1 Legal Nature

> Notwithstanding the marvelous accomplishments of human genius, the veneer of human civilization remains thin. Scratch its surface, and atavism appears. History demonstrates that all it takes for human atrocities is for a few to initiate the trickle down effect, and for the many to remain passive.
>
> M. Cherif Bassiouni

Introduction

The past century witnessed more people killed in various types of conflicts and regime victimization than has ever occurred at any other point in the history of mankind.[1] Most of the victimization falls within the meaning of crimes against humanity (CAH).

The origin of the term "crimes against humanity" can be traced back to a joint declaration of the French, British, and Russian governments, dated May 24, 1915, that addressed the World War I-era crimes committed by the Ottoman Empire against its Armenian population. An estimated twenty million people were killed in World War I. Most of the casualties were combatants, and civilian deaths, for the most part, were unintended consequences of war.[2] The situation in Turkey stood out, as it was a massacre of an estimated 200,000 to 800,000 Armenian civilians.[3] The declaration proclaimed that "[i]n the presence of these new crimes of Turkey against humanity and civilization, the allied Governments publicly inform the Sublime Porte that they will hold personally responsible for the said crimes all members of the Ottoman Government as well as those of its agents who are found to be involved in such massacres."[4] In 1919, the Inter-Allied

[1] From the end of World War II until 2008, some 313 conflicts of various types took place worldwide; the number of casualties is estimated at 92 million, most of whom were non-combatants. *See* Christopher Mullins, *Conflict Victimization and Post-Conflict Justice 1945–2008*, *in* 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE 67, 67 (M. Cherif Bassiouni ed., 2010).

[2] *See* JOHN KEEGAN, THE FIRST WORLD WAR 422-23 (2000).

[3] *See generally* JAMES BRYCE & ARNOLD TOYNBEE, THE TREATMENT OF ARMENIANS IN THE OTTOMAN EMPIRE, 1915–1916: DOCUMENTS PRESENTED TO VISCOUNT GREY OF FALLODEN BY VISCOUNT BRYCE (2000). The position of the Republic of Turkey is that the numbers are inflated, and that the violence against Armenians was popular and spontaneous, because the Armenians collaborated with the Russians during a war in which the Russians were enemies of Turkey. The ultimate truth in these competing allegations has never been established, but the number of Armenian casualties, and the support of the massacre by Turkish officials, clearly reveal the Armenians to have been helpless victims.

[4] United Nations War Crimes Commission, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 35 (1948) (English translation).

Commission (excluding the U.S. and Japan) called for the prosecution of the Turkish officials deemed responsible for the massacre.[5] This call was grounded in the preamble of the 1907 Hague Convention, which referred to the "laws of humanity,"[6] but a secret annex to the Treaty of Lausanne granted amnesty to Turkey, and prosecutions never took place.[7]

Since the end of World War I, international criminal law (ICL) has sought to criminalize individual conduct for certain categories of crimes committed by state actors that are the product of state action or state policy. In addition to CAH,[8] this category of crimes includes crimes against peace (now the crime of aggression)[9] and genocide.[10]

The first prosecutions of crimes against humanity (CAH) took place at Nuremberg in the aftermath of World War II, which resulted in an estimated sixty million casualties, most of whom were civilians, including six million Jews and twenty million Slavs who were killed.[11] But whereas no prosecutions materialized after World War I, the victorious Allies of World War II established the International Military Tribunal at Nuremberg (IMT) and the International Military Tribunal for the Far East in Tokyo (IMTFE), which each contained CAH respectively in Articles 6(c) and 5(c) of these tribunals' Charters.

Since its first codification in the London Charter of the IMT, alongside crimes against peace (now known as the crime of aggression) and war crimes,[12] CAH has progressively evolved into a category of international crimes whose specific contents consist of a number of crimes contained in the laws of most national legal systems.[13] But in order to distinguish CAH from nationally defined crimes, it is necessary to clearly identify the jurisdictional element that gives rise to its classification as an international crime.

[5] Commission on the Responsibilities of the Authors of the War and on the Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, *in* Pamphlet No. 32 (Carnegie Endowment for International Peace, Division of International Law ed., 1919), *reprinted in* 14 Am. J. Int'l L. 95 (1920).

[6] Convention Respecting the Laws and Customs of the War on Land, pmbl., Oct. 18, 1907, 36 Stat. 2277, 15 U.N.T.S. 9, *reprinted in* 2 Am. J. Int'l L. 90 (Supp. 1908).

[7] *See* Treaty of Peace Between the Allied Powers and Turkey (Treaty of Lausanne), July 24, 1923, 28 L.N.T.S. 11, *reprinted in* 18 Am. J. Int'l L. 1 (Supp. 1924).

[8] Larry May, Crimes Against Humanity: A Normative Account (2004); Geoffrey Robertson, The Struggle for Global Justice (2003).

[9] *See* M. Cherif Bassiouni and Benjamin B. Ferencz, *The Crime Against Peace and Aggression: From Its Origins to the ICC*, *in* International Criminal Law: Sources, Subjects, and Contents 207 (M. Cherif Bassiouni ed., 3d rev. ed. 2008).

[10] These are essentially "crimes of state" as discussed in Chapter 2. Although war crimes can be crimes of state, state actors can also commit war crimes without such crimes being the product of state policy or action. With respect to the crime of genocide, *see* Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; William A. Schabas, Genocide in International Law (2000); Matthew Lippman, *Genocide*, *in* International Criminal Law: Sources, Subjects, and Contents, *supra* note 1, at 403; Pieter N. Drost, The Crime of State (1959).

[11] Gerhard L. Weinberg, A World at Arms: A Global History of World War 894 (2d ed. 2005). *See also* Michael Bess, Choice under Fire: Moral Dimensions of World War II 88–110 (2006) (discussing the increased targeting of civilian populations during World War II).

[12] All three crimes were included in the London Charter, as well as under the Statute of the International Tribunal for the Far East. *See* Charter of the International Military Tribunal at Nuremberg art. 6(a), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, [hereinafter IMT Charter]; Charter for the International Military Tribunal for the Far East art. 5(a), *approved* Apr. 26, 1946, T.I.A.S. No. 1589, at 11, 4 Bevans 27, [hereinafter IMTFE Charter].

[13] *See generally infra* ch. 6.

The modern usage of "crimes against humanity" has its genesis in Article 6(c) of the London Charter, which states:

> CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation or other inhumane acts committed against any civilian population, whether before or during the war, or persecutions on political, racial, or religious grounds in execution with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated.[14]

Article 6(c) of the London Charter did not explicitly refer to state policy, but the *chapeau* of Article 6(c) requires that the accused must have been "acting in the interests of the European Axis countries, whether as individuals or as members of organizations." Moreover, the requirement that CAH as defined in Article 6(c) be committed "in connection with any crime within the jurisdiction of the Tribunal" links CAH to crimes associated with a state plan or policy, namely war crimes and crimes against peace. Thus, CAH, like the crime of aggression, is one of the quintessential crimes of state, even though nonstate actors have increasingly committed CAH in post-World War II conflicts.[15]

For reasons of state interests, crimes of state have not been codified in an international convention,[16] but since the end of World War II, genocide,[17] apartheid,[18] and torture[19] have been separately included in conventions. All three crimes require that state actors engage in the prohibited conduct as part of state action or reflecting state policy. Nevertheless, these international crimes address only individual, and not state, criminal responsibility.[20]

No norm exists under ICL that embodies the principle of state criminal responsibility, even though it was applied to Germany and Turkey after World War I in the form of reparations and other sanctions. In that context, responsibility derived from the concept

[14] IMT Charter art. 6(c), *supra* note 12.

[15] "Crimes of state" as referred to herein is a generic label for harmful conduct committed by state actors who abuse their power as part of state action or in execution of state policy against a civilian population. A separate concept, "other forms of collective group violence by non-state actors," refers to aberrant conduct having some characteristics of crimes of state, when committed by nonstate actors acting outside the state structure. Both concepts share similar phenomenological characteristics, produce significant human and material harm, and are not adequately controlled by social and legal mechanisms. They differ primarily as to their participants and the institutional means that they control. It is necessary to distinguish between these two forms of violent interactions in order to identify their respective phenomenology and devise the appropriate prevention, control, and suppression mechanisms necessary to control them. *See infra* ch. 2.

[16] Aggression has not been the subject of prosecution since the IMT and IMTFE.

[17] *See supra* note 10.

[18] International Convention on the Suppression and Punishment of the Crime of *Apartheid*, art. 2, Nov. 30, 1973, 1015 U.N.T.S. 243 [hereinafter Apartheid Convention]; Roger S. Clark, *Apartheid*, *in* INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS, AND CONTENTS 599 (M. Cherif Bassiouni ed., 3d rev. ed. 2008).

[19] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. G.A. Res. 39/46 (10 Dec. 1984), *opened for signature* 4 Feb. 1985, 23 I.L.M. 1027, 24 I.L.M. 535 [hereinafter Torture Convention]; Daniel H. Derby, *The International Prohibition of Torture*, *in* INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS 621 (M. Cherif Bassiouni ed., 3d rev. ed. 2008); MANFRED NOWAK AND ELIZABETH MCARTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY (2008).

[20] *See* M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, ch. 2 (2008) [hereinafter BASSIOUNI, INTRO TO ICL]. Individual criminal responsibility also exists for the perpetrators of *jus cogens* crimes. *See* M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Ormnes*, 59 LAW & CONTEMP. PROBS. 63 (1996).

of reparations, which arose from the historical practices of exactions imposed upon the defeated.[21] This punitive concept was rejected after World War II in favor of individual criminal responsibility presumably because it imposed an unfair burden on future generations for wrongs committed by previous ones. Moreover, the new approach was premised on the belief that collective criminal responsibility is inherently unjust because it does not distinguish between those deemed responsible for international crimes and those who are not. Aside from this basic assumption, no studies were developed on the possible deterrent and preventive impact of collective criminal responsibility on the prospective conduct of states.[22]

The international human rights law regime that developed after World War II provides only certain administrative and civil remedies to victims of crimes of state. Whenever the state conduct is deemed "wrongful conduct,"[23] it is actionable by one state against another, even when the aggrieved party is a single national of the state undertaking the international diplomatic and legal actions on his/her behalf. This type of legal action gives rise to damages, but does not provide for criminal sanctions against the state or the collectivity that engaged in the "wrongful conduct."

The European human rights system provides direct access to justice by individuals against states before the European Court of Human Rights with monetary remedies,[24] but it does not provide for direct action by individual complainants before that court. The Inter-American regional human rights system is a close follow-up.[25] Although the Inter-American regime has made much progress it is yet to have reached its European counterpart. This is due in part to U.S. nonparticipation. The African human rights system is barely nascent.[26] None of these legal regimes, however, have direct enforcement mechanisms. Compliance with them remains a matter of state discretion. But the European system, because of its connection to the European Union, is susceptible to that regional system's economic consequences for noncompliance with the European Convention and the decisions of the European Court. Thus, as noted by Professor Schabas, CAH can also be seen as "an implementation of human rights norms within international criminal law. Just as human rights law addresses atrocities and other violations perpetrated by a State against its own population, crimes against humanity are focused on prosecuting the individuals who commit such violations."[27]

Domestic and international laws are essentially reactive as opposed to being proactive in anticipating forms of aberrant social behavior. More often than not, the law lags behind the manifestations of collective violent conduct. This is evident in the fact that the evolution of international law since World War II has had little effect on interstate

[21] For the modern equivalent *see Principles on State Responsibility*, Report of the International Law Commission on the work of its fifty-third session, 23 April–1 June and 2 July–10 August 2001, U.N. Doc. GAOR A/56/10 (2001). *See also* Ian Brownlie, System of the Law of Nations: State Responsibility (1983).

[22] *See also* International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility (Joseph H.H. Weiler, Antonio Cassese, and Marina Spinedi ed., 1989).

[23] Brownlie, *supra* note 22.

[24] European Convention on Human Rights, art. 7(1), Nov. 4, 1950, EUR. TS. Nos. 5, 213 U.N.T.S. 221.

[25] American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. A/16.

[26] African Charter on Human and Peoples' Rights, *adopted* June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev. 5 (1981), *reprinted in* 21 I.L.M. 58 (1982).

[27] William A. Schabas, The International Criminal Court: A Commentary on the Rome Statute 139 (2010).

and international conflict prevention, conflict resolution, and post-conflict justice.[28] The absence of an international legislative policy reflected in coordinated international legislation has resulted in normative gaps, overlaps, and ambiguities that impact the effectiveness of enforcement, and favor selective enforcement conditioned by political considerations.[29]

Political, social, and behavioral sciences have each developed techniques and methodologies for determining the causes of violent manifestations, as well as some measurements to assess their outcomes. But these disciplines are insufficiently developed to influence policymaking in connection with the prevention or limiting of violent interaction, whether at the interstate or domestic levels. International law, which is the product of state decision-making, has largely ignored social and behavioral sciences to be less encumbered by scientific findings when state interests are at stake. Thus, the synergies and complementarities between legal and other social control mechanisms are lost, resulting in the reduction of the preventive effects of the law on collective violent conduct whether at the domestic or international level.[30]

The greatest manifestations of CAH and other crimes of state[31] remain, as they have been throughout history, the authoritarianism of domestic power-holders over the vast majority of the populations they control; and the exercise of power and hegemony, be it military or economic, by stronger states over weaker ones. Mass killings; slavery; torture; deprivation of civil, economic, political, and cultural rights; and other forms of oppression and exploitation, whether at the domestic or international level, are all on the same continuum when they are the product of state policy or action.[32]

Combined with the few international and national prosecutions for atrocity crimes, perpetrators of these crimes too often benefit from impunity.[33] Moreover, the cynicism of the international community's prevailing *Realpolitik* approach when addressing conflict prevention and postconflict justice is reflected in the false dichotomy between peace and justice.[34] The outcome of this dichotomy has all too often translated into offering immunity to the leaders who perpetrate atrocity crimes and amnesty for their followers

[28] This is evidenced by the fact that 313 conflicts have occurred between 1945 and 2008 that have produced 92 million victims. *See* Christopher Mullins, *Conflict Victimization and Post-Conflict Justice 1945–2008*, *in* THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE 67 (M. Cherif Bassiouni, ed., 2010).

[29] M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, *in* INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS, AND CONTENTS 493 (M. Cherif Bassiouni ed., 3d rev. ed. 2008).

[30] *See also* MARK OSIEL, MAKING SENSE OF MASS ATROCITY (2009); MARK A. DRUMBL, ATROCITY, PUNISHMENT AND INTERNATIONAL LAW (2007); Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L REV 539 (2005); Mark Osiel, *Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751 (2005).

[31] [2]*See generally infra* ch. 2.

[32] DRUMBL, ATROCITY, PUNISHMENT AND INTERNATIONAL LAW, *supra* note 21. David Scheffer, *Atrocity Crimes Framing the Responsibility to Protect*, 40 CASE W. RES. J. INT'L L. 113 (2008); David Scheffer, *The Merits of Unifying Terms: "Atrocity Crimes,"* *in* 2 GENOCIDE STUDIES AND PREVENTION 91 (2007).

[33] M. Cherif Bassiouni, *Assessing Conflict Outcomes: Accountability and Impunity*, *in* 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE 3 (M. Cherif Bassiouni ed., 2010); M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50 VA. J. INT'L L. 269 (2010); *see also infra* ch. 9.

[34] M. Cherif Bassiouni, *The Perennial Conflict Between International Criminal Justice and Realpolitik*, 22 GA. ST. U. L. REV. 541 (2006); M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409 (2000).

in exchange for the cessation of hostilities. The result is the triumph of impunity over accountability. This approach induces costly escalation of conflicts until they reach a level at which it can be argued that offering immunity to the leader and amnesty to the followers is wiser than insisting on accountability and having the conflict continue.[35] The cynicism of this argument derives from the fact that had it not been for the failure of the U.N. and major states to intervene to prevent or stop the given conflict, these hard choices would not have to be faced. Because of the same *Realpolitik* considerations, the Responsibility to Protect concept has been stymied at the U.N.[36]

The definition of CAH provided in Article 6(c) of the London Charter is the matrix of the statutory provisions of the international tribunals that have followed, namely: the International Criminal Tribunal for the former Yugoslavia (ICTY),[37] the International Criminal Tribunal for Rwanda (ICTR),[38] the International Criminal Court (ICC),[39] and, the mixed-model tribunals: the Special Court for Sierra Leone (SCSL),[40] the Extraordinary Chambers in the Courts of Cambodia (ECCC),[41] the Special Panels of the Dili District Court (also called the East Timor Tribunal) for Timor-Leste,[42] and

[35] M. Cherif Bassiouni, *Assessing Conflict Outcomes: Accountability and Impunity*, *in* M. Cherif Bassiouni, 1 The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice 3 (2 vols., M. Cherif Bassiouni ed., 2010); Ruti Teitel, Transitional Justice (2008); Ruti Teitel, *Transitional Justice Genealogy*, 16 Harv. Hum. Rts J. 69 (2003); Miriam J. Aukerman, *Extraordinary Evil. Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 Harv. Hum. Rts. 39 (2002).

[36] 2005 World Summit Outcome, U.N. GAOR, 60th Sess., U.N. Doc. A/60/L.1, ¶¶ 138-139 (Sept. 15, 2005); Scheffer, *Atrocity Crimes Framing the Responsibility to Protect*, *supra* note 23; Gareth J. Evans, The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All (2009); Alex J. Bellamy, Responsibility to Protect (2009); Richard H. Cooper and Juliette Voinov Kohler, Responsibility to Protect: The Global Compact for the 21st Century (2009); James Pattison, Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene? (2010).

[37] Statute of the International Tribunal for the Former Yugoslavia, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 1-2, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1159 [hereinafter ICTY Statute]; M. Cherif Bassiouni (with the collaboration of Peter Manikas), The Law of the International Criminal Tribunal for the Former Yugoslavia (1996) [hereinafter Bassiouni, The Law of the ICTY]; Virginia Morris & Michael Scharf, An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia (2 vols. 1995) [hereinafter Morris & Scharf, Insider's Guide to the ICTY].

[38] Statute of the International Criminal Tribunal for Rwanda, November 8, 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598 (1994) [hereinafter ICTR Statute]; Virginia Morris & Michael Scharf, The International Criminal Tribunal for Rwanda (2 vols. 1998).

[39] The Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, *reprinted in* 37 I.L.M. 999 [hereinafter ICC Statute]; M. Cherif Bassiouni 1–3 The Legislative History of the International Criminal Court (M. Cherif Bassiouni ed., 2005) [hereinafter Bassiouni, 1–3 Legislative History of the ICC].

[40] Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, *available at* http://www.sc-sl.org/Documents/scsl-agreement.html [hereinafter SCSL Statute]. The Statute was endorsed through S.C. Res. 1400, U.N. Doc. S/RES/1400, ¶ 9 (Mar. 28, 2002); William Schabas, The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda, and Sierra Leone (2006).

[41] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, NS/RKM/1004/006 (with inclusion of amendments as promulgated on 27 October 2004) [hereinafter ECCC Law].

[42] Regulation 2000/11 on the Organization of Courts in East Timor, UNTAET/REG/2000/11 (entered into force March 6, 2000) *as amended by* Regulation 2000/14 UNTAET/REG/2000/11 (entered into force May 10, 2000).

the Serbian War Crimes Tribunal (for Kosovo).[43] CAH's existence as a crime of state within the matrix of Article 6(c) of the London Charter continued unchanged until the jurisprudence of the ICTY.[44]

A new reality emerged from the conflicts in the former Yugoslavia and Rwanda, namely the participation of nonstate actors in conflicts, which lead to jurisprudential difficulties in characterizing the armed conflict as being international, noninternational, or purely internal.[45] The confusion surrounding the characterization of a conflict involving the participation of nonstate actors is further complicated when the conflict has multistate characteristics – namely when a conflict occurs in contiguous states, and the participants include state actors and nonstate actors who move from the territory of one state to another (as was the case in the Rwanda conflict). For these reasons, the jurisprudence of the ICTY and the ICTR utilized a more pragmatic or practical element to define CAH: a "widespread or systematic" attack, irrespective of the conflict's legal characterization or the status of perpetrators as state or nonstate actors.[46]

In the *Kunarac* case[47] the ICTY Appeals Chamber concluded that the nature of armed conflicts had evolved, and the capacity of nonstate actors had expanded, to the point where CAH is no longer a crime of state, but can also be committed by nonstate actors. Undoubtedly, the increasingly harmful conduct of nonstate actors in modern armed conflict presents a challenge that must be addressed. But, as discussed below, the *Kunarac* Appeals Judgment is mistaken because it created a historical shift to broaden CAH on a questionable legal basis. The Chamber cherry picked precedents, and ignored altogether Article 7(2) of the Rome Statute and the various commentaries that support

[43] UNMIK Regulation 1999/1, on the Authority of the Interim Administration in Kosovo (July 25, 1999).

[44] *See generally infra* ch. 4, §3.

[45] In the *Tadić* case, the ICTY Trial Chamber took its cue from the Final Report and Annexes of the Commission of Experts and concluded that some portions of the conflict may be of an international character, while others may be of an internal character:

> Having regard then to the nature and scope of the conflict in the Republic of Bosnia and Herzegovina and the parties involved in that conflict, and irrespective of the relationship between the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Bosnian Serb forces, the Trial Chamber finds that, at all relevant times, an armed conflict was taking place between the parties to the conflict in the Republic of Bosnia and Herzegovina of sufficient scope and intensity for the purposes of the application of the laws or customs of war embodied in Article 3 to the four Geneva Conventions of 12 August 1949, applicable as it is to armed conflicts in general, including armed conflicts not of an international character.

Prosecutor v. Tadić, Case No IT-94-1-T, Judgment, ¶ 568 (May 7, 1997) [hereinafter *Tadić* Trial Judgment].

[46] *See, e.g.*, the *Vukovar Hospital* Rule 61 Decision:

> Crimes against humanity are to be distinguished from war crimes against individuals. In particular, they must be widespread or demonstrate a systematic character. However, as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognised as guilty of a crime against humanity if his acts were part of the specific context identified above.

Prosecutor v. Mrkšić et al., Case No IT-95-13-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶ 30 (Apr. 3, 1996) [hereinafter *Vukovar Hosp.* Rule 61 Decision], *cited in* Tadić v. Prosecutor, Case No IT-94-1-A, Judgment, ¶ 248 n. 311 (Jul. 1, 1999) [hereinafter *Tadić* Appeals Judgment].

[47] *See infra* §7.

a state policy requirement.[48] Because the international community faces a new set of facts involving the commission of CAH-type crimes by nonstate actors, there is a need to address the responsibility of these actors for CAH. But this has to be dealt with forthrightly by extending the concept of state policy to apply to nonstate actors with state-like characteristics, and not by relying on selective readings of past cases.

§1. The Characteristics of International Crimes and Their Applicability to CAH

It is well established that an international crime must have a distinguishing element that transforms what is usually a crime under national criminal law to one under international law.[49] In other words, an international element is necessary to distinguish international crimes from national ones. An analysis of international crimes reveals the following characteristics that reflect the social interest sought to be protected:[50]

(a) The prohibited conduct affects a significant international interest;
(b) The prohibited conduct constitutes egregious conduct deemed offensive to the commonly shared values of the world community;
(c) The prohibited conduct involves more than one state in its planning, preparation, or commission, either through the diversity of nationality of its perpetrators or victims, or because the means employed transcend national boundaries; or
(d) The effects of the conduct bear upon an internationally protected interest that is not sufficient to fall into either (a) or (b) above, but requires international criminalization in order to ensure its prevention, control, and suppression because it is predicated on "state policy," without which it could not be performed.

On the basis of these characteristics and on the basis of the nature and scope of all 267 multilateral instruments,[51] it can be concluded that each of the 25 categories of international crimes reflects the existence of any one or a combination of the following elements:

1. International:
   (a) Conduct constituting a threat to the peace and security of the international community, whether directly or indirectly; or

[48] Prosecutor v. Kunarac et al., Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 98, n.114 (Jun. 12, 2002). *See, e.g.*, M. Cherif Bassiouni, Crimes Against Humanity 240–50 (1992); Darryl Robinson, *Defining "Crimes Against Humanity" at the Rome Conference*, 93 Am. J. Int'l L. 43 (1999); William A. Schabas, *Crimes Against Humanity: The State Policy or Plan Element*, *in* The Theory and Practice of International Criminal Law 347 (Leila Nadya Sadat and Michael P. Scharf eds., 2008); William Schabas, *State Policy as an Element of International Crimes*, 98 J. Crim. L. & Criminology 953 (2008); Claus Kress, *On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision*, 23 Leiden J. Int'l L. 855 (2010).

[49] *See* International Criminal Law Conventions and Their Penal Provisions 15–44 (M. Cherif Bassiouni ed., 1997) [hereinafter Bassiouni, ICL Conventions].

[50] *See* M. Cherif Bassiouni, *The Discipline of International Criminal Law*, *in* International Criminal Law: Sources, Subjects, and Contents 3 (M. Cherif Bassiouni ed., 3d rev. ed. 2008); M. Cherif Bassiouni, A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal 45 (1987) [hereinafter Bassiouni, Draft Code].

[51] *See* Bassiouni, Intro to ICL, *supra* note 20, at 6.

(b) Conduct recognized by commonly shared world community values as shocking to the collective conscience of the world community.

2. Transnational:
   (a) Conduct affecting the public safety and economic interests of more than one state whose commission transcends national boundaries; or
   (b) Conduct involving citizens of more than one state (either as victims or perpetrators) or conduct performed across national boundaries.
3. State Policy:
   Conduct containing in part any one of the first two elements but whose prevention, control and suppression necessitates international cooperation because it is predicated on state policy, without which the conduct in question could not be performed.[52]

CAH is a category of international crimes that satisfies in part the first criterion and fully the third criterion for international criminalization. Some events, like the conduct of Nazi Germany during World War II, satisfy all three categories. That conduct was shocking to the commonly shared values of the world community, it did disrupt the peace and security of humankind, and it was predicated on state policy. Moreover, what occurred in that situation could not have been prevented, controlled, or suppressed without military intervention and the responsibility of the perpetrators subsequently addressed through international criminalization and international enforcement, as was the case.

The drafters of the London Charter were, therefore, right in formulating CAH as a new international category of crimes under positive ICL, thus extending the efforts of World War I, and bringing them to conclusion, as discussed in Chapter 3. The post-Charter legal developments discussed in Chapter 4 reaffirm the validity of the Charter, even though a more preferable approach is to have a new convention on CAH.[53] This is particularly necessary because CAH includes a series of criminal acts, all of which are criminalized under domestic law, and also because of the need to extend CAH to encompass nonstate actors.[54]

[52] *Id.*; *see also* the discussion of the policy element for nonstate actors, *infra*, Sections 2 and 3.

[53] *See* M. Cherif Bassiouni, *Crimes Against Humanity: The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457–94 (1994).

[54] This question is similar to the one that arose in 1977 in connection with the Draft Convention on the Prevention and Suppression of Torture. At the time this writer was co-chair along with the late Niall MacDermot of the Committee of Experts that prepared the first draft of this convention, see U.N. Doc. E/CN/4/NGO/213, Feb. 1, 1978; *see also* M. Cherif Bassiouni, *An Appraisal of Torture in International Law and Practice: The Need for an International Convention for the Prevention and Suppression of Torture*, 48 REVUE INTERNATIONAL DE DROIT PÉNAL 23 (1977).

Torture is a crime under the domestic law of most legal systems, but what makes it an international crime? In other words, what is the international or jurisdictional element that can transform torture from a crime under domestic law to an international crime? This writer's proposal was the element of "state policy," insofar as torture is committed by or for the benefit of state agents and for the purposes of obtaining a statement or confession, etc. Article 1 of the Torture Convention, *supra* note 11, specifically states: "1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering . . . where such pain or suffering *is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity* [. . .]."

The analogy between torture and other specific crimes listed in the enumeration contained in Article 6(c) of the London Charter; Article 5 of the ICTY Statute; Article 3 of the ICTR Statute; and Article 7 of the Rome Statute (discussed *infra* ch. 6) is that these enumerated crimes are all crimes under the domestic law of most legal systems. Thus, if the international or jurisdictional element needed for the international crimes of torture was state policy, then it would follow that similar crimes contained in the enumeration

ICL does not criminalize domestic crimes only because they happen to exist in the criminal laws of all or most states. If that were the case, then murder, manslaughter, rape, battery, robbery, and several other crimes found in all or most criminal laws of the world would become international crimes. They are not international crimes, because they lack an international element, which characterizes the crimes as subject to international law. The need for international criminalization of the specific crimes reflected in the various definitions of CAH is essential, because when such crimes are committed as part of a state's policy, it is likely to produce large-scale victimization. Thus, the abuse of state power transforms a domestic crime or series of crimes into an international crime. Furthermore, it is not the quantum of the resulting harm that controls, but the potentiality of large-scale harm that could derive from a state's abuse of power. In other words, when state actors abuse the power of a state, there is little that can stop them before they carry out their course of conduct against a civilian population that is no longer protected by these state actors, but victimized by them.

A policy choice arises, namely whether to rely on (a) the state policy character of CAH, as has been the case since the London Charter; (b) the quantum of the harm performed by state actors; (c) the manner in which state actors engage in the conduct (i.e., widespread or systematic); and (d) the inclusion of nonstate actors on the same level as state actors.

There are several issues with all but the first of these policy approaches:

1. A policy choice based on quantum of harm to internationally criminalize given conduct irrespective of its actors is arbitrary and dependent upon factual outcomes. Its enforcement will depend on outcomes arising out of conduct that cannot be objectively defined before the fact. Thus, it would violate the principles of legality discussed in Chapter 5. More significantly, it could turn into a selective targeting of some of the perpetrators of quantum-driven crimes, while shielding others. Such an approach, however, could distinguish between state and nonstate actors, or include both within the scope of the prohibition. Last, there would have to be a test of relativity to determine the quantum of harm in relative or proportionate terms to victim population each in relation to a geographic area. Such an approach based on relativity would cause significant variations in the application of such a quantum-driven defined crime. This problem also arises in connection with genocide. The Commission of Experts that investigated crimes in the former Yugoslavia between 1992 and 1994 addressed this problem in the province of Prijedor, Bosnia in 1992–93. The conclusion was that the disappearance of an estimated 90 percent of the Muslim population (out of a total Muslim population of some 57,000 persons) amounted to genocide. This conclusion was based on the identification of a civilian population in a given area, which was targeted on the basis of its religion. If the test had been on the basis of the total Muslim population in all of Bosnia, the elimination of 90 percent of the Muslim population in the province of Prijedor

of CAH also require state policy as their international or jurisdictional element. But it must be added that this is not the only reason for the proposition that state policy is required for CAH when the policy or conduct is established or carried out by state actors and by analogy thereto, the requirement of policy when the conduct is carried out by non-state actors. Other reasons include the large-scale nature of the victimization that "shocks the conscience of humanity" and which can affect "peace and security." These are two additional international elements that provide the jurisdictional basis for an international crime. *See* Bassiouni, *The Discipline of International Criminal Law*, *supra* note 50, at 3.