THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-05-87-A

IN THE APPEALS CHAMBER

Before: Judge Liu Daqun, Pre-Appeal Judge
Judge Mehmet Guney
Judge Fausto Pocar
Judge Andresia Vaz
Judge Theodor Meron

Registrar: Mr. John Hocking

Date Filed: 23 September 2009

THE PROSECUTOR

v.

NIKOLA SAINOVIC
DRAGOLJUB OJDANIC
NEBOJSA PAVKOVIC
VLADIMIR LAZAREVIC
SRETEN LUKIC

Public

BOOK OF AUTHORITIES FOR GENERAL OJDANIC'S APPEAL BRIEF

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Mr. Branko Lukic and Mr. Dragan Ivetic for Mr. Sreten Lukic

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2.1.

TRIALS
OF
WAR CRIMINALS
BEFORE THE
NUERNBERG MILITARY TRIBUNALS

NUERNBERG MILITARY TRIBUNALS

VOLUME XIV

"THE MINISTRIES CASE"

TRIALS

OF

WAR CRIMINALS

BEFORE THE

NUERNBERG MILITARY TRIBUNALS

UNDER

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VOLUME XIV

NUERNBERG

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to him. He had no part in the actual extermination of Jews and other concentration camp inmates, and we have no doubt that he would not, even under orders, have participated in that part of the program.

But without doubt he was a consenting participant in part of the execution of the entire plan, although his participation was not a major one.

We find him guilty under count five.

RASCHE

The defendant Rasche is a banker by profession, and after many years of banking experience in the Rhineland he joined the Dresdner Bank, became a member and finally the spokesman for its Vorstand. He was one of the most able and active executive officers of the bank.

The evidence clearly establishes that the Dresdner Bank loaned very large sums of money to various SS enterprises which employed large numbers of inmates of concentration camps, and also to Reich enterprises and agencies engaged in the so-called resettlement programs.

It is unnecessary to recapitulate the evidence in this case or the findings of others of these Tribunals to the unlawful nature of these enterprises.

Prosecution Exhibit 2825 [Document NI–10120] is a draft of a letter of recommendation which Rasche prepared or caused to be prepared for the signature of SS Gruppenfuehrer Pohl, which contains the statement:

> "Dr. Rasche is an old fighter for the Baltikum, and as a member of the delegation of the Reich Leader SS (Himmler) he also participated in the decisive measures concerning resettlement."

The defense that Pohl did not sign this letter and that it was never used is of no materiality, as they are Rasche's own words praising himself and not those of Pohl.

The record, however, does not disclose that Rasche was ever a member of any delegation of the Reich Leader SS, nor what the delegation did, if it ever existed, or what the decisive measures consisted of; nor are we able, from other evidence, to determine any relationship with Himmler or the SS from which any conclusive inference can be drawn.

Rasche was a member of Himmler's Circle of Friends, and the [Dresdner] Bank, with his knowledge, acquiescence, and approval, even in part at his insistence, made large annual contributions to a fund placed at Himmler's personal disposal. There is no evidence, however, that matters relating to the resettlement program were ever discussed or acted upon in the meetings of this circle, or that it was in any way a policy-making body. Nor is there any evidence that Rasche knew that any part of the fund to which the bank made contributions was intended to be or was ever used by Himmler for any unlawful purposes.

His participation in the loans made by the Dresdner Bank to various SS enterprises which employed slave labor and to those engaged in the resettlement program presents a more difficult problem.

The defendant is a banker and businessman of long experience and is possessed of a keen and active mind. Bankers do not approve or make loans in the number and amount made by the Dresdner Bank without ascertaining, having, or obtaining information or knowledge as to the purpose for which the loan is sought, and how it is to be used. It is inconceivable to us that the defendant did not possess that knowledge, and we find that he did.

The real question is, is it a crime to make a loan, knowing or having good reason to believe that the borrower will us the funds in financing enterprises which are employed in using labor in violation of either national or international law? Does he stand in any different position than one who sells supplies or raw materials to a builder building a house, knowing that the structure will be used for an unlawful purpose? A bank sells money or credit in the same manner as the merchandiser of any other commodity. It does not become a partner in enterprise, and the interest charged is merely the gross profit which the bank realizes from the transaction, out of which it must deduct its business costs, and from which it hopes to realize a net profit. Loans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a crime. Our duty is to try and punish those guilty of violating international law, and we are not prepared to state that such loans constitute a violation of that law, nor has our attention been drawn to any ruling to the contrary.

The defendant Rasche should be and is found not guilty under count five.

RITTER

The defendant Ritter, now in his 66th year, entered the Foreign Office in 1922 after a career as a civil servant in various

2.2.

LAW REPORTS OF TRIALS OF WAR CRIMINALS

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CASE No. 9

THE ZYKLON B CASE

TRIAL OF BRUNO TESCH AND TWO OTHERS

BRITISH MILITARY COURT, HAMBURG,
1ST–8TH MARCH, 1946

Complicity of German industrialists in the murder of interned allied civilians by means of poison gas.

Bruno Tesch was owner of a firm which arranged for the supply of poison gas intended for the extermination of vermin, and among the customers of the firm were the S.S. Karl Weinbacher was Tesch's Procurist or second-in-command. Joachim Drosihn was the firm's first gassing technician. These three were accused of having supplied poison gas used for killing allied nationals interned in concentration camps, knowing that it was so to be used. The Defence claimed that the accused did not know of the use to which the gas was to be put ; for Drosihn it was also pleaded that the supply of gas was beyond his control. Tesch and Weinbacher were condemned to death. Drosihn was acquitted.

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

The Court consisted of Brigadier R. B. L. Persse, as President, and, as members, Lt. Col. Sir Geoffrey Palmer, Bart., Coldstream Gds., and Major S. M. Johnstone, Royal Tank Regt.

Capt. H. S. Marshall was Waiting Member.

C. L. Stirling, Esq., C.B.E., Barrister-at-Law, Deputy Judge Advocate General, was Judge Advocate.

Major G. I. D. Draper, Irish Guards, Judge Advocate General's Branch, HQ. B.A.O.R., was Prosecutor.

Three German Counsel appeared on behalf of the accused. Dr. O. Zippel, Dr. C. Stumme and Dr. A. Stegemann defended Tesch, Weinbacher and Drosihn respectively.

2. THE CHARGE

The accused, Bruno Tesch, Joachim Drosihn and Karl Weinbacher, were charged with a war crime in that they " at Hamburg, Germany, between 1st January, 1941, and 31st March, 1945, in violation of the laws and usages of war did supply poison gas used for the extermination of allied nationals interned in concentration camps well knowing that the said gas was to be so used." The accused pleaded not guilty.

3. THE CASE FOR THE PROSECUTION

The prosecuting Counsel, in his opening address, stated that Dr. Bruno Tesch was by 1942 the sole owner of a firm known as Tesch and Stabenow, whose activities were divided into three main categories. In the first place, it distributed certain types of gas and gassing equipment for disinfecting various public buildings, including Wehrmacht barracks and S.S. concentration camps. Secondly, it provided, where required, expert technicians to carry out these gassing operations. Lastly, Dr. Tesch and Dr. Drosihn, the firm's senior gassing technician, carried out instruction for the Wehrmacht and the S.S. in the use of the gas which the firm supplied. The predominant importance of these gassing operations in war-time lay in their value in the extermination of lice.

The chief gas involved was Zyklon B, a highly dangerous poison gas, 99 per cent. of which was prussic acid. The gas was manufactured by another firm. Tesch and Stabenow had the exclusive agency for the supply of the gas east of the River Elbe, but the Zyklon B itself went directly from the manufacturers to the customer.

The contention for the Prosecution was that from 1941 to 1945 Zyklon B was being supplied as a direct result of orders accepted by the accused's firm, Tesch and Stabenow. On that basis, the Zyklon B was going in vast quantities to the largest concentration camps in Germany east of the Elbe. In these same camps the S.S. Totenkopfverbände were, from 1942 to 1945, systematically exterminating human beings to an estimated total of six million, of whom four and a half million were exterminated by the use of Zyklon B in one camp alone, known as Auschwitz/Birkenau. In these concentration camps were a vast number of people from the occupied territories of Europe, including Czechs, Russians, Poles, French, Dutch and Belgians, and people from neutral countries and from the United States. The Prosecutor also claimed that over a period of time the three accused got to know of this wholesale extermination of human beings in the eastern concentration camps by the S.S. using Zyklon B gas, and that, having acquired this knowledge, they continued to arrange supplies of the gas to these customers in the S.S. in ever-increasing quantities, until in the early months of 1944 the consignment per month to Auschwitz concentration camp was nearly two tons.

The accused Weinbacher was a " Procurist " ; when Tesch was absent he was fully empowered and authorised to do all acts on behalf of his principal which his principal could have done. His position was of great importance, since his principal would travel on the business of the firm for as many as 200 days in the year.

The case for the Prosecution was that knowingly to supply a commodity to a branch of the State which was using that commodity for the mass extermination of Allied civilian nationals was a war crime, and that the people who did it were war criminals for putting the means to commit the crime into the hands of those who actually carried it out. The action of the accused was in violation of Article 46 of the Hague Regulations of 1907, to which the German government and Great Britain were both parties.

4. THE EVIDENCE FOR THE PROSECUTION

Emil Sehm, a former bookkeeper and accountant employed by Tesch and Stabenow, supplied information, regarding the legitimate business activities of the firm and the positions of the three accused therein, which substantially bore out the opening statements of the Prosecutor on these points. He went on to state that in the Autumn of 1942 he saw in the files of the firm's registry one of the reports, dictated by Tesch, which gave accounts of his business journeys. In this travel report, Tesch recorded an interview with leading members of the Wehrmacht, during which he was told that the burial, after shooting, of Jews in increasing numbers was proving more and more unhygienic, and that it was proposed to kill them with prussic acid. Dr. Tesch, when asked for his views, had proposed to use the same method, involving the release of prussic acid gas in an enclosed space, as was used in the extermination of vermin. He undertook to train the S.S. men in this new method of killing human beings.

Sehm had written down a note of these facts and taken it away with him, but had burnt it the next day on the advice of an old friend, named Wilhelm Pook, to whom he had related what he had seen.

Dr. Marx, a German Barrister practising since 1934, who was called upon to define the status of a Procurist in German law, said :

> " The procurist had the right to act in the name and on behalf of the firm. He is a man who, out of all the others mentioned in the law who have also the right to act on behalf of the firm, has most of these rights. He has the right to act on behalf of the firm and to conclude any transactions or any sort of act on behalf of the firm, and to conclude any transactions or any sort of legal proceedings in which the firm might find itself involved. One can say that anybody who has any sort of transactions with a man who holds the ' Procura ' and who is called the Procurist is in exactly the same position as if he had had that transaction with the head of the firm."

Erna Biagini, a former stenographer of the firm, who was also in charge of the registry, claimed to have read, in " approximately 1942," a travel report of Dr. Tesch which stated that Zyklon B could be used for killing human beings as well as vermin.

Anna Uenzelmann, a former stenographer of the firm, said that in about June 1942 Tesch, after he had dictated a travel report on returning from Berlin, had told her that Zyklon B was being used for gassing human beings, and had appeared to be as terrified and shocked about the matter as she was.

Karl Ruehmling, who had been a bookkeeper and assistant gassing master with the firm, said that Zyklon B was sent by the concern to the concentration camps at Auschwitz, Sachsenhausen and Neuengamme, but Auschwitz was sent the largest consignments.

Alfred Zaun, who was in charge of the firm's bookkeeping, said that, in his opinion, Auschwitz of all the concentration camps had received the most Zyklon B during the war.

Wilhelm Bahr, an ex-medical orderly at Neuengamme, described a prussic acid course which he had attended in the S.S. Hospital at Oranienburg in

1942, and which Dr. Tesch had conducted. He said that he himself had gassed two hundred Russian prisoners of war in Neuengamme in 1942, using prussic acid gas, but that it was not Dr. Tesch who had taught him the procedure which he had applied.

Perry Broad, who had been a Rottenführer in the Kommandatur of the Auschwitz camp from June 1942 until early 1945, described how persons were gassed there with Zyklon B. The people being gassed, to his knowledge, at Auschwitz and Birkenau were German deportees, Jews from Belgium, Holland, France, North Italy, Czechoslovakia and Poland, and Gypsies.

Dr. Bendel, who had been a prisoner at Auschwitz and had acted as a doctor to the inmates, said that from February 1944 to January 1945 a million people had been killed there by Zyklon B.

The remaining Prosecution witnesses were a member of a British war crimes investigation team, who identified pre-trial statements made by the accused ; Wilhelm Pook and his wife ; and five more employees of Tesch and Stabenow. The evidence of Pook and his wife supported that of Sehm to a degree, though not in every detail, but the fact that they had discussed the events of 1942 between his and their giving evidence was recognised by the Judge Advocate to be " undoubtedly unfortunate."

The Prosecution, acting in accordance with Regulation 8 (i) (*a*) of the Royal Warrant, submitted to the Court a sworn affidavit in which Dr. Diels, a former high-ranking German government official, stated that it was common knowledge in 1943 in Germany that gas was being used for killing people.

Among various other documents(1) Dr. Tesch's S.S. subscription card was produced before the Court ; the Defence pointed out, however, that this did not prove that Dr. Tesch had been an active member of the S.S.

5. THE OPENING STATEMENTS OF DEFENCE COUNSEL

(i) *Counsel for Tesch*

Before calling Tesch to the witness-box, his Counsel stated that he intended to prove to the court, first, that Tesch had no knowledge of the killing of human beings by means of Zyklon B ; secondly, that Zyklon B was delivered only for normal purposes of disinfection and for medical reasons ; thirdly, that parts of gas chambers were sold only for the purpose of exterminating vermin ; fourthly, that concentration camps got the gas only in amounts which were quite normal in relation to the number of inhabitants, and only for killing vermin ; and fifthly, that instruction courses were held only according to the relevant laws and regulations, and again only for the purpose of teaching the method of exterminating vermin.

(ii) *Counsel for Weinbacher*

Dr. Stumme, defending Weinbacher, said that by the evidence which he would call, he would try to prove that Weinbacher had no knowledge of any note or report by Dr. Tesch to the effect that human beings were being killed by poison gas, and that until the capitulation of Germany he never

(1) Of the various documents admitted as evidence in the trial (including five affidavits, and the pre-trial statements by all of the accused) the Secretariat of the United Nations War Crimes Commission has only been able to examine an extract from the affidavit of Dr. Diels.

had any reason to believe that Zyklon B was being used for any other purpose than the destruction of vermin.

(iii) *Counsel for Drosihn*

Counsel for Drosihn set out to prove, by the evidence which he called, first, that Dr. Drosihn had nothing to do with the business concerning the supply of gas ; secondly, that, being on journeys for considerable periods, he had only a very scanty knowledge of the activities of the business ; thirdly, that he heard about the gassing of human beings only after the capitulation of Germany ; and fourthly, that he never carried out instruction either in concentration camps or for S.S. personnel.

6. THE EVIDENCE FOR THE DEFENCE

(i) *Dr. Tesch*

All three accused gave evidence on oath. Dr. Tesch stated that he had heard nothing and had known nothing about human beings being killed in concentration camps with prussic acid. He denied ever having attended any conference, or having been approached by any official or military authority on the subject, or having written in any document that human beings should be killed by prussic acid. He specifically denied that he had made the remarks referred to by Anna Uenzelmann. He had never been to Auschwitz himself and had had no reason to believe that the camps were incorrectly run.

He did not think that deliveries to Auschwitz were very high because it was a large camp and, further, it " administered more camps in the General Government of Poland." He could not remember Dr. Drosihn ever having instructed S.S. men. Although the witness had paid subscriptions to both the S.S. and the Nazi Party, he had never been an active member of either. He thought that the passage in the travel report which Erna Biagini had read might have been a record of an answer put to him by a pupil.

Drosihn, stated Tesch, was a technical expert and was not concerned with the administration of the firm or the office. Weinbacher, however, had complete control when Tesch was away from the office.

(ii) *Karl Weinbacher*

This accused, giving evidence on oath, said that his work was, briefly, to look after the current business affairs in the absence of Dr. Tesch, seeing to the incoming and the outgoing mail, answering any queries, and confirming any orders received. He read some of Dr. Tesch's travel reports but not all, because there were too many ; in particular, he had not read any dealing with the possibility of destroying Jews with Zyklon B. Dr. Tesch had not mentioned any such possibility to him, nor had the witness heard during the war that Jews were being gassed. He had never been inside a concentration camp, nor had he received unfavourable reports during the war about such camps. He, too, stated that Drosihn had nothing to do with the business management. He could not agree that the S.S. would necessarily come to Dr. Tesch for advice on the extermination of human beings with Zyklon B, since, although Dr. Tesch was an expert on the use of the gas, there were plenty of books available on prussic acid.

(iii) *Dr. Drosihn*

Drosihn claimed that his part in the activities of the firm consisted in collaborating on scientific issues, being in charge of the gassing, for instance, of ships in Hamburg docks, and examining delousing chambers to see whether they were working correctly. He spent about 150 to 200 days a year in travelling on business. He had been to check the working of the delousing chambers in Sachsenhausen and Ravensbruck and had been to Neuengamme; but had neither been to Auschwitz, nor given instructions to the S.S. in any place. He knew nothing of the size of consignments of gas to Auschwitz. Contrary to Tesch's evidence, the witness claimed to have reported to him once that he had seen happening in the camps things that were contrary to human dignity.

(iv) *The Remaining Defence Witnesses*

Nine other witnesses called by the Defence did not add very substantially to the evidence before the Court. The subjects covered by their remarks included the character of Dr. Tesch, and the extent of general knowledge in Germany concerning the killing of Jews. *Inter alia*, they were called to prove that Zyklon B was widely used for the legitimate purpose of killing vermin. These witnesses were two Medical Officers from Hamburg, a doctor and two chemists employed by the German Hygiene Institute, a retired professor of the same institute, the Manager of the Disinfection Institute of Hamburg, a stenotypist formally employed by Tesch and Stabenow, and Dr. Stumme, one of the Defence Counsel, who gave evidence regarding the German law regarding State secrets.

7. THE CLOSING ADDRESSES OF THE DEFENCE COUNSEL

(i) *Counsel for Tesch*

In his closing address, Dr. Zippel, dealing with the point of law involved, submitted that, since the charge was not one of destroying human life but only of supplying the means of doing so, such action would only be contrary to the laws and usages of war if the means supplied were necessarily intended to kill human beings. To supply a material which also had quite legitimate purposes was no war crime.([2])

Turning to the facts, Counsel claimed that while supplies of Zyklon B to the S.S. were large, it was the duty of the S.S. to see that the state of health in the eastern provinces was kept at a high level, and it was concerned not only with the Wehrmacht itself, but also with the state of health of those parts of the eastern provinces whose population was repatriated to Germany before the entry of Germany into war with Russia. Supplies were not too great to have been used wholly for legitimate purposes. Since 1944 the S.S. had had unlimited permission to use the gas for the destruction of vermin and the prevention of epidemics. He submitted that even in the concentration camps the gas was, at least at the beginning, used only for its legitimate purpose.

([2]) The English translation of Dr. Zippel's speech subsequently contains the following passage: " I have two duties to perform. The first would be to try to prove that Tesch supplied this gas not knowing for what purposes it might be used. My second duty is that, even if he knew something about it, still the laws of this procedure would not suffice to find him guilty."

Counsel then questioned whether the Zyklon B used at Auschwitz for killing human beings had been supplied by Tesch and Stabenow. The fact that Auschwitz was situated in the district for which the firm were the agents could not be decisive, for other firms were able to supply that district, especially since during the war the boundaries of the districts were not so much respected as before. Further, the S.S. had been active all over the occupied territories during the war and had had various means of securing the gas. So many people were killed by gassing in Auschwitz that the S.S. must necessarily have used sources other than Tesch and Stabenow.

Counsel observed that the witnesses who were called to prove that Dr. Tesch knew about the unlawful use of his gas had given different versions as to how he must or should have known about such use. He proceeded also to throw doubts on the reliability of Sehm, for instance, in view of a statement of his, denied by many other witnesses, that the files of the firm in which he had found the travel report were kept under lock and key. Miss Biagini had denied that she saw anything in this report about a conference with the High Command of the Wehrmacht or any propositions made by Dr. Tesch to this authority. None of the typists who could have typed the travel report in question knew of it or of any rumour in the office regarding it. Under the existing war-time regulations of secrecy, it seemed impossible that a man as careful as Tesch should have dictated a report on an interview with the High Command on such a secret matter, placed the report where anyone in the office could read it, as was the case with all travel reports, and then discussed the facts with his employees. Dr. Tesch had been shown to be a fair and honest man, and his concentration on his work explained why he had not heard any rumour which may have circulated Germany concerning the gassing of human beings. Regarding the large supplies of gas to Auschwitz in particular, Counsel submitted that Dr. Tesch was too busy to be expected to know what individual customers bought, and in any case the supply of Zyklon was not as important to the firm as were its gassing activities. Furthermore, Dr. Tesch had regarded Auschwitz as a transit camp needing therefore unusually frequent delousing. Counsel concluded that Dr. Tesch knew nothing of the gassing of human beings either in Auschwitz or Neuengamme.

(ii) *Counsel for Weinbacher*

In his closing address, Dr. Stumme submitted that it had become clear during the trial that Weinbacher did not know that Zyklon B had been used for the killing of human beings. Not one of the witnesses could say really that Weinbacher had any knowledge of a travel report or any observation of Dr. Tesch that human beings had been killed by Zyklon B, or that Dr. Tesch had conversations with Weinbacher on such a subject. Nor had the trial shown that Weinbacher should have had reasonable suspicion, or grounds for suspicion, that Zyklon B had been used for the killing of human beings. Even if Dr. Tesch had written such a travel report as the one alleged, Weinbacher need not have read it, because he was a busy man, and witnesses had shown that many of the travel reports were filed and read by no one. Even Sehm claimed to have come across the particular report by accident, and Miss Biagini because she had to file it. He repeated Dr. Zippel's argument that Dr. Tesch would not write a State secret in a document which all the staff could read. If Sehm had found any other document, it must have been purely by accident ; and no such accident had happened to Weinbacher. In connection with the large supplies of gas which were sent to Auschwitz, Counsel pointed out that Weinbacher had stated on oath that he had never had a summary of supplies to a single customer because this was left to the accountants. In any case, it had been shown that the quantity of Zyklon B needed for the killing of human beings was much smaller than that required for the killing of insects. The quantities of Zyklon B needed for killing half a million or even a million human beings stood in such small proportion to the quantities needed for the killing of insects that it would not have been noticed at all. Therefore, there had been no need for Weinbacher to have grown suspicious, since, claimed Counsel, he knew that Auschwitz was one of the biggest camps and a sort of transit camp. Counsel did not think, therefore, that it was correct to assume that the large quantity of Zyklon going to Auschwitz was any indication of the fact that human beings were being killed there. Supplies for Neuengamme were much lower than those for Auschwitz.

Dr. Stumme did not deal with the law involved, except for stating that Weinbacher, although a procurist, was still only an employee like Sehm and Miss Biagini, against whom no action was being taken, despite the knowledge which they were said to have had.

(iii) *Counsel for Drosihn*

Dr. Stegemann, in his closing address, confined his remarks to what concerned his client exclusively, while claiming the benefit of everything favourable to him which had already been said by the other Counsel. Every witness who was asked had said that the accused had had nothing whatever to do with the firm's business activities. He could not, therefore, for instance, have known of the size of the consignments to Auschwitz. His relatively small salary showed his subordinate position. He was a zoologist, and first technical gassing master to the firm, and spent more than half the year in travelling. When both Tesch and Weinbacher were away, Mr. Zaun had had the power of attorney, not Drosihn.

Both Dr. Tesch and Dr. Drosihn had said that the latter had never instructed S.S. men in the use of Zyklon B, and not even Sehm claimed that he knew anything about the alleged travel report. Drosihn had been away from the office for irregular periods, and was in no position to read Dr. Tesch's travel reports, which were in any case of no interest to him. Counsel denied that there had been general knowledge in Germany before the end of of the war about the gassing of Jews ; his client could not therefore have acquired such knowledge from rumours.

8. THE PROSECUTOR'S CLOSING ADDRESS

In his closing address, the prosecuting Counsel said that the possibility that some firm other than Tesch and Stabenow could have supplied Zyklon B to Auschwitz could be ruled out, as the latter had the monopoly in that area. The essential question was whether the accused knew of the purpose to which their gas was being put. Counsel admitted that the S.S. were under no restrictions as to the use they made of the gas, and that the direct knowledge which was available to Tesch as to that use was of the scantiest, due to the fear and secrecy in which the S.S. worked. He relied for his case on the evidence of Sehm, Miss Biagini and Miss Uenzelmann.

Counsel said that it was unbelievable that Dr. Tesch did not know that anything wrong went on in the concentration camps. Dr. Drosihn had said without hesitation that he saw things there which were not worthy of human dignity, and that he had said so to Tesch. It was also unbelievable that Dr. Tesch had no knowledge of the amounts of gas being supplied to the S.S. and to Auschwitz in particular, by a firm which was wholly his property. In 1942 and 1943 Auschwitz had been the firm's second largest customer. Dr. Tesch had no reason to believe that Auschwitz was a transit camp, and moreover he was too efficient a man to be duped by the S.S. Counsel completed his case against Tesch by casting doubt on his veracity by showing how contradictions existed between his statements and those of other witnesses on certain details unrelated to the main issue.

Dealing very shortly with Weinbacher's position, Counsel contended that all that Tesch knew must, from the nature of the inner organisation of the business, have also been known by Weinbacher. For 200 days in the year he was in sole control of the firm, with access to all the books, able to read the travel reports, indeed compelled to read the travel reports if he was to carry on the business properly during the periods when his principal was away.

Prosecuting Counsel claimed that Drosihn must to some extent have shared the confidence of Tesch and Weinbacher, even although his activities were confined to the technical side of the firm as opposed to the sales and bookkeeping side.

He concluded that, by supplying gas, knowing that it was to be used for murder, the three accused had made themselves accessories before the fact to that murder.

9. THE SUMMING UP OF THE JUDGE ADVOCATE

The Judge Advocate, in summing up the evidence before the Court, pointed out that the latter must be sure of three facts, first, that Allied nationals had been gassed by means of Zyklon B ; secondly, that this gas had been supplied by Tesch and Stabenow ; and thirdly, that the accused knew that the gas was to be used for the purpose of killing human beings. On points of law he did not think that the Court needed any direction.

After summarising the evidence of the Prosecution witnesses, the Judge Advocate said : " To my mind, although it is entirely a question for you, the real strength of the Prosecution in this case rests rather upon the general proposition that, when you realise what kind of a man Dr. Tesch was, it inevitably follows that he must have known every little thing about his business. The Prosecution ask you to say that the accused and his second-in-command Weinbacher, both competent business men, were sensitive about admitting that they knew at the relevant time of the size of the deliveries of poison gas to Auschwitz. The Prosecution then ask : "Why is it that these competent business men are so sensitive about these particular deliveries ? Is it because they themselves knew that such large deliveries could not possibly be going there for the purpose of delousing clothing or for the purpose of disinfecting buildings ? "

In Weinbacher's case, there was no direct evidence, either by way of conversation or of anything that he had written among the documents of the firm produced during the trial, which formed any kind of evidence specifically imputing knowledge to Weinbacher as to how Zyklon B was being used at Auschwitz. " But the Prosecution," said the Judge Advocate, " ask you to say that, in his case as in Tesch's case, the real strength of their case is not the individual direct evidence, but the general atmosphere and conditions of the firm itself." The Judge Advocate asked the Court whether or not it was probable that Weinbacher would constantly watch the figures relating to a less profitable activity of the firm, particularly since he received a commission on profits as well as his salary.

The Judge Advocate emphasised Drosihn's subordinate position in the firm, and asked whether there was any evidence that he was in a position either to influence the transfer of gas to Auschwitz or to prevent it. If he were not in such a position, no knowledge of the use to which the gas was being put could make him guilty.

10. THE VERDICT

Tesch and Weinbacher were found guilty.

Drosihn was acquitted.

11. THE SENTENCE

Counsel for Tesch, pleading in mitigation of sentence, said that if Tesch did know the use to which the gas was being put, and had consented to it, this happened only under enormous pressure from the S.S. Furthermore, had Tesch not co-operated, the S.S. would certainly have achieved their aims by other means. Tesch was merely an accessory before the fact, and even so, an unimportant one.

Counsel for Weinbacher pleaded that the Court should consider the latter's wife and three children ; that he as a business employee might have thought that the ultimate use of the gas was Tesch's responsibility ; and that if he had refused to supply Zyklon B the S.S. would immediately have handed him over to the Gestapo.

Nevertheless, subject to confirmation, the two were sentenced to death by hanging.

The sentences were confirmed and carried into effect.

B. NOTES ON THE CASE

1. A QUESTION OF JURISDICTION : THE NATIONALITY OF THE VICTIMS

The Prosecutor specified a number of Allied countries from which, he claimed, many of the persons gassed had originated. Wilhelm Bahr told how he himself had gassed two hundred Russians. Perry Broad mentioned Jews from Belgium, Holland, France, Czechoslovakia and Poland, among those gassed at Auschwitz. The Judge Advocate, in his summing up, stated that " among those unfortunate creatures undoubtedly there were many Allied nationals."

It was not alleged that British citizens were among the victims.

The British claim to jurisdiction over the case could be based primarily on the fact that by the Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany, made in Berlin on the 5th June, 1945, the four Allied Powers occupying Germany have assumed supreme authority therein. They have, therefore, become the local sovereigns in Germany. There is vested, then, in the United Kingdom authorities, administering the British Zone of Germany, the right to try German nationals for crimes of any kind wherever committed. The claim to jurisdiction is the stronger if, as in the present case, the criminal activities of the accused have been committed in the British Zone of Germany, by German residents of this Zone, although, of course, the crimes to which the accused were alleged to be accessories had their effect outside Germany, in Auschwitz, Poland.

British jurisdiction could further be based on either

(*a*) the general doctrine called Universality of Jurisdiction over War Crimes, under which every independent State has in International Law jurisdiction to punish pirates and war criminals in its custody regardless of the nationality of the victim or the place where the offence was committed ; or

(*b*) the doctrine that the United Kingdom has a direct interest in punishing the perpetrators of crimes if the victim was a national of an ally engaged in a common struggle against a common enemy.

2. QUESTIONS OF SUBSTANTIVE LAW

(i) *The Crime Alleged*

Article 46 of the Hague Convention of 1907, concerning the Laws and Customs of War on Land, on which the case for the Prosecution was based, provides that " Family honour and rights, individual life and private property, as well as religious convictions and worship must be respected." This Article falls under the section heading, *Military Authority over the Territory of the Hostile State,* and was intended to refer to acts committed by the occupying authorities in occupied territory. In the trial of Tesch, the acts to which the accused were allegedly accessories before the fact were committed mainly at Auschwitz, in occupied Poland.

(ii) *Civilians as war criminals*

The decision of the Military Court in the present case is a clear example of the application of the rule that the provisions of the laws and customs of war are addressed not only to combatants and to members of state and other public authorities, but to anybody who is in a position to assist in their violation.

The activities with which the accused in the present case were charged were commercial transactions conducted by civilians. The Military Court acted on the principle that any civilian who is an accessory to a violation of the laws and customs of war is himself also liable as a war criminal.

2.3.

INTERNATIONAL MILITARY TRIALS · NÜRNBERG ·

NAZI CONSPIRACY AND AGGRESSION

Opinion and Judgment

Office of United States
Chief of Counsel for Prosecution
of Axis Criminality

UNITED STATES GOVERNMENT PRINTING OFFICE
WASHINGTON : 1947

he participated. This is a mitigating fact of which the Tribunal takes notice.

Conclusion.—The Tribunal finds that Funk is not guilty on count one but is guilty under counts two, three, and four.

SCHACHT

Schacht is indicted under counts one and two of the indictment. Schacht served as Commissioner of Currency and president of the Reichsbank from 1923 to 1930; was reappointed president of the bank on March 17, 1933; Minister of Economics in August 1934; and Plenipotentiary General for War Economy in May 1935. He resigned from these two positions in November 1937, and was appointed Minister without Portfolio. He was reappointed as president of the Reichsbank for a 1-year term on March 16, 1937, and for a 4-year term on March 9, 1938, but was dismissed on January 20, 1939. He was dismissed as Minister without Portfolio on January 22, 1943.

Crimes against peace.—Schacht was an active supporter of the Nazi Party before its accession to power on January 30, 1933, and supported the appointment of Hitler to the post of Chancellor. After that date he played an important role in the vigorous rearmament program which was adopted, using the facilities of the Reichsbank to the fullest extent in the German rearmament effort. Reichsbank, in its traditional capacity as financial agent for the German Government floated long-term Government loans, the proceeds of which were used for rearmament. He devised a system under which 5-year notes, known as M. E. F. O. bills, guaranteed by the Reichsbank and backed, in effect, by nothing more than its position as a bank of issue, were used to obtain large sums for rearmament from the short-term money market. As Minister of Economics and as Plenipotentiary General for War Economy he was active in organizing the German economy for war. He made detailed plans for industrial mobilization and the coordination of the army with industry in the event of war. He was particularly concerned with shortages of raw materials and started a scheme of stock-piling, and a system of exchange control designed to prevent Germany's weak foreign exchange position from hindering the acquisition abroad of raw materials needed for rearmament. On May 3, 1935, he sent a memorandum to Hitler stating that "the accomplishment of the armament program with speed and in quantity is the problem of German politics, that everything else therefore should be subordinated to this purpose."

Schacht, by April 1936, began to lose his influence as the central figure in the German rearmament effort when Goering was appointed Coordinator for Raw Materials and Foreign Exchange. Goering advocated a greatly expanded program for the production of synthetic raw materials which was opposed by Schacht on the ground that the resulting financial strain might involve inflation. The influence of Schacht suffered further when on October 16, 1936, Goering was appointed Plenipotentiary for the 4-year plan with the task of putting "the entire economy in a state of readiness for war" within 4 years. Schacht had opposed the announcement of this plan and the appointment of Goering to head it, and it is clear that Hitler's action represented a decision that Schacht's economic policies were too conservative for the drastic rearmament policy which Hitler wanted to put into effect.

After Goering's appointment, Schacht and Goering promptly became embroiled in a series of disputes. Although there was an element of personal controversy running through these disputes, Schacht disagreed with Goering on certain basic policy issues. Schacht, on financial grounds, advocated a retrenchment in the rearmament program, opposed as ineconomical much of the proposed expansion of production facilities, particularly for synthetics, urged a drastic tightening on government credit and a cautious policy in dealing with Germany's foreign exchange reserves. As a result of this dispute and of a bitter argument in which Hitler accused Schacht of upsetting his plans by his financial methods, Schacht went on leave of absence from the Ministry of Economics on September 5, 1937, and resigned as Minister of Economics and as Plenipotentiary General for War Economy on November 16, 1937.

As president of the Reichsbank, Schacht was still involved in disputes. Throughout 1938, the Reichsbank continued to function as the financial agent for the German Government in floating long-term loans to finance armaments. But on March 31, 1938, Schacht discontinued the practice of floating short-term notes guaranteed by the Reichsbank for armament expenditures. At the end of 1938, in an attempt to regain control of fiscal policy through the Reichsbank, Schacht refused an urgent request of the Reichsminister of Finance for a special credit to pay the salaries of civil servants which were not covered by existing funds. On January 2, 1939, Schacht held a conference with Hitler at which he urged him to reduce expenditures for armaments. On January 7, 1939, Schacht submitted to Hitler a report signed by the directors of the Reichsbank which urged a drastic curtailment of armament expenditures and a balanced budget as the only method of preventing inflation. On January 19, Hitler dismissed Schacht as president of the Reichsbank. On January 22, 1943, Hitler dismissed Schacht as Reichs Minister without Portfolio because of his "whole attitude during the present fateful fight of the German Nation." On July 23, 1944, Schacht was arrested by the Gestapo and confined in a concentration camp until the end of the war.

It is clear that Schacht was a central figure in Germany's rearmament program, and the steps which he took, particularly in the early days of the Nazi regime, were responsible for Nazi Germany's rapid rise as a military power. But rearmament of itself is not criminal under the charter. To be a crime against peace under Article 6 of the Charter it must be shown that Schacht carried out this rearmament as part of the Nazi plans to wage aggressive wars.

Schacht has contended that he participated in the rearmament program only because he wanted to build up a strong and independent Germany which would carry out a foreign policy which would command respect on an equal basis with other European countries; that when he discovered that the Nazis were rearming for aggressive purposes he attempted to slow down the speed of rearmament; and that after the dismissal of von Fritsch and von Blomberg he participated in plans to get rid of Hitler, first by deposing him and later by assassination.

Schacht, as early as 1936, began to advocate a limitation of the rearmament program for financial reasons. Had the policies advocated by him been put into effect, Germany would not have been prepared for a general European war. Insistence on his policies led to his eventual dismissal from all positions of economic significance in Germany. On the other hand, Schacht, with his intimate knowledge of German finance, was in a peculiarly good position to understand the true significance of Hitler's frantic rearmament, and to realize that the economic policy adopted was consistent only with war as its object.

Moreover Schacht continued to participate in German economic life and even, in a minor way, in some of the early Nazi aggressions. Prior to the occupation of Austria he set a rate of exchange between the mark and the schilling. After the occupation of Austria he arranged for the incorporation of the Austrian National Bank into the Reichsbank and made a violently pro-Nazi speech in which he stated that the Reichsbank would always be Nazi as long as he was connected with it, praised Hitler, defended the occupation of Austria, scoffed at objections to the way it was carried out, and ended with "to our Fuehrer a triple 'Sieg Heil'." He has not contended that this speech did not represent his state of mind at the time. After the occupation of the Sudetenland, he arranged for currency conversion and for the incorporation into the Reichsbank of local Czech banks of issue. On November 29, 1938, he made a speech in which he pointed with pride to his economic policy which had created the high degree of German armament, and added that this armament had made Germany's foreign policy possible.

Schacht was not involved in the planning of any of the specific wars of aggression charged in count two. His participation in the occupation of Austria and the Sudetenland (neither of which are charged as aggressive wars) was on such a limited basis that it does not amount to participation in the common plan charge in count one. He was clearly not one of the inner circle around Hitler which was most closely involved with this common plan. He was regarded by this group with undisguised hostility. The testimony of Speer shows that Schacht's arrest on July 23, 1944, was based as much on Hitler's enmity towards Schacht growing out of his attitude before the war as it was on suspicion of his complicity in the bomb plot. The case against Schacht therefore depends on the inference that Schacht did in fact know of the Nazi aggressive plans.

On this all important question evidence has been given for the prosecution, and a considerable volume of evidence for the defense. The Tribunal has considered the whole of this evidence with great care, and comes to the conclusion that this necessary inference has not been established beyond a reasonable doubt.

Conclusion.—The Tribunal finds that Schacht is not guilty on this indictment and directs that he shall be discharged by the Marshal, when the Tribunal presently adjourns.

DOENITZ

Doenitz is indicted on counts one, two, and three. In 1935 he took command of the first U-boat flotilla commissioned since 1918, became in 1936 Commander of the submarine arm, was made Vice Admiral in 1940, Admiral in 1942, and on January 30, 1943 Commander in Chief of the German Navy. On 1 May 1945, he became the Head of State, succeeding Hitler.

Crimes against peace.—Although Doenitz built and trained the German U-boat arm, the evidence does not show he was privy to the conspiracy to wage aggressive wars or that he prepared and initiated such wars. He was a line officer performing strictly tactical duties. He was not present at the important conferences when plans for aggressive wars were announced, and there is no evidence he was informed about the decisions reached there. Doenitz did, however, wage aggressive war within the meaning of that word as used by the Charter. Submarine warfare which began immediately upon the outbreak of war, was fully coordinated with the other branches of the Wehrmacht. It is clear that his U-boats, few in number at the time, were fully prepared to wage war.

It is true that until his appointment in January 1943 as Commander in Chief he was not an "Oberbefehlshaber." But this statement under-estimates the importance of Doenitz' position. He was no mere army or division commander. The U-boat arm was the principal part of the German fleet and Doenitz was its leader. The High seas fleet made a few minor, if spectacular, raids during the early years of the war but the real damage to the enemy was done almost exclusively by his submarines as the millions of tons of allied and neutral shipping sunk will testify. Doenitz was solely in charge of this warfare.

2.4.

Reconciling Crimes Against Humanity with the Laws of War

Human Rights, Armed Conflict, and the Limits of Progressive Jurisprudence

Payam Akhavan*

Abstract

If conduct is consistent with the laws of war, may it nonetheless constitute crimes against humanity during an armed conflict? Crimes against humanity initially emerged during the World Wars, in order to extend the protection of the laws of war to a perpetrator's co-nationals. This new category initially required a nexus with international armed conflict, but is now an autonomous concept based on human rights law that criminalizes large-scale atrocities in both war and peacetime. Crimes against humanity committed in armed conflict continue to be shaped by the laws of war. There is substantial convergence between the normative core of 'non-derogable' human rights and the minimum humane treatment standards in the Geneva Law. However, there is considerable divergence with respect to combat operations where the Hague Law applies as lex specialis*, displacing certain human rights norms. ICTY jurisprudence demonstrates some of the instinctive tensions inherent in reconciling human rights with armed conflict. A notable instance is the* Gotovina *case, in which the Trial Chamber held that the laws of war do not apply to 'deportation'* qua *crimes against humanity such that there is no distinction between forcible displacement of civilians in occupied territories as opposed to combat operations. The temptation to dilute the laws of war through reclassification of conduct as crimes against humanity should be resisted because it does not necessarily result in increased protection for civilians in times of armed conflict. Utopian jurisprudence that*

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disregards humanitarian law's realistic code of conduct in the name of progress risks making the law irrelevant to military commanders.

1. Introduction

If conduct is consistent with the laws of war, may it nonetheless constitute crimes against humanity during an armed conflict? The relationship between these two categories of offences has far-reaching implications on the evolution and viability of international criminal law. Crimes against humanity initially emerged during the First World War because the laws of war extended protection only to the nationals of opposing belligerent states. The Allied Powers' abortive attempt to criminalize atrocities against Ottoman nationals of Armenian descent in the 1919 Treaty of Sèvres was based on the broad reference to the 'laws of humanity' contained in the Marten's clause of the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land. When it resurfaced in the Charter of the International Military Tribunal after the Second World War, crimes against humanity extended protection to civilian populations irrespective of nationality but still required a nexus with international armed conflict. The subsequent emergence and pervasive influence of human rights norms on contemporary international law ultimately expanded the criminalization of large-scale atrocities beyond war to peacetime situations.

Although now an autonomous concept based on human rights law, crimes against humanity committed in armed conflict continue to be shaped by the laws of war. Despite the significant conceptual differences between these two categories, there is substantial overlap between 'non-derogable' human rights (e.g. right to life, prohibition of torture, etc.) and the core humane treatment standards under the Geneva Law, applicable to persons *hors de combat* 'in the hands' of a party to the conflict. In contrast, the *lex specialis* relationship between human rights and the laws of war is starkly apparent with respect to the Hague Law, applicable to the means and methods of warfare. It is at this juncture that humanitarian considerations collide with the grim realities of military necessity. Even the sacrosanct right to life becomes circumscribed by the right of belligerents to use lethal force to weaken enemy forces, including not only the killing of combatants, but also incidental killing of civilians in limited circumstances.

ICTY jurisprudence demonstrates some of the instinctive tensions inherent in reconciling human rights with armed conflict. Recent decisions reveal a temptation to dilute the laws of war in order to criminalize civilian suffering by invoking the broader concept of crimes against humanity. A notable instance is the *Gotovina* case in which the Trial Chamber held that the distinction between the Geneva and Hague Law does not apply when deportation is charged as a crime against humanity. In other words, unlike the laws of war, when charged as an element of crimes against humanity, deportation is not limited to civilians in occupied territories, but also applies to forced displacement resulting from the conduct of hostilities prior to occupation. Based on this view, a lawful attack that complies with Hague Law principles of distinction and proportionality may still qualify as deportation *qua* crimes against humanity if a military commander simply knew that it would result in displacement of civilians. Although ostensibly progressive, such expansive interpretations undermine the viability of this otherwise unimpeachable norm of international law by effectively criminalizing the unfortunate consequences of military operations. Disregarding the laws of war risks rendering crimes against humanity a legal utopia so divorced from reality that it becomes irrelevant to military commanders acting in good faith in combat situations.

2. Crimes Against Humanity: From the Laws of War to Human Rights

From its inception, crimes against humanity had an intimate but ambiguous relationship with the laws of war. This new concept emerged to criminalize large-scale atrocities not falling within the confines of war crimes but which, prior to the emergence of human rights law, had to be derived from the humanitarian principles inherent in the laws and customs of war. Egon Schwelb observed in 1946 that under the Charter of the International Military Tribunal at Nürnberg, 'notions of "war crimes" and "crimes against humanity" overlap and that most war crimes are also crimes against humanity, while many crimes against humanity are simultaneously war crimes'.[1] Crimes against humanity was distinguished from war crimes primarily by extending protection to civilian populations irrespective of nationality and the related requirement of a factor of scale or gravity that justified this unprecedented intrusion into state sovereignty.

In the process leading to adoption of the Nürnberg Charter, it had become apparent that the laws and customs of war did not cover atrocities where the victims and perpetrators possessed either the same nationality, or the respective nationalities of two or more states that were not belligerents, or if the victims were stateless. This included for instance, the persecution and extermination of Jews from the Axis countries. Egon Schwelb explained the impetus behind crimes against humanity:

> The unprecedented record of crimes committed by the Nazi régime and the other Axis Powers, not only against Allied combatants but also against the civilian populations of the occupied countries and of the Axis countries themselves, made it necessary to provide that these crimes also should not go unpunished.[2]

1 E. Schwelb, 'Crimes Against Humanity', 23 *British Year Book of International Law* (1946) 178–226, at 179–180.

2 *Ibid.*, at 185.

Initial proposals to deal with atrocities not within the purview of war crimes met with resistance. For instance, the British Government was of the view that the UN War Crimes Commission:

> should confine itself to collecting evidence of atrocities of this nature, e.g., those against Jews, only when perpetrated in occupied countries. . . . [a] clear distinction exists between offences in regard to which the United Nations have jurisdiction under International Law, i.e. war crimes, and those in regard to which they had not. Atrocities committed on racial, political or religious grounds in enemy territory fell within the latter category.[3]

In response to such misgivings, Justice Robert H. Jackson of the United States maintained that:

> These principles have been assimilated as a part of International Law at least since 1907. The Fourth Hague Convention provided that inhabitants and belligerents shall remain under the protection and the rule of 'the principles of the law of nations, as they result from the usage established among civilized peoples, from the laws of humanity and the dictates of the public conscience.'[4]

Ultimately, Article 6(c) of the Charter contained a requirement that crimes against humanity be committed 'in execution of or in connection with any crimes within the jurisdiction of the Tribunal', namely, war crimes or crimes against peace. Reflecting the misgivings surrounding this unprecedented intrusion into state sovereignty, Justice Jackson emphasized that:

> the way Germany treats its inhabitants . . . is not our affair any more than it is the affair of some other government to interpose itself in our problems. The reason that this program of extermination of Jews and destruction of the right of minorities becomes an international concern is this: it was part of a plan for making an illegal war.[5]

Thus, in the years immediately preceding the adoption of the 1948 Universal Declaration on Human Rights and the ensuing transformation of state sovereignty, the restriction of crimes against humanity to international armed conflict and its linkage with the established laws and customs of war made its inclusion more palatable to the drafters of the Nürnberg Charter.

Another dimension that distinguished crimes against humanity from war crimes was the requirement of a factor of scale or gravity. Notwithstanding its link with international armed conflict, the UN War Crimes Commission clarified that the underlying basis for inclusion of this crime in the Charter was an

3 Despatch from the British Ambassador (Halifax) to the (US) Secretary of State, 19 August 1944, in *Foreign Relations of the United States*, Diplomatic Papers 1944, Vol. I, General, at 1351, 1352; cited in R.S. Clark, 'Crimes Against Humanity', in G. Ginsburgs and V.N. Kudriavtsev (eds), *The Nuremburg Trial and International Law* (Dordrecht/Boston/London: Martinus Nijhoff, 1990), at 180.

4 Report of Justice Robert H. Jackson to the President of the United States (7 June 1945), reprinted in 39 *American Journal of International Law* (1945), Supplement, at 178.

5 Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials (1947), at 331.

exceptional degree of moral turpitude, justifying an international normative response:

> Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims.[6]

In later years, the ICTY Appeals Chamber in the *Erdemović* case confirmed this conception of the relationship between war crimes and crimes against humanity:

> Whilst rules proscribing war crimes address the criminal conduct of a perpetrator towards an immediate protected object, rules proscribing crimes against humanity address the perpetrator's conduct not only towards the immediate victim but also towards the whole of humankind. . . . Crimes against humanity are particularly odious forms of misbehaviour and in addition form part of a widespread and systematic practice or policy. Because of their heinousness and magnitude they constitute egregious attacks on human dignity, on the very notion of humaneness. They consequently affect, or should affect, each and every member of mankind, whatever his or her nationality, ethnic group and location.[7]

In this respect, crimes against humanity emerged from the humanitarian principles contained in the laws and customs of war, but presaged universal human rights principles that upheld human dignity irrespective of formal requirements, such as nationality or a state of war.

When crimes against humanity resurfaced in Article 5 of the ICTY Statute in 1993, almost 50 years after the Nürnberg Charter, its definition still required a nexus with armed conflict 'whether internal or international in character'. The Statute, drafted by the Secretary-General and adopted by the UN Security Council, reflected a cautious approach that extended the reach of crimes against humanity to non-international armed conflicts, but without altogether severing the link with war. However, the corresponding Article 3 of the ICTR Statute, adopted by the Security Council the following year in 1994, did not contain a similar requirement. The Council's Member States appeared less reticent than the UN Secretariat in dropping this requirement. In reconciling this difference, the ICTY Appeals Chamber in the *Tadić* case remarked that:

> customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law.[8]

During negotiations on the ICC Statute, delegates pointed out that the 'precedent of the statute of ad hoc Tribunal for Rwanda and the recent decision

6 United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the development of the laws of war* (London: H.M.S.O., 1948), at 179.

7 Joint Separate Opinion of Judge McDonald and Judge Vohrah, *Erdemović* (IT-96-22-A), Appeals Chamber, 7 October 1997, § 21.

8 Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1-A), Appeals Chamber, 2 October 1995, § 141.

of the ad hoc Tribunal for the former Yugoslavia in the *Tadic* case' were among the post-Nürnberg developments 'which militated in favour of the exclusion of any requirement of an armed conflict'.[9] Thus, Article 7 of the ICC Statute definitively divorced crimes against humanity from armed conflict, enshrining its autonomy as a concept rooted in human rights.

It is now widely recognized that 'crimes against humanity are no longer linked to the laws of war but rather to human rights law'.[10] ICTY jurisprudence reflects this contemporary incarnation of the Nürnberg Law. In the *Blaskić* case, for instance, the Appeals Chamber considered 'charges of killing and causing serious injury' as persecutions in light of 'the inherent right to life and to be free from cruel, inhuman or degrading treatment or punishment . . . recognized in customary international law and . . . embodied in Articles 6 and 7 of the ICCPR, and Articles 2 and 3 of the ECHR'.[11]

Without a link to armed conflict, crimes against humanity are tantamount to the categorical criminalization of massive human rights violations. This new characterization, however, does not render the laws of war irrelevant. On the contrary, the autonomy of crimes against humanity as a broad concept linked with human rights provides a clearer comparative vantage point from which the co-existence and interrelationship between the norms applicable in peacetime and wartime can be assessed.

3. Laws of War as *Lex Specialis*

The relationship between international human rights and humanitarian law is an important point of departure in assessing the contours of crimes against humanity during armed conflict. Leading commentators point to the convergence of these two bodies of law, but also recognize their fundamental conceptual differences. Louise Doswald-Beck and Sylvain Vité observe that: 'International humanitarian law is increasingly perceived as part of human rights law applicable in armed conflict'.[12] They suggest that: 'The major legal difference is that humanitarian law is not formulated as a series of rights, but rather as a series of duties that combatants have to obey'.[13] René Provost similarly maintains that: 'Because the substantive norms they contain are in many ways similar or related — for example both provide a protection against torture — there seems to be fertile ground for comparison and perhaps cross-pollination between the two systems'.[14] He concludes, however, that

9 Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, GAOR, 50th Sess., Supp. No. 22, UN Doc. A/50/22 (1995), at § 79.

10 K. Ambos and S. Wirth, 'The Current Law of Crimes Against Humanity: An analysis of UNTAET Regulation 15/2000', 13 *Criminal Law Forum* (2002) 1–90, at 24.

11 Judgment, *Blaskić* (IT-95-14-A), Appeals Chamber, 29 July 2004, § 143.

12 L. Doswald-Beck and S. Vité, 'International Humanitarian Law and Human Rights Law', 293 *International Review of the Red Cross* (1993) 94–119, at 94.

13 *Ibid.*, at 104.

14 R. Provost, *International Human Rights and Humanitarian Law* (Cambridge: Cambridge University Press, 2002), at 9.

'there exists a real and meaningful difference between the normative frameworks of human rights law and humanitarian law. This difference rests on the fact that human rights law is centred, indeed built, on the granting of rights to the individual, while humanitarian law is focused on the direct imposition of obligations on the individual.'[15] Hans-Joachim Heintze also writes that 'there is a convergence between the protection offered by human rights law and that of international humanitarian law. Both bodies of law can be applied in armed conflicts, in order to achieve the greatest possible protection in the sense of the Martens Clause.'[16]

Commentators rightfully explain that 'human rights law is not entirely displaced and can at times be directly applied in situations of armed conflict'.[17] There is support for this proposition in the *Construction of a Wall Advisory Opinion*, where the International Court of Justice held that:

> the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.[18]

This opinion has led some commentators to conclude that:

> la Cour ne privilégie plus le recours exclusive au droit humanitaire par rapport aux droits de l'homme. Elle examine les dispositions des deux corps de normes de manière égale . . . . On assiste ainsi à un glissement de la théorie complémentariste à la théorie intégrationniste: la Cour insiste plutôt sur l'existence d'un noyau dur commun au droit humanitaire et aux droits de l'homme.[19]

While an exhaustive assessment of all situations is beyond the scope of the present discussion, it is sufficient to emphasize that the convergence between the normative core of human rights and humanitarian law is greatest with respect to the fundamental protections enshrined respectively in the minimum humane treatment standards of Article 3 common to the 1949 Geneva Conventions and the non-derogable rights under Article 4 of the ICCPR. These non-derogable rights include the right to life, the prohibition of torture and slavery, the *nullum crimen sine lege* principle, and freedom of conscience.

15 *Ibid.*, at 13.

16 H.-J. Heintze, 'On the relationship between human rights law protection and international humanitarian law', 86 *International Review of the Red Cross* (2004) 789–814, at 812.

17 N. Lubell, 'Challenges in applying human rights law to armed conflict', 87 *International Review of the Red Cross* (2005) 737–754, at 737.

18 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, International Court of Justice, 9 July 2004, available online at http://www.icj-cij.org/docket/files/131/1671.pdf (visited 9 November 2007), § 106.

19 A. Guellali, 'Lex specialis: Droit international humanitaire et droits de l'homme: leur interaction dans les nouveaux conflits armés,' 111 *Revue Générale de Droit International Public* (2007) 539–574, at 546.

There is substantial convergence between these core rights and the broad minimum humane treatment standards contained in the Geneva Law. It cannot be overlooked however, that there is considerable divergence once we move away from the humane treatment of persons *hors de combat* who are 'in the hands of' a party to the conflict, and enter the more volatile domain of combat operations. It is here that the relationship of the laws of war as *lex specialis* displacing certain human rights norms becomes forcefully apparent.

It bears emphasizing that despite the desirability of convergence between human rights and humanitarian law, the classical concept of military necessity is still at the foundation of the laws of war. Doswald-Beck and Vité point out that despite the important contribution of Protocol I of 1977 to 'the careful delimitation of what can be done during hostilities in order to spare civilians as much as possible . . . [t]he balance between military necessities and humanitarian needs that was explained in the [1863] Lieber Code continues to be at the basis of this law, and the States that negotiated this treaty had this firmly in mind so as to codify a law that was acceptable to their military staff'.[20]

The application of crimes against humanity in peacetime as distinct from wartime mirrors some of the tensions between human rights and humanitarian law. The enumerated acts or *actus reus* of crimes against humanity (e.g. murder, torture, etc.) are largely defined by reference to human rights law. In armed conflict, however, the laws of war apply as *lex specialis*. For instance, if civilians under the control of a party to the conflict are arbitrarily killed, there is substantial convergence between the applicable human rights and humanitarian law norms. However, the situation is considerably different if civilians are killed in a military attack. In the *Nuclear Weapons Advisory Opinion* the International Court of Justice explained that although:

> . . . the right not arbitrarily to be deprived of one's life applies also in hostilities . . . [t]he test of what is an arbitrary deprivation of life . . . then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant [on Civil and Political Rights], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[21]

Similarly, in order to determine whether civilian deaths in hostilities constitute the *actus reus* of 'murder' as an element of crimes against humanity, the applicable *lex specialis* would be the laws of war. In other words, if civilian deaths were incidental to a military attack that was neither indiscriminate nor disproportionate contrary to the laws of war, the constituent elements of 'murder' would not be satisfied and the corresponding crime against humanity would not be consummated.

20 Doswald-Beck and Vité, *supra* note 12, at 105.

21 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, International Court of Justice, 8 July 1996, available online at http://www.icj-cij.org/docket/files/95/7495.pdf (last visited 9 November 2007), § 25.

It should be noted that despite its human rights pedigree, the relationship between crimes against humanity and the laws of war is somewhat more complex than that pertaining to human rights and humanitarian law. Although the enumerated *actus reus* of murder, torture, etc., can be assimilated to particular human rights norms, the distinguishing feature of crimes against humanity is the *chapeau* requirement that such acts be committed as part of a 'widespread or systematic attack directed against a civilian population' as stipulated under Article 7 of the ICC Statute. As the International Law Commission states:

> The hallmarks of such crimes lie in their large-scale and systematic nature [and the] particular forms of unlawful acts (murder, enslavement, deportation, torture, rape, imprisonment, etc.) are less crucial to the definition [than] the factors of scale and deliberate policy.[22]

Thus, although the 'material element' or *actus reus* of crimes against humanity is murder, torture, etc., ICTY jurisprudence indicates a requirement of two distinct mental elements:

> The requisite *mens rea* for crimes against humanity appears to be comprised by: (1) the *intent* to commit the underlying offence [e.g., murder, etc.], combined with (2) knowledge of the broader context in which that offence occurs.[23]

It is in this respect that the relationship between crimes against humanity and the laws of war is more complex than that pertaining to human rights law. Since there is a broader *chapeau* requirement, '[t]he prohibition of murder as a crime against humanity is *lex specialis* in relation to the prohibition of murder as a war crime [because] murder as a crime against humanity requires proof of elements that murder as a war crime does not require (the offence must be part of a systematic or widespread attack on the civilian population)'.[24] Conversely, the laws of war is *lex specialis* in relation to the *actus reus* of 'murder' *qua* crimes against humanity under Article 5 of the ICTY Statute in so far as an accused may be convicted 'of violating the prohibition of murder as a crime against humanity only if it finds that the requirements of murder under both Article 3 [laws and customs of war] and under Article 5 are proved'.[25]

In this respect, the laws of war also profoundly shape the *chapeau* requirement of crimes against humanity. In the *Krnojelac* case, for instance, the Trial Chamber emphasized that while the general requirement of an 'attack' under Article 5 of the ICTY Statute is distinct from the concept of 'armed conflict':

> [t]hat is not to say that, in the context of an armed conflict, the laws of war play no role in the Tribunal's determination as to whether the attack was, or was not, 'directed against any

22 See Report of the International Law Commission on the work of its forty-third session (1991), GAOR, 46th Sess., Supp. No. 10, UN doc. A/46/10, at 265.

23 Judgment, *Kupreskić et al.* (IT-95-16), Trial Chamber, 14 January 2000, § 556 (emphasis in original).

24 *Ibid.*, § 701.

25 *Ibid.*, § 704.

> civilian population'. On the contrary, that body of law plays an important part in the assessment of the legality of the acts committed in the course of an armed conflict and whether a civilian population may be said to have been targeted as such.[26]

Similarly, in the *Galić* case, the Trial Chamber concluded that 'when considering the general requirements of Article 5, the body of laws of war plays an important part in the assessment of the legality of the acts committed in the course of an armed conflict and whether the population may be said to have been targeted as such.'[27] The ICTY Appeals Chamber further confirmed in the *Kunarac* case that '[t]o the extent that the alleged crimes against humanity were committed in the course of an armed conflict, the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed in its midst.'[28] These precedents reflect a recognition that in situations of armed conflict, crimes against humanity are defined in significant measure by the laws of war.

While crimes against humanity in peacetime constitute massive human rights violations, in armed conflict they constitute massive violations of the laws of war. In the *Tadić* case, the ICTY Appeals Chamber recognized that by including both classes of crimes, the drafters of the Statute were 'illustrating their intention that those *war crimes* which, in addition to targeting civilians as victims, present special features such as the fact of being part of a widespread or systematic practice, must be classified as crimes against humanity and deserve to be punished accordingly'.[29] In other words, since 'crimes against humanity fall within the [ICTY] Tribunal's jurisdiction only when committed in armed conflict, the difference between the values protected by Article 3 and Article 5 would seem to be inconsequential'.[30]

4. Divorcing Deportation from the Laws of War in the *Gotovina* Case

ICTY jurisprudence is not entirely consistent on the relationship between crimes against humanity and the laws of war. There is an occasional tendency to consider these two categories as wholly separate and independent categories and to thereby justify expansive interpretations of crimes against humanity irrespective of the requirements of humanitarian law. Perhaps the most graphic illustration is the *Gotovina* case. In that case, the Trial Chamber held that: 'The inclusion of separate Articles covering crimes against humanity and war crimes [under the ICTY Statute] is clearly not a matter of coincidence,

26 Judgment, *Krnojelac* (IT-97-25), Trial Chamber, 15 March 2002, § 54.
27 Judgment, *Galić* (IT-98-29), Trial Chamber, 5 December 2003, § 144.
28 Judgment, *Kunarac* (IT-96-23), Appeals Chamber, 12 June 2002, § 91.
29 Judgment, *Tadić* (IT-94-1), Appeals Chamber, 15 July 1999, § 286 (emphasis added).
30 *Kupreskić*, *supra* note 23, § 703.

but indicates that these two regimes exist separately and independently.'[31] It concluded that while:

> it is well established in public international law that rules of international humanitarian law serve, in times of armed conflict, as a *lex specialis* in respect of the interpretation of the limits of prohibitions contained in instruments safeguarding the respect for human beings. . . . [A]ny reference to the *lex specialis* principle with regard to war crimes and crimes against humanity in the context of the jurisdiction of the Tribunal, necessarily differs from this situation.[32]

In *Gotovina*, the Trial Chamber was addressing the question of whether the elements of the *actus reus* of 'deportation' and 'forcible transfer' as a crime against humanity differed from the corresponding war crime. In particular, the indictment charged the defendant with deportation and forcible transfer as crimes against humanity (but not as war crimes) for the forced displacement through shelling *prior* to occupation of the territory in which such civilians were situated. Under the laws of war, the crime of deportation is part of the Geneva Law and thus only applies to civilians 'in the hands of' a party to the conflict. It does not apply to forced displacement of civilians during the conduct of hostilities prior to occupation, which falls within the Hague Law. Article 49 of Geneva Convention IV provides that: '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'.[33] Similarly, Article 85(4)(a) of Protocol I prohibits 'deportation or transfer of all or parts of the population of *the occupied territory* within or outside this territory, in violation of Article 49 of the Geneva Convention'.[34] Rule 129 of the ICRC Study on Customary International Humanitarian Law[35] also contains a requirement that persons deported be situated in occupied territory. Under customary law, as reflected in Article 42 of the 1907 Hague Convention, '[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.' The question before the Trial Chamber in *Gotovina* was whether the elements of deportation or forcible transfer differed when charged as crimes against humanity rather than war crimes such that the Prosecutor need not establish that forcible displacement of civilians took place from occupied territory. This question was particularly important because the Indictment alleged that pre-occupation hostilities displaced all but 'a small fraction'[36] of the civilian population such that restriction of the crimes against humanity

31 Decision on Several Motions Challenging Jurisdiction, *Gotovina* (IT-06-90-PT), Trial Chamber, 19 March 2007, § 26.
32 *Ibid.*, § 24.
33 Emphasis added.
34 Emphasis added.
35 J.-M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. I: Rules (Cambridge: Cambridge University Press, 2005).
36 Prosecution Pre-Trial Brief, *Gotovina* (IT-06-90-PT), 16 March 2007, § 11.

deportation charges to occupied territory would largely negate the prosecution's factual case.

The Trial Chamber ruled that 'the Gotovina Defence contention regarding war crimes as the *lex specialis* in relation to the elements of crimes against humanity is entirely unsupported and is based upon a misunderstanding of the co-existence of and relationship between war crimes and crimes against humanity in the jurisprudence of this Tribunal'.[37]

In holding specifically that deportation *qua* crimes against humanity is not restricted to occupied territory as required by the laws of war, the *Gotovina* Trial Chamber noted that 'nothing in the jurisprudence of the Tribunal supports the Defence contention that 'occupation' is an element of the crime of deportation.'[38] This was based on the Appeals Chamber holding in the *Stakić* case that the *actus reus* of the crime of deportation is 'the forced displacement of persons by expulsion or other forms of coercion from the area in which they are lawfully present, across a *de jure* border or, in certain circumstances, a *de facto* border, without grounds permitted under international law'.[39] The ruling in the *Stakić* case was concerned with whether deportation under Article 5 of the ICTY Statute required displacement across an international boundary and did not address the question of occupation directly.[40] However, it did refer to the 'customary international law' on deportation as 'illustrated in Article 49 of Geneva Convention IV'.[41] Furthermore, ICTY jurisprudence provides unambiguous authority indicating that in armed conflict, the *actus reus* of deportation as a crime against humanity is based on Article 49(1) of Geneva Convention IV. In *Krnojelac*, the Trial Chamber held that:

> Deportation is clearly prohibited under international humanitarian law. While some instruments prohibit deportation as a war crime, it is also prohibited specifically as a crime against humanity, and it is enumerated as such under the [ICTY] Statute. [. . .] *The content of the underlying offence, however, does not differ whether perpetrated as a war crime or as a crime against humanity*.[42]

The Appeals Chamber in *Krnojelac* further confirmed the applicability of Article 49(1) to deportation *qua* crime against humanity:

> The Geneva Conventions are considered to be the expression of customary international law. Article 49 of the Fourth Geneva Convention prohibits displacement to another state, within or from occupied territory. It provides that: [i]ndividual 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 motives.' Moreover, Article 85 of Additional Protocol I prohibits '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 part of the population of the occupied territory within

37 *Gotovina, supra* note 31, § 28.
38 *Ibid.*, § 55.
39 Judgment, *Stakić* (IT-97-24-A), Appeals Chamber, 22 March 2006, § 278.
40 *Ibid.*, §§ 265–321.
41 *Ibid.*, § 300.
42 *Krnojelac, supra* note 26, § 473 (emphasis added).

> or outside this territory in violation of Article 49 of the Fourth Convention.' Furthermore, Article 17 of Additional Protocol II to the Geneva Conventions explicitly prohibits the forced displacement of the population within or outside a country in which an internal armed conflict has broken out.[43]

Notwithstanding this contrary authority, the *Gotovina* Trial Chamber's decision is all the more problematic because of its reasoning as to why the laws of war do not apply to the *actus reus* of deportation under Article 5. The Chamber held that:

> as to the argument that the victims of deportation must be in the hands of a party to the conflict, the Trial Chamber recalls that crimes against humanity must be 'directed against any civilian population'. Article 5 of the Statute therefore applies to 'any' civilian population including one within the borders of the state of the perpetrator. There is no additional requirement in the jurisprudence that the civilian be in the power of the party to the conflict.[44]

The Chamber is clearly confusing the distinction between protection of civilians in occupied territory as distinct from combat situations, with the nationality of such civilians. The reference to 'any' civilian population is merely a relic of Article 6(c) of the Nürnberg Charter, which extended crimes against humanity to all victims irrespective of their nationality. It has no bearing whatsoever on the distinction between the Geneva Law and the Hague Law. Civilians in occupied territories and combat situations may possess the same nationality but be subject to different legal régimes within humanitarian law.

Beyond the abstract relationship between crimes against humanity and humanitarian law, the significance of divorcing deportation from the laws of war in the *Gotovina* case becomes starkly apparent by revisiting the distinction between the Geneva and Hague Law, briefly discussed above. The International Court of Justice has explained that the Hague Law 'fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and means of injuring the enemy in an international armed conflict', whereas Geneva Law 'protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities'.[45] The Court recognizes that 'provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law'.[46] Nonetheless, the distinction between these two legal regimes within a unified body of humanitarian law reflects the very real and substantial difference between the contexts of occupation and combat, respectively. The minimum Geneva Law standards applicable to the humane treatment of persons in occupied territory or otherwise in the power of a party to a conflict are absolute and admit of no exceptions. As discussed earlier, they are in this respect highly

43 Judgment, *Krnojelac* (IT-97-25-A), Appeals Chamber, 17 September 2003, § 220.
44 *Gotovina, supra* note 31, § 56.
45 *Nuclear Weapons, supra* note 21, § 75.
46 *Ibid.*

similar to the core 'non-derogable' human rights under the ICCPR. In contrast, the principles of distinction and proportionality under the Hague Law apply to combat situations where there is considerable complexity and ambiguity.

As previously mentioned, the implications of the distinction between the Geneva and Hague Law are forcefully demonstrated with respect to the right to life. The International Court of Justice recognized in the *Nuclear Weapons Advisory Opinion* that this fundamental human right is qualified by the laws of war in a situation of hostilities. Consider for instance, that the ICTY Prosecutor decided not to initiate an investigation concerning alleged humanitarian law violations by NATO forces during the 1999 Kosovo aerial bombardment campaign despite the killing of 495 civilians and the wounding of 820.[47] Had those civilians been 'in the hands of' NATO forces within the meaning of the Geneva Law, such deaths and injuries would most certainly have given rise to prosecutions. Therein lies the significance of diluting the laws of war by considering crimes against humanity as a wholly separate and independent category, as suggested by the *Gotovina* case.

With respect to deportation, a useful illustration of the occupation/combat distinction is the ICRC Commentary to Article 51(2) of Protocol I prohibiting acts intended to spread terror among the civilian population. The Commentary recognizes the central role that military necessity plays in determining whether hostilities in the context of spreading terror are unlawful or not:

> there is no doubt that acts of violence related to a state of war almost always give rise to some degree of terror among the population . . .. It also happens that attacks on armed forces are purposely conducted brutally in order to intimidate the enemy soldiers and persuade them to surrender. This is not the sort of terror envisaged here. This provision is intended to prohibit acts of violence the primary purpose of which is to spread terror among the civilian population without offering substantial military advantage.[48]

In other words, if a brutal military attack is aimed primarily at intimidating enemy forces and offers substantial military advantage, it is deemed to be lawful even if it spreads terror among the civilian population. Similarly, civilians fleeing lawful bombardment by enemy forces attempting to conquer a territory may be said to have been forcibly displaced under coercive circumstances. But the Hague Law allows for such incidental displacement so long as the primary purpose is to gain a substantial military advantage in accordance with the principles of distinction and proportionality. It is for this reason that the Geneva Law crime of deportation is restricted to forced displacement from occupied territories where circumstances of combat do not apply.

47 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, available online at http://www.un.org/icty/pressreal/nato061300.htm (visited 9 November 2007), §§ 90–91.

48 International Committee of the Red Cross, Commentary to 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, available at http://www.icrc.org/ihl.nsf/COM/470-750065?OpenDocument (last visited 9 November 2007), at § 1940.

The crime against humanity of deportation divorced from the laws of war has far-reaching implications on legal regulation of hostilities. The *Gotovina* Trial Chamber referred to the *Stakić* case definition of deportation as 'the forced displacement of persons by expulsion or other forms of coercion from the area in which they are lawfully present'[49] and interpreted its silence on occupation as dispensing with this requirement, despite authority to the contrary. The implications of this interpretation can be illustrated by the *mens rea* standard enunciated in the *Milošević* case. In that case, the Trial Chamber held that 'in relation to forcible transfer or deportation there must be evidence of an intent to transfer the victim from his home or community; it must be established that the perpetrator either directly intended that the victim would leave *or that it was reasonably foreseeable that this would occur as a consequence of his action*'.[50] If this conception of forcible transfer or deportation does not rest on the laws of war, it could result in the effective criminalization of combat. Consider for instance, the case of a military commander embarking on a campaign of bombardment against enemy forces who issues an 'advance warning' to civilians that may be affected, consistent with the obligation to take precautions in attack under Article 57(2)(c) of Protocol I. Following this warning, the armed forces engage in intensive bombardment of enemy forces which offers substantial military advantage, while doing everything feasible to ensure that the objects attacked are neither civilians nor civilian objects. It may still be 'reasonably foreseeable' to the military commander that despite all precautions, both the advance warning and the terror that combat operations give rise to among the civilian population, including the prospect of incidental casualties, will result in widespread forcible displacement, possibly for a significant time period, depending on the outcome of the war. In *Stakić*, 'The Appeals Chamber considers that the *mens rea* of the offence does not require that the perpetrator intend to displace the individual across the border on a permanent basis'.[51] So even temporary forcible displacement may give rise to criminal liability. Under the laws of war, the military commander would be exonerated from liability because of compliance with the Hague Law. However, if the crime against humanity of deportation or forcible transfer disregards the humanitarian law applicable to the conduct of hostilities as suggested by *Gotovina*, that same military commander could be held criminally liable simply by re-categorization of his conduct. Such an outcome would be logically absurd not to mention the miscarriage of justice that it would occasion. Furthermore, such a utopian standard would undermine the viability of crimes against humanity by disregarding the central role that military necessity has played in making humanitarian law a realistic framework for regulating the unfortunate but inescapable violence of warfare.

49 *Stakić*, *supra* note 39, § 278.
50 Decision on Motion for Judgement of Acquittal, *Milošević* (IT-02-54-), Trial Chamber, 16 June 2004, § 78 (emphasis added).
51 *Stakić*, *supra* note 39, § 278.

5. Conclusions

ICTY jurisprudence indicates that whether or not victims are 'protected persons' under the Geneva Law depends on when 'they fell into the hands of the occupying forces. The exact moment when a person or area falls into the hands of a party to a conflict depends on whether that party has effective control over an area'.[52] The issue is not whether forced displacement takes place through shelling or more directly at gunpoint, but whether a belligerent has effective control over an area. Where a belligerent is engaged in combat and territory remains to be occupied, different considerations apply in determining whether forced displacement should be criminalized.

There is no suggestion that there should be a normative loophole that would justify forcible displacement of civilians in hostilities. The point is that such conduct must be assessed differently during occupation as distinct from combat. The ICRC Study on Customary International Humanitarian Law recognizes in relation to deportation that 'ethnic cleansing' aims at changing the demographic composition of a territory: 'In addition to displacement of the civilian population of a territory, this can be achieved *through other acts* which are prohibited in and of themselves *such as attacks against civilians*',[53] which is part of the Hague Law. Restricting the scope of deportation to protected persons in occupied territory does not create a normative lacuna that would leave forced displacement through shelling of civilians unpunished. It would merely assess criminal liability for such conduct based on Hague Law principles of distinction and proportionality rather than the more exacting standards applicable to civilians who are in the hands of a belligerent party in occupied territory.

The temptation to dilute the laws of war through reclassification of conduct as crimes against humanity should be resisted because it does not necessarily result in increased protection for civilians in times of armed conflict. The laws of war are the result of a venerable tradition of reconciling considerations of humanity with military necessity. They are considered as a realistic code of conduct for military commanders acting in good faith and inclined to sparing non-combatants to the extent possible from the inevitable horrors of war. A legal utopia that criminalizes incidental suffering in war undermines this normative edifice and risks making the law redundant to those confronting the grim reality of warfare. As the former Senior Legal Advisor to the ICTY Prosecutor's Office has recognized '[w]e do not contribute to the viability of IHL by indulging in creative reclassification so that an act which is regarded from one perspective as lawful can be regarded as unlawful because we changed the label' (i.e. from war crimes to crimes against humanity).[54] As the *Galić* court observed, if the Hague Law is disregarded in armed conflict, 'unintended

52 Opinion and Judgment, *Tadić* (IT-94-1), Trial Chamber II, 14 July 1997, § 580.

53 *Supra* note 35, at 461–462 (emphasis added).

54 W.J. Fenrick, 'Crimes in Combat: The Relationship between Crimes Against Humanity and War Crimes', available at: http://www.icc-cpi.int/library/organs/otp/Fenrick.pdf (last visited 9 November 2007).

civilian casualties resulting from a lawful attack on legitimate military objectives would amount to a crime against humanity under Article 5 and lawful combat would, in effect, become impossible.'[55]

A puritanical viewpoint would hold that war is itself a violation of human rights, and that crimes against humanity, being rooted in that body of law, should be a vehicle for gradual dilution of the exemptions and justifications for armed force long recognized by military necessity. Until the prohibition against war becomes a reality, however, utopian jurisprudence that disregards the imperatives of humanitarian law in the name of progress will only dissipate what remains of chivalry and professional pride among the world's armed forces.

55 *Galić*, *supra* note 27, § 144 (emphasis added).

2.5.

INTERNATIONAL CRIMINAL LAW

Second Edition

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OXFORD

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Felix Schwittkowski (on alternative charges).[13]

Finally, the judgments of international courts must provide the legal reasons for the court's findings. These courts must set out the grounds on which they have appraised the available evidence in such a manner as to reach the conclusion that the accused is guilty beyond reasonable doubt of the crimes charged. The need for courts' reasons constitutes an important safeguard for the rights of the accused; it enables him to appeal against any conviction he may consider to be based on an erroneous evaluation of the evidence leading to a miscarriage of justice.[14]

18.4 THE PRINCIPLE OF FAIR AND EXPEDITIOUS TRIAL

That trials must be fair is by now a universally accepted principle of international law. It was laid down in human rights treaties (for instance, the UN Covenant on Civil and Political Rights (Articles 14(1) and 26) and in the European Convention on Human Rights (Article 6) and the American Convention on Human Rights (Article 8)), with regard to national trials. International case law, in particular that of the European Court

was unnecessary for the Prosecution to proceed further' (at 164). He added that, if however the Court felt 'that there is any possibility of there having been any injustice to the Appellant' he would not resist an order for some or all of the charges to be tried. The Court of Appeal held that the trial judge had been right in pronouncing on only two charges: 'After the convictions on the 1st and the 3rd charges it would have been unnecessary and almost inhumane to have gone on with a long string of capital charges; the Defence had no right to demand that the Prosecution should have gone on further' (at 164). In the Court's view, the defence counsel should have made a complete defence in respect of each of the 16 charges. The Court however added: 'On the other hand, the Court is sensible to the difficulties in which the Defence was placed, and we feel that, if there is any likelihood of a miscarriage having occurred, we will do what we can to cure it, whether or not there was any technical mistake on the part of the Defence [...] we feel that it would be more satisfactory if the Defence were allowed to have some of the other charges tried, as has been requested' (at 166). The Court therefore adjourned the appeal *sine die* and remitted the case to the trial judge.

[13] The appellant had stabbed a Norwegian officer in a café in Flensburg. He had been charged with assaulting a member of the Allied Forces in Germany contrary to a Military Government Ordinance, and on an alternative charge with causing dangerous bodily injury, contrary to the German Criminal Code. The trial judge found that the accused did not know that the man he had stabbed was a Norwegian officer, and convicted him on the second charge, adding, 'We do not think that if charges are framed as alternatives there should be conviction under both'; he consequently pointed out that there would be no verdict on the first charge, 'but it will of course remain on the Record' (at 20–2). The Court of Appeal held instead that, 'In a case where there are alternative charges, if a Court finds the necessary facts proved which would justify a conviction on each of the alternative charge (*sic*), we consider that it is a proper course to convict on one charge, but to record no formal finding in respect of the other; should an Appellate Court subsequently find it necessary to quash the conviction on the one charge, it would then be open to that Court, in a case where all the necessary elements constituting the alternative offence have been clearly stated by the Trial Court to have been proved, to substitute a conviction on that alternative charge. If, however, as in the present case, the Court finds that a material element constituting the offence has not been proved, we consider that the accused is entitled to a formal finding of not guilty in respect of the charge which has not been proved' (at 22).

[14] In *Kupreškić and others* (AJ), the ICTY AC found that the appraisal of the evidence by the TC had been so fallacious as to generate a miscarriage of justice (§§21–76).

of Human Rights, has upheld and spelled out the principle.[15] The principle has then come to acquire a fundamental value also with regard to international proceedings. It has been laid down in various international instruments establishing international criminal tribunals[16] and has been upheld by case law.[17] It seems indisputable that by now it belongs to the category of customary norms of international law. Arguably the principle is even endowed with the force of a peremptory norm (*jus cogens*); that is, may not be derogated from by treaty; this proposition, absent state practice and case law on this specific issue, seems nevertheless warranted by the insistence of all states on the importance of fair and expeditious trials.

The principle is articulated into three main standards: equality of arms; publicity of proceedings; and expeditiousness of proceedings.

18.4.1 EQUALITY OF ARMS

There are two different notions of equality of arms.

First, there is the concept developed in the case law of the European Court of Human Rights over the years. It implies that the accused may not be put at a serious procedural disadvantage with respect to the prosecutor. This applies to the accused only: human rights treaties do not grant the prosecutor the right to be put on a par with the defence. On the other hand, human rights treaties do not forbid, and sometimes even require, the accused to be put in a 'better' or more advantageous position than the prosecution in order to preserve an overall balance in the proceedings (the prosecutor normally being better equipped than the defence for the collection of evidence).

Secondly, equality of the parties is an essential ingredient of the adversarial structure of proceedings, based on the notion of the trial as a contest between two parties. Under this approach, it is indispensable for both parties to the proceedings to have the same rights; otherwise, there is no fair fight between the two 'contestants', and the spectators will not be convinced by the outcome. Here, fairness works both ways and therefore also the prosecutor is entitled not to be put in a disadvantageous position.

[15] See, in particular, such cases as *Artico* (§32), *Barberà, Messegué and Jabardo* (§67), *Edwards* (§36), *Raffineries grecques* (§49), including the more recent *Birutis and others* (§§26–35) and *Beckles* (§§48–66).

The requisites of a fair trial in international law were discussed, with regard to war crimes, by the Supreme Court of Norway in *Latza and others* (at 52–85).

See the Charter of the IMT (Article 16) and that of the IMTFE (Article 9); it is set forth in the Statutes of the ICTY (Article 21(2)), the ICTR (Article 20(2)), and the ICC (Article 67, also on the rights of the accused).

[16] See, for instance, Article 21 of the ICTY Statute; Article 20 of the ICTR Statute; and Articles 64, 66, and 67 of the ICC Statute; Article 17 of the SCSL Statute; and Articles 2 and 6 of the ETSPs Regulation 2000/30 as amended by Regulation 2001/15.

[17] For instance, see ICTY, *Tadić, Decision on the Prosecution's Motion requesting Protective Measures for Witness R*, at 4; *Brđanin, Decision on Third Motion by Prosecution for Protective Measures*, §13; *Jelisić*, AJ, at §27; *Kraijsnik, Decision on Prosecutions' Motion for Judicial Notice of Adjudicated Facts and Admission of Written Statements Pursuant to Rule 92bis*, §20; SCSL, *Brima and others, Decision on the Prosecution's Motion for Concurrent Hearing of Evidence Common to Cases*, §§35, 47.

Similar worries do not exist in inquisitorial systems of justice, where proceedings are conceived of as an 'official inquiry'.[18]

Here, I shall focus on the first notion of equality of arms. It acquires particular importance in cases concerning international crimes. Since these crimes are complex, may involve multiple defendants, the evidence may be scattered over many countries and the legal issues at stake may prove complicated, it is crucial for the defendant fully to exercise a host of fundamental rights and in particular to be assisted by competent counsel or even a robust team of such counsel.[19]

In light of the notion of equality of arms under discussion, the defence must be ensured the following:

1. The defendant is entitled to know full particulars specifying the charges preferred against him in the indictment.

2. In addition, within the shortest delay, he has the right to examine the evidence gathered by the prosecution in support of the charges. The 'discovery' process is regulated in detail so as to guarantee the defence as far as possible. The 'disclosure' of this evidentiary material must be done by the prosecutor within a set time-period (30 days after the initial appearance of the accused, under the Rules of the ICTY and ICTR); in addition, no later than 60 days before the date set for trial, the prosecutor must communicate to the defence 'copies of the statements of all witnesses whom the Prosecutor

[18] It would seem that there is some confusion over the two concepts of procedural equality and some misunderstanding of the case law of the European Court of Human Rights in the case law of the ICTY, e.g. with regard to the admissibility of evidence and to disclosure of evidence. For instance, in *Zlatko Aleksovsi* (*Decision on Prosecutor's Appeal on Admissibility of Evidence*) (§§22–8), the AC refused to apply more lenient standards of admissibility to (hearsay) evidence presented by the defence, stating that the prosecution is also entitled to a fair trial within the meaning of human rights conventions. This confusion in case law may be due to the fact that the two different conceptions of equality may, in certain situations, clash.

On the notion that the excessively succinct and summary nature of many defence witness statements violated the principle of equality of arms, see the ICTY decision in *Kupreškić and others* of 11 January 1999, at 2.

[19] The question may also arise before national courts dealing with international crimes. It bears mentioning in this respect the decision of the Hague Court of Appeal in *van Anraat*. The defence had claimed that the principle of equality of arms had been breached, for their financial means in the case had been largely insufficient (the defendant was assisted by his two counsels on the basis of assignment of legal assistance). The defence claimed that the lack of financial means was serious because the case concerned offences allegedly committed approximately 20 years earlier in an other part of the world with a totally different culture and because the investigation had been carried out in many countries all over the world; for that reason, the defence had not had a reasonable chance to conduct an independent investigation. The Court dismissed the claim, noting that the defence counsel had had ample opportunity to make investigations and develop their legal points. The Court conceded that 'the present criminal case has exceptional proportions, partly because of its international dimensions and the fact that the offences (serious international crimes) would have taken place decades ago and mainly in a non-European country. In hearing such a case, especially when the police and the Public Prosecution Service apparently have ample (extra) financial means available for the execution of their tasks, one should make sure that the defence does not end up in a relatively disadvantageous position. This could be true if the present rules for financed legal aid should not acknowledge the special nature of this case. According to the Court, from this special nature arises the need for a defence carried out by two counsels working closely together, which indeed they did, also during the hearings. Moreover the defence brought forward, in general terms, a number of other aspects that hindered them in the performance of their duties, for lack of financial room' (§6.1).