Treatise

Problems Concerning the Universal Applicability of Crimes Against Humanity in International Law: Jurisdictional Certainty, nullum crimen sine lege and Societal Accountability

Nergis Canefe

Nergis Canefe, Professor of Politics, Public Policy and Law, York University, Canada. The author can be reached at ncanefe@yorku.ca. *She wishes to thank Martin Hapla for his compassionate editorship and the two anonymous reviewers for their most helpful guidance, comments and criticisms. An earlier version of this paper was presented at the 2023 IVM Congress in Bucharest, Romania.*

Abstract

This paper pursues the question of what distinguishes crimes against humanity from other international crimes and why and how they fall under the purview of universal jurisdiction. To this end, the normative architecture of crimes against humanity jurisprudence is examined to determine whether jurisdictional certainty alone would suffice for establishing the basis for their adjudication. This category of crimes constitutes a frontal assault on human dignity and humanity at large. Nevertheless, the conundrum we face concerns the vestiges of a historically skewed regime of accountability in international law, regardless of the severity of such crimes. In other words, the problem concerns how international [criminal] law is perceived and operationalized, not with universal jurisdiction's in-principle applicability to crimes against humanity.

Keywords: crimes against humanity, universal jurisdiction, international criminal law, jurisdictional certainty

1. Introduction

The contribution of this article lies in its discussion of the concept of crimes against humanity not only from the perspective of International Criminal Law but also from the broader perspective of societal accountability. Societal accountability is related to but also distinctly different from legal responsibility, in this specific context, that of "individual criminal responsibility" for crimes falling under the purview of international law. The text has two main parts, relying on different approaches and working with separate scholarly literature, ultimately promising the possibility of a hybrid approach. The first set of debates in the following pages relates to International Law, particularly International Criminal Law. Concerning the second part, the article offers a specific selection of literature on legal and political philosophy to bear and comment mainly on the work of Hannah Arendt. The paper emphasizes the extra-legal bases and justifications for adjudicating crimes against humanity.

The debates introduced here are particularly relevant in the immediate aftermath of the South Africa v Israel application at the International Court of Justice (ICJ). The Court's Order of 26 January 2024 established a real and imminent risk of irreparable damage to a group of the rights asserted by South Africa.[1] The impact that the Order will have on other States, especially those facilitating the Israeli operations in Gaza, is particularly relevant to the discussion of limits of universal jurisdiction addressed here and the need for its fortification by domestic action. Some argue that while most African states had restored or established relations with Israel by the early 2020s, including the five Arab League members of Egypt, Morocco, Sudan, Mauritania, and Chad, South Africa was already a fierce critic of Israel outside the Arab and Muslim worlds prior to its application to the ICJ. It opposed Israel‘s observer status in the African Union (AU) and has had a long engagement with the Boycott, Divestment and Sanctions (BDS) campaign against the Jewish state. Though the African National Congress (ANC) explained this policy as a response to Israel‘s historical cooperation with the apartheid regime, this newest affront against Israeli state practices indicates the stakes are higher than what can be justified by historical anger.[2] Furthermore, the significance of the *erga omnes* status of genocide, similar to Crimes against Humanity, is not about the somewhat troubled relations between Israel and South Africa. While South Africa took a stance against the acts committed in the Israeli military campaign against the Palestinian population and declared they may constitute genocide, the incitement to commit genocide, and the failure to punish those responsible in each case, the ICJ ruling indicates that the erga omnes stipulation is not to be restricted to the prohibition of genocide, but refers in general to the ‚rights and obligations enshrined by the Convention‘ for all states, including the obligations to prevent and punish acts of genocide. Furthermore, this particular order signals the further development of the doctrine of humanitarian, that is, the willingness to grant interim relief based on human vulnerability in the case law of the ICJ.[3]

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[1] For the full text of the Order, see Order of International Court of Justice of 26.1.2024, No. 192. Available online: https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf [Last accessed at 11.02.2024].

[2] See BISHKU, Michael B. South Africa's Anti-Israel Obsession. *Middle East Quarterly*, Spring 2023.

[3] See AL TAMIMI, Yussef. Implications of the ICJ Order (South Africa v Israel) for Third States. *EJIL Talk*, published on 6.2.2024, cited on 11.2.2024. Available online at: https://www.ejiltalk.org/implications-of-the-icj-

2. Crimes Against Humanity

2.1 Definitional Conundrums

The commonly accepted understanding of the modern concept and related jurisprudence of crimes against humanity is that they are products of the horror of the crimes committed during the two World Wars. As such, crimes against humanity were codified due to the growing consensus amongst both European and post-colonial states that certain crimes committed by states against their citizens should be legitimate subjects of international criminal law and adjudication.[4] However, unlike war crimes and genocide, crimes against humanity jurisprudence developed through piecemeal additions to customary international law.[5] Consequently, the statutes of most international and internationalized tribunals, including but not limited to the International Criminal Court's Rome Statute, contain slightly different definitions of these crimes regarding the jurisprudence employed by different international, regional and hybrid legal bodies.[6] The evolution of the definition of

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[4] On the politics of establishing the ICC and drafting and ratifying the Rome Statute, see ORENTLICHER, Diane F. Politics by Other Means: The Law of the International Criminal Court. *Cornell Int'l LJ*, 1999, Vol. 32, Issue 3, p. 489.

[5] On the history of crimes against humanity in international law, see ROBERTSON, Geoffrey. *Crimes against humanity: the struggle for global justice*. The New Press, 2013; FANG Jr, Anthony F. *Punishment, justice and international relations: ethics and order after the cold war*. London: Routledge, 2009; BASSIOUNI, Cherif M. (ed.). *International Criminal Law, Volume 2: Multilateral and Bilateral Enforcement Mechanisms*. Brill, 2008; MAY, Larry. *Crimes against humanity: a normative account*. Cambridge: Cambridge University Press, 2005; LUBAN, David. A theory of crimes against humanity. *Yale J. Int'l L.*, 2004, Vol. 29, pp. 85-167; ROBINSON, Darryl. Defining 'Crimes Against Humanity' at the Rome Conference. *The American Journal of International Law*, 1999, Vol. 93, pp. 43-57.

[6] For a historical overview of the definition, see in chronological order:
1945 London Charter of the International Military Tribunal (Nuremberg Charter), Article 6(c): "murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations, before or during the war; or persecutions on political, racial or religious grounds in execution of or connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." [*This definition was also used in the Charter of the International Military Tribunal for the Far East.*]
The Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), Article 5:
"…the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts."
The Statute of the International Criminal Tribunal for Rwanda (ICTR), Article 3:
"…the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape; (h) Persecutions on political, racial and religious grounds; (i) Other inhumane acts."
The Statute of the Special Court for Sierra Leone (SCSL), Article 2:
"…the following crimes as part of a widespread or systematic attack against any civilian population: a. Murder; b. Extermination; c. Enslavement; d. Deportation; e. Imprisonment; f. Torture; g. Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence; h. Persecution on political, racial, ethnic or religious grounds; i. Other inhumane acts."
The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC), Article 5:

crimes against humanity as an international instrument has remained the same, too.[7] As far as the practices of international courts are concerned, later definitions are more expansive. Domesticated definitions tend to be a narrower reading of these crimes at the regional level compared with their international counterparts. It is important to note that the 'domesticated adoptions' capture regional mechanisms and definitions integrated into national penal codes.[8] Although there are some inconsistencies in definitions of these crimes in various documents due to the evolution of the concept in statutes of international and hybrid criminal courts tribunals, the authoritative definition is in Article 7 of the Rome State, and the International Law Commission's proposal for a convention on Crimes against humanity are indeed most promising documents.[9] These developments complicate a suggestion of whether shifting the focus of adjudication of such crimes away from institutions such as the ICC to hybrid or national courts is preferable. This is despite the post-colonial/decolonial critique emanating from the Global South and mainly Africa of the ICC, especially considering the recently accepted applications by the ICC concerning the Global East. African). This text takes the position that following Hannah Arendt's work, it is imperative to emphasize the universal and not country-specific nature of crimes against humanity. If so, national and international courts (such as the ICC) are suitable for trying those crimes, as clearly reflected in the Rome Statute's complementarity principle.

Still, the contents of both *jus cogens* norms and *erga omnes* obligations dictating state parties to punish crimes against humanity remain subject to greater controversy than has been the case in the prescribing of punishment for genocide and war crimes.[10] One may argue that these are merely jurisprudential matters to be settled in courts with subject matter

"…any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, such as murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial, and religious grounds; other inhumane acts."

[7] For instance, in 2002, the USA asked all countries who were part of the ratification scheme for the ICC to sign agreements exempting US citizens from prosecution by the Court and threatened economic sanctions if they refused. Some countries yielded to this pressure even after ratifying the ICC Statute. What is essential for the present and future context is the subsequent introduction of bilateral immunity agreements (BIAs) into the architecture of the Rome Statute. For further debate, see NOORUDDIN, Irfan. PAYTON, Autumn L. Dynamics of influence in international politics: The ICC, BIAs, and economic sanctions. *Journal of Peace Research*, 2010, Vol. 47, Issue 6, pp. 711-721.

[8] A key example is the Canadian jurisprudence on Crimes against Humanity. In 1998, the Government of Canada established its Crimes against Humanity and War Crimes Program. The mandate of the program is to deny safe haven to persons believed to have committed or been complicit in war crimes, crimes against humanity or genocide. For details of the jurisdictional mandate of this body, see Canada and the International Criminal Court. *Government of Canada*, published on 30.10.2023, cited on 11.2.2024. Available online at: https://www.international.gc.ca/world-monde/international_relations-relations_internationales/icc-cpi/index.aspx?lang=eng.

[9] See the International Law Commission. Draft articles on Prevention and Punishment of Crimes Against Humanity. *Office of Legal Affairs*, published in 2019, cited on 11.2.2024. Available online at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_7_2019.pdf.

[10] On the disputed nature of the norm, see WALD, Patricia M. Genocide and crimes against humanity. *Wash. U. Global Stud. L. Rev.,* 2007, Vol. 6, pp. 621-633; PATERSON, Robert K. Resolving Material Culture Disputes: Human Rights, Property Rights and Crimes against Humanity. *Willamette Journal of International Law and Dispute Resolution*, 2006, Vol. 14, No. 2, p. 161.

jurisdiction. In the following pages, I argue otherwise and posit that many of these seemingly jurisprudential disputes relate to the criteria used to determine what constitutes a crime against humanity and the determination of criminal thresholds. As such, there is an intrinsic politico-normative challenge concerning the issue of their universal applicability.

2.2 Jurisprudential Necessities

In jurisprudential terms, the primary challenge in defining crimes against humanity is identifying the precise elements that distinguish these offences from crimes exclusively subject to national laws. The definition not only determines the scope of international jurisdiction but also gives rise to several significant consequences concerning trial structure, conditional and selective removal of immunities and the commuting of sentences. Unlike most domestic crimes, these offences are generally considered outside the purview of statutes of limitations. Equally importantly, the immunities that often shield state representatives and high-ranking public and military officers from criminal responsibility are categorically removed in the context of crimes against humanity, at least when trials are held before international tribunals or domestic courts employing universal jurisdiction. Although applications of universal jurisdiction remain controversial vis-à-vis the capacities of domestic courts, proponents of the norm invariably include crimes against humanity within its scope. When put into practice, the following would be the result. While the crime of murder could only be tried in a court with a jurisdictional link to the act, a murder committed as a crime against humanity could be tried by any criminal court in any jurisdiction.

The unique character of this category of crimes emanates from the fact that the prohibition of crimes against humanity falls strictly under the purview of *jus cogens* norms in international law. At least in theory, states have an obligation under international law either to prosecute perpetrators of crimes against humanity or to extradite them to states intending to pursue prosecutions, hence the *erga omnes* obligation about this particular set of crimes. In light of the serious legal consequences of designating an offence a crime against humanity and the severe moral condemnation the label entails, the importance of understanding the exact juridical nature of these offences needs no further explanation. However, this paper is not an exercise in that vein. Although it does provide a brief historical sketch of the evolution of the norms and jurisprudence prohibiting crimes against humanity, as well as an assessment of its constitutive crimes, the core of the argument developed in the following pages pertains to another and, I would purport, an equally important issue: the politico-normative framework within which these offences find meaning and are deemed worthy of trial under the aegis of universal jurisdiction. The ultimate aim of this exercise is to determine whether the focus of their adjudication could be shifted away from institutions such as the ICC to hybrid or national courts, thus examining the possibility of ‚domesticating' this particular category of state criminality.

In essence, crimes against humanity are mass crimes committed against the fundamental human rights of a civilian population. If so, their standard inclusion under humanitarian, rather than human rights, law is misleading and has grave consequences. They are rightfully distinguished from egregious state crimes such as genocide in that they need not target a specific group but may aim at the civilian population in general. Thus, they create conditions

of generalized trauma and loss. Similarly, crimes against humanity are regarded differently from war crimes insofar as the criminal conduct is directed not toward an enemy‘s population but against the perpetrators‘ own, hence the difficulty of their adjudication. In the following pages, an appeal is made to understand the politico-normative precepts of crimes against humanity jurisprudence in an attempt to render them meaningful and valuable within the domestic realm, where these crimes are perpetrated, rather than being seen as an imposition by an international court or a consortium of states (the latter format commonly known as ‚victor‘s justice‘).

3 The Normative Architecture of Crimes Against Humanity Jurisprudence

In international law, crimes against humanity found their first explicit formulation as a category of crime in Article 6 (c) of the Nürnberg/Nuremberg Charter which emerged from the Tribunal.[11] The offences categorized as crimes against humanity were also included in Article 5 (c) of the Tokyo Charter and Article II (1) of Control Council Law No. 10.[12] While the Nuremberg and Tokyo Charters required that crimes against humanity evidence a connection to aggressive war or war crimes, this supplementary requirement was later on left out of Control Council Law No. 10. The Statutes of the Yugoslavia and Rwanda Tribunals. The ICC then reaffirmed the customary law character of crimes against humanity, and the prohibition of crimes against humanity was recognized as having the status of *jus cogens* and its adjudication belonging to the domain of *erga omnes* obligations.

It is worthy of note that the legal phrase ‚crimes against humanity‘ was first employed earlier, in a 1915 Declaration by the governments of Great Britain, France and Russia, which condemned the Turkish government for the alleged massacres of Armenians as „crimes against humanity and civilization for which all the members of the Turkish [*sic* Ottoman] Government will be held responsible together with its agents implicated in the massacres.”[13] Despite this early use of the term, the first prosecutions of crimes against humanity did not occur until after the Second World War in 1945, in the form of the International Military Tribunal (IMT) at Nuremberg, Germany. The charter establishing the Nuremberg IMT defined crimes against humanity as murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war, or

[11] See UN. Secretary-General. The Charter and Judgment of the Nürnberg Tribunal – History and Analysis: Memorandum/ submitted by the Secretary-General, Document A/CN.4/5. *United Nations*, published in 1945, cited on 11.2.2024. Available online at: https://digitallibrary.un.org/record/160809/files/A_CN.4_5-EN.pdf?ln=en.

[12] For the complete text, see Control Council Law No. 10. *Lillian Goldman Law Library*, published in 1945, cited on 11.2.2024. Available online at: http://avalon.law.yale.edu/imt/imt10.asp. The list includes atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

[13] See ROBERTSON, Geoffrey. *Crimes against humanity: the struggle for global justice*. The New Press, 2013; and MATAS, David. Prosecuting crimes against humanity: the lessons of World War I. *Fordam Int'l LJ*, 1989, Vol. 13, Issue 1, p. 86.

prosecutions on political, racial or religious grounds in the execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where they were perpetrated. After the Nuremberg Charter, the Tokyo Charter of 1946 established the International Military Tribunal for the Far East, incorporating the exact definition of crimes against humanity. Following the Nuremberg and Tokyo trials of 1945-1946, no other international tribunal with jurisdiction over crimes against humanity was established until the *ad hoc* Yugoslav and Rwanda Tribunals.

Meanwhile, in 1947, the International Law Commission was charged by the United Nations General Assembly with the formulation of the principles of international law recognized and reinforced in the Nuremberg Charter and drafted a „code of offences against the peace and security of mankind" which included crimes against humanity.[14] In 1996, this Draft Code from 1947 was brought to the attention of jurists who then reinstated crimes against humanity as inhumane acts including murder, extermination, torture, enslavement, persecution on political, racial, religious or ethnic grounds, institutionalized discrimination, arbitrary deportation or forcible transfer of population, arbitrary imprisonment, rape, enforced prostitution, and other inhuman acts committed in a systematic manner or on a large scale, and, instigated or directed by a Government or by any organization or group within the boundaries of a state.[15] This latter definition differs from the one used in Nuremberg in that, as stated above, the former only targeted criminal acts committed „before or during the war," thus establishing a prescriptive nexus between crimes against humanity and armed conflict.

Prior to this expended 1996 definition, in 1993, the International Criminal Tribunal for the Former Yugoslavia (ICTY) was established by the UN Security Council in order to investigate and prosecute genocide, war crimes, and crimes against humanity which had taken place in the former Yugoslavia, have already opened up the 1947 draft definition. Although the ICTY's connecting of crimes against humanity to both international and non-international armed conflict led to the expansion of the list of criminal acts used in Nuremberg to include imprisonment, torture and rape, as per Article 5 of the ICTY Statute, this was done so concerning a specific case. In 1994, the UN Security Council established the International Criminal Tribunal for Rwanda (ICTR) under the genocide that had taken place between April and July 1994. This second *ad hoc* international criminal tribunal yet again changed the scope of the definition of crimes against humanity. In the ICTR Statute, the linkage between crimes against humanity and an armed conflict was dropped. Instead,

[14] See the International Law Commission. Draft Code of Crimes against the Peace and Security of Mankind with commentaries. *Office of Legal Affairs*, published in 1996, cited on 11.2.2024. Available online at: http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf.

[15] The International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind (1996), Article 18 stated that "[a]ny of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group: (a) Murder; (b) Extermination; (c) Torture; (d) Enslavement; (e) Persecution on political, racial, religious or ethnic grounds; (f) Institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population; (g) Arbitrary deportation or forcible transfer of population; (h) Arbitrary imprisonment; (i) Forced disappearance of persons; (j) Rape, enforced prostitution and other forms of sexual abuse; (k) Other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm." Ibid.

a new requirement was added, stipulating that the committal of such inhumane acts must be part of a "systematic or widespread attack against any civilian population on national, political, ethnic, racial or religious grounds," as per Article 3 of the ICTR Statute.[16] This change was introduced due to the concern that, given the internal nature of the conflict in Rwanda, crimes against humanity would likely not have been applicable if the nexus of armed conflict had been maintained.

3.1 ICC and Vicissutes of the Rome Statute

Post-1996, the most up-to-date definition of crimes against humanity came with establishing a permanent international court, the ICC, in 2002. In its founding treaty, the Rome Statute, crimes against humanity are stated somewhat differently than in any preceding legal definitions. For the purpose of this Statute, crime against humanity denotes any of the following acts when committed as part of a widespread or systematic attack directed against a civilian population: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; enforced disappearance of persons; the crime of apartheid; and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[17] Essentially, the Rome Statute employs the same definition of crimes against

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[16] See the whole body of the Statute at STATUTE OF THE INTERNATIONAL TRIBUNAL FOR RWANDA. *Office of Legal Affairs*, published in 2007, cited on 11.2.2024. Available online at: http://legal.un.org/avl/pdf/ha/ictr_EF.pdf.

[17] In treaty language, an "attack directed against any civilian population" means a course of conduct involving the multiple commission of acts against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack; "Extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population; "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children; "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law; "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions; "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law; "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity; "The crime of apartheid" means inhumane acts ... committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime; and, "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information

humanity as the ICTR. However, it removes the requirement that the attack must have been carried out „on national, political, ethnic, racial or religious grounds." In addition, the Rome Statute definition offers the most expansive list of specific criminal acts to be covered by international criminal law.

Against the extensive nature of this jurisprudence, however, international law scholars have repeatedly pointed out the need for a more specialized convention to determine crimes against humanity.[18] This is partly because its current framing could be problematic in light of the limited application of principles of legality to such crimes. For instance, the maxim *nullum crimen sine lege*, a fundamental principle of criminal law writ large, dictates that an individual can only be convicted for specific acts which, at the time of their commission, were known to be of criminal nature. The aforementioned *ad hoc* tribunals could not limit their jurisdiction with that maxim. However, at least a partial solution is offered to this conundrum by international criminal law jurisprudence. Fundamentally, crimes against humanity are inhumane acts committed as part of a widespread or systematic attack against civilians by their own state or by an organized political authority with jurisdiction over that territory. Their connection to a broader or systematic attack justifies the exercise of criminal jurisdiction. It thus removes the burden of such crimes not being already codified within the confines of domestic jurisprudence. Similarly, the *erga omnes partes* category of obligations dictates the necessity for any legal party to pursue punishment, even in the likely event of the impossibility of domestic adjudication of crimes against humanity. In normative terms, the *erga omnes* obligation is weaker than the *nullum crimen sine lege* dictum, though together with the systematic attack component, it forms a defence for the applicability of crimes against humanity jurisprudence for both past and present cases.

It is also true that some scholars make a distinction between substantive and procedural law in the context of *nullum crimen sine lege*.[19] According to this view, a change in substantive law leading to liability must occur before a criminal act is committed for it to be suitable for adjudication. However, a change in procedural aspects of the law leading to liability may occur after the act is committed. For example, extending the Statute of limitations to allow the prosecution of crimes that occurred in the past would constitute a change in procedural law and thus make it possible to qualify the *nullum crimen sine lege* restriction in the specific context of crimes against humanity.[20] This would directly apply to acts punished by international criminal tribunals whose status was legally ambiguous in the immediate context of the conflict or atrocity situations. Finally, though the exact wording of the definitions of crimes against humanity differs in the cornerstone documents that provide it a juridical standing, each definition is made up of similar underlying criminal elements (e.g., murder, extermination, rape, and so forth) as well as common contextual elements under

on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

[18] See BASSIOUNI, Cherif M. (ed.). *International Criminal Law, Volume 2: Multilateral and Bilateral Enforcement Mechanisms*. Brill, 2008.

[19] See BOOT, Machteld. *Genocide, crimes against humanity, war crimes: nullum crimen sine lege and the subject matter jurisdiction of the International Criminal Court*. Antwerpen: Intersentia, 2002.

[20] See FLETCHER, George P. *Basic Concepts of Criminal Law*. New York: Oxford University Press, 1998.

which the criminal act must have been committed. Therefore, the foundational meaning attributed to this category of crimes is only available for a narrow reading of the law.

3.2 Determination of Thresholds

As far as the structure of these crimes is concerned, the material element of crimes against humanity determination requires the commission of a specific individual act during a widespread or systematic attack against a civilian population.[21] The attack on the civilian population also represents the contextual element of the crime. The mental element requires intent and knowledge regarding the material elements of the crime, including the contextual element. These crimes affect not only the individual victim(s), but as already mentioned, they constitute a systematic or widespread denial of the fundamental human rights of a civilian population as a whole. This particular characteristic of organized violence calls into question the responsibilities of humanity as a whole against the atrocities committed. In principle, the norm protects individual human rights, including the right to life, health, freedom and dignity.[22]

Secondly, the primary object of these crimes is harming the civilian population. However, this explicit focus does not apply to the category of war crimes targeting both military personnel and civilian populations as victims. Furthermore, crimes against humanity are directed against a civilian population at large and not merely against select individuals. A civilian population is any plurality of persons connected with each other by common characteristics, including but not limited to ethnicity, religion, race, nationality, and political belief, and any of these characteristics could render them the target of an attack. The most contentious part of this generic definition is the criterion that the presence of a limited number of combatants among an attacked civilian population does not negate its civilian character. Accordingly, at times of ethnic civil war, the state cannot justify its actions in attacking civilian populations through the reasoning that they have a military/guerilla arm. Neither is it necessary for the entire population of a state or territory to be affected by the attack. The civilian character of the attacked population and persons as a threshold requirement applies both in civil war or occupation and during peacetime. Therefore, to determine the criminal element, a distinction between civilians and non-civilians is not possible solely by applying the terms of customary international humanitarian law.

In the context of crimes against humanity, the application of the notion of harming the civilian population for criminal adjudication aims to protect the fundamental rights of every human being against any form of systematic violence. The determining factor for adjudication is the victims‘ need for protection and the presumption of their defenselessness vis-à-vis the state, the military or other types of politically organized force. By derivation, anyone *not* part of

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[21] See Article 7 of the International Criminal Court. Rome Statute of the International Criminal Court. Document A/CONF.183/9 of 17 July 1998. *International Criminal Court*, published on 17.7.1998, cited on 25.5.2020. Available online at: https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

[22] According to the definition in Article 7 (2) (a) of the ICC Statute, an "attack on a civilian population" denotes "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."

this organized political power using force is considered a civilian and a potential victim. Furthermore, it is not the formal status—such as membership in the military forces—but a person's actual role at the time of committing these crimes that determines their culpability under the purview of crimes against humanity. In other words, members of military forces or other armed groups who have laid down their arms or been rendered *hors de combat* should not be subjected to culpability criteria. By the same token, paramilitary forces who engage in acts qualified as state criminality would be subject to adjudication even though they are not formally regarded as members of the military or the police.

Another critical feature concerning the normative architecture of these crimes concerns the definition of an „attack." This element describes a specific course of conduct involving committing acts of violence. In its latest iteration, such a course of conduct must include the „multiple commission" of acts listed in Article 7 (1) of the ICC Statute. However, this does not mean that the perpetrator needs to act repeatedly by him- or herself.[23] Rather, what is in question is the widespread or systematic character of these acts of violence. Specifically, the criterion „widespread" describes a quantitative element related to the crimes committed. The attack's widespread nature can arise either from the number of victims targeted or from the extension of its effects over a broad geographic area. On the other hand, the criterion of a systematic attack is a qualitative qualifier. It refers to the organized nature of the committed acts of violence, thus excluding isolated acts from the notion of crimes against humanity. Earlier case law of the *ad hoc* tribunals required that an individual act adjudicated based on the definition of crimes against humanity following a predetermined plan or policy. However, the Appeals Chamber of the Yugoslavia Tribunal then distanced itself from such a requirement and set a precedent for its' limited application.[24] Accordingly, although attacks on a civilian population typically follow a predetermined plan, this does not make the existence of a plan or policy an essential element of the crime. This argument relies on the principle that, under customary international law, crimes against humanity do not call for the proven presence of a policy element. However, Article 7 (2) (a) of the ICC Statute extended the definition again. It stipulated that crimes against humanity jurisprudence dictate that the attack on a civilian population must have been carried out „pursuant to or in furtherance of a State or organizational policy to commit such attack."[25]

Finally, there is the issue of perpetrators and victims. Perpetrators need not be members of the State or an organization involved in the crime. This category could include all persons

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[23] See LUBAN, David. A theory of crimes against humanity. *Yale J. Int'l L.*, 2004, Vol. 29, pp. 85-167.

[24] See the jurisprudence in the section on judgment and sentencing in Chambers. *United Nations International Criminal Tribunal for the Former Yugoslavia*, cited on 25.5.2020. Available online at: http://www.icty.org/en/about/chambers.

25 Article 7(2)(a) clarifies that it needs to be a State or organizational policy. One Pre-Trial Chamber declared that the term 'State' was self-explanatory but added that the policy did not have to be conceived at the highest level of the State machinery' [*Situation in the Republic of Kenya*, ICC PT. Ch. II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01-09, 31 March 2010, para. 89, citing *Prosecutor v Blaškić*, ICTY T. Ch., Judgment, 3 March 2000, para. 205]. Therefore, a policy adopted by regional or local organs of the State could satisfy this requirement [Ibid.]." See HEIKKILÄ, Mikaela. Commentary Rome Statute: Part 2, Articles 5-10. *Case Matrix Network*, published in 30.6.2016, cited in 25.5.2020. Available online at: https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-2-articles-5-10/.

who act to implement or support the policies of the State or the organization in question. In its most current rendition, the list of such acts includes killing (Art. 7 [1] [a] of the ICC Statute), extermination (Art. 7 [1] [b]), enslavement (Art. 7 [1] [c]); deportation or forcible transfer of population (Art. 7 [1] [d]); imprisonment (Art. 7 [1] [e]); torture (Art. 7 [1] [f]); sexual violence (Art. 7 [1] [g] of); persecution (Art. 7 [1] [h]); enforced disappearance (Art. 7 [1] [i]); apartheid (Art. 7 [1] [j]), and 'other inhumane acts' (Art. 7 [1] [k]). In all cases, it must be proven beyond doubt that the perpetrator acted with intent and must be fully cognizant that their actions constituted a part of the attack on the civilian population.[26] Furthermore, criteria must be fulfilled for the possibility of persecution of crimes against humanity in keeping with prior post-Second World War jurisprudence, which led to an even narrower interpretation of the term „civilian." In some earlier cases, courts have interpreted the term by incorporating *hors de combat*. However, both the ICTY and the ICC have moved towards a restrictive interpretation of the term, potentially excluding armed forces members. This move may be regarded as regressive, leading to a protection gap which crimes against humanity jurisprudence was initially intended to close. In hindsight, excluding members of the armed forces from the definition of „civilian" may well have been a concession extended to increase the number of signatory states to the Rome Statute.[27]

3.3 Distinct Features of Crimes Against Humanity

Overall, crimes against humanity pertain to both past and present atrocities, and two new concepts have been introduced into the landscape of international law as a result: the first one describes the violence, oppression, or persecution undertaken or allowed by the state itself (international crime component), and the second one encompasses the variety of responses to these acts of violence, oppression or persecution (transitional justice component). With the establishment of the ICC, a new hope arose that ordinary citizens, whose lives were marked by the violence of genocide, crimes of war, and crimes against humanity, have

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[26] On the issue of intent, see WERLE, Gerhard. *Principles of International Criminal Law*. Oxford University Press, 2005, and METTRAUX, Guénaël. *International Crimes and the ad hoc Tribunals*. Oxford University Press, 2005.

[27] As Payam Akhavan argues, if the conduct is consistent with the laws of war, it may be hard to prove that it nonetheless falls under the category of crimes against humanity during an armed conflict. Initial jurisprudence about crimes against humanity extended the protection of the laws of war to a perpetrator's co-nationals. Although this new category initially required a nexus with an international armed conflict, it is now an autonomous concept based on human rights law that criminalizes large-scale atrocities in *both war and peacetime*. However, crimes against humanity committed during an 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.
Meanwhile, there is considerable divergence concerning combat operations where the Hague Law applies as *lex specialis* concerning human rights norms. Akhavan states that the ICTY jurisprudence demonstrates tensions inherent in reconciling human rights law 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. If so, the temptation to dilute the laws of war through reclassification of the conduct as crimes against humanity should be resisted, as it may lead to a decrease in protection for civilians during armed conflict. See AKHAVAN, Payam. Reconciling Crimes Against Humanity with the Laws of War Human Rights, Armed Conflict, and the Limits of Progressive Jurisprudence. *Journal of International Criminal Justice*, 2008, Vol. 6, Issue 1, pp. 21-37.

finally found a platform to ask for justice and seek the punishment of persons responsible for these atrocities. However, the truth is much more complicated, and justice for crimes against humanity is far more evasive than what a flat reading of the Rome Statute might suggest. In this regard, a reexamination of the Tokyo Trial compared to the ICC reveals interesting characteristics concerning the evolution of international criminal law. The background of the Tokyo Trial was somewhat different from that of the Nuremberg Trial, as it had a unique jurisprudential context due to the declarations explicitly made on Japan by the principal Allied Powers. Among the crimes provided for in Article 5 of the Tokyo Charter, crimes against peace, for which there was to be individual responsibility, were the most disputed jurisprudence during the proceedings. Furthermore, war crimes and crimes against humanity were not clearly distinguished in either the Indictment or the Judgment of the Trial.[28]

Furthermore, later discussions on international criminal law also led to the necessity of clearly defining peremptory norms, which were not addressed during the Tokyo Trials. As a safeguard, the 1969 Vienna Convention on the Law of Treaties introduced the concept of *jus cogens* into international law.[29] Meanwhile, the related category of *erga omnes* obligations remains one of the most problem-laden areas in international law. Contrary to what the term may imply in its first reading, the rule that every state has the right to define its international legal position vis-à-vis these obligations remains in force. In this regard, the judgment of the English House of Lords in the Pinochet case is of particular interest.[30], as the problem of criminal responsibility of individuals for grave violations of international law was trumped by political concerns amounting to the personal immunity of heads of state.[31] In comparison, the emergence of legal rules governing criminal liability for genocide represents a different response in international criminal law. Punishing those

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[28] See FUTAMURA, Madoka. *War crimes tribunals and transitional justice: the Tokyo trial and the Nuremberg legacy*. Routledge, 2007, as well as TANAKA, Yuki. MCCORMACK, Tim. SIMPSON, Gerry (eds.). *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited*. Leiden, Boston: Martinus Nifhoff, 2010. Available online at https://www.researchgate.net/profile/Yoriko_Otomo/publication/282818305_The_Decision_Not_to_Prosecute_the_Emperor/links/561d6c5508aec7945a2532e9.pdf.

[29] See VILLIGER, Mark E. *Commentary on the 1969 Vienna Convention on the Law of Treaties*. Brill, 2009; and BASSIOUNI, Cherif M. International crimes: jus cogens and obligatio erga omnes. *Law & Contemp. Probs.,* 1996, Vol. 59, pp. 63-74.

30 This judgment was given on 25 November 1998. The appeal was allowed by a majority of three to two, and the House restored the second warrant on 23 October 1998. Of the majority, Lord Nicholls and Lord Steyn each delivered speeches holding that Senator Pinochet was not entitled to immunity. Lord Hoffmann agreed with their speeches but did not give separate reasons for allowing the appeal. As a result of this decision, Senator Pinochet was required to remain in the UK to await the decision of the Home Secretary on whether to authorize the continuation of the proceedings for his extradition under section 7(1) of the Extradition Act 1989.
See the actual text of the judgement of the House of Lords of 15.12.1998, *IN RE PINOCHET*, https://publications.parliament.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm.

[31] Since this case, the impact (if any) of Spanish and British Court rulings on the Pinochet case on the progress of human rights cases in Chilean courts has been widely debated. Chilean judges chafe at the notion that foreign courts exerted any influence on them, arguing that they were empowered to strip Pinochet of his immunity based solely on Chilean law and the evidence already before them. On the other hand, human rights critics allege that the courts had been thoroughly immobilized for decades by the authoritarian legacy to which they were enjoined. The botched trial certainly achieved at least this much: it shamed the Chilean Government into pressuring its

responsible for committing such abominations required an unequivocal consecration of the criminality of mass killings in the hands of the state in international humanitarian law. Regulations concerning the methods and means of war, limiting or prohibiting the use of certain types of weapons and ammunition, and protecting victims of armed conflict, all together constituting a body of jurisprudence known as war crimes, is another example. Unlike these two other prototypical international crimes—war crimes and genocide—the proscription against crimes against humanity remains to be enshrined in such clear terms. While the former two are primarily used for international law purposes outside the domain of domestic jurisdiction, and historically in international courts, crimes against humanity relate to internal affairs of the state and, as such, require additional steps to be taken at the national level to enable its adjudication. As discussed above, the jurisprudence pertaining to crimes against humanity has developed mainly through the various international courts and tribunals established since the end of the Second World War. This process has yielded enduring normative difficulties as well as doctrinal ambiguities. Still, the law against crimes against humanity promises to fulfill a function that no other body of jurisprudence has been capable of in the context of human rights law or humanitarian law.

4. Competing Politico-Normative Visions

Despite the avowed desire to reach a certain level of legal certainty, there are foundational normative questions that crimes against humanity jurisprudence are not fully poised to answer, such as what makes an inhumane act a crime against humanity or the distinct purpose of establishing such a category of crimes. This is the case even though, in the drafting of the Rome Statute, the differentiation of these crimes from war crimes and genocide was fortified with substantive legal reasoning.[32] However, both during the Rome Conference and in its aftermath, normative discussions were always circumscribed by the conflicting political goals of individual states.[33] As a result, delegations were often willing to compromise their vision of crimes against humanity if the alternative was to write off the prospect of a permanent international criminal court. As such, the Rome Conference produced jurisprudence on the issue without an underlying or overtly expressed normative consensus. Instead, several normative visions of crimes against humanity competed and continue to do so for recognition in the law, jurisprudence, and scholarship related to this specific category of crimes. In

high courts to deliver a modicum of justice to the victims of Pinochet. See BIANCHI, Andrea. Immunity versus human rights: the Pinochet case. *European Journal of International Law*, 1999, Vol. 10, No. 2, pp. 237-277.

[32] See WRINGE, Bill. Why punish war crimes? Victor's justice and expressive justifications of punishment. *Law and Philosophy*, 2006, Vol. 25, No. 2, pp. 159-191.

[33] As another case in point, the institutional design of the UN's new human rights organ, the Human Rights Council (HRC), was heavily contested, the options being an exclusive body with a high membership threshold or an inclusive structure built upon cooperative mechanisms. The HRC features a moderate membership threshold. The same dynamic was in place during the drafting of the Rome Statute. On this issue, see Larry May's work, including MAY, Larry. *Genocide: a normative account*. Cambridge University Press, 2010, MAY, Larry. *Crimes against humanity: a normative account*. Cambridge: Cambridge University Press, 2005, MAY, Larry. HOFFMAN, Stacey (eds.). *Collective responsibility: Five decades of debate in theoretical and applied ethics*. Rowman & Littlefield Publishers, 1992, as well as KELLY, Jamie T. The moral foundations of international criminal law, *Journal of Human Rights*, 2010, Vol. 9, pp. 502-510.

order for the ICC or other national and international judicial bodies to be able to exercise adequate jurisdiction over crimes against humanity, an accurate and consistent assessment of situations in which these crimes have been committed must be achieved. This is not an exclusively jurisdictional matter, either. For the aforementioned judicial bodies to attribute individual criminal responsibility for these crimes without violating the principles of legality or legal certainty, they must have clear guidance regarding the core principles with reference to indictment, defence, and sentencing. This, again, is not simply a jurisdictional matter but requires [political] recognition of the Rome Statute as a binding document. Finally, for states to justify resorting to universal jurisdiction in addressing crimes against humanity, the scope of these crimes must be clearly defined. This is perhaps the only aspect of crimes against humanity jurisprudence with an exclusive legislative focus. Even there, politico-normative concerns determine the threshold for resorting to the exercise of universal jurisdiction, i.e., trying nationals of another country above and beyond the requirements of nationality-territoriality nexus in international criminal law.

Despite this notably heavily normative nature of the determination, adoption, and application of definitions about crimes against humanity, declaring them as worthy of international law jurisdiction simply on the basis that they threaten the peace and security of the world was the central argument posed by the Nuremberg Charter and Judgments.[34] The context of the Second World War and its aftermath justified the initial adjudication of such crimes. Atrocities committed within a state with no connection to war were regarded as a matter concerning that state alone. Indeed, some participants in the Rome Conference continued to endorse this perspective as late as 1998. With the Rome Statute coming into effect, however, a broader view of the peace and security rationale was adopted, encompassing internal armed conflict and civil war.[35] Ultimately, eliminating the requirement of the context of armed conflict from the definition trumped the peace and security rationale for these crimes. However, what is to replace the war nexus is yet to be determined. Crimes committed against civilian populations in peacetime by a sovereign state pose unique challenges for international law. The trials about the horrendous crimes of the Khmer Rouge provide an apt example. In justifying the continued detention of one of the defendants charged with crimes against humanity, the Extraordinary Chambers in the Courts of Cambodia ('ECCC') echoed the old peace and security rationale.[36] On the other hand, the Rome Statute's rationale rests

[34] BADAR, Mohamed E. From the Nuremberg Charter to the Rome Statute: defining the elements of crimes against humanity, *San Diego Int'l LJ*, 2004, Vol. 5, pp. 73-144; and ROBERTSON, Geoffrey. *Crimes against humanity: the struggle for global justice*. New York: The New Press, 2013.

[35] For Chapter VII of the UN Charter's full text, see Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression (Articles 39-51). *United Nations*, cited on 11.2.2024. Available online at: https://www.un.org/en/about-us/un-charter/chapter-7. Chapter VII pertains to threats to peace, breaches of peace and acts of aggression.

[36] 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 (2004), Art. 5, and Nuon Chea (ECCC-002/14-08-2006), Provisional Detention Order, 19 September 2007, para. 5.

more on the gravity of the crimes. In this latter context, one of the most frequently invoked justifications for crimes against humanity is that they „shock the conscience of humanity."[37]

The ICC-endorsed view of crimes against humanity is duly appreciated in the international human rights law framework, as a result of which crimes against humanity are depicted as particularly severe violations of fundamental human rights. Accordingly, the purpose of the overarching category of crimes against humanity is to capture this seriousness related to a targeted „population" and a „widespread or systematic attack." Meanwhile, proponents of the gravity rationale amongst human rights scholars employ a generously wide reading of jurisprudence and reject the notion that crimes against humanity should require a government or organizational policy or a discriminatory intent to be present. Unfortunately, the difficulty with this particular normative vision is that it calls for applying a scale for judging the gravity of the crimes in question. Such a task is not a legitimate component of international law, much less the jurisprudence about crime against humanity.[38]

In addition to the peace and security argument and the justification for adjudication based on the gravity of the offences, a third normative perspective envisions the ethos of crimes against humanity as punishment for the misuse of state power to attack rather than to protect.[39] If so, the misuse and abuse of state power renders these crimes non-justiciable in

[37] This language evokes the Martens' Clause's "laws of humanity" and "dictates of the public conscience," as stated in the Preamble to the Hague Conventions on the Laws and Customs of War on Land (1899). See MERON, Theodor. The Martens Clause, principles of humanity, and dictates of public conscience. *The American Journal of International Law*, 2000, Vol. 94, No. 1, pp. 78-89.

[38] The contours of the prohibition of crimes against humanity concerning proceedings before the ICTY and deliberations at the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC) prove that, because of the relatively contemporary status of these offences under international law, a particular reference to the genesis and re-interpretation of the war nexus requirement became essential. The task at hand was identifying the elements of these offences to distinguish them from "ordinary" municipal crimes (e.g., murder, assault or false imprisonment) and to justify the exercise of international jurisdiction that would otherwise be the subject of domestic adjudication. For the drafters of the Nuremberg Judgment, the war nexus originally served precisely this purpose. The ICTY then devised an ingenuous solution to the problem of delimiting international jurisdiction and distinguishing crimes against humanity from "ordinary" crimes: The Trial Chamber did not require proof of a substantial link between the defendant's inhumane act and a state of war. Instead, the Chamber defined crimes against humanity in terms of the mens rea of the defendant and the existence of a widespread or systematic attack against a civilian population. However, it also added elements to the definition of crimes against humanity, further complicating the definition and the Prosecution's burden of proof. The Appeals Chamber did overturn the Trial Chamber's decision in this regard in the Tadic case (SASSÓLI, Marco. OLSON, Laura M. Prosecutor V. Tadic (Judgement). Case No. IT-94-1-A. 38 ILM 1518 (1999). International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, July 15, 1999. *The American Journal of International Law*, 2000, Vol. 94, No. 3, pp. 571-578). During the drafting of the Statute for the permanent ICC, both the ICTY Statute and the work of the Tribunal were used to draft a consensus definition of crimes against humanity that will govern prosecutions before the new permanent international court. The drafters of the Rome Statute defined crimes against humanity with reference only to the existence of a widespread or systematic attack against a civilian population and the mental state of the individual defendant. In so doing, they recognized that once abuse of civilians surpasses a particular threshold, the prescriptions of international law are activated, and individual perpetrators can be held internationally liable for their acts of murder, assault, rape, or unlawful detention. See MCAULIFFE DEGUZMAN, Margaret. The road from Rome: the developing law of crimes against humanity. *Human Rights Quarterly*, 2000, Vol. 22, No. 2, pp. 335-403.

[39] Both Cherif Bassiouni and William Schabas state that the concept of crimes against humanity embraces only serious and egregious human rights violations perpetrated by state members or state-like actors against their own

the domestic sphere, and the likelihood they will go unpunished mandates the availability of universal jurisdiction. Proponents of this view promote the inclusion of a state policy element in the definition of crimes against humanity. If so, only inhumane acts dictated by official policy measures to commit such violence would merit designation as crimes against humanity. This last vision reflects an overreliance on a rigid understanding of state sovereignty, especially concerning crimes perpetrated by regional alliances and non-state actors intervening in a civil war situation or during a military occupation, not to mention state-like actors in international law such as transnational corporations, especially active in extractive industries across the Global South.

Despite their differences, all three instances of normative justifications provided for the crimes against humanity jurisprudence share a blind spot: While it is true that domestic legal systems are generally unwilling or unable to prosecute their state or state-like actors, it is far from clear that an international court could easily step in to remedy the lacunae for the adjudication of such crimes. In this regard, even though the critique of state sovereignty is the most vigorous normative standpoint for the justification for crimes against humanity jurisprudence, it falls short of identifying the political and institutional route required to try these cases in non-domestic courts other than its reliance on universal jurisdiction. This weakness is only partially remedied by a select emphasis on the group-based harm element of the crimes against humanity jurisprudence, which could, in some instances, counter-balance the lack of official policy measures dictating mass violence.[40] This aspect of the jurisprudence requires that the targeted group share particular characteristics beyond the geographic proximity of its members, such as nationality, race, religion, or ethnicity.[41] Such a definition brings the normative basis of crimes against humanity jurisprudence close to the prohibition against genocide, although without the requirement of intent to destroy the group in whole or in part. Still, the exclusive emphasis on this element needs to pay more attention to the large-scale and systemic attack component, thus weakening the coverage of the overall definition of these crimes concerning their effects on society.

In this debate on normative justifications, we must also include the ILC and its experimentation with different rationales in the immediate post-war years. Accordingly, its 1954 Draft Code adopted a combination of state action and discrimination, while the 1991 Draft Code relied on seriousness, introducing the criteria of „systematic“ or „mass scale.“ Finally, the 1996 Draft Code combined the seriousness and state action requirements. Overall, the post-Nuremberg statutes pertaining to crimes against humanity have carried forward inconsistencies in their justifications. The ICTY resurrected the nexus with armed conflict; the ICTR required both seriousness and discrimination; the ICC injected a requirement of

citizens. See SCHABAS, William A. State Policy as an Element of International Crimes. *Journal of Criminal Law and Criminology*, 2008, Vol. 98, Issue 3, p. 959; BASSIOUNI, Cherif M. *The Legislative History of the International Criminal Court*. New York: Transnational Publishers, 2005, particularly pp. 151-155; and VERNON, R. What is a Crime Against Humanity*?*. *Journal of Political Philosophy*, 2002, Vol. 10, No. 3, 242.

[40] For David Luban, for example, the rationale for crimes against humanity lies in the interest all humans share 'in ensuring people are not killed solely because of their group affiliation.' See LUBAN, David. A theory of crimes against humanity. *Yale J. Int'l L.*, 2004, Vol. 29, p. 139.

[41] Legal philosopher Larry May also suggests that group-based harm can justify attaching the label crimes against humanity.

state—or at least group—action; the Special Court for Sierra Leone (SCSL) relied almost exclusively on seriousness; and the ECCC re-injected the element of discrimination. The resultant lack of normative uniformity in the jurisprudence has led to important doctrinal questions which remain unresolved. Aside from jurisprudential debates, the current state of affairs also clearly indicates the importance of the politico-normative context of adopting and using crimes against humanity jurisprudence. Consequently, no single vision of crimes against humanity emerged despite the jurisprudential authority of the Rome Statute. Instead, from the Nuremberg judgment onwards, various approaches continue to compete for a solid basis for adjudicating these crimes.

5. Adjudication, Responsibility and the Law: Limits of Universal Jurisdiction

Since 1945, there have been myriad prosecutions for crimes against humanity. In addition, charges for particular instances of crimes against humanity are often brought in conjunction with charges for war crimes.[42] The changing nexus requirements according to which these prosecutions took place have already been discussed. In this section, this debate will be extended to address another issue, that of collective responsibility. As already stated, under Article 7(2)(a) of the ICC Statute, crimes against humanity require that a widespread or systematic attack on a civilian population be committed „pursuant to or in furtherance of a State or organizational policy to commit such attack." Here, the term „state policy" and the interpretation of „organization" remain controversial. Normative and jurisprudential debates on the exact meanings of these terms lead to varying conclusions. Now, if these terms were understood as reflecting the ordinary meaning of the concepts and include any association of persons with an established structure of political authority, perhaps the dubiousness of their coverage would erode. What is it, then, that makes such a simple interpretation, thereby associating responsibility with the state or state-like organizations and people acting on their behalf, so cumbersome a task?

The missing link between the adjudication of crimes against humanity and a principled acknowledgement of their relationship with the acts of the state or state-like political authority harks back to the 1961 Eichmann trial in Jerusalem.[43] The Eichmann trial is part of a series of Holocaust-related trials widely known and studied among Holocaust scholars. Specifically, Holocaust scholars have come to employ the tripartite concept of information, knowledge, and awareness for the determination of criminal accountability for crimes against humanity based on the study of these trials. Their work maintains that an awareness gap exists between information flow, its processing and interpretation into general knowledge, and the crystallization of the recognition of the consequences of criminal actions.[44] These

[42] A lengthy list of crimes against humanity cases can be found in the International Criminal Database (ICD). See Cases by name. *International crimes database*, cited on 11.2.2024. Available online at: http://www.internationalcrimesdatabase.org/Cases/ByName.

[43] The primary text referred to throughout this section about these trials is ARENDT, Hannah. *Eichmann in Jerusalem*. Penguin, 1963.

[44] YABLONKA, Hanna. The development of Holocaust consciousness in Israel: The Nuremberg, kapos, Kastner, and Eichmann trials. *Israel Studies*, 2003, Vol. 8, No. 3, pp. 1-24.

trials contributed to building a consciousness of individual responsibility for state crimes. In this regard, in addition to the Nuremberg Trial, the trials of Jewish functionaries during the Holocaust (otherwise known as the Kapo trials), the Malkiel Gruenwald trial (otherwise known as the Kastner trial), and the Eichmann trial are cornerstones of legally inclined Holocaust research.[45] Insofar as the Holocaust was so aberrant and unprecedented an event, these trials also set a formidable precedent for tracing the complex paths that acts constituting crimes against humanity to follow before they amount to mass destruction.

These trials are generally accepted as offering significant clues concerning the politico-normative underpinnings of crimes against humanity adjudication. The Nuremberg trials (1945-1947), in particular, which took place during the period immediately prior to the establishment of the state of Israel, were marked by the intensive diplomatic and military struggle against the British for Jewish independence in Mandate Palestine and the sanctification of Jewish national freedom. The „Kapo trials" and the Kastner trial (1948-1959) also occurred during the transition from a pre-state community (*Yishuv*) to sovereign statehood. They took place under the circumstances of Israel's War of Independence, mass immigration, and the building of the new state's legal, economic, and security infrastructure. At this time, Israeli jurors also crafted Law No. 64, „Nazi and Nazi Collaborators Punishment Law" (1950), designed to bring Nazis and their proxies to justice through the quasi-legal practice of universal jurisdiction.[46] The Eichmann Trial (1960-1967) came after these two initial sets of trials; it received public attention at a time of economic and political growth of the Israeli state and was used to make that state's voice audible in international law. Holocaust scholars are not at all reticent in stating that each of these trials proceeded according to the national spirit and political environment of the times. Each trial was also associated with a specific agenda: the Nuremberg trials reflected the Allies' victory over Nazi Germany. In contrast, the Kapo trials were an expression of the postwar mass immigration that put its stamp on Israeli society. Finally, the political dimension of awareness of the Holocaust as an international crime stood at the core of the Kastner trial. The Eichmann trial, on the other hand, focused on the operative meaning of state sovereignty, the privatization of the Holocaust, and the place of crimes against humanity in the broader context of World War II. The remainder of this section will focus on interpreting crimes against humanity during and in the aftermath of the Eichmann trial and compare the context within which this debate took place with the current obsession with the universality of the Rome Statute.

[45] See the judgment of the Nuremberg trials at https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf [last accessed 11.2.2024]. For the case summaries of the remaining Holocaust trials, see BAZYLER, Michael J. TUERKHEIMER, Frank M. *Forgotten Trials of the Holocaust*. NYU Press, 2015.

[46] For the full text of the law, see the International Red Cross Archives at Law no. 64 : Nazi and Nazi Collaborators (Punishment) Law, 1950. *International Humanitarian Law Databases*, cited on 11.2.2024. Available online at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/9D6164171FA43DE7C12575AE0034A437.

5.1 Arendtian Preoccupations

According to Hannah Arendt, men are incapable of forgiving what they cannot punish or adequately punishing what is unforgivable.[47] Indeed, the most distinguishing feature of crimes against humanity, in the form that they were articulated during the Eichmann trials, is their imprescriptibility.[48] The Arendtian claim concerning the impossibility of punishment in some instances, such as crimes against humanity, clearly indicates the limits of positive law. This is what Arendt alludes to in her discussion on the „radical evil," the inadequacy of existing sentences and punishment schemes in addressing the damage caused, both because of the unprecedented nature of the crimes committed and due to their extreme cruelty constituting an obstacle to the very idea of adequate punishment. According to Arendt, during the Eichmann trial, the monstrous scale of the Nazi crimes made any punishment provided for them not just inadequate but also absurd.[49] Specifically, in *Personal Responsibility under Dictatorship*, Arendt stated that the horror of the Nazi crimes themselves, in their naked monstrosity, transcended all moral categories and exploded existing standards of jurisdiction.[50] Hence, she concluded that such crimes were neither adequately punishable nor suitable for forgiveness. In the same text, she further claimed that contrary to the statements made by the Israeli courts, reasons such as the need for society to be protected against these kinds of crimes, the rehabilitation of criminals, the dissuasive force of the example, or measures of retributive justice would not bring a complete closure. Thus, more than our ordinary sense of justice is needed in the case of crimes against humanity.

In her later work, particularly in *The Human Condition,* it is true that Arendt admitted a possible combination of forgiveness and punishment concerning crimes against humanity.[51] Still, she clearly stated that punishment is a mere alternative to forced forgiveness by the dictates of history.[52] Punishment and forgiveness have one crucial aim in common: an attempt to end something without interference would lack closure. Forgiveness is not alien to politico-normative judgment. However, forgiveness could not be routinized, and it remains an exceptional act. Meanwhile, we make the opposite claim for crimes against

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[47] The full quote is, "The alternative to forgiveness, but by no means its opposite, is punishment, and both have in common that they attempt to put an end to something that without interference could go on endlessly. It is therefore quite significant, a structural element in the realm of human affairs, that men are unable to forgive what they cannot punish and that they are unable to punish what has turned out to be unforgivable." See ARENDT, Hannah. *The Human Condition, pp. 238-43, Cited on 11.2.2024. Available online at:* https://cenlib.tau.ac.il/sites/cenlib.tau.ac.il/files/media_server/Wiener/forgiveness_arendt.pdf.

[48] For the full text of the proceedings of the Eichmann Trial, see The Trial of Adolf Eichmann – Proceedings: The 15 Charges. *Remember*, cited on 25.5.2020. Available online at: http://remember.org/eichmann/charges.

[49] See ARENDT, Hannah. *The Origins of Totalitarianism*. Meridian Books, 1962. Like Arendt, philosopher Vladimir Jankélévitch advocated that if no proportional punishment can be found, the crime remains unforgivable. According to him, forgiveness died in the death camps. See JANKÉLÉVITCH, Vladimir. *L'imprescriptible. Pardonner? Dans l'honneur et la dignité*. Le Seuil, 2015.

[50] ARENDT, Hannah. Personal responsibility under dictatorship. In ARENDT, Hannah. *Responsibility and judgment*. Schocken Books, 2003, pp. 17-48.

[51] ARENDT, Hannah. *The human condition*. University of Chicago Press, 2013. On the issue of forgiveness, see DERRIDA, Jacques. *On cosmopolitanism and forgiveness*. Psychology Press, 2001.

[52] This is even though confusion blurring the boundaries between forgiveness, apology, remorse, amnesty, and prescription remains problem-laden.

humanity jurisprudence: it is meant to be the supreme example of the regularization of forgiveness in international law, presumably finding a suitable universal codification. To think more deeply about this antinomy, it is necessary to consider the context in which both the „globalization of forgiveness" and universal jurisdiction about crimes against humanity emerged.[53] Especially in the Global South, but also in the heart of what were once the colonial empires, scenarios of repentance, confession, and forgiveness have multiplied since the end of the Second World War. The Catholic Church's request for forgiveness for the Second World War crimes, that of the Prime Minister of Japan towards the Korean and Chinese societies, that of the Belgian government for not having acted on the genocide in Rwanda, the Chilean armed forces' confession of their crimes, and the Canadian prime minister's apology to the Native Peoples of Canada are just a few examples widely advertised in this avalanche of a desire for forgiveness for crimes that cannot be punished or forgotten. This proliferation of scenes of regret and requests for forgiveness coincides with the renewed urgency of memorials and institutional repentance. It appears to be a symptom of a larger yearning for redemption. As such, forgiveness and its solicitation are directly conditioned by the weight of guilt felt on the shoulders of the public. What is worrisome about this trend is not so much that we choose to remember and to give account for past wrongs, but the *simulacrum* of healing that comes with repentance. This calculative aspect of public apology is troubling, considering the egregious nature of the crimes that constitute the subject matter of such historical apologies. Consequently, the general character of requests for forgiveness could be paramount to collective guilt rather than collective responsibility.

This is one of the most vital reasons to re-embrace the jurisprudence of crimes against humanity in international law. This particular branch of criminal jurisprudence emerges as a chance for freeing societies from the repentance-redemption equation or its opposite, the total denial of heinous and most egregious crimes. A publicly appointed body could not forgive on behalf of either the direct victims of egregious crimes or the public who suffered in relation to or as a result of such crimes. The State, its institutions and courts cannot force wronged people to forgive simply because an official apology has been extended to them. Through the adjudication of crimes against humanity, on the other hand, the culpable person(s) is called upon in relation to unforgivable acts, and yet without being redeemed. That is a much more potent form of seeking accountability and as a society, claiming responsibility for mass violence, rooted in politics, history and normative grounds, than what forced forgiveness alone could provide.[54]

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[53] LEVY, Daniel. SZNAIDER, Natan. Forgive and not forget: Reconciliation between forgiveness and resentment. In BARKAN, Elazar. KARN, Alexander (eds.). *Taking wrongs seriously: Apologies and reconciliation*. Stanford University Press, 2006, pp. 83-100, and BERNSTEIN, Richard J. Derrida: The aporia of forgiveness?. *Constellations*, 2006, Vol. 13, No. 3, pp. 394-406.

[54] For Arendt, forgiveness is a purely human experience rather than having anything to do with divinity or sacred realms. Yet, suppose forgiveness is a grand societal and historical gesture, the essence of which could not be captured by any existing, past or future law. In that case, we cannot sustain the presumption of symmetry between forgiveness and adequate punishment. This is also an important debate in the transitional justice literature on mass societal and political crimes. See HANZ, Pierre. Measuring the impact of punishment and forgiveness:

5.2 Limits of Universal Jurisdiction

Despite the universal jurisdiction clause attached to them, much like forgiveness, crimes against humanity have politico-normative foundations that determine the form of their adjudication. I would further argue that crimes against humanity jurisprudence should not be 'normalized' in international law. By the nature of the crimes it attends, this body of jurisprudence must remain exceptional and extraordinary, putting impossibility to the test, as if it interrupts the ordinary course of human sociality. Only then would it assume the power to intercept the flow of events that sanctify egregious crimes. This article started with distinguishing crimes against humanity from other international crimes. The answer to this question cannot be determined solely based on the doctrinal qualities of crimes against humanity jurisprudence; we need to attend closely to their normative architecture. Their distinct status in this regard deeply connects with Hannah Arendt's narration of the „banality of evil/radical evil" duality with reference to the Eichmann trials.

More than half a century ago, as Arendt witnessed the proceedings of the trial of Adolf Eichmann as one of the major figures in the organization and conduct of the Holocaust, she coined these two separate and yet related terms. The former term has since become a legal conundrum, though it constitutes the beginning point for the study of authoritarian regimes cloaked in legality. Arendt certainly did not mean evil had become ordinary or that Eichmann and his Nazi cohorts had committed ordinary crimes. Rather, she was convinced that the crimes committed were so exceptional that they demanded a new approach to legal judgment.[55] Concomitantly, she offered several challenges to traditional conceptions of legal judgment. The first one was related to *legal intention*. The key question here is whether the courts had to prove that Eichmann intended to commit genocide in order for him to be convicted of the crime. Eichmann may have lacked the required legal intention insofar as he failed to even consider his acts as constitutive of a crime. Though Eichmann acted in total conscious capacity and without being affected by insanity, he lacked a mode of rationality that would yield intentionality. This observation led Arendt to claim that although national socialism was capable of making individuals implement policies that led to egregious crimes, it also equipped them with a cathartic state of assuming no responsibility for their actions and attributing no intentionality to their involvement in the making and sustenance of a criminal regime. In order to claim intentionality, one has to convey the capacity or knowledge needed to think reflectively about the consequences of one's willful actions. The banality Arendt named thus corresponds to the inability to think and understand the weight of one's actions as a legal/political being.

Furthermore, Arendt was not trying to establish an exceptional case for Israel or the Jewish people. Rather, she was striving to articulate the backbone of a theory of crimes against

a framework for evaluating transitional justice. *International Review of the Red Cross*, 2006, Vol. 88, No. 861, pp. 19-47.

[55] In the works of the three post-Holocaust thinkers—Emmanuel Levinas, Hans Jonas, and Hannah Arendt—radical evil, a term originally coined by the German philosopher Immanuel Kant, found a disturbing new meaning that casts a shadow over the gains of crimes against humanity jurisprudence. On the meaning and implications of both "radical evil" and the "banality of evil," see NEIMAN, Susan. *Evil in modern thought: An alternative history of philosophy*. Princeton University Press, 2015, and CARD, Claudia. *The atrocity paradigm: A theory of evil*. Oxford University Press, 2002.

humanity, one that would acknowledge the destruction of not just Jews but also Catholics, Gypsies, gay people, communists, the disabled and the ill under the Nazi regime.[56] In her thinking, the destruction and displacement of these populations on a categorical basis was an attack not only on those specific groups but on humanity itself. As a result, Arendt objected to a specific nation-state such as Israel conducting the trial of Eichmann exclusively in the name of its own population. She was cursed and almost crucified for her interpretation of the crimes of the Nazis. Yet, her interventions also made it possible to talk about crimes against humanity above and beyond the Jewish case and the Holocaust. As the history of crimes against humanity jurisprudence proves, after the particular historical juncture of the Eichmann trial, it became necessary to devise new codes of international law that identify and propose punishment for crimes against humanity in a generic sense.

Finally, a critical aspect of Arendt's observations of the Eichmann trial fell aside in the debate on later developments of international jurisprudence in this area. It concerns the „banality" of such crimes, indicating that they were committed amid daily life and routines, without notable opposition to their conduct, and without being named a crime when they were committed. In a sense, Arendt's calling a crime against humanity banal allows us to conceptualize the socially accepted, routinized nature of these crimes, which are committed mostly through policy enactments and under institutional guidelines and, as such, without moral revulsion, political indignation or public resistance. Hence, her interpretation of crimes against humanity calls for a new political and legal reflection mode. This opposition between the radical nature of the crimes committed and the ordinariness that their committal assumes invites us to rethink the almost mechanical reiteration of crimes against humanity jurisprudence in the post-Rome Statute era of international law.

Arendt was also long blamed for trivializing the Holocaust and the Nazi crimes, as she was seen as attributing them to the Nazis' and their collaborators' simple failure to think before they act. For her, however, the degradation of thinking worked hand in hand with the systematic destruction of populations. What drew the ire against Arendt's interpretation of the Eichmann trials was related to the fact that she confronted the Israeli courts in terms of their legal reasoning and conduct, though not their final verdict. She thought the trial needed to focus more on the acts that Eichmann committed, acts that left an imprint on the whole of humanity, not only the millions of European Jews who perished as a result.

This is partly because similar to the legal philosopher Yosal Rogat before her, Arendt did not think anti-semitism in Germany could be tried in a courthouse.[57] She thus objected to the ways Israel used the Eichmann trial to establish and legitimate its own legal authority and national aspirations as a Jewish state. She was severely displeased by the fact that Eichmann was made to stand for all of anti-semitism and for every Nazi. In her view, this was far too simplistic an interpretation of who Eichmann was and what he stood for. Finally, for Arendt, the Eichmann trial necessitated a profound critique of the idea of collective guilt and

[56] See KRISTEVA, Julia. *Hannah Arendt*. Vol. 1. Columbia University Press, 2001, and FINE, Robert. Crimes Against Humanity Hannah Arendt and the Nuremberg Debates. *European Journal of Social Theory*, 2000, Vol. 3, Issue 3, pp. 293-311.

[57] See ROGAT, Yosal. The Judge as Spectator. *University of Chicago Law Review*, 1964, Vol. 31, Issue 2, pp. 213-256.

a broader reflection on the historically specific challenges to assuming collective and moral responsibility under dictatorships and authoritarian rule. Eichmann was guilty because he failed to take distance from the requirements that Nazi law and policy imposed upon him in a legal order that was impeccably legitimate on paper.

6. Conclusion

There remains, then, a profound question pertaining to the politico-normative foundations of the adjudication of egregious crimes such as crimes against humanity. The first time we heard of acts that could be defined as crimes against humanity was 100 years ago, in 1915, when France, Great Britain and Russia used this concept on a diplomatic note. They were considering issuing a warning concerning the massacre of the Armenians at the hands of the Ottoman elite and military. The first legally sanctioned instance of the adjudication of this category of crimes appeared four decades later, at the Nuremberg trials, set up to judge major Nazi criminals. At Nuremberg, it became a practical necessity to create such a special category of crimes that did not fit into the conduct commonly classified as war crimes. This need to create a new framework was partly because, otherwise, Germany‘s persecution of its own citizens could not be classified as a war crime. Indeed, a country‘s expulsion, deportation, and mass murder of its citizens was not unheard of in the history of war or state-making alike. However, the degree to which the German state-orchestrated and publicly condoned these acts constituted a unique case.

The trouble is, what was once considered unique became a routinely criminalized conduct, but with the expectation to deliver a sense of closure for societal morass and lack of collective responsibility. Thus, the current normative framework characterizing crimes against humanity as a frontal attack on plurality and human diversity became a *pro forma* acknowledgement of the conduct that constitute such crimes as part of the maintenance of the current system of sovereign statehood. Addressing this issue requires a closer look at how international law has played out in court and litigation-based accountability measures, at least in large part, with a particular emphasis on the Global South. Not only did crimes against humanity become normalized, but they also got regularly attributed to only states and societies in the post-colonial geographies, which ultimately and unfortunately led to the current crisis of the legitimacy of their adjudication.

Here comes the hopeful twist introduced by the South Africa v Israel application and corresponding ICJ Order, which brings us back to where this discussion started. Though the international crime in question in this application was not related to Crimes against Humanity, the obligations the Order bespoke of clearly indicated that the elimination of such state conduct was the responsibility of the ‚society of states,‘ including not aiding and assisting in the commission of acts of genocide. Indeed, the affirmative tone indicating the responsibility to prevent genocidal conduct stands out as a macro-scale appropriation of the Arendtian call for not normalizing, streamlining or juridifying the unforgivable. If only the duty to stand against Crimes against Humanity could be redefined as one with a Global Scope, just as the ICJ Order did in the case of Israeli military offensives in Gaza, in the absence of a Convention such as the Genocide Convention. Hence remains our task unfinished, but the need undiminished.