted the act, they lacked sufficient consistency in order to be considered as 'applicable' to the court.⁹⁷ Even if sufficient consistency and clarity is found within the decisions of the *ad hoc* tribunals, this does not entail that they can be wholly imported into the Court's decisions, or that they are 'applicable.' Instead, their decisions must be thoroughly considered and contextualized to prevent reasoning which falls outside of the established framework of Art. 21. Not doing so would run risk of not only creating a degree of inconsistency at the Court itself (noting that both *ad hoc* tribunals have made conflicting decisions between and within each other over time), but also run risk of violating the principle of *nullum*

⁹⁵ *Statute for the Special Court for Sierra Leon*. Art. 20(3).

⁹⁶ *Situation in Uganda (Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes in the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification)*, (ICC-02/04-01/05-60), 28 October 2005, par. 19.

⁹⁷ Note: This case will be discussed in more depth below.

crimen sine lege under Art. 22 of the ICC Statute. As such, prior decisions by the *ad hoc* tribunals are considered to be supportive material to the assertion of secondary sources such as customary international law or general principles of international law but cannot alone establish the existence or content of such a source.

With the above caveat in place, the ICC has, in general, been cautious when applying general principles and customary international law to the Statute for the purpose of interpretation. In *Lubanga*, the ICC Trial Chamber was posed with the question of how to interpret Art. 25 relating to co-perpetration. The prosecution argued that there existed a well-established method to identifying it within customary international law, mainly expounded within jurisprudence at the ICTY. Again, rather than accepting the position of the *ad hoc* tribunal the ICC instead examined the various means of identifying co-perpetration in existence and comparing it with the statute for applicability. It found three main means of identifying co-perpetration; through the objective approach, subjective approach/ common purpose and control approach.⁹⁸ It found that the most widely acknowledged approaches did not wholly adhere to the text of the Statute. The objective was not applicable because Art. 25(3)(a) of the ICC Statute permits the commission of offence through another individual and thus physical contribution is not required.⁹⁹ Again, the subjective element was found as not applicable because it does not distinguish between principles and accessories.¹⁰⁰ It was only the lesser acknowledged control approach which was found to be in ‘applicable’ in relation to Art. 25 of the Statute. As a result, while it acknowledged that there were well established means of identifying co-perpetration under international law, it was forced by means of the textual restrictions in the Statute, to forgo adoption of the most widely acknowledged approaches in favor of that which best adhered to the Statute. Judge Van den Wyngaert expanded on this method of judicial interpretation in her dissenting opinion in *Ngudjolo*. She stated that while a customary norm may be in place and recognized by the *ad hoc* tribunals, the application of such norms was permissible due to the dearth of their respective Statutes. The Rome Statute includes an extensive codification of its rules and therefore it is highly doubtful, especially in regard to procedural rules, that customary norms as they currently stand will be wholly applicable

⁹⁸ *Situation in the Democratic Republic of the Congo (Prosecutor v Thomas Lubanga Dyilo) (Decision on the Confirmation of Charges)* (ICC-01/04-01/06). 28 January 2007. par. 326-332.

⁹⁹ *Ibid.* par. 333.

¹⁰⁰ *Ibid.* par. 334-336.

to the ICC.¹⁰¹ This explanation of how and to what extent custom can be used has a complimentary effect on the understanding of how judicial creativity is expected to operate. The ICC, instead of readily adopting claims of customary international law instead took in those approaches from the viewpoint that they were established theories to identifying co-perpetration. It then took them and compared them with the Statute itself, choosing that which was most complimentary to it for adoption. This entails that the Court is not wholly dictated by its secondary sources even when there is a degree of ambiguity present within the Statute, Rules of Procedure and Evidence and Elements of Crimes. Instead it utilizes them to aid in informing its overall decision. In other words, constant reference back to the statute ensured that the court was unable to overexert its interpretive powers. Instead it was able to clarify what was present within the statute through comparison with existing custom.¹⁰²

This does not mean that customary international law, general principles or prior decisions by the *ad hoc* tribunals cannot have a direct impact on the Court's interpretation of the Statute; the reality is quite the opposite. In the very same decision, the ICC was posed with a different issue regarding the interpretation of its Statute. Both the Statute and Elements of Crimes did not clarify what is meant by international armed conflict. To clarify the meaning, the Court resorted to use of Art. 21(1)(b). Firstly, its reference to international treaty was limited to only that of the Common Art. 2 of the Geneva Conventions of 1949. This set a baseline by which international armed conflict was to be understood and did not conflict with the Statute itself as it readily accepted that total or partial occupation was an element to be included within the definition. To better flesh out what occupation entailed the court then looked towards customary international law, as declared in *Democratic Republic of the Congo v. Uganda*. In the decision the ICJ observed that, under customary international law, as reflected in Art. 42 of the Hague Regulations of 1907, "territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised."¹⁰³ Moreover, pertaining to the classification of a conflict as either international or non-

¹⁰¹ *Situation in the Democratic Republic of the Congo (Prosecutor v Mathlue Ngudjolo Chul) (Public Judgement Pursuant to Article 74 of the Statute concurring opinion of Judge Christine Van den Wyngaert)*, (ICC-01/04-02/12) 18 December 2012. par. 9.

¹⁰² *Situation in the Democratic Republic of the Congo (Prosecutor v Thomas Lubanga Dyilo) (Decision on the Confirmation of Charges)* (ICC-01/04-01/06). 28 January 2007. par. 322-341.

¹⁰³ International Court of Justice *Case Concerning Armed Activities on the Democratic Republic of the Congo (Democratic Republic of the Congo v. Uganda) (Judgement)*. 19 December 2005. par. 172.

international, the ICC again relied on custom, predominantly as was declared by the ICTY in *Tadic*. It took the two means of identification, direct and indirect and also readily adopted the overall control test to identify if indirect intervention had taken place.¹⁰⁴ It is interesting to note here that there are proponents of two different types of tests to identifying if indirect intervention has taken place; the overall control test developed by the ICTY in *Tadic*,¹⁰⁵ and confirmed by the ICC in *Lubanga*,¹⁰⁶ on one hand; and the ‘effective control’ test as developed by the ICJ in the *Nicaragua*¹⁰⁷ and *Bosnia Genocide* cases.¹⁰⁸ One would expect there to be some discussion as to why the court agreed with the *Tadic* approach and why this is believed to be a general principle or customary international law. However, this was in fact not the case. Instead it took a more flexible approach by merely adopting the overall control test. This shows that in regards to the utilization general principles, customary international law and reliance on jurisprudence from other international tribunals, while the ICC is expected to be stringent and comprehensive in its analysis of them, it has only done so when the principle or rule at hand may be at odds with the primary sources. Otherwise it has been somewhat flexible with its selection and utilization of them. This may be an inevitable limitation placed upon the Court itself. While lengthy explanations of how and when, for example, a norm crystallized into custom would further ensure consistency in its decisions, it would also run the risk of overburdening the Court. Regardless, this clearly shows that the Court’s hesitance in the use of secondary sources is only to the extent that they do not conflict with its primary ones. Aside from this, it has readily interpreted the Statute though treaty law, general principles and custom as well as made reference to the decisions of the *ad hoc* tribunals.

Overall, the perceived restrictions that Art. 21(1)(b) of the Rome Statute places upon the ICC for the sake of statutory interpretation are not nearly as detrimental to the ICC’s ability to creatively interpret its rules as it might initially appear. Instead, they have merely prevented unjust

¹⁰⁴ *Situation in the Democratic Republic of the Congo (Prosecutor v Thomas Lubanga Dyilo) (Decision on the Confirmation of Charges)* (ICC-01/04-01/06). 28 January 2007 par. 211.

¹⁰⁵ ICTY, *Prosecutor v. Tadic*, Case No. IT-94-A, Judgment, 15 July 1999, par. 145.

¹⁰⁶ *Situation in the Democratic Republic of the Congo (Prosecutor v Thomas Lubanga Dyilo) (Decision on the Confirmation of Charges)* (ICC-01/04-01/06). 28 January 2007. par. 210, 211.; *Situation in the Democratic Republic of the Congo (Prosecutor v. Thomas Lubanga Dyilo) (Judgement Pursuant to Article 74 of the Statute)* (14 March 2012). ICC-01/04-01/06-2842. par. 541.

¹⁰⁷ ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986 (Merits), par. 115.

¹⁰⁸ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 27 February 2007, par. 406 and 413.

reference to sources in a manner which might create inconsistency with the Statute and, in turn, violate the principle of legality. Only under select circumstances such as an evident gap in the rules can the court resort to Art. 21(1)(b). In doing so, use of treaty law must be restricted to only universally accepted conventions which are directly applicable to the Rome Statute itself, such as the United Nations Convention Against Torture, ICCPR and other UN-based human rights conventions such as the UN Convention on the Elimination of All Forms of Racial Discrimination(CERD) and Convention on the Elimination of All Forms of Discrimination Against Women(CEDAW). Recourse to other treaties is still acceptable, however. In doing so they must be presented within the framework of a general principle of international law or customary international law. In addition, while the ICC has been hesitant in utilizing general principles of international law and customary international law this is only because they are required to first ensure compatibility of these rules with the Statute and the principle of legality prior to application. Only after this is done can the Court determine if a rule is applicable. This ensures the ability to progressively interpret its substantive rules without running the risk of falling into the realm of judicial legislation.

2.3. General Principles of Law

The third and final sub-paragraph in Art.21(1) identifies “general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime” as an applicable source of law for statutory interpretation.¹⁰⁹ This was, the most contentious element within the drafting of Art. 21 and, as such, must be provided with the greatest deal of attention. The question as to the degree of importance the ICC should place on national law, how it should impact the decision making process to ensure consistency and adherence to the principle of legality as well as the exact meaning of general principles were all points of question. The ICC could not simply pick and choose what domestic laws it examined as was often claimed to be the case with the *ad hoc* tribunals. Art. 22 required that such principles be strictly construed and not extended by analogy. In order to understand what is exactly meant by general principles and how they are to be identified this section will first provide a brief background on general principles and how they have developed up until their inclusion within the Rome Statute. Then it will provide a means for

¹⁰⁹ *Rome Statute* Art. 21(1)(c).

identification of such principles which has been indirectly recognized by the Court. Finally, it will apply this method to prior ICTY and ICTR jurisprudence to show how improper identification of general principles can lead to an overreach of judicial authority and amount to judicial legislation. However, if properly identified general principles can be easily defined and applied providing the Court with sufficient room for creative interpretation while staying within the framework of Art. 21 and adhering to the principle of *nullum crimen sine lege*.

2.3.1. *General Principles at the PCIJ and ICJ*

Recourse to the use of general principles of international law is by no means a recent development. The first notable inclusion of general principles at the international level was in the statute of the Permanent Court of International Justice (PCIJ) under Art. 38(3) of its statute.¹¹⁰ General principles at that time were perceived to consist of two elements: 1) they were legal principles of a general character; 2) they were upheld *in foro domestico*, in other words through domestic legal systems of all states which the court deemed to be “civilized nations.”¹¹¹ To prevent the court from extending beyond its intended scope and thus creating law instead of interpreting it, these general principles were required to be clearly established and unambiguously defined within the national legal systems of participating states.¹¹² Aside from the court’s position on Art. 38(3) during the drafting stages of its statute, little can be gained from their use of it in practice. Antonio Cassese observed that the PCIJ seldom utilized the provision in its decisions and, on the instances in which it did, was only done so *ad adjuvandum*, meaning their use was inconsequential to the overall decision rendered.¹¹³ Moreover, in the limited instances in which the provision was referred to, the court forewent surveying the national laws of states, instead favoring international legal tenets and legal logic to determine the existence of such principles.¹¹⁴ One of the few notable instances when the court commented on Art. 38(3) was in the *S.S. Lotus Case* of 1927, when it suggested that the use of general principles should be regulated to only when the principle in question was universally accepted and “in force between all independent nations.”¹¹⁵ Such a

¹¹⁰ League of Nations, *Statute of the Permanent Court of International Justice*. 16 December 1920. Art. 38(3).

¹¹¹ Yee, Sienho and Tieya, Wang. *International Law in the Post-Cold War: Essays in Memory of Li Haopi*. New York: Routledge, 2001. pp.44.

¹¹² *Ibid.*

¹¹³ *Ibid.* pp. 45.

¹¹⁴ Yee, Sienho and Tieya, Wang. *International Law in the Post-Cold War: Essays in Memory of Li Haopi*. New York: Routledge, 2001. pp. 45.

¹¹⁵ Permanent Court of International Justice. *The Case of the S.S. Lotus(France v. Turkey)(Judgment)*. PCIJ Ser. A No. 10 (7 Sept. 1927) par. 36-37.

stringent approach to general principles may be the reason why the PCIJ was hesitant towards their use throughout its lifetime.

With the replacement of the PCIJ by the International Court of Justice (ICJ) the approach towards identification of general principles began to veer away from reliance on legal tenets and lean closer to the originally envisioned notion of *in foro domestico* proposed during the drafting of the PCIJ Statute. However, while in comparison, the ICJ resorted to the use of general principles more often than the PCIJ, it still limited its use of them in its decisions. When it did discuss the use of, or applied general principles in its decisions, the ICJ recognized the challenges in surveying all independent nations as was claimed to be a necessity in the *S.S. Lotus Case*. Instead, it favored “examination of the practice of a great number of States” over the entire corpus of the international community.¹¹⁶ In addition, Judge McNair in the *International Status of South-West Africa Advisory Opinion*, recognizing the lack of recourse to general principles by the ICJ to date, took time in his dissenting opinion to warn against the direct importation of general principles into international decisions.¹¹⁷ Aside from the above, the ICJ, in its early years, did not attempt to provide a detailed set of formal and mechanical requirements for both identifying and applying general principles at the international level.

2.3.2. *General principles at the International Criminal Tribunals*

The reluctance of the PCIJ and ICJ to provide clear cut methods for identifying and applying general principles posed a unique challenge to international criminal tribunals. Neither the ICTY, ICTR nor more recent internationalized criminal tribunals such as the SCSL and the ECCC included within their statutes provisions detailing the various applicable sources, hierarchy and means of interpretation of the law.¹¹⁸ Recognizing that reliance solely on international conventions and customary international law would prove problematic in rendering decisions on acts which did not have longstanding international jurisprudence at the time, the *ad hoc* tribunals

¹¹⁶ International Court of Justice. *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) (Dissenting Opinion of Judge Lachs)*. ICJ Reports (20 February 1969). pp. 229.

¹¹⁷ International Court of Justice. *International Status of South-West Africa (Advisory Opinion) (Dissenting Opinion of Judge McNair)*. ICJ Reports (11 July 1950). pp. 148

¹¹⁸ Stahn, Carsten and Sluiter, Goran. *The Emerging Practice of the International Criminal Court*. Leiden: Martinus Nijhoff Publishers. 2009. pp. 286-7.; Note: The Special Tribunal for Lebanon was also placed in the same situation until the enactment of Security Council Resolution 1757. see: UN Security Council, *Security Council resolution 1757 (on the establishment of a Special Tribunal for Lebanon)*, 30 May 2007, S/RES/1757 (2007). Section I Art. 1.

(ICTY and ICTR) looked for other applicable legal sources. It naturally followed that, as these tribunals were expected to utilize treaty and customary international law, both of which were included under Art. 38(1)(a) and (b) of the ICJ statute, general principles could also be utilized as an authoritative source for statutory interpretation. One should take note at this point that while the Rome Statute is markedly different from the statutes of the *ad hoc* tribunals, including a clearly defined hierarchical structure and extensive list of applicable law under Art. 21, there is no mention of how subsidiary sources such as general principles of law are to be identified, nor their limits in application. Resultantly, ICC will need to consider or reference jurisprudence at the ICTY and ICTR for clarification on interpretation. Kai Ambos has commented that while the ICC is much more restricted in its application of general principles, a comparative analysis of jurisprudence at the *ad hoc* tribunals with the limited existing jurisprudence at the ICC and the Rome Statute could aid in better understanding the limits on interpretation and application of general principles at the Court.¹¹⁹ It is important to bear in mind that the *ad hoc* tribunals have experienced mixed results in their application of general principles. It is, however, undeniable that overall, the *ad hoc* tribunals have contributed a great deal to the understanding of how general principles are to be identified and applied; both diverging and greatly expanding upon the limited contributions by the PCIJ and ICJ.

2.3.3. *Identification of general principles through the vertical and horizontal move*

In regards to identification, general principles are now identified through two aspects: the vertical move and horizontal move.¹²⁰ The vertical move is understood as a method of abstraction under which a base or fundamental legal rule or principle is distilled from national laws.¹²¹ This links itself closely with the notion of *in foro domestico* understanding of general principles at the PCIJ. However, the method towards identifying the vertical move has hinged closer towards the *North Sea Continental Shelf Cases* of the ICJ and not that of the *S.S. Lotus Case*. In one sense this is reasonable, considering the logistical difficulties involved in identifying a “universally accepted” general principle. Recourse to general principles would become impractical if courts required themselves to examine all laws of all nations. However, this poses a risk in its own right, and has

¹¹⁹ Ambos, Kai. “General Principles of Criminal Law in the Rome Statute,” *Criminal Law Forum*. Vol. 10 (1999). pp. 30-2.

¹²⁰ Elias, Olufemi., and Lim, Chin. “Identification of ‘General Principles of Law’, ‘Soft’ Law and the International Law.” *Netherlands Yearbook of International Law*. Vol. 28 (December 1997). pp.23-24

¹²¹ *Ibid.*

resulted in under representation of various legal systems and neglect to cite sufficient national laws in decisions. One such example can be taken from the *Kupreskic Judgment* at the ICTY, in which the court attempted to establish that there existed a general principle of protected values. However, its decision surveyed only the national laws and decisions of four states: Canada, Italy, France and Austria.¹²² This may be a more extreme example, but it highlights the risks courts face in this realm.

One might make the assertion that this was an issue of concern for the *ad hoc* tribunals and will not be of concern to the ICC. Such a position would be based on the examination of the ILC draft statute for the ICC (Draft Code of Crimes against the Peace and Security of Mankind) in which it was commented that the Court should make reference to the “whole corpus of criminal law” including both international and national practice to identify a general principle.¹²³ This would mitigate concerns over misrepresentation as was the case in *Kupreskic* and show a lean closer to the PCIJ *S.S. Lotus Case* decision on identification. In practice, however, the ICC has not shown a tendency to conduct such an intensive survey of national laws. One such example can be derived from *Lubanga Decision on the Practices of Witness Familiarisation and Witness Proofing*, when the Court was tasked with identifying the permissibility of witness proofing. After initial reference to the Rules of Procedure and Evidence provided no answer to the matter the Court looked towards general principles of law for a resolution. The decision engaged itself in a more rigorous analysis than what would be expected of it, citing not only the national laws of 10 States, but also the codes of conduct from a number of national bar associations.¹²⁴ One might find it perplexing that the national laws of the DRC were not taken into account within this analysis.¹²⁵ However, as nine of the 10 national laws examined explicitly prohibited the practice of witness proofing, the ICC deemed that in accordance with the wording “including, as appropriate the national laws of States that would normally exercise jurisdiction over the crime” under Art.

¹²² *Prosecutor v. Kupreskic (Judgment)*, IT-95-16-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), (14 Jan. 2000). par. 693.

¹²³ United Nations. *Yearbook of the International Law Commission 1994 Vol. 2*. A/CN.4/SER.A/1994/Add.1 (Part 2). pp. 51.

¹²⁴ *Situation in the Democratic Republic of the Congo*. (Prosecutor vs. Thomas Lubanga Dyilo) (Decision on the Practices of Witness Familiarisation and Witness Proofing) (8 Nov. 2006) ICC Case No. ICC-01/04-01/06-679. Par. 35-42.

¹²⁵ Note: the Pre-Trial Chamber merely mentioned the lack address of the DRC in its claim that such a general principle existed. Hinting that at least in instances when one is attempting to positively identify a general principle the national laws of the state in question should also be taken into account. For negative identification this is not necessarily expected. See: *Situation in the Democratic Republic of the Congo*. (Prosecutor vs. Thomas Lubanga Dyilo) (Decision on the Practices of Witness Familiarisation and Witness Proofing) (8 Nov. 2006) ICC Case No. ICC-01/04-01/06-679. par. 35.

21(1)(c) that no examination of the national laws of the DRC was required.¹²⁶ Either way, when attempting to show the existence of the vertical move, *Lubanga Decision on the Practices of Witness Familiarisation* recognized that the national laws, judicial decisions and, to an extent, the practice of relevant institutions should all be thoroughly examined before one can claim the existence of a general principle of law.

The second requirement in identifying a general principle is in locating what is known as the horizontal move. This is described by Elias and Lim as the ‘census’ element; meaning the general principle must be widely recognized.¹²⁷ This poses itself as an immediate concern when conducting comparison between the *ad hoc* tribunals and the ICC, as the former relied on Art. 38(1)(c) of the ICJ statute which provides it is to apply “the general principles of law recognized by civilized nations”¹²⁸ while the latter states “general principles of law derived by the Court from national laws of legal systems of the world.”¹²⁹ Scholars have attempted to make a distinction between the two provisions in this regard, but in practice there seems to be little differentiation that can be made.¹³⁰ For example, at the ICTY the court has often forgone use of the phrase ‘civilized nations’ in favor of descriptions which more adhere to Art. 21(1)(c) of the Rome Statute such as; general principles of law “recognized by the community of nations”¹³¹ or “common to the major legal systems of the world.”¹³² In any sense the provision, both within the context of the *ad hoc* tribunals and the ICC, is in clear reference to the need for comparative legal methods to identify a widespread representation of the principle in question throughout the different legal systems of the world. This was discussed by the ICC in the *Lubanga Decision on the Practices of*

¹²⁶ *Situation in the Democratic Republic of the Congo*. (Prosecutor vs. Thomas Lubanga Dyilo) (Decision on the Practices of Witness Familiarisation and Witness Proofing) (8 Nov. 2006) ICC Case No. ICC-01/04-01/06-679. par. 35-42.

¹²⁷ Elias, Olufemi and Lim, Chin. “Identification of ‘General Principles of Law’, ‘Soft’ Law and the International Law.” *Netherlands Yearbook of International Law*. Vol. 28 (December 1997). pp.24.

¹²⁸ United Nations. *Statute of the International Court of Justice*. 18 April 1946. Art. 38(1)(c). emphasis added.

¹²⁹ UN General Assembly. *The Rome Statute of the International Criminal Court*. (17 July 1998) Art. 21(1)(c). Emphasis added.

¹³⁰ Yotova, Rumiana. “Challenges in the Identification of the ‘General Principles of Law Recognized by Civilized Nations’: The Approach of the International Court. *Canadian Journal of Comparative and Contemporary Law*., Vol. 3 (20017). pp. 281-3.; Safferling, Christoph. *International Criminal Procedure*. Oxford: Oxford UP (2012). pp.113-4.; Cassese, Antonio, Gaeta, Paola *et al.* *The Rome Statute of the International Criminal Court A Commentary*, Vol. 2. Oxford: Oxford UP (2002). pp. 1073.

¹³¹ *Prosecutor v. Erdemovic (Sentencing Judgment)*, IT-96-22-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), (22 Nov. 2006). par. 40.

¹³² *Prosecutor v. Kupreskic (Judgment)*, IT-95-16-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), (14 Jan. 2000). par. 591.

Witness Familiarisation and Witness Proofing mentioned above. The prosecution asserted that witness proofing was a general principle of law, citing the laws and decisions from a number of states. However, the ICC disregarded such claims based on the fact that no reference to civil law systems was made.¹³³ One can take from this that the Court has recognized the need for the horizontal move before the existence of a general principle can be established. One problematic aspect of this is that the decision only commented on the need to reference the two major legal systems: civil law and common law. However, one should merely take this as terse dismissal of the prosecution's argument by the Court, as it is generally recognized that the horizontal move must take into consideration other legal systems and regions.¹³⁴ Even so, the risk of misrepresentation through overemphasis on certain States has been a point of concern both at the ICC and *ad hoc* tribunals. The *ad hoc* tribunals' resort to general principles have faltered on a number of occasions due to over reliance on three means of selection: 1) personal knowledge 2) accessibility and 3) locality.¹³⁵ While it is understandable that justices would look towards these aspects when attempting to identify a general principle, they have led to misrepresentation, with a predisposition towards citing primarily the laws of western states. Raimondo's research on the national laws examined by international criminal tribunals has shown that in total, 43% of all States examined when attempting to assess the existence of a general principle of law have been represented by only seven States in EU and North America. Other regions such as Africa, Asia and South America have been underscored as well as legal systems which fall outside of common or civil law.¹³⁶ In a more positive light, one can see that there has been a trend, at least with the OTP at the ICC towards representing a wider range of regions and legal systems when attempting to establish the existence of a general principle. In *Katanga* when arguing for the existence of a general principle of right to appeal any decision of a first instance court, the prosecution cited the laws from 21 different States from civil, common, and religious legal systems as well as attempted to represent various different regions.¹³⁷ While the ICC was mostly silent on the methods implemented by the prosecution, one

¹³³ *Situation in the Democratic Republic of the Congo*. (Prosecutor vs. Thomas Lubanga Dyilo) (Decision on the Practices of Witness Familiarisation and Witness Proofing) (8 Nov. 2006) ICC Case No. ICC-01/04-01/06-679. par. 41.

¹³⁴ Raimondo, Fabian O. *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*. Leiden: Martinus Nijhoff Publishers. 2008. pp. 181-182.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Situation in the Democratic Republic of the Congo*. (Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal) (13 July 2006) ICC Case No. ICC-01/04-168. par. 21-32.

would run off the notion that all major systems including religious and mixed systems, as well as regions such as Africa, Asia and South America should be taken into account when assessing the horizontal move.

2.3.4. *Risk of Mechanical Transposition and Additional Guidelines for Application*

Aside from the elements of identification, the *ad hoc* tribunals have commented on the potential risks and provided a guideline for the application of general principles of law into international criminal law. In *Prosecutor vs. Erdemovic*, Antonio Cassese noted that one must be careful not to mechanically transpose general principles of law into international criminal law even if they meet the vertical and horizontal move.¹³⁸ Instead, the Court must first take into consideration four tenets before attempting to apply the principle in question. The first requires the court to look towards its statute and rules, their ‘object and purpose’ prior to examining other sources of law.¹³⁹ This runs parallel with Art. 21(1)(a) of the Rome Statute which situates the Statute, Rules of Procedure and Evidence and Elements of Crimes at the top of the hierarchy of applicable sources.¹⁴⁰ Moreover, the phrase ‘object and purpose’ used in this dissenting opinion is a clear reference to use of Art. 31 and 32 of the Vienna Convention on the Law of Treaties which the Trial Chamber at the ICC recognized as the authoritative source to interpreting the sources within Art. 21(1)(a).¹⁴¹ The second point claims international law must be exhaustively explored before resort to national law is considered. This is due to the fact that international courts are created on the basis of applying international law to a given situation. As such, they are expected to examine other forms of international law such as treaty law and custom prior to engaging with general principles.¹⁴² Once again, this is the case as Art. 21(1)(a), (b) and (c) of the Rome Statute begin with the phrases “in the first place,” “in the second place” and “failing that” respectively; indicating that there exists an internal hierarchy in favor of international rules and norms before

¹³⁸ Note: Cassese did not make reference to the vertical and horizontal move in this decision, rather once a general principle has been identified it should not be mechanically transposed. See: *Prosecutor v. Erdemovic (Sentencing Judgment) (Separate and Dissenting Opinion of Judge Cassese)*, IT-96-22-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), (22 Nov. 2006). par. 2.

¹³⁹ *Ibid.*

¹⁴⁰ Cassese, Antonio, Gaeta, Paola *et al.* *The Rome Statute of the International Criminal Court A Commentary*, Vol. 2. Oxford: Oxford UP (2002). pp.1051.

¹⁴¹ *Situation in the Democratic Republic of the Congo.* (Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal) (13 July 2006) ICC Case No. ICC-01/04-168. par. 33-40.

¹⁴² *Prosecutor v. Erdemovic (Sentencing Judgment) (Separate and Dissenting Opinion of Judge Cassese)*, IT-96-22-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), (22 Nov. 2006). par. 3.

that of national laws.¹⁴³ In this sense, Cassese's first two tenets towards application harmonize with the Rome Statute.

The third and fourth tenets expressed in the opinion expand upon Judge McNair's warning in the *International Status of South-West Africa Advisory Opinion* at the ICJ. That is, firstly one must reflect upon the nature of international criminal tribunals as a mixture of both common and civil law legal systems. He claimed that international criminal tribunals "combine and fuse... the adversarial or accusatorial system with a number of significant features of the inquisitorial approach. This combination or amalgamation is unique and begets a legal logic that is qualitatively different from that of each of the two national criminal systems: the philosophy behind international trials is markedly at variance with that underpinning each of those national systems."¹⁴⁴ As a result, the legal reasoning implemented in their decision making will naturally differ to some degree from the two major legal systems. This statement itself has been contested in scholarship on the basis that not only are there a number of States which operate within a hybrid legal system, but also the majority of States usually cited in assessing the horizontal move can no longer be considered as pure common or civil law systems.¹⁴⁵ Such an assertion can be considered as reasonable; however the overall objective of Cassese's opinion becomes more apparent when considering the third and fourth tenet in tandem. That is, one must take into consideration the impact the application of such principles will have on the substantive rules and procedures of international courts.¹⁴⁶ International courts are created and operate within a different context than national courts. They do not derive their authority from a single sovereign nation nor do they operate within its territorial confines. As such, the principles and values at the national level may need to be altered or interpreted differently to adequately fit within the international legal system.

An example of the differences between international and national courts and how the former has coped with these challenges was notably reflected upon in the *Tadic Appeals on Jurisdiction* decision. In this case the jurisdiction of the ICTY was challenged based on the

¹⁴³ Cassese, Antonio, Gaeta, Paola *et al.* *The Rome Statute of the International Criminal Court A Commentary*, Vol. 2. Oxford: Oxford UP (2002). pp. 1051.

¹⁴⁴ *Prosecutor v. Erdemovic (Sentencing Judgment) (Separate and Dissenting Opinion of Judge Cassese)*, IT-96-22-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), (22 Nov. 2006). par 4.

¹⁴⁵ Darcy, Shane, and Joseph Powderly. *Judicial Creativity at the International Criminal Tribunals*. Oxford: Oxford UP, 2010. pp. 48-49.

¹⁴⁶ *Prosecutor v. Erdemovic (Sentencing Judgment) (Separate and Dissenting Opinion of Judge Cassese)*, IT-96-22-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), (22 Nov. 2006). par. 5.

assertion that that there existed a general principle requiring that the court be ‘established by law.’ In order for the court to be deemed as ‘established by law’ the defense argued that it needed to be created through either amendment to the UN charter, treaty or the consent of all nations concerned.¹⁴⁷ Establishment via Security Council Resolution 827 was argued to have extended beyond the intended scope of Chapter VII of the Charter and did not fall into accordance with the general principle inherent within all domestic legal systems; that is through a central lawmaking organ.¹⁴⁸ Resultantly, it was claimed that the court was not only in violation of this general principle as it exists at the domestic level, but also its counterpart within international conventions.¹⁴⁹ Such an appeal put the court in a precarious position, as there was no question that there existed such a general principle in national laws. In order to properly address the issue, the court examined what it deemed to be the three various interpretations one could derive from the phrase ‘established by law.’ The first interpretation followed closely with the argument posed by the defense, that the law required the court to be established through a legislative body. However, the current nature of the international legal system precluded the establishment of a tribunal through such means. Designation between legislative, judicial and executive powers has not been clearly established at the international level. Concisely stated, at the international level there exists no legislative counterpart similar to that at the domestic level. Transposition of the general principle in this sense could not be done, as it was incompatible with the current international legal system.¹⁵⁰ The second position was, all States have the obligation to uphold decisions of the Security Council under Art. 25 of the UN Charter and, therefore, must follow the resolution.¹⁵¹ However, this alone was deemed as insufficient in addressing the concerns raised by the defense; so the ICTY attempted to interpret the principle within the context of the international legal system. It distilled from the various national and international laws cited by the defense what it deemed to be the essence of the general principle. That is, such national laws and provisions in international conventions were devised with the aim of ensuring that a tribunal be “established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and

¹⁴⁷ *Prosecutor v. Tadic (Decision on the Defense Motion on Jurisdiction)*, IT-94-1, International Criminal Tribunal for the Former Yugoslavia (ICTY), (10 Aug. 1995). par. 2.

¹⁴⁸ *Prosecutor v. Tadic (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction)*, IT-94-1-AR72, International Criminal Tribunal for the Former Yugoslavia (ICTY), (2 Oct. 1995). par. 43.

¹⁴⁹ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966. Art. 14(1).

¹⁵⁰ *Prosecutor v. Tadic (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction)*, IT-94-1-AR72, International Criminal Tribunal for the Former Yugoslavia (ICTY), (2 Oct. 1995). par. 43.

¹⁵¹ *Ibid.* par. 44.

even-handedness, in full conformity with internationally recognized human rights instruments.”¹⁵² As such, the court was able to aptly assert that it was not in violation of the general principle that a tribunal must be ‘established by law.’

The *Tadic* decision accurately addressed and coped with issues which could arise through the mechanical application of general principles of law at the international level. It fully recognized that such a general principle existed at the national level but noticed the differences between the domestic understanding of the general principle and its partial incompatibility with the international legal system. Instead of simply dismissing the application of that principle, the court recognized its importance and instead, considering the uniqueness of the international system and the fundamental values which the principle served to uphold, extrapolated what it deemed to be the essence of the principle that a court must be ‘established by law’ which could be applied at the international level. This approach took into consideration the vertical and horizontal move in identifying a general principle along with the uniqueness of the international legal system to provide an application of the law in a way which creatively interpreted the law at hand, without extending beyond its scope into the realm of judicial legislation.

2.3.5. *General Principles in Practice: Akayesu vs. Furundzija*

The above has provided a guideline as to how general principles are to be identified and applied at international criminal tribunals. While a majority of the decisions discussed above applied general principles of law to procedural rules, this dissertation endeavors to identify and apply them to substantive law. For the sake of clarification, it would thus be prudent to provide examples of such application in jurisprudence. As no decision has been rendered at the ICC dealing with interpretation of substantive rules through general principles to date, the following examples will be derived from the two *ad hoc* tribunals, namely the first two interpretations of the crime of rape in *Akayesu* at the ICTR and *Furundzija* at the ICTY. It will assess the two based on their adherence to the doctrine of judicial creativity relative to the identification and application of general principles of law.

Akayesu

¹⁵² *Prosecutor v. Tadic (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction)*, IT-94-1-AR72, International Criminal Tribunal for the Former Yugoslavia (ICTY), (2 Oct. 1995). par. 45.

It is well known that the two *ad hoc* tribunals included no description of the crimes which they had jurisdiction over (unlike the Rome Statute). The case of *Akayesu* was the first time when a decision needed to be rendered on the crime of rape. As such it was left to the Trial Chamber to establish the contents of the crime for use in further decisions. In doing so, the ICTR began by rightfully making recourse to international conventions, noting that there existed no commonly accepted definition at the international level. Following this, it turned to national laws defining rape. However, its examination was surprisingly terse, with no explicit mention made to any national legal systems. It merely stated “The Tribunal notes that while rape has been historically defined in national jurisdictions as non-consensual sexual intercourse, variations on the form of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.”¹⁵³ This statement is immediately problematic in identifying a general principle, as no clear reference is made to the vertical move, the number of states examined or the region and legal system which they operate within. Instead, the Trial Chamber merely generalized and listed the potential means by which the crime could be defined under national laws. This reliance on possible, but not identified as prevalent, means of commission coupled with the support of witness testimony was used as impetus for expanding the definition of rape beyond what was, at the time, the traditional definition at the national level.¹⁵⁴ It followed by justifying its reasoning for such expansion through the UN Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment analogizing the purpose of both crimes of rape and torture to humiliate, degrade, punish, control or destroy a person.¹⁵⁵ It used this to define rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”¹⁵⁶ Before commenting on the adherence of this decision to the doctrine of judicial creativity, one should note that this definition has been widely praised by scholars for taking a number of progressive steps in the definition of the crime. It rejected the traditional definition of rape in common law systems by including aspects such as forced oral penetration within its scope. Moreover, the definition itself is gender neutral; meaning both victims and

¹⁵³ *Prosecutor v. Jean-Paul Akayesu (Judgement)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), (2 Sept. 1998). par. 686.

¹⁵⁴ Weiner, Phillip. “The Evolving Jurisprudence of the Crime of Rape in International Criminal Law.” *Boston College Law Review*, Vol. 54 Iss. 2 (May 2013). pp. 1209.

¹⁵⁵ *Prosecutor v. Jean-Paul Akayesu (Judgement)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), (2 Sept. 1998). par. 597, 687.

¹⁵⁶ *Ibid.* par. 688.

perpetrators of the act could be either male or female.¹⁵⁷ A final point, in asserting that “rape cannot be captured in a mechanical description of objects and body parts” the definition also provided a wide breadth of means under which the act could be committed.¹⁵⁸ Despite the progressiveness in the definition adopted by the court, there was no clear reference made to any of the tenets required to identify a general principle, nor were any steps taken to ensure the application of such a principle was in adherence with accepted legal standards. Instead, the method used by the Trial Chamber resulted in a disconnected line of argumentation which did not base itself in legal logic. Over reliance on witness testimony and the opinions of the judges to craft a definition of a substantive rule resulted in a breach of the court’s integrity through clear judicial legislation.

Furundzija

Only four months after the *Akayesu* decision the Trial Chamber at the ICTY rendered its first decision on rape in *Prosecutor v. Furundzija*. While the Trial Chamber could have referred to the *Akayesu* decision, it largely forwent citing it in favor of crafting its own definition of the crime. Similar to the Trial Chamber in *Akayesu*, the ICTY began by examining international conventions. While it recognized that rape and other forms of indecent assault are prohibited under Art. 27 of the Geneva Conventions relative to the Protection of Civilian Persons in Time of War, Art. 76(1) of its Additional Protocol I and Art. 4(2)(e) of its Additional Protocol II; it also noted that no definition of the act was codified in international treaty law, custom or general principles of international law.¹⁵⁹ In order to identify the contents of the crime the court thus made recourse to general principles of law through the national laws of legal systems throughout the world. In doing so it conducted an evaluation of 18 different nations, noting the legal system they identified as and the different regions they represented.¹⁶⁰ Contrary to the findings in *Akayesu* it found that there did indeed exist some parallels in how rape was defined throughout most of the states surveyed. Discrepancies aside, the ICTY deemed that rape within the national context could be understood as “the forcible sexual penetration of the human body by the penis or the forcible insertion of any

¹⁵⁷ Weiner, Phillip. “The Evolving Jurisprudence of the Crime of Rape in International Criminal Law.” *Boston College Law Review*, Vol. 54 Iss. 2 (May 2013). pp. 1210.

¹⁵⁸ *Ibid.* pp. 1210.

¹⁵⁹ *Prosecutor v Furundzija (Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), (10 Dec. 1998). par. 175-177.

¹⁶⁰ Note: the court did not explicitly mention that it was taking region into account, but it included in its survey states from five different regions: North America, South America, Europe, Africa and Asia.

other object into either the vagina or the anus.”¹⁶¹ However, the court did not simply adopt this base definition. Instead, it deemed it necessary to address the issue of forced oral penetration, an act which was often described by victims as a form of rape but was classified as a form of sexual assault within a number of national laws. The ICTY then commented on three points to establish whether or not the definition of rape at the international level could encompass such an act. Firstly, it assessed the effect which the commission of the act had upon its victims. It noted that forced oral penetration can be equally traumatizing and humiliating on the victim as forced vaginal or anal penetration and is to be considered as a “degrading attack on human dignity.”¹⁶² It then followed by reflecting upon the rationale to criminalizing rape at the international level, claiming: “forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity. The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d’être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law.”¹⁶³ Considering the fundamental values which the prohibition of rape is meant to uphold at the international level and the trauma it imposes upon its victims the court came to the conclusion that “this principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honor, the self-respect or the mental well-being of a person. It is consistent with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape.”¹⁶⁴ The final point the Trial Chamber commented on was the impact such a decision would have on fair trial rights, notably the principle of *nullum crimen sine lege*. It deemed that such inclusion under the definition of rape would not be a violation, as the act in and of itself has clearly been deemed as criminal both at the national and international level. The inclusion of the act under the ambit of rape instead of sexual assault as an ‘other inhumane act’ merely highlighted the difference in classification which at the international level

¹⁶¹ *Prosecutor v Furundzija (Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), (10 Dec. 1998). par. 181.

¹⁶² *Ibid.* par. 183.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

is dictated by a slightly different set of fundamental principles than some national laws.¹⁶⁵ As such the Trial Chamber came to the conclusion that rape is to be defined as:

(i) 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;

(ii) by coercion or force or threat of force against the victim or a third person.¹⁶⁶

One should take note from the above two examples in regard to the rationale implemented in application of a general principle of law. Both the *Akayesu* and *Furundzija* decisions arrived at a similar definition of the crime, in terms of content and progressiveness. However, the methods implemented in identifying and applying a general principle in the former were unclear and terse, resulting in weak reasoning which eventually led it to being deemed as an illegitimate exercise in judicial legislation. The latter case, however, is considered to be an acceptable exercise in expansion of substantive rules through judicial creativity. In *Furundzija* the court duly began by resort to international law, identifying a clear prohibition to the act and linkage with other similar acts. Only after this did the court begin to examine national laws, deriving a general principle by accurately representing not only the vertical move but also the horizontal move. This principle was then juxtaposed within the international legal system to extrapolate the base fundamental values which the prohibition of the act served to protect. It took this base value of respect for human dignity and then contextualized it within crimes against humanity and war crimes, taking into consideration the effects the act has on its victims and fair trial rights. In doing so, it was able to come to a logically sound conclusion that progressively defined the crime of rape without undermining the national laws of States which defined the crime differently. In summary, whereas the *Akayesu* decision was unsubstantiated in the law due to an overemphasis on witness testimony and the opinion of the judges, *Furundzija* was able to adequately balance methods for identifying and applying general principles of law. This is most likely why *Furundzija* has gone largely

¹⁶⁵ *Prosecutor v Furundzija (Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), (10 Dec. 1998), par. 184.

¹⁶⁶ *Ibid.* par. 185.

uncontested by States and has set the standard; not only in how the crime of rape is to be understood at the international level, but also as to how general principles can be applied successfully to creatively interpret the substantive rules of international criminal tribunals.

Concluding Remarks

In conclusion, this chapter has sought to show the formal restrictions placed upon the ICC when interpreting the Rome Statute. It has shown that while it may initially seem as if the Statute cannot be interpreted in a way which permits the creative expansion of its substantive rules, this is not the case. However, there is a strict procedure which must be taken into account when attempting to do so. A primacy must be placed on the complex hierarchical pyramid that is Art. 21. In every instance, the Statute must first be examined followed by the Elements of Crimes. Despite conflicting jurisprudence, one must always remember that the Elements of Crimes are not binding on the Court and they do not set out an operational definition of its crimes. It is merely an assistive tool used for interpretation of the Statute. As such, it is essential to take into consideration the object, purpose and preparatory works of the relevant provisions in the Statute before examining the Elements of Crimes. Doing so will ensure that primacy is rightfully placed upon the Statute itself and also may provide a greater degree of opportunities to examine the secondary and tertiary sources listed under Art. 21(1)(b) and (c). When resorting to the use of its secondary and tertiary sources, it is important to remember that just because there exists a rule under paragraphs (b) or (c) it does not entail that it can be imported wholly into the Statute. There are restrictions as to what treaties are directly applicable to the Court. Other treaties can only be examined in order to show the existence of a general principle of international law or custom. Moreover, general principles of international law and custom cannot be applied in the same way as they were at the *ad hoc* tribunals. Close comparison must be made with the Statute first to ensure its compatibility. Only after this is done can it be deemed as an applicable source. In terms of general principles of national laws, there is a strict methodological approach which must be adhered to in order to ensure that the court does not overextend its interpretive powers into the realm of judicial legislation. As national laws tend to vary, it is essential to take into consideration both the vertical and horizontal move before asserting that a general principle is in place. If correctly done one can properly make claims to the inclusion of acts which have not yet been formally introduced within the Statute without violating the principle of legality or disturbing the hierarchy for statutory interpretation.

This method will be used throughout the remainder of the dissertation when attempting to creatively expand Article 7(1)(k) to include forced marriage, 'ethnic cleansing' and terrorist acts.

Chapter 3: Forced Marriage and the International Criminal Court

Introduction

The Rome Statute of the International Criminal Court (ICC) was devised with the awareness that “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured...”¹⁶⁷ It aims at eliminating impunity for those who have committed crimes of concern to the international community.¹⁶⁸ Another of its goals is not to just prosecute individuals for the crimes they have committed, but also to deter such acts from occurring in the future.¹⁶⁹ Whether or not the ICC actually functions as a deterrent to the commission of war crimes, genocide or crimes against humanity is an area which is often of debate. However, before one can even ask such a question it is important to understand what “crimes of concern to the international community” actually entails. It is true that the Rome Statute provides an extensive list of crimes under which it has jurisdiction, but it cannot be assumed that all crimes which are of concern to the international community will always fall within the scope of those already enumerated within the Statute. It is the very same high levels of ingenuity which has made the human race so successful that is also reflected within the crimes its members commit. In other words, those who perpetrate crimes are constantly devising new ways to do so; ones which may fall outside the scope of criminal law and prevent prosecutions from occurring. This is why the Statute has instilled under crimes against humanity a residual, or catch-all, clause. But where this provision is meant to safeguard against the commission of novel criminal acts it also encounters other difficulties. It raises the question of specificity in the law, and the right of the accused to be aware of the charges against them. It holds the potential to cause conflict with the principle of legality, or *nullum crimen sine lege* and thus undermine the accused’s rights.

This chapter seeks to explore the permissible scope of the residual clause under crimes against humanity known as ‘other inhumane acts’ contained in Art. 7 of the Rome Statute. The eleventh (and last) category of offences listed in the first paragraph of this provision refers to “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” This chapter aims to do so through examining an act which has seen a great deal of proliferation during armed conflict in recent years, that of forced

¹⁶⁷ *Rome Statute* Preamble.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

marriage. It will start by providing a legal understanding of marriage at the international level and make distinctions between forced marriage and other contemporary forms of marriage. Then it aims at elucidating the crime's exposure within international criminal tribunals and follow by creating a comprehensive definition of the act. The final section of this chapter will then examine how forced marriage can be classified at the ICC. It will show that not only can the crime be classified within 'other inhumane acts' but that doing so both upholds the principle of *nullum crimen sine lege* and also better represents the crime and injustices done to its victims than prosecuting it under the classification of other more well established crimes.

3.1. The Legal Status of Forced Marriage under International Law

This section will identify to the reader, domestic laws, international human rights conventions, General Assembly (GA) resolutions and other international legal instruments which address the requirements necessary for a marriage to be legally recognized under both domestic and international law. It will be used to argue that, while the status of all established norms and protections regarding marriage are up for debate, two elements of marriage can be considered as enshrined within general principles of international law. The first of which is the freedom of the right to marriage itself. The second is, when exercising the freedom to the right to marriage it must be entered in upon with the full and willing consent of both parties. These two components of marriage should be considered as included within general principles of international law. They indicate that forced marriage is not a legally recognized act at the global level and its forceful implementation on unwilling individuals taints the internationally recognized cultural importance of the system, harming not only its victims but also society as a whole. To aid in this assertion a comparison will be made later in this section between forced marriages, as international criminal law is concerned,¹⁷⁰ and arranged marriages in modern day society. Doing so will highlight the differences between the two practices and show that while arranged marriages may in some instances fall out of the scope of international human rights law, they are a culturally based practice

¹⁷⁰ Note: this paper will only discuss forced marriage in relation to international criminal law such as that which occurred in Uganda, Mozambique, Sierra Leone, Democratic Republic of the Congo and Rwanda. The writer is aware that 'forced marriage' is a term which has been used in reference to other situations such as bride wealth and bride inheritance but to avoid confusion it will not be labeled as such. These are instead understood in this chapter to fall within the scope of arranged marriages that do not adhere to international human rights standards but do not meet the requirements of international criminal law. That is, they do not occur as a part of a widespread or systematic attack against a civilian population. For more on other types of forced marriage see: Chantler K, Gangoli G and Hester M. "Forced marriage in the UK: Religious, cultural, economic or state violence?" *Critical Social Policy* Vol. 29 (4) (Nov. 2009).

and do not include the requisite components to be considered as a crime against humanity at the international level; an element which is present in the crime of forced marriage.

3.1.1. The Right to Enter Marriage as a General Principle of Law

To begin it is necessary to understand the importance in identifying marriage as a general principle of law. International criminal tribunals largely tend to opt in favor of using customary international law when progressively interpreting the scope of a given crime within their statute. This is often the most beneficial route as it usually incurs little objection from the international community and the defense/prosecution when rendering a judgment. However, as will be seen in this section it is debatable as to whether or not the right to marriage can be considered as part of international legal custom. In cases where neither the substantive law of a given international tribunal nor customary international law can adequately regulate a legal issue international criminal tribunals tend to look towards other subsidiary sources of international law.¹⁷¹ One such recognized and often cited subsidiary form of international criminal law is that of general principles of law.¹⁷² The term general principles of law has incurred a wide degree of differing interpretations in scholarship to encompass that of “general principles of international legal relations,” analogous legal principles prevalent in the national laws of states throughout the world, or to that of legal principles which regulate all legal interactions including national law, international law and even the laws within international organizations.¹⁷³ For the purpose of this chapter however general principles of law will be used as an umbrella term to encompass general principles of international law and general principles of national law. The reason for this is not to assert that general principles of law should always be understood in this manner, but rather to acknowledge the two recognized definitions provided within the Rome Statute of the ICC. That is after first examining the Rome Statute, Rules of Procedure and Evidence and Elements of Crimes the Court may then firstly look towards “the principles and rules of international law.”¹⁷⁴ This can be considered as encompassing general principles of international law and customary international

¹⁷¹ *e.g. *Prosecutor V. Zoran Kupreškić et al.* (Trial Judgment), IT-95-16-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 14 January 2000. par. 591.

¹⁷² Note: Raimondo uses this phrase in reference to the principle of non-intervention and the prohibition on the use of force in international relations. See: Raimondo, Fabian O. “General Principles of Law as Applied by International Criminal Courts and Tribunals” *The Law and Practice of International Courts and Tribunals*. Vol. 6(3) 2007. pp. 394.

¹⁷³ *Ibid.*

¹⁷⁴ *Rome Statute* Art. 21 (1) (b).

law. Following such an examination the court may also look at “general principles of law derived by the court from national laws of legal systems of the world” when interpreting the statute.¹⁷⁵ Since state practice enjoys a degree of overlap between both general principles of international and national law it would be more efficacious to address the two in the same manner in this section. As a separate caveat, this author is fully aware that general principles of law are usually referenced when addressing procedural or other interpretations of a tribunal’s statute. However, in the ICTY’s *Furundzija* decision it was identified that general principles of law may also be used to interpret the scope of substantive crimes.¹⁷⁶ This means that by identifying the right to marriage as a general principle of law both at the international and national level it can be utilized by the ICC in identifying the scope of the crime of forced marriage.

While determining the right to marriage as a general principle of law may aid in assessing the criminal status of the act of forced marriage it must be properly identified. When identifying a general principle of international law, one must identify a set of norms or legal principles consistent throughout either treaty or customary international law. The norms and principles which have been found through this manner may also be reinforced through the existence of recognition through international resolutions or declarations. In addition, State practice or the existence of general principles which exhibit themselves throughout national laws may also be used in order to show the existence of a general principle of international law. Since the latter (State practice) is an element which can be used in showing the existence of both conditions (as a general principle of international and national law) it will be dealt with firstly. Following this international treaties and declarations will be examined. Through the aforementioned method, this subsection aims to show that without a doubt the right to marriage is a general principle of law present at both the national and international level.

As was stated in the previous chapter the first step in identifying a general principle of law at the national level is through the implementation of what Elias and Lim term as the ‘vertical move’ or State practice.¹⁷⁷ In other words, courts extract an underlying legal principle from similar domestic legal rules throughout the world. Indeed, this is the position which has been adopted by

¹⁷⁵ *Rome Statute* Art. 21 (1) (c).

¹⁷⁶ *Prosecutor v. Anto Furundzija*. (Trial Judgement), IT-95-17/1-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 10 December 1998. par. 183.

¹⁷⁷ Elias, Olufemi., and Lim, Chin. “Identification of ‘General Principles of Law’, ‘Soft’ Law and the International Law.” *Netherlands Yearbook of International Law*. Vol. 28 (December 1997). pp. 23-26.

most international criminal tribunals.¹⁷⁸ Some scholars have asserted that the prerequisite in uniformity in State practice is impossible to identify. The differences in legal and political systems worldwide are diverse enough that there will never be a general principle of international law which can develop. This is especially so with common law systems in which the law may not be explicitly detailed within a legal document but have developed through jurisprudence over time. As such, when identifying a general principle of law courts must also take into consideration the ‘horizontal move.’¹⁷⁹ In other words, the legal principle which was identified through the ‘vertical move’ must exhibit itself within a generality of legal systems throughout the world.¹⁸⁰ Identifying the ‘horizontal move’ is usually accomplished through the examination of national laws in both civil and common law States. Examining all civil and common law States around the globe would prove to be an overly lengthy process and inconsistent with the opinions and practices of international courts and tribunals.¹⁸¹ Instead, civil and common law States most commonly cited by international criminal tribunals and other international courts such as the ICJ will be used to provide an example of the formation of the right to marriage as a general principle of law at the national level.

3.1.1.1. *The Right to Marriage in Domestic Legal Systems*

The right to marriage itself is recognized within a plethora of domestic legal systems. It is deemed as a fundamental right in the EU Charter of Fundamental Rights Art. 9 which states "The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights." Italy, France and Germany have all adopted or include similar rights to marriage within their constitution or respective civil codes.¹⁸² Other non-European States have also recognized marriage as a fundamental right. In the United States it has long been associated as a necessary right not only for the happiness of the human race, but also

¹⁷⁸ Raimondo, Fabian O. *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*. Leiden: Martinus Nijhoff Publishers. 2008. pp. 46-47.

¹⁷⁹ Elias, Olufemi., and Lim, Chin. "Identification of 'General Principles of Law', 'Soft' Law and the International Law." *Netherlands Yearbook of International Law*. Vol. 28 (December 1997). pp. 23-26.

¹⁸⁰ Darcy, Shane, and Joseph Powderly. *Judicial Creativity at the International Criminal Tribunals*. Oxford: Oxford UP, 2010. pp. 52.

¹⁸¹ Note: This position is supported by Justice Cassese in his remark that courts should "...refrain from engaging in meta-legal analyses" See: *Prosecutor v. Erdemovic (Appeals Judgment)*, IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, International Criminal Tribunal for the Former Yugoslavia (ICTY), (7 Oct. 1997). par. 11.

¹⁸² European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02. Art. 9.; Italy. *Constitution of Italy*, 22 December 1947. Art. 29.; Germany. *Basic Law for the Federal Republic of Germany*. 23 May 1949. Art. 6(1); France. *Code Civil*. 7 January 1999. Art. 146.

for the success of the State and the human race as a whole.¹⁸³ The right has also been affirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey* which declared, "these matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."¹⁸⁴ In the Republic of Korea "any adult person may freely enter into a matrimonial agreement."¹⁸⁵ Canada also provides similar recognition in that "marriage is a fundamental institution in Canadian society and the Parliament of Canada has a responsibility to support that institution because it strengthens commitment in relationships and represents the foundation of family life for many Canadians."¹⁸⁶ This is not meant to be an exhaustive list of States which recognize marriage as a fundamental right, but as a means of highlighting its existence throughout a number of domestic legal systems throughout the globe.

Moreover, consent is recognized as a prerequisite to enter into marriage in a plethora of different countries. Similar to the above, within the EU; France, Italy and Germany all require that free consent be provided by both intending spouses in order to solemnize a given marriage.¹⁸⁷ Canada requires that the two intending spouses provide free and enlightened consent or the marriage will not be recognized by the State. The UK,¹⁸⁸ the Republic of Korea,¹⁸⁹ and Australia,¹⁹⁰ all in some way require that consent be provided by both potential spouses in order for the marriage to be validated. Instances in which this criterion is not present may result in the nullification of the marriage which took place and may entail criminal responsibility for the individual who forced the marriage upon the other intending spouse.

¹⁸³ Supreme Court of the United States. *Skinner v. State of Oklahoma*, ex. rel. Williamson, 316 U.S. 535 (1942).; Supreme Court of the United States. *Loving v. Virginia*. 388 U.S. 1 (1967); Supreme Court of the United States. *Zablock v. Redhail*. 434 U.S. 78 (1978); Supreme Court of the United States. *Turner v Safley*. 482 U.S. 78 (1987)

¹⁸⁴ Supreme Court of the United States. *Planned Parenthood of Southeastern Pennsylvania v. Casey*. 505 U.S. 833 (1992).

¹⁸⁵ Republic of Korea. *Minbup (Civil Code)*. Amended January, 2002 Art. 800 and 807.

¹⁸⁶ Parliament of Canada. *Civil Marriage Act*.S.C. 2005, c. 33. (20 July 2005). Preamble.

¹⁸⁷ Italy, *Codice civile (Italian Civil Code)*. 1 December 2015. Art. 122 and 128.; Germany. *Bürgerliches Gesetzbuch (Civil Code)*. 2 January 2002. Section 1310(1).; France. *Code Civil*. 7 January 1999. Art. 146.

¹⁸⁸ Parliament of the United Kingdom. *The Matrimonial Causes Act* (c 18). 1973. Art. 12(c).

¹⁸⁹ Republic of Korea. *Minbup (Civil Code)*. Amended January, 2002. Art. 813.

¹⁹⁰ Parliament of Australia. *Marriage Act 1961*. 1961. Sec. 23 par. 1(d).

The above examples are indicative of a majority of the States which have been referenced by most international criminal tribunals in assessing if a general principle law exists.¹⁹¹ One should bear in mind that the degree to which the right to marriage is recognized and what is meant by consent incurs a great deal of diversity between the aforementioned States. Even within domestic legal systems, definitions and understanding of the right to marriage and need for consent have undergone a great deal of evolution over time. In the UK, for example, the notion of coercion and lack of consent as grounds for nullifying a marriage began as applying to only instances in which the victim was "overborne by genuine and reasonably held fear caused by threat of imminent danger... to life, limb or liberty."¹⁹² This definition has evolved over time to encompass all cases in which the mind of the victim was overborne in any way to alter their decision.¹⁹³ Nonetheless, there seems to be a general consensus that marriage is a fundamental aspect of society which the State has the obligation to protect and uphold. Moreover, while there may be inconsistencies over the understanding of consent in regard to obtaining it through psychological coercion; there does seem to be a consensus within domestic legal systems that consent as obtained through duress, threat to body or family or use of force is generally accepted as a circumstance which, if present, nullifies the legality of the marriage.

While there does seem to be a general consensus over the right to marriage and the need for unadulterated consent to validate a marriage, this does not mean that the right should be reflected within international law. Indeed Cassese asserts that "legal constructs and terms of art upheld in national law should not be automatically applied at the international level" and that "one should explore all the means available at the international level before turning to national law."¹⁹⁴ This stance should be upheld for two reasons. First, as was observed above, there does exist some nonconformity between laws present among States. Second, even though there may exist a set of laws which are reflected within the laws of a number of States, they may not be suitable or intended to be applied at the international level. Taking this into account, one should look at international resolutions, conferences, and international conventions or any other materials which establish the

¹⁹¹ Raimondo, Fabian O. "General Principles of Law as Applied by International Criminal Courts and Tribunals" *The Law and Practice of International Courts and Tribunals*. Vol. 6(3) 2007. pp. 402.

¹⁹² *Szechter v Szechter* (1970) 3 All ER 905.

¹⁹³ *Hirani v Hirani* (1982) 4 FLR 332.

¹⁹⁴ *Prosecutor v. Erdemovic (Appeals Judgment)*, IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, International Criminal Tribunal for the Former Yugoslavia (ICTY), (7 Oct. 1997). par. 2-3.

opinions of the international community and the legal obligations which States have imposed upon themselves. Doing so identifies what States have pronounced to the international community as to what their opinions are on the given subject. Even if there is a disjunction between States on the scope or applicability of a given rule, international statements and obligations made by them indicate their intentions to implement and uphold these rules in the future. As such, when identifying a general principle of international law, one should look at domestic legal systems, international resolutions, statements and conventions.

3.1.1.2. *The Right to Marriage in International Law*

Marriage is not only recognized as an important societal institution within domestic legal systems, but also as a fundamental right of the individual at the international level. Historically, rights of the family during wartime have been widely recognized, such as in the Lieber Code of 1863,¹⁹⁵ the Brussels Declaration of 1874,¹⁹⁶ the 1907 Hague Convention,¹⁹⁷ and Geneva Conventions (IV) relative to the Protection of Civilians Persons in Times of War.¹⁹⁸ These treaties provide protection to “family honor and rights”¹⁹⁹ by placing a number of obligations on factions involved in a conflict requiring them to: avoid the separation of family units, provide means of contact between the family, and provide information regarding the whereabouts and status of family members.²⁰⁰ While marriage is not explicitly referenced in many of these documents, it has been noted that the intention of these provisions were to protect parents, their children, family dwelling and “to safeguard marriage ties.”²⁰¹ In 1948, 1 year before the adoption of Geneva Conventions IV, the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR) which recognized the family as “the natural and fundamental group unit

¹⁹⁵ International Committee of the Red Cross (ICRC), *Instructions for the Government of Armies of the United States in the Field (Lieber Code)*, 24 April 1863. Art. 24.

¹⁹⁶ International Committee of the Red Cross (ICRC), *Project of an International Declaration concerning the Laws and Customs of War. (Brussels Declaration)*, 27 August 1874. Art. 38.

¹⁹⁷ International Committee of the Red Cross (ICRC), *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. (Hague Convention)*, 18 October 1907. Art. 46.

¹⁹⁸ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287. Art. 27.

¹⁹⁹ *Fourth Geneva Conventions*. Art. 27.; Note: Bideke, M. 2002. “Gender Crimes in the International Criminal Court Statute Gender Crimes in the International Criminal Court Statute.” alludes to the fact that use of the term “honour” in the aforementioned conventions suggests that it is not as serious an offence as other crimes which may be committed against an individual. This also may call into question the customary status of the right.

²⁰⁰ *Fourth Geneva Conventions*. Art. 27.

²⁰¹ *Ibid.*

of society."²⁰² In addition, it stated “men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.”²⁰³ It also provides, “Marriage shall be entered into only with the free and full consent of the intending spouses.”²⁰⁴ Rights to women’s equality and freedom to enter into marriage have also been addressed in subsequent resolutions and international declarations such as in the Declaration on the Elimination of Discrimination against Women (DEDAW),²⁰⁵ Association of South East Asia (ASEAN) Human Rights Declaration,²⁰⁶ the International Conference on Population and Development Programme of Action²⁰⁷ as well as in the UN Secretary General Report on Preventing and Eliminating Child, Early and Forced Marriage.²⁰⁸ All of these recognize the importance of the family unit, marriage as a fundamental right and the need for free and full consent to validate a marriage. Although it is true that these resolutions and reports do not create any direct legal obligations on members of the international community; their influence on the development of other international legally binding conventions can be considered as an indication, *prima facie*, of *opinio juris*. In other words, they serve to indicate that there exists a general consensus within the international community that the practice of marriage is a fundamental right of all men and women.

While the UDHR and other declarations can only be considered as an indicator of *opinio juris*, the ideas enumerated within them regarding marriage were also summarized and, in some cases, replicated directly in a number of international legally binding documents. One of the most profound of these is encompassed in the International Covenant on Civil and Political Rights (ICCPR) Art. 23. In it, Art. 16(3) of the UDHR is copied word for word, declaring the family to be; “the natural and fundamental group unit of society”²⁰⁹ and stating “The right of men and

²⁰² UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III). Art. 16 par. 3.

²⁰³ *Ibid.* Art. 16 par. 1.

²⁰⁴ *Ibid.* Art. 16 par. 2.

²⁰⁵ UN General Assembly, *Declaration on the Elimination of Discrimination against Women (DEDAW)*, 7 November 1967, A/RES/2263(XXII). Art. 6(2).

²⁰⁶ Association of Southeast Asian Nations (ASEAN). *ASEAN Human Rights Declaration*. 18 Nov. 2012. Art. 18.

²⁰⁷ United Nations. *Population and Development: Programme of Action Adopted at the International Conference on Population and Development, Cairo, 5-13 September 1994*. New York: United Nations, Dept. for Economic and Social Information and Policy Analysis, 1995. pp. 14.

²⁰⁸ Human Rights Council. *Preventing and eliminating child, early and forced marriage Report of the Office of the United Nations High Commissioner for Human Rights*. 2 April 2014. A/HRC/ 26/22. par. 7.

²⁰⁹ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999. Art. 23(1).

women of marriageable age to marry and to found a family shall be recognized.”²¹⁰ These two articles representing the importance of the family within society and the right to marry have also been contained in a variety of other International Human Rights treaties including; the International Covenant on Economic, Social and Cultural Rights (ICESCR),²¹¹ American Convention on Human Rights (ACHR),²¹² African Charter on Human and People’s Rights (ACHPR),²¹³ European Convention on Human Rights (ECHR),²¹⁴ Southern African Development Community (SADC) Protocol on Gender and Development,²¹⁵ and The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).²¹⁶ The prevalence of the right to marry in international human rights treaties has led to it being adorned as an “absolute right” by the Human Right’s Council.²¹⁷ In addition it has come to be considered a “social act of the highest importance”²¹⁸ one which is an axiomatic and fundamental right of all people.²¹⁹

In addition to the recognition of the right to marriage there exists a consensus on the need to receive consent of both individuals involved for it to be legally valid. The ICCPR provides that “No marriage shall be entered into without the free and full consent of the intending spouses.”²²⁰ The ICESCR Art. 10(1) adopts more conservative stance in its understanding of consent.²²¹ It states, “Marriage must be entered into with the free consent of the intending spouses.”²²² In this instance the term “full” is omitted from the text leading to the assertion that it may limit its possible

²¹⁰ *International Covenant on Civil and Political Rights*. Art. 23(2).

²¹¹ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993. Art 10(1).; Note: this only recognizes the family as a fundamental unit of society.

²¹² Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969. Art. 17(1).

²¹³ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Art. 18(1) *Note: this only mentions the family as the cornerstone of society.

²¹⁴ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950. Art. 12.

²¹⁵ Southern African Development Community (SADC) *Protocol on Gender and Development*. Art. 8 par. 2.

²¹⁶ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, 18 December 1979, United Nations, Treaty Series, vol. 1249. Art. 16(1)(a).

²¹⁷ *International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*. pp. 689-690.

²¹⁸ Nowak, Manfred. *U.N. Covenant on Civil and Political Rights: CCPR Commentary*. Kehl: N. P. Engel, 2005. pp. 516.

²¹⁹ *Ibid.*

²²⁰ *International Covenant on Civil and Political Rights*. Art. 23(3).

²²¹ Note: It is understood that Art. 10(1) may exhibit progressiveness over ICCPR Art 16(3) in other areas such as the use of the phrase “right to freely choose a spouse” as opposed to referencing man and woman. See:

²²² *International Covenant on Economic, Social and Cultural Rights*. Art. 10(1).

interpretive worth.²²³ However, while the phrasing may incur differences, the need to provide consent by both intending spouses is still present. The Convention on the Consent to Marriage Art. 1 provides additional criteria stating, “No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law.”²²⁴ This takes the notion of consent and provides not only that it must be free and full but also must be explicitly expressed for by both individuals in person or when there are exceptional circumstances, when such consent has been expressed by the relevant individual as prescribed by law before a competent authority.²²⁵ The need for consent to be recognized by some form of authority may be beneficial as it is assumed that the validity of consent in relation to marriage may be difficult to ascertain in some situations.²²⁶ Freeman asserts that gender role expectations, economic inequality as well as social and cultural norms may all put pressures (especially on women) and influence their ability to provide free consent to a marriage.²²⁷ Moreover, age may be an influential factor in ability to provide consent. As such, in cases of minors it is necessary to obtain full consent from both the intended spouses as well as their parent/guardian(s).²²⁸ These examples serve to show the degree of pressure which may be involved in providing free consent as well as the “highly personal character of the right to marry.”²²⁹

The above examples show that the right to marriage is well established within international human rights law. However, its existence as international customary law is one that is up for debate, as it is identified as only encompassing that of second tier international human rights law.²³⁰ This means that the right to marriage and its components are non-derogable except in instances of national security or emergency. Moreover, marriageable age and other aspects of the right are well contested topics amongst some States within the international community. The same follows for

²²³ Saul, Ben., Kinley, David., and Mowbray, Jacqueline. *The International Covenant on Economic, Social and Cultural Rights: commentary, cases, and materials*. Oxford University Press: Oxford, 2014. pp. 763.

²²⁴ UN General Assembly, *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, 7 November 1962. Art. 1.

²²⁵ Freeman, Marsha A., Rudolf, Beate., and Chinkin, C. M. *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary*. Oxford: Oxford UP, 2012. pp. 423-424.

²²⁶ *Ibid.*

²²⁷ *Ibid.*

²²⁸ *Ibid.*

²²⁹ Joseph, Sarah, Jenny Schultz, and Melissa Castan. *International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*. 3rd Edition. Oxford UP: Oxford. 2014 pp. 534.

²³⁰ Dauvergne, Cathrine and Millbank, Jenni. “Forced Marriage as a Harm in Domestic and International Law.” *The Modern Law Review*. Vol. 73 No.1 (2010). pp. 58-59.

equal rights and treatment of both spouses before, during and at the dissolution of a marriage. Therefore, the customary legal status of the right to marriage as a whole can still be considered as undetermined. However, the freedom to engage in marriage is an undisputed right which is well recognized in international law. Moreover, the need to provide free consent is perceived as a *sine qua non* in order to verify the validity of such marriages.²³¹ As such, there seems to be enough recognition at both the national and international level of the right to marriage and the need for full consent to validate a marriage to qualify it as a general principle of international law.

3.2. Differentiating Arranged and Forced Marriage

While marriage itself can be considered as a general principle of international law its implications on the status of forced marriage may still be of question. Justice Julia Sebutinde and Justice Teresa Doherty of the SCSL in their respective concurring and dissenting opinions to the *Armed Forces Revolutionary Council (AFRC) Trial Chamber Judgment* as well as the *ARFC Appeals Chamber* in their judgment recognized that the legal status of marriage was not meant to impart any implications upon the criminalization of arranged marriages.²³² In their collective opinions they felt it necessary to distinguish the two acts from one another, showing that while arranged marriages in times of peace may occasionally fall outside of the requirements to marriage as understood within international human rights law, they can be distinguished from that of forced marriage which occurs during armed conflict.²³³ This is most notable in regards to three aspects; the requirements needed to be fulfilled in order to be considered a crime against humanity, the right to free consent, and inclusion of the family in the decision making process. Arranged marriages operate on the understanding of their creation as a cultural and societal norm. An indication of consent is provided through the involved individuals' acceptance of these customs and their conferral of the right to choose a partner onto their parents or competent family

²³¹ Saul, Ben., Kinley, David., and Mowbray, Jacqueline. *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials*. 3rd ed. Oxford: Oxford UP, 2014. pp. 786.

²³² *Prosecutor V. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu*. (Separate Concurring Opinion of the Honorable Justice Julia Sebutinde Appended to the judgement pursuant to Rule 88 (c)), Special Court for Sierra Leone (SCSL), SCSL-04-16-T, 20 June 2007. par. 8-12.; *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu*. (Appeals Judgment), Special Court for Sierra Leone (SCSL), SCSL-2004-16-A, 22 February 2008. par.194.; *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu*. (Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8('Forced Marriages')), Special Court for Sierra Leone (SCSL), SCSL-04-16-T, 20 June 2007. par. 36.

²³³ Note: This in some instances such as was stated above in which the right to free and full consent is not provided by one or both spouses may also be understood as 'forced marriage' during peacetime. It is not to be confused with 'forced marriage' which occurs during armed conflict. See: Dauvergne, Cathrine and Millbank, Jenni. "Forced Marriage as a Harm in Domestic and International Law." *The Modern Law Review*. Vol. 73 No.1 (2010).

members.²³⁴ As such they provide their consent to marriage under the conditions that their family is aware and intently involved in the decision making process. It follows that lack of objection by those who are to be wed provides an indication of their own consent to the cultural practice of arranged marriage and to the capability of the individuals' family to choose a spouse for them.²³⁵ Some assert that this is sufficient in providing full consent for marriage while others warn that the notion of implied consent overlooks cultural restrictions on the individual to withdraw or deny consent to the proposed marriage.²³⁶ Indeed, individuals involved in arranged marriages may be unable to decline for a number of reasons including; parental desire to solidify relationships between two families, familial concerns over the background or capability of a suitor,²³⁷ economic stability,²³⁸ religious affiliation, virginity, early pregnancy, and widow inheritance.²³⁹ However, while these circumstances may be a reason for criticizing the practice of arranged marriage under international human rights law, they are the exception to the norm, and are not considered as acts which entail international criminal responsibility under international criminal law. Rather, they indicate a need for revision/ enforcement of domestic laws to fall in compliance with those standards.

Conversely, forced marriage operates on a different plane than that of arranged marriages. Firstly, consent which takes place in arranged marriages, (whether tacit, explicitly expressed by both spouses and families or only family members) is wholly absent in the case of forced

²³⁴ Scharf, Michael P. "Forced Marriage as a Separate Crime Against Humanity" in Jalloh, Charles. *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law*. Cambridge: Cambridge UP, 2013. pp. 202.

²³⁵ Jain, Neha. "Forced Marriage as a Crime against Humanity: Problems of Definition and Prosecution." *Journal of International Criminal Justice*. Vol. 6 (2008). pp. 1027.

²³⁶ Packer, Corinne A. A. *Using Human Rights to Change Tradition: Traditional Practices Harmful to Women's Reproductive Health in Sub-Saharan Africa*. Antwerpen: Intersentia. 2002. pp. 76.

²³⁷ Within the Sierra Leone context it was favorable to marry daughters to religious leaders, chiefs/ leaders, or herbalists in order to ensure the future success and protection of the family. See: *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu*. (Prosecution Filing of Expert Report Pursuant to Rule 94(bis) and Decision on Prosecution Request for Leave to Call an Additional Expert Witness), Special Court for Sierra Leone (SCSL), SCSL-04-16-T, 08 August 2005. pp. 9.

²³⁸ Note: This can refer to either the economic standing of one or both families and/or the acceptance of bride wealth as was explained in the above section. See: *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials*. pp. 763.

²³⁹ Note: Widow Inheritance is defined as; after the death of a wife her sister is subsequently married to her deceased sister's husband. This may occur for a number of reasons, some of which have already been listed such as economic stability and the solidifying of familial ties but may also be done for other reasons such as raising children without the interference of an 'outsider' or 'stranger.' See: Freeman, Marsha A., Rudolf, Beate., and Chinkin, C. M. *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary*. Oxford: Oxford UP, 2012. pp. 423.

marriages.²⁴⁰ Individuals are forcefully abducted from their residence within an ongoing armed conflict. They are then coerced, under threat of force, use of force, duress or otherwise into a matrimonial like situation with either their captor or another individual. Consent is not provided by the victim and the ‘marriage’ often takes place without the knowledge of the victim’s family. It follows that these ‘marriages’ are not legally recognized but they still serve to mimic the institution in a number of ways by requiring conjugal duties of the ‘spouse’ including; cooking, cleaning, psychological support for their ‘spouse,’ sexual services, child upbringing and other duties.²⁴¹ In conjunction with non-adherence to international standards this also undermines the assistive value that arranged marriage is intended to provide within practicing societies.²⁴² Neither the family nor victim(s) have any means of ensuring one of the primary goals of arranged marriages, that is, “the perpetuation of social, cultural and religious values.”²⁴³ Secondly, whereas arranged marriages are considered as a “private arrangement regarding the union of two families” forced marriage is “an institutionalized policy either created by the State, organizations, or groups that affect a wide swath of the civilian population.”²⁴⁴ Its commission takes place as a part of or in relation with a widespread or systematic attack against a civilian population. This meets one of the primary requirements of it to be considered as a crime against humanity and is why, whereas some instances of arranged marriage can be considered as in violation of international human rights law, forced marriage is considered as an act which can entail international criminal responsibility under international criminal law.²⁴⁵

3.3. Conceptualizing Forced Marriage

While forced marriage can be identified as a violation of international human rights standards and as an act which may entail international criminal responsibility, the question arises as to how it should be classified. As there has been confusion over whether forced marriage should

²⁴⁰ Scharf, Michael P. “Forced Marriage as a Separate Crime Against Humanity” in Jalloh, Charles. *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law*. Cambridge: Cambridge UP, 2013. pp. 203. Note: Scharf explains that even in cases of arranged marriage which are contentious there exists at the bare minimum some level of consent from the intended spouses and/ or their family members.

²⁴¹ *Ibid.* pp. 229.

²⁴² *Ibid.* pp. 203.

²⁴³ *Ibid.*

²⁴⁴ Nguyen, Frances. “Untangling Sex, Marriage, and Other Criminalities in Forced Marriage.” *Goettingen Journal of International Law* Vol. 6 (2014). pp. 35.

²⁴⁵ *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu*. (Separate Concurring Opinion of the Honorable Justice Julia Sebutinde Appended to the judgement pursuant to Rule 88 (c)), Special Court for Sierra Leone (SCSL), SCSL-04-16-T, 20 June 2007. par. 12.

be prosecuted for as an ‘other inhumane act’ or an act of sexual slavery, the first part of this section will set out to provide an understanding of what sexual slavery is to the reader through international jurisprudence. After this, forced marriage as it was dealt with in the SCSL will be examined. Both areas of confusion and clarity exhibited in classifying the crime in the AFRC and Revolutionary United Front (RUF) cases will be addressed and commented on. It will draw the distinction that in order to encompass the entirety of the scope of forced marriage it should be adjudicated upon as an ‘other inhumane act.’ The reasoning here will then be used in the final section to create a comprehensive definition of the crime of forced marriage which will be used throughout the rest of the chapter.

3.3.1. *Sexual Slavery*

Sexual slavery, similar to that of forced marriage, is a relatively new crime in terms of its recognition as a distinct form of slavery in the statutes of international criminal tribunals. It was first adopted as a crime against humanity under the Rome Statute Art. 7(1)(g). The *actus reus* of the crime is separated into two distinct parts within the Rome Statute. The first, serves as a general definition of the act of slavery based off of the 1926 Slavery Convention and Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956.²⁴⁶ It provides: “The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.”²⁴⁷ The listed means of obtaining ownership in this paragraph are non-exhaustive and should be interpreted broadly so as to include any act which exhibits control or restriction of the individual autonomy of a person.²⁴⁸ This may exhibit itself through a multitude of means such as, “...the control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.”²⁴⁹ It is also accepted that slavery like conditions may extend to the conferral of an individual to a servile status

²⁴⁶ Dormann, Knut. *Elements of war crimes under the Rome statute of the International criminal court: sources and commentary*. Cambridge UP: Cambridge. 2003. pp. 327-328.

²⁴⁷ *Elements of Crimes*. (2011). Art. 7(1)(g)-2 par. 1.

²⁴⁸ *Prosecutor V. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*. (Judgment), IT-96-23/1-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 22 February 2001. par. 542.

²⁴⁹ *Ibid.* par. 543.

by means of: debt bondage, serfdom, forced child labour or other acts.²⁵⁰ Moreover, while there has been concern with the overemphasis of pecuniary or other forms of compensation in the *actus reus* of enslavement and sexual slavery in the Rome Statute, it is generally accepted in international criminal jurisprudence that this is not required, rather it is merely an indication that enslavement or slavery-like conditions exist.²⁵¹ Also, distinct from other crimes against humanity it does not require the physical detainment of an individual nor does it require that the act is committed in a specific area. Rather, slavery and sexual slavery may be understood as a continuous act²⁵² in which the victim was unable to leave as they had nowhere else to go and remained out of fear of physical harm or their own lives.²⁵³

Whereas, at the onset, the two crimes of sexual slavery and enslavement share similar *actus reus*, the crime of sexual slavery distinguishes itself in requiring the additional element of “The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.”²⁵⁴ This implies that the perpetrator exercises control over the sexual autonomy of the victim.²⁵⁵ Such control may but does not necessarily need to include rape as they are two distinct forms of gender crimes. The crime of sexual slavery hinges upon ongoing control or ownership of the victim which is not included within the scope of rape. In a similar manner, while rape requires the sexual

²⁵⁰ United Nations. *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 226 U.N.T.S. 3, entered into force April 30, 1957. Art. 1.

²⁵¹Note Carmen M Argibay raises concern over the Rome Statute’s emphasis on the link between commercial exchange and enslavement by presenting only “purchasing, selling, lending or bartering” as concrete examples of enslavement. She believes that this is not only an antiquated understanding of the crimes constituent aspects, undermines the contemporary experiences of individuals who were coerced, deceived or in other ways forced into enslavement or sexual slavery. As such she deems the definition of sexual slavery and enslavement is significantly narrow to warrant concern over how the judges at the ICC will interpret them. For more on this see: Argibay, Carmen M. “Sexual Slavery and the Comfort Women of World War II.” *Berkeley Journal of International Law*. Vol. 21 Iss. 2. (2003) pp. 388-389. This author however adopts the reasoning of the Trial Chamber in *Kunarac, Radomir Kovac and Zoran Vukovic*. (Judgment), IT-96-23/1-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 22 February 2001. par. 543.

²⁵² *Prosecutor v. Charles Ghankay Taylor*. (Trial Judgment), Special Court for Sierra Leone (SCSL), SCSL-03-01-T, 18 May 2012. Par. 119 and 1080.; Oosterveld, Valerie. “Gender and the Charles Taylor Case at the Special Court for Sierra Leone.” *William and Marry Journal of Women and the Law*. Vol. 19 No. 7 (2012) pp. 17.

²⁵³*Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*. (Judgment), IT-96-23/1-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 22 February 2001. Par. 750.; Lee, Roy S. *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*. Transnational Publishers; New York. 2001, pp. 192.

²⁵⁴ *Elements of Crimes* Art. 7(1)(g)-2 par. 2.

²⁵⁵ Triffterer, Otto. *Commentary on the Rome Statute of the International Criminal Court: observers’ notes, article by article*. 2nd ed. Baden-Baden: Nomos, 2008. pp. 211.

penetration of an individual under coercive circumstances, sexual slavery may include all acts of a sexual nature.²⁵⁶ This is not limited to penetrative acts and can include but is not limited to enforced nudity, non-penetrative sexual touching or any other form of sexual violence.²⁵⁷ The distinction made here is significant as it recognizes the cumulative aspect of the crime which may be exercised through multiple rapes or other forms of sexual violence over a period of time which the perpetrator exercises control over the victim's autonomy.²⁵⁸ Indeed it was the differences between the *actus reus* of rape and sexual slavery that caused the Trial Chamber in *Taylor* to deem that the two crimes are sufficiently different to legally permit convictions for both sexual slavery and rape simultaneously.²⁵⁹

While textually, sexual slavery contains an additional element in its *actus reus* this may not be all that different from that of enslavement *prima facie*, as it has been established in *Kunarac* that control over an individual's sexual autonomy can be subsumed within the definition of enslavement.²⁶⁰ Its inclusion as a separate crime within the Rome Statute however shows that the drafters recognized the need to distinguish sexual slavery from other forms of enslavement as the act is conceptually distinct from other incarnations of enslavement and that it represented more than the sum of its constitutive elements.²⁶¹ In other words, it is not simply the act of enslavement, but its other elements such as sexual dominance which warrants its distinction as a separate crime. Oosterveld complements this point of view asserting that the inclusion of sexual slavery in the Rome Statute was not due to substantial differences in the methods of enslavement but rather due to the fact "that sexual slavery is a prevalent contemporary crime warranting express

²⁵⁶ *Prosecutor v. Charles Ghankay Taylor*. (Trial Judgment), Special Court for Sierra Leone (SCSL), SCSL-03-01-T, 18 May 2012. par. 6989.; Oosterveld, Valerie. "Gender and the Charles Taylor Case at the Special Court for Sierra Leone." *William and Mary Journal of Women and the Law*. Vol. 19 No. 7 (2012) pp. 28.

²⁵⁷ Argibay, Carmen M. "Sexual Slavery and the Comfort Women of World War II." *Berkeley Journal of International Law*. Vol. 21 Iss. 2. (2003) pp. 383-386.

²⁵⁸ Oosterveld, Valerie. "Gender and the Charles Taylor Case at the Special Court for Sierra Leone." *William and Mary Journal of Women and the Law*. Vol. 19 No. 7 (2012) pp. 29.

²⁵⁹ *Prosecutor v. Charles Ghankay Taylor*. (Trial Judgment), Special Court for Sierra Leone (SCSL), SCSL-03-01-T, 18 May 2012. par. 6989.

²⁶⁰ *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*. (Judgment), IT-96-23/1-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 22 February 2001. par. 542.

²⁶¹ Frulli, Micaela. "Advancing International Criminal Law: The Special Court for Sierra Leone Recognizes Forced Marriage as a 'New' Crime against Humanity." *Journal of International Criminal Justice*. Vol. 6 (2008). pp. 1036.; Oosterveld, Valerie. "Sexual Slavery and the International Criminal Court: Advancing International Law." *Michigan Journal of International Law*. Vol. 25:605 (Spring, 2004). Pp. 622-625.

recognition.”²⁶² By including it as a separate crime it increased the gender-sensitivity of the Rome Statute and emphasized that it is a crime of the greatest concern to the international community. In a separate light it may also be perceived that sexual slavery may warrant attention, both in protective measures and redress that is distinct from other forms of enslavement.²⁶³ Doing so recognizes the “specific nature of the form of enslavement and ensures that it will be given the distinct attention it deserves.”²⁶⁴

In all, sexual slavery as an internationally recognized crime, despite relatively low examples of prosecution, still retains a high level of recognition and elaboration through international criminal jurisprudence. Its inclusion within the Rome Statute has identified it as one of the most serious crimes of concern to the international community and led to the assertion that it has been elevated to the level of a *jus cogens* norm.²⁶⁵ While it exhibits degrees of overlap with other crimes against humanity such as rape and enslavement it is imperative to note why it has been recognized as a distinct crime. Doing so will aid in identifying that, similar to the rationale used in separating it from enslavement, distinction from sexual slavery is also needed to be made when prosecuting forced marriage. The next part will seek to provide an understanding of forced marriage as it has been represented at the SCSL and show that while there is some overlap between the two crimes; due to international recognition, proliferation within armed conflicts and conceptual differences, that it is best to prosecute the crime as separate from that of sexual slavery.

3.3.2. *Forced Marriage at the SCSL*

As was stated above, the first, and to date only, prosecutions and convictions for forced marriage took place in the RUF and AFRC cases at the SCSL. As will be seen in this part, the court’s and prosecutor’s approach towards forced marriage has varied within these two cases, with over-emphasis on the sexual nature of the crime and bunching it together with sexual slavery and sexual violence. This section will seek to identify the problems addressed with forced marriage and how it was dealt with at the SCSL in order to provide both a comprehensive definition of the

²⁶² Oosterveld, Valerie. “Sexual Slavery and the International Criminal Court: Advancing International Law.” *Michigan Journal of International Law*. Vol. 25:605 (Spring, 2004). pp. 625.

²⁶³ Argibay, Carmen M. “Sexual Slavery and the Comfort Women of World War II.” *Berkeley Journal of International Law*. Vol. 21 Iss. 2. (2003) pp. 385-386.

²⁶⁴ *Ibid.* pp. 386.

²⁶⁵ Henckaerts, Jean-Marie, Louise Doswald-Beck, and Carolin Alvermann. *Customary International Humanitarian Law: Volume 1, Rules*. Cambridge: Cambridge UP, 2005. pp. 329-330.

crime as well as an understanding of how it can be prosecuted as an ‘other inhumane act.’ Doing so will aid in identifying how the crime should be conceptualized within the ICC framework, and whether, in order to uphold the principle of *nullum crimen sine lege*, it should be prosecuted as sexual slavery or an ‘other inhumane act.’ This part will begin with a brief overview of the development of forced marriage at the SCSL, and then address the difficulties the chambers had in identifying the crime as well as the different approaches taken by each respective trial chamber. It will follow, based on the information provided via the Appeals Chamber decision in the AFRC, the Trial Chamber’s judgement in the RUF case and in conjunction with other scholarly authors, with an outline of a basic definition of the crime which will later be analyzed in light of the Rome Statute of the ICC.

The first ever attempt at prosecuting an individual for the act of forced marriage as a crime under ‘other inhumane acts’ took place in the AFRC case of the SCSL. In it, the prosecutor provided evidence showing a number of areas within the context of the Sierra Leone conflict where women and (mostly) girls had been systematically abducted by rebel combatants. The fate of those abducted varied and many were subject to inhumane treatment including; torture, rape, sexual violence and murder.²⁶⁶ It is estimated that between 1997-1999 some 215,000-275,000 women and girls were victims of some sort of sexual violence associated with the conflict.²⁶⁷ One such form of sexual violence as defined by the Physicians for Human Rights was that of forced marriage.²⁶⁸ Many women and girls which had been abducted were selected by combatants or commanders within their respective rebel movement to be their ‘wife.’ Those chosen were most often young girls or young women ranging from nine to 19 years old.²⁶⁹ This most often took place in camps of the AFRC and RUF,²⁷⁰ but also occurred within other factions involved in the conflict such as with the West Side Boys.²⁷¹ Once these women and girls were ‘married’ they were required to carry out a variety of duties for their ‘husband’ including; cooking, cleaning, doing laundry, farm

²⁶⁶ Physicians for Human Rights. *War-related Sexual Violence in Sierra Leone: A Population-based Assessment: A Report*. Boston, MA: Physicians for Human Rights, 2002. pp. 25.

²⁶⁷ *Ibid.* pp. 4.

²⁶⁸ *Ibid.* pp.41.

²⁶⁹ Park, Augustine S.J. “‘Other Inhumane Acts’: Forced Marriage, Girl Soldiers and the Special Court for Sierra Leone.” *Social and Legal Studies*. Vol. 15 No. 3 (2006) pp. 322.

²⁷⁰ The Sierra Leone Truth and Reconciliation Commission (TRC). *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*. The Sierra Leone Truth and Reconciliation Commission. 2004. par. 335.

²⁷¹ *Ibid.* par. 372-374.

maintenance, and other forms of domestic chores.²⁷² They also were expected to provide psychological support to their husband and show levels of intimacy with him in the form of both affection and the performance of sexual services on demand.²⁷³ ‘Husbands’ usually enjoyed a level of exclusivity over their ‘wives’ which sometimes shielded them from arbitrary rape from other members within the camps where they resided.²⁷⁴ However this was not always the case and victims were often raped, beaten, tortured, or murdered while their ‘husband’ was out in the field.²⁷⁵ ‘Husbands’ also had sole control over pregnancies which resulted from rapes that occurred within the ‘marriage.’ This means that they had the only say on if their ‘wife’ was to either abort or give birth to the child.²⁷⁶ While physical violence was prevalent in almost all cases of forced marriage, those who refused demands or did not meet the needs of their ‘husbands’ ran the risk of exceptionally brutal beatings, mutilations and in some cases abandonment or murder.²⁷⁷ Women were discouraged from attempting to escape or leave their ‘husbands’ with fear of similar retribution. One witness stated, “I wanted to run away, to escape, but there was no way. If you were caught trying to escape, you were killed or put in a box.”²⁷⁸ Another testified that even though she was permitted to go shopping outside the camp in which she was held captive that she dare not try to escape as her ‘husband’ warned that if she tried “it would not be good for her.”²⁷⁹

Perpetrators of forced marriage also took other measures in order to deter attempted escape and to ensure compliance with the ‘marriage.’ One common means of doing so was through the branding of the victim’s chest with the insignia of the respective rebel movement in which they

²⁷² Human Rights Watch. *‘We’ll Kill You If You Cry’: Sexual Violence in the Sierra Leone Conflict.* (New York: Human Rights Watch, 2003). pp. 43-45.; O’Brien, Melanie. ““Don’t kill them, let’s choose them as wives’: the development of the crimes of forced marriage, sexual slavery and enforced prostitution in international criminal law.” *The International Journal of Human Rights.* Vol. 20 No.3 (2016) pp. 389-390.

²⁷³ Stout, Krista. “What’s in a Name? The Feasibility and Desirability of Naming Forced Marriage as a Separate Crime under International Humanitarian Law.” *Dalhousie Journal of Legal Studies.* Vol. 19 (2010). pp. 5-6.

²⁷⁴ *Ibid.*

²⁷⁵ The Sierra Leone Truth and Reconciliation Commission (TRC). *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission.* The Sierra Leone Truth and Reconciliation Commission, 2004. pp. 166.

²⁷⁶ Belair, Karine. “Unearthing the Customary Law Foundations of “Forced Marriages” During Sierra Leone’s Civil War: The Possible Impact of International Criminal Law on Customary Marriage and Women’s Rights in Post-Conflict Sierra Leone.” *Columbia Journal of International Law.* Vol. 15 No. 3 (2006). pp. 555.

²⁷⁷ *Ibid.* pp.556

²⁷⁸ Stout, Krista. “What’s in a Name? The Feasibility and Desirability of Naming Forced Marriage as a Separate Crime under International Humanitarian Law.” *Dalhousie Journal of Legal Studies.* Vol. 19 (2010). pp. 4.; Physicians for Human Rights. *War-related Sexual Violence in Sierra Leone: A Population-based Assessment: A Report.* Boston, MA: Physicians for Human Rights, 2002. pp. 70.

²⁷⁹ Jalloh, Charles. *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law.* Cambridge: Cambridge UP, 2013. pp. 241.

were being held captive (in this case the letters AFRC or RUF).²⁸⁰ These women even if they managed to escape were at risk of being killed by government forces if the brand was seen or if they were suspected of being a rebel.²⁸¹ Many cases in which victims overcame these issues and successfully managed to make their way back to their families resulted in them being labeled as a rebel supporter and ostracized by their society and even family.²⁸² As such, women within these camps experienced a level of despair and encouraged each other to not resist their ‘husband’ and that they should tolerate and endure the situation they had been placed in.²⁸³

While the facts supporting the act of forced marriage were deemed as sufficient in establishing that it could be considered as a crime against humanity the approach towards it by both the Trial Chamber and prosecutor were confused as to whether it should be considered as an act of sexual slavery or ‘other inhumane act.’ The prosecution formally asserted that forced marriage was distinct from sexual slavery, in that it forces the victim into the appearance of a marriage in which they are obligated to fulfill ‘conjugal duties’ associated with their role within the ‘marriage.’²⁸⁴ This often includes, but does not require, sexual violence be committed against the victim.²⁸⁵ Despite the prosecution’s assertion that sexual violence is not a necessity in forced marriage, Oosetrveld observes that when presenting evidence the prosecutor relied heavily on the sexual aspects of the crime, creating a level of uncertainty as to how it should be perceived.²⁸⁶ An example of such confusion can be taken from the prosecutions labeling of the crime. During proceedings the prosecution combined both charges of sexual slavery and forced marriage together under the heading of “Sexual Violence” in the indictment and later under the same title as “Sexual Slavery and/or Forced Marriage.”²⁸⁷ In addition, the prosecution’s allegation that those forced into these ‘marriages’ were required to fulfill ‘conjugal duties’ was also of concern as the phrase was,

²⁸⁰ Belair, Karine. “Unearthing the Customary Law Foundations of “Forced Marriages” During Sierra Leone’s Civil War: The Possible Impact of International Criminal Law on Customary Marriage and Women’s Rights in Post-Conflict Sierra Leone.” *Columbia Journal of International Law*. Vol. 15 No. 3 (2006). pp. 556.

²⁸¹ *Ibid.*

²⁸² *Ibid.*

²⁸³ *Ibid.*

²⁸⁴ *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu*. (Trial Judgment), Special Court for Sierra Leone (SCSL), SCSL-04-16-T, 20 June 2007. par. 701.

²⁸⁵ *Ibid.*

²⁸⁶ She infers from this that the Prosecutor felt that doing so would best illustrate the violations which the victims endured; however it may have also altered the trial chamber’s perception of the crime. See: Jalloh, Charles. *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law*. Cambridge: Cambridge UP, 2013. pp 246.

²⁸⁷ *Ibid.*

at least during the trial proceedings, considered as imprecisely defined and plain in meaning.²⁸⁸ This led to the question of the crime's adherence to the principle of *nullum crimen sine lege* as it was presented in a way that was vague, ill-defined and thus infringed on the defense's right to provide an adequate defense.²⁸⁹ While the Trial Chamber disagreed with the defense in this regard, the rationale used by the court in doing so was terse. As a result, confusion over the scope of 'conjugal duties' as well as the difference between forced marriage and other gender-based crimes included within the SCSL's statute became a prevailing factor over the course of the trial. The court needed to identify what forced marriage is and how to classify it under international criminal law.

In the resulting decision the Trial Chamber attempted to clarify a number of these issues. It first attempted to clarify the use of 'other inhumane acts' to cover acts of a sexual nature. It found that charging sexually based crimes under 'other inhumane acts' was impermissible as "... 'other inhumane acts' even if residual, must logically be restrictively interpreted as covering only acts of a non-sexual nature amounting to an affront on human dignity."²⁹⁰ As a result, evidence regarding sexual conduct was omitted from the court's consideration on the charges. Wharton asserts that this was a major flaw by the Trial Chamber in reasoning, as there is no indication in the provision on gender crimes that it should be interpreted as exhaustive.²⁹¹ This argument seems to be valid as 'other inhumane acts' are intended to be applied to crimes against humanity as a whole and, new or other novel acts which have not been explicitly enumerated within the statute, whether sexual or non-sexual in nature, as long as they meet the criteria set forth by the statute, should logically be adjudicable under the guise of 'other inhumane acts.'²⁹² This had a profound impact on the overall reasoning by the court in identifying both if forced marriage could be considered as meeting the requirements of the elements of the crime under 'other

²⁸⁸ Thompson, Sidney. "Forced Marriage at the Special Court for Sierra Leone: Questions of Jurisdiction, Legality, Specificity and Consistency." In: *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law*. Cambridge: Cambridge UP, 2013. pp. 123.

²⁸⁹ *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu*. (Trial Judgment), Special Court for Sierra Leone (SCSL), SCSL-04-16-T, 20 June 2007. par. 702.

²⁹⁰ *Ibid.* par. 697.; Note: the logic implemented by the Trial Chamber is based off jurisprudence from within the SCSL. See: *Prosecutor v. Norman et al.*, (Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence), SCSL-04-14-PT, 24 May 2005, par. 19.

²⁹¹ Wharton, Sara. "The Evolution of International Criminal Law: Prosecuting 'New' Crimes before the Special Court for Sierra Leone." *International Law Review*. Vol. 11 (2011). pp. 230-231.

²⁹² Note: This argument runs parallel to the legal rhetoric which was used by the Appeals Chamber which will be discussed below. It is in this author's opinion that gender crimes should be permissible under 'other inhumane acts.' See: *Ibid.* pp. 228-229.

inhumane acts’ and also whether or not it could be distinguished from sexual slavery. The stance of the trial chamber over these two aspects can be best understood in their statement:

“The Prosecution’s evidence in the present case does not point to even one instance of a woman or girl having had a bogus marriage forced upon her in circumstances which did not amount to sexual slavery. Not one of the victims of sexual slavery gave evidence that the mere fact that a rebel had declared her to be his wife had caused her any particular trauma, whether physical or mental. Moreover, in the opinion of the Trial Chamber, had there been such evidence, it would not by itself have amounted to a crime against humanity, since it would not have been of similar gravity to the acts referred to in Article 2(a) to (h) of the Statute.”²⁹³

This highlights the Trial Chamber’s belief that the conferral of the status of ‘wife’ amounted to an attempt by the accused to assert ownership over the victim.²⁹⁴ While the ‘wife’ was forced into a conjugal relationship with the accused there was no sense of reciprocation (fulfillment of conjugal duties) by the ‘husband.’ As such, the mutuality involved in marriage had not existed and the victim was only purportedly a ‘wife.’ In other words, the use of forced marriage had been deemed a misnomer and could only be identified as amounting to the crime of sexual slavery.

The above reasoning by the Trial Chamber in the AFRC judgment has incurred a great deal of criticism for being misguided and overly narrow. Justice Doherty in her dissenting opinion noted that the judgment neglected to take into consideration “...the mental and physical trauma of being forced unwillingly into a marital arrangement, the stigma associated with being labeled as a rebel ‘wife’ and the corresponding rejection by the community.”²⁹⁵ Indeed the Trial Chamber seemed to be subsumed with the sexual nature of the crime at hand and neglected to take into consideration of the framing of forced marriage, with instead preferring to analyze the crime by presupposing it as an act of sexual slavery instead of as an ‘other inhumane act.’ It is because of this approach that the SCSL was unable to identify the other aspects of the crime, such as the social and psychological

²⁹³ *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu.* (Trial Judgment), Special Court for Sierra Leone (SCSL), SCSL-04-16-T, 20 June 2007. par. 710.

²⁹⁴ *Ibid.* par. 711.

²⁹⁵ *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu.* (Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8(‘Forced Marriages’)), Special Court for Sierra Leone (SCSL), SCSL-04-16-T, 20 June 2007. par. 42.

effect the conferral of the status of wife had on the victims and only focused on the physical trauma they had sustained.

The Appeals Chamber of the SCSL in the AFRC as well as the Trial Chamber in the RUF touched on a great deal of these issues in an attempt to clarify the definition of conjugal duties and the effects the conferral of the status of wife had on victims. Three main points were touched upon over the two decisions. The first was whether or not the Trial Chamber erred in its interpretation on the exclusion of acts of sexual violence within ‘other inhumane acts.’ The Chamber reasoned that, “[h]owever much care [was] taken in establishing a list of all the various forms of infliction, one would never be able to catch up with the imagination of future torturers who wish to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes.”²⁹⁶ As such, it was found that there exists no evidence to assume that sexual based acts could not be included within ‘other inhumane acts’ and that the crime of forced marriage can be considered as crime containing sexual elements. However, it should be clarified that forced marriage should not be perceived as a sexually dominated crime. Rather acts of a sexual nature including rape and sexual violence may accompany the crime itself, but it should be considered as predominantly non-sexual.²⁹⁷ This follows with not just sexual but also non-sexual acts which may be associated with the crime of forced marriage such as physical violence, abduction, enslavement and other acts. These are to be perceived as elements which are not necessarily required of the crime, but rather evidence of the lack of the victims consent.²⁹⁸ The main aspects of the crime are considered to be the non-consensual conferral of a spousal title on an individual through the use of force, threat of force or coercion in addition to the conjugal duties imposed upon them.²⁹⁹ If forced marriage is viewed in this light it becomes much clearer as to why it should be classified as a crime under ‘other inhumane acts.’

²⁹⁶ *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu.* (Appeals Judgment), Special Court for Sierra Leone (SCSL), SCSL-2004-16-A, 22 February 2008. par. 186.

²⁹⁷ Thompson, Sidney. “Forced Marriage at the Special Court for Sierra Leone: Questions of Jurisdiction, Legality, Specificity and Consistency.” in: *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law.* Cambridge: Cambridge UP, 2013. pp. 231-232.

²⁹⁸ *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu.* (Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8(‘Forced Marriages’)), Special Court for Sierra Leone (SCSL), SCSL-04-16-T, 20 June 2007. par.70.

²⁹⁹ Thompson, Sidney. “Forced Marriage at the Special Court for Sierra Leone: Questions of Jurisdiction, Legality, Specificity and Consistency.” in: *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law.* Cambridge: Cambridge UP, 2013. pp. 231-232.

While the crime may have overlapping elements with sexual slavery such as deprivation of liberty and non-consensual sexual acts; the psychological, mental and social trauma sustained as a result of these ‘marriages’ and their conjugal duties is much different. In the context of Sierra Leone individuals labeled as a ‘wife’ of rebel forces were viewed as collaborating with them.³⁰⁰ In many cases victims, if they were able to escape had nowhere to go as they had been ostracized by their own community. Those who did return to their community encountered threats, beatings and the fear of murder from their own neighbors. In addition, the conferral of the status of ‘marriage’ hindered and even prevented most from entering into formal, internationally recognized marriages in the future. This has been acknowledged as due to their association with rebel forces and societal norms which discouraged remarriage in their community. Moreover, the physiological manipulation involved in the conferral of the status of ‘wife’ may prohibit the victim from separating with their ‘spouse’ even after the cessation of hostilities.³⁰¹ Physicians for Human Rights reports that due to the prolonged nature of the act, some women accept the physical and mental violence associated with the marriage and, instead of leaving, opt to continue to reside with their ‘husband’ afterwards. This may be due to the fear of physical retribution, but also has been attributed to the social stigma attached to the crime and inability of the victims to otherwise provide for themselves.³⁰² It is an accumulation of all of the above which has led to the determination that not only is forced marriage distinct from sexual slavery, but also showed the signs of meeting the requirements of ‘other inhumane acts.’ The resulting trauma victims incurred as a result of its commission, coupled with the similarities the crime held with that of sexual slavery, rape and enslavement was deemed sufficient to determine that *at least* a similar degree of injustice resulted from its commission. In addition, it was found to be of similar character to other crimes against humanity listed within the Statute.

3.3.3. *Defining Forced Marriage*

While it has been identified by the SCSL Appeals Chamber in the AFRC judgment that forced marriage is significantly different from that of sexual slavery, the decision did not provide

³⁰⁰ Oosterveld, Valerie. “Evaluating the Special Court for Sierra Leone’s Gender Jurisprudence.” in: *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law*. Cambridge: Cambridge UP, 2013. pp. 250.

³⁰¹ Physicians for Human Rights. *War-related Sexual Violence in Sierra Leone: A Population-based Assessment: A Report*. Boston, MA: Physicians for Human Rights, 2002. pp.76-77.

³⁰² *Ibid.*

a substantive definition of the crime for which future prosecutions could occur.³⁰³ This has led to a great deal of debate as to how the crime should be approached in the case of future prosecutions. Some assert that the single act of conferring the status of marriage without consent of an individual and as a part of an attack on a civilian population should be sufficient in meeting the requirements of the crime.³⁰⁴ Others take a more conservative approach, adopting a similar position to that of Justice Doherty. That is, forced marriage is a cumulative crime which is defined from the combination of conferral of the status of marriage and forced conjugal duties.³⁰⁵ This part will focus on the latter approach. It will show that from jurisprudence at the SCSL and scholarly writings the crime of forced marriage can be broken down in to three core aspects.

First, and most apparent of these is that the perpetrator forced the status of marriage on an individual without their full and willing consent through the use of force or coercion. Goodfellow makes claims in a similar vein to that of the *Taylor* Trial Chamber, asserting that doing so has no legal implications and, therefore, should only be interpreted as a means of exerting ownership over the victim.³⁰⁶ This is a valid position to take and has been done in the past, for example by the Sierra Leone Truth and Reconciliation Commission.³⁰⁷ However, it overlooks the long term psychological and social impacts that the imposition of the title of ‘wife’ has on the victim. It does not simply assert ownership, but also limits the victim’s future ability in finding another spouse, reinserting themselves within their community, sustaining themselves, and also puts them at risk of physical and physiological violence from others.³⁰⁸ Therefore, the conferral of the status of ‘marriage’ should be seen as much more than the assertion of ownership over a victim, but as a denial of the universal right to decide to whom, when, where and how an individual will engage in matrimonial relations. It removes the individual’s right to choose what is most important to them in terms of furthering social, religious, political and/or economic gain as would result from

³⁰³ Toy-Cronin, Bridgette A. “What is Forced Marriage? Towards a Definition of Forced marriage as a Crime Against Humanity.” *Columbia Journal of International Law*. Vol. 19 No. 2 (2010). pp. 575.

³⁰⁴ *Ibid.*

³⁰⁵ See Jain, Neha. “Forced Marriage as a Crime against Humanity: Problems of Definition and Prosecution.” *Journal of International Criminal Justice*. Vol. 6 (2008).

³⁰⁶ Goodfellow, Nicholas Azadi. “The Miscategorization of ‘Forced Marriage’ as a Crime against Humanity by the Special Court for Sierra Leone.” *International Criminal Law Review*. Vol. 11 (2011). pp. 858-860.

³⁰⁷ *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*. pp 140.

³⁰⁸ *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu*. (Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8(‘Forced Marriages’)), Special Court for Sierra Leone (SCSL), SCSL-04-16-T, 20 June 2007. par 47-51.

marriage. Instead of focusing on the legality of the ‘marriage’ the victim has experienced, it would be more prudent to examine the denial of fundamental rights which occur as a result of the act.

Second, there exists a level of exclusivity between the victim and the perpetrator of the forced marriage. Jain uses this as an example of how forced marriage is distinct from sexual slavery.³⁰⁹ It is indeed true that a great deal of instances including multiple perpetrators, such as the use of comfort women by Japanese soldiers during WWII, have been recognized as sexual slavery in the past. But from the examination of sexual slavery above it can manifest itself similar to that of rape, meaning that just as rapes including multiple perpetrators (gang rapes) are subsumed under the categorization of rape in international criminal law, sexual slavery can still exist in instances of single or multiple perpetrators as long as it is established that the victim has been placed in slavery like circumstances. The core difference in exclusivity in the case of forced marriage however lies within the forced recognition of a spousal relationship between the victim and the ‘husband.’

Third, the perpetrator causes the victim to engage in acts which are similar to that which arise from a marriage relationship. These can be considered as the conjugal duties which the prosecutor in AFRC had addressed. Toy-Cronin has warned that by defining conjugal duties in this way it makes it gender biased.³¹⁰ By this she means, firstly, by detailing conjugal duties to cooking, cleaning, child bearing, etc. it implies that, under international law, women are expected to fulfill these roles within a marriage relationship. Secondly, by defining conjugal duties in such a way it also infers that women are the only victims which can occur as a result of forced marriage.³¹¹ This position has its merits, however just as with the ICTY’s decision on the scope of sexual slavery and pecuniary advantages; one should not interpret the scope of conjugal duties to encompass only those acts which have been listed. The scope of conjugal duties should be determined on a case by case basis. What is the norm for a marriage relationship in one society may differ in another and the term should be broad enough to reflect that. Taking these points and

³⁰⁹ Jain, Neha. “Forced Marriage as a Crime against Humanity: Problems of Definition and Prosecution.” *Journal of International Criminal Justice*. Vol. 6 (2008). pp.1021.

³¹⁰ Toy-Cronin, Bridgette A. “What is Forced Marriage? Towards a Definition of Forced marriage as a Crime Against Humanity.” *Columbia Journal of International Law*. Vol. 19 No. 2 (2010). pp. 579-581

³¹¹ *Ibid.*

the decisions by the SCSL in the AFRC and RUF cases into consideration, forced marriage should be considered as:

- The conduct was committed as a part of a widespread or systematic attack directed against a civilian population.
- The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.³¹²
- The perpetrator conferred through words or other conduct a spousal title on one or more persons, by force or coercion, for example through fear of violence, duress, detention, psychological or physical abuse against the victim, or by utilizing coercive circumstances or the incapacity of the victim to provide genuine consent;
- the perpetrator forced the victim to engage in acts which usually arise from a spousal relationship including; the showing of intimacy, domestic labor, raising a family, and any other conjugal duties.³¹³

The above has been an attempt to show the difficulties that the prosecutor and Trial Chamber in SCSL had in classifying the sexual basis of the act of forced marriage. However, similar to what was found by the Appeals Chamber in the AFRC appeals judgment there exists no limiting clause that crimes with sexual conduct cannot be included as under ‘other inhumane acts.’ Moreover, classifying forced marriage as a solely sexual crime would not only undermine the cumulative injustices done to its victims, it would also narrow the scope of the act. It is thus not the sexual acts committed as a result of forced marriage nor the act of forcibly imposing marriage upon an individual or the conjugal duties associated with that title that should be singled out as defining the crime. Rather, forced marriage should be considered as a crime which defines itself

³¹² The first two parts of this definition are taken from the *Elements of Crimes*. Art. 7(1)(k).

³¹³ This definition is based off of *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu*. (Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8(‘Forced Marriages’)), Special Court for Sierra Leone (SCSL), SCSL-04-16-T, 20 June 2007. Par. 45.; Jain, Neha. “Forced Marriage as a Crime against Humanity: Problems of Definition and Prosecution.” *Journal of International Criminal Justice*. Vol. 6 (2008). pp. 1031.

from the cumulative aspects of each of the aforementioned acts. It is this that produces a negative stigma upon the victim and harbors potential lifelong trauma.

3.4. Forced Marriage under the Rome Statute

This section seeks to examine forced marriage as it has been discussed and its applicability to the Rome Statute of the ICC. Due to the controversies discussed in the last section over categorizing forced marriage as an ‘other inhumane act’ or as an act of sexual slavery at the SCSL and within scholarship, this section will be divided into three parts. The first will examine if forced marriage can be dealt with as a crime under the Rome Statute. This will take place through an examination of forced marriage as was defined above with that of sexual slavery in the Rome Statute. It will show that, although the crime can be subsumed under the heading of sexual slavery, there are aspects of the crime which are not fully addressed through labeling it as such and suggest that it may be more beneficial to opt for categorization as its own unique crime under ‘other inhumane acts.’ The second part will examine the ability to classify forced marriage as an ‘other inhumane act.’ It will show that while there is jurisprudence suggesting that forced marriage can be subsumed under sexual slavery, there is enough evidence and judicial recognition that the crime not only meets the requirements set forth by the Elements of Crimes, but it also incurs sufficient distinctions from that of sexual slavery to warrant its classification as an ‘other inhumane act.’ The third and final part will examine the potential issues of prosecuting the crime of forced marriage as an ‘other inhumane act’ in relation to the principle of *nullum crimen sine lege*. It will show that not only is the category of ‘other inhumane acts’ significantly precise, but also that the act of forced marriage itself is well enough established in international law and as such in adherence with this principle.

3.4.1. Forced Marriage as Sexual Slavery

Forced marriage is not a crime which has been entirely unacknowledged by the ICC. The prosecutor has identified it as a “global curse that weighs heavily on our collective consciousness” and that the Office of the Prosecutor is committed and obligated to “employ the full force of the law to investigate and punish the worst perpetrators of these crimes and deter their commission in the future.”³¹⁴ Furthermore, it has been a prevailing issue within a number of situations in which

³¹⁴ Office of the Prosecutor. *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on International Day of the Girl Child* International Criminal Court. (10 October 2014).; Note: these crimes are used in reference to both the crime of forced marriage and use of child soldiers in the statement. See also: Office of the

the Court has or is currently investigating, including the situation in the DRC³¹⁵ and Uganda.³¹⁶ However, its approach to this crime, similar to that in the SCSL, has varied from being labeled as a crime of sexual slavery in the situation of the DRC and that of an ‘other inhumane act’ in the situation in Uganda. In starting with an analysis on how to categorize forced marriage under the Rome Statute it is pertinent to examine how it could be classified as a crime of sexual slavery.

As was discussed in the section on sexual slavery, the Rome Statute Elements of Crimes provides for two key aspects of *actus reus* in establishing the crime.³¹⁷ Machteld Boot claims that while no explicit mention is made to forced marriage within the Elements of Crimes it was devised to encompass this act, and it should be perceived as an act of slavery. As such, it should be prosecuted for under the categorization of sexual slavery.³¹⁸ However, this assertion runs contrary to the preparatory commission’s work in which there was general desire by the States parties that any instances of marriage, whether they be internationally legally recognized or not, be omitted from the definition of sexual slavery in order to safeguard against expansionist interpretations of the crime by western judges which may inhibit cultural practices.³¹⁹ The Elements of Crimes defines enslavement as a person exercising “any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.”³²⁰ Similar to what was discussed in the section on sexual slavery the Court has explicitly recognized in *Katanga* that pecuniary gain is not a necessary condition needed to be met in determining the existence of slavery or slavery like conditions.³²¹ However, the issue of forced marriage and its constitutive elements, those being the conferral of the status of marriage and forced conjugal duties are

Prosecutor. “*Gender Justice and the ICC: Progress and Reflections*” *International Conference: 10 Years Review of the ICC. Justice for All? The International Criminal Court*. International Criminal Court. (14 February 2012).

³¹⁵ Tan, Joe. Sexual Violence Against Children on the Battlefield as a Crime of Using Child Soldiers: Square Pegs in Round Holes and Missed Opportunities in *Lubanga Yearbook of International Humanitarian Law, Volume 15; Volume 2012* pp. 123.

³¹⁶ *Situation in Uganda*. (The Prosecutor v. Dominic Ongwen.) (Document Containing the Charges) (22 December 2015) ICC Case No. ICC- 02/04-01/15. Par. 134.

³¹⁷ *Elements of Crimes* Art. 7(1)(g)-2.

³¹⁸ Triffterer, Otto. *Commentary on the Rome Statute of the International Criminal Court: observers’ notes, article by article*. 2nd ed. Baden-Baden: Nomos, 2008. pp 211.

³¹⁹ Lee, Roy S. *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*. Transnational Publishers. 2001. pp. 69.

³²⁰ *Rome Statute Elements of Crimes*. Art. 7(1)(g)-2.

³²¹ *Situation in the Democratic Republic of the Congo*. (Prosecutor v. Katanga Germain Katanga) (Judgment Pursuant to Article 74 of the Statute) (7 March. 2014) ICC Case No. ICC-01/04-01/07. Par. 976.

textually not addressed either in the Statute or in the Elements of Crimes. In order to identify if forced marriage should be interpreted to be subsumed under the crime of “sexual slavery” it would follow that, in accordance with Art. 21 of the Rome Statute, the ICC would need to look beyond the textual aspects of the Rome Statute and its Elements of Crimes by consulting other relevant treaties, principles and rules of international law.³²²

The Elements of Crimes provides in footnote 11 and 18 that deprivation of liberty may “include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956.”³²³ Thus, in identifying if the non-consensual conferral of the status of marriage can be considered as an act reducing an individual to servile status, and thus meet slavery like conditions, the 1956 Supplementary Convention on Slavery should be consulted. In it, marriage is addressed but in a limited sense. It identifies the condition of reducing an individual to a servile status or slavery like conditions can arise from; debt bondage, serfdom, exploitation of child labour, and other practices.³²⁴ The first of these other practices is identified as “A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group.”³²⁵ In this case, the provision explicitly mentions pecuniary advantages to the individual’s family. This is most likely an attempt to classify the practice of bride wealth. However, as was established above, it seems to be that regardless of whether pecuniary advantages take place, international jurisprudence recognizes that this only serves as evidence that slavery like conditions exist. Other non-commercial means can still take place to limit the autonomy of an individual resulting in slavery like conditions. As such, the only limiting aspect in this provision would be that it requires non-consensual transferal of a woman to another individual or group for the purpose of marriage.³²⁶ In the second provision “The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise” follows the same tone by requiring that some action is taken by a family member without consent of the woman to another

³²² UN General Assembly. *Rome Statute of the International Criminal Court*. (17 July 1998) (last amended 2010). Art. 21.

³²³ *Rome Statute Elements of Crimes*. footnote 11 and 18.

³²⁴ United Nations. *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 226 U.N.T.S. 3, entered into force April 30, 1957. Art. 1.

³²⁵ *Ibid.* Art. 1(c)(i).

³²⁶ *Ibid.* Art. (1)(c)(ii).

individual. The third and final provision states, “A woman on the death of her husband is liable to be inherited by another person.”³²⁷ This is undoubtedly a reference to the practice of bride inheritance. None of these provisions address instances in which the individual is forcibly taken from their family (often without the family’s knowledge) and forced to ‘marry’ an individual. It follows that while marriage is addressed within the 1956 Supplementary Convention on Slavery, it does not explicitly address instances of marriage as far as forced marriages are concerned and thus does not aid in identifying if the non-consensual conferral of the status of ‘marriage’ alone amounts to slavery like conditions. Instead, if the act of non-consensual ‘marriage’ is to be considered as enslavement then one would need to adopt the SCSL’s stance in the AFRC Trial Chamber decision. This was reiterated at the ICC in *Katanga* when the Trial Chamber stated that doing so shows the perpetrator “harbored the intention to treat the victims as if they owned them and obtain sexual favors from them.”³²⁸ This reasoning would fall in line similarly with that of the AFRC trial chamber and undermines the impact of this act.

In addition to the conferral of the status of ‘marriage’ it is also necessary to identify whether conjugal duties are covered under these articles. As was described above, the Elements of Crimes identifies deprivation of liberty as including; exacting forced labour or otherwise reducing a person to a servile status. It is also understood that the conduct described in this element includes “trafficking of persons, in particular women and children.”³²⁹ Some of the physical aspects of conjugal duties have been identified by the prosecutor as including acts of domestic servitude.³³⁰ This position was adopted by the Court in *Katanga* in which it found that household chores could be considered as acts of forced labour.³³¹ Moreover, other acts which could be considered as conjugal duties are also key elements of sexual slavery such as sexual conduct. However, while similarities lie here there is no indication of other psychological elements inherent within conjugal

³²⁷ United Nations. *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 226 U.N.T.S. 3, entered into force April 30, 1957. Art. (1)(c)(iii).

³²⁸ *Situation in the Democratic Republic of the Congo*. (Prosecutor v. Katanga Germain Katanga) (Judgment Pursuant to Article 74 of the Statute) (7 March. 2014) ICC Case No. ICC-01/04-01/07. par. 1001.

³²⁹ *Rome Statute Elements of Crimes*. footnote 11 and 18.

³³⁰ *Situation in Uganda*. (The Prosecutor v. Dominic Ongwen.) (Document Containing the Charges) (22 December 2015) ICC Case No. ICC- 02/04-01/15. par. 129-130.

³³¹ Note: the trial chamber only recognized that these may be additional aspects of those involved in forced marriage, but as the charges in the case were for that of sexual slavery the chamber focused almost wholly on the sexual aspects of the crime. See: *Situation in the Democratic Republic of the Congo*. (Prosecutor v. Katanga Germain Katanga) (Judgment Pursuant to Article 74 of the Statute) (7 March. 2014) ICC Case No. ICC-01/04-01/07. par. 958 and 1652.

duties as expressed within forced marriage. Indeed, this seems to have been intentional by the drafters of the Statute as there was a desire that forced labour and right to ownership “not include rights, duties and obligations incident to marriage.”³³² As such, the implications of subsuming the role of a ‘wife’ and providing levels of intimacy such as affection, or other culturally accepted duties of a spouse to the perpetrator are not addressed. Moreover, while the Court’s decision in *Katanga* identifies some aspects of forced marriage, it only does so through the scope of sexual slavery, similar to that of the Trial Chamber in the AFRC judgment.

This examination of forced marriage before the ICC has shown that it is capable of adjudicating upon the crime under the categorization of sexual slavery and there is jurisprudence to support its classification as such. However, the position taken by the Court only addresses the crime in a limited sense and does not encompass the entirety of the injustices done to the victims of such a crime. Doing so would draw similarities to the prosecution of rape as an act of torture. While the act can be adjudicated as such, it undermines the levels of injustices done to the victims, as well as the levels of long term physical and psychological damage incurred. Instead, it should be perceived that sexual slavery can be an additional factor accompanying forced marriage. In order to encompass the scope of the crime in its entirety it should be adjudicated upon as a separate act under ‘other inhumane acts.’

3.4.2. *Forced Marriage as Forced Pregnancy*

Forced Marriage also shows degrees of similarities and distinguishes itself from other gender-based crimes in the Rome Statute. One such example can be derived from the crime of forced pregnancy. Forced pregnancy is defined within the Elements of Crimes as, “The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.”³³³ The crime can be separated into two key elements. The first part “The perpetrator confined one or more women forcibly made pregnant...” is aimed at identifying the *actus reus* of the crime. There are two points to take into consideration when examining this part. The first is that it does not limit the crime solely to that of the individuals who are responsible for impregnating the victim. Indeed,

³³² Preparatory Commission for the International Criminal Court. *Proposal submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic and United Arab Emirates concerning the elements of crimes against humanity*. 3 December 1999. PCNICC/1999/WGEC/DP.39.

³³³ *Elements of Crimes* Art. 7(1)(g)-4.

it can and should be interpreted to encompass those individuals who forcefully confined and required the impregnated individual to see the pregnancy through.³³⁴ The term ‘confinement’ here should be interpreted broadly so as to encompass any physical deprivation of liberty the victim incurs, regardless of duration.³³⁵ This ensures that distinction is made between pregnancy which results from the crime of rape and instances when an individual has no control over whether or not to keep or abort a baby as a result of rape.³³⁶ Forced marriage, as was defined in this chapter, follows similar lines to this in two areas. The first is that the victim, when impregnated as a result of the ‘marriage’ usually does not have control over whether or not to see the pregnancy through or abort the baby.³³⁷ The decision is wholly within the control of another individual. The second is that the individual responsible for the ‘marriage’ is not limited to the victim’s ‘spouse.’ It may encompass other individuals who may have forced the ‘marriage’ onto the victim.³³⁸ This may extend to that of the ‘spouse’ but may also be used to cover cases in which rebel leaders or other individuals in a place of authority designated the ‘marriage,’ or when ‘marriages’ are arranged without consent through governmental policy, such as that which occurred within the Khmer Rouge Regime in Cambodia. In such cases as this it becomes dubious as to whether or not the ‘spouse’ of the victim is indeed the perpetrator of the ‘marriage,’ as organizational or governmental policy requires both of them to fulfill expected conjugal duties of those involved in the ‘marriage.’³³⁹ This is where the two crimes also experience a degree of divergence from one another. Forced pregnancy is identified as a crime in which “...one or more women...” are identified as possible victims of the crime. Taking from the above example of the Khmer Rouge regime or from the Lord’s Resistance Army (LRA) in Uganda, one can see that forced marriage does not always include the willing consent of both ‘spouses.’ Indeed, it should be perceived that this crime is gender neutral, including both female and male victims. As such, cases in which male

³³⁴ Fischer, Horst, Claus Kress, and Sascha Rolf Luder. *International and National Prosecutions of Crimes under International Law: Current Developments*. Berlin: Berlin Verlag, 2001. pp. 85.

³³⁵ Brouwer, Anne-Marie De. *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and ICTR*. Antwerpen: Intersentia, 2005. pp. 145.

³³⁶ Fischer, Horst, Claus Kress, and Sascha Rolf Luder. *International and National Prosecutions of Crimes under International Law: Current Developments*. Berlin: Berlin Verlag, 2001. pp. 85.

³³⁷ Belair, Karine. “Unearthing the Customary Law Foundations of "Forced Marriages" During Sierra Leone's Civil War: The Possible Impact of International Criminal Law on Customary Marriage and Women's Rights in Post-Conflict Sierra Leone.” *Columbia Journal of International Law*. Vol. 15 No. 3 (2006). pp. 555.

³³⁸ Carlson, Kristopher and Mazurana, Dyan. *Forced Marriage within the Lord's Resistance Army, Uganda*. Feinstein International Center; Tufts University, May 2008. pp. 18-19.

³³⁹ *Ibid.* pp. 20-21.

victims are forced to rape, impregnate, support and see the pregnancy through cannot be perceived as victims through the application of forced pregnancy.

In addition to the *actus reus* requirement of forced pregnancy it also consists of an additional *mens rea* requirement separate from that which is included within the *chapeau* of crimes against humanity. That is, that commission of the crime occurred “with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.”³⁴⁰ This part is wholly absent from the established definition of forced marriage made above. Indeed, forced marriage has often occurred within a single or specific ethnic group. In Sierra Leone, ethnicity has not been usually regarded as an influential factor over the conflict or the sexual violence which occurred during it. With the LRA, there was no discrimination as to the ethnicity of the victims. Girls from Acholi, Langi and other tribes within Uganda were systematically abducted and designated as wives to members of the rebel group.³⁴¹ Within Cambodia the policy was enacted to apply to the entirety of the population with the goal of raising the population to 20 million.³⁴² As such, if one were to interpret overlap between forced marriage and forced pregnancy in this instance “affecting the ethnic composition of any population” would have to be so broadly interpreted to include any act of impregnation which had an effect on the ethnic composition of a group, either positively or negatively. Such an interpretation would, however, nullify the necessity for the inclusion of such a clause within the Elements of Crimes. One should then interpret it as akin to the special mental element similar to that included within the crime of genocide.³⁴³ Consequently, one can determine that there is no significant overlap between the two crimes in this regard. Forced marriage does not include the *mens rea* of affecting the ethnic composition of a given population and is not a requirement or a means of commission of the crime which has taken place to date.

However, forced pregnancy also includes a separate potential *mens rea* for the crime. It may also be proven to have taken place with the intention of committing any other grave violations

³⁴⁰ *Elements of Crimes*. Art. 7(1)(g)-4

³⁴¹ Note: It was reported that Acholi girls were treated more favorably over girls from other tribes. See: Carlson, Kristopher and Mazurana, Dyan. *Forced Marriage within the Lord's Resistance Army, Uganda*. Feinstein International Center; Tufts University, May 2008. pp. 22-23.

³⁴² Extraordinary Chambers in the Courts of Cambodia (ECCC). *Forced Marriage (Case 002)*. 2014.

³⁴³ Brouwer, Anne-Marie De. *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and ICTR*. Antwerpen: Intersentia, 2005. pp. 146.

of international law. This would seemingly cover other crimes which may have been committed with the intent of forcefully impregnating the victim. Rape and sexual slavery are all acts which are clearly in grave violation of international law and as such would seem to be sufficient in proving the requisite *mens rea* of the crime. However, this interpretation lacks both textual and historical insight into the clause. The clause was inserted within the Elements of Crimes in order to cover instances when women were impregnated with the intent to use their fetuses for medical experimentation, such as what occurred during WWII.³⁴⁴ This means that forced pregnancy should be understood as a means to commit other grave violations of international law. However, and once again, forced marriage does not always amount to this. Instead, intent may include the commission of other grave violations of international law such as rape, forced pregnancy, sexual slavery, etc. but these are not required elements of the crime. Forced pregnancy is not absolute in terms of conjugal duties. In case such as was observed in Sierra Leone, when elderly are forcefully ‘married,’ pregnancy is neither the goal nor the condition upon which the crime takes place.³⁴⁵ Instead, the victim is required to fulfill other roles expected of a spouse of their age within the society which they reside, such as cooking, cleaning, sexual services and emotional support. Moreover, as what has taken place within the LRA in Uganda, younger victims who are ‘married’ to each other are not only discouraged, but in some cases prohibited from sexual conduct between each other until they have reached a certain age.³⁴⁶ The victim may be released or escape captivity before they reach such an age when sexual conduct becomes permissible. Some ‘spouses’ may also simply not be used for purposes of pregnancy, but rather to ensure the physical and emotional stability of their ‘spouse’ and others within the group which they are being held. This indicates that one should perceive that forced marriage, while it includes some overlap with forced pregnancy, differs enough in its *actus reus* and *mens rea* to be considered as a distinct crime in its own right.

³⁴⁴ Martinez, Katherine Hall and Bedont, Barbara. “Ending Impunity for Gender Crimes under the International Criminal Court.” *The Brown Journal of World Affairs*, Vol. 6(1). 1999. pp. 9.

³⁴⁵ Human Rights Watch. *‘We’ll Kill You If You Cry’: Sexual Violence in the Sierra Leone Conflict*. (New York: Human Rights Watch, 2003). pp.38.

³⁴⁶ Carlson, Kristopher and Mazurana, Dyan. *Forced Marriage within the Lord’s Resistance Army, Uganda*. Feinstein International Center; Tufts University, May 2008. pp. 22-23.

3.4.3. *Forced Marriage as an ‘Other Inhumane Act’*

Before delving into the next part, a caveat should be brought to the reader’s attention. The Rome Statute includes under crimes against humanity in Art. 7(1)(g) on gender crimes the crime of, “any other acts of sexual violence of comparable gravity.”³⁴⁷ This is meant to serve as a residual clause for other gender based crimes which are not included within the Rome Statute. Some may think it prudent to include this within the analysis. However, this author has decided not to include it for the following reason. In accordance with the Elements of Crimes, in order for an act to be encompassed by this clause the perpetrator must have “... committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.”³⁴⁸ The emphasis here on “act of a sexual nature” means that acts which some may associate as gender based crimes may not necessarily always fall within this category. One example can be taken from the ICC Pre-Trial Chamber’s decision in *Prosecutor v. Francis Kirimi Muthaura, Uhuru Mugai Kenyatta and Muhammed Hussein Ali* regarding genital mutilation.³⁴⁹ It found that “... not every act of violence which targets parts of the body commonly associated with sexuality should be considered as an act of sexual violence” and the sexual nature of an act must be firmly established.³⁵⁰ The definition included within the Elements of Crimes and the aforementioned Pre-Trial Chamber’s decision serves to highlight why forced marriage will not be analyzed under the residual clause within Art. 7(1)(g). As the previous sections have already established that forced marriage should not be conceived primarily as an act of sexual violence but rather as a multifaceted crime which may include, but not necessarily, acts of sexual violence; this analysis would not benefit from examining it.

While the crime of forced marriage can be included under the auspice of sexual slavery within the Rome Statute, doing so undermines the complexity of the crime and the level of injustice

³⁴⁷ *Rome Statute* Art. 7(1)(g).

³⁴⁸ *Elements of Crimes* Art. 7(1)(g)-6 par. 1.

³⁴⁹ Note: the phrase mutilation of genitalia in this case should not be confused with female genital mutilation. In the aforementioned case the victims were males who endured forced circumcision or penile amputation. See: *Situation in the Republic of Kenya* (Prosecutor v. William Samoei Ruto et al.) (Decision on the Confirmation of Charges Pursuant to Article 61(a) and (b) of the Rome Statute) (23 January 2012). ICC-01/09-01/11. par. 260-266.

³⁵⁰ *Ibid.* par. 265.

done to the victim. As such it would be more prudent to instead opt for prosecuting the crime under ‘other inhumane acts.’ Nevertheless, similar to the reasoning for adding sexual slavery as a crime separate from enslavement, forced marriage shares a number of similarities with sexual slavery but contains different elements, both in the effects it places upon its victims and the substantive requirements it has for them. This is why in order to determine the applicability of forced marriage as an ‘other inhumane act’ this part will examine two aspects of the crime. The first will be its requirements pursuant to the Rome Statute. This means it will seek to establish that forced marriage “inflicts great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act” and that it is of similar character to one or more of the acts listed as criminal under Art. 7 on crimes against humanity.³⁵¹ In doing so, it will examine the circumstances of the victim as well as the effects the act has on the victim in light of the context in which these acts have been committed in the past.³⁵² This will be achieved through at first examination of the Rome Statute and its Elements of Crimes, then with any other applicable treaties, international jurisprudence and national laws. Doing so should aid in establishing that forced marriage can be included as a distinct crime under ‘other inhumane acts’ as it not only meets, but exceeds the requirements of the Rome Statute as well as incurs onto the victim other physiological effects and long lasting harm which run in violation of recognized international human rights law.

The first aspect in identifying forced marriage’s inclusion as an ‘other inhumane act’ is showing that it inflicts great suffering on its victims. Identifying this may be difficult as suffering is a subjective element which can only be determined after a crime’s commission. However, it was established in *Kupreskic* that the best way to achieve this is through *ejusdem generis* standards;

³⁵¹ Note: the *mens rea* of the elements of ‘other inhumane acts’ (paragraphs 3 and 5) are subjective and have thus been omitted as they do not aid in establishing if forced marriage can be classified as a crime under Art 7(1)(k). This applies similarly to paragraph 4 as there would be no benefit to the analysis from its interpretation. The elements of crimes lists le following: 1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act. 2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute. 3. The perpetrator was aware of the factual circumstances that established the character of the act. 4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. 5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population. *Rome Statute Elements of Crimes* Art(1)(k).

³⁵² This method is based off of the ruling in *Vasiljevic* as to how to identify if a crime falls under the ‘other inhumane acts’ category. Its use is not meant to supersede that of two Elements of Crimes, but rather to supplement it in order to highlight the additional aspects of the crime beyond that of others already included within crimes against humanity. Its use should aid in understanding how sexual slavery and forced marriage differ from one another. See: *Prosecutor V. Miltar Vasiljevic*. (Judgment), IT-98-32-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 29 November 2002. par. 235.

meaning that the suffering endured by victims of the act must be similar and comparable in gravity to that of other acts included under crimes against humanity.³⁵³ In addition, a link must also be established between the suffering endured and the act which the alleged perpetrator is being charged.³⁵⁴ The examples provided in light of the case in Sierra Leone show this, but examples can also be taken from other instances of forced marriage in other conflicts. Women are usually abducted during raids on their village in which often they witness the murder, torture and/ or rape of family members.³⁵⁵ They are forcefully kept under the watch of their captors and are either chosen or designated to members of the group to be their ‘wives.’³⁵⁶ They often endure physical violence, forced drug consumption, and physical mutilation in order to ensure compliance with their ‘husband’ and the demands of their captors.³⁵⁷ Moreover, these women are often subject to repeated rapes and forced impregnation through which many contract sexually transmitted diseases such as HIV.³⁵⁸ Even a cursory examination of the wrongdoings victims must endure as a result of these forced marriages shows a great deal of similarities to other prohibited acts listed within crimes against humanity including rape, torture, sexual slavery and forced pregnancy.

Furthermore, the sufferings which victims endure and their similarities to other prohibited acts listed within crimes against humanity is insufficient in describing the entirety of the suffering experienced. Forced marriage also includes additional mental and physiological sufferings. Attempts to obfuscate the gravity of the acts committed under the guise of ‘marriage’ only serves to magnify the level of damage victims incur. It forces the victim to endure additional trauma through psychological manipulation by requiring them to take on all aspects of the role associated

³⁵³ *Prosecutor V. Kupreškić et al.* (Judgment), IT-95-16-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 14 January 2000. par. 566.

³⁵⁴ *Prosecutor v. Clement Kayishema and Obed Ruzindana.* (Judgement), ICTR-95-1-A, International Criminal Tribunal for Rwanda. 1 June 2001. par. 146.

³⁵⁵ Scharf, Michael P. “Forced Marriage as a Separate Crime Against Humanity” in Jalloh, Charles. *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law.* Cambridge: Cambridge UP, 2013. pp. 204.

³⁵⁶ Note: This is reported as occurring in other areas such as Mozambique, DRC, Uganda and Rwanda and even Democratic Kampuchea (although forced marriage in the latter case is a result of a government policy in which all individuals of marriageable age are taken from their family and married without consent). See: Toy-Cronin, Bridgette A. “What is Forced Marriage? Towards a Definition of Forced marriage as a Crime Against Humanity.” *Columbia Journal of International Law.* Vol. 19 No. 2 (2010). pp. 557-561.

³⁵⁷ Stout, Krista. “What’s in a Name? The Feasibility and Desirability of Naming Forced Marriage as a Separate Crime under International Humanitarian Law.” *Dalhousie Journal of Legal Studies.* Vol. 19 (2010). pp. 6.

³⁵⁸ *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu.* (Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8(‘Forced Marriages’)), Special Court for Sierra Leone (SCSL), SCSL-04-16-T, 20 June 2007. par. 30.

with a spouse in their society including emotional support and the showing of affection to the individual that is the source of their suffering. Often the perpetrators of this crime are directly responsible for injuring and murdering the victim's friends and/or family members.³⁵⁹ This places the victim in a conflicting and confusing situation in which some become convinced that the injustices done to them are the norm, or what should be accepted in a marital relationship.³⁶⁰ This is why a number of victims have been found as staying with their 'husband' and even attempting to protect them from prosecution after the cessation of violence.³⁶¹ Moreover, due to social and cultural norms as well as the context in which the 'marriage' takes place many victims are forced to recognize that they are unable to remarry, depriving them of the fundamental human right to marriage and what is considered as a crucial life altering decision. As such, not only does the crime of forced marriage meet the required level of 'grave suffering' similar to that of other acts under crimes against humanity, but it also includes other forms of suffering distinguishing itself from them.

In addition to the subjective element of great suffering, in order to be considered as an 'other inhumane act' a crime must also be of similar or comparable gravity to that of other crimes within the Rome Statute. Again, this is to be identified through *ejusdem generis* standards.³⁶² As forced marriage is to be perceived as a cumulative crime it already assumes the inclusion of multiple acts which are already classified under the Rome Statute as crimes against humanity such as; rape, torture, forced pregnancy and enslavement.³⁶³ Many of these crimes are in fact are elevated to the status of *jus cogens* norms and as such are non-derogable even in times of conflict or state emergency.³⁶⁴ While acts such as rape and sexual slavery are not required to prove the existence of forced marriage, it still follows that the commission of the crime itself almost always includes at least one or more of the aforementioned acts. This is undoubtedly due to the inclusion of forced conjugal duties within the definition of forced marriage as sexual acts are usually

³⁵⁹ Toy-Cronin, Bridgette A. "What is Forced Marriage? Towards a Definition of Forced marriage as a Crime Against Humanity." *Columbia Journal of International Law*. Vol. 19 No. 2 (2010). pp. 560.

³⁶⁰ Physicians for Human Rights. *War-related Sexual Violence in Sierra Leone: A Population-based Assessment: A Report*. Boston, MA: Physicians for Human Rights, 2002.

³⁶¹ *Ibid.*

³⁶² *Prosecutor V. Zoran Kupreškić et al.* (Trial Judgment), IT-95-16-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 14 January 2000. par. 564.

³⁶³ Scharf, Michael P. "Forced Marriage as a Separate Crime Against Humanity" in Jalloh, Charles. *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law*. Cambridge: Cambridge UP, 2013. pp. 205-206.

³⁶⁴ *Ibid.*

associated with spousal roles. Considering the levels of overlap between forced marriage and other crimes against humanity as well as the cumulative aspect of the crime, it should be considered as meeting the criteria of similar gravity.

Just as victims can be identified as enduring additional sufferings, the commission of forced marriage has other implications. It has been used in an attempt to mimic the social structure of an institution which has been recognized as the foundation of society, and as a shield to protect against being held responsible for acts which would normally entail individual criminal responsibility under international criminal law. Claiming that physical violence, rape, forced drug consumption, torture, forced physical labour, etc. is acceptable when it occurs within a marital relationship degrades the importance of the institution and runs contrary to the accepted international legal definition of marriage. Additionally, by forcefully placing victims in a spousal relationship with another individual, it deprives them of the general principle of freedom of the right to marriage with free consent under international human rights law. All of the above should be considered as sufficient evidence in showing that forced marriage meets both the subjective and objective elements needed to be prosecuted for as an ‘other inhumane act.’ As such, it should be considered as crime against humanity; or a particularly odious offence which “constitute(s) a serious attack on human dignity or a grave humiliation or degradation of one or more persons.”³⁶⁵

3.5. Addressing *Nullum Crimen Sine Lege*

While forced marriage has been addressed within international criminal tribunals to date, as discussed above, there has been concern over its adherence with the principle of *nullum crimen sine lege*. Considering the ICC’s status as a treaty-based organization, it is expected to hold the principle of legality in high regards.³⁶⁶ Taking this into account, this part will analyze two key concerns regarding *nullum crimen sine lege* at the ICC. The first will show ‘other inhumane acts’ as a significantly precise provision and its customary status in international criminal law. The second part will deal with the crime of forced marriage itself. It will show that the key elements detailed within the definition of forced marriage display convergence with existing general principles of international law on marriage and encompasses other prohibited acts within the Rome

³⁶⁵ Cassese, Antonio, et al. *Cassese's International Criminal Law*. 3rd ed. Oxford: Oxford UP, 2013. pp. 90.

³⁶⁶ Cassese, Antonio, Paola Gaeta, John R.W.D. Jones. *The Rome Statute of the International Criminal Court: A Commentary*. Vol. 1. Oxford: Oxford UP, 2002. pp. 353.

Statute. Therefore, the crime of forced marriage is not in contest with the principle of *nullum crimen sine lege* and should be adjudicable, under ‘other inhumane acts’ or otherwise at the ICC.

While ‘other inhumane acts’ may not enjoy as much attention in international criminal tribunals as other more widely adjudicated upon crimes it has none the less been present in all tribunals since the International Military Tribunal at Nuremberg.³⁶⁷ Unlike other provisions it does not provide for specific examples or instances of what other “inhumane acts” might entail, but serves as a framework by which abhorrent acts which are not enumerated within the statute can be punished.³⁶⁸ This has caused concern and the potential danger over the use of this provision has been commented upon by the ICTY in both *Kupreskic* and *Stakic*.³⁶⁹ Overall, its core components consist of; 1) the perpetrator caused great suffering or serious injury to body or mental or physical health by means of an inhumane act 2) This act must be of similar character to that of ‘other inhumane acts’ listed within crimes against humanity. Moreover, the knowledge of the criminal nature of the act itself must be foreseeable and accessible at its commission.³⁷⁰ If the act does not meet any of these components then it is to be considered as incompatible with the principle of *nullum crimen sine lege* and non-adjudicable.

The scope of ‘other inhumane acts’ may be difficult to envision but can be considered to encompass; “forcible transfer of a population, serious physical or mental injury, biological, medical or scientific experiments, enforced prostitution, other acts of sexual violence, acts of violence to and mutilation of a dead body that caused mental suffering to witnesses, and enforced disappearance.”³⁷¹ While each of these acts differ in some way, either substantively or methodologically, they are no less acts which are prohibited under international law. In addition, they have met the requirements of imposing great suffering or serious mental or physical harm to an individual. It was the need to include a residual catch-all provision at the end of crimes against

³⁶⁷ United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement")*, 8 August 1945. Art. 6.

³⁶⁸ Goodfellow, Nicholas Azadi. “The Miscategorization of ‘Forced Marriage’ as a Crime against Humanity by the Special Court for Sierra Leone.” *International Criminal Law Review*. Vol. 11 (2011). pp. 842.

³⁶⁹ *Prosecutor V. Kupreskić et al.* (Judgment), IT-95-16-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 14 January 2000. par. 563.; *Prosecutor v. Milomir Stakic.* (Judgment), IT-97-24-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 31 July 2003. par. 770-773.

³⁷⁰ *Kafkaris v. Cyprus.* (Merits), No. 21906/04, European Court of Human Rights (Grand Chamber), 12 February 2008. par. 140.

³⁷¹ Triffterer, Otto. *Commentary on the Rome Statute of the International Criminal Court: observers’ notes, article by article.* 2nd ed. Baden-Baden: Nomos, 2008. pp. 231.

humanity in order for the Court to safeguard against human ingenuity in committing inhumane acts in the future which were not conceived by the Statute's drafters.³⁷² It is for this reason that the Appeals Chamber in AFRC deemed that not only is 'other inhumane acts' adequately specific so as not to fall out of alignment with the principle of *nullum crimen sine lege*, but also that its now exists as a part of customary international law.³⁷³ This means that the provision can conform to not only new crimes being committed but its scope be advanced in accordance with developing international human rights law as long as the violation meets the above requirements for the crime.

While 'other inhumane acts' are enshrined as a part of customary international law there still exists concern over the use of the crime to encompass acts which have not been adjudicated upon in the past. Goodfellow comments that the SCSL AFRC Appeals Chamber's analysis of forced marriage and its adherence to the principle of *nullum crimen sine lege* was shallow and unrefined.³⁷⁴ The simple reasoning that 'other inhumane acts' does not infringe upon the principle of legality is insufficient; it must be shown that the crime itself which the accused is being tried for has a firm basis within international criminal law. This analysis however undermines how international criminal law is established. In the *Kupreskic* case the ICTY Trial Chamber identified that 'other inhumane acts' can be identified through the use of the "Universal Declaration on Human Rights of 1948, the two United Nations Covenants on Human Rights of 1966 and other international instruments on human rights or on humanitarian law."³⁷⁵ This reasoning supports the wording in Art. 21 of the Rome Statute in that when interpreting the Statute and the scope of the crimes enshrined within it, the Court should take into account relevant conventions and general principles of international law. While conventions on international humanitarian law are cited as an example, they are not to be considered as limiting the scope to applicable treaties to this realm. Moreover, paragraph 3 of Art. 21 states that "The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights."³⁷⁶ Taking this into account it must be accepted that aspects of international human rights law can be referenced in

³⁷² *Prosecutor V. Kupreškić et al.* (Judgment), IT-95-16-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 14 January 2000. par. 563.

³⁷³ *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu.* (Appeals Judgment), Special Court for Sierra Leone (SCSL), SCSL-2004-16-A, 22 February 2008. par. 197.

³⁷⁴ Goodfellow, Nicholas Azadi. "The Miscategorization of 'Forced Marriage' as a Crime against Humanity by the Special Court for Sierra Leone." *International Criminal Law Review*. Vol. 11 (2011). pp. 848-849.

³⁷⁵ *Prosecutor V. Kupreškić et al.* (Judgment), IT-95-16-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 14 January 2000. par. 621.

³⁷⁶ *Rome Statute* Art. 21 par. 3.

establishing evidence to show if a crime is in adherence with the principle of legality. The right to marriage is considered as a fundamental right in international human rights law and must include the free consent of both individuals involved. The argument that its status as a general principle alone may not be sufficient in establishing the criminality of the crime, however. The widespread criminalization of non-consensual marriage however support this. Examples such as Albania,³⁷⁷ Bulgaria,³⁷⁸ Canada,³⁷⁹ Germany,³⁸⁰ Macedonia,³⁸¹ Kosovo,³⁸² Kyrgyzstan,³⁸³ Malta,³⁸⁴ Norway,³⁸⁵ Scotland,³⁸⁶ Switzerland,³⁸⁷ The UK,³⁸⁸ Uzbekistan³⁸⁹ and other domestic legal systems have adopted legislation which criminalizes the act of placing an individual into a marriage or marriage like arrangement without consent or under coercion. In addition, a number of States in which forced marriage as it has been discussed throughout this chapter such as Uganda,³⁹⁰ Sierra Leone,³⁹¹ and Mozambique³⁹² have taken steps to either criminalize forced marriage or deter its use. While the textual content of all of the above examples may differ, their essence remains unified. The deprivation of an individual's right to marriage through non-consent or coercion is an act which entails individual criminal responsibility. This coupled with the above information on the right to marriage as a general principle of international law shows that indeed the commission of the act of forced marriage can be considered as accessible, foreseeable considered as a general principle of international law, and it follows that the non-consensual

³⁷⁷ Albania. *Criminal Code of the Republic of Albania* (No. 7895), 27 January 1995. Art. 130.

³⁷⁸ Bulgaria, *Criminal Code of Bulgaria*, 1968, last amended 2017. Art. 177.

³⁷⁹ Parliament of Canada. *Criminal Code*. R.S.C., 1985 c. C-46. Last amended 12 Dec. 2013. Art. 292.

³⁸⁰ Germany. *Strafgesetzbuch (German Criminal Code)*. 13 Nov. 1998. Last amended 20 October 2015. Art. 237.

³⁸¹ Macedonia, *Criminal Code of the Republic of Macedonia*, 1996, Last amended 2009. Art. 418.; Note: this is recognized as a form of human trafficking.

³⁸² Republic of Kosovo. *The Criminal Code of the Republic of Kosovo* (No. 04/L-82). 20 April 2012. Art. 246.

³⁸³ Kyrgyzstan, *Criminal Code of the Kyrgyz Republic*, 1997, Last amended 2006. Art. 155.

³⁸⁴ Malta, *Criminal Code of the Republic of Malta*, 1854, Last amended 2018. Art. 199-200.

³⁸⁵ Kingdom of Norway. *The General Civil Penal Code* (No. 10). 22 May 1902. Last amended 21 Dec. 2005. Section 220, 215.

³⁸⁶ Parliament of the United Kingdom. *Forced Marriage (Civil Protection) Act 2007* (c.20) August 2007.

³⁸⁷ The Federal Assembly of the Swiss Confederation. *Swiss Criminal Code* (No 311.0) 21 Dec 1937. Amended 1 July 2014. Art. 181(a).

³⁸⁸ Parliament of the United Kingdom. *Forced Marriage (Civil Protection) Act 2007* (c.20) August 2007.

³⁸⁹ Republic of Uzbekistan. *Criminal Code of the Republic of Uzbekistan* (No. 2012-XII) 22 Sept. 1994. Amended 29 August 2001. Art. 136

³⁹⁰ Uganda. *Penal Code Act* (L-75312). 15 June 1950. Art. 152.

³⁹¹ Sierra Leon. *The Sexual Offences Act* (No. 12) 19 Oct. 2012. Note: the sex act provides that marriage may no longer be used as a defense to crimes committed.

³⁹² Republic of Mozambique. *14 Suplemento 31 de Dezembro de 2014* (No. 105). 31 December 2014. Art. 205

conferral of the title of spouse onto an individual is significantly detailed and defined to fall into accordance with the principle of *nullum crimen sine lege*.

Other aspects of the crime such as conjugal duties must also show themselves to be significantly defined and well established within international criminal law. Substantively, the core aspects of the crime of conjugal duties are already well established within the Rome Statute itself. The forcible assertion of conjugal duties has already been recognized as amounting, in some degree, to that of domestic servitude and forced labour. Other aspects of the crime such as showing a degree of intimacy and affection can be considered at least *prima facie* to be in violation of an affront to dignity,³⁹³ an aspect of international humanitarian law which is now well established in custom. The sexual aspects of the crime, while not integral to the identification of the crime itself, are also reflected within the Rome Statute's Art. 7(1)(g) on sexual violence and other gender based crimes such as rape, sexual slavery, and sexual violence. It concludes that while the act of forced marriage is not specifically detailed within the Statute, its key elements can be seen as either a violation of existing customary international law, general principles of international law or are already reflected within the Rome Statute and are not in contest with *nullum crimen sine lege*.

Conclusions

This chapter set out to identify if forced marriage could be prosecuted for within the ICC under the categorization of 'other inhumane acts.' In order to do this, it first established the legal status of marriage as a fundamental aspect of society recognized in international law and then strove to distinguish forced marriages from that of arranged marriages. It found that while arranged marriages may not always comply with international legal standards forced marriage violates the core components of consent, self-determination and occurs in accordance with a widespread or systematic attack against a civilian population. As such, there was indication to believe that forced marriage could be considered as a crime against humanity. After this it set out to identify the key components of an already recognized international criminal act to which forced marriage has been associated with in the past, that of sexual slavery. It highlighted the key components of this crime as control over the sexual autonomy of an individual and forced sexual acts. It then showed that while there is significant overlap between the crime of sexual slavery and enslavement, sexual

³⁹³ The Sierra Leone Truth and Reconciliation Commission (TRC). *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*. The Sierra Leone Truth and Reconciliation Commission. 2004. pp. 229.

slavery was chosen to be included as a separate crime under the Rome Statute due to its contemporary use, recognition by the international community as a “concern to the international community as a whole” and the distinct effects victims incur as a result of its commission. It then followed by examining jurisprudence at the SCSL and comprised a definition of the crime. This was used to conduct an analysis of the crime under the Rome Statute. Following this, it established that forced marriage is a crime adjudicable by the ICC under sexual slavery. However, due to the long lasting and severe effects that conjugal duties and conferral of the status of ‘wife’ under coercive circumstances have on the victims of this act it would be more suitable to forego the use of the label of sexual slavery and instead opt for prosecuting the crime as an ‘other inhumane act.’ The final section showed that classifying forced marriage in this way would not violate the principle of *nullum crimen sine lege* at the ICC by showing that ‘other inhumane acts’ are recognized as a part of customary international law. Similarly the crime itself, while not enjoying as much of a detailed definition as that of rape for example, is present in sufficient breadth throughout a number of international human rights and international humanitarian law conventions, some recognized as customary, to be considered as foreseeable and accessible to the accused.

This chapter will close by adding a caveat to the above analysis. While forced marriage can be addressed by the ICC as an ‘other inhumane act’ this does not ensure that future attempts at prosecuting it will meet the same acknowledgement by ICC judges. At the time of writing the prosecution has taken to amend the charges against Dominic Ongwen to include that of forced marriage. Whether or not the ICC will deem that the crime can be encompassed under ‘other inhumane acts’ or sexual slavery will depend on the methods to which the prosecutor presents the crime. Just as the Trial Chamber in AFRC and Taylor judgments produced different interpretations of the crime than the AFRC Appeals and RUF Trial Chamber, it can be assumed that similar conflicts could occur at the ICC. The crime of forced marriage needs to be considered on a case by case basis, taking into consideration the cultural and societal practices and implications of the conferral of the status of ‘marriage’ on an individual. Only by showing the long lasting and severe effects that the cumulative aspects of conjugal duties, forced sexual acts and conferral of the status of ‘marriage’ have on its victims can it be successfully adjudicated upon as an ‘other inhumane act.’

Chapter 4: ‘Ethnic Cleansing’ and ‘Other Inhumane Acts’

Introduction

On February 13, 2004, Janjaweed³⁹⁴ forces moved to occupy Abun, a small village in Western Sudan. As the surrounding villages in the area had already been subject to a number of aerial bombardments and pillaging, only a few individuals stayed for the purpose of securing remaining valuables and food sources. After its occupation, the Janjaweed found, captured, beaten, and in some cases murdered a number of the remaining villagers in Abun. A witness to the account recalled: “They said: ‘We know the cows and camels are in Chad and must get them.’ They asked for guns. They searched but didn’t find any. They burned all the houses that weren’t visible from the main Geneina-Habila road. They took blankets, money and clothes. They took animals.”³⁹⁵ The Janjaweed were not wholly interested in obtaining the above provisions, however. Their sights were also fixated on the removal of all of the remaining inhabitation of Abun. They decided rather than killing all of the remaining villagers to instead force them out of their homes stating, “We don’t want to see you again in this place. It is for us, our camels and cows. Leave it soon.”³⁹⁶ Those who were forced from their residence in Abun, Diridida, Onyanata and other villages attacked by the Janjaweed were prevented from returning not just from the fear that if they returned they would be killed, but also due to the fact that after the Janjaweed occupied these villages they moved their families into the huts and houses of previous residences.³⁹⁷ Others were prevented from returning due to the complete obliteration of villages. Human Rights Watch listed over 11 villages between 2003 and 2004 which had been burned to the ground by the Janjaweed in order to permanently remove its inhabitants from the area.³⁹⁸ Acts such as this committed against civilians occurred quite frequently in Western Sudan not only in the early stages of the conflict in 2003 and 2004 but up to present day. They accounted for the displacement of nearly 1 million civilians by 2004 alone.³⁹⁹

After a cursory examination of the events which took place in Sudan one might assume this to be a clear case of forced displacement of a civilian population, an act that entails individual

³⁹⁴ Note: For the purpose of this entry one only need to understand that Janjaweed are a militia group active in Sudan and Eastern Chad.

³⁹⁵ Human Rights Watch. “Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan.” *Human Rights Watch* Vol. 16, No. 6(a). 7 May 2004. pp.30-31.

³⁹⁶ *Ibid.*

³⁹⁷ *Ibid.* pp. 34-35.

³⁹⁸ *Ibid.* pp. 41-42.

³⁹⁹ *Ibid.* pp. 50-51.

criminal responsibility as a war crime and/or crimes against humanity under international criminal law. However, there was a clear distinction in the intended victims of forced displacement in these cases. Acts such as this were committed in areas where the victims were predominantly of a certain ethnicity (Fur, Masalit, Zaghawa, and Nuba) which the Janjaweed and Sudanese government allegedly aimed to “cleanse” from “their” lands. This has led to the assertion that the attacks which took place in Sudan were something more than forced displacement of a civilian population.⁴⁰⁰

The above is an example of what has been termed in contemporary times an act of ‘ethnic cleansing.’⁴⁰¹ While this example adequately depicts the aims of ‘ethnic cleansing’ as the forced removal of a population based on ethnicity, and despite the widespread use of the term in contemporary times, ‘ethnic cleansing’ as a crime in its own right is not legally recognized at the international level. This article therefore seeks to accomplish two tasks. The first is to identify the key aspects of ‘ethnic cleansing’ through historically recognized examples, treaty law, General Assembly (GA) and Security Council (SC) resolutions in order to construct a definition of the act. It will then examine how this act can be, if at all, classified under the Rome Statute of the International Criminal Court. In order to accomplish this, it will examine existing crimes which draw several parallels with ‘ethnic cleansing.’ It endeavors to primarily focus on crimes against humanity, namely deportation or forced transfer of a civilian population, persecution and ‘other inhumane acts.’ It will show that while ‘ethnic cleansing’ can be classified under the former two acts, doing so undermines key aspects of its proposed *mens rea*. This dictates that the act might be better classified as an ‘other inhumane act’ under Art. 7(1)(k) of the Statute. However, it finds that while ‘ethnic cleansing’ can be situated under Art. 7(1)(k), the principle of *nullum crimen sine lege* elucidates a number of flaws within its nomenclature, judicial precedence and specificity which prevent an adequate legal qualification of the act as it currently stands. In other words, while ‘ethnic cleansing’ in its current incarnation can be included within the ICC framework, doing so would undermine the historically recognized scope of victims and core elements of the act. The following section will examine ‘ethnic cleansing’ by means of its historical development,

⁴⁰⁰ Human Rights Watch. “Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan.” *Human Rights Watch* Vol. 16, No. 6(a). 7 May 2004. pp. 39-42.

⁴⁰¹ Note: quotation marks will be used for the duration of the chapter when using the term ‘ethnic cleansing.’ This is firstly to make a point to the reader that ‘ethnic cleansing’ is not a legally recognized crime under International Criminal Law. Secondly, doing so will aid in keeping consistency in the usage of the term throughout the chapter as, in exception for a small number of cases, ‘ethnic cleansing’ has been almost exclusively written with quotations in the judicial decisions of international criminal tribunals.

contemporary use, recognition and citation through international organizations vis-a-vis UN resolutions and legally binding international documents in an attempt to create a working definition of the act.

4.1. What is ‘Ethnic Cleansing?’

4.1.1. *Historical Overview*

While coinage of the phrase ‘ethnic cleansing’ did not come about until the early 1990’s it is accepted that commission of the act was prevalent in the past. Philipp Ther notes that in its early stages the term ‘ethnic’ was not used to describe the act. Instead it encompassed a variety of different victims including those targeted for ethnic, religious, cultural, national, racial and political reasons. As a result, the act was only described during this time under the broader category of ‘cleansing.’⁴⁰² Additionally, there existed three preconditions which spurred the emergence of ‘ethnic cleansing’ in its early stages. The first was the spread of nationalism and the Darwinian inspired biological concept of the nation which came to rise in the late 19th century. Minorities became the subject of criticism and were viewed as “harmful to the organism or body of the nation.”⁴⁰³ Second, the notion of popular sovereignty and the restructuring of governmental authority from intermediary institutions, such as feudal regimes, to the centralization of power also contributed, as leaders were held directly accountable to their constituency.⁴⁰⁴ In order to consolidate power and maximize approval by their population many States sought to remove or simply neglect minorities and instead focus on enacting policies for the benefit of the majority.⁴⁰⁵ The third and final factor was the development of population policies. At this time States, for example the German Empire, realized that by creating objective standards to identifying ‘nationality’ they could efficiently expel minority groups from acquired territories and create a nationally homogeneous State. This was deemed as a potent means of mitigating the risk of rebellion by ‘politically unstable’ populations present in recently conquered territories.⁴⁰⁶ ‘Ethnic cleansing’ during this time period could accordingly take place both during wartime and peacetime.

⁴⁰² Ther, Philipp. “Ethnic Cleansing” in Stone, Dan. *The Oxford Handbook of Postwar European History*. Oxford UP; Oxford. 2012. pp. 143-144.

⁴⁰³ *Ibid.*

⁴⁰⁴ Note: Ther claims that because power was delegated to nobles who administrated a smaller area it was less difficult to manage and appease minority groups. See: Ther, Philipp. “Ethnic Cleansing” in Stone, Dan. *The Oxford Handbook of Postwar European History*. Oxford UP; Oxford.

⁴⁰⁵ *Ibid.* pp. 144.

⁴⁰⁶ Bell-Fialkoff, Andrew. “A Brief History of Ethnic Cleansing.” *Foreign Affairs* Vol. 72 No. 3 (Summer 1993). pp. 111.

One can separate this pre-modern understanding of ‘ethnic cleansing’ as falling within two separate time frames: the early stage and the pre-WWII stage.⁴⁰⁷

Some of the first instances of ‘ethnic cleansing’ took place as early as the mid-8th century B.C. when the Assyrian ruler Tiglath enacted a statewide policy to remove the indigenous population of any territory conquered and repopulate it with Assyrian settlers.⁴⁰⁸ This may be one of the first recorded instances of ‘ethnic cleansing’ but, for the sake of spatial congruency, the early era of ‘ethnic cleansing’ will be addressed through two main occurrences that took place within the Ottoman Empire between 1914 and 1925.⁴⁰⁹ While it is difficult to pinpoint exactly when ‘ethnic cleansing’ began during this time frame, the most easily identifiable instances took place shortly after the onset of ‘Turkification’ of the empire in the early 1910’s.⁴¹⁰ This manifested itself through two acts which have been recognized as falling under the scope of ‘ethnic cleansing.’ It first manifested itself through negotiations between Greece and the Ottoman Empire in 1914 encouraging the ‘voluntary exchange’ of Christian Greeks in the Ottoman Empire for Muslims living in Greece. The negotiations served as a means of ‘cleansing’ many areas of the Ottoman Empire, most notably the Eastern Thrace region, of Christians and repopulating it with the desired Muslim population.⁴¹¹ While the exchanges were purportedly ‘voluntary’ in nature a large number, especially in regards to removal of Christians from the Eastern Thrace region, were persecutory.

⁴⁰⁷ Note: While there are other time frames which could fall into this analysis such as religious cleansing that took place Middle Ages or the cleansing of populations post WWII these have been omitted as the subsection is only intended to provide a cursory historical understanding of ‘ethnic cleansing.’ The 2 time frames were included as they provided a clear connection between the current understanding of ‘ethnic cleansing’ and also showed nuanced differences such as that in the means of commission and targeted victims. For a more comprehensive look at ‘ethnic cleansing’ as it has occurred in the past see: Mann, Michael. *The Dark Side of Democracy: Explaining Ethnic Cleansing*. Cambridge UP; Cambridge 2005.

⁴⁰⁸ Bell-Fialkoff, Andrew. “A Brief History of Ethnic Cleansing.” *Foreign Affairs* Vol. 72 No. 3 (Summer 1993). pp. 111-112.

⁴⁰⁹ Note: Some might consider the onset of ‘ethnic cleansing’ in the Ottoman Empire to have occurred sometime between the mid 1850’s with the enactment of persecutory laws against the Armenian population, or in 1894 with the government endorsed repression and death of thousands of Armenians. While these are plausible arguments to make one must note that there is a difference between civil strife, persecution and ‘ethnic cleansing.’ Taking as an example the massacre in 1894 there is no evidence to suggest that the goal was the removal of the Armenian population and therefore should be viewed as a brutal reaction by the Ottoman Empire to Armenian nationalist protests. For these reasons the author deems that the intent to physically remove the Armenian and Greek population from the Ottoman Empire did not occur until the persecutions and negotiations between Greece and the Ottoman Empire in 1914. See: Mann, Michael. *The Dark Side of Democracy: Explaining Ethnic Cleansing*. Cambridge UP; Cambridge 2005. Pp. 118-199.

⁴¹⁰ Note: ‘Turkification’ here is used to represent the ideology adopted by the Young Turks in the early 1910’s and encompasses the push for increased Islamism, nationalism and Ottomanism.

⁴¹¹ Mourellos, Yannis G. “The 1914 Persecutions and the First Attempt at an Exchange of Minorities between Greece and Turkey.” *Balkan Studies* Vol. 26 (1985). pp. 391-392.

Christians were removed through forced expatriation, expedited and permanent forced evacuation of towns and other acts.⁴¹² It was as a result of these negotiations and persecutory acts that in 1923 the two States adopted the Treaty of Lausanne. The treaty attempted to regulate population exchanges between the two countries, ensuring that the transfers were done in a manner which was “orderly and humane.”⁴¹³ However, the treaty also explicitly recognized the transfers as compulsory in nature and led to the forced removal of as much as 1.5 million Christian Greeks living in the Ottoman Empire and 400,000 Muslim Turks from Greece.⁴¹⁴

The second instance was that of the Ottoman Empire’s removal of Armenians from its territory between 1915-1922. It is important to note that this was ongoing within the same time frame as the removal of Greek Christians from the Ottoman Empire, leading to the assertion that this was an attempt to homogenize the population and should thusly be considered as ‘ethnic cleansing.’ Additionally, while time frame between these two acts was similar, the methods implemented by the State in removing the population differed. The Armenian population was removed from the area through two separate means. The first was through forced displacement. Unlike the situation with Greece there was no designated destination, and victims were transferred to inhospitable areas such as deserts in Mesopotamia and Syria.⁴¹⁵ Many who were transferred perished as they received no support from the government, were not allowed to bring any possessions with them and were unable to acclimate to living in a desert climate.⁴¹⁶ Those who were not deported were targeted for extermination. While the exact number of victims is still debatable, it is estimated that at least 500,000 to over 1.5 million Armenians perished between 1915-1922 as a direct result of transfers and exterminatory policies.⁴¹⁷ The Armenian’s were almost entirely ‘cleansed’ from the State, with an estimated 10% of the original population still residing within the Ottoman Empire after the cessation of ‘cleansing.’⁴¹⁸ ‘Ethnic cleansing’ as committed during the early stages and within the Ottoman context was centered on the

⁴¹² Mourelos, Yannis G. “The 1914 Persecutions and the First Attempt at an Exchange of Minorities between Greece and Turkey.” *Balkan Studies* Vol. 26 (1985). pp. 391-392.

⁴¹³ Preece, Jennifer Jackson. “Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms.” *Human Rights Quarterly* Vol 20 (4) (Nov. 1998). pp. 823.

⁴¹⁴ *Ibid.*

⁴¹⁵ Mann, Michael. *The Dark Side of Democracy*. Cambridge UP; Cambridge 2004. pp. 152.

⁴¹⁶ *Ibid.* pp.144.

⁴¹⁷ *Ibid.* pp.152.

⁴¹⁸ Bell-Fialkoff, Andrew. “A Brief History of Ethnic Cleansing.” *Foreign Affairs* Vol. 72 No. 3 (Summer 1993). pp. 113.

‘Turkification’ of the population within the Ottoman Empire. In respect to the Greek transfers, it was considered as a means of ensuring the right of the minority group to self-determination. When moved to a State which reflected their nationality it was believed that their ethno-cultural distinctiveness would be better represented.⁴¹⁹ This is not to undermine the implications of the forced nature of the transfers. It was precisely this coupled with the violent and large scale removal of the Armenian population which led to the subsequent consensus that mass compulsory expulsions should only be used as a last resort in stabilizing the population of a State.⁴²⁰

The second phase of ‘ethnic cleansing’ took place from 1938 to 1944 in Central and Eastern Europe. Its precursor was that of the Munich Treaty of 1938 which not only permitted the annexation of the borderlands of Czechoslovakia, but also encouraged the redrawing of borders to promote ethnic and national purity. Nazi Germany adopted the *Umsiedlung* (resettlement) and *Volksdeutsche* (literally ethnic German (repatriation)) policies during this time period which, in their early stages, led to the compulsory migration of nearly 190,000 Czechs and the resettlement of the areas in which they lived with repatriated Germans.⁴²¹ Germans repatriated through various bilateral agreements were also transferred to other areas after forced expulsion of the non-German population. In the Alsace-Lorraine region more than 100,000 French were transferred out in order to ‘cleanse’ the area. More drastic in numbers were those displaced from Poland between 1939-1941. Germany forcefully removed nearly to 370,000 Poles, many from the annexed Warthegau region of Poland and repopulated the area with repatriated Germans. Several agreements were also concluded with Germany for the exchange of populations including those with the Soviet Union, Italy, Romania, and a number of Baltic States. In total, Germany had planned to transfer over 45 million non-Germans out of Eastern Europe in order to fulfill Hitler’s *Heim ins Reich* plan.⁴²² While the plan ultimately failed, it clearly exemplifies how ‘ethnic cleansing’ had been committed through public policy and international agreements.⁴²³

⁴¹⁹ Preece, Jennifer Jackson. “Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms.” *Human Rights Quarterly* Vol 20 (4) (Nov. 1998). pp. 822.

⁴²⁰ Ther, Philipp. “Ethnic Cleansing” in Stone, Dan. *The Oxford Handbook of Postwar European History*. Oxford UP; Oxford. 2012. pp. 149.

⁴²¹ *Ibid.*

⁴²² Note: This policy was to remove all non-Germans from occupied territories in order to encourage the repatriation of Germans who were living abroad. See: *Ibid.* pp. 150.

⁴²³ Note: The plan can be said to have failed on 2 different levels. The first is the inability of Germany to complete the desired transfer of repatriated Germans. The second is the reaction by the Allies to the *Heim ins Reich* plan through the large-scale removal the German populations which were transferred into those areas after WWII.

While these different phases of ‘cleansing’ do not necessarily amount to the modern understanding of ‘ethnic cleansing’ as expressed by the international community,⁴²⁴ they do serve to highlight its historical background and the similarities between the two acts. ‘Cleansing’ was similarly used as a means to create a homogeneous territory. The difference within shows that it had not been committed against solely ethnic or religious groups, as is the current understanding of the crime. Instead, it was used as a means of removing minority groups for the purpose of ensuring domestic stability and demographic unity. In addition, it also served to encourage nationalism and a collective identity within the population. Even after its evolution into the modern notion of ‘ethnic cleansing,’ the understanding of the act still reflects a great deal of these aspects. However, even though ‘cleansing’ had been considered as a violation of international law, the political atmosphere and constricted understanding of the act created a level of uncertainty and, ultimately, competing opinions on how it should be classified under international criminal law.

4.1.2. *Definitional Dissonance*

Since the adoption of the term, ‘ethnic cleansing’ has incurred significant controversial understandings at the international level. This part will first examine two main actors in the UN system which have made statements regarding ‘ethnic cleansing,’ the General Assembly (GA) and Security Council (SC). Then it will look at relevant international treaties to establish the key elements of ‘ethnic cleansing’ as a violation of fundamental human rights laws. Before beginning, it must be noted that while GA resolutions are not considered as legally binding they still serve as an indicator of *opinio juris* and may aid in formulating a consensus on what should be included within the definition of ‘ethnic cleansing.’ Conversely, SC resolutions, which some may argue should be utilized to formulate a complete legal definition of the act, will not be accepted as creating new binding laws in their entirety. This approach will be adopted for two reasons. The first is that this author has chosen to adopt Michael Wood’s stance on interpretation of SC resolutions. That is, SC resolutions are adopted to insure the peace and security of the international community. Unless explicitly expressed within the resolution itself they cannot be interpreted in a way which creates new law or expounds upon existing law.⁴²⁵ As such, the legally binding effect of SC resolutions are limited only to their decisive clauses. In other words, clauses which include

⁴²⁴ Note: International community is used here in reference to declarations by the General Assembly, Security Council and other relevant international organizations. It is not meant to reflect the individual opinions of States.

⁴²⁵ Wood, Michael C. “The Interpretation of Security Council Resolutions.” *Max Planck Yearbook of United Nations Law*. Vol. 2 (1998) pp. 86-88.

terms such as “authorizes,” “decides,” “declares,” “proclaims” etc. are the only aspects of SC resolutions which will be accepted as having a legal character to them. Other clauses, for example those beginning with phrases such as “encourages,” “recommends,” “endorses,” etc. do not hold a legal character to them. As will be seen below, due to inconsistencies in how the SC has addressed ‘ethnic cleansing’ in the past and the lack of decisive clauses used in describing the elements of the act, it would be impossible to create a coherent definition based on SC resolutions alone. Moreover, accepting the totality of a SC resolution as legally binding would, in cases such as this when the law has not been formalized, run contrary to one of the core principles included within the Rome Statute, *nullum crimen sine lege*. Allowing an act to be codified into international law and its contents and classification changed drastically within a short span of time violates the need for specificity and foreseeability in the law. It would thus undermine the fundamental rights of the accused by removing their ability to formulate a proper defense to accusations made against them. Instead, non-decisive clauses within SC resolutions will be recognized as the opinion of the council as a member of the international community. These opinions will be used in conjunction with other non-binding resolutions, such as those adopted by the GA, to determine the stance of the community on the contents of ‘ethnic cleansing.’ One must take note, however, that this is not to undermine the legal character of decisive clauses within SC resolutions. They must be clearly identified as legally binding in character and as an overriding aspect in the creation of a legal definition of the act.

Security Council

Universal condemnation and recognition of the illegality of ‘ethnic cleansing’ is present at the international level, but there is no clear consensus on the elements nor on the classification of the act under international law. The SC has stated that it “strongly condemns all violations of international humanitarian law, including the practice of ‘ethnic cleansing’” and asserted “those that commit or order the commission of such acts will be held individually responsible in respect of such acts.”⁴²⁶ This attempts to establish ‘ethnic cleansing’ as a crime encompassed under international humanitarian law. If one were to accept this, then it follows that ‘ethnic cleansing’

⁴²⁶ UN Security Council. *Security Council Resolution 787 (Bosnia and Herzegovina)*. 16 November 1992, S/RES/787 (1992); Also reiterated in UN Security Council. *Security Council Resolution 819 (Bosnia and Herzegovina)*. 16 April 1993, S/RES/819 (1993) par. 7.; UN Security Council. *Security Council Resolution 771 (Former Yugoslavia)*. 13 August 1992. S/RES/771 (1992) par. 2.; UN Security Council. *Security Council Resolution 820 (Bosnia and Herzegovina)*. 17 April 1993, S/RES/820 (1993) par. 6.

could potentially be adjudicated for as a war crime under international criminal law. However, the above opinion runs contrary to the 2005 World Summit Outcome in which it is made clear that:

“We are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”⁴²⁷

In the World Summit Outcome, the act is not categorized as a war crime, rather it is recognized as a separate distinct act. The issue then lies with the classification of ‘ethnic cleansing’ as either a core crime or as an act which is subsumed within war crimes. For proponents of the full legally binding effect of SC resolutions this may not seem to be a matter of contestation, as the World Summit Outcome is neither a legally binding document nor reflective of the opinion of the SC. However, the council has expressly recognized and supported the 2005 World Summit Outcome stating it “reaffirms the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”⁴²⁸ In this sense it becomes dubious as to the legal qualification of ‘ethnic cleansing’ through SC resolutions; as it is both labeled as a war crime and as something unique, deserving of its own recognition as a core crime.⁴²⁹ In order to resolve the aforementioned discrepancy one would best take from the *Namibia* case at the ICJ when the court clarified:

“25. ...The language of a resolution of the Security Council should be carefully analyzed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances

⁴²⁷ UN General Assembly *2005 World Summit Outcome*. 24 October 2005, A/RES/60/1. par. 139.

⁴²⁸ UN Security Council. *Security Council Resolution 1674 (Protection of Civilians in Armed Conflict)*. 28 April 2006, S/RES/1674 (2006) par. 4.

⁴²⁹ Pegorier, Clotilde. *Ethnic Cleansing a Legal Qualification*. Rutledge; New York. 2013. pp. 18.

that might assist in determining the legal consequences of the resolution of the Security Council.”⁴³⁰

The above decision adheres to the previous line of reasoning on how to interpret SC resolutions. Neither implement language which would invoke a legally binding effect on the qualification of the act of ‘ethnic cleansing.’ Accordingly, these statements can only serve to reflect the opinions of the SC as a member of the international community at that point in time. However, the Security Council’s first reference to ‘ethnic cleansing’ under resolution 771 includes some of the strongest declaratory statements in which the council proclaimed it “strongly condemns any violations of international humanitarian law, including those involved in the practice of ‘ethnic cleansing.’”⁴³¹ The council further provided that it “decides, acting under Chapter VII of the Charter of the United Nations, that all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina, shall comply with the provisions of the resolution...”⁴³² Taking from *Namibia* and Wood’s means of identifying the legally binding aspects of a SC resolution one can come to the conclusion that the use of the term “Strongly condemns” along with the last paragraph which evokes Chapter VII of the Charter makes this a legally binding clause. However, this is only to the extent that it prohibits acts which are perpetrated throughout the commission of ‘ethnic cleansing.’ It does not endeavor to create a legal classification of the crime and, as such, can only be used to support the illegality of acts which ‘ethnic cleansing’ is comprised of.

General Assembly

The GA has been largely unified with the SC in its stance towards the illegality of ‘ethnic cleansing.’ It has been condemned as an “abhorrent act” which fosters hatred and violence through its implementation.⁴³³ It is recognized as a violation of core fundamental rights and that “...those who commit or order the commission of acts of ‘ethnic cleansing’ are individually responsible and should be brought to justice.”⁴³⁴ Similar to the SC, the GA has also demonstrated dissent over

⁴³⁰ International Court of Justice. *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*. International Court of Justice, 21 June 1971. par. 25.

⁴³¹ Security Council. *Security Council Resolution 771(Former Yugoslavia)*. 13 August 1992. S/RES/771 (1992) par. 2.

⁴³² *Ibid.* par. 7.

⁴³³ UN General Assembly. *Ethnic cleansing and racial hatred*, 16 December 1992, A/RES/47/80/ (1992) preamble.

⁴³⁴ *Ibid.* par. 4

classifying the act. It first pronounced in 1992 that ‘ethnic cleansing’ was a form of genocide claiming “...mass expulsions of defenseless civilians from their homes and the existence in Serbian and Montenegrin controlled areas of concentration camps and detention centers [was] in pursuit of the abhorrent policy of ethnic cleansing, which is a form of genocide.”⁴³⁵ A year later its position shifted to include the act as a violation of international humanitarian law and a war crime.⁴³⁶ These two approaches to identifying ‘ethnic cleansing’ are not necessarily incompatible with one another, but when considering the decision to label it as something distinct from genocide, war crimes and crimes against humanity in the World Summit Outcome of 2005, one may call into question the overall opinion of the GA as to the classification of the crime.

The above can be viewed as exemplifying both the unification over the prohibition of ‘ethnic cleansing’ as well as the lack of consensus over how to perceive the act in light of international criminal law. With such disparity over how to classify the act it would be beneficial to take into consideration the Secretary General’s report on implementing the responsibility to protect. It states that “under conventional and customary international law, States have obligations to protect and punish genocide, war crimes and crimes against humanity. Ethnic cleansing is not a crime in its own right under international law, but acts of ethnic cleansing may constitute one of the other three crimes.”⁴³⁷ This is undeniably true, especially when considering the lack of inclusion of ‘ethnic cleansing’ as a crime within the Rome Statute. Moreover, adopting the Secretary General’s position allows one to reconcile with the discrepancies created within SC and GA resolutions and examine other core crimes to identify if the act can be encompassed within them. By actively delving into core crimes within international criminal law such as crimes against humanity, one can do away with the inconsistencies over the classification of the act at the political level and identify the rightful place of ‘ethnic cleansing’ through legal jurisprudence.

⁴³⁵ UN General Assembly. *The Situation in Bosnia and Herzegovina*, 18 December 1992. A/RES/47/121 (1992) preamble.

⁴³⁶ UN General Assembly. *Situation of human rights in the territory of the former Yugoslavia : violations of human rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia*, 20 December 1993. A/RES/48/153 (1993) par. 5.

⁴³⁷ UN General Assembly. *Implementing the Responsibility to Protect: Report of the Secretary General*, 12 January 2009. A/63/677 (2009) par. 3.

4.1.3. Constitutive Elements as a Violation of IHRL

While the above details the current dissention over how to classify ‘ethnic cleansing,’ there does exist a consensus over certain aspects of the act; especially in regard to its constitutive elements. The Special Commission created by the Security Council to investigate events in Yugoslavia found that “‘ethnic cleansing’ means rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area. ‘Ethnic cleansing’ is contrary to international law.”⁴³⁸ Its final report supported and expounded upon this definition stating:

“...‘ethnic cleansing’ is a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas. To a large extent, it is carried out in the name of misguided nationalism, historic grievances and a powerful driving sense of revenge. This purpose appears to be the occupation of territory to the exclusion of the purged group or groups.”⁴³⁹

It can manifest itself through a number of physical and psychological acts such as: “murder, torture, arbitrary arrest and detention, extra judicial executions, rape and sexual assault, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property.”⁴⁴⁰ Using this as a foundation, one can identify many of the key violations of international human rights law which take place as a result of ‘ethnic cleansing.’

The commission of ‘ethnic cleansing’ violates a number of universally recognized human rights norms. One such example is what Alfred de Zayas calls the right to one’s home and country.⁴⁴¹ It is not an explicitly recognized right in treaty law but is rather negatively expressed

⁴³⁸ Security Council. *First Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780, S/25274* (1992). par. 55.

⁴³⁹ Security Council. *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780, S/1994/674* (1992). par. 130.

⁴⁴⁰ Security Council. *First Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780, S/25274* (1992). par 56.; see also UN General Assembly. *Situation of human rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)*, 11 March 1996. A/Res/50/193 (1996). par. 2.

⁴⁴¹ De Zayas, Alfred. “The Right to One’s Homeland, Ethnic Cleansing, and the International Criminal Tribunal for the Former Yugoslavia.” *Criminal Law Forum* Vol. 6 No. 9 (1995).

through the prohibition on deportation and forcible transfer⁴⁴² and also implicitly through international conventions, as it is a necessity in order to enjoy the rights included within their provisions. One of its core rights is included under the Universal Declaration of Human Rights Art. 13 which provides: “1. Everyone has the right to freedom of movement and residence within the borders of each State. 2. Everyone has the right to leave any country, including his own, and to return to his country.”⁴⁴³ While this is not legally binding the notion is repeated in conventions such as the ICCPR: “1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”⁴⁴⁴ The right to residence is further included in a number of regional human rights instruments including the ACHPR,⁴⁴⁵ ECHR,⁴⁴⁶ and ACHR.⁴⁴⁷ Its widespread inclusion in IHRL has led to the assertion that it is firmly established that the deportation or expulsion of a State’s nationals is prohibited under international law.⁴⁴⁸ Within the context of ‘ethnic cleansing,’ the forced uprooting of individuals and/or groups legally residing within the State amounts to a violation of the right to choose ones residence and freely move within their State.

This is not the only injustice that occurs as a result of the violation to one’s home and country. ‘Ethnic cleansing’ quite often is accomplished through enacting discriminatory and repressive legislation, harassment, death threats, forced removal from one’s work, refusal of medical treatment, non-consensual publication of a group or individuals private information including religious affiliation and ethnicity, as well as other acts.⁴⁴⁹ The problem that arises is the aforementioned acts are not a requirement of ‘ethnic cleansing.’ They do, however, highlight how the forceful removal of a population manifests itself as an attack on an individual’s honour,

⁴⁴² Note: In order to prevent overlap between sections the discussion on the prohibition on deportation and forcible transfer will take place in the next section.

⁴⁴³ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A(III). Art. 13.

⁴⁴⁴ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999. Art. 12.

⁴⁴⁵ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Art. 12.

⁴⁴⁶ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950. Protocol 4. Art. 3.

⁴⁴⁷ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969. Art. 22.

⁴⁴⁸ Henckaerts, Jean-Marie. *Mass Expulsion in Modern International Law and Practice*. Martinus Nijhoff Publishers; The Hague. 1995. pp. 78.

⁴⁴⁹ Petrovic, Drazen. “Ethnic Cleansing - an Attempt at Methodology.” *European Journal of International Law* Vol. 5 (1994). pp. 345-346.

reputation and privacy; all which are protected under customary international law.⁴⁵⁰ An example of this can be found under Art. 17 of the ICCPR which provides: “No one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”⁴⁵¹

A final point to address is the targets of ‘ethnic cleansing’ and the effect that the act has upon them. It is firmly established that discriminatory acts committed against an ethnic or religious group is prohibited under international human rights law. The ICCPR provides “In those States which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right... to enjoy their own culture, to profess practices of their own religion, or to use their own language.”⁴⁵² Art. 18 further states that “everyone shall have the right to freedom of thought, conscience and religion.”⁴⁵³ The International Convention on the Elimination of All Forms of Racial Discrimination also dedicates itself entirely to the promotion of racial and ethnic equality and to condemning discriminatory acts.⁴⁵⁴ In its decision on the situation in Bosnia and Herzegovina CERD openly recognized ‘ethnic cleansing’ as a practice that runs contrary to the convention and asserted that in order to ensure compliance with the convention it was necessary for the population to be able to effectively participate in public life.⁴⁵⁵ Scholars seem to agree with this point, claiming that removal of these groups from their territory often impedes their ability to engage in their religion, cultural practices or any other form of communal life.⁴⁵⁶

The varied means of committing ‘ethnic cleansing’ taken in tandem with the fundamental rights which it denies to those who are victim of it can provide for a preliminary understanding of the elements of the crime itself. First, it is the removal of a group from their established territory. Second, removal of the group is done without the consent of the individuals within the group and in nonconformity with international law. Third, the act is committed against a group with the intent

⁴⁵⁰ De Zayas, Alfred. “The Right to One’s Homeland, Ethnic Cleansing, and the International Criminal Tribunal for the Former Yugoslavia.” *Criminal Law Forum* Vol. 6 No. 9 (1995). pp. 276.

⁴⁵¹ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999. Art. 17.

⁴⁵² *Ibid.* Art. 27.

⁴⁵³ *Ibid.* Art. 18.

⁴⁵⁴ UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660.

⁴⁵⁵ UN General Assembly. *Elimination of Racism and Racial Discrimination: Report of the Committee on the Elimination of Racial Discrimination* 22 September 1995. A/50/18 (1995). par. 219.

⁴⁵⁶ De Zayas, Alfred. “The Right to One’s Homeland, Ethnic Cleansing, and the International Criminal Tribunal for the Former Yugoslavia.” *Criminal Law Forum* Vol. 6 No. 9 (1995). pp. 279.

to achieve ethnic or religious homogeneity in the area. This is not to say that the current elements which have been elucidated through this section are wholly representative of the crime. To the contrary, as will be seen in the sections below, there are a few additional nuanced elements to ‘ethnic cleansing’ which have been clarified through jurisprudence. The above is merely meant to serve as an initial rubric to identify the similarities and differences between ‘ethnic cleansing’ and other crimes listed within the Rome Statute. Bearing this in mind one can next examine if ‘ethnic cleansing’ can be dealt with under the title of deportation or forced transfer of a civilian population.

4.2. ‘Ethnic Cleansing’ as Deportation or Forced Transfer of a Civilian Population

Within the ICC itself a number of acts which have been labeled as ‘ethnic cleansing’ have been addressed by the Court, including the situation in The Republic of Kenya,⁴⁵⁷ Sudan,⁴⁵⁸ and Côte d'Ivoire.⁴⁵⁹ While the Court has or is still in the midst of classifying these instances of ‘ethnic cleansing,’ it is important to note that it has, to date, never recognized nor used the term when describing the act. In every instance before the Court it has always chosen to forego the use of the term and describe the act within the confines of deportation or forced transfer of a civilian population or persecution. This is in stark contrast to jurisprudence at the ICTY and ICTR, where ‘ethnic cleansing’ had been openly discussed on a number of occasions. It has been recognized as not a crime in and of itself but rather a crime closely linked to deportation or forced transfer of a civilian population,⁴⁶⁰ as a specific form of persecution,⁴⁶¹ and also an act with genocidal characteristics.⁴⁶² The lack of use of the term and the avoidance, despite countless reference to ‘ethnic cleansing’ in documents provided to the Court and through testimony, suggests that it does not have an answer to on how to qualify ‘ethnic cleansing’ as of yet.

⁴⁵⁷ Rice, Xan. “US Envoy Says Violence in Kenya is Ethnic Cleansing.” *The Guardian*, 31 January 2008.

⁴⁵⁸ Human Rights Watch. “Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan.” *Human Rights Watch* Vol. 16, No. 6(a). 7 May 2004.

⁴⁵⁹ United Nations. *Statement attributed to the UN Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Côte d'Ivoire*. United Nations; New York, 19 January 2011.

⁴⁶⁰ *Prosecutor v. Blagonje Simic et al. (Trial Judgement)*, IT-95-9-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 17 October 2003. par. 133.

⁴⁶¹ *Prosecutor v. Milorad Krnojelac (Appeals Judgement)*, IT-97-25-A, International Criminal Tribunal for the Former Yugoslavia (ICTY), 15 September 2003. par. 221.

⁴⁶² *Prosecutor v. Radovan Karadzic and Ratko Mladic (Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence)*, IT-95-5-R61/ It-95-18-R61, International Criminal Tribunal for the Former Yugoslavia (ICTY), 11 July 1996. par. 90-94.; *Prosecutor v. Radislav Krstic (Trial Judgement)*, IT-98-33-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 02 August 2001. par. 561-562.

4.2.1. Development

This section will discuss one of the crimes listed under Art. 7 which ‘ethnic cleansing’ correlates strongly with. Deportation or forced transfer of a civilian population is a compilation of what were once two distinct crimes under international humanitarian law that were later merged into a single crime set under the Rome Statute.⁴⁶³ Deportation is the longest recognized of the two acts. Aspects of the prohibition on deportation were first included within the Lieber Code of 1863 which provided “private citizens are no longer murdered, enslaved, carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.”⁴⁶⁴ While the Lieber Code was a highly influential document in both regulating the conduct of war and in the drafting and adoption of treaties regarding the laws and customs of war, deportation itself was not recognized as an act prohibited under international humanitarian law. The Hague Convention of 1907 instead chose to forgo regulating deportation and instead only limited itself to covering “family honour and rights the lives of persons and private property...”⁴⁶⁵ Authors such as Bassiouni make the argument that this article, when read in tandem with Art. 47 on the prohibition of pillaging and Art. 53 regulating permitted seizures, could have been interpreted as a holistic ban on deportation.⁴⁶⁶ More convincingly however, others such as Pictet assert that deportation was not included in the Hague Convention of 1907 as the practice had fallen into abeyance at that particular time in history.⁴⁶⁷

Pictet’s argument may have indeed reflected the reality more accurately, as it wasn’t until after the conclusion of World War II and the creation of the International Military Tribunal at Nuremburg (IMT) and International Military Tribunal for the Far East (IMTFE) that, not all forms of deportation, but rather deportation for the purpose of slave labour became universally prohibited.

⁴⁶³ Note: Although there are distinctly different elements between the two acts which is why they still retain their original nomenclature.

⁴⁶⁴ International Committee of the Red Cross (ICRC), *Instructions for the Government of Armies of the United States in the Field (Lieber Code)*. 24 April 1863. Art. 23.

⁴⁶⁵ International Committee of the Red Cross (ICRC), *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. (Hague Convention)*, 18 October 1907. Art. 46.

⁴⁶⁶ Bassiouni, Cherif M. *Crimes Against Humanity in International Criminal Law*. 2nd ed. Kluwer Law International; The Hague, 1999. pp. 312.

⁴⁶⁷ Pictet, Jean S. *The Geneva Conventions of 12 August 1949 Commentary IV: Geneva Convention Relative to the Protection of Civilian Persons in Time of War*. International Committee of the Red Cross; Geneva, 1958. pp. 279-280.

Art.6 (b) of the Nuremburg Charter provides that it had jurisdiction over war crimes “namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory...”⁴⁶⁸ While deportation was included within both the IMTFE and IMT Charter without the above limiting clause, it was done so under the more contentious Art. 6(c) and 5(c) as a crime against humanity. The specifics of the crime were ambiguous at the time, and only by development through the tribunals’ judgments did its contents become evident. Ultimately, it was found that the crime was similarly limited to deportation for slave labour or other purposes⁴⁶⁹ and it could only be committed by one occupying power against the civilian population of the territory being occupied.⁴⁷⁰ It was only by this point in time that one could assert with some degree of certainty that only a very specific type of deportation within the context of armed conflict had been prohibited under international law.

Having an understanding of the context in which the prohibition on deportation developed it becomes essential to examine the current understanding of the act. The first explicit prohibition would come with the adoption of the Geneva Conventions (IV) Relative to the Protection of Civilian Persons in Time of War of 1949. Art. 49 of the convention states “Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.”⁴⁷¹ This provision not only explicitly prohibits deportation but also forced transfers, which entails the forced displacement of an individual or group within a State’s territory. However, the scope of the aforementioned provision was still limited and only applied to that of civilians in an occupied territory. Jacques notes the limits of the Geneva Conventions in this regard, stating “Civilians in the hands of a power of which they are nationals, these victims fall outside the protection of the civilians’ convention.”⁴⁷² A cursory inspection would seem to indicate that in the case of ‘ethnic cleansing,’ and in respect to the Geneva Conventions IV,

⁴⁶⁸ *Trial of the Major War Criminals before the International Military Tribunal, Nuremburg, 14 Nov. 1945- 1 October 1946.* (Nuremburg: Germany, 1947) pp. 252-253.

⁴⁶⁹ Jacques, Melanie. *The Prohibition of Forced Displacement in International Armed Conflicts.* Cambridge UP; Cambridge, 2012. pp. 24-25.

⁴⁷⁰ Fleck, Dieter. *The Handbook of International Humanitarian Law.* Oxford UP; Oxford, 2008. pp.697-698.

⁴⁷¹ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287. Art. 49.

⁴⁷² Jacques, Melanie. *Armed Conflict and Displacement: The Protection of Refugees and Displaced Persons under International Humanitarian Law.* Cambridge UP; Cambridge, 2012. pp. 43.

civilians could be unlawfully deported based on their ethnicity without protection. This seems to be the case, as all regulations placed upon the transfer or deportations of civilians are regulated for the occupying powers only. A clear distinction between the occupying and protecting powers is made here confirming that while the GCIV does indeed do more in terms of protection of civilians from deportation and forced transfer than its predecessors, it does not engage in placing any regulation on the protecting power.⁴⁷³ Even Additional Protocol I, while providing additional protections to the civilian population against deportation and forced transfers, does not wholly rectify this lacuna in the law. It prohibits as part of its grave breaches “the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory...”⁴⁷⁴ The provision once again only places regulations upon the occupying power and only in relation to the movement of civilians to or from the territory which it is occupying.⁴⁷⁵ Additional Protocol II to the Geneva Conventions may be considered as more progressive in this instance as it wholly prohibits the displacement of civilians, but only during non-international conflict.⁴⁷⁶ Within APII the territory in which the civilian population resides and the destination of the displacement have no bearing on the prohibition and therefore both nationals and non-nationals of a belligerent party are covered by the provision.

However, there are exceptions to the aforementioned protections, and individuals or groups may be displaced if either military necessity or the security of the population requires it.⁴⁷⁷ Additionally, whereas in the GCIV there was no protection for nationals of a belligerent, API and APII do away with the term ‘evacuation’ leading to the assertion that displacement for indeterminate time may not be covered.⁴⁷⁸ One could interpret this as a progressive or a digressive

⁴⁷³ *Ibid.* pp. 43.

⁴⁷⁴ International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977 Art. 85(4)(a).

⁴⁷⁵ Pictet, Jean S. *Commentary on the additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. International Committee of the Red Cross; The Hague, 1987. par. 3502.

⁴⁷⁶ Note: This does only apply to cases of non-international armed conflict, however. International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977. Art. 17(1).

⁴⁷⁷ International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977. Art. 17(1).

⁴⁷⁸ Note: It should be noted that the exemptions which were included within GCIV only permitted what was termed as ‘evacuations’ which do not entail permanency of any kind. Under GCIV as soon as the population is able it must

element within the convention. It is also prohibited to compel the civilians in an area to leave their own territory for reasons connected with the conflict.⁴⁷⁹ By ‘their own territory’ it is understood to mean the surrounding territory of the area in which the individual or group resides, not the territorial boundaries of the State.⁴⁸⁰ If a power attempts to compel the individual or group to leave the territory in which they reside for reasons related to the conflict it will be considered as an attempt to forcibly transfer or deport them, and is thus a violation of the prohibition on civilian displacement.⁴⁸¹

4.2.2. *Under the Rome Statute*

While the above provides for an understanding on how deportation and forced transfer of a civilian population has developed within international humanitarian law, it does not provide the entirety of the scope of the act to which it can be prosecuted for under international criminal law. Deportation was included within the IMT and IMTFE, but only to a limited degree. The next inclusion of the act would be under the ICTY Art. 2(g) as a war crime, 5(d) as a crime against humanity and later within the ICTR Statute Art. 3(d) as a crime against humanity.⁴⁸² One should note that while forced transfer of a population is only mentioned as a war crime under Art. 2(g) of the ICTY Statute, it was later incorporated in as a crime against humanity under Art. 5(i) as an

be allowed to safely return to its residency without any impedance by the occupying power. The notion of ‘evacuation’ and how that interacts with ‘ethnic cleansing’ will be discussed more in detail below. For more on evacuations see: Piotrowicz, Ryszard. *Displacement and Displaced Persons* in Wilmschurst, Elizabeth “Perspectives on the ICRC Study on Customary International Law.” Cambridge UP; Cambridge, July 2009.; Jacques, Melanie. *The Prohibition of Forced Displacement in International Armed Conflicts*. Cambridge UP; Cambridge, 2012. Pp. 28-34.

⁴⁷⁹ International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977. Art. 17(2).; Note: This is only mentioned in relation to displacement within non-international conflict and therefore may not be applicable in international armed conflict.

⁴⁸⁰ Pictet, Jean. *Commentary on the additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. International Committee of the Red Cross; The Hague, 1987. Par. 4859.

⁴⁸¹ *Ibid.* par. 4859-4868.

⁴⁸² Note: The inclusion of deportation under the ICTR required additional elements of, “a widespread or systematic attack committed against any civilian population on national, political, ethnic, racial or religious grounds.” UN Security Council, *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006)*, 8 November 1994. Art. 3. The discrepancy between this and the ICC Art. 7 Chapeau requirements and what it implies for ethnic cleansing will be discussed in greater detail in the following sections.

⁴⁸² *Prosecutor V. Kupreškić et al.* (Trial Judgment), IT-95-16-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 14 January 2000. par. 566.; *See also: Prosecutor v. Radislav Krstić* (Trial Judgement), IT-98-33-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 02 August 2001. par. 521-523.; *Prosecutor v. Milomir Stakić*. (Appeals Judgment), IT-97-24-A, International Criminal Tribunal for the Former Yugoslavia (ICTY), 22 March 2006. par. 315-317.

‘other inhumane act.’⁴⁸³ But what is most important is how the crime is understood at the ICC. It is included under Art. 7(d) as a crime against humanity. To understand how ‘ethnic cleansing’ can fit within the ambit of deportation or forced transfer it is necessary to examine the elements of the crime within the ICC. It follows:

1. The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.
2. Such person or persons were lawfully present in the area from which they were so deported or transferred.
3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.⁴⁸⁴

This indicates that in order for ‘ethnic cleansing’ to be considered as falling within the ambit of deportation or forced transfer of a civilian population under the Rome Statute, the act would need to meet a set number of criteria. It would need to fulfill two main aspects of the crime, its *mens rea* and *actus reus*. In order to establish this, one must first examine the *actus reus* listed in elements 1 and 2 of the Elements of Crimes. That is, it is necessary to identify what the scope of illegal deportation and forced transfer is under the Rome Statute, and how expulsion and other coercive acts can manifest themselves. In addition, one must identify if ‘ethnic cleansing’ meets the *mens rea* aspect of the crime. In regard to the *mens rea* of deportation and forced transfer of a

⁴⁸³ *Prosecutor V. Kupreškić et al.* (Trial Judgment), IT-95-16-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 14 January 2000. par. 566.; *See also: Prosecutor v. Radislav Krstić* (Trial Judgement), IT-98-33-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 02 August 2001. par. 521-523.; *Prosecutor v. Milomir Stakić*. (Appeals Judgment), IT-97-24-A, International Criminal Tribunal for the Former Yugoslavia (ICTY), 22 March 2006. par. 315-317.

⁴⁸⁴ *Elements of Crimes* Art. 7(1)(d).

civilian population, there are three main elements of the crime: the temporal aspect (particularly the intent of permanency), the spatial aspect, and the intended victims of the crime.

Actus Reus

Considering the many different methods by which ‘ethnic cleansing’ can be committed, one is likely to ask what the scope of the term ‘forced’ means in relation to displacement. In many cases of ‘ethnic cleansing’ there is no direct physical confrontation going on between the civilians being displaced and the actors displacing them.⁴⁸⁵ Before doing this however, there is distinction to be made between deportation and forced transfer as a war crime and that as a crime against humanity. Firstly, despite there being a strong correlation to the development of deportation and forced transfer within IHL this does not ensure that the crimes will be exactly the same for war crimes and crimes against humanity. As crimes against humanity no longer requires an nexus to an ongoing conflict and is intended to protect any civilian population as a whole, there is respectively no need for occupation of the territory where the victims reside for deportation or forced transfer of a civilian population to take place.⁴⁸⁶ Instead, the key value which is protected through it is the right for one to stay in one’s home and community. As a crime against humanity, borders and existence of an ongoing conflict have no bearing on the decision as to whether an act falls within deportation or forcible transfer of a civilian population.⁴⁸⁷ Rather, it is the value of right to home and community which international criminal law places a primacy on and the prohibition to forced displacement strives to uphold.⁴⁸⁸ It is then not the destination to which the

⁴⁸⁵ This was especially the case in immediate post WWII. See: Bell-Fialkoff, Andrew. “A Brief History of Ethnic Cleansing.” *Foreign Affairs* Vol. 72 No. 3 (Summer 1993).; Mann, Michael. *The Dark Side of Democracy: Explaining Ethnic Cleansing*. Cambridge UP; Cambridge 2005.

⁴⁸⁶ *Prosecutor v. Ante Gotovina et al. (Decision on Several Motions Challenging Jurisdiction)*, IT-06-90-PT, International Criminal Tribunal for the Former Yugoslavia (ICTY), 19 March 2007. par. 55-57.

⁴⁸⁷ Note: this is not meant to entail that a differentiation is unnecessary, but rather for accepting the charge of Deportation or Forced Transfer of a Civilian Population it is no longer required to take territorial borders into account. See: *Situation in the Republic of Kenya (Prosecutor v. William Samoei Ruto et al.) (Decision on the Confirmation of Charges Pursuant to Article 61(a) and (b) of the Rome Statute)* (23 January 2012). ICC-01/09-01/11. par. 268.

⁴⁸⁸ *Prosecutor v. Slobodan Milosevic (Decision on Motion for Judgement of Acquittal)*, IT-02-54-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 16 June 2004. par. 69.; *Prosecutor v. Blagonje Simic et al. (Trial Judgement)*, IT-95-9-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 17 October 2003. par. 130.; *Prosecutor v. Milorad Krnojelac (Appeals Judgement)*, IT-97-25-A, International Criminal Tribunal for the Former Yugoslavia (ICTY), 15 September 2003. par. 218.

victims are sent, but the forced nature of these displacements through illegal uprooting of inhabitants within a territory which entails individual criminal responsibility.⁴⁸⁹

Another point to bear in mind is how forced displacement can be considered as occurring within a widespread or systematic attack under the chapeau requirements of crimes against humanity. Providing a definition of ‘attack’ allows for a better understanding of how the tribunals have come to interpret what the term ‘forced’ means. The Elements of Crimes provides that “‘...widespread or systematic attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population...”⁴⁹⁰ By ‘multiple commission’ it is understood to indicate that there must be a plurality in the committing of one or more of the acts listed under paragraph 1, not that more than one act under paragraph 1 must have been committed.⁴⁹¹ It follows that since acts which may be strictly non-physical, such as apartheid, are included within paragraph 1 then the term ‘attack’ does not need to be limited to acts which are only physical in nature. Such an interpretation was confirmed in *Akayesu* when the court stated: “An attack may also be non-violent in nature, like imposing a system of apartheid [...], or exerting pressure on the population to act in a particular manner...”⁴⁹² In the case of deportation and forced transfer of a civilian population, as long as there is a widespread or systematic course of conduct which is implemented against a civilian population and prohibited under Art.7 of the Statute then the chapeau requirements of crimes against humanity can be considered as fulfilled.⁴⁹³

Taking the above example of ‘attack’ into account one can better understand the meaning of ‘forced’ within forced displacement. The forced nature of the displacement may take place through a multitude of different conducts. The most apparent of these is through physical intervention, when the individual or group is physically removed from their residence to a different

⁴⁸⁹ *Prosecutor v. Milorad Krnojelac (Appeals Judgement)*, IT-97-25-A, International Criminal Tribunal for the Former Yugoslavia (ICTY), 15 September 2003. par. 218.

⁴⁹⁰ UN General Assembly. *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998. Art. 7(2)(a).

⁴⁹¹ Boot, Machteld. *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*. Intersentia; New York 2002. pp. 478.

⁴⁹² *Prosecutor v. Jean-Paul Akayesu (Trial Judgement)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998. par. 581.

⁴⁹³ *Situation in the Central African Republic (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)* (15 June 2009). ICC-01/05-01/08. par. 75.

territory. This can amount to shelling of a given area where the group aimed at being displaced takes residence,⁴⁹⁴ pillaging or wanton destruction of property, murder, rape, torture, extermination, or other acts.⁴⁹⁵ There is no established limit on the number of acts which can amount to forced physical conduct. Instead, forced displacement is considered as an ‘open-conduct’ crime, meaning the perpetrator may commit a multitude conducts which result in the expulsion or “the perpetrator may commit several different conducts which can amount to ‘expulsion or other coercive acts’, so as to force the victim to leave the area where he or she is lawfully present, as required by article 7(2)(d) of the Statute and the Elements of Crimes.”⁴⁹⁶ This shows that as long as the conduct leads to expulsion or may be considered a coercive act, the requirement of ‘forced’ can be considered as fulfilled.

The above understanding of ‘forced’ entails that it is not limited to a strictly physical means. By ‘forced’ it is implied that the displacement occurred against the will of the victims and without their ‘genuine choice.’⁴⁹⁷ The means to identify this is somewhat subjective, but the notion has grounding in jurisprudence. Fear of violence, threat or use of force, duress, psychological oppression or other factors may compel a victim to provide consent to displacement. However, even if consent is provided it may be vitiated due to impeding coercive circumstances such as the ones previously stated.⁴⁹⁸ This line of reasoning was provided by the court in *Krnolejac* and is highly reminiscent of that which was implemented in *Kunarac* regarding ‘genuine/true consent’ when assessing cases of alleged rape. It was found that even if consent had been given by the

⁴⁹⁴ *Prosecutor v. Ante Gotovina et al. (Decision on Several Motions Challenging Jurisdiction)*, IT-06-90-PT, International Criminal Tribunal for the Former Yugoslavia (ICTY), 19 March 2007. par. 1743-1745.

⁴⁹⁵ *Situation in the Republic of Kenya (Prosecutor v. William Samoei Ruto et al.) (Decision on the Confirmation of Charges Pursuant to Article 61(a) and (b) of the Rome Statute)* (23 January 2012). ICC-01/09-01/11. par. 260-261 and 171-172.

⁴⁹⁶ *Ibid.* par. 244.

⁴⁹⁷ *Prosecutor v. Milorad Krnojelac (Appeals Judgement)*, IT-97-25-A, International Criminal Tribunal for the Former Yugoslavia (ICTY), 15 September 2003. par 229.; *Prosecutor v. Vidoje Blagojevic and Dragan Jokic (Trial Judgement)*, IT-02-60-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 17 January 2005. par. 593.; *Prosecutor v. Radoslav Brdanin (Trial Judgement)*, IT-99-36-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 1 September 2004. par. 543.; Note: In *Brdanin* the trial chamber does not use the phrase ‘genuine choice’ rather ‘real choice.’ Its description of ‘real choice’ however mirrors that of ‘genuine consent’ used in *Krnjelac* and *Blagojevic and Jokic*. For this reason, it has been included as an example of ‘genuine consent.

⁴⁹⁸ This was the case in *prosecutor v Krnolejac* in which the chamber found that even though some of the 35 non-Serb KP Dom detainees in Foca, Bosnia and Herzegovina who were transferred to Montenegro agreed to and some seemingly ‘keenly wished’ to be moved this did not amount to genuine choice due to the pervasiveness of illegal detentions, beatings, threats, and other forms of coercion used on the detainees which made them more vulnerable and altered their ability to provide uninhibited consent. *Prosecutor v. Milorad Krnojelac (Appeals Judgement)*, IT-97-25-A, International Criminal Tribunal for the Former Yugoslavia (ICTY), 15 September 2003. par. 229-233.

victim, it cannot be considered as genuine or true unless there is a complete lack of coercive circumstances.⁴⁹⁹ Moreover, the ICTY expounded “circumstances giving rise to the instant appeal and that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive.”⁵⁰⁰ Within this context ‘forced’ under the Rome Statute can rightly be understood as:

“... not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.”⁵⁰¹

It is important to also note that these coercive circumstances do not necessarily need to take place through explicitly recognized illegal means. Military leaders, political leaders or others cannot provide consent to a transfer on behalf of the individuals who are to be displaced.⁵⁰² This applies equally for other groups and organizations including that of the ICRC.⁵⁰³ If done so and not in accordance with the provisions regarding ‘evacuations,’ particularly if not done for the safety of the civilian population or for military necessity, the transfer is considered as in nonconformity with international law. Additionally, the agreement does not mitigate and may instead serve to exacerbate a situation which may be perceived as coercive and consequently prevent the victim from making a genuine choice.⁵⁰⁴ Instead, the most important factor to take into consideration when assessing genuine choice is “the personal consent or wish of an individual, as opposed to collective consent as a group, or a consent expressed by official authorities, in relation to an individual person, or a group of persons.”⁵⁰⁵

⁴⁹⁹ *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*. (Appeals Judgment), IT-96-23/1-A, International Criminal Tribunal for the Former Yugoslavia (ICTY), 12 June 2002. par. 131-133.

⁵⁰⁰ *Ibid.* par. 130.

⁵⁰¹ *Elements of Crimes*. (2011). Art. 7(1)(e) footnote 12.

⁵⁰² *Prosecutor v. Mladen Naletilic, aka “Tuta” and Vinko Martinovic, aka “Stella” (Judgement)*, IT-98-34-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 31 March 2003. par. 523.

⁵⁰³ *Prosecutor v. Milomir Stakic*. (Trial Judgment), IT-97-24-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 31 July 2003. par. 682-683.; *Prosecutor v. Blagonje Simic et al. (Trial Judgement)*, IT-95-9-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 17 October 2003. par.127.

⁵⁰⁴ *Prosecutor v. Blagonje Simic et al. (Trial Judgement)*, IT-95-9-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 17 October 2003. par. 126-127.

⁵⁰⁵ *Ibid.* par. 128.

The above has strong implications for the inclusion of ‘ethnic cleansing’ under the categorization of deportation or forced transfer of a civilian population at the ICC. Firstly, it includes the various incarnations of alleged ‘ethnic cleansing’ which have occurred to date. The understanding of the use of forced includes acts which have been committed in the past and have been labeled as ‘ethnic cleansing’ by the international community. One example can be taken from alleged acts of ‘ethnic cleansing’ that took place in Sudan. In March of 2004, a coalition of Sudanese government and Janjaweed forces targeted a multiple number of villages in southwestern Sudan in order to permanently remove the Fur and Masalit ethnic populations in the area. ‘Ethnic cleansing’ was carried out through forceful means including aerial bombardment, murder, rape, pillaging, physical abuse and the burning of entire villages.⁵⁰⁶ These attacks were consistently repeated until the entire population had been driven from the area.⁵⁰⁷ Afterwards, respective forces moved into the villages and established checkpoints in order to ensure that the population could no longer return.⁵⁰⁸ The example of Sudan here adequately represents the many different ways in which ‘ethnic cleansing’ has been carried out through physical means which mirrors that of deportation or forced transfer of a civilian population.

In addition, taking the example of the ICTY, one can see the aforementioned non-physical means of committing forced displacement as embodied through ‘ethnic cleansing.’ In situations such as the removal of Bosnian Muslims in Bijeljina and Zvornik up until 1992 ‘ethnic cleansing’ was commissioned through non-physical intrusive public policies. In this instance the Srpska Demokratska Stranka (SDS) implemented a three-phase plan to remove the population from the aforementioned areas. First, they aimed at dividing the districts and creating an atmosphere which actively urged the Bosnian Muslim population to leave. Second, those who refused would be fired from their positions and reassigned to areas outside of Bijeljina and Zvornik. The third phase consisted of humiliating remaining Bosnian Muslims through assigning degrading or menial tasks to them until they had no choice but to decide to leave the area.⁵⁰⁹ While this may not be as severe

⁵⁰⁶ Human Rights Watch. “Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan.” *Human Rights Watch* Vol. 16, No. 6(a). 7 May 2004. pp. 41.

⁵⁰⁷ *Ibid.*

⁵⁰⁸ *Ibid.*

⁵⁰⁹ *Prosecutor v. Radovan Karadzic and Ratko Mladic (Trial Judgement)*, IT-95/18-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 24 March 2016. par. 670.

a way of committing ‘ethnic cleansing’ as was in the situation in Sudan,⁵¹⁰ it highlights how the crime can be committed through non-physical means. The policies enacted placed the population within coercive circumstances and thus vitiated their ability to provide ‘genuine consent’ to their displacement.

All the above examples represent the different modalities in which ‘ethnic cleansing’ can manifest itself. It has been commissioned through physical acts such as murder, rape, pillaging, etc. In addition, it has also taken place through non-physical means, by way of creating coercive circumstances including through organizational policy. The different methods in its execution serve to highlight the degree of similarity it shares with forced displacement under the Rome Statute. Notably, the *actus reus* between the two crimes are so similar that there should be initial doubt as to if ‘ethnic cleansing’ should not be classified as an act of forced displacement. Indeed, this is most likely the reason why, to date, many instances of ‘ethnic cleansing’ which have been address by the international criminal tribunals have been addressed under the crime of deportation or forced transfer of a civilian population. However, this does not entail that the two crimes should be equated with one another. Before doing so one must also take into consideration their *mens rea*.

Mens Rea

The above has shown that there are a number of similarities between the *actus reus* of forced displacement and ‘ethnic cleansing.’ The conduct which can amount to forced displacement does not need to be physical. Placing the victim in coercive circumstances in which they feel compelled to leave for their safety or the safety of others invalidates their ability to make a ‘genuine choice’ and is sufficient for the requirement of forced to be fulfilled. These similarities alone are not enough to qualify ‘ethnic cleansing’ as a form of deportation or forced transfer, however. In order to come to such a conclusion, it is also necessary to examine the *mens rea* of the crime. In assessing the *mens rea* of deportation or forced transfer of a civilian population one must examine three main aspects of the requirement. That is, the spatial, temporal and discriminatory element in the intent to displace a population.

Forced displacement has undergone numerous conflicting interpretations as to the details of the temporal element within its *mens rea*. It has been argued that the intent of the perpetrator

⁵¹⁰ Note: The situation however developed into the use of physical force to remove the population from the area later.

must be that those uprooted from their residence never return. However, this is irrespective of how it has developed through jurisprudence. The mistake leading to this assertion is clearly rooted in the *Simic* ICTY Trial Judgment, when the Trial Chamber asserted that the French version of *Krnolejac* appeals, in its use of the phrase ‘*déracinement forcé*’, implied a degree of permanency to the *mens rea* of the crime and therefore the perpetrators must intend for the displacement to be permanent in nature.⁵¹¹ Firstly, there was a misunderstanding of what the Appeals Chamber implied in the use of the term ‘*déracinement forcé*’ or forced uprooting. The phrase itself does imply a degree of permanency, but this is to be applied to the effect the act has on its victims. In other words, once uprooted from their community, even if an individual or group is permitted to return to their homes, they will not be able to enjoy the same quality of life that they once had. This can be attributed to the permanent trauma that is sustained as a result of the displacement that took place. It has no relationship to the intent of those who have committed the act. Such a position is supported through GCIV Art. 49 having no mention of permanency and its prohibition on forced displacement applying “regardless of their motive.”⁵¹² In *Stakic* appeals the chamber commented in a similar vein, stating that *Simic* and others had placed too much emphasis on the GCIV commentary and thus mistakenly interpreted its provision.⁵¹³ In other words, they sought to clarify the issue so in the future “Trial Chambers will not require proof of intent to permanently displace...”⁵¹⁴

The decision by the ICTY Appeals Chamber in *Stakic* also allows for one to reconcile with another disjunction between the *mens rea* of forced displacement and that of ‘ethnic cleansing.’ Philipp Ther has made the argument that ‘ethnic cleansing’ includes the intent to “permanently remove a group from the area it inhabits.”⁵¹⁵ Such intent seems to be reciprocated in cases of alleged ‘ethnic cleansing’ which have occurred to date. The final report of the Commission of Experts established pursuant to SC resolution 780, in a much different direction from that of forced

⁵¹¹ *Prosecutor v. Blagonje Simic et al. (Trial Judgement)*, IT-95-9-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 17 October 2003. par. 133.; *Prosecutor v. Mladen Naletilic, aka “Tuta” and Vinko Martinovic, aka “Stella” (Trial Judgement)*, IT-98-34-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 31 March 2003. par. 520.

⁵¹² International Committee of the Red Cross (ICRC). *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287. Art. 49.

⁵¹³ *Prosecutor v. Milomir Stakic. (Appeals Judgment)*, IT-97-24-A, International Criminal Tribunal for the Former Yugoslavia (ICTY), 22 March 2006. par. 305-306.

⁵¹⁴ *Ibid.* par. 307.

⁵¹⁵ Stone, Dan. *The Oxford Handbook of Postwar European History*. Oxford UP; Oxford. 2012. pp.142.

displacement, asserted the intent of ‘ethnic cleansing’ is “occupation of territory to the exclusion of the purged group or groups.”⁵¹⁶ In *Karadzic*, Ambassador Herbert Okun testified that the aim of ‘ethnic cleansing’ was “settlement homogenization.”⁵¹⁷ In addition, the division of the population was later confirmed by the chamber to have the intent to be permanent in nature.⁵¹⁸ This is not the only example of ‘ethnic cleansing’ asserting a degree of permanency in its mental element. It has also been the case as observed by Human Rights Watch in a number of other situations. Human Rights Watch, when commenting on ‘ethnic cleansing’ in Burma, asserted that there exists a motive to change the demographic composition of the State through separating the two religious groups.⁵¹⁹ Moreover, it was made clear that such a division is intended to be permanent in nature.⁵²⁰ With other alleged instances of ‘ethnic cleansing’ being overseen by the ICC such as in Sudan, it has been reported that those displaced were done so with the intent to redistribute the population to areas where they can be easily confined, contained and controlled.⁵²¹ Those displaced are discouraged from returning not just through destruction of their residence and the surrounding area, but also through the active deployment of forces to those territories after their destruction.⁵²² In addition, any who try to return are subsequently attacked or murdered.⁵²³ Furthermore, in the *Situation in Kenya* the prosecutor alleged that various ethnic groups such as the Kikuyu, Kamba and Kisii were forced from their homes with the intent that they be permanently displaced.⁵²⁴ There are also historical instances such as Hitler’s *Heim ins Reich* policy which detailed a plan to permanently remove non-Germans from conquered territories and resettle the areas with repatriated Germans.⁵²⁵ These examples serve to show the commission of ‘ethnic cleansing’ has consistently included a degree of permanency which is not required of forced

⁵¹⁶ Security Council. *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780, S/1994/674* (1992). par. 130.

⁵¹⁷ *Prosecutor v. Radovan Karadzic and Ratko Mladic (Trial Judgement)*, IT-95/18-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 24 March 2016. par. 2762.

⁵¹⁸ *Ibid.* par. 3237.

⁵¹⁹ Human Rights Watch, *All You Can Do is Pray: Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State*. Human Rights Watch; New York, 2013. pp. 119.

⁵²⁰ *Ibid.* pp. 118.

⁵²¹ Human Rights Watch. “Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan.” *Human Rights Watch* Vol. 16, No. 6(a). 7 May 2004. pp. 40.

⁵²² *Ibid.* pp. 41-42.

⁵²³ *Ibid.* pp.42.

⁵²⁴ *Situation in the Republic of Kenya* (Prosecutor v. William Samoei Ruto et al.) (Decision on the Confirmation of Charges Pursuant to Article 61(a) and (b) of the Rome Statute) (23 January 2012). ICC-01/09-01/11. par. 181.

⁵²⁵ Note: See Section 1.1. for more on this.

displacement. However, it does not entail that the two crimes are incompatible with one another. Instead it serves to highlight how ‘ethnic cleansing’ is narrower than forced displacement due to its required intent of permanency.

The temporal aspect within the *mens rea* of forced displacement and ‘ethnic cleansing’ is not the only point of divergence between the two crimes. There also exists a difference in the spatial intent between them. Before addressing this, it is essential to note the difference between deportation and forced transfer in this regard. The *mens rea* of deportation or forced transfer share some similarities but also differ slightly depending on which crime is being addressed. Forced transfer includes only the intent to transfer within a State’s borders.⁵²⁶ Conversely, deportation requires the intent to displace outside of the State’s borders.⁵²⁷ By outside the State, *de jure* borders are primarily considered to be the most easily identifiable but *de facto* borders may be included within the ambit of deportation under certain circumstances.⁵²⁸ Concisely put, if the perpetrator perceived and intended the displacement to be beyond the State’s territory and there is sufficient evidence to show that there was *de facto* control of the region then the act may fall within the ambit of deportation. Aside from the above difference in the *mens rea* of intended destination there is no other distinguishable element between the *mens rea* of deportation and forced transfer of a civilian population.⁵²⁹

The difference between the spatial intent of deportation or forced transfer highlights a slight divergence with the crime of ‘ethnic cleansing.’ Within the *mens rea* of the crime there is no distinction to be made with the intent to transfer a population within or outside of a State’s territory. Instead, the intent is to promote ethnic or religious homogeneity, usually within a territory which is perceived by one group as sacred, holy or which the group believes they have exclusive

⁵²⁶ *Prosecutor v. Radislav Krstic* (Trial Judgement), IT-98-33-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 02 August 2001. par. 521.; *Prosecutor v. Milomir Stakic*. (Appeals Judgment), IT-97-24-A, International Criminal Tribunal for the Former Yugoslavia (ICTY), 22 March 2006. par. 317.

⁵²⁷ *Prosecutor v. Milorad Krnojelac* (Trial Judgement), IT-97-25-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 15 March 2002. par. 474.

⁵²⁸ *Prosecutor v. Radovan Karadzic and Ratko Mladic* (Trial Judgement), IT-95/18-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 24 March 2016. par. 493.; *Prosecutor v. Milomir Stakic*. (Appeals Judgment), IT-97-24-A, International Criminal Tribunal for the Former Yugoslavia (ICTY), 22 March 2006. par. 278.

⁵²⁹ *Prosecutor v. Slobodan Milosevic* (Decision on Motion for Judgement of Acquittal), IT-02-54-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 16 June 2004. par. 77-79.

entitlement to.⁵³⁰ In order to achieve such a goal the perpetrators must remove specific groups from a perceived territory. If this is the entirety of the State it may result in cross border displacement similar to deportation, but cases in which only certain territories within a State are targeted, it may only correspond with the crime of forced transfer of a civilian population. The area where the displaced are forced to is contingent upon the swath of territory the perpetrators intend to make ethnically or religiously uniform. However, the above is contingent upon the assumption that the intent to forcibly displace a population is a necessity in proving the existence of ‘ethnic cleansing.’ A more accurate understanding of the crime within its etymological framing would suggest that while forced displacement is usually a means of achieving ‘ethnic cleansing,’ it need not always be so. In *Karadzic and Mladic* Professor Garde, when responding to questions regarding the definition of ‘ethnic cleansing,’ said: “Well, ethnic cleansing is a practice which means that you act in such a way that in a given territory the members of a given ethnic group are eliminated.”⁵³¹ Subsequent agreement by the Trial Chamber on his understanding of the crime has led to the assertion by authors such as Mann that the commission of ‘ethnic cleansing’ may, in some cases, take place without forced displacement.⁵³² Instead, it can also embody itself through exterminatory characteristics, meaning that the crime may be commissioned through the destruction of a group in whole or part with the intent of ‘cleansing’ it from the territory desired to be ethnically or religiously uniform.⁵³³ This entails that there need not exist the intent to displace a group or groups in the commission of ‘ethnic cleansing.’ When taken into consideration this provides for an understanding as to the difference between the two crimes. The spatial element in the *mens rea* of forced displacement places an emphasis on the destination of the victims while with ‘ethnic cleansing’ the focal point is on removal or elimination of a group or groups from a designated area through any means.

⁵³⁰ Ther, Philipp. “Ethnic Cleansing” in Stone, Dan. *The Oxford Handbook of Postwar European History*. Oxford UP; Oxford. 2012. pp. 143.

⁵³¹ *Prosecutor v. Radovan Karadzic and Ratko Mladic (Transcript of Proceedings 28 June 1996)*, IT-95/18-R61, International Criminal Tribunal for the Former Yugoslavia (ICTY), 28 June 1996. pp.128.

⁵³² Mann, Michael. *The Dark Side of Democracy: Explaining Ethnic Cleansing*. Cambridge UP; Cambridge 2005. Chapter 1.

⁵³³ Pegorier, Clotilde. *Ethnic Cleansing a Legal Qualification*. Routledge; Oxford. 2013. pp.79-80.; also see Mann, Michael. *The Dark Side of Democracy: Explaining Ethnic Cleansing*. Cambridge UP; Cambridge 2005. Note: This is not the most common way of carrying out ‘ethnic cleansing.’ It is usually a combination of murder/ extermination in tandem with other acts or policies which force the population to flee from their territory.

The above serves to demonstrate the difference between ‘ethnic cleansing’ in terms of intended permanency and destination. In addition to this, there is a more apparent difference in the intended victims of the crime. Whereas deportation or forced transfer of a civilian population aims at displacing a civilian population from a given area, ‘ethnic cleansing’ is again much more specific. The intent is to *remove any* ethnic or religious group which is not perceived as the same or similar to that of the perpetrating party from a given territory. This highlights another key difference between ‘ethnic cleansing’ and deportation or forced transfer of a civilian population as it also includes a level of discrimination. ‘Ethnic cleansing’ in this regard can be considered as a substantially different crime from forced displacement as its objective is to cleanse, or permanently remove an ethnic or religious population(s) from the area, by any means, in order to ensure ethnic homogeneity.

While the act of ‘ethnic cleansing’ shares a great degree of similarities with that of forced displacement in its *actus reus*, it does not entail that it should be classified as such. It can, and has in the past, been categorized as an act of deportation or forced transfer of a civilian population, but doing so overlooks the distinct *mens rea* elements of the crime. One needs to take into consideration the differences in the spatial, temporal and discriminatory intent within the crime before deciding to classify it as an act of forced displacement. Reflecting on the definition of ‘ethnic cleansing’ which was posed earlier in this chapter, the act does not simply displace a population but removes them with a level of intent which is permanent, spatially distinct and discriminatory in nature. The intent is to permanently change the demographics of a given territory in order to render it ethnically or religiously homogeneous. This key aspect of the crime is omitted from the contents of crimes against humanity of deportation or forced transfer of a civilian population under the Rome Statute.⁵³⁴ Despite ‘ethnic cleansing’ having been discussed within the context of article 7(1)(d) at the ICC in the past, it should not be perceived as the ideal means of addressing the act. Instead it would be best to examine other acts which may better represent its elements.

⁵³⁴ Note: This should not be confused as asserting that ‘ethnic cleansing’ can never be considered as a form of deportation or forced transfer of a civilian population. In the case of the ICTR it would be much easier to make a case for this as the Chapeau requirements under crimes against humanity require that the attack was based on national, political, ethnic, racial or religious grounds.

4.3. Persecution

Having an understanding that ‘ethnic cleansing’ draws a great deal of similarities to forced displacement but differs in its *mens rea* it becomes essential to examine other acts which ‘ethnic cleansing’ could be classified under. One approach is to analyze it against another crime which it shares a number of elements with, persecution. Persecution has, as argued by scholars such as Pegorier, developed in tandem with that of genocide.⁵³⁵ The heading of persecution was used for the prosecution of the crime of genocide in the IMT. While genocide eventually evolved into its own core crime, persecution was retained as a crime against humanity. Due to the simultaneous development of both crimes and prosecutions for genocide taking place under the auspice of persecution at the IMT there existed a degree of ambiguity over how the crimes differed. Therefore, the first part of this section will identify to the reader the key differences between persecution and genocide alongside a comprehensive definition of the crime of persecution. It will then attempt to classify ‘ethnic cleansing’ under this framework. It will show that while there is potential to prosecute for ‘ethnic cleansing’ under the heading of persecution, nuanced differences, similar to those which exist between genocide and persecution, draw into question the appropriateness of classifying the crimes as such. This coupled with the additional disjunctions that exist between ‘ethnic cleansing’ and forced displacement will highlight the aspect of the crime which will be underrepresented if prosecuted for as an act of persecution.

4.3.1. *Persecution and Genocide: a different dolus specialis*

As was stated above, there has been a degree of confusion over the difference between persecution and genocide after the IMT. During the Nuremburg proceedings genocide, albeit not featured in the IMT statute, was prosecuted for as a crime against humanity of persecution (in connection with other crimes such as extermination). With the creation of the ICTY and ICTR these crimes were separated from one another and genocide was elevated to a core crime while persecution was retained as a crime against humanity. The two tribunals were thus presented with the task of discerning persecution from genocide, despite a large body of jurisprudence linking the two. They found two major differences between the aforementioned crimes. The first dealt with the *mens rea* of persecution. The second identified the difference in *actus reus* of the two crimes. Comparing the two aspects of both crimes not only aids in garnering a proper understanding of

⁵³⁵ Pegorier, Clotilde. “‘Only One Step Away from Genocide.’: The Crime of Persecution in International Criminal Law.” *International Criminal Law Review* Vol.10 (5) (October 2010).

persecution as it exists within the Rome Statute, but also serves to elucidate the nuanced differences between ‘ethnic cleansing’ and persecution.

The first and most apparent difference between the two acts is in their *mens rea*. An overly simplistic way of differentiating the two is by stating that crimes against humanity do not include the requisite *dolus specialis* which is present within genocide. This is undoubtedly true if one were to perceive *dolus specialis* to only refer to “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”⁵³⁶ However, it has been argued that this is an oversimplification of the term, which has evolved to mistakenly only be used in reference to the crime of genocide.⁵³⁷ *Dolus specialis* in its plain meaning only refers to *special deceit/intent*; something distinct from normal intent and usually identified through a specific goal that extends beyond the reach of the perpetrator’s conduct.⁵³⁸ Persecution can fit within this definition as it includes the intent to commit a prohibited act with the additional goal to discriminate against an individual or group based on “political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law.”⁵³⁹ By providing an additional subjective element in which the perpetrator not only is required to intend to commit an act which is prohibited and entails individual criminal responsibility, but also that these acts must be committed with the intent to discriminate based on the aforementioned grounds, the crime of persecution can be asserted to include an additional *mens rea* or special intent which is not present within other crimes against humanity.⁵⁴⁰ Genocide and persecution, therefore, still share similarities in that they both require, albeit very different in substance, a *dolus specialis* to be prosecuted for. Persecution in this sense has been defined as an offence of the same genus of genocide.⁵⁴¹ Both crimes intend to discriminate against a particular group or groups based on their inclusion or close affiliation with a group. In fact, the *mens rea* of the two crimes were, quite controversially, said to be close enough that in a number of judgments, for example in the

⁵³⁶ UN General Assembly. *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998. Art. 6.

⁵³⁷ Pegorier, Clotilde. “‘Only One Step Away from Genocide.’: The Crime of Persecution in International Criminal Law.” *International Criminal Law Review* Vol.10 (5) (October 2010).

⁵³⁸ Cassese, Antonio et al. *Cassese’s International Criminal Law*. 3rd ed. Oxford UP; Oxford, 2013. pp. 44.

⁵³⁹ UN General Assembly. *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998. Art. 7(1)(h).

⁵⁴⁰ Mettraux, Guenael. *International Crimes and the ad hoc Tribunals*. Oxford UP; Oxford, 2005. pp.333.

⁵⁴¹ *Ibid.* pp.334.; See also: *Prosecutor V. Zoran Kupreškić et al.* (Trial Judgment), IT-95-16-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 14 January 2000. par. 636.

Kashiyama trial judgment, it was deemed that cumulative convictions for persecution and genocide could not occur.⁵⁴² The court later in *Kupreskic* asserted that genocide is, in and of itself, “a most extreme form of persecution.”⁵⁴³ In addition, any charge under the heading of genocide would subsume all of the elements within a charge of persecution and, consequently, the court adopted the position that “Since the crimes of persecutions and genocide do not have a mutually distinct element, it is not possible to cumulate convictions for both.”⁵⁴⁴

The above decisions seemingly overlook the additional *mens rea* element in place within genocide, differing aspects in the *actus reus* of the two crimes, as well as one of the core differences between genocide and crimes against humanity. Firstly, while persecution can manifest itself through a multiplicity of different acts including those which can be present in the commission of genocide such as extermination, murder, rape, etc. it stops short of the particular element of discriminatory intent to destroy a particular group in whole or in part as such.⁵⁴⁵ Conversely, genocide can include but does not require the immediate physical destruction of a protected group, rather the intent to destroy a protected group as such eventually is sufficient in proving the *mens rea* of the crime.⁵⁴⁶ This explains why while mass murder can be included within the ambit of genocide, other acts such as the forced transfer of children who belong to a protected group may also qualify. The forcible transfer of young children from a specific ethnicity to an area of another, whether through direct physical force or as a result of threats, trauma or coercion,⁵⁴⁷ imparts two distinct levels of sufferings upon the victim group by compromising the physical composition of

⁵⁴² *Prosecutor v. Clement Kayishema and Obed Ruzindana (Trial Judgement)*, ICTR-95-1-T, International Criminal Tribunal for Rwanda (ICTR), 21 May 1999. par. 577-578.; *Prosecutor v. Goran Jelusic (Trial Judgement)*, IT-95-10-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 14 December 1999. par. 68.

⁵⁴³ *Prosecutor V. Zoran Kupreškić et al. (Trial Judgment)*, IT-95-16-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 14 January 2000. par. 636.

⁵⁴⁴ *Prosecutor v. Radislav Krstic (Trial Judgement)*, IT-98-33-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 02 August 2001. par. 684.

⁵⁴⁵ *Prosecutor V. Zoran Kupreškić et al. (Trial Judgment)*, IT-95-16-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 14 January 2000. par. 636.; See also: *Prosecutor v. Goran Jelusic (Trial Judgement)*, IT-95-10-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 14 December 1999. par. 68.

⁵⁴⁶ *Prosecutor v. Mitar Vasiljevic (Trial Judgement)*, IT-98-32-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 29 November 2002. par. 227.

⁵⁴⁷ *Prosecutor v. Jean-Paul Akayesu (Trial Judgement)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998. par. 507-510.; Note: This is also applicable to the prevention of births within a protected group as a form of genocide.

the group and also depressing or potentially eliminating the identity of the displaced children.⁵⁴⁸ Both effects of the crime do not indicate the immediate physical destruction of the protected group however.

On a separate note, some may find the difference between the two somewhat confusing when comparing exterminatory persecution and murderous or exterminatory genocide. Murderous or exterminatory genocide may be convicted as long as one or multiple murders have taken place with the requisite *dolus specialis*, that is the intent to physically or biologically destroy the target protected group ‘as such.’⁵⁴⁹ Persecutory extermination, on the other hand, must always be dealt with on a large scale and only requires evidence of discriminatory intent. Individuals can be convicted for extermination if they have committed or played a role in the commission of a single murder, but this must have occurred in connection with a mass killing event.⁵⁵⁰ This means that exterminatory persecution, when compared to genocide through murder and regardless of the difference in protected groups or persons, holds a distinctly different mental element⁵⁵¹ along with a higher initial threshold in regards to its *actus reus*.⁵⁵²

In addition, persecution must meet the chapeau requirements of crimes against humanity. This means that it must take place within the context of a widespread or systematic attack against a civilian population and the perpetrator must have knowledge of such an attack. Genocide is less demanding on two points in this regard: the target of the attack, and the widespread and systematic nature of such an attack. An initial caveat should be addressed here. It is undoubtedly true that the crime of genocide only covers protected groups under the Genocide Convention, specifically national, ethnic, racial or religious groups. Persecution allows for more coverage in the types of individuals protected, including political, racial, ethnic, cultural, religious, gender or other groups. In this regard it should be considered as less restrictive than genocide. However, persecution within crimes against humanity can only be dealt with when it is committed against a civilian population.

⁵⁴⁸ Watts, Arthur. *The International Law Commission 1949-1998: Volume Three: Final Draft Articles and Other Materials*. Oxford University Press; Oxford, 1999. pp. 1745.

⁵⁴⁹ Mettraux, Guenael. *International Crimes and the ad hoc Tribunals*. Oxford UP; Oxford, 2005. pp. 338.

⁵⁵⁰ *Prosecutor v. Mitar Vasiljevic (Trial Judgement)*, IT-98-32-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 29 November 2002. par. 227.

⁵⁵¹ Note: by distinctly different it is meant that genocide seeks to destroy at the very least a distinct part of the targeted group while murderous persecution must target a collectively but can be committed in a sporadic manner. See: *Ibid.* par. 227.; *Prosecutor v. Goran Jelusic (Trial Judgement)*, IT-95-10-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 14 December 1999. par. 107-108.

⁵⁵² Mettraux, Guenael. *International Crimes and the ad hoc Tribunals*. Oxford UP; Oxford, 2005. pp. 338.

Genocide, on the other hand, may extend to the entirety of the protected group. In other words, in terms of victims, genocide does not distinguish between combatants or civilians while persecution does.⁵⁵³ A second point to take into consideration is the widespread or systematic nature of the attack. Under genocide there is no such requirement.⁵⁵⁴ It may often be commissioned in conjunction with a widespread or systematic attack, but the individual does not need to be aware that his/her actions took place within the context of an attack, be it widespread, systematic, violent or otherwise.⁵⁵⁵ Geography is not considered as an important factor in this regard as the commission of genocide has been recognized to take place within limited geographical zones.⁵⁵⁶ These differences are why both the ICTY and ICTR eventually changed their positions and came to the conclusion that while persecution and genocide may share similarities, there are significant differences between them to permit for cumulative convictions.⁵⁵⁷

It is questionable if the above distinction can be made under the framework of the ICC, however. In jurisprudence at the ICTY, the differences between persecution and genocide are well established, but due to the high level of overlap in the *mens rea* present in the Elements of Crimes it becomes highly dubious whether one can transpose ICTY jurisprudence on the matter to the ICC. This argument stems from Art. 6(a) in the Elements of Crimes which provides, “the term ‘in the context of’ would include the initial acts in an emerging pattern.”⁵⁵⁸ The use of the phrase “emerging pattern” has led some authors to make the assertion that this is equivalent to “widespread or systematic attack” and therefore may indeed be a retrogressive requirement added

⁵⁵³ Mettraux, Guenael. *International Crimes and the ad hoc Tribunals*. Oxford UP; Oxford, 2005. pp. 331. in reference to *Krstic* Trial Chamber not distinguishing between civilian and combatant victims when addressing genocide.

⁵⁵⁴ This is only as established through jurisprudence at the ICTY and ICTR. As will be mentioned below there is potential room for divergence with this understanding of genocide within the ICC.

⁵⁵⁵ *Prosecutor v. Goran Jelusic (Appeals Judgement)*, IT-95-10-A, International Criminal Tribunal for the Former Yugoslavia (ICTY), 15 July 2001. par. 45-46,100.; *Prosecutor v. Radislav Krstic (Appeals Judgement)*, IT-98-33-A, International Criminal Tribunal for the Former Yugoslavia (ICTY), 19 April 2004. par. 223.

⁵⁵⁶ *Prosecutor v. Radislav Krstic (Trial Judgement)*, IT-98-33-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 02 August 2001. par. 590.

⁵⁵⁷ *Prosecutor v. Radislav Krstic (Appeals Judgement)*, IT-98-33-A, International Criminal Tribunal for the Former Yugoslavia (ICTY), 19 April 2004. Par. 219-229.; Note: This topic was also discussed at length regarding, in general, cumulative convictions between genocide and crimes against humanity. It was found that due to the distinctions between the two, regardless of the crime the defendant has allegedly committed within crimes against humanity cumulative convictions can occur.; See: *Prosecutor v. Alfred Musema (Appeals Judgement)*, ICTR-96-13-A, International Criminal Tribunal for Rwanda (ICTR),16 November 2001. par. 358-370.

⁵⁵⁸ *Elements of Crimes* Art. 6(a).

to the crime of genocide.⁵⁵⁹ If this line of argument is assumed to have any validity then it would undermine one of the distinguishing features between genocide and persecution within the Rome Statute.⁵⁶⁰ To reconcile with this it might be advantageous to note Antonio Cassese's reflection on the matter concerning the difference between crimes against humanity and genocide. He claims, "the crime of genocide protects transnational interests, whereas crimes against humanity protect individual interests; this throws out the option of 'false' (or 'fake') cumulation as between genocide and crimes against humanity. The first cannot 'consume' the latter and visa-versa."⁵⁶¹

In sum, there exist distinctly different elements in the *mens rea* of genocide and persecution. The first is the scope of potential victims which are targeted. Genocide protects a narrower range of groups while persecution extends to a larger range of groups. Moreover, genocide serves to protect the existence of the group 'as such' and while persecution does not endeavor to do so. It instead serves to protect individuals within a group or groups from violation of the right to equality as a fundamental right.⁵⁶² More importantly, the intent to physically or biologically destroy a group in whole or part is not present in cases of persecution, even for example, when committed through extermination.⁵⁶³ This is why they are considered as two distinct crimes. While there was once ambiguity between the two crimes in the past, the differences between them have now been

⁵⁵⁹ Note: It is in this Author's opinion that the inclusion may have been reactive to the *Jelisić* decision which alluded to the potential of prosecuting persons accused of committing genocide through an individual undertaking. In this sense it merely reiterates the basic requirements of genocide as expounded through jurisprudence, albeit in a concise way. Had the Elements of Crimes been more expansive in its explanation of the element it may have better reflected the overall intentions of the drafters.

⁵⁶⁰ Note: making such an assumption however would undermine that while the Elements of Crimes certainly enjoys a higher level supremacy in interpreting the Statute than other forms, such as jurisprudence at other tribunals, it is also meant to serve as a guideline for interpretation. Interpreting it in this way would run contrary to developed jurisprudence on the matter. For the time being one can only speculate that in the future there is potential for such a change to occur, not to assert its inevitability.

⁵⁶¹ Cassese, Antonio *et al.* *The Rome Statute of the International Criminal Court: Commentary*. Oxford UP; Oxford, 2002. pp. 491-492.; Note: this line of reasoning is also reflected to a degree in Judge Khan's dissenting opinion in *Kayishema*. He argues that cumulative charges in this area should not be denied based on similarity until the sentencing stages. Only then should the sentence be altered to reflect the differences in the crimes for which the individual was found guilty.; *Prosecutor v. Clement Kayishema and Obed Ruzindana (Trial Judgement)(Separate and Dissenting Opinion of Judge Khan Regarding the Verdicts under Charges of Crimes Against Humanity/ Murder and Crimes Against Humanity/ Extermination)*, ICTR-95-1-T, International Criminal Tribunal for Rwanda (ICTR), 21 May 1999. par. 4-25.

⁵⁶² *Prosecutor v. Dusko Tadić (Opinion and Trial Judgement)*, IT-94-1-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 7 May 1997. par. 697.

⁵⁶³ Gaeta, Paola. *The UN Genocide Convention: A Commentary*. Oxford UP; Oxford, 2009. pp.107-108.

adequately defined. Many of these points also serve as defining elements in differentiating not just genocide and persecution, but also persecution and ‘ethnic cleansing.’

4.4. ‘Ethnic Cleansing’

Before beginning with the analysis on ‘ethnic cleansing’ and persecution two points should be addressed. Firstly, one should bear in mind that there have been scholars who asserted that jurisprudence regarding refugee law would bolster the understanding of persecution in international criminal law. While there exists an abundance of rulings at the domestic level on this topic, they cannot be utilized in this instance. Art 21(c) does permit the use of domestic law in interpreting its crimes, however refugee law and the jurisprudence surrounding it draws an inherent and distinct point of divergence from international criminal law.⁵⁶⁴ Namely, refugee law places an emphasis on victims and how they perceived the actions committed against them. It serves to provide shelter in light of urgent need for protection and assistance for, in this case, victims of perceived persecution.⁵⁶⁵ Refugee law thus omits an essential axiom in place within international criminal law in that the *mens rea* of the perpetrator is distanced from a court’s decision on whether or not persecution took place. If one were to permit the use of such jurisprudence in the analysis of persecution it would risk violating the principle of legality. Refugee law does not endeavor to create individual criminal responsibility for the act of persecution and can thusly be perceived as similar in nomenclature, but different in content between the two legal spectrums. In summary, refugee law serves to protect individuals, and international criminal law serves to punish and prevent future violations from occurring.⁵⁶⁶ Bearing this in mind one must forgo examining refugee law and only examine persecution at the international criminal tribunals through its content, and how this coincides/ differs from that of ‘ethnic cleansing.’

Secondly, the core rights which persecution serves to uphold have been recognized as “the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment and

⁵⁶⁴ Art. 21 on interpretation and applicable law provides: “The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.”

⁵⁶⁵ Moore, Jennifer. *Humanitarian Law in Action within Africa*. Oxford UP; Oxford, 2012. pp. 166.

⁵⁶⁶ *Ibid.*

the right to private property.”⁵⁶⁷ These are some of the key elements present in de Zayas’ understanding of ‘ethnic cleansing’ as a violation of the right to one’s home and country.⁵⁶⁸ The underlying question which one would then ask is: “Can ‘ethnic cleansing’ be recognized as a crime with the aims of protecting a group, or does it lie within the same scope of other crimes against humanity, in which case it only serves to prevent the violation of individual rights?” When reflecting on ‘ethnic cleansing’ as a violation of the right to one’s home and country it becomes evident that the violations which are taking place are those which have been established through international human rights conventions. As such, they apply to an individual’s rights and make no assurance for the collective rights of a group. The same follows for pronouncements cited earlier by the SC and GA regarding ‘ethnic cleansing.’ There is no indication that it distinguishes itself from crimes against humanity or war crimes, which serve to protect the individual.⁵⁶⁹ Genocide, on the other hand, has been explicitly referred to as a crime which was implemented to safeguard the existence of protected groups ‘as such.’⁵⁷⁰ Moreover, it has been stated that the loss of these groups would have a negative impact upon society. As there is no evidence to suggest that ‘ethnic cleansing’ contains a special group element which its prohibition serves to protect, it would be illogical to assume that it cannot be classified as a crime which violates individual rights and values. Bearing these two points in mind one can examine the *mens rea* and *actus reus* of persecution, as well as the convergences and divergences between it and ‘ethnic cleansing.’

⁵⁶⁷ *Situation in the Democratic Republic of the Congo* (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) (9 June 2014) ICC-01/04-02/06. par. 58.

⁵⁶⁸ De Zayas, Alfred. “The Right to One’s Homeland, Ethnic Cleansing, and the International Criminal Tribunal for the Former Yugoslavia.” *Criminal Law Forum* Vol. 6 No. 9 (1995).

⁵⁶⁹ Note: this becomes ever more apparent when reflecting upon the unique mental element of ‘ethnic cleansing’ which targets victims based on non-inclusion from a group. For more on this see the following subsection on *mens rea*.

⁵⁷⁰ Note: Emphasis should be placed here on *safeguarding the existence of the protected group ‘as such,’* not merely penalizing for acts which will bring about its destruction. The Pre-Trial chamber in Al-Bashir stated “...the protection offered to the targeted groups by the penal norm defining the crime of genocide is dependent on the existence of an intent to destroy, in whole or in part, the targeted group. As soon as such intent exists and materializes in an isolated act of a single individual, the protection is triggered, regardless of whether the latent threat to the existence of the targeted group posed by the said intent has turned into a concrete threat to the existence in whole or in part of that group” See: *Situation in Darfur, Sudan* (Prosecutor v. Omar Hassan Ahmad Al Bashir) (Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir), (4 March 2009) ICC-02/05-01/09. par.120.

4.4.1. *Actus Reus*

The question of whether or not the *actus reus* of ‘ethnic cleansing’ can fall within the scope of persecution may seem straightforward. However, it still has been a topic of discussion and is an essential point to take into consideration. To begin, with the inclusion of persecution under the ICTR and ICTY, the elements of the *actus reus* of the crime was not provided for. The crime was only defined as “persecution on political, racial and religious grounds.”⁵⁷¹ The Rome Statute provides a much more robust and well-articulated definition of the crime as “persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.”⁵⁷² The argument has been brought forth that Art. 7(1)(h) and its Elements of Crimes counterpart require, in order to prosecute for an act of persecution, the act must be committed in connection with one of the other acts included under crimes against humanity.⁵⁷³ This is essential to consider for the inclusion of ‘ethnic cleansing’ under the crime of persecution; as with some aspects of the crime it may seemingly be controversial as to whether or not they can be considered as directly being a violation of one of the other ten crimes listed under crimes against humanity. Use of the term ‘connection’ elucidates how this is not a requirement. It does not entail that the act committed must be included within Art. 7(1) of the Rome Statute in order to fall within the ambit of persecution. Adopting such a restrictive interpretation of the element would undermine the inclusion of footnote 22 in the Elements of Crimes, which provides that no additional *mens rea* is required for this element other than that what is provided for in the chapeau of Art. 7.⁵⁷⁴ This indicates that persecution can potentially include other acts which fall outside that of Art. 7 as long as they: 1) constitute a severe deprivation of an individual’s fundamental rights, 2) meet the specific *mens rea* element of the crime and 3) can be linked to the

⁵⁷¹ UN Security Council. *Statute of the International Criminal Tribunal for Rwanda* (as last amended on 13 October 2006), 8 November 1994. Art. 3(h).; UN Security Council. *Statute of the International Criminal Tribunal for the Former Yugoslavia*, 25 May 1993 Art. 5(h).

⁵⁷² UN General Assembly. *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998. Art. 7(1)(h).

⁵⁷³ Art. 7(1)(h)(4) provides The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.; See: *Elements of Crimes* Art. 7(1)(h)(4).

⁵⁷⁴Note: footnote 22 reads “It is understood that no additional mental element is necessary for this element other than that inherent in element 6,” which is the last element included in each crime listed within crimes against humanity and is a direct reference to the Chapeau mental element. See: *Elements of Crimes* footnote 22.

commission of other acts under Art. 7. Such an understanding of the *actus reus* of persecution was endorsed on multiple occasions at the ICTY, for example when the *Kordic* Trial Chamber stated, “neither international treaty law nor case law provides a comprehensive list of illegal acts encompassed by the charge of persecution.”⁵⁷⁵ Its *actus reus* is therefore not comprehensively defined in international criminal law. It certainly can be most easily identified when committed by means of acts listed under Art. 7 but is not limited to this. It has been found to include physical and non-physical means as well including: personal economic sanctions,⁵⁷⁶ judicial and legal deprivation of fundamental rights,⁵⁷⁷ political policies,⁵⁷⁸ and incitement to commit crimes encompassed under crimes against humanity.⁵⁷⁹ It follows that there is no singular physical element required of the crime in and of itself.⁵⁸⁰ Its *actus reus* has thusly been identified as merely encompassing any act or omission which is of comparable gravity to other acts included under crimes against humanity which constitute a serious deprivation of fundamental human rights.⁵⁸¹ Meeting the above threshold would prove excessively difficult if one were to approach the crime based on singular acts and/or deprivation of fundamental rights, especially when committed through non-physical, economic, social or other means. It is for this reason that persecution must not be viewed in isolation, but within a cumulative context.⁵⁸²

The *actus reus* of persecution is unique, as it can occur through a number of different means both physical, non-physical and including acts not incorporated under Art. 7 of the Statute. In the section on forced displacement it was shown that ‘ethnic cleansing’ can be committed through a compilation of acts including murder, rape and organizational or other forms of coercion which vitiates an individual’s ability to make a ‘genuine choice.’ However, all of these acts can have

⁵⁷⁵ *Prosecutor v. Dario Kordic and Mario Cerkez (Trial Judgement)*, IT-95-14/2-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 26 February 2001. par. 192.

⁵⁷⁶ *Prosecutor v. Dusko Tadic (Opinion and Trial Judgement)*, IT-94-1-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 7 May 1997. par. 707 in reference to *Flick*.

⁵⁷⁷ *Ibid.* par. 709 in reference to *Justice*.

⁵⁷⁸ *Ibid.* par. 710 in reference to *Eichmann*.

⁵⁷⁹ *Ibid.* par. 708 in reference to *Streicher*.

⁵⁸⁰ *Prosecutor V. Zoran Kupreškić et al. (Trial Judgment)*, IT-95-16-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 14 January 2000. par. 568.

⁵⁸¹ *Prosecutor v. Georges Ruggiu (Trial Judgement and Sentence)*, ICTR-97-32-I, International Criminal Tribunal for Rwanda (ICTR), 1 June 2000. par. 21.

⁵⁸² *Prosecutor V. Zoran Kupreškić et al. (Trial Judgment)*, IT-95-16-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 14 January 2000. par. 615 (e).

found to fall in alignment with the crime of forced displacement. Even the distinguishing factor present in ‘ethnic cleansing,’ that it aims at the removal instead of the displacement of a population, does not necessarily prevent its inclusion under the heading of persecution. It follows that the *actus reus* of ‘ethnic cleansing’ fits within the scope of prohibited acts which are covered by persecution. Consequently, the only difference between the two crimes could be within their *mens rea*.

4.4.2. *Mens Rea*

As was discussed above, identifying the *actus reus* of persecution must be done through a broad means. This does not entail that there are no limitations to its *actus reus*, but considering the breadth of potential acts it could and has covered in the past coupled with the inherent convergences between ‘ethnic cleansing’ and deportation or forced transfer of a civilian population, there seemingly does not exist a listed instance of the crime that would fall outside the *actus reus* of persecution. Instead, one must look at the more heavily emphasized aspect of the crime, its *mens rea*, to identify if ‘ethnic cleansing’ can fit within persecution. Only through identifying the content of the *mens rea* of persecution and the convergences and divergences between it and ‘ethnic cleansing’ can one understand the nuanced differences between the two crimes.

The mental element of persecution can most easily be understood as comprising three parts under the Rome Statute. First, the knowledge of a widespread or systematic attack against a civilian population must be present. Second, there must be intent to commit one of the many aforementioned means of fulfilling the *actus reus* of persecution. Third, there must be the specific intent to discriminate through acts which are contrary to international law. To begin, it is best to identify what is meant by the specific intent to discriminate. In *Krstic* it was the opinion of the ICTY Trial Chamber that there needs to be evidence showing a deliberate intent to discriminate against a group or groups included within the description of persecution.⁵⁸³ To show that such intent is present, it is imperative to prove that not only the intended act occurred but, regardless of outcome, the perpetrator also had a biased motive and targeted victims based on their affiliation with a specific group.⁵⁸⁴ Proving such intent exists can, admittedly, be a difficult undertaking.

⁵⁸³ *Prosecutor v. Radislav Krstic* (Trial Judgement), IT-98-33-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 02 August 2001. par. 536.

⁵⁸⁴ Oosterveld Gender, “Persecution, and the International Criminal Court: Refugee Law’s Relevance to the Crime Against Humanity of Gender-Based Persecution.” *Duke Journal of Comparative and International Law*. Vol. 17 (40) (2006). pp. 83.; See Also Roberts, Anthea. “Gender and refugee law.” *Australian Yearbook of International Law* Vol. 5 (2002). pp. 164-165.; Chertoff, Emily. “Prosecuting Gender Based Persecution: the Islamic State and the

Within ICC case law it has been shown that an expressed organizational policy which targets a group covered under the provision must be present to show this intent.⁵⁸⁵ For example, taking again from the Pre-Trial Chamber in the Situation in Darfur, it was found that Janjaweed and Sudanese Military forces, by targeting specific villages based on the belief that they were predominantly inhabited by the Fur ethnicity, showed such discriminatory intent.⁵⁸⁶ Similarly, in Cote d'Ivoire the Pre-Trial Chamber found that various killings, rapes and other crimes committed by pro-governmental forces were done so due to the perpetrators' belief on the victim's ethnic, racial or political identity.⁵⁸⁷ The above examples show that the Court has adopted a less stringent approach to identifying the mental element of persecution. As long as there is proof of meeting the criteria of crimes against humanity there is no need to duplicate the requirement of an organized widespread or systematic attack. The requirement is considered as being fulfilled once it is established that the chapeau requirements of crimes against humanity are met and there is reasonable evidence to support that there was discriminatory intent. In addition to this, one should note that the Pre-Trial Chamber did not rely solely on objective criteria, but also on the perceived identity of the victims within a group by the perpetrators.

Additionally, it should be noted that in *Kupreskić* it was asserted by the ICTY Trial Chamber that the intent of persecution can be thought to extend beyond the reach of mere discrimination. It can also be perceived to encompass “the removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself.”⁵⁸⁸ If this were accepted in relation to the overall understanding of the *mens rea* of persecution it would fall more in line with the current understanding of ‘ethnic cleansing.’ However, this is not the line of reasoning which has been adopted in decisions since, and does not seem to be an element

ICC.” *Yale Law Journal* Vol. 126(1050) (2017). pp. 1107.; Note: While these Authors write within the context of gender-based persecution their work are written in a way which suggests that this can apply to any other form of persecution as well.

⁵⁸⁵ Chertoff, Emily. “Prosecuting gender based persecution: the Islamic state and the ICC.” *Yale Law Journal* Vol. 126(1050) (2017). pp. 1108.

⁵⁸⁶ *Situation in Darfur, Sudan* (Prosecutor v. Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Al Abd-Al-Rahman (“Ali Kushayb”)) (Decision on the Prosecution Application under Article 58(7) of the Statute) (27 April 2007). ICC-02/05-01/07. par. 74-75.

⁵⁸⁷ *Situation in Cote D'Ivoire* (Prosecutor v. Laurent Gbagbo) (Decision on the Prosecution Application under Article 58(7) of the Statute) (27 April 2007). ICC-02/05-01/07. par. 67-68.

⁵⁸⁸ *Prosecutor V. Zoran Kupreškić et al.* (Trial Judgment), IT-95-16-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 14 January 2000. par. 636.

which is included within the requirements of persecution.⁵⁸⁹ The lack of this as a requirement, however, does not entail that ‘ethnic cleansing’ cannot fall within the scope of the crime of persecution. Rather it demonstrates that, as long as discriminatory intent can be proven, it can be considered as a more specific crime which can be encompassed within it.

While the above points serve to show the potential to allow for the inclusion of ‘ethnic cleansing’ under that of persecution, there is a nuanced difference between the two crimes which warrants address. If accepted as true, then one could make the argument that the *mens rea* in ‘ethnic cleansing’ is different from persecution in light of discriminatory intent and thus warrants examination of its potential inclusion under other crimes within the Statute. This argument hinges itself upon the definition of a ‘protected group.’⁵⁹⁰

Both genocide and persecution identify their victims based on their identity within a group or collectivity which is ‘protected’ in relation to the crime being addressed. In identifying a protected group the same formula must be used in cases concerning persecution and genocide.⁵⁹¹ In practice, the courts have utilized two different means of doing so, the positive and negative approach.⁵⁹² Under the positive approach, protected groups are identified through their characteristics. It is the most widely used means of identifying a group at the international tribunals. A group is characterized by its classification as an ethnic, religious, racial, national or other identifying factor. This can be accomplished through subjective interpretation, objective analysis or a combination of the two.⁵⁹³ The second is what is known as the negative approach. Under this method a group is defined simply by what it is not. More succinctly put, the negative approach aims at “identifying individuals as not being part of the group to which the perpetrators of the

⁵⁸⁹ Roberts, Ken. The Law of Persecution before the International Criminal Tribunal for the Former Yugoslavia. *Leiden Journal of International Law* Vol 15(3) (Sept. 2002). pp. 635.

⁵⁹⁰ Note: The phrase ‘protected group’ used in this part is understood to mean a group which is protected under the respective crime which is being discussed. It does not refer solely to protected group under genocide.

⁵⁹¹ Note: The *Kupreskic* trial judgment asserted, “Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging.” The notion of group is discussed similarly in regard to both crimes and the means of identifying a ‘group,’ is considered as the same. See *Prosecutor V. Zoran Kupreškić et al.* (Trial Judgment), IT-95-16-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 14 January 2000. par. 635-6.

⁵⁹² *Prosecutor v. Goran Jelusic (Trial Judgement)*, IT-95-10-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 14 December 1999. par. 69-71.

⁵⁹³ Otto Triffterer states that it a group, collectivity or individuals present within the group or collectivity are not identified through strictly objective means. Rather the perpetrators perception of the group also aid in identifying if it is covered under the provision of persecution. See: Triffterer, Otto. *The Rome Statute of the International Criminal Court: A Commentary*. Third Ed. Oxford; Baden-Baden, 2015. pp. 220-221.

crime consider that they themselves belong and which to them displays specific [...] characteristics. Thereby, all individuals thus rejected would, by exclusion, make up a distinct group.”⁵⁹⁴ This would be the means by which a group must be identified under the previous definition of ‘ethnic cleansing.’ As the object of ‘ethnic cleansing’ is to render an area homogeneous in ethnicity, the object of the perpetrators is to remove any other ethnicity and instill within that territory their own ethnic group.

However, there exist several problems with the negative approach, as proposed in the *Jelusic* decision, which render it inapplicable. Most notably, its reference and concurrence in an understanding of what the negative approach is relies on the commission of expert’s final report on the situation in Bosnia and Herzegovina. The report states:

If there are several or more than one victim groups, and each group as such is protected, it may be within the spirit and purpose of the Convention to consider all the victim groups as a larger entity. The case being, for example, that there is evidence that group A wants to destroy in whole or in part groups B, C and D, or rather everyone who does not belong to the national, ethnic, racial or religious group A. In a sense, group A has defined a pluralistic non-A group using national, ethnic, racial and religious criteria for the definition.⁵⁹⁵

Akayesu agreed with this position in claiming that one must first identify a group as stable and permanent before determining it as protected.⁵⁹⁶ A more direct criticism of the negative approach was also present in *Stakic* when the court proclaimed, “in cases where more than one group is targeted, it is not appropriate to define the group in general terms, as, for example, ‘non-Serbs.’ In this respect, the Trial Chamber does not agree with the ‘negative approach’ taken by the Trial Chamber in *Jelusic*.”⁵⁹⁷ Indeed, these decisions seem to follow a more logical pattern and stay into conformity with the notion of ‘as such’ within the genocide convention. Consequently, the *Jelusic* decision misrepresents the negative approach in identifying what a protected group is.

⁵⁹⁴ *Prosecutor v. Goran Jelusic (Trial Judgement)*, IT-95-10-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 14 December 1999. par. 71.

⁵⁹⁵ UN Security Council. *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*. s/1994/674. par. 96.

⁵⁹⁶ *Prosecutor v. Jean-Paul Akayesu (Trial Judgement)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998. par. 701.

⁵⁹⁷ *Prosecutor v. Milomir Stakic*. (Trial Judgment), IT-97-24-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 31 July 2003. par. 512.

One might wonder how this is to apply to the relationship between ‘ethnic cleansing’ and persecution as it deals primarily with genocide. The above decisions hinge themselves on how to identify a protected group ‘as such’ which is also a necessity for persecution as it also seeks to protect individuals who belong to a particular protected group and have been targeted due to their belonging in that group.⁵⁹⁸ Taking from two examples, one can see the difference in place between how to identify a protected group under persecution and how it is applied through ‘ethnic cleansing.’ Under the first example individual A belongs to ethnicity a, and commits a prohibited act against individual B and C with the intent to discriminate against ethnicity b and c. The intent to discriminate is separate for each respective individual. Under the second example individual A intends to commit prohibited acts against anyone who is not of the same ethnicity. The intent to discriminate is therefore not due to their inclusion within a specific ethnicity, but rather due to their non-inclusion in ethnicity A. While it may seem that this is discrimination, it does not fit within the accepted means of identifying a group for the purpose of holding an individual criminally responsible for discriminatory intent under persecution as included within the Rome Statute. Taking from this, ‘ethnic cleansing’ does not refer to protected groups, rather only the ultimate goal of the act; that is the creation of an ethnically homogeneous territory which required purging all individuals which do not fall within the identity of the perpetrating group. This falls under the understanding of the negative approach adopted by the *Jelisić* Trial Chamber and thus cannot be used as a true representation of how to identify a protected group. As a result, ‘ethnic cleansing’ does not directly correspond to persecution in terms of the *mens rea* aspect of the crime. By asserting that ‘ethnic cleansing’ is a crime of persecution one would thus overlook the true intent of the crime, which is selective demographics homogenization of a State or territory. Taken the above points into consideration, while ‘ethnic cleansing’ can fit within the scope of persecution it may not best represent all aspects of the crime.

4.5. ‘Ethnic Cleansing’ as an ‘Other Inhumane Act’

The above has shown that there are challenges when attempting to classify ‘ethnic cleansing’ as a form of forced displacement, persecution and even as a core crime. Another alternative would be to attempt to classify it under the heading of ‘other inhumane acts.’ In order to do so it is necessary to establish whether it fulfills two requirements. The first is identifying if

⁵⁹⁸ *Prosecutor V. Zoran Kupreškić et al.* (Trial Judgment), IT-95-16-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 14 January 2000. par. 635-6.

‘ethnic cleansing’ fits within the ambit of ‘other inhumane acts.’ It is also necessary to examine how the principle of legality prevents or enables the inclusion of the crime within this provision. Doing so will show that while ‘ethnic cleansing’ can fit under this clause and there are no violations of the principle, there are a number of faults present within it.

4.5.1. Meeting the Requirements

In order to identify if ‘ethnic cleansing’ can be classified as an ‘other inhumane act’ one must identify two aspects of the crime. These are included within the Elements of Crimes under Art. 7(1)(k) which provides: “1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act. 2. Such act was of a character similar to any other act referred to in article 7, paragraph 1.”⁵⁹⁹ In order to do this it is first essential to identify if ‘ethnic cleansing’ inflicts great suffering by means of an inhumane act. Then it is necessary to show that it is of similar character to other acts within Art. 7. However, this alone is not enough to permit its inclusion under Art. 7(1)(k). Without showing that ‘ethnic cleansing’ does not violate the principle of *nullum crimen sine lege* it cannot be included within the Statute under crimes against humanity.

It is first imperative to show that ‘ethnic cleansing’ inflicts great suffering, or serious injury to body or to mental or physical health by ways of an inhumane act. In order to do so the act must be as severe as other acts listed within crimes against humanity.⁶⁰⁰ In identifying this, it has been recognized in *Kupreskic* that the crime can extend beyond that of what is included under crimes against humanity and include other acts which violate international human rights law.⁶⁰¹ Documents explicitly mentioned in the decision which can aid in assessing this include the Universal Declaration on Human Rights and the International Covenants of 1966.⁶⁰² One should note while the Universal Declaration of Human Rights is not a legally binding treaty, in this instance the ICTY referred to it as a means of supporting provisions already included within the ICCPR and ICESCR. Therefore, the Universal Declaration of Human Rights can be utilized as a

⁵⁹⁹ Note: this section will omit the *mens rea* aspect of crimes against humanity, as it is already included within the Chapeau requirements of crimes against humanity and examination of these requirements would not be beneficial for the study at hand. See: *Elements of Crimes* Art. 7(1)(k).

⁶⁰⁰ *Prosecutor V. Zoran Kupreškić et al.* (Trial Judgment), IT-95-16-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 14 January 2000. par 566.;

⁶⁰¹ *Ibid.* par. 566.

⁶⁰² Note: Therefore the author is similarly limiting the use of the UDHR to only support and supplement provisions within both treaties.

means of supporting what is already included within the two covenants. ‘Ethnic cleansing’ through its forced removal of ethnic and possibly religious groups denies a number of fundamental rights included within these treaties. Art. 27 of the ICCPR provides “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”⁶⁰³ This right extends beyond that of just minorities as it is established that everyone has the right to take part in cultural life.⁶⁰⁴ By cultural life it is accepted that this includes language, religion or belief system, natural and man-made environments, rites, ceremonies, as well as “customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives.”⁶⁰⁵ ‘Ethnic cleansing’ committed against individuals and groups through forced displacement serves to separate these people from the geographical area in which they practice their religion, culture, etc. and also prohibits them from interacting within the community which they associate themselves with. As such, it serves to inhibit this right to take part in a cultural life.

Taking, for example, more specific instances of religious based ‘ethnic cleansing,’ Art. 18 of the ICCPR provides:

“1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”⁶⁰⁶

⁶⁰³ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999. Art. 27.

⁶⁰⁴ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993. Art. 15(1).; UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A(III). Art. 27(1).

⁶⁰⁵ UN Economic and Social Council, *General Comment No. 21: Right of Everyone to Take Part in Cultural Life (art. 15, para. 1(a), of the International Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21. par.13.

⁶⁰⁶ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999. Art. 18.

This right is also provided for under Art. 18 of the UDHR.⁶⁰⁷ The right in and of itself does not just serve to protect just those of a religion, but also the right of an individuals to choose, change or abandon a religion. Moreover, it provides the individual with the right to not accept a religion or political ideology which he/she disagrees with.⁶⁰⁸ While it does not prohibit the separation of church and State, it does ensure the retention of religious pluralism within a State.⁶⁰⁹ While there are times when restrictions of this provision are legally permissible, such as to maintain the public order or safety, it is recognized as a non-derogable right and thus its violation is prohibited.⁶¹⁰ As ‘ethnic cleansing’ requires an individual or group either subscribe to a certain religion or be removed from the community in which they reside, its commission within a religious context would be a fundamental denial of this right. These violations compounded with the level of injustice dealt to victims based solely of their forced removal from the community in which they reside is goes beyond that of some crimes already listed within the Statute. One should take this as sufficient in showing that ‘ethnic cleansing’ meets the gravity requirement to be considered as an ‘other inhumane act.’

Second, ‘ethnic cleansing’ must be of similar character to other acts included within Art. 7 of the Statute. This has already been addressed to a degree in the past sections on other crimes listed within crimes against humanity. Its *actus reus* can be very similar to the crime of forced displacement. It can be carried out by means of murder, discrimination, deportation or forced transfer of a civilian population, rape, and other acts which are explicitly listed under Art. 7 of the Statute. In addition, other acts which are not explicitly included such as political agreements are recognized as inhibiting an individual’s ability to make a genuine choice and, as such, can still be considered to be in accordance with other crimes such as forced displacement. While this serves as an indication of it meeting the requirement of ‘other inhumane acts’ it must also be shown that ‘ethnic cleansing’ is not subsumed by any of the other acts listed.⁶¹¹ In regards to forced

⁶⁰⁷ UDHR Art. 18 reads ”Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

⁶⁰⁸ Moeckli, Daniel *et al.* *International Human Rights Laws*. 2nd ed. Oxford UP; Oxford, 2014. pp. 220.

⁶⁰⁹ *Ibid.*

⁶¹⁰ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999. Art. 4(2).

⁶¹¹ *Situation in Uganda* (Prosecutor v. Dominic Ongwen) (Decision on the Confirmation of Charges against Dominic Ongwen) (23 March 2016). ICC-02/04-01/15. par. 91.

displacement, it does not require the degree of intended permanency and does not include the specific discriminatory intent of the crime. In contrast, persecution and ‘ethnic cleansing’ are so close that some may consider it to be subsumed by it. However, the intent to create an ethnically homogeneous territory indicates that it cannot fall into adherence with the means of identifying a protected group. Moreover, persecution does not include the specific intent to create a homogeneous territory through demographic manipulation and, consequently, cannot be considered as subsumed within the act of persecution. This results in an act which is manifestly similar in most aspects to other crimes already included within crimes against humanity but also fundamentally different in terms of its mental element. Therefore ‘ethnic cleansing’ can be considered as not subsumed by other acts included within the Statute as well as meeting the requirements to be considered as an ‘other inhumane act.’

4.5.2. *Nullum Crimen Sine Lege and Reconceptualizing ‘Ethnic Cleansing’*

While ‘ethnic cleansing’ may fit within the scope of ‘other inhumane acts’ it is still essential to identify its adherence with the principle of *nullum crimen sine lege*. If it is found to be in nonconformity with this principle, then it cannot be prosecuted for under the Rome Statute. In providing an understanding of the principle of *nullum crimen sine lege*, it should be mentioned that the act which is being addressed must meet a set number of criteria. First, it must be reasonably foreseeable that the act has been criminalized or would entail individual criminal responsibility. In *Prosecutor v. Enever Hadzihasanovic et al.* the ICTY Trial Chamber found that when assessing if a crime is in adherence to the principle of *nullum crimen sine lege* “it is critical to determine whether the underlying conduct at the time of its commission was punishable. The emphasis on conduct rather than on the specific description of the offence in substantive criminal law is of primary relevance.”⁶¹² This is indeed reflected within the Rome Statute Art. 22(1) provides: “1. 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.”⁶¹³ In other words, when assessing the foreseeability of the act one must look at the active elements of the crime, not the legal status of the crime in name. In respect to ‘ethnic cleansing,’ its similarities to forced

⁶¹² *Prosecutor V. Enever Hadzihasanovic*. (Decision on Joint Challenge to Jurisdiction), IT-01-47-PT, International Criminal Tribunal for the Former Yugoslavia (ICTY), 12 November 2002. par. 62.

⁶¹³ UN General Assembly. *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998. Art. 22.

displacement and persecution in the *actus reus* of the crime entail that the constitutive aspects of the crime would lead to individual criminal responsibility. Due to the violation of the aforementioned freedom to express one's culture and choose one's religion, which manifests itself through the intent to create an ethnically or religiously homogeneous territory, the commission of 'ethnic cleansing' seeks to deny fundamental human rights. Moreover, the active elements of the crime, despite being quite broad, are included in other acts already criminalized, such as forced displacement, murder and sexual violence. As such, in respect to the *actus reus* of the crime, there is sufficient evidence to show that the commission of the act would entail individual criminal responsibility.

The second point to address is whether the act in question is sufficiently specific. In identifying this one must ensure that the crime in question is precise enough to avoid ambiguity but not so precise as to prevent development through judicial interpretation over time.⁶¹⁴ While the term 'cleansing' may be considered as somewhat ambiguous, the definition of the crime does not reflect this. Its *mens rea* is the intent to create an ethnically or religiously homogeneous area through, mainly forced removal of a civilian population. This can be considered as precise, but it highlights a problem in how 'ethnic cleansing' has been perceived by scholars and by the courts in the past. Lieberman claims that 'ethnic cleansing' extends beyond that of mere ethnicity and religion' and includes also race, gender, and class.⁶¹⁵ However, if one were to implement the current iteration of the crime within the statute it would need to be on its most basic level. In other words, only 'ethnic cleansing' committed for ethnic reasons could be covered by the act.⁶¹⁶ Other factors which have historically defined 'ethnic cleansing' in the past such as political, racial and cultural could not be included within the definition of the crime without compromising the specificity of the crime reflected in its label. As a result, its current nomenclature and definition

⁶¹⁴ Boot, Machteld. *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*. Intersentia; New York 2002. pp. 388.; Note: Boot identifies ambiguity as the existence of an obscure or double meaning.

⁶¹⁵ Lieberman, Benjamin David. *Terrible Fate: Ethnic Cleansing in the Making of Modern Europe*. Bowman & Littlefield; Maryland, 2006. Preface xii-xiv.

⁶¹⁶ Note: Religious may also be incorporated into this understanding of the crime, but it may compromise the foreseeability of the scope of the act due to its label. This is reflected in the 1996 ILC draft code which changed the label of 'apartheid' to 'institutionalized discrimination' so as to include other victim groups.

can be considered as problematic since it does not explicitly recognize other potential means of ‘cleansing’ nor is it able to be expanded upon through jurisprudence to include them.⁶¹⁷

In summary, ‘ethnic cleansing’ is not in violation of either of the above principles, but examination shows that it does lack in malleability and there is a clear disjunction over the scope of the crime in terms of historically recognized victims. In order to rectify this issue two different approaches can be taken. The first and least appealing of the two options would include the crime under ‘other inhumane acts,’ limiting the potential victims of the crime to reflect only the current label of the act. Doing so would, however, undermine the different potential goals of ‘ethnic cleansing.’ It would overlook not only some of the iterations of ‘ethnic cleansing’ which have been recognized by international tribunals, but also those which have been historically recognized. The second option would be to include the crime under ‘other inhumane acts,’ but in this case expand upon the definition of the crime and reconceptualize it in order to better reflect victims and the mental element of the crime. Doing so will more fully represent the crime as it has been detailed through discourse and recognized historically. It would also enable the crime to evolve over time through judicial interpretation and would not be so restrictive as to exclude potential victim groups in the future.

Conclusions

This Chapter sought to examine ‘ethnic cleansing’ as a concept and determine if it could be placed within the confines of ‘other inhumane acts’ under the Rome Statute. It began by providing a cursory understanding of the crime and its recognition as an act entailing individual criminal responsibility under international criminal law. It then compared the crime with that of deportation and forced transfer of a civilian population under Art.7(1)(d) of the Statute. It found that the *actus reus* of the crime was significantly similar, but the *mens rea* was incompatible. In examining the crime of persecution, again the *actus reus* was found to be similar, however, even though persecution more accurately covered ‘ethnic cleansing’ in terms of its *mens rea*, the established limitations on how to define victim groups of the crime prevented it from being subsumed by the act. Because of this it became essential to examine whether ‘ethnic cleansing’ could be considered as an ‘other inhumane act.’ The examination of ‘ethnic cleansing’ showed

⁶¹⁷ Note: This is not to claim that ‘ethnic cleansing’ by name cannot be included within the statute. Merely, similar to that of apartheid, it would be so precise as to only cover a single group.

that it does fit the requisite criteria to be classified as an ‘other inhumane act.’ In addition, the crime saw no deviation from the principle of *nullum crimen sine lege*. However, the examination brought to light the inflexibility of the crime and indeterminacy in terms of its victims. Inclusion under its current nomenclature would serve as not only overly restrictive, but non-representative of historically and judicially recognized iterations of the crime. In addition, it would be so specific as to limit its overall interpretive value in the future. This encouraged a suggested relabeling and reconceptualization of the crime to better represent the act and include the essential *mens rea* elements neglected through persecution. Whether or not future acts of ‘ethnic cleansing’ will be dealt with in this way by the Court is one of debate.

Chapter 5: From Quandary to Clarity: Customary International Criminal Law on Terrorism, ‘Other Inhumane Acts’ and the Principle of *Nullum Crimen Sine Lege*

Introduction

This chapter will show how Art. 22 can be rigidly upheld while still permitting the use of customary international law to include acts, namely that of terrorism, under Art. 7(1)(k) of the Statute. In doing so, the chapter will be broken down into three parts. First, the question of whether or not customary international law can be used to interpret the substantive rules of the Court will be addressed. It will show that while this can be done, several additional elements, aside from the normal criteria for identifying customary international law, must be present. After this, the chapter will apply these criteria to domestic and international laws regarding terrorism in order to establish: 1) If there is a customary norm prohibiting terrorism and 2) whether this customary norm meets the requirements to be applicable to the Rome Statute. In order to begin with such an endeavor, the chapter will first examine the only instance thus far in which a tribunal of an international character has recognized that there is a customary norm prohibiting terrorism. The flaws in the decision by the Appeals Chamber in the Special Tribunal for Lebanon will be pointed out along with its successes. While the logic implemented by the court was flawed and resulted in an opaque decision, its successes (mainly in the development of domestic law criminalizing terrorism as well as international condemnation and attempts towards criminalization of the act) will be used with current domestic laws, domestic jurisprudence, international conventions, declarations by the General Assembly, Security Council reports and resolutions, and a small number of international jurisprudence on the matter to assert that there is a customary norm prohibiting terrorism with a simplified yet still functional definition of the act already in place. In addition, this customary norm meets the requirements to be applied to international criminal law. After identifying the customary status and compiling a definition of the act, it will then be applied to art. 7(1)(k) of the Statute. The findings will show that the Rome Statute is not, in fact, a black box which works in solitude, away from contemporary developments in international criminal law. The principle of *nullum crimen sine lege* permits the use of customary international law to expand the scope of substantive law within the Statute, especially by allowing the inclusion of customary international criminal law within Art. 7(1)(k) of the Statute. However, while the principle permits the inclusion of the act of terrorism under Art. 7(1)(k), not all aspects of it can be integrated into the Rome

Statute due to lack of specificity. The result is a simplified crime of terrorism under ‘other inhumane acts’ which is and will continue to develop in the near future.

5.1. Applying Customary International Law to the Rome Statute

Art. 21 of the Rome Statute provides an extensive and exhaustive set of authoritative means which the Court can utilize to interpret the Statute in general, and also clarify existing crimes within its jurisdiction.⁶¹⁸ It thus serves as an essential tool in identifying which acts can be incorporated within the Statute under Art. 7 as an ‘other inhumane act.’ There are a multitude of different means for interpretation available, which are listed in hierarchical order within the provision. Firstly, the Court must examine the Statute, Elements of Crimes and Rules of Procedure and Evidence. Secondly, it may examine applicable treaties and the principles and rules of international law.⁶¹⁹ Finally, it may use general principles of law derived by the Court from national laws of legal systems around the world, provided that the national laws in question do not run contrary to international legal standards.⁶²⁰ The latter two means of interpretation can only be used by the court when two conditions are met: 1) there is a *lacuna* in the law which cannot be filled by use of the Statute, Rules of Procedure and Evidence or Elements of Crimes and 2) that *lacuna* cannot also be filled by the use of Art. 31⁶²¹ and 32⁶²² of the Vienna Convention on the

⁶¹⁸ Note: Initially this was proposed as a means to cover only the non-substantive rules of the court, but was later expanded upon to also include substantive rules as well.

⁶¹⁹ *Rome Statute* Art. 21(1)(b).

⁶²⁰ *Ibid.* Art. 21; See: *Lubanga Decision on the Confirmation of Charges* when the court confirmed that it can only look at general principles of law from national laws of legal systems around the world after examining paragraphs (a) and then (b) of Art. 21. *Situation in the Democratic Republic of the Congo (Prosecutor v Thomas Lubanga Dyilo) (Decision on the Confirmation of Charges)* (ICC-01/04-01/06). 28 January 2007. par. 69.

⁶²¹ United Nations. *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations Treaty Series Vol. 1155. Art. 31. “1. 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 purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.”

⁶²² *Ibid.* Art. 32. “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 : (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.”

Law of Treaties.⁶²³ The second condition may seem extraneous initially, as the Vienna Convention on the Law of Treaties is not mentioned within the Statute itself, but the Court has on more than one occasion recognized Art. 31 and 32 of the Vienna Convention as the corresponding acceptable methods that should be implemented to interpret the Statute.⁶²⁴ In addition to the above, the ICC also has the ability to apply principles and rules of law as interpreted in its previous decisions.⁶²⁵ Moreover, whenever the Court seeks to interpret the Statute its interpretation must fall into adherence with internationally recognized human rights standards.⁶²⁶ While this outlines the accepted means and methods of interpretation, the question as to whether or not the Court is able to utilize customary international law if it were to attempt to include terrorism under Art. 7(1)(k) as an ‘other inhumane act’ is not directly addressed within this framework. Such a question can only be answered through examination of the preparatory works, scholarly analysis of Art. 21 and decisions rendered by the court.

The provision on applicable law did not endure as much deliberation or attention as others during the drafting process. However, there still existed some areas of contestation over the contents of it. The ILC draft listed the provision under Art. 33 and similarly mentioned ‘principles and rules of general international law.’⁶²⁷ In its commentary, the ILC stated, “The expression ‘principles and rules’ of general international law includes general principles of law, so that the court can legitimately have recourse to the whole corpus of criminal law, whether found in national

⁶²³ See: *Situation in Darfur, Sudan (Prosecutor v. Omar Hassan Ahmad Al Bashir) (Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir)*, (4 March 2009) ICC-02/05-01/09. par. 126.

⁶²⁴ See: *Situation in the Democratic Republic of the Congo (Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal)* (13 July 2006). ICC-01/04-168. par. 33.; *Situation in the Democratic Republic of the Congo (Prosecutor v. Germain Katanga) (Judgement on the Appeal of Mr. Germain Katanga Against the Decision of Pre-Trial Chamber I Entitled “Decision on the Defense Request Concerning Languages”)* (27 May 2008). ICC-01/04-01/07-522. par. 38-39.; *Situation in the Central African Republic (Prosecutor v. Jean-Pierre Bemba Gombo) (Judgement on the Appeal of Mr. Jean-Pierre Bemba Gombo Against the Decision of Trial Chamber III of 28 July 2010 Entitled “Decision on the Review of the Detention of Mr. Jean-Pierre Bemba Gombo Pursuant to Rule 118(2) of the Rules of Procedure and Evidence”)* (15 November 2010). ICC-01/05-01/08-1019. par. 49.; *Situation in the Democratic Republic of the Congo (Prosecutor v. Thomas Lubanga Dyilo) (Judgement Pursuant to Article 74 of the Statute)* (14 March 2012). ICC-01/04-01/06-2842. par. 600-601.

⁶²⁵ Note: Where this falls within the hierarchy is considered as somewhat questionable at this stage, but it is generally accepted that all interpretation must at least go through Art. 21(1)(a) prior to referencing previous decisions.

⁶²⁶ *Rome Statute*. Art. 21(3).

⁶²⁷ United Nations. *Yearbook of the International Law Commission 1994 Vol. II Part II: Report of the Commission to the General Assembly on the work of its forty-sixth session*. A/CN.4/SER.A/1994/Add.1 (Part 2) (1997). Art. 33 (b). pp. 51.

forums or in international practice, whenever it needs guidance on matters not clearly regulated by treaty.”⁶²⁸ Alain Pellet comments that this confuses general principles of international law which are customary in nature with that of general principles of law under Art. 38(1)(c) of the ICJ Statute.⁶²⁹ In other words, the commentary completely omitted any reference to customary international law and instead limited itself to endorsing only comparative criminal law for Art. 33. While the ILC draft was not adopted as it stood, and its commentary does not hold any legal weight, it still can be deemed relevant when reflecting on the concerns of the States involved in the drafting process. That is, some States believed that the principle of legality should be strictly adhered to within the context of criminal law in order to prevent the Court from adopting the ‘Cassese approach’ through innovative judgements.⁶³⁰ In cases of ambiguity they believed that it should not have the power to ‘legislate’ over general principles or customary international law and instead only have recourse to the application of the relevant national legal systems when interpreting its substantive law in a specific situation.⁶³¹ This was not the majority opinion at the time, but its influence has been observed through two changes made during the plenary sessions. The first is that the notion of customary international law became viewed as insufficiently precise within the context of international criminal law and, as such, inappropriate for inclusion within the Statute.⁶³² The second, and a much more visible result, was the omission of the term ‘general’ from the final draft, which now reads the Court can use “principles and rules of international law.”⁶³³ This removed the tie-in that Art. 21 once had with Art. 38 of the ICJ Statute and therefore the argument that customary international law was a form of applicable law which could be utilized by the Court was somewhat diminished. Consequently, the exact scope of the provision was left uncertain and

⁶²⁸ United Nations. *Yearbook of the International Law Commission 1994 Vol. II Part II: Report of the Commission to the General Assembly on the work of its forty-sixth session.* A/CN.4/SER.A/1994/Add.1 (Part 2) (1997). pp. 51.

⁶²⁹ Cassese, Antonio., Gaeta Paola., et al. *The Rome Statute of the International Criminal Court: A Commentary Vol. II.* Oxford: Oxford UP. 2002. pp. 1071

⁶³⁰ Fan, Mary. “Custom, General Principles and the Great Architect Cassese.” *Journal of International Criminal Law.* Vol. 10, (2012). pp. 1068.

⁶³¹ United Nations. *Report of the Preparatory Committee on the Establishment of an International Criminal Court , Volume II: Compilation of Proposals.* A/51/22[VOL-II](SUPP) (14 Sept. 1996), p. 104-106. Art. T.

⁶³² Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millennium (2002) 177, par. 12.

⁶³³ Note: the majority opinion was exactly the opposite of this. Recourse to national laws for specific situations was seen as a concern, as it would promote inconsistency in the application of law in different situations.

the phrasing led to a great deal of confusion and controversy as to whether or not customary international law could be used by the court to clarify its substantive rules.⁶³⁴

The ambiguities in the adopted text of Art. 21 led to the assertion by some that customary international law was not only excluded textually from the Statute, but recourse to it for the purpose of delineating the Court's substantive law was either partially or wholly prohibited by it. This was claimed to be the case especially in regard to the Statute's provisions detailing the principle of legality. One of the more convincing arguments in this vein is made by Ambos, who concedes that while Art. 21(b) seems to allude to the notion that customary international law could be a means of applicable law utilized by the court, the provisions included on the principle of legality, in fact, make its application impossible. He asserts that Art. 22 and 24 (non-retroactivity) "make clear that the ICC's only and exclusive basis for the prosecution and punishment of international crimes is the Statute."⁶³⁵ In addition, he provides that Art. 22(3) "stipulates that this shall 'not affect the characterization of any conduct as criminal' under general international law."⁶³⁶ Taking these two points into account he claims that because the Court is not intended to have an impact on the development of law outside of its own confines, then neither the identification of newly emerging customary principles nor the utilization of customary principles which developed external of the court would fall in accordance with the Statute. Such an attempt at application would run contrary to Art. 22(1), which requires that the act in question be criminalized and within the jurisdiction of the Statute.⁶³⁷ Resultantly, future developments of customary international law would be inapplicable to the Rome Statute as they would run counter to the principle of *nullum crimen sine lege*.

There are additional issues regarding the principle of legality which, allegedly, would arise from the use of customary international law in clarifying the substantive law of the Statute. The most direct (and arguably opaque) critique is; as customary international law is not explicitly mentioned as a form of applicable law within the Statute, its use could lead to the application of

⁶³⁴ Triffterer, Otto. Ambos, Kai. *The Rome Statute of the International Criminal Court: A Commentary*. Third Ed. Oxford: Hart Publishing. 2016. pp. 939.

⁶³⁵ Ambos, Kai. *Treatise on International Criminal Law*. Vol. I. Oxford: Oxford UP. 2013. pp 92.

⁶³⁶ *Ibid.* pp. 92-93.

⁶³⁷ Note: As will be discussed below Art. 21 does not state that the act must be criminalized within the Statute. Merely, it must be criminalized and within the jurisdiction of the Statute.

Art. 32(2) omitting individual criminal responsibility.⁶³⁸ Others have taken a different position, commenting that while previous international criminal tribunals did not have such stringent requirements regarding *nullum crimen sine lege*, the Rome Statute is expected to uphold all aspects of the legal principle. Application of customary international law would, if held to the highest standards of the legal principle, violate its *lex scripta* and *lex stricta* requirements.⁶³⁹ The *lex scripta* requirement, as per definition is “law authorized or created by statute rather than custom or usage.”⁶⁴⁰ It asserts that in order to ensure the rights of the accused, which are of paramount concern in criminal proceedings, it is necessary to codify the law within the appropriate legal statute before it can be applied.⁶⁴¹ Customary international law, however, is formulated based on State practice and *opinio juris*.⁶⁴² Its contents may develop from, but are not necessarily identical to, what is encompassed within respective treaties. Treaty law and customary international law enjoy a distinct and separate existence from one another.⁶⁴³ The contents and development of customary international law are dynamic in nature and cannot be written down or codified.⁶⁴⁴ *Stricto sensu*, its use would then be considered as a violation of the *lex scripta* aspect of *nullum crimen sine lege*. The same follows for the *lex stricta* requirement. Its inclusion is intended to protect the accused from arbitrary State conduct by prohibiting the application of law by analogy. What is meant by this is that while the law can be interpreted within a reasonable sense, it cannot be interpreted in a way which creates a new crime.⁶⁴⁵ Once the development of a legal rule evolves into the creation of a new law, then it is deemed as no longer a valid interpretation, but extension of the law by analogy.⁶⁴⁶ The application of customary international law to Art. 7(1)(k) of the Statute would thus be creating a new form of criminal offence not already included within the

⁶³⁸ Rome Statute Art. 32(2).

⁶³⁹ Note: This is especially the case with the above 2 aspects of the legal principle. Generally, it is thought that previous international criminal tribunals relied more heavily and, at times, exclusively on the *lex praevia* and *lex certa* aspects of the principle. *Lex scripta* and *lex stricta* were not necessarily always taken into account. Under the Rome Statute, however, all of the above are considered as having equal weight in assessing adherence to the principle.

⁶⁴⁰ Garner, Bryan A. *Black's Law Dictionary*. Eighth Ed. United States of America: Thompson West. 2004. pp. 931.

⁶⁴¹ Lincoln, Jennifer. “*Nullum Crimen Sine Lege* in International Criminal Tribunal Jurisprudence: The Problem with the Residual Category of Crime.” *Eyes on the ICC*, Vol 7, Iss. 1 (2010). pp. 141-142.

⁶⁴² *Continental Shelf (Libyan Arab Jarnahiriya/Malta)* (Judgment). I.C.J. Reports, 3 June 1985. par. 27.; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion). I.C.J. Reports, 8 July 1996. par. 64

⁶⁴³ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)* (Judgement). I.C.J. Reports. 27 June 1986. par. 178.

⁶⁴⁴ Shaw, Malcolm N. *International Law*. Sixth Ed. Cambridge: Cambridge UP. 2010. pp. 73.

⁶⁴⁵ Boot, Machteld. *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*. Oxford: Intersentia. 2002. pp. 100-101.

⁶⁴⁶ *Ibid.*

Rome Statute and result in the formation of a legal deficit within the Court by which the *lex stricta* requirement is not adhered to.⁶⁴⁷

Even putting these two aspects of the principle aside there is still doubt as to whether customary international law can provide a clear and unambiguous definition of an act which was foreseeable at the time it was committed.⁶⁴⁸ Indeed, the formulation of international crimes is a complex and involved process, requiring the consideration and integration of international and national legal principles and concepts from representative States within the international legal community. As such, any attempts to utilize customary international law in clarifying the scope of substantive law within the Court's jurisdiction would, allegedly, run high risk of non-adherence with the principle as a whole. Ben Saul claims that these conditions are sufficient to assert, "at least with regard to the jurisdiction of the International Criminal Court and its allegiance to the *nullum crimen* principle in Articles 22 and 24 of its Statute, a rule of customary international law cannot generate criminal responsibility."⁶⁴⁹ It is for this reason that some make the assertion that customary international law cannot be applied to the Rome Statute for the purpose of expanding or otherwise interpreting its substantive rules.

All the above arguments have their merits and should be seriously considered when attempting to ascertain if customary international law can be used as an authoritative source of law with the ability to include terrorism under 'other inhumane acts.' However, they all tend to either undermine certain aspects of the Statute, misjudge the role of customary international law in interpreting in the Statute, or neglect jurisprudence from the Court. The argument, "because Art. 21 does not explicitly mention customary international law then the ICC is prohibited from its use" can be easily reconciled with. Customary international law is, without a doubt, part of the legal bedrock, or one of the core sources within international law, including international criminal law.⁶⁵⁰ Its omission from the Rome Statute would neglect an entire corpus of law which could aid the Court in its interpretation of the Statute. In addition, it would be an unprecedented step as all

⁶⁴⁷ Fletcher, George P. and Ohlin, Jens D. "Reclaiming Fundamental Principles of Criminal Law in the Darfur Case." *Journal of International Criminal Justice*. Vol. 3, (2005). pp. 551-552.

⁶⁴⁸ Werle, Gerhard. *Principles of International Criminal Law*. The Hague: TMC Asser Press. 2005. pp. 105

⁶⁴⁹ Saul, Ben. *Research Handbook on International Law and Terrorism*. Cheltenham: Edward Elgar. 2014. pp. 22-23.

⁶⁵⁰ Armstrong, David. *Routledge Handbook of International Law*. London: Routledge. 2011. pp. 72.; Wallace, Rebecca M.M. *International Law*. Fourth Ed. London: Sweet and Maxwell. 2002. pp. 9.; Cassese, Antonio., Acquaviva, Guido., et al. *International Criminal Law: Cases and Commentary*. Oxford: Oxford UP. 2011. pp. 5-6.

major UN criminal tribunals have relied on customary international law for clarification of their substantive law in the past.⁶⁵¹ This seems to be one of the many reasons why the majority of scholars have claimed that ‘principles and rules of international law’ as listed under Art. 21(1)(b) must include customary international law, and this is without a doubt the case as of present.⁶⁵² The matter was unequivocally settled by the Court when it confirmed in *Lubanga* that customary international law is an applicable source of law under Art. 21(1)(b) and that it can be used in identifying the substantive elements of crimes already enumerated within the Statute.⁶⁵³ This puts to rest the simple assertion that customary international law is not a source of applicable law within the Statute.

While *Lubanga* clarified that customary international law is a form of applicable law, it did not elaborate on the extent to which it can be used and what limitations the principle of *nullum crimen sine lege* places upon it. In the same decision, however, it did state that when identifying whether there has been an infringement of the principle of legality, the Court must identify if the act in question is based on a written (*lex scripta*) pre-existing criminal norm, which has been approved by the States Party to the Rome Statute (*lex praevia*), defining a prohibited conduct with a related sentence (*lex certa*), which cannot be interpreted by analogy (*lex stricta*).⁶⁵⁴ So, it has recognized that it holds responsibility to uphold even the more rigorous aspects of *nullum crimen sine lege*, and this would naturally extend to the application of customary international law to the Statute. In practice, admittedly, the Court has been much more lenient with these principles than its presentation made it seem. For example, there seems to be enough room to utilize custom without violating the *lex scripta* requirement drawing from the text of the decision alone. That is, the act in question must be “based on a written pre-existing criminal norm.” The text does not provide that the customary rule must be written within the Statute itself, nor does it need to be written at all. Instead, as long as it is formed from the foundation of an already existing written norm which identifies the nature of the act as criminal, then the requirement of *lex scripta* can be

⁶⁵¹ This is to say at the very least the Nuremburg Tribunals and ICTR and ICTY. See: Cassese, Antonio., Acquaviva, Guido., et al. *International Criminal Law: Cases and Commentary*. Oxford: Oxford UP. 2011. pp. 5-6

⁶⁵² Arajarvi, Noora. *The Changing Nature of Customary International Law Methods of Interpreting the Concept of Custom in International Criminal Tribunals*. London: Routledge. 2014. pp. 72-73.

⁶⁵³ *Situation in the Democratic Republic of the Congo (Prosecutor v Thomas Lubanga Dyilo) (Decision on the Confirmation of Charges)* (ICC-01/04-01/06). 28 January 2007. par. 212 (on occupation of a territory), par. 311 (prohibition of child recruitment).

⁶⁵⁴ *Situation in the Democratic Republic of the Congo (Prosecutor v Thomas Lubanga Dyilo) (Decision on the Confirmation of Charges)* (ICC-01/04-01/06). 28 January 2007. par. 303.

considered as fulfilled. Consequently, customary international law which formed overtime from the basis of existing treaty law or national laws would not be considered as a violation of Art. 22.

Application of the *lex stricta* requirement does not seem to be as rigorously upheld as one might expect either.⁶⁵⁵ Arguments that application of customary international law would violate the *lex stricta* requirement, especially in regard to Art. 7(1)(k), also fall short of making a compelling argument. Simply attempting to place terrorism within the scope of ‘other inhumane acts’ cannot be considered as extension by analogy. It would not be an attempt to create a new criminal offence of terrorism, but rather assessing if terrorism contains all the elements necessary to be considered as an ‘other inhumane act.’ It therefore does not attempt to create a distinct crime of terrorism, nor does it extend the scope of ‘other inhumane acts’ by analogy. Rather, it identifies if the constitutive elements of terrorism fit within Art. 7(1)(k) to be considered as an ‘other inhumane act.’ The result would then be framed as terrorism as an ‘other inhumane act,’ and the individual convicted would be punished for having committed an inhumane act rather than the crime of terrorism. The framing of the act and the strict adherence to the elements of ‘other inhumane acts’ is then what keeps it from violating the *lex stricta* principle.⁶⁵⁶

Stark proponents of the prohibition to applying customary international law to ‘other inhumane acts’ may still be undeterred from the above reasoning. In response to this, it is worthwhile to note that the Court has not only endorsed the use of customary international law when identifying if an act falls within the scope of ‘other inhumane acts,’ it has identified it as a key component in doing

⁶⁵⁵ Note: Ambos has claimed that the Court has already made decisions which run contrary to or at the very least bend this requirement to an unacceptable level. His reasoning for this is based on the court’s decision to classify resistance movements as included within the scope of Art. 8(2)(b)(xxvi). The decision takes the phrase *national armed forces* and extends its scope to include the FPLC wing of the UPC. However, during the drafting stages the provision expressly only intended to cover State armed forces, not Non-State actors. As such the decision creates a new legal prohibition as extension by analogy and is an example of the of the court’s overall lax position towards the *lex stricta* requirement of *nullum crimen sine lege*. See: Ambos, Kai “The first confirmation decision of the International Criminal Court: Prosecutor v. Thomas Lubanga Dyilo” *International Criminal Court: Legal Database Record*. 2010. pp. 991-994.; De Beco, Gauthier. “War Crimes in International Versus Non-International Armed Conflicts: ‘New Wine in Old Wineskins?’” *International Criminal Law Review*, Vol. 8 Iss. 1 (2008). pp. 327-328.; *Situation in the Democratic Republic of the Congo* (Prosecutor v. Germain Katanga) (Decision on the Confirmation of Charges) (14 Oct. 2008). ICC-01/04-01/07-522. par. 259.

⁶⁵⁶ Note: this has been done several times at prior international criminal tribunals to show the addition of a crime in adherence with *nullum crimen sine lege*. (e.g. recognition of desecration of a human corpse as an ‘other inhumane act’ through customary international law in *Prosecutor v. Theoneste Bagasora et al.* (Trial Judgment), ICTR-98-41-A, International Criminal Tribunal for Rwanda (ICTR), 14 December 2011. par. 729; see also the recognition of forced transfer, albeit in this case as a form of persecution, through customary international law in *Prosecutor v. Milorad Krnojelac.* (Appeals Judgment), IT-97-25-A, International Criminal Tribunal for the Former Yugoslavia (ICTY), 17 September 2003. par. 217-222.

so. In *Katanga* the Pre-Trial Chamber commented, “In the view of the Chamber, in accordance with article 7(1)(k) of the Statute and the principle of *nullum crimen sine lege* pursuant to Article 22 of the Statute, inhumane acts are to be considered as serious violations of international customary law and the basic rights pertaining to human beings, drawn from the norms of international human rights law, which are of a similar nature and gravity to the acts referred to in Article 7(1) of the Statute.”⁶⁵⁷ Here the Court explicitly identifies that customary international law as a means of identifying what acts are included within the residual clause of crimes against humanity. The issue at hand is therefore no longer if customary international law can be used to clarify the scope of Art. 7(1)(k), but how customary international law can be applied for this purpose without violating *nullum crimen sine lege*.

The question then follows, to what extent can customary international law be used without violating the principle of *nullum crimen sine lege*? In order to answer this question, one must look at two things. First, one must understand how customary international law is formed. Second, under what circumstances is the application of customary international law to international criminal law at the International Criminal Court permitted. Regarding the first point, within public international law, custom is normally identified through State practice and *opinio juris*, and these two aspects are also integral to identifying custom within international criminal law. State practice is assessed primarily on the consistency and the widespread application of a certain rule. Absolute consistency or uniformity is not a requirement for a rule to enter into custom, however the higher the levels of consistency and the more rigorous the practice shows itself to be, the less time is required for the crystallization of a certain rule into custom to occur.⁶⁵⁸ Regardless, substantial or, at the very least, general consistency with the rule is required for such crystallization to take place. One must note here that instances in which a State acts inconsistently with the rule in question

⁶⁵⁷ *Situation in the Democratic Republic of the Congo* (Prosecutor v. Germain Katanga) (Decision on the Confirmation of Charges) (14 Oct. 2008). ICC-01/04-01/07-522. par. 448.

⁶⁵⁸ *North Sea Continental Shelf (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark)*, I.C.J. Reports. 20 Feb. 1969. par. 74.; The decision reads: “...Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.”

should not immediately be taken as an indication of the lack of customary status of the rule. Rather, such actions are to be considered a breach of normal rules regulating practice.⁶⁵⁹

The second element is that of *opinio juris sive necessitatis*, more commonly referred to as *opinio juris*. It is the psychological element of custom and is the notion of a State feeling a legal obligation, or necessity to act in a certain way. It bases itself on normativity, the thought that a practice should, or even if it does not in a formal sense, have a legally binding character to it. Most recognize it as a means of ensuring State consent to the emergence of legal custom.⁶⁶⁰ Such consent can be voiced either actively or through tacit agreement.⁶⁶¹ It is usually inferred from official statements by State representatives, decisions by high courts and General Assembly resolutions.⁶⁶² However one must be cautious when utilizing General Assembly resolutions as they: 1) vary in votes towards their adoption, 2) are usually a result of compromise between States and therefore may not reflect their actual attitude towards the rule in question.⁶⁶³ Even when States may not comply with the rule in question, as long as they justify themselves in relation to that rule it can still be considered as evidence of *opinio juris*.⁶⁶⁴ In such situations, to determine if inconsistencies are prohibitive towards the crystallization of a rule one must identify if the State or States in question exhibit themselves as a persistent objector to the development of such a rule.⁶⁶⁵ Such an occurrence is less common in recent times, but still can be observed. Overall, if there is general consistent practice of a rule in which States conduct themselves in a way which is evidentiary of an obligation to fulfil that rule without consistent and active protest against it, then one can assert that rule is, at the very least, on the verge of crystallizing into customary international law.

⁶⁵⁹ Crawford, James. *Brownlie's Principles of Public International Law*. Eighth ed. Oxford: Oxford UP. 2012. pp. 28.

⁶⁶⁰ *Ibid.*

⁶⁶¹ *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/ United States of America)* (Judgement). I.C.J. Reports, 12 Oct. 1984. par. 130.; Shaw, Malcolm N. *International Law*. Sixth Ed. Cambridge: Cambridge UP. 2010. pp. 89-91.

⁶⁶² International Court of Justice. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* ICJ Reports. 1986. par. 188.

⁶⁶³ Shaw, Malcolm N. *International Law*. Sixth Ed. Cambridge: Cambridge UP. 2010. pp. 88-89.; see also: Advisory opinion on the Legality of the use of Nuclear Weapons par. 68-71; *Texaco v. Libyan Arab Republic* (1977) in which Professor Dupuy stated that the in order to properly establish whether or not a GA resolution reflects *opinio juris* or not one must look not at the resolution itself, but also at the voting patterns by States at the time of its adoption.

⁶⁶⁴ International Court of Justice. *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* (*Dissenting Opinion of Judge Lachs*). ICJ Reports (20 February 1969). par. 108-109.

⁶⁶⁵ International Court of Justice. *Fisheries Case (United Kingdom v. Norway)* (Judgement). ICJ Reports. 1951. pp. 131.

The mere customary status of a rule does not equate to its applicability within international criminal law, especially for the purpose of clarifying the scope of existing substantive rules.⁶⁶⁶ While it is true that all the crimes listed within the Rome Statute are considered as reflective of customary international law,⁶⁶⁷ that does not equate to treaty law nor customary international law automatically entailing individual criminal responsibility.⁶⁶⁸ The *Tadic* Appeals Chamber seems to have addressed this issue to a certain extent, and from it three necessary elements have been compiled which permit the expansion of international criminal law by means of customary international law.⁶⁶⁹ First, the conduct must be prohibited at the international level and there must be a clearly delineated definition of the act.⁶⁷⁰ As was explained above, the act need not be explicitly written, but the core contents of it must be specific enough so as to not create confusion over its prohibition and criminality. Second, commission of the act must amount to a serious breach of fundamental rights and values which are internationally recognized.⁶⁷¹ This can be most easily assessed through violation of *jus cogens* norms, but also any violation of rights which have been deemed as fundamental by the international community and are represented in major human rights conventions may also suffice. Finally, the act at some level must be recognized as entailing individual criminal responsibility *regardless* of domestic laws.⁶⁷² Universal jurisdiction can be considered as a means by which States can express their desire to hold perpetrators of the act accountable regardless of national laws or political position. Security Council resolutions or widely

⁶⁶⁶ *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (Decision). STL-11-01/I/AC/R176bis F0936/COR/20130530/R144405-R144558/EN/nc, Special Tribunal for Lebanon (STL) 16 Feb. 2011. par. 103.

⁶⁶⁷ Note: At least they were considered as such when the Statute was enacted. Customary international law has since developed further in many areas.

⁶⁶⁸ Boister, Neil. "Transnational Criminal Law?" *European Journal of International Law*. Vol. 14 No. 5 (2003). pp. 962-963.

⁶⁶⁹ Note: The decision provides that in order to be prosecuted under Art. 3

"(i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met (see below, para. 143); (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious violation of international humanitarian law" although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby "private property must be respected" by any army occupying an enemy territory; (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule." See: *Prosecutor v. Dusko Tadic aka "Dule"* (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction), IT-94-1-AR72, International Criminal Tribunal for the Former Yugoslavia (ICTY), 2 October 1995. par. 94.

⁶⁷⁰ Saul, Ben. *Research Handbook on International Law and Terrorism*. Cheltenham: Edward Elgar. 2014. pp. 26

⁶⁷¹ *Ibid.*

⁶⁷² Werle, Gerhard. *Principles of International Criminal Law 3rd ed.* The Hague: TMC Asser Press. 2014. pp. 32.

ratified international treaties which declare the act as criminal and require its prosecution by all members of the international community may also serve to indicate that this condition is met. On a softer level, similar to the usual *opinio juris* requirement, General Assembly resolutions, while non-binding in nature, can reflect the opinion of the international community on the criminal status of the act being examined. Only once the basic criteria of identifying a customary international rule and the additional three criteria set forth above are fulfilled, can then customary international law be properly applied to expand the scope of substantive law within the Rome Statute.

While, in the past, there was confusion over customary international law and its relationship with the Rome Statute, the Court has, to an extent, clarified these issues. Customary international law can be utilized when interpreting the substantive law within the Statute. In cases where the Statute and Elements of Crimes have little or nothing to add, most notably when interpreting Art. 7(1)(k), customary international law has, and is expected to continue to, provide valuable insight. However, unrestricted application still holds the potential to violate the principle of legality, even more so with the ICC than with previous tribunals such as the ICTY and ICTR, as the Court has recognized that it must uphold all aspects of the legal principle. That is why additional steps are necessary to check the status of custom before applying it to the Statute. The customary status of the act must first be checked through the existence of State practice and *opinio juris*. Then the act must show itself to be: 1) prohibited with a clear definition, 2) a serious violation of internationally recognized and fundamental human rights, 3) universally criminalized. These conditions will serve as a guiding set of criteria for identifying if terrorism can be considered a crime under customary international law which can fit within ‘other inhumane acts’ in the Rome Statute. But in order to do so the contents of the act itself must be fleshed out and a proper definition must be put into place.

5.2. STL and Customary International Law on Terrorism

Before attempting to ascertain whether or not the act of terrorism can fit under Art. 7(1)(k) of the Statute it is essential to examine how the act, as a customary norm, has been perceived by international criminal tribunals in the past. As of present, the only tribunal to have commented on the customary status of the act of terrorism has been that of the Special Tribunal for Lebanon (STL). Its ruling in *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* provided unique insight into how one can perceive the content of the act, as well as the common faults that must be circumvented in order to properly identify if

a customary norm which can be applied to international criminal law, has come into existence. In order to show both the successes and faults of the decision, this section will first provide a brief overview of the historical background which led to the establishment of the tribunal and its decision. This will then be followed by a critical analysis of the decision itself. It will show that while the court framed the decision in a way that was progressive, the logic and reasoning utilized to come to its decision were not satisfactory when compared with the standards for identifying customary international law as stated above.

5.2.1. Background

On 14 February 2005 at around 12:30 in the afternoon, former Lebanese Prime Minister Rafik Hariri departed from the Parliament in central Beirut. After a quick stop at a café with former Minister and member of Parliament Bassil Fuleihan the two individuals entered into a black armour-plated Mercedes and were escorted by a security convoy consisting of five additional vehicles. The group were allegedly taking a secure route which had been transmitted to them immediately preceding their departure. Shortly before 13:00, as the convoy was passing by the St. Georges Hotel, it was engulfed by a large explosion. Approximately 1,000 kilograms of trinitrotoluene (TNT) had been detonated from directly below the vehicles creating a large crater in the road and sending shrapnel in every direction.⁶⁷³ The former Minister was instantly killed from the blast. A further 22 other individuals lost their lives and numerous others were injured either directly from the blast or due to the ensuing bombardment of shrapnel that accompanied it.⁶⁷⁴

Immediately following the attack, jurisdiction of the investigation fell to the Military Court. However, the overall management of the crime scene, steps taken to preserve evidence, and quality of the criminal investigation fell well below international standards, especially considering that the explosion caused the death of Mr. Hariri, who was well known by the populous as the “most important person in Lebanese public life.”⁶⁷⁵ Initial searches for survivors were lacking in rigor, some individuals who had survived the initial blast perished due to the slow pace of the search. Locating bodies did not seem to be a priority as some were still being recovered up to two weeks

⁶⁷³ United Nations. *Report of the Fact-finding Mission to Lebanon inquiring into the causes, circumstances and consequences of the assassination of former Prime Minister Rafik Hariri*. S/2005/203 (24 March 2005). par. 24-33.

⁶⁷⁴ Alamuddin, Amal et al. *The Special Tribunal for Lebanon: Law and Practice*. Oxford: Oxford UP. 2014. pp.12.

⁶⁷⁵ United Nations. *Report of the Fact-finding Mission to Lebanon inquiring into the causes, circumstances and consequences of the assassination of former Prime Minister Rafik Hariri*. S/2005/203 (24 March 2005). par. 16.

later, with many being located by civilians and not authorities designated with such a task. In addition, evidence was not properly treated during the investigation. It was improperly handled, removed from the crash site, damaged or destroyed. The police were also found to have inadequately documented, neglected to document and even blatantly fabricated evidence. Investigations into potential suspects were terse and inconsistent with the facts available. Other leads were unnecessarily delayed and led to the loss of potentially valuable information. All of the above led to the assertion that the investigation displayed at the very least “gross negligence, possibly accompanied by criminal actions for which those responsible should be made accountable.”⁶⁷⁶ It showed lack of coordination, communication, professionalism, proper information gathering procedures, necessary equipment and control by management. Overall, the conduct of the authorities reflected their indifference towards carrying out a proper investigation which met international standards. Mr. Hariri was a well-known political figure both domestically and internationally. His death elevated already existing high levels of political tension within the State. The nature of the act, along with the tense political atmosphere, unsurprisingly caught the attention and concern of the international community. This coupled with the inability or unwillingness of the Lebanese authorities to properly conduct an investigation in accordance with international standards prompted a response from the United Nations Security Council.

On the day after the bombing, the President of the Security Council responded to the situation, formally calling it a terrorist attack and demanding that Lebanese authorities bring to justice its supporters, organizers and sponsors.⁶⁷⁷ In the same statement, the president authorized the creation of a UN fact-finding mission in order to promote democratic building and to prevent destabilization within the State.⁶⁷⁸ The mission found, for the reasons listed above, that the investigation was manifestly inconsistent with international standards.⁶⁷⁹ At the same time, realizing the need to hold those accountable for the acts committed and the political and civil instability within the State, the Lebanese Prime Minister requested the SC create a tribunal of an

⁶⁷⁶ Nations. *Report of the Fact-finding Mission to Lebanon inquiring into the causes, circumstances and consequences of the assassination of former Prime Minister Rafik Hariri*. S/2005/203 (24 March 2005). par. 47.

⁶⁷⁷ United Nations Security Council. Statement by the President of the Security Council. S/PRST/2005/4 (15 Feb. 2005).

⁶⁷⁸ *Ibid.*

⁶⁷⁹ United Nations. *Report of the Fact-finding Mission to Lebanon inquiring into the causes, circumstances and consequences of the assassination of former Prime Minister Rafik Hariri*. S/2005/203 (24 March 2005). par. 60-64.

international character to deal with the issue.⁶⁸⁰ The SC responded positively to this request, and ordered the Secretary General to begin work with the Lebanese Parliament to create a draft statute for the court.⁶⁸¹ While the Lebanese Prime Minister had requested the creation of the tribunal, its jurisdiction, and substantive rules were a controversial topic within the Lebanese Parliament and, as such, the proposed draft statute for the court was never ratified. As a result, pursuant to paragraph 1(a) of Resolution 1757 and enacted under Chapter VII of the UN charter, the Special Tribunal for Lebanon was established, regardless of national consensus on 10 June 2007.⁶⁸²

5.2.2. *Decision*

The STL was created primarily with the intent to investigate and hold accountable those who were responsible for the terrorist attack that took place in Beirut on 14 February 2005. One must take note that while the tribunal was established as a result of SC resolution under article VII of the UN Charter, it is not to be considered as a purely international criminal tribunal. Its creation was meant to ensure criminal proceedings were conducted in a manner which adhered to international standards.⁶⁸³ However, the substantive law of the tribunal is not international in character. Crimes which would normally be included within an international criminal tribunal's jurisdiction, such as crimes against humanity or genocide, were omitted and instead the statute relies solely upon domestic law for its substantive law. Moreover, Art. 2 of the statute limits jurisdiction of the court to cover only certain aspects of the Lebanese criminal code including, "terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy."⁶⁸⁴ It is for this reason that the STL is not considered as an international criminal tribunal like the ICC, ICTY or ICTR, but rather and *internationalized*

⁶⁸⁰ United Nations Security Council. *Letter dated 13 December 2005 from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General*. S/2005/783 (13 Dec. 2005).

⁶⁸¹ United Nations Security Council. *Resolution 1644 (2005) Adopted by the Security Council at its 5329th meeting, on 15 December 2005*. S/Res/1644 (15 Dec. 2005). par. 6-8.; United Nations Security Council. *Resolution 1664 (2006) Adopted by the Security Council at its 5401st meeting, on 29 March 2006*. S/Res/1664 (29 March 2006).

⁶⁸² United Nations Security Council. *Resolution 1757 (2007) Adopted by the Security Council at its 5685th meeting, on 30 May 2007*. S/Res/1757 (30 May 2007). par. 1(a).

⁶⁸³ Dickinson, Laura A. "The Promise of Hybrid Courts." *The American Journal of International Law*. Vol. 97, No.9 (April 2003). pp. 295.

⁶⁸⁴ United Nations Security Council. *Resolution 1757 (2007) Adopted by the Security Council at its 5685th meeting, on 30 May 2007*. S/Res/1757 (30 May 2007). Art. 2.

criminal tribunal.⁶⁸⁵ Despite it not being an international criminal tribunal *per se*, since it is required to meet international standards, its decisions can still be utilized by the ICC to aid it in interpreting the scope of crimes within its jurisdiction. As such, its decision on the customary status of the prohibition on terrorism in international criminal law provides a great deal of insight in assessing whether or not the act can be included under Art. 7(1)(k) of the Rome Statute.

The crime of terrorism is defined within the Lebanese penal code as: “all acts intended to cause a state of terror and committed by means liable to create a public danger such as explosive devices, inflammable materials, toxic or corrosive products and infectious or microbial agents.”⁶⁸⁶ The definition of the crime was transposed from the Lebanese criminal code and was not intended to have any impact on an international definition of the crime. While the question was not posed to the appeals chamber, in its *Interlocutory Decision on the Applicable Law* the court felt the need to clarify two main points regarding the crime of terrorism. First, it sought to identify if the court could consider relevant international law in defining terrorist acts. Second, if the court found in the affirmative, how can this be reconciled with the domestic definition included under Art. 2 of the statute and what would the offence then entail? In other words, when reconciling Art. 2 with relevant international law, what would be the constitutive elements of the offence? The decision is one of the most controversial to come from the tribunal, as its statute does not provide that international law is an applicable source of law to be used by the court. Additionally, the question itself was brought up by one of the Judges and not by the defense or prosecution. Some have taken this as an indication that the aspect of the decision dealing with application of international law, more specifically the formation of and decision to include a customary international law definition of terrorism, was an *ultra vires* act by the court and, at least the part dealing with customary international law on terrorism, should not be taken as a legitimate aspect of the decision. This argument has its merits but does not strike at the heart of the debate in this chapter. To date the STL’s decision is the only instance in which a criminal court of an international character has claimed that there is a customary legal norm prohibiting terrorism and that norm entails individual criminal responsibility. As such, regardless of claims contesting the legitimacy of the decision it can serve as an analytical tool. It is essential to understand the content of the definition provided

⁶⁸⁵ Schabas, William A. “The Special Tribunal for Lebanon: Is a ‘Tribunal of an International Character’ Equivalent to an ‘International Criminal Court’?” *Leiden Journal of International Law*, Vol. 21, (2008). pp. 523-524.

⁶⁸⁶ Special Tribunal for Lebanon. *Lebanese Penal Code: Selected Articles*. (Sept. 2015). Art. 314.

by the court, its successes and shortcomings if one is to properly understand the content of the definition regarding terrorism that will be presented in the next section.

The Appeals Chamber *Interlocutory Decision on the Applicable Law* stated that terrorism is a crime under customary international law, and this was applicable to the STL Statute for the purpose of clarifying the scope of the crime. In the seminal decision, the court defined terrorism under customary international law as: “(i) the perpetration of a criminal act, or threatening such an act; (ii) the intent to spread fear among the population or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act consists of a transnational element.”⁶⁸⁷ In identifying the customary status of this definition, the court referred to the rules set forth in ICJ jurisprudence.⁶⁸⁸ State practice and *opinio juris* were found to be present for all aspects of the act through examining consistency in the definition of terrorism within: domestic criminal statutes and jurisprudence of States in the international legal community, domestic judicial decisions endorsing the customary status of the crime, widespread and universally accepted (or nearly so) international conventions, declarations made by the international community and State representatives, as well as decisions by international courts. Methodologically, the approach implemented by the court is wholly consistent with internationally recognized means to identifying custom. However, while the methods which the Appeals Chamber implemented were acceptable, the logic and means of argumentation were not necessarily wholly consistent. Each of the above examined areas added a great deal to how one can understand the act of terrorism and its status under customary international law, however the decision also contained a number of defects that have led some to assert that there is no customary international legal definition of terrorism. The defects in the decision are apparent, but when examined through a more constructive, rather than destructive lens, these defects actually serve as tool for identifying the true scope of terrorism as a crime under international criminal law.

5.2.2.1. State Practice

In its assessment, the court looked at the two main aspects of identifying a customary norm. That is, it discussed State practice and *opinio juris*. The requirement of State practice is expressed

⁶⁸⁷ *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (Decision). STL-11-01/I/AC/R176bis F0936/COR/20130530/R144405-R144558/EN/nc, Special Tribunal for Lebanon (STL) 16 Feb. 2011. par. 85.

⁶⁸⁸ *Continental Shelf (Libyan Arab Jarnahiriya/Malta)* (Judgment). I.C.J. Reports, 3 June 1985. par. 27.; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion). I.C.J. Reports, 8 July 1996. par. 64.

mainly through the consistency of a State's application of a given rule. In assessing this, the court mainly relied on domestic laws and the adoption of international conventions. These two sources were provided the greatest degree of attention within the decision. However, while there seemed sufficient examples within international treaty law to assert that a customary norm was forming, the number of discrepancies in domestic legislation at the time was enough to assert that more time was required before one could assert a full-fledged customary norm had developed.

5.2.2.1.1. *Domestic laws*

In assessing the coherence of domestic law in regards to the emergence of a customary international norm prohibiting terrorism, the Appeals Chamber rightly relied on the *Furundzija* decision which asserts that “it is necessary to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws.”⁶⁸⁹ In addition, when identifying these principles from national laws, due consideration should be given to all national legal systems throughout the world, not to a single system, for example civil or common law. Due to the differences in legal systems one cannot attempt to transpose the law from national to the international level, rather it is necessary to identify “the common denominators in these legal systems so as to pinpoint the basic notions they share.”⁶⁹⁰ The court attempted to do so with marginal levels of success.

When assessing consistency in State practice the court referred the domestic penal laws enacted by a total of 32 States from most legal systems throughout the globe.⁶⁹¹ While majority of States cited in the decision are classified as having a civil or common law legal system, it should be noted that the court also took into account States which use religious and hybrid systems. Moreover, their assessment was varied spatially, taking into consideration all geographical regions represented at the UN. Regardless, two points of criticism have arisen regarding this aspect of the decision. The first is that the sample size of States chosen was insufficient to make the claim that

⁶⁸⁹ *Prosecutor v. Anto Furundzija*. (Trial Judgement), IT-95-17/1-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 10 December 1998. par. 177.

⁶⁹⁰ *Ibid.* par. 178.

⁶⁹¹ They are: Argentina, Australia, Austria, Belgium, Canada, Chile, Columbia, Ecuador, Egypt, Finland, France, Germany, India, Iraq, Jordan, Mexico, The Netherlands, New Zealand, Pakistan, Panama, Peru, The Philippines, The Russian Federation, Saudi Arabia, South Africa, Sweden, The Seychelles, Tunisia, UAE, UK, USA, and Uzbekistan, See: *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (Decision). STL-11-01/I/AC/R176bis F0936/COR/20130530/R144405-R144558/EN/nc, Special Tribunal for Lebanon (STL) 16 Feb. 2011. par. 92-96.

State practice had developed. If one were to rely on the International Law Association's (ILA) working definition of customary international law, then one would expect to see both an extensive and representative number of States examined.⁶⁹² While the court's assessment can be considered as representative, due to the inclusion of different geographical regions and legal systems, it can hardly be labelled as extensive. Indeed, 32 States only accounts for a little more than 16% of the total number of UN member States at the time of the decision; well under the level of what could be considered as extensive. However, it is important to remember that the ILA's definition was not intended to be a formal means of identifying customary international law.⁶⁹³ It is true that, in the past, the ICJ has conducted extensive examination of domestic laws to identify if State practice was present.⁶⁹⁴ However, there have been instances in which it has foregone examining domestic law entirely.⁶⁹⁵ Instead, the decisions of international criminal tribunals provide a higher degree of consistency and reliability in this instance. The means to recognizing State practice has focused more identifying if it has been widespread and representative, rather than numerically extensive and wholly identical. In comparison, the sample size used by the STL in its decision was around the same size as that of other cases concerning customary international law as dealt with by other tribunals in the past. In an ideal scenario, one would expect the content of each State's domestic laws to be examined in order to assess if State practice is present. However, such an undertaking is impractical for most international criminal tribunals, which is why emphasis on a widespread and representative assessment is preferred. In this case, the sample size taken by the court met the current standards for assessing whether or not State practice was occurring.

The second issue, proposed primarily by Ben Saul, claims that the domestic laws utilized by the court are inapplicable, because they were not crafted with the intent to cover international

⁶⁹² Note: Paragraph 2 of the definition reads "(ii) If a sufficiently extensive and representative number of States participate in such a practice in a consistent manner, the resulting rule is one of "general customary international law." Subject to Section 15, such a rule is binding on all States." See: International Law Association. *Final Report of the Committee: Statement of Principles Applicable to the Formation of Customary International Law*. London Conference. (2000). pp. 8.

⁶⁹³ International Law Association. *Final Report of the Committee: Statement of Principles Applicable to the Formation of Customary International Law*. London Conference. (2000). pp. 8-10.

⁶⁹⁴ *North Sea Continental Shelf (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark)*, I.C.J. Reports. 20 Feb. 1969.; Note: In general, the decision does not establish the requirement of a high number of States to establish that State practice is present, merely that it can aid in identifying it. See par. 73.

⁶⁹⁵ *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* (Judgement) I.C.J. Reports 25 September 1997. par. 46. In which the court only made reference to its opinions in previous cases.

terrorism.⁶⁹⁶ Without claims to extraterritorial jurisdiction under the universality principle, laws enacted by States cannot be transposed to the international level.⁶⁹⁷ Doing so would, as he claims, be like “suggesting that because every State prohibits murder in its own territory, therefore transnational murder must be a customary international crime.”⁶⁹⁸ There is some degree of truth in this statement but, ultimately, it oversimplifies and undermines how customary international law evolves and is created. The content of crimes has often been expanded upon, or new crimes have been included within the jurisdiction of international criminal tribunals by means of customary international law. One such example is that of the definition of rape, in which the *actus reus* of the crime was expounded upon with resort to domestic laws.⁶⁹⁹ In both *Furundzija* and *Kunarac*, none of the laws cited by the court had reference to the universality principle; rather grave breaches of fundamental human rights, proclamations by the international community on the severity and abhorrent nature of the act, as well as concurrence on the basic principles which led to its criminalization at the national level were deemed sufficient to permit expansion of the definition.⁷⁰⁰ Another, somewhat different example can be derived from torture. While its contents were mainly derived from international conventions, domestic laws, albeit minimally, have still been taken into consideration. However, despite the prohibition of torture having crystallized into a customary international criminal norm and its formal recognition as *jus cogens*,⁷⁰¹ it clearly developed without widespread reliance on the universality principle in both national and international law.⁷⁰² Taking these points into consideration, one must remember that explicit reference to the universality principle in not just domestic, but also international laws is one, but not the only way to assess whether or not an act can entail individual criminal responsibility at the international level. The conclusion of international treaties prohibiting the act in question,

⁶⁹⁶ Saul, Ben. “Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism.” *Leiden Journal of International Law*. Vol. 24, (2011). pp. 681.

⁶⁹⁷ *Ibid.*

⁶⁹⁸ *Ibid.* 681-682.

⁶⁹⁹ *Prosecutor v. Anto Furundzija*. (Trial Judgement), IT-95-17/1-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 10 December 1998. par. 178-185; *Prosecutor v. Dragoljub Kunarac et al.* (Trial Judgment), IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 22 February 2001. par. 443-460.

⁷⁰⁰ *Prosecutor v. Anto Furundzija*. (Trial Judgement), IT-95-17/1-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 10 December 1998. par. 174-186; *Prosecutor v. Dragoljub Kunarac et al.* (Trial Judgment), IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 22 February 2001. par. 457.

⁷⁰¹ *Prosecutor v. Delalic et al.* (Trial Judgement), IT-96-21-T, International Criminal Tribunal for the Former Yugoslavia (ICTY). 16 November 1998. pp. 452-454.

⁷⁰² Werle, Gerhard. *Principles of International Criminal Law 3rd ed.* The Hague: TMC Asser Press. 2014. pp. 74.

statements at the international and domestic level that such acts are to be prohibited and criminalized regardless of domestic laws, and a consistent understanding of the contents of the act, are the necessary elements to identifying if a customary international criminal norm has come into existence. The fact that only a select few national laws had reference to the universality principle does not adversely affect the decision as a whole.

While the criticisms above have some degree of merit, they do not strike at the heart of what was problematic in the court's use of national legislation criminalizing terrorism. The issue inherent with the court's assessment lay primarily with how the evidence was interpreted and presented in the judgement. It cannot be denied that a number of States had definitions of terrorism which fell directly in accordance with what the court had claimed was the customary definition. Canada, New Zealand, the United Kingdom and others all had highly similar descriptions of the crime.⁷⁰³ However, this was not the case for a large majority of domestic laws cited. Legislation adopted by the Russian Federation criminalizing the act serves as a fitting example of this.⁷⁰⁴ One of the two pieces of legislation cited by the court was the Russian Penal Code of 2004. Its provision on terrorism included all elements of the *mens rea* from the alleged customary definition, which is either the intent to instill fear within a civilian population or to coerce a government or authority. However, the *actus reus* of the crime differed in that it was limited to a select number of acts, such as arson or use of explosives.⁷⁰⁵ This followed similarly for several other States cited by the court. In total, 10 of the 32 States listed exacted jurisdiction over a very limited *actus reus*.⁷⁰⁶ Instead of addressing the differences in *actus reus* present in national laws, the court claimed that the laws of

⁷⁰³ Note: this does not mean that they all included within their definition a transnational element. Only a select few such as Canada and the United States had incorporated this into their criminal code, distinguishing between domestic and international terrorism.

⁷⁰⁴ Note: As should become apparent below this was chosen because not only did the court cite 2 pieces of legislation from the Russian Federation, but they both contained different definitions of the crime which reflect the major discrepancies in most domestic laws.

⁷⁰⁵ *The Criminal Code of the Russian Federation*. No. 63-FZ. 13 June 1996. As amended 28 December 2004. Art. 205 par. 1 states: "1. Terrorism, that is, the perpetration of an explosion, arson, or any other action endangering the lives of people, causing sizable property damage, or entailing other socially dangerous consequences, if these actions have been committed for the purpose of violating public security, frightening the population, or exerting influence on decision making by governmental bodies, and also the threat of committing said actions for the same ends..."

⁷⁰⁶ These were: Argentina, Columbia, Ecuador, Finland, Germany, Pakistan, Panama, The Russian Federation, Saudi Arabia and South Africa.

all of the States listed “share a core concept: terrorism is a criminal action...”⁷⁰⁷ This is without a doubt true as all listed States had criminalized terrorist acts in some form. But to take this as an example that there is uniformity in how terrorism is understood and that the *actus reus* of the crime of terrorism at the international level is “a criminal act,” is not logically sound. The court, whether intentionally or not, broadened the *actus reus* of the crime at a point in time when it should have narrowed it to accommodate for States which had a very specific *actus reus* of the crime.

In continuing with the example of the Russian Federation, the same held true for the *mens rea* of the crime. Perplexingly, the court also cited Law 35-FZ of 2006 in its decision.⁷⁰⁸ Confusion as to why it cited this is partly because the law was markedly different than its 2004 counterpart. Instead of a narrow *actus reus*, which encompassed certain acts such as arson or use of explosive devices, it instead opted for a broader, general criminalization of the act. This falls more in line with what the court claimed was encompassed in the customary international definition of the crime. However, while it converged in its *actus reus* it diverged from the definition in its *mens rea*. Instead, it defined terrorist acts as “the practice of influencing the adoption of a decision by public authorities, local self-government bodies or international organizations connected with frightening the population...”⁷⁰⁹ By replacing the conjunctive *or* with the phrase *connected with* the law established itself as narrower than the court’s definition by requiring both elements to be in place for the *mens rea* to be fulfilled. While, out of all the other listed States only the Philippines followed this pattern, others still exhibited a narrower *mens rea* from the international definition. Eight of the 32 States listed included either only the attempt to instill fear in a civilian population⁷¹⁰ or only the attempt to coerce an authority⁷¹¹ as the sole *mens rea* of the crime. Considering this, it becomes questionable as to how the court was able to claim that the *mens rea* of the crime was to instill fear within a civilian population *or* coerce an authority.

⁷⁰⁷ *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (Decision). STL-11-01/I/AC/R176bis F0936/COR/20130530/R144405-R144558/EN/nc, Special Tribunal for Lebanon (STL) 16 Feb. 2011. par. 97.

⁷⁰⁸ Note: As will be seen in later sections, the court continuously cited judicial decisions, domestic laws and international conventions which fell outside of its temporal jurisdiction. This is commented on, and has wider implications on the decision as a whole, but falls outside of the scope of the current topic and so will not be discussed at length.

⁷⁰⁹ Russian Federation. *On Counteraction Against Terrorism*. Federal Law No. 35-FZ. 6 March 2006. Art. 3 (1).

⁷¹⁰ They are: Colombia, Egypt, Iraq, Peru, UAE and Uzbekistan.

⁷¹¹ They are: Finland and Seychelles.

Taking all elements of the purported customary international law definition into account one finds that even within the selection size by the court there were few States which actually adhered to the definition. In all, 18 of the total 32 States which were surveyed either differed in the *actus reus*, *mens rea* or both elements of the crime.⁷¹² For those that do not find the above sufficiently persuasive, it is important to take into consideration that this view was not limited to only those States cited in the court's decision. In 2009 the SC Counter Terrorism Commission presented findings that showed a large degree of discrepancy in national laws regarding terrorism. It claimed that 87 States were observed to lack a specific definition of the act. In addition, 46 had a special generic definition, while 48 others had a composite generic definition.⁷¹³ Some of these were expressed to be excessively broad, covering acts such as defacing of road signs⁷¹⁴ to the forceful seizure of money or jewelry as all encompassed under the ambit of terrorism.⁷¹⁵ This led the commission to come to the conclusion that regarding terrorism, "close attention to national laws shows that wide divergences in national definitions make it difficult to ascertain any common, customary definition."⁷¹⁶ In light of all of the above it becomes difficult, if not excessive, to claim that there was a consistent and uniform understanding of what the crime of terrorism actually entailed within domestic legislation. The divergences show that, in all, the court's definition did not match that of State practice at the time.

The above shows that beyond a doubt there was, at the time of the decision, a degree of discrepancy in the national laws criminalizing acts of terrorism. Some included all aspects of what the court had claimed entered into custom, but more often than not there were some form of difference between them. These laws either included only some of the elements purported to be a part of custom or they required additional ones. The court's resort to selectively choosing specific parts of a law, or eliminating reference to other parts which contradict their definition, whether intentional or not, only serve to highlight the fact that consistency in domestic law was not present

⁷¹² They are: Jordan, Iraq, UAE, Egypt, Germany, Finland, Pakistan, South Africa, Columbia, Peru, Panama, Argentina, Ecuador, The Russian Federation, The Philippines, Uzbekistan, Seychelles and Saudi Arabia.

⁷¹³ Saul, Ben. *Defining Terrorism in International Law*. Oxford: Oxford UP. 2008. pp. 264. in reference to *The 2009 Global Survey of the Implementation of Security Council Resolution 1373 (2001)*. See also: *Thomas v Mowbray* ([2007] HCA 33). High Court of Australia. 2 Aug. 2007. par. 279-280.

⁷¹⁴ Sri Lanka. *Prevention of Terrorism (Temporary Provisions)*. Act. No. 48 of 1979. Art. 2(1)(i).

⁷¹⁵ Bangladesh. *Suppression of Terrorist Offences Act*. Act. No. 44 of 1992. 6 Nov. 1992 Art. 2(d).

⁷¹⁶ Saul, Ben. *Defining Terrorism in International Law*. Oxford: Oxford UP. 2008. pp. 264. in reference to *The 2009 Global Survey of the Implementation of Security Council Resolution 1373 (2001)*.

at the time of the decision. One can see that such a change was incipient at the time of the decision, but it needed more time to coalesce before making such a claim.

5.2.2.1.2. *Treaty law*

In its decision, the STL also detailed a number of international conventions which supported its claim that a customary norm prohibiting terrorism had developed. These were the product of regional and universal conventions as well as sectoral and comprehensive treaties.⁷¹⁷ Similar to their argument covering domestic legislation on the matter, they were able to properly assert that a general prohibition to terrorism had developed under international law. However, once again, it was too early to expand prohibition outward to craft a generic customary definition which entails individual criminal responsibility. The restrictiveness inherent within many of the sectoral treaties cited could not be used to compile a comprehensive or indeed even a general understanding of the prohibition of terrorism. Conversely, comprehensive treaties, while showing an overall prohibition of terrorism, exhibited a degree of differentiation in how the elements of the act were defined. At most, the exercise by the court could be used as a leadoff into the discussion over whether the prohibition on terrorism had entered into customary international law. It showed that there existed a number of convergences which, at the time, exhibited a gradual advancement towards the crystallization of a customary norm. However, due to divergences in content, that process had not been completed by that time.

Regional

The court examined a multitude of regional conventions related to terrorist acts to argue that there existed consistency in how terrorism was defined. It examined a total of 13 regional treaties in the entirety of its discussion on State practice. Considering all of the treaties examined by the court, this group showed the highest level of similarity to the described customary definition of “*criminal acts intended to terrorize populations or coerce an authority.*”⁷¹⁸ Regarding the *mens rea* of the act, out of 13 treaties; eight included the intent to spread fear or terror within a

⁷¹⁷ Note: Sectoral treaties can be understood as a treaty dealing with a specific act such as the taking of hostages or hijacking of aircraft. Conversely, Comprehensive treaties aim at providing a general understanding or definition of a given act. In other words, sectoral treaties regarding terrorist acts prohibit only specific incarnation(s) of terrorism while comprehensive treaties endeavor to create a general and widely applicable definition of the act as a whole.

⁷¹⁸ *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (Decision). STL-11-01/I/AC/R176bis F0936/COR/20130530/R144405-R144558/EN/nc, Special Tribunal for Lebanon (STL) 16 Feb. 2011. par. 88.; Note: Italics have been left as they were in the decision.

population,⁷¹⁹ six included intent to coerce an authority⁷²⁰ and six included both elements.⁷²¹⁷²² In this case, separate from what was seen with domestic laws; all treaties which included both aspects of *mens rea* separated them with the conjunctive *or*. This means, at least at the international level, there was much less of a divergence in how the *mens rea* of the act was perceived. Instead, when taking into consideration that a number of the conventions only included specific sectoral offences and thus contained little or no reference to *mens rea*,⁷²³ it becomes apparent that there was, at the very least, a convergence in what the *mens rea* of the act was.

While regional conventions showed some level of similarity in how they defined the *mens rea* of the act, there were divergences within them. The more problematic aspect of the conventions

⁷¹⁹ Council of the European Union. *Council Framework Decision of 13 June 2002 on Combating Terrorism* 2002/475/JHA. 13 June 2002. Art. 1(1); Organization of African Unity (OAU). *OAU Convention on the Prevention and Combating of Terrorism*. 14 June 1999. Art. 3(a)(i); Executive Committee of the Commonwealth of Independent States. *Treaty on Cooperation among the Members of the Commonwealth of Independent States in Combating Terrorism*, 1999. 4 June 1999. Art. 1.; League of Arab States. *The Arab Convention for the Suppression of Terrorism*. April 1998. Art. 1(2); *Communaute Economique et Monetaire de l'Afrique Centrale*. Convention Relataive a la Lute Contre le Terrorism en Afrique Centrale. 5 February 2005, No. 08/05-OEAC-057-CM-13. Art. 1(2); Cooperation Council for the Arab States of the Gulf. *Convention of the Cooperation Council for the Arab States of the Gulf on Combating Terrorism*. 4 May 1999. Art. (1)(2); Shanghai Cooperation Organization. *Shanghai Convention on Combating Terrorism, Separatism and Extremism*. 29 March 2003. Art. (1)(1)(b); South Asian Association for Regional Cooperation (SAARC). *Additional Protocol to the SAARC Regional Convention on the Suppression of Terrorism*. 6 Jan. 2004. Art. 4(1)(b).

⁷²⁰ Council of the European Union. *Council Framework Decision of 13 June 2002 on Combating Terrorism* 2002/475/JHA. 13 June 2002. Art. 1(1); Organization of African Unity (OAU). *OAU Convention on the Prevention and Combating of Terrorism*. 14 June 1999. Art. 3(a)(i); Executive Committee of the Commonwealth of Independent States. *Treaty on Cooperation among the Members of the Commonwealth of Independent States in Combating Terrorism*, 1999. 4 June 1999. Art. 1.; *Communaute Economique et Monetaire de l'Afrique Centrale*. Convention Relataive a la Lute Contre le Terrorism en Afrique Centrale. 5 February 2005, No. 08/05-OEAC-057-CM-13. Art. 1(2); Shanghai Cooperation Organization. *Shanghai Convention on Combating Terrorism, Separatism and Extremism*. 29 March 2003. Art. (1)(1)(b); South Asian Association for Regional Cooperation (SAARC). *Additional Protocol to the SAARC Regional Convention on the Suppression of Terrorism*. 6 Jan. 2004. Art. 4(1)(b).

⁷²¹ *Note: all 6 treaties including attempt to coerce a government also included the element of attempting to terrorize a civilian population. In addition, they all included the conjunctive *or* when connecting both mental elements. See: Council of the European Union. *Council Framework Decision of 13 June 2002 on Combating Terrorism* 2002/475/JHA. 13 June 2002. Art. 1(1); Organization of African Unity (OAU). *OAU Convention on the Prevention and Combating of Terrorism*. 14 June 1999. Art. 3(a)(i); Executive Committee of the Commonwealth of Independent States. *Treaty on Cooperation among the Members of the Commonwealth of Independent States in Combating Terrorism*, 1999. 4 June 1999. Art. 1.; *Communaute Economique et Monetaire de l'Afrique Centrale*. Convention Relataive a la Lute Contre le Terrorism en Afrique Centrale. 5 February 2005, No. 08/05-OEAC-057-CM-13. Art. 1(2); Shanghai Cooperation Organization. *Shanghai Convention on Combating Terrorism, Separatism and Extremism*. 29 March 2003. Art. (1)(1)(b); South Asian Association for Regional Cooperation (SAARC). *Additional Protocol to the SAARC Regional Convention on the Suppression of Terrorism*. 6 Jan. 2004. Art. 4(1)(b).

⁷²² Note: The Council of Europe Convention on the Prevention of Terrorism was omitted from this count as intent to spread fear within a civilian population and intent to coerce a government or authority are only present within the preamble and thus cannot be counted as a formal element to the definition. See: Council of Europe. *Council of Europe Convention on the Prevention of Terrorism*. ETS No. 196. 16 May 2005. Preamble.

⁷²³ Note: This is to say that if a *mens rea* was to be included, it would have been included within the specific sectoral treaties cited. However, this is most often not the case and these treaties only mention an *actus reus*.

lied in their *actus reus*. Unlike domestic laws they were not manifestly different in character; rather they only attempted to make reference to sectoral treaties. Of the 13 treaties examined seven held for a general offence⁷²⁴ and six included only specific sectoral offences.⁷²⁵ It becomes more difficult to assert that there has been a growing trend towards the creation of a generic definition when considering that only three of the six regional treaties which included a general *actus reus* were adopted after 2000.⁷²⁶ Conversely, nearly all, five out of six, of the treaties which included a set of specific sectoral offences were concluded after 2000.⁷²⁷ Divergences in treaty law such as this led authors such as Lawless to assert that “there is no specific definition from which it would be possible to draft an independent "antiterrorist" treaty or convention.”⁷²⁸ The international community stalled in their attempt to create a generic definition due to lack of consensus and

⁷²⁴ Organization of African Unity (OAU). *OAU Convention on the Prevention and Combating of Terrorism*. 14 June 1999. Art. 3.; Executive Committee of the Commonwealth of Independent States. *Treaty on Cooperation among the Members of the Commonwealth of Independent States in Combating Terrorism*, 1999. 4 June 1999. Art. 1.; League of Arab States. *The Arab Convention for the Suppression of Terrorism*. April 1998. Art. 1(2) and (3).; *Communaute Economique et Monetaire de l'Afrique Centrale*. *Convention Relataive a la Lute Contre le Terrorism en Afrique Centrale*. 5 February 2005, No. 08/05-OEAC-057-CM-13. Art. 1; Shanghai Cooperation Organization. *Shanghai Convention on Combating Terrorism, Separatism and Extremism*. 29 March 2003. Art. 1(1)(a), Art. 1(1)(b) and Annex 1.; Cooperation Council for the Arab States of the Gulf. *Convention of the Cooperation Council for the Arab States of the Gulf on Combating Terrorism*. 4 May 1999. Art. 1(2) and Art. 1(3).; South Asian Association for Regional Cooperation (SAARC). *Additional Protocol to the SAARC Regional Convention on the Suppression of Terrorism*. 6 Jan. 2004. Art. 4(1).

⁷²⁵ Council of the European Union. *Council Framework Decision of 13 June 2002 on Combating Terrorism* 2002/475/JHA. 13 June 2002. Art. 1; Council of Europe. *Council of Europe Convention on the Prevention of Terrorism*. ETS No. 196. 16 May 2005. Art. 1(1) and Appendix.; South Asian Association for Regional Cooperation (SAARC). *Regional Convention on the Suppression of Terrorism, South Asian Association for Regional Cooperation (SAARC)*. 4 Nov. 1987. Art. 1.; Black Sea Economic Cooperation (BSEC). *Additional Protocol on Combating Terrorism to the Agreement among the Governments of the Black Sea Economic Cooperation Organization Participating States on Cooperation in Combating Crime, in Particular in its Organized Forms*. 3 Dec. 2004. Art. 1.; Organization of American States (OAS). *Inter-American Convention against Terrorism*. 3 June 2002. Art. 2 (1).; Association of Southeast Asian Nations. *Convention on Counter Terrorism*. 30 Jan. 2007. Art. 2 (1).

⁷²⁶ *Communaute Economique et Monetaire de l'Afrique Centrale*. *Convention Relataive a la Lute Contre le Terrorism en Afrique Centrale*. 5 February 2005, No. 08/05-OEAC-057-CM-13.; *Shanghai Convention on Combating Terrorism, Separatism and Extremism*. 29 March 2003.; *Additional Protocol to the SAARC Regional Convention on the Suppression of Terrorism*. 6 Jan. 2004.

⁷²⁷ Council of the European Union. *Council Framework Decision of 13 June 2002 on Combating Terrorism* 2002/475/JHA. 13 June 2002.; Council of Europe. *Council of Europe Convention on the Prevention of Terrorism*. ETS No. 196. 16 May 2005.; Black Sea Economic Cooperation (BSEC). *Additional Protocol on Combating Terrorism to the Agreement among the Governments of the Black Sea Economic Cooperation Organization Participating States on Cooperation in Combating Crime, in Particular in its Organized Forms*. 3 Dec. 2004.; Organization of American States (OAS). *Inter-American Convention against Terrorism*. 3 June 2002.; Association of Southeast Asian Nations. *Convention on Counter Terrorism*. 30 Jan. 2007.

⁷²⁸ Lawless, Michael. “Terrorism: an International Crime.” *International Journal*. Vol. 63, Iss. 1, (Mar. 2008). pp. 147.

instead focused on prohibiting specific acts of terrorism.⁷²⁹ One could take this as partially true when examining just the regional treaties listed by the court. While the *mens rea* may have aligned with the alleged customary definition, the move away from using a generic *actus reus* to citing only specific sectoral treaties may have shown a reluctance by States towards the development of a generic definition and, by extension, a customary norm. At the very least, it shows that contrary to the court's claim, there were enough divergences to assert that State practice could not be derived from regional international conventions.

One should note that other aspects of the crime were also not given adequate attention during this examination. While it is true that several sectoral treaties dealing with terrorist offences require a transnational element, the regional conventions the court relied so heavily on did not. Of the regional treaties examined only a select few called for a transnational element in their definition of terrorist acts. The same follows for the restriction of the act occurring during times of peace only. Recognition that the act could only be committed during times of peace was present in some of these conventions, but not prevalent. For example, the Shanghai Convention on Combating Terrorism, Separatism and Extremism (Shanghai Convention) provides a clear exception to this restriction. It provides that terrorist acts are “intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict...”⁷³⁰ the text here implicitly recognizes that terrorist acts can, in fact, take place during times of armed conflict. However, as per definition, they cannot be committed against active combatants, rather only to civilians and non-combatants. Discussions such as this were only glossed over by the court and detract from the credence of the decision. Regardless, while there were a number of convergences in how terrorist acts were defined within regional treaties, divergences in the *actus reus* of the act indicate that a general customary definition had not been agreed upon at that time.

Universal

Before continuing on to the universal treaties cited by the court it would be beneficial to comment briefly on its reference to sectoral treaties. While all universal treaties cited by the court were sectoral in nature, one should take care to differentiate between the content of these treaties.

⁷²⁹ Noteboom, Aaron J. “Terrorism: I Know It When I See It.” *Oregon Law Review*. Vol. 81 Iss. 2 (2002). pp. 564-565.

⁷³⁰ Shanghai Cooperation Organization. *Shanghai Convention on Combating Terrorism, Separatism and Extremism*. 29 March 2003. Art. 1(b).

For example, while note was made to treaties concerning the taking of hostages,⁷³¹ hijacking of planes⁷³² and harming of diplomatic representatives⁷³³ what they can add to the creation of a generic customary definition of the act of terrorism is minimal. This is because they do not include any of the elements which the court asserted are common amongst treaties regarding terrorism. In addition, they do not include any overarching similarities amongst themselves from which a customary definition can be extrapolated. They largely omitted any reference to a mental element in their provisions.⁷³⁴ Moreover, they only served to identify a select *actus reus* which can amount to a terrorist act. It should therefore be conceived that when these treaties were drafted they were done so only with the intent to prohibit a very narrow *actus reus*.⁷³⁵ There was no attempt by the international community to create a general definition of the crime, as the overall purpose for the adoption of these treaties was to deal with particular events which had occurred in the past. Therefore, sectoral treaties enacted prior to 1999 will not be discussed in detail. Instead, those which the court relied more heavily on and included elements which can be used to identify if a customary definition was in place at the time of the decision will be focused on. These are The International Convention for the Suppression of Acts of Nuclear Terrorism (Nuclear Terrorism Convention) and The International Convention for the Suppression of the Financing of Terrorism (Financing Terrorism Convention).

Of the two conventions listed above the court placed heavy emphasis on the Financing Terrorism Convention when making its argument. While only singular in nature, the sheer support provided to it by means of GA resolutions, SC resolutions and number of ratifications provides

⁷³¹ See: United National General Assembly. *International Convention Against the Taking of Hostages*, No. 21931. 17 Nov. 1979.

⁷³² See: United Nations General Assembly. Convention for the suppression of unlawful acts against the safety of civil aviation, No. 14118. 23 Sept. 1971.; United Nations. Convention for the Suppression of Unlawful Seizure of Aircraft. 16 Dec. 1970.; International Civil Aviation Organization. *Convention on Offences and Certain Acts Committed on Board Aircraft*. 14 Sept. 1963.; United Nations. *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, No. 14118. 24 February 1988.

⁷³³ See: United Nations General Assembly. *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents*. 14 Dec. 1973.

⁷³⁴ Note: the term largely is used here as 3 of the conventions cited by the court which were adopted before 1999 included in some way, mention of a *mens rea*. They are United National General Assembly. *International Convention Against the Taking of Hostages*, No. 21931. 17 Nov. 1979 Art. 1.; United Nations General Assembly. *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, No. 2900410 March 1988. Art. 3(2)(c).; United Nations General Assembly. *International Convention for the Suppression of Terrorist Bombings*, No. 37517. 15 Dec. 1997. Art. 2(1).

⁷³⁵ Noteboom, Aaron J. "Terrorism: I Know It When I See It." *Oregon Law Review*. Vol. 81 Iss. 2 (2002). pp. 564-565.

most likely the highest probability that there was some sort of customary norm prohibiting terrorism.⁷³⁶ This is ultimately where the court derived its customary definition of terrorism from. The discrepancy between *mens rea* and *actus reus* in regional conventions can be perceived as converging at this point within a single universal treaty. However, some assert that the resort by the STL in its use of the terrorist finance convention is unfounded.⁷³⁷ It was created for the purpose of prohibiting the financing of terrorist acts, and was not devised with the intention of creating a universal generic definition of terrorism applicable at the international level.⁷³⁸ Therefore, its definition of terrorism can only be used when attempting to identify if a violation of the prohibited act (the financing of terrorist acts) has occurred. However, this argument runs into several logical issues. First, one cannot criminalize the aiding of an act which is, itself not criminal. Second, the convention covers both existing sectoral treaties along with its general definition. Due to the sheer number of ratifications and the lack of reservations respective of Art. 2, the States party to the convention can be considered to have recognized the generic definition of terrorism included within the treaty.

Even if the above is accepted, it does not mean that all contents of the treaty have risen to the level of international custom. In fact, it was not the use of the Financing Terrorism Convention by the court which was problematic, but rather how it was used. The transposition of all the contents of the treaty into the alleged customary definition ostensibly negated the examination of regional treaties and domestic laws, all of which include elements which contradict aspects of the definition adopted by the court. At the domestic level, there were significant issues regarding both *actus reus* and *mens rea*, all of which were internationally recognized, but overlooked by the court. Regional international conventions showed a higher degree of convergence with the alleged customary definition, but there still existed a trend pushing away from utilizing generic definitions, even after the adoption of the Financing Terrorism Convention, and instead focused on listing a very large set of sectoral treaties instead. Additional aspects, such as the inclusion of a transitional element, are questionable as they are not present to a significant degree at the regional level. While the court framed its argument to show that domestic law, regional international conventions and

⁷³⁶ Currently there are 189 States which have ratified the convention. Additionally it has been supported by SC Resolution 1373 and GA Resolution A/RES/59/290.

⁷³⁷ Saul, Ben. "Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism." *Leiden Journal of International Law*. Vol. 24, (2011). pp. 694.

⁷³⁸ *Ibid.*

universal international conventions all shared a high degree of commonality with one another in how they defined terrorist acts, this was actually somewhat misrepresentative of the reality at that time. In terms of State practice, there existed a sufficient degree of discrepancies to assert that a customary definition of the act of terrorism was either, not yet realized, or was somewhat different from that which the court purported it to be.

5.2.2.2. *Opinio Juris*

The court claimed that not only there was existing domestic and international legislation prohibiting acts of terrorism, but there also was a stable consensus on the content of the act, sufficient to warrant the aspect of State practice fulfilled. In addition to this it needed to show that there was *opinio juris* on the matter. The court attempted to show this through two aspects of recognition, those being domestic, through judicial statements, and international, through General Assembly and Security Council resolutions. Its assessment was, once again, marred with issues of selectivity and omission, but ultimately showed that indeed there was a developing *opinio juris* at the time. However, what existed at the international level was much more prominent than at the domestic level.

International Recognition

Overall, the court cited 16 different GA resolutions and two SC resolutions as evidence of international *opinio juris* regarding terrorism. The earliest of the two SC resolutions was S/RES/1373 adopted in September of 2001. Similar to the later resolution cited by the court, it has come under heavy criticism for extending beyond SC mandate by “legislating” over the international community.⁷³⁹ The resolution, acting under Chapter VII of the UN Charter, required member States to; ratify current and prior international conventions regarding terrorist acts,⁷⁴⁰ put in place domestic legislation which both criminalized terrorist acts and fell into accordance with international obligations,⁷⁴¹ and to report to the Counter Terrorism Committee on changes implemented to ensure adherence with the resolution.⁷⁴² The court used this as evidence to assert that *opinio juris* had developed amongst the international community. It cited a number of States

⁷³⁹ Szasz, Paul C. “The Security Council Starts Legislating.” *The American Journal of International law*. Vol. 96, No. 2 (Oct. 2002).

⁷⁴⁰ United Nations Security Council. *Resolution 373 (2001) Adopted by the Security Council at its 4385th meeting, on 28 September 2001*. S/Res/1373 (28 Sept. 2001). Par. 3(d).

⁷⁴¹ *Ibid.* par. 2(e).

⁷⁴² *Ibid.* par. 6.

which had reported back to the Counter Terrorism Committee that they had taken measures to fulfill the requirements of the resolution. The problem with the above examples is they cannot be used to show the existence of *opinio juris* by UN member States. Similar to what was discussed in the beginning of this chapter, *opinio juris* has been defined by the ICJ on numerous occasions as a belief that a practice is rendered obligatory.⁷⁴³ The most that can be taken from this is that the SC and its members believed there was an obligation to criminalize and prevent the planning, financing and execution of terrorist acts. The actions made by other UN member States reflected not a belief, but an actual obligation which was imposed on them vis-à-vis resort to Chapter VII of the UN Charter by the SC.⁷⁴⁴ This line of thought follows similarly with the argument that the sheer number of States party to the Financing Terrorism Convention indicates that a customary norm has developed. Prior to SC resolution 1373 only 10 States had ratified the convention.⁷⁴⁵ It bears repeating that one must be mindful of the context and conditions surrounding the adoption of such conventions. Art. 3(d) of the resolution clearly attempts to require States to ratify international conventions to combat terrorism, specifically the Financing Terrorism Convention.⁷⁴⁶ The sudden increase from 10 to 117 States party to the convention in four weeks' time⁷⁴⁷ has been directly attributed to the adoption of SC/Res/1373.⁷⁴⁸ If this is accepted as true, then the number of signatories to the convention cannot be perceived as an indication of *opinio juris*, but rather a formal obligation imposed upon States by the council. This is no more reflected than in the discrepancies and dialogue surrounding the latter resolution 1566 by the council. Whereas 1373

⁷⁴³ *North Sea Continental Shelf* (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark), I.C.J. Reports, 20 Feb. 1969. par.77; *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States) (Judgement), I.C.J. Reports, 27 June 1986. par. 207. See also: Crawford, James. *Brownlie's Principles of Public International Law*. Eighth ed. Oxford: Oxford UP. 2012. pp. 25-27.

⁷⁴⁴ Note: There is no dispute over the obligation Res. 1373 placed upon States. However, Kassa takes this notion of obligation further to argue that in order to appropriately criminalize Art. 2 of the *Terrorist Financing Convention* States were also required by the resolution to adopt the definition of terrorism placed within the treaty.; Kassa, Wondwossen D. "Rethinking the *No Definition Consensus* and the *Would Have Been Binding Assumption* Pertaining to Security Council Resolution 1373." *Finders Law Journal*. Vol. 17 Iss. 1 (2015). pp. 139-142.

⁷⁴⁵ Ridley, Nick. *Terrorism in East and West Africa: The Under-focused Dimension*. Cheltenham: Edward Elgar. 2014. pp. 10. Note: This was Stated by the Author to be as of 10 Sept. 2001. The exact number between Sept 9-11th has shown some level of discrepancy in the literature ranging from only four to 10 ratifications. The larger number has been chosen here in order to not misrepresent the actual number.

⁷⁴⁶ United Nations Security Council. *Resolution 373 (2001) Adopted by the Security Council at its 4385th meeting, on 28 September 2001*. S/Res/1373 (28 Sept. 2001). par. 3(d).

⁷⁴⁷ Ridley, Nick. *Terrorism in East and West Africa: The Under-focused Dimension*. Cheltenham: Edward Elgar. 2014. pp. 10.

⁷⁴⁸ Norberg, Naomi. "Terrorism and International Criminal Justice: Dim Prospects for a Future Together." *Santa Clara Journal of International Law* Vol. 8 Iss. 1 (Jan. 2010). pp. 25.

endeavored to make requirements of the international community to criminalize terrorist acts it lacked a clear definition which was to be placed within domestic legislation. 1566 sought to change this by transposing the definition from within the Financing Terrorism Convention into the resolution and asking States to criminalize and prevent such acts. Interestingly enough, the court only cited this resolution as an example of conformity in how the generic definition of terrorism is to be understood at the international level. It did not mention that the resolution was largely ignored by States after its adoption. The reason for this has been recognized as two-fold. First, there was no international consensus over a general definition of the act. Second, it did not place a legal obligation upon States to adopt the definition implemented within the resolution's definition.⁷⁴⁹ Regardless, it goes to show that the ratifications of the Financing Terrorism Convention and response and interaction with the established Counter Terrorism Committee cannot be automatically assumed to be an indication of *opinio juris*. Instead, one can only derive from it the opinions of the SC member States.

While a great deal of emphasis was placed on SC resolutions 1373 and 1566, they cannot be taken as the deciding factor as to if *opinio juris* was present at the international level. The STL cited 16 total GA resolutions spanning over the course of 15 years. It used these resolutions to support the claim that there was consistent, unified support on the prohibition of terrorist acts. However, attention to these resolutions is limited to a single sentence within the section. That is, within each of the cited resolutions the GA has condemned or declared "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them."⁷⁵⁰ To take the above and automatically assert that it is an example of

⁷⁴⁹ Saul, Ben. *Research Handbook on International Law and Terrorism*. Cheltenham: Edward Elgar. 2014. pp. 646-647.

⁷⁵⁰ United Nations General Assembly. *Measures to Eliminate International Terrorism*. A/Res/64/118. 16 Dec. 2009. par. 1 and 4.; United Nations General Assembly. *Measures to Eliminate International Terrorism*. A/Res/63/129. 11 Dec. 2008. par. 1 and 4.; United Nations General Assembly. *Measures to Eliminate International Terrorism*. A/Res/62/71. 6 Dec. 2007. par. 1 and 4.; United Nations General Assembly. *Measures to Eliminate International Terrorism*. A/Res/61/40. 4 Dec. 2006. par. 1 and 4.; United Nations General Assembly. *Measures to Eliminate International Terrorism*. A/Res/60/43. 8 Dec. 2005. par. 1-2.; United Nations General Assembly. *Measures to Eliminate International Terrorism*. A/Res/59/46. 2 Dec. 2004. par. 1-2.; United Nations General Assembly. *Measures to Eliminate International Terrorism*. A/Res/58/81. 9 Dec. 2003. par. 1-2.; United Nations General Assembly. *Measures to Eliminate International Terrorism*. A/Res/57/27. 19 Nov. 2002. par. 1-2.; United Nations General Assembly. *Measures to Eliminate International Terrorism*. A/Res/56/88. 12 Dec. 2001. par. 1-2.; United Nations General Assembly. *Measures to Eliminate International Terrorism*. A/Res/55/158. 12 Dec. 2000. par. 1-2.;

opinio juris on the prohibition of terrorist acts, which could lead to the creation of a customary international principle is problematic for two reasons. First, the court did not take into consideration the context under which the resolutions were adopted. At the onset this may not seem an issue as votes were either not tallied and the resolution was passed at the behest of the committee or, when taken, were starkly in favor with no recorded votes against for any of the resolutions.⁷⁵¹ However, this does not mean that concerns were not present over the implications of the resolution itself. Authors such as Much have commented on the reluctance of States to agree to a general comprehensive definition of the act because terrorism, “is not only a phenomenon, it is also an invective, and there are many examples of States using this invective in a most subjective manner to de-legitimize and demonize political opponents, associations or other States.”⁷⁵² Indeed, if one were to delve into the verbatim records of these sessions one would find that such a sentiment was recognized as present within some members of the delegation and resulted in concern by a number of others on the definition, legality and rhetorical abuse of the term.⁷⁵³ Because of this, the resolutions were deemed to be a political condemnation and not to be misconstrued to add to the construction of a legal general definition of the act.⁷⁵⁴ One of the main ways the delegations agreed a legal definition could be constructed was through the adoption of the convention on the

United Nations General Assembly. *Measures to Eliminate International Terrorism*. A/Res/54/110. 9 Dec. 1999. par. 1-2.; United Nations General Assembly. *Measures to Eliminate International Terrorism*. A/Res/53/108. 8 Dec. 1998. par. 1-2.; United Nations General Assembly. *Measures to Eliminate International Terrorism*. A/Res/52/165. 15 Dec. 1997. par. 1-2.; United Nations General Assembly. *Measures to Eliminate International Terrorism*. A/Res/51/210. 17 Dec. 1996. par. 1-2.; United Nations General Assembly. *Measures to Eliminate International Terrorism*. A/Res/50/53. 11 Dec. 1995. par. 1-2.; United Nations General Assembly. *Measures to Eliminate International Terrorism*. A/Res/49/60. 17 Feb. 1994. Annex par. 3.

⁷⁵¹ Note: in 2 of the 16 resolutions examined Lebanon and Syrian Arab Republic were observed to have abstained. See: United Nations General Assembly. *Measures to Eliminate International Terrorism*. A/Res/55/158. 12 Dec. 2000.; United Nations General Assembly. *Measures to Eliminate International Terrorism*. A/Res/54/110. 9 Dec. 1999.

⁷⁵² Much, Christian. “The International Criminal Court (ICC) and Terrorism as an International Crime.” *Michigan State Journal of International Law*. Vol. 14 (2006). pp. 133.

⁷⁵³ The representative from Iran stated that a general definition must address “the root causes of terrorism and the double standards by which some terrorist groups are being treated. It should also consider proper mechanisms to rescue that much abused term from those who use it as a pejorative term for any dissent from their policies.” See: United Nations General Assembly. *Fifty-ninth Session, 87th Plenary Meeting Verbatim Records*. A/59/PV.87. 7 April 2005. pp. 18.

⁷⁵⁴ The Representative from the Russian Federation claimed that the elements included within the definition “...are more political than legal in character” and that more time was needed before a legally viable universal definition could be formed. See: United Nations General Assembly. *Fifty-ninth Session, 87th Plenary Meeting Verbatim Records*. A/59/PV.87. 7 April 2005. pp. 6.

comprehensive definition of terrorism.⁷⁵⁵ In other words, the GA resolutions recognized exactly how the delegations intended for a legal definition of the act to arise and attempted to denounce their use for the furtherance of the creation of a legal definition outside of such a means.

Second, even if the above were to be put aside, the court never commented on the discrepancies present in the content of terrorist acts between the GA resolutions, SC resolutions and treaty law. While, as stated above, there was little in the way of differences between the stated understanding of the content of terrorist acts between the SC and the Financing Terrorism Convention; the GA resolutions understanding of terrorism did not reflect these definitions. There are similarities in that terrorist acts are criminal acts which are committed against a civilian population with intent to spread fear within that population. However, the decision by the STL claimed that there was a consensus on two elements of the definition: an attempt to coerce a government or authority to act or refrain from acting and a transnational element. Neither of these elements are present in any shape or form in any of the GA resolutions cited by the court. Moreover, the resolutions include that acts of terrorism are committed with a political purpose, an aspect which the court deemed not to be included within the existing customary definition.⁷⁵⁶ This is, of course, not meant to assert that such an element should have been included in the definition, but rather to show that the understanding of terrorist acts within the GA was markedly different from what was seen in more recent conventions and SC resolutions which the court examined. One finds it perplexing as to how resolutions with significantly different definitions of the act could be used in support of a conflicting definition. In this case, the court simply chose to highlight certain aspects of the resolutions in order to make its argument while neglecting contrary aspects of it.⁷⁵⁷

Domestic recognition

⁷⁵⁵ This was the reason for the creation of the Ad Hoc committee to create a comprehensive convention on terrorism. See: United Nations General Assembly. *Measures to Eliminate International Terrorism*. A/Res/51/210. 17 Dec. 1996. preamble and par. 6.

⁷⁵⁶ *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (Decision). STL-11-01/I/AC/R176bis F0936/COR/20130530/R144405-R144558/EN/nc, Special Tribunal for Lebanon (STL) 16 Feb. 2011. par 106.

⁷⁵⁷ Note: this is made more glaring through italicization of certain key words by the court and neglect to address similar key words which contradict their statement within the same paragraph. It reads: "*criminal acts* intended or calculated to *provoke a state of terror* in the general public, a group of persons or particular persons for political purposes are *in any circumstance* unjustifiable[.]" *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (Decision). STL-11-01/I/AC/R176bis F0936/COR/20130530/R144405-R144558/EN/nc, Special Tribunal for Lebanon (STL) 16 Feb. 2011. par. 88.

The court did not limit its study on *opinio juris* to only that of international proclamations. As stated earlier it also recognized that in identifying the customary status of the act of terrorism there needs to be some level of *opinio juris* which can be derived from domestic judicial decisions affirming the status of the act. The STL in its decision provided an overview of a number of different States in which such affirmations were made. Most notable of these were *Suresh v Canada* and *Almog v. Arab Bank*. The examples provided along with the reasoning implemented by the court show that within domestic jurisprudence there does indeed exist some level of *opinio juris* regarding the customary status of the prohibition on terrorist acts.

The Canadian Supreme Court seems to have the strongest arguments of all examples, not only recognizing the status of terrorism under customary international law, but also reaffirming its content and potential criminal prosecutions in the future. *Suresh v Canada* was the most cited case by the STL in these regards. In it, the court commented on acts of terrorism as “the random and arbitrary taking of innocent lives, rippling out in an ever-widening spiral of loss and fear.”⁷⁵⁸ Their commission are to be viewed as a violation of not only on the fundamental values of Canada, but the world as a whole. While there has existed confusion over the precise definition of the act, the propagation of GA and SC resolutions as well as international treaties prohibiting and requiring the criminalization of terrorist acts at the domestic level, especially through the International Convention for the Suppression of the Financing of Terrorism, are sufficient in depth to permit criminal procedures against individuals who have committed such acts. Additionally, the definition provided within the convention “catches the essence of what the world understands by ‘terrorism.’”⁷⁵⁹ The court proclaimed that to limit its understanding of terrorism to only specifically proscribed acts listed in prior conventions would undermine the consensus of the international community as to what the act itself actually is and how it may change in the future.⁷⁶⁰ Therefore it proceeded to use the definition of terrorism included under Art. 2(b) of the Financing Terrorism Convention to provide a definition of the act for use under domestic law. The decision was therefore deemed to be indicative of *opinio juris* by the STL due to the court’s comments regarding the essence of the act of terrorism as viewed by the world and the decision to not rely

⁷⁵⁸ *Suresh v Canada* (Judgement). Supreme Court of Canada No. 27790. 1 Nov. 2002. par. 3.

⁷⁵⁹ *Ibid.* par. 98.

⁷⁶⁰ *Ibid.* par. 96-98.

on existing proscriptive definitions in favour of a stipulative one which reflected its international legal obligations.

While *Suresh v Canada* provides a clear example of the Supreme Court of Canada's endorsement of the STL's general definition of terrorism, it is not wholly consistent with prior or later decisions. In *Pushpanathan v Canada* the court recognized that through international conventions and resolutions, there was a reasonable consensus by the international community over the prohibition of a number of acts, one of those being terrorism.⁷⁶¹ This is not problematic, and could even be seen as an indication of a willingness to accept a general definition such as what occurred in *Suresh v Canada*. However, the consensus mentioned in *Pushpanathan* was later expanded upon in *Zrig v Canada* to claim that there was "international consensus on certain forms of terrorism."⁷⁶² The wording here does not indicate the formation or recognition of a general or universal definition of terrorism, but rather only sectoral incarnations of the act. More perplexingly, the court also provided and endorsed a generic definition of terrorism which differs from that which was provided in *Suresh*.⁷⁶³ Overall, it shows uncertainty as to whether there was a general definition of terrorism in existence and what that definition actually entailed.

One of the other and, undeniably more contentious cases cited by the court was that of *Almog v Arab Bank*. The case did not specifically state that a prohibition on acts of terrorism had entered into customary international law, but rather that that it is a norm which "condemns bombings and other attacks intended to coerce or intimidate a civilian population."⁷⁶⁴ In other words, instead of risking implementing the label of terrorism (in which the alleged international norm deviates somewhat with U.S. domestic law),⁷⁶⁵ the court instead chose to extrapolate the core elements of the act and discuss its customary status. This was mainly derived from two international conventions, the International Convention for the Suppression of Terrorist Bombings and the Financing Terrorism Convention. Both treaties, due to their widespread levels of ratification, the existing prohibition to targeting civilians and the reaffirmation of the definition of

⁷⁶¹ *Pushpanathan v Canada* (Judgement) Supreme Court of Canada, No.25173. 4 June 1998. par. 65-66.

⁷⁶² *Zrig v Canada* (Judgement). Supreme Court of Canada, 3 FC 761. 7 April 2003. par. 180.

⁷⁶³ It is: "All of the acts of violence (attacks, hostage takings) committed by an organization to create a climate of insecurity, in order to practice extortion against a government, to satisfy a hatred toward a community, a country, a system" *Zrig v Canada* (Judgement). Supreme Court of Canada, 3 FC 761. 7 April 2003. par. 175.

⁷⁶⁴ *Almog v Arab Bank*, 471 F. Supp. 2nd par. 257, 276.

⁷⁶⁵ Sterba Discusses these differences in detail in: Sterba, James P., et al. *Terrorism and International Justice*. Oxford: Oxford UP. 2003. Ch. 11 *Terrorism and International Justice*.

terrorism under SC resolution 1566 indicated that there was an existing international norm prohibiting such acts.⁷⁶⁶ These examples listed by the court also serve to reaffirm that, while it did not overtly mention such conducts were to be labelled as terrorist acts, they were included in the definition of terrorist acts.

Previous decisions relating to this did not come to the same conclusion, however. In 1984 the U.S. Court of Federal Appeals in *Tel Oren v Libyan Arab Republic* case explicitly mentioned that there existed no international consensus on the definition of terrorism and thus there was no customary norm prohibiting the act.⁷⁶⁷ Even in more recent cases such as *United States v Yousef* the court never claimed acts of terrorism were prohibited through customary international norms.⁷⁶⁸ Instead, the case was primarily concerned with whether or not it could exercise universal jurisdiction over terrorist acts.⁷⁶⁹ In *Yousef*, the court deemed that it could not expand the set of crimes judicially to allow for universal jurisdiction.⁷⁷⁰ This provides evidence contrary to *Almog vs Arab Bank*. One should take note, however, that the avenues made available to identify if terrorism had entered into custom did not involve the inclusion of international tests. The statement made in *Yousef* has therefore been deemed as mute towards whether an international customary norm had developed. Therefore, although it was reluctant to identify this act as terrorism by name, the Supreme Court's decision in *Almog v Arab Bank* has been deemed as indicative of *opinio juris*, at least in regards to acts prohibited under the Financing Terrorism Convention and Terrorist Bombing Convention.

While the above decisions led the court to proclaim that a prohibition against the commission of terrorist acts had crystallized into a customary international norm, some have made comments contesting this. The main reason for such levels of discrepancy is the nature of the *Almog v Arab Bank* case and the issues it served to address. The case was concerned with a suit brought forth under the Alien Tort Statute of 2006 by victims of a terrorist attack against Arab Bank for the financing of such attacks. The case was therefore not criminal in nature and instead was a civil lawsuit. Because of this, the court was not in the right to make claims regarding the

⁷⁶⁶ *Almog v Arab Bank*, 471 F. Supp. 2nd par. 257, 273-280.

⁷⁶⁷ *Tel-Oren v Libyan Arab Republic*. 726 F.2d 774. 3 Feb 1984. par. 126.

⁷⁶⁸ *United States of America v Yousef*. 327 F.3d 56. 4 April 2003. par. 148.

⁷⁶⁹ *Ibid.* par. 64-154.

⁷⁷⁰ *Ibid.* par. 154 and 472.

customary status of terrorist acts.⁷⁷¹ While this point is a legitimate complaint to be had of the decision itself, it circumvents the argument made by the court in favour of denouncing it outright due to jurisdictional matters.⁷⁷² While certain aspects of decisions may sometimes later be repealed and deemed as an *ultra vires* act; such a thing does not indicate that there was no merit within the argument of the decision. The most important point to take into consideration in such matters is not if the court should or should not have engaged in such a discussion, but how their discussion was articulated, where it faltered and if it can still be considered as substantively relevant. In the case of *Almog v Arab Bank*, while the court wasn't tasked with the duty of deciding if a customary international norm on terrorism existed, it did examine what customary international law is, how it forms, and what the current status of the act in question was. It not only examined relevant international conventions, but SC resolutions and pronouncements by the international community as well. Moreover, it sought to show that prior decisions regarding acts of terrorism were either not properly addressed by previous cases or that the situation had changed since. In other words, the case implemented a logically compelling argument that should be given serious consideration regardless of the overarching issue the court was tasked with adjudicating upon.

The above are just two examples of cases that the court cited in confirming the customary status on the prohibition towards terrorism at the international level. It also cited other cases in affirmation of its belief towards this including pronouncements from courts in Italy, Mexico, Belgium, the U.K. and Argentina.⁷⁷³ In *Bouyahia Maher Ben Abdelaziz et al.* the Italian Supreme Court claimed that "a rule of customary international law [is] embodied in various resolutions by the UNGA and the UNSC, as well as in the 1997 Convention for the Suppression of Terrorist Bombings."⁷⁷⁴ Similarly, the Federal District Court of Mexico in the *Cavallo Case* stated, "the multiple conventions to which reference has been made, provide that the crimes of genocide, torture and terrorism are internationally wrongful in nature and impose on member States of the world community the obligation to prevent, prosecute and punish those culpable of

⁷⁷¹ Saul, Ben. "Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism." *Leiden Journal of International Law*. Vol. 24, (2011). pp. 689.

⁷⁷² Guenael Mettraux makes a different but similar argument in regards to the STL and its decision on the customary norm of terrorism mentioning that the court acted out of its own jurisdictional powers in addressing the matter. See: Saul, Ben. *Research Handbook on International Law and Terrorism*. Cheltenham: Edward Elgar. 2014. pp 653-655.

⁷⁷³ *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (Decision). STL-11-01/I/AC/R176bis F0936/COR/20130530/R144405-R144558/EN/nc, Special Tribunal for Lebanon (STL) 16 Feb. 2011. par. 86 and 100 footnote 193.

⁷⁷⁴ *Ibid.* par. 86 and 106 footnote 205.

their commission.”⁷⁷⁵ Also the Argentinian Supreme Court took the position in the *Enrique Lautaro Arancibia Clovel Case* that “...customary international law and conventional law echo the need for international cooperation for the repression of terrorism, as well as any indiscriminate attack against a defenseless civilian population.”⁷⁷⁶ The above examples show that at the domestic level there seems to be a strong convergence in recognizing the customary status of the prohibition to terrorism. The mild sways in recognition observed in cases such as *Zrig v Canada*, *Tel Oren v Libyan Arab Republic* and *United States of America v Yousef* do not detract from the belief that the international community has on the customary prohibition towards terrorist acts.

5.2.2.3. *On the Cusp of Crystallization*

In light of the above, it becomes clear as to where the court faltered and what it did well when rendering its decision on the customary status of the prohibition on terrorist acts. In regard to State practice, it examined a large and diverse set of domestic laws. However, in its examination it did not look at those laws as a whole. Instead, it selectively chose certain aspects to present in its decision while excluding those which did not fall into alignment with its opinion. Taking into consideration the vast array of differences in how terrorism was found to be defined at the national level, it becomes clear that the court erred in its claim that domestic law supported its customary definition. International conventions examined by the court showed a higher degree of convergence than that of domestic laws. The court clearly succeeded in showing that there was a developing trend at the regional level as to how the *mens rea* of general terrorist acts were to be perceived. Unfortunately, it did not take into consideration the move away in recent years (respective of the decision) from adopting regional treaties which had general comprehensive definitions of terrorist acts. Instead, reliance on the adoption of sectoral treaties had become prevalent. The reluctance to implement general definitions within these treaties served to undermine its claim that there has been a convergence in how States understood and defined terrorist acts to the point that a generic customary definition had emerged.

⁷⁷⁵ *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (Decision). STL-11-01/I/AC/R176bis F0936/COR/20130530/R144405-R144558/EN/nc, Special Tribunal for Lebanon (STL) 16 Feb. 2011. par. 86 footnote 132.

⁷⁷⁶ *Ibid.* par. 86 footnote 133.

Note: each of the three above decisions were reasoned through an unofficial translation of their respective language made by the court. The context in which the statements by the above courts were not elaborated upon within the decision itself.

The court's claim regarding *opinio juris* showed itself to be much more successful, but still mixed as to if the development of a customary international norm had occurred. Its use of SC and GA resolutions was not well substantiated. Issues surrounding the nature of the SC resolutions cited and their impact were not properly addressed. In addition, GA resolutions were not examined in full, leaving out discussions and concerns which led to their adoption. As a result, the only point that could be derived from their use is that there had been statements by the international community condemning terrorism. Conversely, their survey of domestic jurisprudence, while including moderate discrepancies, showed an overall recognition of the belief that a customary norm prohibiting terrorism exists.

The STL's examination was undoubtedly fraught with issues in how it analyzed and articulated its argument. Its assertion that a customary norm prohibiting terrorism existed was not adequately substantiated by the evidence it provided. It did, however, show that such a norm was very close to developing and exactly what areas needed to change for that norm to come into existence. In order to ensure the element of State practice as fulfilled, two changes would need to occur. First, more States would need to alter their domestic laws to reflect the generic definition proposed by the court. Second, one would need to observe a trend in international conventions moving towards, not away from, a generic definition of the act. The issue of *opinio juris* is less clear, in that it could arguably be considered as fulfilled based on domestic jurisprudence alone. However, more explicit recognition of a generic definition at the international level would be beneficial. Simply put, more time was needed before such a norm could come into existence.

5.3. Convergence and Customary Status

The decision by the STL on the customary status of terrorism was lacking in methodological rigor and clear logical rhetoric. While it showed that a customary norm criminalizing terrorism at the international level was developing, it did not put forth a compelling argument that such a norm was in place in 2005. This entails that the alleged norm cannot be utilized by the ICC to include acts of terrorism under Art. 7(1)(k) of the Rome Statute. As recourse to applicable treaties under Art. 21 of the Statute would limit application to only a select few universal and regional conventions, many of which do not claim terrorism as an international crime, one would naturally come to the conclusion that the label of terrorist acts could not be used by the Court. Instead, it would be limited to addressing only acts which occur during the commission of

a terrorist act under the headings of, for example murder, persecution or extermination.⁷⁷⁷ While the Court's authority to adjudicate over these acts in this way is unquestionable, the aims of this project are not to identify the means of including terrorist acts under the scope of such crimes within the Rome Statute. Rather, it aims to identify how the limitations placed upon the Court via Art. 21 and 22 of the Statute impact its ability to include acts, such as terrorism, under Art. 7(1)(k). With this in mind, simply asserting that a customary international criminal norm was not in place in 2005 and, therefore, the Court cannot utilize custom is insufficient. Instead, it is relevant to see if a customary norm has developed as of recent. After all, as was discussed above, the Court is not prohibited from identifying if a customary norm has come into existence. Therefore, this section aims to identify if such a norm has crystalized to date. After finding in the affirmative, it will detail the exact contents of that customary norm and assess if, or to what degree it is adjudicable within the realm of international criminal law. After doing so, it will engage in application of Art. 7(1)(k) of the Rome Statute, comparing it with similar crimes but also indicating its uniqueness. Overall, this section will show that, there is a contemporary customary prohibition of terrorist acts which can be adjudicated on under Art. 7(1)(k) of the Statute. This definition, however, is more basic than what is usually stated by the international community. While it meets the requirements to be included under Art. 7(1)(k) and does not contravene with the principle of *nullum crimen sine lege*, this inclusion should only be done on a temporary basis. The unique aspects of the crime as referenced by the international community still requires a core definition, enshrined within an international convention, and the crime itself should be included within the Statute as an amendment in order to provide more complete coverage.

Before establishing the existence and the contents of the customary definition of terrorist acts, it is important to reiterate some key points from the previous sections. That is, while the issue of *opinio juris* is essential towards establishing a customary norm, the STL mostly found that even though there have been mild differences in the past on the definition of the act, there exists a consensus that there is indeed a prohibition on international acts of terrorism at the domestic level. Moreover, *opinio juris* also reflects a feeling that those who committed such acts should be regarded as *hostis humani* and, therefore, must be held individually criminally accountable for the act. As such, the issue of *opinio juris* will not be dealt as a distinct subsection, but rather will be

⁷⁷⁷ Martinez, Lucy. "Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems." *Rutgers Law Journal*. Vol. 34, (2002-2003). pp.26-40.

touched upon when reflecting on domestic laws and international laws. Instead, the bulk of this section will focus on establishing if the act itself has met the formal requirements through State practice to have crystalized into customary international law. This entails that one must reexamine two aspects of the crime. Its representation under domestic law and international conventions.

5.3.1. *Domestic laws*

As stated above, a major flaw in the STL's reasoning was how it selectively extrapolated elements of the definition of terrorism from domestic laws without examining them as a whole. If such an approach were made by the court it could never have come to the decision that their customary international definition of terrorism was supported by domestic legislation. There were significant discrepancies in both the *actus reus* and *mens rea* of the crime. However, one should not take this to mean that there has not been a convergence on the understanding of the act at the domestic level since then. Domestic laws dealing with acts of terrorism have been slowly converging to better reflect international obligations from international conventions and SC resolutions, as well as to fall in accordance with international human rights standards. When examining these domestic criminal codes, a number of aspects need to be taken into account to assert that there has developed a customary norm prohibiting the act which could entail individual criminal responsibility at the international level. The first addresses the *actus reus* of the act. One must identify if a commonality has developed between nations in defining the *actus reus* of the crime. This must exhibit either similar textual representation or sufficient indication on the scope and gravity of the crime in order to distill a general definition of the act. Second, the *mens rea* must also be taken into consideration. It was already shown above that the STL mistakenly asserted that both the intent to instill fear within a civilian population and the intent to coerce a government or authority were present within domestic laws despite only one element being present in many cases. Therefore, it is essential to identify whether domestic law still reflects only one of the above intents or has converged to include both. In order to properly identify the current status of domestic laws, a comparison was made to the most recent criminal codes and acts relating to terrorism between 47 different States representative of different regions and legal systems throughout the world.⁷⁷⁸ In order to adhere as closely as possible to prior standards implemented by other

⁷⁷⁸ Note: while not included within the count for the analysis, other states have been taken into consideration. These were criminal codes or acts which, for linguistic reasons, the author was unable to analyze. However, reports from various sources such as the Counter Terrorism Committee gave limited insight into the faults of these laws and, therefore, have been used. The States utilized for this part and their respective laws on terrorism are as follows:

international judicial organs when identifying customary international law the States chosen were intended to represent a variety of different regions including Europe, the Middle East, Africa, South America, Asia and North America. Moreover, in terms of representation of legal systems civil law, common law and hybrid systems were also considered.

5.3.1.1. *Actus reus*

One of the major criticisms made of the STL's interpretation of domestic law and its contribution towards the crystallization of a customary norm is that many States did not define the *actus reus* of terrorism in the same manner. A number of States limited their definitions to only those listed within treaty law or their definitions only included singular acts, for example the use of explosive devices. Indeed, even now this can still be observed in some cases, however changes

Andorra, *Nouveau Code Penal (Criminal Code)*, 2005. Art. 362.; Armenia, *Criminal Code*, 18 April 2003. Art. 217.; Austria, *Austrian Criminal Code (Strafgesetzbuch)*, 1974, Last amended 19 June 2019. Art. 89c and 129a.; Azerbaijan, *Criminal Code of the Republic of Azerbaijan*, N.787-IQ, Last amended 2018. Art. 214.; Belgium, *Criminal Code (Code Penal)*, 1867, Last amended 2018. Art. 137.; Bosnia and Herzegovina, *Criminal Code of Bosnia and Herzegovina*, 2003, Last amended 2015. Art. 201.; Bulgaria, *Criminal Code of Bulgaria*, 1968, last amended 2017. Art. 108.; Canada, *Criminal Code of Canada*. 1985, last amended 2018. Art. 83.01.; Croatia, *Criminal Code*, 2011. Art. 97.; Columbia, *Criminal Code of Columbia (Código Penal Colombiano)*, Act. 599, 2000. Art. 144.; Czech Republic, *Criminal Code of the Czech Republic*, 2009, Last amended 2011. Art. 311-312.; Denmark, *The Criminal Code of Denmark*, 2005. Art. 114.; Estonia, *The Criminal Code of the Republic of Estonia*, 2001, Last amended 2019. Art. 237.; Finland, *Criminal Code of the Republic of Finland*, 1889, Last amended 2015. Chap. 34(a).; France, *Criminal Code (Code Penal)*, Last amended 2019. Art. 421.; Georgia, *Criminal Code of Georgia*, 1999, Last amended 2019. Art. 323.; Hungary, *Criminal Code of the Republic of Hungary*, Last amended 2012. Sect. 314.; Iceland, *General Penal Code of Iceland*, 1940, Last amended 2015. Art. 100a.; India, *The Prevention of Terrorism Act*, Act. No. 15, 2002. Art.3.; Ireland, *Criminal Justice (Terrorist Offences) Act 2005*, 2005. Art. 5.; Kazakhstan, *Criminal Code of the Republic of Kazakhstan*, 2014, Last amended 2016. Art. 255.; Kyrgyzstan, *Criminal Code of the Kyrgyz Republic*, 1997, Last amended 2006. Art. 226.; Latvia, *Criminal Law of the Republic of Latvia*, 1998, Last amended 2018. Sec. 88.; Liechtenstein, *Criminal Code of the Principality of Liechtenstein*, 1987, Last amended 2019. Art. 278c.; Lithuania, *Criminal Code of Lithuania*, 2000, Last amended 2017. Art. 250.; Luxembourg, *Criminal Code of the Grand-Duchy of Luxembourg*, 1879, Last amended 2018. Art. 135-1.; Macedonia, *Criminal Code of the Republic of Macedonia*, 1996, Last amended 2009. Art. 394-b.; Malta, *Criminal Code of the Republic of Malta*, 1854, Last amended 2018. Art. 328a.; Moldova, *Criminal Code of the Republic of Moldova*, 2002, Last amended 2018. Art. 278.; Mongolia, *Criminal Code of Mongolia*, 2002. Art. 81.; Netherlands, *Criminal Code of the Kingdom of Netherlands*, 1881, Last amended 2012. Sec. 83a.; New Zealand, *Terrorism Suppression Act 2002*, 2002 No. 34, 17 October 2002. Art. 5.; Norway, *Penal Code of the Kingdom of Norway*, 1902, Last amended 2017. Sec. 131.; Pakistan, *The Anti-Terrorism Act*, 1997. As enacted via S.R.O No. 496(1) 2000. Sec. 6.; Philippines, *An Act to Secure the State and Protect our People from Terrorism*, Rep. Act No. 9372, 2007. Sec. 3.; Russia, *On Counteraction Against Terrorism*. Federal Law No. 35-FZ. 6 March 2006. Art. 3.; Serbia, *Criminal Code of the Republic of Serbia*, 2005, amended 2012. Art. 312.; Seychelles, *Prevention of Terrorism Act, 2004*, 1 Dec., 2004. Art. 15.; Slovenia, *Criminal Code of the Republic of Slovenia*. 2008. Art. 108.; South Africa, *Anti-Terrorism Bill*, No. 24076, 15 November 2002. Chap. 2.; Sweden, *Act on Criminal Responsibility for Terrorist Offences*, 24 April 2003. Sec. 2.; Tajikistan, *Criminal Code of the Republic of Tajikistan*. 1998, Last amended 2011. Art. 179.; Ukraine, *Criminal Code of Ukraine*, 2001, Last amended 2010. Art. 258.; United Arab Emirates, *On Combating Terrorism Offences*, Federal Law No. (7), 2014. Title 1. Chap. 2.; United States, *Title 18 of the United States Code*, Last amended 2017. Art. 2231.; Uzbekistan, *Criminal Code of the Republic of Uzbekistan*, 1994, Last amended 2002. Art. 115.; United Kingdom, *Terrorism Act*, 2000, Last amended 2015. **Note: Herein after the laws will be referenced by State name only.

have developed over time. As was stated above, Russia's Law 35-FZ of 2006 succeeded the definition provided in the 2004 criminal code. In it, the *actus reus* of the act was expanded beyond that of use of explosive devices to a very broad category of 'the ideology of violence.'⁷⁷⁹ While this definition has shown itself to be problematic due to its vague formulation,⁷⁸⁰ it does serve to show that some change was made to expand the law beyond its 2004 limitations. Aside from this there still exist limited stated *actus reus* of the act in domestic laws. Austria's criminal code is exemplary in the sense that while it has a limited *actus reus*, it shows how this can still be used to formulate a general customary definition. The crimes listed extend well beyond that of what has been included within traditional anti-terrorist treaty law, including murder, serious bodily injury, threat to life or physical integrity, kidnapping/ abduction, hijacking, etc. if such an act is committed with the requisite intent to coerce a government or authority or instill fear within the civilian population.⁷⁸¹ Building off of this, the criminal code also explicitly expands the definition of terrorism to include all acts of genocide, war crimes and crimes against humanity as provided in their international criminal code, as long as the specific mental element is present.⁷⁸² This is noteworthy as it touches upon two main aspects of the issues which the STL did not address. Firstly, while it does include a limited *actus reus* of the crime, it still covers many of the gravest crimes which international criminal law is concerned with. Second, by including reference to crimes against humanity, it also recognizes that terrorist acts can occur within this sphere of crimes. Overall, the Austrian Criminal Code can be viewed as an instance in which a limited *actus reus* has been implemented which does not run the risk of arbitrary interpretation nor overly narrowing the scope of the crime to prevent the development of customary international law.

While not all States have included the exact same *actus reus* for terrorist acts in their domestic legislation, one can still draw several key similarities for the identification of a customary norm. That is, many other countries have criminalized the act in a similar manner as Austria has done, by focusing primarily on the *mens rea* of the crime and merely listing a portion of their gravest criminal offences as applicable. Of the 47 countries examined, 24 of them provided an

⁷⁷⁹ Russia, *On Counteraction Against Terrorism*. Federal Law No. 35-FZ. 6 March 2006. Art. 3.

⁷⁸⁰ The overly broad definition provided coupled with the enactment of Federal Law on Mass Media (No. FZ-2124-1) and Federal Law on the Federal Security Service (No. 40) have contributed to human rights violations, such as the freedom of expression. See: Human Rights Watch. *"As If They Fell From the Sky" Counterinsurgency, Rights Violations, and Rampant Impunity in Ingushetia*. (NY: Human Rights Watch, 2008). pp. 27-33.

⁷⁸¹ *Austrian criminal code (Strafgesetzbuch)* Art. 89c and 129a. Last amended 19 June 2019.

⁷⁸² *Ibid.* Art. 89c.

extensive list of crimes which could amount to terrorism.⁷⁸³ Unsurprisingly, a large portion of States included within these lists acts which have been represented within international conventions, such as use of explosive devices, kidnapping and hijacking. More importantly, other acts, such as murder and attack on or threat to life and physical integrity were also widely included within their list of offences. While this may not meet the same level of convergence with international law similar to the Austrian Criminal Code, it highlights a key aspect in the rationale for utilizing a list rather than a general *actus reus*. That is, if improperly construed a general *actus reus* could provide for avenues of abuse. In clarifying this, one should note that domestic law is regarded similarly to international law; in the sense that acts are usually criminalized because they are perceived as causing special or serious harm to society or the community.⁷⁸⁴ However, the communities, their historical, and social ties also have an impact on what is considered to have a serious impact on society. As such, at the domestic level, there will always be a greater degree of acts which have been criminalized, some more severe than others. Limiting the potential acts which could amount to a terrorist act therefore highlights that the crime itself is intended to only encompass the gravest of acts which have been criminalized at the domestic level. Conversely, if the law provided that all criminal offences with the requisite intent would fall within the offence of terrorist acts, this would undermine the gravity of the crime as a whole and run rife with opportunity for exploitation. For example, unsanctioned peaceful protests or statements which attempt to coerce a government authority from making a decision, have little impact on the public and do not fit within the traditional scope of what could be considered as a terrorist act. Indeed, this has been the cause for criticism of a number of countries which have enacted anti-terrorism laws such as Sri Lanka. Human Rights Watch has noted this on several occasions, stating that including a prohibition towards speaking or writing statements which could ‘threaten the unity of Sri Lanka’ or ‘intimidating a population’ were overly vague, did not adhere to international standards on terrorist acts and violated fundamental human rights, such as the right to freedom of expression.⁷⁸⁵ Overall, the use of lists to limit the *actus reus* can be seen as a valuable method for

⁷⁸³ They are: Andorra, Austria, Belgium, Bulgaria, Czech Republic, Denmark, France, Georgia, Iceland, India, Latvia, Liechtenstein, Lithuania, Macedonia, Malta, New Zealand, Pakistan, Philippines, Seychelles, Slovenia, South Africa, Sweden, Tajikistan and United Kingdom.

⁷⁸⁴ Wise, Edward M. “International Crimes and Domestic Criminal Law.” *DePaul Law Review* Vol. 38 Iss. 4, 1989. pp. 925-927.; Marchuk, Iryna. *The Fundamental Concept of Crime in International Criminal Law: A Comparative Law Analysis*. NY: Springer. 2014. pp. 69-70.

⁷⁸⁵ Human Rights Watch. “Sri Lanka Draft Counter Terrorism Act of 2018: Human Rights Watch Submission to Parliament.” *Human Rights Watch*. October 19, 2018. pp. 2-3.

safeguarding the public at the national level. Following this line of thought, many of the countries that have decided to utilize open ended clauses for their *actus reus* of the crime have focused on a necessary gravity requirement used in tandem with a more stringent *mens rea*. Overall, while criticisms have been made over the limiting clauses which accompany the *actus reus* of the crime of terrorism in domestic laws, this does not detract from the consensus of what terrorism entails, rather it is a means for better utilizing the act at the domestic level.

In addition, a number of other States have opted to utilize a general, or open-ended *actus reus* to define the crime. In total, of the 47 States observed 23 exhibited a general offence within their *actus reus*.⁷⁸⁶ While in many cases, acts listed in international conventions such as the use of explosive devises and hijacking have also been listed, they have been followed by the inclusion of a more general offence. Latvia was the only country observed to have an extensive list of over 15 different acts which could amount to a terrorist offence with an included residual clause of ‘other activities.’⁷⁸⁷ In most other cases the *actus reus* was represented through the commission of any criminal offence which is a threat to or poses a risk to life or bodily harm. This is usually restricted through either utilizing a series of qualifiers such as ‘serious’ or ‘grave’ bodily harm. Even with an observed emphasis on the gravity requirement, the Counter Terrorism Committee has consistently commented on the status of individual States and has observed that there still exist a few definitional divergences, particularly within the *actus reus*. Overall, as the Counter Terrorism Committee has commented, there seems to be an ideal definition which has emerged within domestic laws. That is, terrorist acts should be defined as an act which; (a) constituted the intentional taking of hostages; or (b) is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or (c) involved lethal or serious physical violence against one or more members of the general population or segments of it.⁷⁸⁸

In summary, regarding the *actus reus* at the domestic level, one can observe that there still is a degree of divergence over the exact framing of the crime. However, where textually there may

⁷⁸⁶ They are: Armenia, Azerbaijan, Bosnia, Canada, Croatia, Columbia, Estonia, Hungary, Ireland, Kazakhstan, Kyrgyzstan, Latvia, Luxembourg, Moldova, Netherlands, Norway, Russia, South Africa, Tajikistan, Ukraine, United Arab Emirates, United States and Uzbekistan.

⁷⁸⁷ Latvia, *Criminal Law of the Republic of Latvia*, 1998, Last amended 2018. Sec. 88.

⁷⁸⁸ United Nations Human Rights Council. *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin*. A/HRC/10/3, 4 Feb. 2009. pp. 13-15.

be some differences, there is overlap with the core human rights which the law seeks to protect. Unlike the STL's assessment of domestic laws, it was found that terrorism cannot be simply transposed into the international system due to mere criminalization. Rather, a connection was established between the act and the fundamental human rights which its prohibition seeks to protect. That is, the reliance in domestic laws on making reference to acts which may entail or are a threat to the public and pose a threat to life and physical integrity. These acts overlap with what Bassiouni has listed as the cornerstone for the creation of crimes against humanity, that is the protection of the right to life, liberty and security.⁷⁸⁹ As such, the differences observed can be seen as merely States exercising their own prerogative to try and prevent the abuse of the crime by extending it to lesser acts. Overall, at the domestic level, it is clear that any criminal act that poses a threat to the public, physical integrity or life can amount to a terrorist act, as long as it meets the requisite *mens rea*.

5.3.1.1. *Mens rea*

Even though there were some minor differences in defining the *actus reus* of terrorist acts, when examining the *mens rea* of the act, its reflection in domestic law is much more consistent. The STL was criticized for identifying two means of intent (to instill fear within a population and to coerce a government or authority) and asserting that they were both simultaneously present within domestic law despite a plurality of States including only one element or requiring both to be present. However, as of current, of the 47 different domestic laws surveyed, an overwhelming majority of 44 States have included intent to instill fear within a population as part of their definition.⁷⁹⁰ The same follows for the intent to coerce a government or authority, which was present within 39 of the 47 States examined.⁷⁹¹ Of all of the States including these elements, a total of 38 included both elements within their definition of terrorism.⁷⁹² This may seem more

⁷⁸⁹ Grunfeld, Fred and Semulders, Alette. *International Crimes and Other Gross Human Rights Violations: A Multi- and Interdisciplinary Textbook*. Nijhoff: Leiden. 2011. pp. 86.

⁷⁹⁰ They are: Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia, Bulgaria, Canada, Croatia, Columbia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Hungary, Iceland, India, Ireland, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Luxembourg, Macedonia, Malta, Moldova, Netherlands, New Zealand, Norway, Pakistan, Philippines, Russia, Seychelles, Slovenia, South Africa, Sweden, Tajikistan, Ukraine, United Arab Emirates, United States, Uzbekistan, and the United Kingdom.

⁷⁹¹ They are: Armenia, Austria, Azerbaijan, Belgium, Bosnia, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, Georgia, Hungary, Iceland, Ireland, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Luxembourg, Malta, Moldova, Mongolia, Netherlands, New Zealand, Norway, Pakistan, Philippines, Russia, Seychelles, Slovenia, Sweden, Tajikistan, Ukraine, United Arab Emirates, United States, Uzbekistan, and the UK

⁷⁹² They are: Armenia, Austria, Azerbaijan, Belgium, Bosnia, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, Georgia, Hungary, Iceland, Ireland, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Luxembourg,

convincing to the STL's claims, but what is most important is the connection made between the two. Of the 38 States including both elements in their definition, only two required that both be simultaneously present.⁷⁹³ In other words, concerns over use of the conjunctives 'or' or 'and' as proposed by authors such as Ben Saul have dissipated over time. This means that there has emerged an overwhelming majority within domestic legal systems that the *mens rea* of terrorism may include *either* the intent to instill fear within a civilian population *or* to coerce a government or authority. Of the two surveyed which required both elements to be present, Russia and the Philippines, as was stated above, both have come under a high degree of scrutiny for their laws on terrorism, and have been urged by the international community and respective international instruments, such as the Counter Terrorism Committee, to amend their laws to better suit the current trend in defining terrorist acts. As such, while their included *mens rea* differs from the norm, they should not be considered as an example of a persistent objector which would obstruct the formation of customary international law. Rather, due to the human rights concerns surrounding these particular domestic laws, they should be seen as an exception which is in need of amendment to adhere to international standards.⁷⁹⁴

In addition to the above, one should note that there is a third element which has also emerged within domestic laws. This is that the attack was intended to undermine or destabilize the fundamental constitutional, societal or economic structure of the State.⁷⁹⁵ While not as prevalent as the prior two elements it has seen a rise, particularly, within European States. Weigend has commented on the development of this element both at the international and national level, stating that while the formal text comes off as somewhat awkward and practical application of this clause may be difficult in the future, it adequately reflects the intent of its lawmakers. That is, they wished to reinforce that the label of terrorism should only be used to cover the most egregious and dangerous acts against society.⁷⁹⁶ In his opinion, it elevates the threshold to an unnecessarily high

Malta, Moldova, Netherlands, New Zealand, Norway, Pakistan, Philippines, Russia, Seychelles, Slovenia, Sweden, Tajikistan, Ukraine, United Arab Emirates, United States, Uzbekistan, and the United Kingdom.

⁷⁹³ They are: Russia and the Philippines.

⁷⁹⁴ For a general discussion of violation of human rights norms and the persistent objector see: Green, James A. *The Persistent Objector Rule in International Law*. Oxford: OUP, 2016. pp. 197-200.

⁷⁹⁵ This was observed in 26 different national laws. They are: Andorra, Austria, Belgium, Bosnia, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Hungary, India, Ireland, Kazakhstan, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Seychelles, Slovenia, Sweden, Tajikistan, and Ukraine.

⁷⁹⁶ Weigend, Thomas. "The Universal Terrorist The International Community Grappling with a Definition." *Journal of International Criminal Justice* Vol. 4 Iss. 5. 2006. pp.926-927

degree, drawing into question if any attack which does not reach the scale of, for example the 9/11 terrorist attack, could fit within this definition. Regardless of whether this is or is not the actual case, one should note that the inclusion of this element in domestic laws has a limited impact on the overall definition and formation of a customary norm. This is because in almost all cases the intent is also separated with the conjunctive ‘*or*.’ In other words, the inclusion of this additional *mens rea* can be perceived in two different ways. Firstly, it extends the definition of terrorism beyond that of what has been observed in the majority of domestic laws. In this case, because of the use of the conjunctive ‘*or*’ it does not conflict with existing domestic laws for the formation of a customary definition. Second, whether or not it can be utilized in the future; it can still, as Weigend asserted, serve a symbolic purpose. Whereas, in the section above, there were concerns over potential for abuse in the case a gravity requirement was not present; this could be viewed as reinforcing lawmakers’ opinion that terrorist acts should cover only the gravest of crimes. As a result, while the additional third element lacks representation numerically, throughout different legal systems and regions to be included within a customary definition, it still provides insight into the intended scope of the crime and its potential for future development.

Overall, domestic laws have shown a greater degree of convergence in the understanding of terrorism. The *actus reus* is not solely bound to what has been included in traditional treaty law. Rather, States have attempted to expand upon the *actus reus* because the main distinguishing factor in the commission of terrorist acts is the intent behind it, not the act committed itself. Therefore, while most traditionally recognized forms of terrorism are still represented, most States have opted for a list which reflects grave crimes which can be committed with the prerequisite intent and still have the same impact. If this trend is taken in tandem with the number of States which have opted for a general definition of the act, one can come to the conclusion that a general *actus reus* can be put together as long as it is limited to the gravest of criminal acts, namely those included under crimes against humanity. As for the *mens rea*, there is near universal acceptance at the national level that it includes at least two elements, the intent to instill fear within a population or to coerce an authority. The third element of destabilizing a fundamental social, economic or political structure, seems to have begun to develop as well, although this seems to be more secluded to western States. While it does not enjoy sufficient backing to be included within a customary definition, its existence does serve to reinforce States’ desire to have a high gravity requirement for the crime. What this means, how they can or cannot be applied at the international level requires

a greater degree of examination of more recent international conventions, however. Domestic law is just one aspect needed to identify if a customary norm has developed.

5.3.2. *International Conventions and Directives*

As was shown, there has been a large degree of convergence over the definition of terrorism at the national level. However, in order for a customary international norm to develop there must also be an observed convergence at the international level. As was discussed above, in the STL's assessment there were some issues relating to the recognized *actus reus* of the crime, especially with regional conventions. In addition to this, lack of the inclusion of the need for a transnational element drew into question whether or not these treaties attempted to criminalize terrorist acts at the international level, or simply set forth standards for domestic criminalization. Unfortunately, regarding more recent international conventions there have been few new ones adopted since the STL's decision. However, this does not entail that there have been no developments which indicate that a customary norm has developed. Instead one can look at existing international treaties on terrorism, directives and other treaties which have dealt with the issue of terrorism to bolster the notion that a customary definition has crystalized. In order to do so, this section will focus primarily on three additional documents, revisiting the Finance convention, the EU directive of 15 March 2017 and the Malabo Protocol for the Creation of an African Court. These documents, taken into consideration with the convergences observed within other regional and universal treaties on terrorism will indicate that a customary norm has recently developed.

5.3.2.1. *The International Convention for the Suppression of the Financing of Terrorism*

As was seen above The International Convention for the Suppression of the Financing of Terrorism laid at the center of the STL's decision on the existence of a customary norm prohibiting terrorist acts. Recourse to the use of the convention itself was largely unproblematic, the convention has been widely endorsed by the SC and international community. Moreover, its definition of terrorist acts has been recognized as the essence of what the international community perceives terrorism to be.⁷⁹⁷ For the sake of identifying a customary definition it is the most pertinent treaty for examination, as it shows a number of traits. First, it is universal in nature and was constructed to be applicable to the international community as a whole, not a specific region.

⁷⁹⁷ Note: This was reflected in the above section on the STL and its decision.

Second, it provides for a general definition of terrorist acts. The third and final reason, is it now enjoys near universal ratification/ ascension by UN member States. As such, the convention should be considered as important as it was when examined by the STL.

The Financing Terrorism Convention clearly establishes that acts of terrorism are “criminal and unjustifiable, wherever and by whomever committed.”⁷⁹⁸ In order to foster international cooperation and in an attempt to prevent the future commission of such acts it provided a clear definition of what is to be considered as a terrorist act. This was defined under Art. 2(1) of the convention: “(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”⁷⁹⁹ The first portion of this definition is in reference to a total of nine sectoral treaties relating to specific terrorist offences, such as but not limited to; unlawful seizure of aircraft and hostage taking. The inclusion of these sectoral treaties was uncontroversial, as it was the same method for listing terrorist offences as adopted by other regional conventions.⁸⁰⁰ However, it differed in adding a second general definition of terrorist acts. As was seen above, this definition has been almost universally adopted in domestic laws. The *mens rea* is near identical, and while the *actus reus* is more general than what was exhibited in domestic laws with a narrow or limited *actus reus*, it still places emphasis on the core crimes instilled within them. That is, threat to life and physical integrity.

In addition, Art. 3 provides that the convention is not applicable if such an offence is committed solely within the territory of a State. This was one of the driving factors for the STL in their decision that the international definition of terrorism would require a transnational, or cross-border element to it. This distinguishes itself from most domestic laws, as such an element is

⁷⁹⁸ United Nations General Assembly. *International Convention for the Suppression of the Financing of Terrorism* 9 Dec. 1999. Preamble.

⁷⁹⁹ *Ibid.* Art. 2(1).

⁸⁰⁰ For example see: South Asian Association for Regional Cooperation (SAARC), *Regional Convention on the Suppression of Terrorism, South Asian Association for Regional Cooperation (SAARC)*, 6 Jan. 2004. Art. 1.

usually not a requirement.⁸⁰¹ Such an element has enjoyed mixed reception with other international treaties on terrorism. However, what is most important is not its lack of its inclusion within domestic laws, rather its inclusion within the Financing Terrorism Convention. It effectively limits the scope of terrorist acts to only cover acts which include a transnational element to them. As such, for a customary definition, one would expect that such an element is retained.

5.3.2.2. *EU Directive 2017/541*

Second, it may be prudent to discuss the EU Directive of 15 March 2017. It serves as one of the more recent legally binding documents on EU member States regarding terrorism and aimed at creating a clear and comprehensive definition for the criminalization of terrorist acts and the financing of such acts at the domestic level. The definition finds itself, unsurprisingly, very similar to what was observed within most domestic laws, both inside and outside of the European Union. In all, the directive took three steps towards not only clarifying the definition of terrorism at the regional level, but also for criminalization at the international level by elucidating the core contents of terrorist acts, the *actus reus*, and *mens rea*. Each will be discussed below and their importance towards the contribution to the formation of a customary international norm criminalizing terrorist acts.

Overall, of the three steps the directive took in aiding the formation of a customary norm, the most apparent of these was the scope under which terrorist acts can be committed. Specifically, it sought to criminalize acts of terrorism in regards to not only domestic but also foreign terrorist fighters.⁸⁰² This may not seem as a new development; the Financing Terrorism Convention was aimed directly at individuals and groups committing terrorist acts within foreign States.⁸⁰³ However, the EU Directive of 15 March 2017 makes it a requirement that all States amend their criminal laws to include both national and foreign nationals within their definition of terrorist acts. In addition to this, the directive explicitly recognizes the need to combat and hold individuals and groups criminally accountable for terrorist offences, regardless of their country of origin. This need has arisen as an international obligation resulting from SC resolutions and international treaty law.

⁸⁰¹ There are exceptions to this, however. For example, Canada's criminal code includes two distinct crimes, domestic and international terrorism.

⁸⁰² European Union. *Directive 2017/541 of the European Parliament and of the Council*. 15 March 2017. Preamble par. 4-5.

⁸⁰³ United Nations General Assembly. *International Convention for the Suppression of the Financing of Terrorism* 9 Dec. 1999. Art. 3.

It effectively recognizes that States have an international obligation to ensure in their domestic law they can prosecute both domestic and foreign individuals for terrorist offences. Therefore, the directive serves to show solidarity within the EU that terrorist acts, especially those with a transnational element to them are prohibited under international law.

Secondly, the definition provides a clear *actus reus* for the crime. It includes a list of nine different potential active elements to the crime including murder, attacks on the physical integrity of an individual, kidnapping, seizure of aircraft, causing extensive damage to a public or government facility, use of explosive weapons, release of substances which would endanger human life, disabling water or power supplies which may endanger human life, etc. The directive has, therefore, forgone the need to list individual conventions and clearly and exhaustively list each and every active element, with more contemporary elements such as systems interference also being included within the active scope of the crime. However, when examining the above acts one can see clear similarities with the *actus reus* observed at the domestic level. Within the directive, the core acts included are considered as the gravest acts which an individual could commit, as they cause or have the potential to threaten the life or bodily integrity of individuals. In this sense it reaffirms the trends observed at the domestic level.

The third and final part clarifies the *mens rea* of the crime. This includes three separate potential intents which can lead to being charged with a terrorist offence, namely: “a) seriously intimidating a population; (b) unduly compelling a government or an international organization to perform or abstain from performing any act;(c) seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization.”⁸⁰⁴ The first two, as were seen above, are almost universally accepted within domestic laws as potential elements of the crime and are taken verbatim from the Financing Terrorism Convention. Those being, the intent to instill fear within a civilian population *or* the intent to coerce a government or authority. The third element was also seen to be present within domestic laws. This being, ‘seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization.’⁸⁰⁵ As was discussed above, this element has been a relatively new development. Its inclusion within the

⁸⁰⁴ European Union. *Directive 2017/541 of the European Parliament and of the Council*. 15 March 2017. Art. 3.

⁸⁰⁵ *Ibid.*

directive and within some domestic laws can be viewed as an indication of a developing additional *mens rea*. However, it needs additional inclusion with domestic laws and international treaties before it can be considered as a part of the international definition on terrorist acts.

The EU directive may only represent a single region when looking at the formation of custom, but it shows a great deal of overlap with what was observed in the domestic understanding of terrorist acts. As Caiola has noted, EU directives constitute not only a formal obligation on EU member States but are also reflective of the opinion of such members.⁸⁰⁶ Therefore, the directive serves a dual purpose for the development of customary international law. It acts as both an indicator of State practice and *opinio juris* at the international level. What the directive shows then is that EU member States, regardless of whether their current domestic laws currently reflect it, have come to an agreement that terrorist acts are: a) of paramount concern to the international community, b) criminalized internationally regardless of the country of origin of the individual who commits them and c) that there exists a clear legal definition for the crime through international conventions. Overall, the directive serves as one of the most recent and impactful developments at the international level indicating that a customary norm prohibiting terrorist acts has crystalized.

5.3.2.3. *The Malabo Protocol for the Creation of an African Court*

The final treaty for consideration regarding the customary prohibition of terrorist acts is that of the Malabo Protocol for the Creation of an African Court (Malabo Protocol). This treaty has not come into force as of present. Even so, it can be seen as reflective of the position of AU member States over the definition of terrorist acts, and thus has an impact on the development of international criminal law. In it, terrorism is listed under Art. 28G which includes three distinct elements. The first is, the act must be a violation of the criminal laws of a State party to the AU, the laws of AU itself or recognized regional economic community or international law.⁸⁰⁷ This element itself would pose similar problems regarding potential for abuse as was seen in domestic law. Its construction is inherently vague and open ended. Also, the lack of explicit reference to criminal laws and instead only to the laws of the AU is concerning. This means that the latter part

⁸⁰⁶ Caiola, Antonio. "The European Parliament and the Directive on Combating Terrorism." *Academy of European Law*. 21 Sep. 2017. pp. 409-424.

⁸⁰⁷ African Union, *Protocol Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, 27 June 2014. Art. 28 G.

of the clause has the potential to violate the principle of *nullum crimen sine lege* by extending the scope of the provision to violations of general regional and international law. As little has been done in terms of referencing this provision since the drafting of the protocol, it is uncertain if this was intentional or an oversight. However, the textual fault in the provision can be seen as somewhat mitigated by the second element, which provides further clarification in that the act must also endanger life, physical integrity or cause serious injury or death to any person or group, or substantial damage to public property or natural resources.⁸⁰⁸ This second element serves as a safeguard, raising the gravity requirement to only the most egregious acts against an individual or group. As Ben Saul has observed, it narrows the scope of the provision to better adhere to the essence of terrorist acts.⁸⁰⁹ It can be perceived as adhering to the core elements of the crime, similar to what was observed in domestic laws, the Financing Terrorism Convention and the EU directive. The first two elements can, thus, be seen as an example when the *actus reus* of the crime has been construed through a general act, and not a list of specific crimes. However, it is still specific enough to cover only the most egregious crimes of concern to the international community.

The third element is the *mens rea* of the crime. Under the Malabo Protocol it is broken into three separate parts, the intent to; 1) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act; 2) disrupt any public service; or 3) create a general insurrection in a State. The first part finds itself largely in accordance with what has been observed within other international treaties and domestic laws.⁸¹⁰ It provides protection to governments and other forms of authority from acts of coercion and prohibits the intent to instill fear within a civilian population. However, and once again, the text of the clause is vaguely organized, which leaves it open to interpretation. For example, the object of fear could be considered as not limited to a civilian population, but also may extend to governments or other authorities. The same follows for the intent to coerce, as it may apply to the population instead of a government or authority. Once again, it is dubious as to whether or not this was a textual oversight or a cognizant inclusion within the provision. Either way, the mental element largely overlaps with what has been observed in other international conventions and in

⁸⁰⁸ African Union, *Protocol Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, 27 June 2014. Art. 28 G.

⁸⁰⁹ Jalloh, Charles C. *et al. The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges*. Cambridge: CUP, 2019. pp. 425-426.

⁸¹⁰ *Ibid.* pp. 430-431

domestic laws. While it may cover a greater degree of potential *mens rea* through its textual construction, it does not contravene the core aspects of what has been observed in other international treaties by adequately covering the intent to instill fear within a civilian population or coerce a government or authority.

Aside from the first element it would be prudent to address the latter two parts of the mental element of the crime. The second part find itself as vaguely similar to the third mental intent included within the EU directive of 2017. However, it diverges in that it significantly lowers the gravity threshold by omitting qualifiers, for example like the term ‘severe’ used in the EU directive. The gravity requirement set forth in the second element of the *actus reus* of the crime may serve to alleviate this issue, but there are authors who believe that this unduly lowers the threshold to the point where lesser acts such as vandalism could be included under the scope of terrorist acts.⁸¹¹ The third part endures similar issues. It unduly conflates terrorist acts with other forms of political violence. Insurrections do not always utilize terrorist means of violence and can often be conducted in a way which only targets certain aspects of a government while protecting or avoiding civilian casualties. The inclusion of this mental element, therefore, “conflates the question of the legitimacy of resort to violence with the legitimacy of the means and methods used.”⁸¹² In any sense, this element is not widely present in either domestic or international conventions regarding terrorism and thus its inclusion does little in clarifying the content of a customary definition.

Overall, while the Malabo Protocol differs textually from other international conventions and domestic laws it still reflects all of the essential elements of terrorist acts within it. It provides within its definition a prohibition of any acts which could endanger the life or bodily integrity of an individual. Moreover, while the mental element included within it is awkwardly construed, it still reflects the same core elements of instilling fear within a population or coercing a government or authority. As such, while there may be additional elements included within the definition of terrorism under the Malabo Protocol, it can also be utilized to aid in asserting the customary definition under international law.

⁸¹¹ Jalloh, Charles C. *et al. The African Court of Justice and Human and Peoples’ Rights in Context: Development and Challenges*. Cambridge: CUP, 2019. pp.433-434.

⁸¹² *Ibid.* pp.435.

The above shows that the definitions provided within the most recent and widely ratified international conventions enjoy significant overlap with each other. They all formally recognize the act as an international crime, one which entails individual criminal responsibility. Moreover, they draw significant overlaps in their understanding of the *mens rea* and *actus reus* of the act. The EU directive and the Malabo Protocol, however, cannot be used alone to identify the content of an international norm prohibiting terrorist acts. Instead, they reflect a more recent trend in defining the act and can be used to represent the opinion of member States in those respective regions. Overall, it is the recent trend of defining terrorism in line with the definition provided within the Financing Terrorism Convention which is most impactful. The Financing Terrorism Convention enjoys a unique status as a treaty with near universal acceptance. As such, even though some regional treaties have diverged from it in the past, recent trends in defining terrorist acts coupled with the near universal acceptance of the Financing Terrorism Convention show that there is indeed a consensus over the prohibition of terrorist acts.

5.3.3. *Customary definition*

When addressing the potential emergence of a customary norm on terrorism one of the most common arguments against its development deals with the lack of the adoption of the comprehensive convention on terrorism. While it is undeniable that the comprehensive treaty on terrorism has been and is still under negotiations, the hesitance towards adopting a comprehensive definition lay not in the core aspects of the definition itself, rather in the potential for abuse by State actors, in utilizing it to target liberation movements. Many have been unable to cope with this issue, asserting that if this element was the reason for not adopting a comprehensive definition on terrorism, then no customary definition could have formed. However, while this element is still of concern to States, it does not preclude the development of a general customary definition in and of itself. One should recall that there are a number of concepts within international law that have not had a definition formally agreed upon nor codified within treaty law, such as the notion of

culture,⁸¹³ environment⁸¹⁴ and investment.⁸¹⁵ Despite this, international law has successfully developed entire legal regimes around these concepts, some of which have developed into custom.⁸¹⁶ As a result, the argument that, due to disagreement over which actors may commit acts that may be deemed as a terrorist act does not prevent the development of a definition of the act. In other words, international law is not concerned with who committed the act in question, as it does not have an impact on the core aspects of the crime itself, the *actus reus* or *mens rea*. One would best take from the position of the International Commission of Jurists in this regard which stated that there is a "...wide agreement internationally that the core elements of terrorism consist of criminal acts committed with the intent to cause death or serious bodily injury with the purpose of provoking terror in order to compel governments or international organizations to do or abstain from doing any act. The Panel takes the view that in principle anyone can commit terrorist acts: it is important, therefore, to focus on the act itself and not the actor."⁸¹⁷ Bearing this in mind, one can move away from arguments concerning the lack of a convention geared towards providing a comprehensive definition on terrorism and move forward to identifying the key aspects of the crime which have developed into customary international law.

With the above in mind, one can move into identifying the customary status of the crime and its applicability within international criminal law. To begin, it would be beneficial to recap the prior sections on identifying *opinio juris*. In the above sections *opinio juris* was identified based on representation on two distinct levels, the domestic and international. It was shown, at the domestic level, there was the feeling that terrorist acts entailed individual criminal responsibility at the international level and that such a prohibition had entered into international custom. A

⁸¹³ The closest identifiable definition of culture could be drawn from the *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* definition on 'cultural property; see: United Nations, *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*. 14 Nov. 1970. Art. 1.

⁸¹⁴ The closest identifiable definition of culture could be drawn from the United Nations Convention on Biological Diversity definition on 'ecosystem' See: United Nations. *United Nations Convention on Biological Diversity*. 5 June 1992. Art. 2.

⁸¹⁵ Mortenson, J.D. "The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law." *Harvard International Journal of Law* Vol. 51-1. 2010. pp. 257-318.

⁸¹⁶ e.g. for customary international law developments on the protection of cultural property see: Zhang, Yue. "Customary International Law and the Rule Against Taking Cultural Property as Spoils of War." *Chinese Journal of International Law*. 2018.

⁸¹⁷ International Commission of Jurists. *Assessing Damage, Urging Action An initiative of the International Commission of Jurists Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*. International Commission of Jurists: Switzerland. 2009. pp. 3.

number of different domestic judicial decisions, most notably in *Almog v Arab Bank* and *Suresh v Canada*, among others, served to show this. While different opinions existed over what the content of the customary definition was, overall, there seemed to be a consensus that such a customary norm had developed. At the international level, it was found that, due to obligations stemming from SC resolutions to ratify international treaties on terrorism, the existence of *opinio juris* had become much more difficult to ascertain, especially in relation to the Financing Terrorism Convention. The stark increase in signatories to the Financing Terrorism Convention shortly after the SC resolution may have been seen as a legal obligation, however, those who chose not to ratify the conventions could also be viewed as persistent objectors in the sense that they did not fulfil their obligations due to the belief that they did not consider terrorism as defined in the convention an international crime, or they were opposed to its development into a customary norm. However, this has not been the case and since the initial influx in signatories, an additional 79 States have become party to the treaty itself. In this sense, it has become more difficult to assert that *opinio juris* for the customary prohibition of terrorist acts has not emerged as only four of the 193 States member to the United Nations have become party to the treaty.⁸¹⁸ In all, recent developments, especially in regard to the number of States party to the Financing Terrorism Convention, have quelled arguments over the development of *opinio juris*. This, coupled with national decisions and the criminalization of the act at the domestic level, provides evidence that *opinio juris* over the customary status of terrorist acts has indeed developed.

With *opinio juris* for the customary law status of the prohibition on terrorist acts clearly established, it is then important to move on to the secondary element, State practice. This has been viewed through two different areas, domestic law and international conventions. Regarding domestic law, it was shown that there was significant overlap in the understanding of the crime. The *mens rea* of the act enjoyed near universal acceptance, with minimal deviation. Additionally, the *actus reus* of the crime also showed significant overlap, in that it contained the gravest acts, such as murder, serious injury, kidnapping and hijacking within their definitions. These convergences were also observed at the international level. Sectoral treaties supported the criminalization of some of the gravest acts, such as kidnapping and hijacking, while more recent and the most widely adopted regional and universal treaties provided for the same acts as well as

⁸¹⁸ Note: signatories can be located at:
https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-11&chapter=18&clang=_en.

other grave acts against life and physical integrity of an individual. Moreover, there was near universal understanding of the *mens rea* in this regard; it included the intent to instill fear within a civilian population or coerce a government or authority. Deviations presented within these treaties were framed in a way which did not exclude them from contributing to the formation of a customary definition. As such, there exists, at present, sufficient convergence in State practice and *opinio juris* to assert that a customary international norm prohibiting terrorist acts has formed.

As was brought to light in the beginning of the chapter, the formation of a customary norm in and of itself does not entail individual criminal responsibility at the international level. Instead, to identify if individual criminal responsibility could entail from a customary norm, three additional elements must be identified. The first is that the act is prohibited at the international level and there is a clear, unambiguous definition of the act. The prohibition of the act at the international level has been clear and consistently upheld through SC and GA resolutions. Moreover, the plethora of both regional and universal treaties clearly provide that the act does in fact entail individual criminal responsibility at the international level. Additionally, while there have been differences on how the crime has been defined within these treaties, the most widely accepted treaty, the Financing Terrorism Convention, provided a clear and unambiguous definition of terrorist acts as a criminal offence. This is the same definition which was clearly prohibited by the SC in resolution 1566. As such, while there are some differences in how the act has been defined through treaty law, there still exists a clear general definition of the act at the international level. This entails that the requirement that the crime be clearly defined and entail individual criminal responsibility at the international level is considered as fulfilled.

The second element which needs to be fulfilled is that the act is a serious breach of fundamental rights and values which have been internationally recognized. The core elements stipulated in the understanding of terrorist act is that it violates the right to life, security and physical integrity. As was stated above, crimes against humanity was created and elevated to the status of a core crime because it places a primacy on protecting these rights. Moreover, commission of acts such as murder, threat or commission of bodily harm are all considered as violations of the above fundamental rights. Aside from the *actus reus*, the key aspects of the *mens rea* are also considered as a violation of fundamental human rights. The intent to instill fear within a civilian population has been prohibited in international humanitarian law because it obstructs the right to

liberty and security. As such, elements within both the *actus reus* and *mens rea* are considered as a violation of fundamental rights. Therefore, this element can be considered as fulfilled and an indication that commission of terrorist acts can entail individual criminal responsibility at the international level.

The third and final element which needs to be fulfilled is that the act must entail individual criminal responsibility regardless of domestic laws. It was observed above that the act has clearly been represented and criminalized at the domestic level. However, the increase in criminalization was not a natural occurrence, it was the product of namely, international treaty obligations and SC resolutions. The SC and GA have made it clear that terrorist acts are not only to be considered as abhorrent acts which are of the gravest concern to the international community but also as criminal in nature. O'Donnell has commented that this was an attempt to create a legal regime surrounding terrorism.⁸¹⁹ The SC, by not only recognizing the criminal nature of the crime, but also by calling upon all States to become party to international conventions on terrorism showed their intent to foster the development of a customary international norm by creating universal jurisdiction. Universal jurisdiction, in this sense would not be the result of the SC resolutions, but rather the product of widespread ratification of universal treaties which address the act. In the case of terrorist acts, seven universal treaties were examined have more than 150 States party to them. While many of them are sectoral in nature, the most widely accepted convention is the Financing Terrorism Convention with 189 States party. As the convention details a generic definition of terrorism and clearly identifies the act as entailing individual criminal responsibility, there is no doubt that that the third element for international criminalization of terrorist acts can be considered as fulfilled.

From the above it has become apparent that a customary international norm prohibiting terrorist acts has developed and it does, in fact, entail individual criminal responsibility at the international level. Overall, the definition of the prohibition can be considered as including all of the same elements which were included within the STL's definition. However, in order to provide further clarification on its contents and for ease of assessing its application under Art. 7(1)(k) of the Rome Statute, the definition here has been separated into two distinct parts, similar to the

⁸¹⁹ O'Donnell, Daniel. "International Treaties against Terrorism and the use of Terrorism During Armed Conflict and by Armed Forces." *International Review for the Red Cross*. Vol. 8 No. 864, 2006.

Counter Terrorism Committee's observed model terrorism definition at the domestic level.⁸²⁰ The customary definition for application within international criminal law would then follow as:

- a) The conduct was committed as a part of a widespread or systematic attack directed against a civilian population.
- b) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.⁸²¹
- c) The perpetrator caused or threatened the death of one or more persons, serious bodily or mental harm, or any other prohibited act under Art. 7 or the Statute.
- d) The perpetrator acted with the intent to instill fear within a civilian population.

Or

- a) The conduct was committed as a part of a widespread or systematic attack directed against a civilian population.
- b) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.⁸²²
- c) The perpetrator caused or threatened the death of one or more persons, serious bodily or mental harm, or any other prohibited act under Art. 7 or the Statute.
- d) The perpetrator acted with the intent to coerce a government or authority.

There may be additional arguments that a third definition of terrorist acts has begun to emerge as well. We have seen that within domestic laws there has been an increase in a third *mens rea*; that is the intent to seriously destabilize a fundamental social or economic institution. While arguments for its inclusion could be made, overall, there is insufficient international backing to support that this definition has crystalized into customary international law. Moreover, its representation at the domestic level has been secluded to specific regions, mainly within Europe and other western States. This is most likely due to EU directive of 2017. However, this seems to

⁸²⁰ United Nations Human Rights Council. *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin*. A/HRC/10/3, 4 Feb. 2009. pp. 13-15.

⁸²¹ The first two parts of this definition are taken from the *Elements of Crimes*. Art. 7(1)(k).

⁸²² The first two parts of this definition are taken from the *Elements of Crimes*. Art. 7(1)(k).

be more akin to the status of custom as the STL had perceived in the past, and therefore should not be considered as having developed into international custom at this time. Only with further acceptance in both international and domestic law in the future could it be considered as an additional, separate definition of terrorist acts.

5.4. Inclusion within ‘other inhumane acts’ and *nullum crimen sine lege*

The above has shown that the customary definition of terrorist acts could be broken down into two separate parts due to its unique *mens rea*. The first would address the intent to instill fear within a civilian population while the second would represent the intent to coerce a government or authority. While this is essentially the same as the definition provided by the STL the definition has been broken into two parts to aid in analysis. Therefore, this section will examine both parts separately to identify which can be included within Art. 7(1)(k) and their adherence, or lack thereof, to the principle of *nullum crimen sine lege*.

To begin it is essential to establish that the crime can be included under Art. 7(1)(k) of the Statute. The Elements of Crimes provides: “1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act. 2. Such act was of a character similar to any other act referred to in article 7, paragraph 1.”⁸²³ As the key elements to terrorist acts revolve around the violation of the right to life and bodily harm, it has a strong overlap with other crimes included within Art. 7 such as murder, extermination and torture. In addition, other elements, such as the right to security and liberty, are enshrined within The UDHR under Art. 3 which provides, “Everyone has the right to life, liberty and security of person.”⁸²⁴ Moreover the right is also enshrined within the ICCPR under Art. 9 and Art. 5 of the ECHR. While the UDHR is not a binding treaty in and of itself it does serve to indicate the importance the international community has placed on such a right.

The second and most important aspect to address for the sake of this analysis is the adherence of this crime to the principle of *nullum crimen sine lege*. As was clarified in the previous chapters in order to show adherence to this principle the crime must meet the four tenets described in the *Lubanga* decision, *lex scripta, lex praevia, lex certa and lex stricta*. The first tenet, *lex scripta* ensures that the crime in question is derived from a pre-existing criminal norm. This does not need

⁸²³ *Elements of Crimes* Art. 7(1)(k).

⁸²⁴ *Universal Declaration of Human Rights* Art. 3.

to be explicitly written in treaty law, as thus, as discussed above, the utilization of custom is permissible. In the case of terrorist acts, the crime is sufficiently represented in treaties and other internationally binding documents such as SC resolution 1566, the Financing Terrorism Convention and the EU directive of 15 March 2017. As such, even though it is of a customary nature, both crimes, that which includes the intent to instill fear within a civilian population and that which includes the intent to coerce a government or authority, can be considered as adhering to this tenet. The same follows with *lex praevia* and *lex certa* as both acts are sufficiently established in treaty law and customary international law and would be included within the Statute under the label of an agreed upon prohibited conduct of ‘other inhumane acts.’ However, the last tenet paints the two crimes in a different light. Regarding the intent to instill fear in a civilian population, one can perceive the *lex stricta* elements as being fulfilled. In all cases the crime correlates with not only a prohibited conduct, but also it serves to uphold the core fundamental values instilled within crimes against humanity. The intent to coerce a government or authority fails to meet this requirement, however. Its inclusion unduly analogies the crimes listed under Art. 7, such as murder, rape, torture, etc. and the negative impact they have on the individual with a government or organizational authority. Simply stated, the inclusion of this additional element would extend the definition beyond the bounds of crimes against humanity by seeking to protect the State or organizations, which cannot be considered as enjoying the same fundamental human rights as individuals. As such, what we find is that only the aspect of including intent to instill fear within a civilian population adheres to the principle of *nullum crimen sine lege* and permits for inclusion of terrorist acts under Art. 7(1)(k).

Conclusions

This chapter has shown the difficulties in identifying and including acts under Art. 7(1)(k) through customary international law. One must first take care of the material which is being examined. It is insufficient to merely look at the inclusion of the act being considered. It must also include a number of other elements which indicate that the act not only is prohibited but entails individual criminal responsibility at the international level. With the STL this method was not taken into consideration and, in its attempt to progressively develop the law, it ran into a number of logical fallacies. This was done primarily by selecting certain domestic laws, decisions and international conventions and then ‘cherry picking’ the most attractive elements of those sources to formulate its argument. What resulted was a definition which not only contravened the general

consensus under domestic and international law but also violated the principle of *nullum crimen sine lege* itself. It retroactively identified an emerging norm and mistakenly asserted that it had already been in place for half a decade. Even now, and through implementing proper methodological standards to identifying such a norm it was found that it cannot be recognized in its entirety. However, the unique aspects of the crime and how it has been identified at the international and national level showed that two separate definitions have been developing simultaneously. Both definitions were found to be near universally accepted and meet all the formal requirements to be considered as fitting within customary international law. Even so, when examining the two definitions in light of the principle of *nullum crimen sine lege* there is a clear distinction that is found between them. The former intent to instill fear within a civilian population, runs sufficient overlap with the traditional *mens rea* included under crimes against humanity. It fully adheres to all of the tenets included within the principle. The second intent, to coerce a government or authority, finds itself meeting most requirements including *lex scripta*, *lex praevia* and *lex certa*. However, the same intent distances itself from other crimes against humanity by violating the *lex stricta* element; it analogizes the harm done to a civilian population with that of a government or authority. As such, the findings show that while the customary international definition of terrorist acts can be included under Art. 7(1)(k), it can only represent a portion of the customary definition. Such an inclusion should only be done on a temporary basis. An amendment to the Statute creating a distinct offence of terrorism would provide for more complete coverage of the act.

Chapter 6: Conclusions

The key goal in the above chapters was to provide an answer to the question ‘How does the principle of *nullum crimen sine lege* impact the International Criminal Court’s ability to include acts which have yet to be explicitly included within the Rome Statute under Art. 7(1)(k)?’ This was particularly important due to the systemic differences observed between the ICC and the prior *ad hoc* tribunals, most notably the ICTY, ICTR and SCSL. Whereas the ICTY and ICTR have shown themselves to rely more on methods usually found in common law legal systems and had a greater degree of freedom when expansively interpreting their statutes, the Rome Statute was crafted in a way which curtailed the freedom of judges in the decision making process. This was done primarily through the inclusion of extensive definitions in the Elements of Crimes, a structured and specific hierarchy of sources under Art. 21 and the addition of the principle of *nullum crimen sine lege* under Art. 22 of the Rome Statute; all of which served to push the Court further away from common law practices and edge it closer to what might be observed in civil law systems. The mere existence of these qualities led to a dissensus within the scholarly community over the extent to which the Court could creatively interpret the Rome Statute to permit for the inclusion of contemporary acts which have not been formally criminalized at the international level.

It may be asked if the inclusion of a residual clause under Art. 7(1)(k) further complicated this issue, by indicating that the ICC was indeed intended to be able to actively adapt to current situations by including novel acts within the scope of the provision. What could be included under the scope of ‘other inhumane acts’ while strictly adhering to the principle of *nullum crimen sine lege* is an issue which the Court has yet to thoroughly explore. This thesis has set out to find an answer to this question by establishing a methodological framework for judicial creativity which could be utilized by the Court and applying it to three potential crimes which it could or is currently addressing, namely: forced marriage, ‘ethnic cleansings’ and terrorist acts.

In this context, it is of special importance to bear in mind that the ‘residual offence’ under the jurisdictional scope of crimes against humanity has a long pedigree in precedence. It is originally derived from the statute of the IMT attached to the 1945 London Agreement. Art. 6(c) of the IMT Statute provided that the IMT was entrusted with the jurisdiction, among others, over “[c]rimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions

on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”⁸²⁵ Such an approach of the drafters leaving judicial leeway deliberately open is replicated in the statutes of the three UN *ad hoc* Tribunals: Art. 5 of the Statute of the ICTY,⁸²⁶ Art. 3 of the statute of the ICTR,⁸²⁷ and Art. 2 of the statute of the SCSL. All these include, among nine underlying offences of the crimes against humanity, reference to ‘other inhuman acts.’ Still, as explained at length at the preceding chapters, the crafting of those statutes owe much to the influence of common law countries (notably, the United States), and this explains an amplitude of ‘judicial experimentation’ in ‘discovering’ and elaborating upon specific international crimes especially by invoking customary law. By comparison, by the time of the Rome Conference in July of 1998 that led to the adoption of the ICC Statute, the hesitancy by many civil law countries over such ‘judicial adventure’ in view of their rigorous understanding of the *nullum crimen sine lege* principle resulted in the detailed codification of the then 50 underlying offences that constitute the war crimes under Art. 8 of the Rome Statute.⁸²⁸

In order for the Court to function as intended it needs to show adherence to the principle of *nullum crimen sine lege* and still be able to include novel inhumane acts under Art. 7(1)(k) of the Statute. While this was also done within the prior *ad hoc* tribunals, the emphasis placed on this legal principle was observed to be mixed. On occasions it engaged in rigorous discussion and placed a high emphasis on it, while at other times it glossed over or even omitted any reference to the principle. One could assert that this was done primarily to help further legitimize their decisions, and at times when this was felt to be unnecessary the courts were free to forgo such discussions as they were not formally obligated to uphold the principle itself. What this means for the ICC is that the standards which were implemented at the ICTY, the ICTR and the SCSL will not always overlap with the more strenuous standards required through the Rome Statute. Chapter 2 served to

⁸²⁵ United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement")*, 8 August 1945. Art. 6.

⁸²⁶ United Nations Security Council. *Statute of the International Criminal Tribunal for the Former Yugoslavia*, 25 May 1993.

⁸²⁷ United Nations Security Council. *Statute of the International Criminal Tribunal for Rwanda* (as last amended on 13 October 2006), 8 November 1994.

⁸²⁸ *Rome Statute* Art. 8 (Eight offences under the grave breaches of the Geneva Conventions of 1949; 26 offences under the category of serious violations of laws and customs of war applicable to IAC; four offences under serious violations of common Art. 3 of the Geneva Conventions; and 12 offences under the category of serious violations of laws and customs of war applicable to NIAC). Since the Kampala Review Conference, the last (fourth) category includes offense relating to means and methods of war in NIAC, so that the list is expanded to 16 offences.

highlight this dichotomy and how judicial creativity must be handled within the ICC. This was done by first identifying the restrictions placed on its judges to judicially interpret its provisions. By clearly establishing a hierarchical structure under which it must formulate its decisions and the inclusion of the principle of *nullum crimen sine lege*, judges have much less discretion than those at the prior *ad hoc* tribunals. This, however, does not entail that the system does not provide for adapting its own laws for the insertion of ‘other inhumane acts’ within crimes against humanity. The Court does have the capacity to do so and Art. 7(1)(k) is far from an inoperable clause as some would claim it to be. In reality, the insurgence of recent claims for inclusion of acts under Art. 7(1)(k) has provided the impetus for such an examination.

Chapter two served as a methodological framework for interpretation at the court, clarifying the standards set forth by the Rome Statute, and how they differed from those at other international tribunals. It showed that the Court is indeed much more regulated in how it can expansively interpret its Statute, however it still retained the ability to utilize all traditional international legal sources when doing so. The Statute must be viewed as paramount, and despite vagueness within Art. 21 over the relationship between the Statute and Elements of Crimes, the Statute itself should always be considered as sitting atop the hierarchical pyramid for interpretation. While the Elements of Crimes is considered as the second most authoritative means for interpretation, it must always be examined simultaneously with the Statute itself. Only in cases of ambiguity or conflict can one begin to examine secondary and tertiary sources. In doing so, it must first examine applicable treaties and principles and rules of international law. This means that in terms of treaty law it can make reference to, the Court is much more limited than the *ad hoc* tribunals. It can only directly examine the treaties under which it is bound and universally accepted human rights conventions, such as the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Genocide Convention. This does not mean that no other treaties can be utilized by the ICC when interpreting its provisions, however. As the term principles and rules of international law refers to general principles of international law and customary international law, the Court may utilize other international conventions to show the existence of such a principle or norm. In doing so, it not only ensures that the Court is applying law which is universal in nature, but also reaffirms some of the key tenets of the principle of *nullum crimen sine lege*, particularly the *lex scripta* and *lex praevia* requirements.

Regarding the use of other sources, such as general principles of international law and customary international law, one must take care to ensure that each one is properly assessed prior to application. General principles of international law must be identified through the existence of *opinio juris* as well as being expressed throughout treaty law. Customary international law, on the other hand, must show itself to include *opinio juris* and State practice as evidence through both treaty law and domestic law. However, the principle of *nullum crimen sine lege* and the extensive codification of rules and definitions within the Rome Statute dictates that even if such norms are identified they must first be properly analyzed with the principle and compared to the Statute and Elements of Crimes before being applied.

The third source of law under Art. 21 endures similar requirements and restrictions. This is primarily due to the inconsistent assessment of general principles by the *ad hoc* tribunals, such as was seen in the *Akayesu* decision at the ICTR. As such, in order to adhere to the principle of *nullum crimen sine lege* while permitting the ICC to creatively interpret its provisions it is expected that a general principle meet a set of criteria. This was labeled as the vertical and horizontal move. In addition to this prior to application the Court must also show that; all other avenues within international law were explored prior to resorting to national laws, the principle aligns itself with the object and purpose of the Rome Statute, it is compatible for application within the at the international level, and will not negatively impact the development of substantive or procedural law.

The above served to indicate that while the ICC is much more restricted in its ability to creatively interpret its Statute, it is by no means prohibited from doing so. In actuality, more contentious means of interpretation, as was seen in the application of general principles of law and customary international law by the *ad hoc* tribunals, are still permissible. However, when utilizing these sources, the Court must take extra precautions. Doing so ensures that it will be able to creatively interpret certain provisions, such as Art. 7(1)(k) of the Rome Statute, while simultaneously and rigidly upholding the hierarchy within the Rome Statute as well as adhering to the principle of *nullum crimen sine lege*. This methodological approach was then subsequently applied to three different acts; forced marriage, ‘ethnic cleansing’ and terrorist acts to see how the principle of *nullum crimen sine lege* impacted the courts ability to include such acts under Art. 7(1)(k).

The example of forced marriage, as developed by the SCSL,⁸²⁹ served as a clear and concrete example of when and how the Court can include an act which has not been formally criminalized under international law under Art. 7(1)(k) without violating the principle of *nullum crimen sine lege*. The crime itself showed a number of clear similarities with other crimes included under Art. 7, such as sexual slavery and forced pregnancy. However, while it showed a degree of overlap with these crimes it also showed itself to be very different. This difference lied in the overall commission of the act and the harm placed upon its victims through the imposition of a spousal title and the conjugal duties which accompanied it. It distinguished itself in that many of the overlaps it enjoyed with other crimes under Art. 7 were not a requirement of the crime itself. The commission of the act denied victims the right to marriage and the conjugal duties which accompanied it were found to differ from what was traditionally observed through sexual slavery. In many cases, rape or other gender-based crimes did not necessarily accompany the act itself and other psychological elements were present. Resultantly, it became clear that the crime was distinct from all others, it was not a gender crime, nor did it fit adequately within the scope of other acts included under Art. 7 of the Statute. The principle of *nullum crimen sine lege* served to highlight these differences in that to meet the requirement of *lex certa* and *lex praevia* the two distinct elements, violation of the fundamental right to marriage and imposition of conjugal duties were sufficiently represented in domestic criminal law and prohibited through universally accepted human rights conventions. The result of such an examination thus showed that the principle itself reinforced the differences observed and their criminal nature by requiring them to be written, clearly criminalized at the international level, foreseeable, and not extended by analogy. As such, the act could be considered as a key example when the principle of legality both enabled inclusion under Art. 7(1)(k) and aided in a more complete understanding of the act.

The fourth chapter on the act of ‘ethnic cleansing’ made it even clearer as to the role *nullum crimen sine lege* plays in including an act under Art. 7(1)(k). The controversies surrounding ‘ethnic cleansing’ between the political and legal level serve to support this. At the political level it has been claimed to be a distinct crime, while at the legal level it has often been equated with forced displacement. In regard to its understanding at the *ad hoc* tribunals, the similarities in its *actus reus* cannot be overlooked. In fact, the *actus reus* between the two are so similar that it is easy to see

⁸²⁹ *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu*. (Appeals Judgment), Special Court for Sierra Leone (SCSL), SCSL-2004-16-A, 22 February 2008.

why the two crimes were often conflated with one another. However, one must look beyond the simple surface level similarities and inclusion of the core *actus reus* of the crime through *lex scripta*. Instead, the principle requires that all elements be significantly established at the international level. In the above case there is no doubt that the core elements of ‘ethnic cleansing’ are foreseeable as a crime under international law and that they can be addressed through other crimes under Art. 7, for example forced displacement or persecution. However, it is the *mens rea* of the crime that sets it apart from other acts. The nuanced difference between targeting a protected group and targeting individuals based on their lack of inclusion within a group makes it distinct from other crimes such as persecution. While this element may aid in distinguishing it from other acts, it is the lack of specificity which draws into question the acts adherence to the principle of *nullum crimen sine lege*. The label imposed upon the act sufficiently limits its applicability to only acts which aim at creating an ethnically homogeneous territory. In practical use however, the term is often used in a much broader sense, to refer to acts which attempt to create an area which is homogeneous in terms of religion, race, gender and even class. Thus, the principle itself aided in identifying a core issue with the inclusion of the crime under Art. 7(1)(k). While its inclusion is not prohibited, it aided in highlighting how it would limit the scope of the crime. Its inclusion would unnecessarily limit the scope of the act and thus it would be preferable to reconceptualize the crime and its label before application to provide for fuller coverage.

Finally, chapter five dealt with the complex issue of terrorist acts and showed that there are a plethora of issues which can emerge when attempting to utilize customary international law for the inclusion of an act under Art. 7(1)(k). Prior attempts to define the crime under customary international criminal law have faulted in that they undermined the existence of State practice. The STL’s *Interlocutory Decision on the Applicable Law* reflected this. In it the STL selectively chose aspects of the definition of terrorism in international and national laws to formulate a definition which did not reflect widespread State practice at the time of its commission. Despite this it was found that as of current, there is a customary international norm which entails individual criminal responsibility for terrorist acts. However, even with the existence of a customary international norm which entails individual criminal responsibility, one sees that what could be considered as custom may not always fall in alignment with the principle of *nullum crimen sine lege* for the sake of inclusion under Art. 7(1)(k). The principle itself forces one to critically engage with the customary definition as a whole and in doing so brings to light the faults within it. The unique

aspects of the customary definition of terrorist acts has developed to include two separate crimes, one with the intent to instill fear within a civilian population and the other to coerce a government or authority. The first draws a number of parallels with traditional *mens rea* under crimes against humanity. It places a focus on the individual, and serves to protect the fundamental right to life, security and liberty. However, the second intent to coerce a government or authority cannot be included, despite near universal recognition of its criminal nature. While it meets the majority of tenets to be considered as falling in line with *nullum crimen sine lege*, it does not meet the requirement of *lex stricta*. Its inclusion would unduly expand the notion of crimes against humanity to focus on the effects an act has on a government or authority. This does not entail that it is not a crime. It only shows that the principle brought to light its key differences through the *lex stricta* requirement, and its need for inclusion outside of crimes against humanity as a distinct crime in and of itself.

When reflecting on the main research question, the chapters served to provide an answer to how the principle of *nullum crimen sine lege* impacts the ICC's ability to include acts under Art. 7(1)(k). The principle has shown itself to be more rigid than what was experienced at the *ad hoc* tribunals, requiring strict adherence to the tenets of *lex scripta*, *lex certa*, *lex praevia* and *lex stricta*. These tenets mostly reflect their counterparts within civil law, but have some notable differences. *Lex scripta*, for example, does not require formal written codification of a prohibited act for adjudication at the international level, but instead must derive itself from a written law. This entails that sources such as customary international law are permissible sources. *Lex certa* requires that an act be criminalized, however, explicit international criminalization through treaty law, while preferable, is not required. Instead, through the commission of grave violations of fundamental human rights and overlaps with other formally criminalized acts under Art. 7 of the Rome Statute one can assert it was foreseeable that the act would entail individual criminal responsibility at the international level. In this sense, while the principle is still much more rigid than what was observed at the *ad hoc* tribunals, it still enjoys a degree of flexibility to it.

Aside from the differences observed, how the principle acts when including acts under Art. 7(1)(k) of the Rome Statute is also notable. Similar to its domestic counterpart, it serves to protect the accused and to prevent arbitrary application of the law. Just as important, when rigidly upheld it serves as a sifting agent. When assessing if an act meets the required tenets it forces one to make

clear distinctions and draw similarities between what has already been criminalized and the act itself. Therefore, it brings to the forefront the unique aspects of the act being considered for inclusion under Art. 7(1)(k) as well as the unique violations which occur through its commission. As was the case with forced marriage and part of the definition on terrorism, the principle showed that the unique aspects of conjugal duties and instilling fear within a civilian population were significantly similar to permit inclusion under Art. 7(1)(k). ‘Ethnic cleansing’ showed itself similarly. However, examination through the principle and considering its contemporary use brought to light the problems with including it under Art. 7(1)(k) as it currently stands. The second definition of terrorism when viewed through *nullum crimen sine lege* showed that the unique aspects of the crimes diverged significantly from what was generally included under crimes against humanity. Its inclusion would serve to undermine the core tenets of crimes against humanity as a whole and, therefore, could not be included. As such, the principle served to uphold the rights of the accused, and represent the injustices done to victims by requiring a deeper understanding of the crimes at hand. This does not mean that the acts which could not be included should not be considered as criminal. To the contrary, because of their uniqueness the Assembly of States Party to the Rome Statute should endeavor to include these crimes within the Statute in a way which adequately protects the accused and represents the injustices which the victims endure, through amendment to the Statute.

In furtherance to the above, one should note that the findings have implications for practical applicability, both at the ICC and other international tribunals. There has been an observable increase in calls for the use of Art. 7(1)(k) of the Rome Statute at the ICC. The prosecution has on some occasions neglected to follow proper procedure in their applications and formation of argumentation. The reasons for why this is the case could be mere oversight, but more likely is the result of many practitioners at the Court being used to the practices at the *ad hoc* tribunals. By recognizing that the principle of *nullum crimen sine lege* is not only unique from its incarnation at the *ad hoc* tribunals but its application can aid in a better understanding of the act which is being analyzed, Art. 7(1)(k) can be utilized more successfully and frequently. The principle can then serve as a guideline to practitioners to ensure that fuller coverage can be provided in the future. It is imperative to ensure that the prosecution is doing all it can to properly classify and label its crimes, as well as tailor its arguments in a way which will not only adhere to the restrictions imposed on them by the Statute, but also highlight the unique aspects of the crime. Doing so

ensures that victims are better represented at the Court, while also ensuring that the rights of the accused are properly upheld. Each group deserves adequate protection and representation during proceedings and by adopting the above methods towards identifying and classifying crimes, it becomes easier to sift through political or social clout which may surround the issue being examined. It is of no doubt that these factors will always have some degree of impact on not only the ICC but on the decision making process in general, but reliance on the principle of *nullum crimen sine lege* ensures that those notions do not cloud the decision-making process and lead to inconsistent rulings. Overall, the principle does not simply restrict, but also provides an avenue for the expansion of crimes under which the court has jurisdiction. In furtherance to this, it becomes important to continue to strive to identify what other acts could and could not be included under Art. 7(1)(k). Such an endeavor would be beneficial not only to the Court and international criminal law in general, but also to our own understanding of the most abhorrent acts which have been committed in recent years. It remains to be seen how the ICC, in its still nascent jurisprudence, will develop its malleable scope of discretion under the ‘residual clause’ and what role it will assign to the case-law of the *ad hoc* criminal tribunals and to the customary law principles with a view to marshalling arguments in favour of its ‘judicial creativity.’

Bibliography

Scholarly Works

- Alamuddin, Amal *et al.* *The Special Tribunal for Lebanon: Law and Practice*. Oxford: Oxford UP. 2014.
- Ambos, Kai. "General Principles of Criminal Law in the Rome Statute," *Criminal Law Forum*. Vol. 10 (1999).
- Ambos, Kai. "Judicial Creativity at the Special Tribunal for Lebanon: Is there a Crime of Terrorism under International Law?" *Leiden Journal of International Law*. Vol. 24, (2011).
- Ambos, Kai. *Treatise on International Criminal Law*. Vol. I. Oxford: Oxford UP. 2013.
- Ambos, Kai "The first confirmation decision of the International Criminal Court: Prosecutor v. Thomas Lubanga Dyilo" *International Criminal Court: Legal Database Record*. 2010. Accessed at: <https://www.legal-tools.org/en/browse/record/012518/>.
- Arajärvi, Noora. *The Changing Nature of Customary International Law Methods of Interpreting the Concept of Custom in International Criminal Tribunals*. London: Routledge. 2014.
- Argibay, Carmen M. "Sexual Slavery and the Comfort Women of World War II." *Berkeley Journal of International Law*. Vol. 21 Iss. 2. (2003) pp. 388-389.
- Armstrong, David. *Routledge Handbook of International Law*. London: Routledge. 2011.
- Arnold, Roberta and Quenivet, Noelle. *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law*. Leiden: Martinus Nijhoff Publishers. 2008.
- Arnold, Roberta. "The Prosecution of Terrorism as a Crime Against Humanity." *Heidelberg Journal of International Law*. Vol. 64, (2004).
- Arnold, Roberta. *The ICC as a New Instrument for Repressing Terrorism*. New York: Transnational Publishers. 2004.
- Aust, Anthony. *Handbook of International Law*. 2nd Edition. Cambridge: Cambridge UP 2010.

- Bassiouni, Cherif M. *Crimes Against Humanity in International Criminal Law*. 2nd ed. Kluwer Law International; The Hague, 1999.
- Baxter, Richard., Meron, Theodor., et al. *Humanizing the Laws of War*. Oxford UP; Oxford. (2013).
- Begorre-Bret, Cyrille. "The Definition of Terrorism and the Challenge of Relativism." *Cardozo Law Review*. Vol. 27, No. 5 (2006).
- Belair, Karine. "Unearthing the Customary Law Foundations of "Forced Marriages" During Sierra Leone's Civil War: The Possible Impact of International Criminal Law on Customary Marriage and Women's Rights in Post-Conflict Sierra Leone." *Columbia Journal of International Law*. Vol. 15 No. 3 (2006).
- Bell-Fialkoff, Andrew. "A Brief History of Ethnic Cleansing." *Foreign Affairs* Vol. 72 No. 3 (Summer 1993).
- Bernhardt, Rudolf. *Encyclopaedia of Public International Law*. Vol. 2. Amsterdam: North-Holland Publishing Company. 1981.
- Bideke, M. 2002. "Gender Crimes in the International Criminal Court Statute." available at: <http://www.justint.org/Gender%20Crimes%20in%20the%20ICC%20Statute.html>.
- Boister, Neil. "'Transnational Criminal Law'?" *European Journal of International Law*. Vol. 14 No. 5 (2003).
- Boot, Machteld. *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*. Intersentia; New York 2002.
- Bunting, Annie. "'Forced Marriage' in Conflict Situations: Researching and Prosecuting Old Harms and New Crimes." *Canadian Journal of Human Rights*. 1:1 (2012).
- Caiola, Antonio. "The European Parliament and the Directive on Combating Terrorism." *Academy of European Law*. 21 Sep. 2017.
- Cassese, Antonio, et al. *Cassese's International Criminal Law*. 3rd ed. Oxford: Oxford UP, 2013.

- Cassese, Antonio., Acquaviva, Guido., et al. *International Criminal Law: Cases and Commentary*. Oxford: Oxford UP. 2011.
- Cassese, Antonio., Gaeta Paola., et al. *The Rome Statute of the International Criminal Court: A Commentary Vol. I*. Oxford: Oxford UP. 2002.
- Cassese, Antonio., Gaeta Paola., et al. *The Rome Statute of the International Criminal Court: A Commentary Vol. II*. Oxford: Oxford UP. 2002.
- Chantler K, Gangoli G and Hester M. “Forced marriage in the UK: Religious, cultural, economic or state violence?” *Critical Social Policy* Vol. 29 No. 4 (Nov. 2009).
- Chertoff, Emily. “Prosecuting Gender Based Persecution: the Islamic state and the ICC.” *Yale Law Journal* Vol. 126(1050) (2017).
- Cohen, Aviv. “Prosecuting Terrorists at the International Criminal Court: Reevaluating an Unused Legal Tool to Combat Terrorism.” *Michigan State International Law Review*. Vol. 20. Iss. 2. (2012).
- Crawford, James. *Brownlie’s Principles of Public International Law*. Eighth ed. Oxford: Oxford UP. 2012.
- Cryer, Robert. *An Introduction to International Criminal Law and Procedure*. 4th ed. Cambridge: CUP. 2019.
- Cryer, Robert. *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*. Cambridge UP; Cambridge, 2005.
- Cryer, Robert. “Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources.” *New Criminal Law Review*, Vol. 12 (2009).
- Cryer, Robert. “The Definitions of International Crimes in the Al Bashir Arrest Warrant Decision.” *Journal of International Criminal Justice*, Vol.7 (2009).
- Darcy, Shane, and Joseph Powderly. *Judicial Creativity at the International Criminal Tribunals*. Oxford: Oxford UP, 2010.
- Dauvergne, Cathrine and Millbank, Jenni. “Forced Marriage as a Harm in Domestic and International Law.” *The Modern Law Review*. Vol. 73 No.1 (2010)

- De Beco, Gauthier. "War Crimes in International Versus Non-International Armed Conflicts: 'New Wine in Old Wineskins'?" *International Criminal Law Review*, Vol. 8 Iss. 1 (2008).
- De Zayas, Alfred. "The Right to One's Homeland, Ethnic Cleansing, and the International Criminal Tribunal for the Former Yugoslavia." *Criminal Law Forum* Vol. 6 No. 9 (1995).
- Dickinson, Laura A. "The Promise of Hybrid Courts." *The American Journal of International Law*. Vol. 97, No.9 (April 2003).
- Dormann, Knut. *Elements of war crimes under the Rome statute of the International criminal court: sources and commentary*. Cambridge UP: Cambridge. 2003.
- Duffy, Helen. *The War on Terror and the Framework of International Law*. Cambridge: Cambridge UP. 2015.
- Elegab, Omer and Elagab Jeehaan. *International Law Documents Relating to Terrorism*. Third Edition. New York: Routledge-Cavendish. 2007.
- Elias, Olufemi., and Lim, Chin. "Identification of 'General Principles of Law', 'Soft' Law and the International Law." *Netherlands Yearbook of International Law*. Vol. 28 (December 1997).
- Fan, Mary. "Custom, General Principles and the Great Architect Cassese." *Journal of International Criminal Law*. Vol. 10, (2012).
- Feinberg, Myriam. "Terrorism Inside and Out: Legislating for Humanity to Combat Terrorism." *North Carolina Journal for International Law*. Vol. 42, (2017).
- Fillipo, Marcello Di. "Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes." *The European Journal of International Law*. Vol.9, No. 3., (2008).
- Finch, George. "The Nuremberg Trial and International Law." *American Journal of International Law*, 41(1). 1947.

- Fiorentini, Sara. *Terrorism and International Criminal Law*. The Hague: International Courts Association. 2013.
- Fleck, Dieter. *The Handbook of International Humanitarian Law*. Oxford UP; Oxford, 2008.
- Fletcher, George P. and Ohlin, Jens D. "Reclaiming Fundamental Principles of Criminal Law in the Darfur Case." *Journal of International Criminal Justice*. Vol. 3, (2005).
- Freeman, Marsha A., Rudolf, Beate, and Chinkin, C. M. *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary*. Oxford: Oxford UP, 2012.
- Frulli, Micaela. "Advancing International Criminal Law: The Special Court for Sierra Leone Recognizes Forced Marriage as a 'New' Crime against Humanity." *Journal of International Criminal Justice*. Vol. 6 (2008).
- Fry, James D. "Terrorism as a Crime Against Humanity and Genocide: The Backdoor to Universal Jurisdiction." *UCLA Journal of International Law and Foreign Affairs*. Vol. 7, (2002-2003).
- Gaeta, Paola. *The UN Genocide Convention: A Commentary*. Oxford UP; Oxford, 2009.
- Galicki, Zdzislaw. "International Law and Terrorism." *American Behavior Scientist*. Vol. 48, No. 6, (Feb. 2005).
- Galingging, Ridarson. "Prosecuting Acts of Terrorism as a Crimes Against Humanity under the ICC Treaty." *Jurnal Huklm Internasional*. Vol. 7, No. 4, (July 2010).
- Garner, Bryan A. *Black's Law Dictionary*. Eighth Ed. United States of America: Thompson West. 2004.
- Gillet, Matthew and Schuster, Matthias. "Fast Track Justice: The Special Tribunal for Lebanon Defines Terrorism." *Journal of International Criminal Justice*. Vol. 9, (2011).
- Goodfellow, Nicholas Azadi. "The Miscategorization of 'Forced Marriage' as a Crime against Humanity by the Special Court for Sierra Leone." *International Criminal Law Review*. Vol. 11 (2011)
- Green, James A. *The Persistent Objector Rule in International Law*. Oxford: OUP, 2016

- Grunfeld, Fred and Semulens, Alette. *International Crimes and Other Gross Human Rights Violations: A Multi- and Interdisciplinary Textbook*. Nijhoff: Leiden. 2011.
- Guillaume, Gilbert. "Terrorism and International Law." *International and Comparative Law Quarterly*. Vol. 53, No.3, (July 2004).
- Haenen, Iris. "Classifying Acts as Crimes Against Humanity in the Rome Statute of the International Criminal Court." *German Law Journal*. Vol. 14 No. 7 (2013)
- Henckaerts, Jean-Marie, Louise Doswald-Beck, and Carolin Alvermann. *Customary International Humanitarian Law: Volume 1, Rules*. Cambridge: Cambridge UP, 2005.
- Henckaerts, Jean-Marie. *Mass Expulsion in Modern International Law and Practice*. Martinus Nijhoff Publishers; The Hague. 1995.
- Higgins, Rosalyn and Flory, Maurice. *Terrorism and International Law*. Taylor and Francis Group; London. 1997.
- Hohmann, Hans. "The Nature of the Common Law and the Comparative Study of Legal Reasoning." *The American Journal of Comparative Law*. Vol. 38, No. 1. 1990.
- Human Rights Watch, *All You Can Do is Pray: Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State*. Human Rights Watch; New York, 2013.
- Human Rights Watch. "*As If They Fell from the Sky*" *Counterinsurgency, Rights Violations, and Rampant Impunity in Ingushetia*. (New York: Human Rights Watch, 2008).
- Human Rights Watch. "Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan." *Human Rights Watch* Vol. 16, No. 6(a). 7 May 2004.
- Human Rights Watch. '*We'll Kill You If You Cry*': *Sexual Violence in the Sierra Leone Conflict*. (New York: Human Rights Watch, 2003).
- Human Rights Watch. "Sri Lanka Draft Counter Terrorism Act of 2018: Human Rights Watch Submission to Parliament." Human Rights Watch. October 19, 2018.
- International Commission of Jurists. *Assessing Damage, Urging Action An initiative of the International Commission of Jurists Report of the Eminent Jurists Panel on Terrorism,*

- Counter-terrorism and Human Rights*. International Commission of Jurists: Switzerland. 2009.
- Jacques, Melanie. *The Prohibition of Forced Displacement in International Armed Conflicts*. Cambridge UP; Cambridge, 2012.
 - Jalloh, Charles C. *et al. The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges*. Cambridge: CUP, 2019.
 - Jalloh, Charles. *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law*. Cambridge: Cambridge UP, 2013.
 - Jodoin, Sebastien. "Terrorism as a War Crime." *International Criminal Law Review*. Vol. 7, (2007).
 - Joseph, Sarah, Jenny Schultz, and Melissa Castan. *International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*. 3rd Edition. Oxford UP: Oxford. 2014
 - Jain, Neha. "Forced Marriage as a Crime against Humanity: Problems of Definition and Prosecution." *Journal of International Criminal Justice*. Vol. 6 (2008)
 - Kassa, Wondwossen D. "Rethinking the *No Definition Consensus* and the *Would Have Been* Binding Assumption Pertaining to Security Council Resolution 1373." *Finders Law Journal*. Vol. 17 Iss. 1 (2015).
 - Lawless, Michael. "Terrorism: An International Crime." *International Journal*. Vol. 63, Iss. 1, (Mar. 2008).
 - Lee, Roy S. *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*. Transnational Publishers. 2001.
 - Lemkin, Raphael. *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*. Carnegie Endowment of International Peace Division of International Law; Washington, 1944.
 - Levitt, Geoffrey. "Is 'Terrorism' worth Defining?" *Ohio Northern University Law Review*. Vol. 13, Iss. 1, (1986).

- Lieberman, Benjamin David. *Terrible Fate: Ethnic Cleansing in the Making of Modern Europe*. Bowman & Littlefield; Maryland, 2006.
- Lincoln, Jennifer. "Nullum Crimen Sine Lege in International Criminal Tribunal Jurisprudence: The Problem with the Residual Category of Crime." *Eyes on the ICC*, Vol 7, Iss. 1 (2010).
- Lynch, Andrew., MacDonald, Edwina., Williams, George. *Law and Liberty in the War on Terror*. The Sydney: Federation Press. 2007.
- Marchuk, Iryna. *The Fundamental Concept of Crime in International Criminal Law: A Comparative Law Analysis*. NY: Springer. 2014.
- Mallat, Chibli. "The Original Sin: 'Terrorism' or 'Crime Against Humanity'?" *Case Western Journal of International Law*. Vol. 34, Iss. 2, (Spring 2002).
- Mann, Michael. *The Dark Side of Democracy: Explaining Ethnic Cleansing*. Cambridge UP; Cambridge 2005.
- Martinez, Lucy. "Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems." *Rutgers Law Journal*. Vol. 34, (2002-2003).
- Mazandaran, Pouyan Afshar. "An International Response to an International Problem: Prosecuting International Terrorists." *International Criminal Law Review*. Vol. 6, (2006).
- Mettraux, Guenael. *International Crimes and the ad hoc Tribunals*. Oxford UP; Oxford, 2005.
- Moeckli, Daniel *et al.* *International Human Rights Laws*. 2nd ed. Oxford UP; Oxford, 2014.
- Moore, Jennifer. *Humanitarian Law in Action within Africa*. Oxford UP; Oxford, 2012.
- Mortenson, J.D. "The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law." *Harvard International Journal of Law* Vol. 51-1. 2010.
- Mourellos, Yannis G. "The 1914 Persecutions and the First Attempt at an Exchange of Minorities between Greece and Turkey." *Balkan Studies* Vol. 26 (1985).
- Much, Christian. "The International Criminal Court (ICC) and Terrorism as an International Crime." *Michigan State Journal of International Law*. Vol. 14 (2006).

- Norberg, Naomi. "Terrorism and International Criminal Justice: Dim Prospects for a Future Together." *Santa Clara Journal of International Law* Vol. 8 Iss. 1 (Jan. 2010).
- Noteboom, Aaron J. "Terrorism: I Know It When I See It." *Oregon Law Review*. Vol. 81 Iss. 2 (2002).
- Nowak, Manfred. *U.N. Covenant on Civil and Political Rights: CCPR Commentary*. Kehl: N. P. Engel, 2005.
- Lee, Roy S. *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*. Transnational Publishers; New York. 2001.
- Nguyen, Frances. "Untangling Sex, Marriage, and Other Criminalities in Forced Marriage." *Goettingen Journal of International Law* Vol. 6 (2014)
- O'Brien, Melanie. "'Don't kill them, let's choose them as wives': the development of the crimes of forced marriage, sexual slavery and enforced prostitution in international criminal law." *The International Journal of Human Rights*. Vol. 20 No.3 (2016)
- Oheimichen, Anna. *Terrorism and anti-terror legislation - the terrorized legislator? A comparison of counter-terrorism legislation and its implications on human rights in the legal systems of the United Kingdom, Spain, Germany, and France*. Antwerp: Intersentia (2009).
- Omarjee, Nadira. "Conflicts, Gender-Based Violence and the Ramifications for HIV and AIDS." *South African Review of Sociology*. Vol. 39 No. 1 (2008).
- Oosterveld, Valerie. "Sexual Slavery and the International Criminal Court: Advancing International Law." *Michigan Journal of International Law*. Vol. 25:605 (Spring, 2004)
- Oosterveld, Valerie. "Gender and the Charles Taylor Case at the Special Court for Sierra Leone." *William and Mary Journal of Women and the Law*. Vol. 19 No. 7 (2012)
- Oosterveld, Valerie. "Forced Marriage and the Special Court for Sierra Leone: Legal Advances and Conceptual Difficulties." *International Humanitarian Legal Studies*. Vol. 2 (2011)

- Oosterveld Gender, "Persecution, and the International Criminal Court: Refugee Law's Relevance to the Crime Against Humanity of Gender-Based Persecution." *Duke Journal of Comparative and International Law*. Vol. 17 (40) (2006).
- Packer, Corinne A. A. *Using Human Rights to Change Tradition: Traditional Practices Harmful to Women's Reproductive Health in Sub-Saharan Africa*. Antwerpen: Intersentia. 2002.
- Paraschiv, Gavril. "Terrorism: International Crime." *Journal of Law and Public Administration*. Vol. 1, Iss. 1, (2015).
- Park, Augustine S.J. "'Other Inhumane Acts': Forced Marriage, Girl Soldiers and the Special Court for Sierra Leone." *Social and Legal Studies*. Vol. 15 No. 3 (2006)
- Pegorier, Clotilde. *Ethnic Cleansing a Legal Qualification*. Routledge; Oxford. 2013.
- Pegorier, Clotilde. "'Only One Step Away from Genocide.': The Crime of Persecution in International Criminal Law." *International Criminal Law Review* Vol.10 (5) (October 2010).
- Pejovic, Caslav. "Civil Law and Common Law: Two Different Paths Leading to the Same Goal." *Victoria University Wellington Law Review*. Vol. 32 2001.
- Petrovic, Drazen. "Ethnic Cleansing - an Attempt at Methodology." *European Journal of International Law* Vol. 5 (1994).
- Physicians for Human Rights. *War-related Sexual Violence in Sierra Leone: A Population-based Assessment: A Report*. Boston, MA: Physicians for Human Rights, 2002.
- Pictet, Jean S. *Commentary on the additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. International Committee of the Red Cross; The Hague, 1987.
- Pictet, Jean S. *The Geneva Conventions of 12 August 1949 Commentary IV: Geneva Convention Relative to the Protection of Civilian Persons in Time of War*. International Committee of the Red Cross; Geneva, 1958.

- Preece, Jennifer Jackson. "Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms." *Human Rights Quarterly* Vol 20 (4) (Nov. 1998).
- Proulx, Vincent-Joel. "Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes Against Humanity?" *American University Law Review*. Vol. 19, (2003-2004).
- Raimondo, Fabian O. *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*. Leiden: Martinus Nijhoff Publishers. 2008.
- Raimondo, Fabian O. "General Principles of Law as Applied by International Criminal Courts and Tribunals" *The Law and Practice of International Courts and Tribunals*. Vol. 6(3) 2007.
- Ridley, Nick. *Terrorism in East and West Africa: The Under-focused Dimension*. Cheltenham: Edward Elgar. 2014.
- Rice, Xan. "US Envoy Says Violence in Kenya is Ethnic Cleansing." *The Guardian*, 31 January 2008.
- Roberts, Anthea. "Gender and refugee law." *Australian Yearbook of International Law* Vol. 5 (2002).
- Roberts, Ken. "The Law of Persecution before the International Criminal Tribunal for the Former Yugoslavia." *Leiden Journal of International Law* Vol 15(3) (Sept. 2002).
- Roque, H. Harry L. Jr. "The Changing Face of Terrorism: A New Crime Against Humanity?" *World Bulletin*. Vol. 18 (Jan-June 2002).
- Sadat, Leila Nadya. "Crimes Against Humanity in the Modern Age." *The American Journal of International Law*. Vol. 107:334 (2013)
- Sadat, Leila Nadya. *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*. Martinus Nijhoff: Leiden. 2002.
- Safferling, Christoph. *International Criminal Procedure*. Oxford: Oxford UP (2012).

- Salinas de Frias, Ana Maria., Samuel, Katja L.H., White, Nijel D. *Counter-Terrorism: International Law and Practice*. Oxford: Oxford UP. 2012.
- Saul, Ben. *Defining Terrorism in International Law*. Oxford: Oxford UP. 2008.
- Saul, Ben. “Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism.” *Leiden Journal of International Law*. Vol. 24, (2011).
- Saul, Ben. *Research Handbook on International Law and Terrorism*. Cheltenham: Edward Elgar. 2014.
- Saul, Ben., Kinley, David., and Mowbray, Jacqueline. *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials*. 3rd ed. Oxford: Oxford UP, 2014.
- Schabas, William. *An Introduction to the International Criminal Court*. Cambridge: CUP 2007.
- Schabas, William A. *Genocide in International Law: The Crime of Crimes*. 2nd ed. Cambridge UP; Cambridge, 2009.
- Schabas, William. *The International Criminal Court: A Commentary on the Rome Statute*. 2nd Edition. OUP: Oxford, 2016.
- Schabas, William A. “The Special Tribunal for Lebanon: Is a ‘Tribunal of an International Character’ Equivalent to an ‘International Criminal Court’?” *Leiden Journal of International Law*, Vol. 21, (2008).
- Schomburg, Wolfgang and Peterson, Ines. “Genuine Consent to Sexual Violence under International Criminal Law.” *American Journal of International Law*. Vol 101:121 (2007)
- Sepúlveda, M. Magdalena. *The Nature of the Obligations under the International Covenant on Economic, Social, and Cultural Rights*. Antwerpen: Intersentia, 2003.
- Shaw, Malcolm N. *International Law*. Sixth Ed. Cambridge: Cambridge UP. 2010.
- Sluiter, Goran and Stahn, Carsten. *The Emerging Practice of the International Criminal Court*. Martinus Nijhoff: Leiden, 2009.

- Stahn, Carsten. *The Law and Practice of the International Criminal Court*. Oxford: OUP, 2015
- Sterba, James P., et al. *Terrorism and International Justice*. Oxford: Oxford UP. 2003.
- Stone, Dan. *The Oxford Handbook of Postwar European History*. Oxford UP; Oxford. 2012.
- Stout, Krista. "What's in a Name? The Feasibility and Desirability of Naming Forced Marriage as a Separate Crime under International Humanitarian Law." *Dalhousie Journal of Legal Studies*. Vol. 19 (2010)
- Swart, Bert. "Cooperation Challenges for the Special Tribunal for Lebanon." *Journal of International Criminal Justice*. Vol. 5, Iss. 5, (2007).
- Szasz, Paul C. "The Security Council Starts Legislating." *The American Journal of International Law*. Vol. 96, No. 2 (Oct. 2002).
- Tan, Joe. Sexual Violence Against Children on the Battlefield as a Crime of Using Child Soldiers: Square Pegs in Round Holes and Missed Opportunities in *Lubanga Yearbook of International Humanitarian Law, Volume 15; Volume 2012*
- Tahmindjis, Philip. "Sexuality and International Human Rights Law." *Journal of Homosexuality*. Vol. 48 (2008)
- The Sierra Leone Truth and Reconciliation Commission (TRC). *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*. The Sierra Leone Truth and Reconciliation Commission. 2004.
- Thiam, Doudu. "Eleventh report on the draft Code of crimes against the peace and security of mankind, by Mr. Doudou Thiam, Special Rapporteur." A/CN.4/449 and Corr.1. Yearbook of the International Law Commission Vol. II(1), 1993.
- Toy-Cronin, Bridgette A. "What is Forced Marriage? Towards a Definition of Forced marriage as a Crime Against Humanity." *Columbia Journal of International Law*. Vol. 19 No. 2 (2010)
- Triffterer, Otto. *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article*. 2nd ed. Baden-Baden: Nomos, 2008.

- Triffterer, Otto. "Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such." *Leiden Journal of International Criminal Law*. Vol. 14 (2001).
- Triffterer, Otto. Ambos, Kai. *The Rome Statute of the International Criminal Court: A Commentary*. Third Ed. Oxford: Hart Publishing. 2016.
- Wallace, Rebecca M.M. *International Law*. Fourth Ed. London: Sweet and Maxwell. 2002.
- Watts, Arthur. *The International Law Commission 1949-1998: Volume Three: Final Draft Articles and Other Materials*. Oxford University Press; Oxford, 1999.
- Weigend, Thomas. "The Universal Terrorist: The International Community Grappling with a Definition." *Journal of International Criminal Justice* Vol. 4 Iss. 5. 2006.
- Weiner, Phillip. "The Evolving Jurisprudence of the Crime of Rape in International Criminal Law." *Boston College Law Review*, Vol. 54 Iss. 2 (May 2013).
- Werle, Gerhard. *Principles of International Criminal Law 3rd ed.* The Hague: TMC Asser Press. 2014.
- Wharton, Sara. "The Evolution of International Criminal Law: Prosecuting 'New' Crimes before the Special Court for Sierra Leone." *International Law Review*. Vol. 11 (2011)
- Williamson, Myra. *Terrorism, War and International Law: The Legality of the Use of Force Against Afghanistan in 2001*. Ashgate Publishing; Vermont.
- Wilmshurst, Elizabeth "Perspectives on the ICRC Study on Customary International Law." Cambridge UP; Cambridge, July 2009.
- Wise, Edward M. "International Crimes and Domestic Criminal Law." *DePaul Law Review* Vol. 38 Iss. 4, 1989.
- Wood, Michael C. "The Interpretation of Security Council Resolutions." *Max Planck Yearbook of United Nations Law*. Vol. 2 (1998).
- Wright, William F. "Limitations on the Prosecution of International Terrorists by the International Criminal Court." *Journal of International Law and Practice*. Vol. 8, (1999).

- Yee, Sienho and Tieya, Wang. *International Law in the Post-Cold War: Essays in Memory of Li Haopi*. New York: Routledge, 2001.
- Yotova, Rumiana. “Challenges in the Identification of the ‘General Principles of Law Recognized by Civilized Nations’: The Approach of the International Court.” *Canadian Journal of Comparative and Contemporary Law*, Vol. 3 (20017).
- Young, Reuven. “Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation.” *Boston College International and Comparative Law Review*. Vol. 29, Iss. 1 (1 Dec. 2006).
- Zhang, Yue. “Customary International Law and the Rule Against Taking Cultural Property as Spoils of War.” *Chinese Journal of International Law*. 2018.
- Zeegers, Krit. *International Criminal Tribunals and Human Rights Law: Adherence and Contextualization*. Springer: The Hague, 2016.

Treaties and Documents

- African Union, *Protocol Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, 27 June 2014.
- Association of Southeast Asian Nations (ASEAN). *ASEAN Human Rights Declaration*. 18 Nov. 2012.
- Association of Southeast Asian Nations (ASEAN). *Convention on Counter Terrorism*. 30 Jan. 2007.
- Black Sea Economic Cooperation (BSEC). *Additional Protocol on Combating Terrorism to the Agreement among the Governments of the Black Sea Economic Cooperation Organization Participating States on Cooperation in Combating Crime, in Particular in its Organized Forms*. 3 Dec. 2004.
- Communauté Economique et Monétaire de l'Afrique Centrale. *Convention Relative a la Lute Contre le Terrorism en Afrique Centrale*. 5 February 2005, No. 08/05-OEAC-057-CM-13.

- Cooperation Council for the Arab States of the Gulf. *Convention of the Cooperation Council for the Arab States of the Gulf on Combating Terrorism*. 4 May 1999.
- Council of the European Union. *Council Framework Decision of 13 June 2002 on Combating Terrorism* 2002/475/JHA. 13 June 2002.
- Council of Europe. *Council of Europe Convention on the Prevention of Terrorism*. ETS No. 196. 16 May 2005.
- Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950
- Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950. Protocol 4.
- Executive Committee of the Commonwealth of Independent States. *Treaty on Cooperation among the Members of the Commonwealth of Independent States in Combating Terrorism, 1999*. 4 June 1999.
- European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02.
- European Union. *Directive 2017/541 of the European Parliament and of the Council*. 15 March 2017.
- Human Rights Council. *Preventing and eliminating child, early and forced marriage Report of the Office of the United Nations High Commissioner for Human Rights*. 2 April 2014. A/HRC/ 26/22.
- International Civil Aviation Organization. *Convention on Offences and Certain Acts Committed on Board Aircraft*. 14 Sept. 1963.
- International Committee of the Red Cross (ICRC), *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land.(Hague Convention)*, 18 October 1907.

- International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287. available at: <https://www.icrc.org/applic/ihl/ihl.nsf/INTRO/380>
- International Committee of the Red Cross (ICRC), *Instructions for the Government of Armies of the United States in the Field (Lieber Code)*. 24 April 1863.
- International Committee of the Red Cross (ICRC), *Project of an International Declaration concerning the Laws and Customs of War. (Brussels Declaration)*, 27 August 1874.
- International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977 Art. 85(4)(a).
- International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977.
- International Law Commission. *Draft Code of Crimes against the Peace and Security of Mankind with commentaries 1996*. United Nations; New York, 2005.
- International Law Association. *Final Report of the Committee: Statement of Principles Applicable to the Formation of Customary International Law*. London Conference. (2000).
- International Peace Conference. *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*. (18 October 1907).
- League of Arab States. *The Arab Convention for the Suppression of Terrorism*. April 1998.
- League of Nations, *Committee for the International Repression of Terrorism*. Report to the Council Adopted by the Committee on January 10th, 1936.
- League of Nations, *Statute of the Permanent Court of International Justice*. 16 December 1920.

- Office of the Prosecutor. *“Gender Justice and the ICC: Progress and Reflections” International Conference: 10 Years Review of the ICC. Justice for All? The International Criminal Court.* International Criminal Court. (14 February 2012).
- Office of the Prosecutor. *Statement by Fatou Bensouda, Deputy Prosecutor, during the press conference regarding the arrest of Germain Katanga.* International Criminal Court. (October 19 2007)
- Office of the Prosecutor. *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on International Day of the Girl Child International Criminal Court.* (10 October 2014).
- Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights (“Banjul Charter”),* 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982),
- Organization of American States (OAS), *American Convention on Human Rights, “Pact of San Jose”, Costa Rica,* 22 November 1969.
- Organization of African Unity (OAU). *OAU Convention on the Prevention and Combating of Terrorism.* 14 June 1999.
- Organization of American States (OAS). *Inter-American Convention against Terrorism.* 3 June 2002.
- Preparatory Commission for the International Criminal Court. *Proposal submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic and United Arab Emirates concerning the elements of crimes against humanity.* 3 December 1999. PCNICC/1999/WGEC/DP.39.
- Preparatory Commission for the International Criminal Court. *Proposal Submitted by the United States of America ‘Draft Elements of Crimes’.* PCN/ICC/1999/DP.4. 4 February 1999.
- Shanghai Cooperation Organization. *Shanghai Convention on Combating Terrorism, Separatism and Extremism.* 29 March 2003.

- South Asian Association for Regional Cooperation (SAARC). *Additional Protocol to the SAARC Regional Convention on the Suppression of Terrorism*. 6 Jan. 2004.
- South Asian Association for Regional Cooperation (SAARC). *Regional Convention on the Suppression of Terrorism, South Asian Association for Regional Cooperation (SAARC)*. 4 Nov. 1987.
- Southern African Development Community (SADC) *Protocol on Gender and Development*.
- Special Tribunal for Lebanon. *Lebanese Penal Code: Selected Articles*. (Sept. 2015).
- *Statute for the Special Court for Sierra Leon*.
- The International Criminal Court. *Elements of Crimes*. (2011) available at: <http://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf>
- *Treaty of Versailles*. 28 June 1919.
- United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement")*, 8 August 1945.
- United Nations. *Draft Statute for the International Criminal Court and Draft Final Act*. A/CONF.183/2/Add.1 (14 April 1998).
- United Nations. *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, annex 1, resolution E, done at Rome on 17 July 1998*. A/CONF.183/10 (17 July 1998).
- United Nations. *Population and Development: Programme of Action Adopted at the International Conference on Population and Development, Cairo, 5-13 September 1994*. New York: United Nations, Dept. for Economic and Social Information and Policy Analysis, 1995.
- United Nations. *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, No. 14118. 24 February 1988.

- United Nations. *Report of the Fact-finding Mission to Lebanon inquiring into the causes, circumstances and consequences of the assassination of former Prime Minister Rafik Hariri*. S/2005/203 (24 March 2005).
- United Nations. *Report of the Preparatory Committee on the Establishment of an International Criminal Court , Volume II: Compilation of Proposals*. A/51/22[VOL-II](SUPP) (14 Sept. 1996).
- United Nations. *Statement attributed to the UN Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Côte d'Ivoire*. United Nations; New York, 19 January 2011.
- United Nations. *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 226 U.N.T.S. 3, entered into force April 30, 1957.
- United Nations. *Statute of the International Court of Justice*. 18 April 1946.
- United Nations, *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*. 14 Nov. 1970.
- United Nations. *United Nations Convention on Biological Diversity*. 5 June 1992.
- United Nations. *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations Treaty Series Vol. 1155.
- United Nations. *Yearbook of the International Law Commission 1994 Vol. II Part II: Report of the Commission to the General Assembly on the work of its forty-sixth session*. A/CN.4/SER.A/1994/Add.1 (Part 2) (1997).
- United Nations Commission on Human Rights. *The Realization of Economic, Social and Cultural Rights: The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers*, 2-27 August 1993, E/CN.4/Sub.2/1993/17.
- United Nations Economic and Social Council, *Contemporary Forms of Slavery*, 30,47, U.N. Doc. E/CN.4/Sub.2/1998/13 (June 22,1998)

- United Nations Economic and Social Council, *General Comment No. 21: Right of Everyone to Take Part in Cultural Life (art. 15, para. 1(a), of the International Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21.
- United Nations General Assembly, *2005 World Summit Outcome*. 24 October 2005, A/RES/60/1.
- United Nations General Assembly. *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, No. 2900410 March 1988.
- United Nations General Assembly. *Convention for the suppression of unlawful acts against the safety of civil aviation*, No. 14118. 23 Sept. 1971.
- United Nations General Assembly. *International Convention for the Suppression of Acts of Nuclear Terrorism*, A/RES/59/290. 15 April 2005.
- United Nations General Assembly. *International Convention for the Suppression of the Financing of Terrorism* 9 Dec. 1999.
- United Nations. *Convention for the Suppression of Unlawful Seizure of Aircraft*. 16 Dec. 1970.
- United Nations General Assembly, *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, 7 November 1962
- United Nations General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, 18 December 1979, United Nations, Treaty Series, vol. 1249.
- United Nations General Assembly. *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents*. 14 Dec. 1973
- United Nations General Assembly, *Declaration on the Elimination of Discrimination against Women (DEDAW)*, 7 November 1967, A/RES/2263(XXII).
- United Nations General Assembly. *Elimination of Racism and Racial Discrimination: Report of the Committee on the Elimination of Racial Discrimination* 22 September 1995. A/50/18 (1995).

- United Nations General Assembly. *Ethnic cleansing and racial hatred*, 16 December 1992, A/RES/47/80/ (1992).
- United Nations General Assembly. *Fifty-ninth Session, 87th Plenary Meeting Verbatim Records*. A/59/PV.87. 7 April 2005.
- United Nations General Assembly. *Implementing the Responsibility to Protect: Report of the Secretary General*, 12 January 2009. A/63/677 (2009).
- United Nations General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999
- United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993
- United National General Assembly. *International Convention Against the Taking of Hostages*, No. 21931. 17 Nov. 1979
- United Nations General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660.
- United Nations General Assembly. *International Convention for the Suppression of Terrorist Bombings*, No. 37517. 15 Dec. 1997.
- United Nations General Assembly. *Measures to Eliminate International Terrorism*. A/Res/64/118. 16 Dec. 2009.
- United Nations General Assembly. *Measures to Eliminate International Terrorism*. A/Res/63/129. 11 Dec. 2008.
- United Nations General Assembly. *Measures to Eliminate International Terrorism*. A/Res/62/71. 6 Dec. 2007.
- United Nations General Assembly. *Measures to Eliminate International Terrorism*. A/Res/61/40. 4 Dec. 2006.
- United Nations General Assembly. *Measures to Eliminate International Terrorism*. A/Res/60/43. 8 Dec. 2005.

- United Nations General Assembly. *Measures to Eliminate International Terrorism.*
A/Res/59/46. 2 Dec. 2004.
- United Nations General Assembly. *Measures to Eliminate International Terrorism.*
A/Res/58/81. 9 Dec. 2003.
- United Nations General Assembly. *Measures to Eliminate International Terrorism.*
A/Res/57/27. 19 Nov. 2002.
- United Nations General Assembly. *Measures to Eliminate International Terrorism.*
A/Res/56/88. 12 Dec. 2001.
- United Nations General Assembly. *Measures to Eliminate International Terrorism.*
A/Res/55/158. 12 Dec. 2000.
- United Nations General Assembly. *Measures to Eliminate International Terrorism.*
A/Res/54/110. 9 Dec. 1999.
- United Nations General Assembly. *Measures to Eliminate International Terrorism.*
A/Res/53/108. 8 Dec. 1998.
- United Nations General Assembly. *Measures to Eliminate International Terrorism.*
A/Res/52/165. 15 Dec. 1997.
- United Nations General Assembly. *Measures to Eliminate International Terrorism.*
A/Res/51/210. 17 Dec. 1996.
- United Nations General Assembly. *Measures to Eliminate International Terrorism.*
A/Res/50/53. 11 Dec. 1995.
- United Nations General Assembly. *Measures to Eliminate International Terrorism.*
A/Res/49/60. 17 Feb. 1994.
- United Nations General Assembly. *Report of the Ad Hoc Committee on the Establishment of an
International Criminal Court.* A/50/22. 6 Sept. 1995.
- United Nations General Assembly. *Rome Statute of the International Criminal Court.* (17 July
1998) (last amended 2010) [http://www.icc-cpi.int/nr/rdonlyres/add16852-ae9-4757-
abe7-9cdc7cf02886/283503/romestatuteng1.pdf](http://www.icc-cpi.int/nr/rdonlyres/add16852-ae9-4757-abe7-9cdc7cf02886/283503/romestatuteng1.pdf)

- United Nations General Assembly. *Situation of human rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)*, 11 March 1996. A/Res/50/193 (1996).
- United Nations General Assembly. *Situation of human rights in the territory of the former Yugoslavia : violations of human rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia*, 20 December 1993. A/RES/48/153 (1993).
- United Nations General Assembly. *The Crime of Genocide Resolution 96(i)*. (11 Dec. 1946).
- United Nations General Assembly. *The Situation in Bosnia and Herzegovina*, 18 December 1992. A/RES/47/121 (1992).
- United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A(III).
- United Nations General Assembly. *Yearbook of the International Law Commission 1994. Vol. 2 Part 2*. A/CN.4/SER.A/1994/Add. 1 (Part 2).
- United Nations Human Rights Council. *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin*. A/HRC/10/3, 4 Feb. 2009.
- United Nations Security Council. *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*, S/1994/674 (1992).
- United Nations Security Council. *First Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*, S/25274 (1992).
- United Nations Security Council. *Letter dated 29 March 2005 from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General*. S/2005/208 (29 March 2005).
- United Nations Security Council. *Letter dated 13 December 2005 from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General*. S/2005/783 (13 Dec. 2005).

- United Nations Security Council. *Resolution 373 (2001) Adopted by the Security Council at its 4385th meeting, on 28 September 2001.* S/Res/1373 (28 Sept. 2001).
- United Nations Security Council. *Security Council Resolution 771(Former Yugoslavia).* 13 August 1992. S/RES/771 (1992).
- United Nations Security Council. *Security Council Resolution 787 (Bosnia and Herzegovina).* 16 November 1992, S/RES/787 (1992).
- United Nations Security Council. *Security Council Resolution 819 (Bosnia and Herzegovina).* 16 April 1993, S/RES/819 (1993).
- United Nations Security Council. *Security Council Resolution 820 (Bosnia and Herzegovina).* 17 April 1993, S/RES/820 (1993).
- United Nations Security Council. *Resolution 1566 (2004) Adopted by the Security Council at its 5053rd meeting, on 8 October 2004.* S/Res/1566 (8 Oct. 2004).
- United Nations Security Council. *Resolution 1644 (2005) Adopted by the Security Council at its 5329th meeting, on 15 December 2005.* S/Res/1644 (15 Dec. 2005).
- United Nations Security Council. *Security Council Resolution 1674 (Protection of Civilians in Armed Conflict).* 28 April 2006, S/RES/1674 (2006).
- United Nations Security Council, *Security Council resolution 1757 (on the establishment of a Special Tribunal for Lebanon),* 30 May 2007, S/RES/1757 (2007).
- United Nations Security Council. *Statement by the President of the Security Council.* S/PRST/2005/4 (15 Feb. 2005).
- United Nations Security Council. *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006),* 8 November 1994.
- United Nations Security Council. *Statute of the International Criminal Tribunal for the Former Yugoslavia,* 25 May 1993.
- United Nations Security Council. *Statute of the Special Tribunal for Lebanon.* S/RES/1757

Domestic Laws

- Andorra, *Nouveau Code Penal (Criminal Code)*, 2005.
- Armenia, *Criminal Code*, 18 April 2003.
- Austria, *Austrian Criminal Code (Strafgesetzbuch)*, 1974, Last amended 19 June 2019.
- Azerbaijan, *Criminal Code of the Republic of Azerbaijan*, N.787-IQ, Last amended 2018.
- Belgium, *Criminal Code (Code Penal)*, 1867, Last amended 2018.
- Bosnia and Herzegovina, *Criminal Code of Bosnia and Herzegovina*, 2003, Last amended 2015.
- Bulgaria, *Criminal Code of Bulgaria*, 1968, last amended 2017.
- Canada, *Criminal Code of Canada*. 1985, last amended 2018.
- Croatia, *Criminal Code*, 2011.
- Columbia, *Criminal Code of Columbia (Código Penal Colombiano)*, Act. 599, 2000.
- Czech Republic, *Criminal Code of the Czech Republic*, 2009, Last amended 2011.
- Denmark, *The Criminal Code of Denmark*, 2005.
- Estonia, *The Criminal Code of the Republic of Estonia*, 2001, Last amended 2019.
- Finland, *Criminal Code of the Republic of Finland*, 1889, Last amended 2015.
- France. *Code Civil*. 7 January 1999.
- France, *Criminal Code (Code Penal)*, Last amended 2019.
- Georgia, *Criminal Code of Georgia*, 1999, Last amended 2019.
- Germany. *Basic Law for the Federal Republic of Germany*. 23 May 1949.
- Germany. *Bürgerliches Gesetzbuch (Civil Code)*. 2 January 2002.
- Hungary, *Criminal Code of the Republic of Hungary*, Last amended 2012.
- Iceland, *General Penal Code of Iceland*, 1940, Last amended 2015.

- India, *The Prevention of Terrorism Act*, Act. No. 15, 2002.
- Ireland, *Criminal Justice (Terrorist Offences) Act 2005*, 2005.
- Italy, *Codice civile (Italian Civil Code)*. 1 December 2015.
- Italy. *Constitution of Italy*, 22 December 1947.
- Kazakhstan, *Criminal Code of the Republic of Kazakhstan*, 2014, Last amended 2016.
- Kyrgyzstan, *Criminal Code of the Kyrgyz Republic*, 1997, Last amended 2006.
- Latvia, *Criminal Law of the Republic of Latvia*, 1998, Last amended 2018.
- Liechtenstein, *Criminal Code of the Principality of Liechtenstein*, 1987, Last amended 2019.
- Lithuania, *Criminal Code of Lithuania*, 2000, Last amended 2017.
- Luxembourg, *Criminal Code of the Grand-Duchy of Luxembourg*, 1879, Last amended 2018.
- Macedonia, *Criminal Code of the Republic of Macedonia*, 1996, Last amended 2009.
- Malta, *Criminal Code of the Republic of Malta*, 1854, Last amended 2018.
- Moldova, *Criminal Code of the Republic of Moldova*, 2002, Last amended 2018.
- Mongolia, *Criminal Code of Mongolia*, 2002.
- Netherlands, *Criminal Code of the Kingdom of Netherlands*, 1881, Last amended 2012.
- New Zealand, *Terrorism Suppression Act 2002*, 2002 No. 34, 17 October 2002.
- Norway, *Penal Code of the Kingdom of Norway*, 1902, Last amended 2017.
- Pakistan, *The Anti-Terrorism Act*, 1997. As enacted via S.R.O No. 496(1) 2000.
- Parliament of the United Kingdom. *Forced Marriage (Civil Protection) Act 2007* (c.20) August 2007.
- Parliament of Canada. *Civil Marriage Act*.S.C. 2005, c. 33. (20 July 2005).
- Parliament of the United Kingdom. *The Matrimonial Causes Act* (c 18). 1973.

- Philippines, *An Act to Secure the State and Protect our People from Terrorism*, Rep. Act No. 9372, 2007.
- Republic of Korea. *Minbup (Civil Code)*. Amended January, 2002.
- Russia, *The Criminal Code of the Russian Federation*. No. 63-FZ. 13 June 1996. As amended 28 December 2004.
- Russia, *On Counteraction Against Terrorism*. Federal Law No. 35-FZ. 6 March 2006.
- Serbia, *Criminal Code of the Republic of Serbia*, 2005, amended 2012.
- Seychelles, *Prevention of Terrorism Act, 2004*, 1 Dec, 2004.
- Slovenia, *Criminal Code of the Republic of Slovenia*. 2008.
- South Africa, *Anti-Terrorism Bill*, No. 24076, 15 November 2002.
- Sri Lanka. *Suppression of Terrorist Offences Act*. Act. No. 44 of 1992. 6 Nov. 1992.
- Sri Lanka. *Prevention of Terrorism (Temporary Provisions)*. Act. No. 48 of 1979. 6 Nov. 1992.
- Sweden, *Act on Criminal Responsibility for Terrorist Offences*, 24 April 2003.
- Tajikistan, *Criminal Code of the Republic of Tajikistan*, 1998, Last amended 2011.
- Ukraine, *Criminal Code of Ukraine*, 2001, Last amended 2010.
- United Arab Emirates, *On Combating Terrorism Offences*, Federal Law No. (7), 2014.
- United States, *Title 18 of the United States Code*, Last amended 2017.
- Uzbekistan, *Criminal Code of the Republic of Uzbekistan*, 1994, Last amended 2002.
- United Kingdom, *Terrorism Act*, 2000, Last amended 2015.

Judicial Decisions

- *Almog v Arab Bank*, 471 F. Supp. 2nd 257.
- *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/ United States of America)* (Judgement). I.C.J. Reports, 12 Oct. 1984.

- *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* (Judgement) I.C.J. Reports, 25 September 1997.
- *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)* (Judgement). I.C.J. Reports, 27 June 1986.
- *Continental Shelf (Libyan Arab Jarnahiriya/Malta)* (Judgment). I.C.J. Reports, 3 June 1985.
- *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (Decision). STL-11-01/I/AC/R176bis F0936/COR/20130530/R144405-R144558/EN/nc, Special Tribunal for Lebanon (STL) 16 Feb. 2011.
- International Court of Justice. *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*. International Court of Justice, 21 June 1971.
- International Court of Justice. *Case Concerning Armed Activities on the Democratic Republic of the Congo (Democratic Republic of the Congo v. Uganda)* (Judgement). 19 December 2005.
- International Court of Justice. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* ICJ Reports. 1986.
- International Court of Justice. *Fisheries Case* (United Kingdom v. Norway) (Judgement). ICJ Reports. 1951
- International Court of Justice. *International Status of South-West Africa (Advisory Opinion) (Dissenting Opinion of Judge McNair)*. ICJ Reports (11 July 1950).
- International Court of Justice. *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) (Dissenting Opinion of Judge Lachs)*. ICJ Reports (20 February 1969).
- *Kafkaris v. Cyprus*. (Merits), No. 21906/04, European Court of Human Rights (Grand Chamber), 12 February 2008

- *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion). I.C.J. Reports, 8 July 1996.
- *Ms. Juliet Joslin et al. v. New Zealand*, Communication No. 902/1999. U.N. Doc. A/57/40 at 214 (2002).
- *North Sea Continental Shelf (Federal Republic of Germany/Netherlands; Federal Republic of Germany/ Denmark)*, I.C.J. Reports. 20 Feb. 1969.
- Permanent Court of International Justice. *The Case of the S.S. Lotus (France v. Turkey) (Judgment)*. PCIJ Ser. A No. 10 (7 Sept. 1927).
- *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu*. (Appeals Judgment), Special Court for Sierra Leone (SCSL), SCSL-2004-16-A, 22 February 2008.
- *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu*. (Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 ('Forced Marriages')), Special Court for Sierra Leone (SCSL), SCSL-04-16-T, 20 June 2007
- *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu*. (Prosecution Filing of Expert Report Pursuant to Rule 94(bis) and Decision on Prosecution Request for Leave to Call an Additional Expert Witness), Special Court for Sierra Leone (SCSL), SCSL-04-16-T, 08 August 2005.
- *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu*. (Separate Concurring Opinion of the Honorable Justice Julia Sebutinde Appended to the judgement pursuant to Rule 88 (c)), Special Court for Sierra Leone (SCSL), SCSL-04-16-T, 20 June 2007.
- *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu*. (Trial Judgment), Special Court for Sierra Leone (SCSL), SCSL-04-16-T, 20 June 2007
- *Prosecutor v. Alex Issa Hassan Sesay, Morris Kallon, and Augustine Gbao*. (Trial Judgment), Special Court for Sierra Leone (SCSL), SCSL-04-15-T, 02 March 2009.
- *Prosecutor v. Alfred Musema (Appeals Judgement)*, ICTR-96-13-A, International Criminal Tribunal for Rwanda (ICTR), 16 November 2001.

- *Prosecutor v Goran Jelusic (Trial Judgement)* IT-95-10-T. International Criminal Tribunal for the Former Yugoslavia. 14 December 1999. -*Prosecutor v. Ante Gotovina et al. (Decision on Several Motions Challenging Jurisdiction)*, IT-06-90-PT, International Criminal Tribunal for the Former Yugoslavia (ICTY), 19 March 2007.
- *Prosecutor v. Anto Furundzija. (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 10 December 1998.
- *Prosecutor v. Charles Ghankay Taylor. (Trial Judgment)*, Special Court for Sierra Leone (SCSL), SCSL-03-01-T, 18 May 2012.
- *Prosecutor v. Blagonje Simic et al. (Trial Judgement)*, IT-95-9-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 17 October 2003.
- *Prosecutor v. Clement Kayishema and Obed Ruzindana. (Appeals Judgement)*, ICTR-95-1-A, International Criminal Tribunal for Rwanda. 1 June 2001.
- *Prosecutor v. Clement Kayishema and Obed Ruzindana (Trial Judgement)*, ICTR-95-1-T, International Criminal Tribunal for Rwanda (ICTR), 21 May 1999.
- *Prosecutor v. Dario Kordic and Mario Cerkez (Trial Judgement)*, IT-95-14/2-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 26 February 2001.
- *Prosecutor v. Delalic et al. (Trial Judgement)*, IT-96-21-T, International Criminal Tribunal for the Former Yugoslavia (ICTY). 16 November 1998.
- *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic. (Appeals Judgment)*, IT-96-23/1-A, International Criminal Tribunal for the Former Yugoslavia (ICTY), 12 June 2002.
- *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic. (Judgment)*, IT-96-23/1-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 22 February 2001.
- *Prosecutor v. Dusko Tadic. (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction)*, IT-94-1-AR72, International Criminal Tribunal for the Former Yugoslavia (ICTY), 2 October 1995.

- *Prosecutor v. Dusko Tadic (Decision on the Defense Motion on Jurisdiction)*, IT-94-1, International Criminal Tribunal for the Former Yugoslavia (ICTY), (10 Aug. 1995).
- *Prosecutor v. Dusko Tadic (Opinion and Trial Judgement)*, IT-94-1-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 7 May 1997.
- *Prosecutor v. Enever Hadzihasanovic. (Decision on Joint Challenge to Jurisdiction)*, IT-01-47-PT, International Criminal Tribunal for the Former Yugoslavia (ICTY), 12 November 2002
- *Prosecutor v. Erdemovic (Appeals Judgment)*, IT-96-22-A, International Criminal Tribunal for the Former Yugoslavia (ICTY), (7 Oct. 1997).
- *Prosecutor v. Erdemovic (Sentencing Judgment)*, IT-96-22-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), (22 Nov. 2006).
- *Prosecutor v. Georges Ruggiu (Trial Judgement and Sentence)*, ICTR-97-32-I, International Criminal Tribunal for Rwanda (ICTR), 1 June 2000.
- *Prosecutor v. Goran Jelusic (Appeals Judgment)*, IT-95-10-A, International Criminal Tribunal for the Former Yugoslavia (ICTY), 15 July 2001.
- *Prosecutor v. Goran Jelusic (Trial Judgement)*, IT-95-10-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 14 December 1999.
- *Prosecutor v. Jean-Paul Akayesu (Trial Judgement)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998.
- *Prosecutor v. Kupreškić et al. (Judgment)*, IT-95-16-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 14 January 2000.
- *Prosecutor v. Mladen Naletilic, aka "Tuta" and Vinko Martinovic, aka "Stella" (Trial Judgement)*, IT-98-34-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 31 March 2003.
- *Prosecutor v. Milomir Stakic. (Appeals Judgment)*, IT-97-24-A, International Criminal Tribunal for the Former Yugoslavia (ICTY), 22 March 2006.

- *Prosecutor v. Milomir Stakic*. (Judgment), IT-97-24-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 31 July 2003.
- *Prosecutor v. Mitar Vasiljevic*. (Judgment), IT-98-32-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 29 November 2002
- *Prosecutor v. Milorad Krnojelac (Appeals Judgement)*, IT-97-25-A, International Criminal Tribunal for the Former Yugoslavia (ICTY), 15 September 2003.
- *Prosecutor v. Milorad Krnojelac (Trial Judgement)*, IT-97-25-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 15 March 2002.
- *Prosecutor v. Dragoljub Kunarac et al.* (Trial Judgment), IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 22 February 2001.
- *Prosecutor v. Mitar Vasiljevic (Trial Judgement)*, IT-98-32-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 29 November 2002.
- *Prosecutor v. Norman et al.*, (Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence), SCSL-04-14-PT, 24 May 2005.
- *Prosecutor v. Radislav Krstic (Appeals Judgement)*, IT-98-33-A, International Criminal Tribunal for the Former Yugoslavia (ICTY), 19 April 2004.
- *Prosecutor v. Radislav Krstic (Trial Judgement)*, IT-98-33-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 02 August 2001.
- *Prosecutor v. Radoslav Brdanin (Trial Judgement)*, IT-99-36-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 1 September 2004.
- *Prosecutor v. Radovan Karadzic and Ratko Mladic (Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence)*, IT-95-5-R61/ IT-95-18-R61, International Criminal Tribunal for the Former Yugoslavia (ICTY), 11 July 1996.
- *Prosecutor v. Radovan Karadzic and Ratko Mladic (Transcript of Proceedings 28 June 1996)*, IT-95/18-R61, International Criminal Tribunal for the Former Yugoslavia (ICTY), 28 June 1996.

- *Prosecutor v. Radovan Karadzic and Ratko Mladic (Trial Judgement)*, IT-95/18-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 24 March 2016.
- *Prosecutor v. Slobodan Milosevic (Decision on Motion for Judgement of Acquittal)*, IT-02-54-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 16 June 2004.
- *Prosecutor v. Theoneste Bagasora et al. (Trial Judgment)*, ICTR-98-41-A, International Criminal Tribunal for Rwanda (ICTR), 14 December 2011.
- *Prosecutor v. Vidoje Blagojevic and Dragan Jokic (Trial Judgement)*, IT-02-60-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 17 January 2005.
- *Prosecutor V. Zoran Kupreškić et al. (Trial Judgment)*, IT-95-16-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 14 January 2000.
- *Situation in the Central African Republic (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)* (15 June 2009). ICC-01/05-01/08.
- *Situation in the Central African Republic (Prosecutor v. Jean-Pierre Bemba Gombo) (Judgement on the Appeal of Mr. Jean-Pierre Bemba Gombo Against the Decision of Trial Chamber III of 28 July 2010 Entitled “Decision on the Review of the Detention of Mr. Jean-Pierre Bemba Gombo Pursuant to Rule 118(2) of the Rules of Procedure and Evidence”)* (15 November 2010). ICC-01/05-01/08-1019.
- *Situation in Cote D’Ivoire (Prosecutor v. Laurent Gbagbo) (Decision on the Prosecution Application under Article 58(7) of the Statute)* (27 April 2007). ICC-02/05-01/07.
- *Situation in Darfur, Sudan (Prosecutor v. Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Al Abd-Al-Rahman (“Ali Kushayb”)) (Decision on the Prosecution Application under Article 58(7) of the Statute)* (27 April 2007). ICC-02/05-01/07.
- *Situation in Darfur, Sudan (Prosecutor v. Omar Hassan Ahmad Al Bashir) (Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir)*, (4 March 2009) ICC-02/05-01/09.
- *Situation in Darfur, Sudan (Prosecutor v Omar Hassan Ahmad Al Bashir) (Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a*

- Warrant of Arrest against Omar Hassan Ahmad Al Bashir*"), (ICC-02/01-09/05-OA). 3 February 2010.
- *Situation in the Democratic Republic of the Congo (Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS5 and VPRS 6)*, (ICC-01/04-101-tEN-Corr). 17 January 2006.
 - *Situation in the Democratic Republic of the Congo (Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation)*, (ICC-01/04-374). 18 August 2007.
 - *Situation in the Democratic Republic of the Congo (Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal)* (13 July 2006). ICC-01/04-168.
 - *Situation in the Democratic Republic of the Congo (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)* (9 June 2014) ICC-01/04-02/06.
 - *Situation in the Democratic Republic of the Congo (Prosecutor v. Germain Katanga) (Decision on the Confirmation of Charges)* (14 Oct. 2008). ICC-01/04-01/07-522.
 - *Situation in the Democratic Republic of the Congo (Prosecutor v. Germain Katanga) (Judgement on the Appeal of Mr. Germain Katanga Against the Decision of Pre-Trial Chamber I Entitled "Decision on the Defense Request Concerning Languages")* (27 May 2008). ICC-01/04-01/07-522.
 - *Situation in the Democratic Republic of the Congo. (Prosecutor v. Katanga Germain Katanga) (Judgment Pursuant to Article 74 of the Statute)* (7 March. 2014) ICC Case No. ICC-01/04-01/07. available at: <http://www.icccpi.int/iccdocs/doc/doc1963464.pdf>
 - *Situation in the Democratic Republic of the Congo (Prosecutor v Mathlue Ngudjolo Chul) (Public Judgement Pursuant to Article 74 of the Statute concurring opinion of Judge Christine Van den Wyngaert)*, (ICC-01/04-02/12) 18 December 2012.
 - *Situation in the Democratic Republic of the Congo (Prosecutor v Thomas Lubanga Dyilo) (Decision on the Confirmation of Charges)* (ICC-01/04-01/06). 28 January 2007.

- *Situation in the Democratic Republic of the Congo (Prosecutor v Thomas Lubanga Dyilo)*
(Decision reviewing the Registry's decision on legal assistance for Mr. Thomas Lubanga Dyilo pursuant to Regulation 135 of the Regulations of the Registry), (ICC-01/04-01/06) 30 August 2011.
- *Situation in the Democratic Republic of the Congo. (Prosecutor vs. Thomas Lubanga Dyilo)*
(Decision on the Practices of Witness Familiarisation and Witness Proofing) (8 Nov. 2006) ICC Case No. ICC-01/04-01/06-679.
- *Situation in the Democratic Republic of the Congo (Prosecutor v Thomas Lubanga Dyilo)*
(Judgement on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defense Challenge to the Jurisdiction of the Court Pursuant to Article 19 (2) (a) of the Statute of 3 October 2006). (ICC-01/04-01/06-772). 14 December 2006.
- *Situation in the Democratic Republic of the Congo (Prosecutor v. Thomas Lubanga Dyilo)*
(Judgement Pursuant to Article 74 of the Statute) (14 March 2012). ICC-01/04-01/06-2842.
- *Situation in the Democratic Republic of the Congo (Prosecutor v Thomas Lubanga Dyilo)*
(Redacted Decision on the request by DRC-DOL-WWWW-0019 for special protective measures relating to his asylum application), (ICC-01/04-01/06), 5 August 2011.
- *Situation in the Republic of Kenya (Prosecutor v. William Samoei Ruto et al.)* (Decision on the Confirmation of Charges Pursuant to Article 61(a) and (b) of the Rome Statute) (23 January 2012). ICC-01/09-01/11.
- *Situation in Uganda (Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration and Motion for Clarification)*, (ICC-02/04-01/05) 28 October 2005.
- *Situation in Uganda (Prosecutor v. Dominic Ongwen)* (Decision on the Confirmation of Charges against Dominic Ongwen) (23 March 2016). ICC-02/04-01/15.
- *Situation in Uganda. (The Prosecutor v. Dominic Ongwen.)* (Document Containing the Charges) (22 December 2015) ICC Case No. ICC- 02/04-01/15.

- Supreme Court of the United States. *Loving v. Virginia*. 388 U.S. 1 (1967).
- Supreme Court of the United States. *Planned Parenthood of Southeastern Pennsylvania v. Casey*. 505 U.S. 833 (1992).
- Supreme Court of the United States. *Skinner v. State of Oklahoma*, ex. rel. Williamson, 316 U.S. 535 (1942).
- Supreme Court of the United States. *Turner v Safley*. 482 U.S. 78 (1987)
- Supreme Court of the United States. *Zablock v. Redhail*. 434 U.S. 78 (1978)
- *Suresh v Canada* (Judgement). Supreme Court of Canada, No. 27790. 1 Nov. 2002.
- *Tel-Oren v Libyan Arab Republic*. 726 F.2d 774. 3 Feb 1984.
- *Thomas v Mowbray* ([2007] HCA 33). High Court of Australia. 2 Aug. 2007.
- *Trial of the Major War Criminals before the International Military Tribunal, Nuremburg, 14 Nov. 1945- 1 October 1946*. (Nuremburg: Germany, 1947).
- *Zrig v Canada* (Judgement). Supreme Court of Canada, 3 FC 761. 7 April 2003.
- *Pushpanathan v Canada* (Judgement) Supreme Court of Canada, No.25173. 4 June 1998.
- *United States of America v Yousef*. 327 F.3d 56. 4 April 2003.