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BOARD OF EDITORS

OVERVIEW

The Journal of International Criminal Law (*JICL)* is a scientific, online, peer-reviewed journal, first edited in 2020 by Prof. Dr. Heybatollah Najandimanesh, mainly focusing on international criminal law issues.

Since 2023 JICL has been co-managed by Prof. Dr. Anna Oriolo as General Editor and published semiannually in collaboration with the International and European Criminal Law Observatory (IECLO) staff.

JICL Boards are powered by academics, scholars and higher education experts from a variety of colleges, universities, and institutions from all over the world, active in the fields of criminal law and criminal justice at the international, regional, and national level.

The aims of the JICL, *inter alia*, are as follow:

- to promote international peace and justice through scientific research and pubblication;
- to foster study of international criminal law in a spirit of partnership and cooperation with the researchers from different countries;
- to encourage multi-perspectives of international criminal law; and
- to support young researchers to study and disseminate international criminal law.

Due to the serious interdependence among political sciences, philosophy, criminal law, criminology, ethics and human rights, the scopes of JICL are focused on international criminal law, but not limited to it. In particular, the Journal welcomes high-quality submissions of manuscripts, essays, editorial comments, current developments, and book reviews by scholars and practitioners from around the world addressing both traditional and emerging themes, topics such as

- the substantive and procedural aspects of international criminal law;
- the jurisprudence of international criminal courts/tribunals;
- mutual effects of public international law, international relations, and international criminal law;
- relevant case-law from national criminal jurisdictions;
- criminal law and international human rights;
- European Union or EU criminal law (which includes financial violations and transnational crimes);
- domestic policy that affects international criminal law and international criminal justice;
- new technologies and international criminal justice;
- different country-specific approaches toward international criminal law and international criminal justice;
- historical accounts that address the international, regional, and national levels; and

- holistic research that makes use of political science, sociology, criminology, philosophy of law, ethics, and other disciplines that can inform the knowledge basis for scholarly dialogue.

The dynamic evolution of international criminal law, as an area that intersects various branches and levels of law and other disciplines, requires careful examination and interpretation. The need to scrutinize the origins, nature, and purpose of international criminal law is also evident in the light of its interdisciplinary characteristics. International criminal law norms and practices are shaped by various factors that further challenge any claims about the law's distinctiveness. The crime vocabulary too may reflect interdisciplinary synergies that draw on domains that often have been separated from law, according to legal doctrine. Talk about "ecocide" is just one example of such a trend that necessitates a rigorous analysis of law *per se* as well as open-minded assessment informed by other sources, *e.g.*, political science, philosophy, and ethics. Yet other emerging developments concern international criminal justice, especially through innovative contributions to enforcement strategies and restorative justice.

The tensions that arise from a description of preferences and priorities made it appropriate to create, improve and disseminate the JICL as a platform for research and dialogue across different cultures, in particular, as a consequence of the United Nations push for universal imperatives, *e.g.*, the fight against impunity for crimes of global concern (core international crimes, transboundary crimes, and transnational organized crimes).

ARTICLES

Journal of International Criminal Law [Vol. 4 – Issue 2]

The Crime of Genocide: National and International Theories and Practices. The Judgment of Hierarchical Responsible in Genocidal Processes. Dialogues and Comparative Experiences: From International Criminal Court to Argentina ESMA Trial

by Carlos Federico Gaitan Hairabedian[*]

ABSTRACT: Genocides and crimes against humanity may involve the highest political leaders and high-ranking military officials. These leaders can be far from the actual site of the crimes, and not engaging personally in any of the material elements of the crime charged. The present work will address theoretical and jurisprudential discussions regarding diverse forms of intervention in punishable acts, to analyze how to attribute individual criminal responsibility of the superior for the acts of their subordinates. Whether they are military commanders or not. I will compare the development of hierarchical responsibility or the responsibility of the Commander-in-Chief within international law, based on the Nuremburg judicial proceedings to the present with the International Criminal Court and the "ESMA Trial" about individual criminal responsibility in the Argentina Navy base between 1976 and 1983. In order to achieve this objective, I will analyze the distinct forms of how responsibility is assigned, referenced in art. 25.3 (a) and art. 28 of the Roman Statute and the adaptation with the rules and regulations of decisions of the International Criminal Court.

KEYWORDS: Argentina; Crimes Against Humanity; ESMA; Genocide; International Criminal Court; Human Rights; Justice; Memory; Truth.

I. Introduction

It is commonplace in genocide studies to say that the 20th century was the century in which more people died due to wars and crimes committed by the state. From the massacres against the *Hereros* and the Armenian Genocide through the Holocaust; from two world wars to the crimes committed in Rwanda, Yugoslavia, Bangladesh, Sudan, the Middle East and the rise of international terrorism, preventive attacks and conservative nationalism. There is no doubt that the 20th century has been a century of state homicides.

After the Second World War, the process of justice and punishment of Holocaust reached a peak of prominence in the Nuremberg Military Tribunal trials. Similarly, but with less visibility, it happened in Tokyo, Japan. Decades later, international justice was delivered by the *ad hoc* tribunals International Criminal Tribunal for the Former Yugoslavia (ICTY) and the

International Criminal Tribunal for Rwanda (ICTR). Towards the end of the 20th century, hybrid courts emerged such as the Special Court for Sierra Leone, the Court of Bosnia Herzegovina, the Special Court of Sierra Leone, the Extraordinary Chamber in the Court of Cambodia, etc.

International human rights law, public international law and humanitarian law emerged as international instances of justice against crimes against humanity or genocide. At the end of the 1990s, the International Criminal Court (ICC) was created as a synthesis, of all the previous

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experiences with competence *ratione materiae* in international crimes (genocide, war crimes and crimes against humanity among others). This fact undoubtedly marked a clear advance in the international fight against impunity, despite the enormous difficulties of implementing the Rome Statute (RS) and certain criticisms in the definitions of some criminal types.

Meanwhile, at the beginning of the 21st century in South America, Argentina, a powerful process of impunity was stopped by the struggle of the human rights movement – which was accompanied by broad sectors of society. The search for truth, memory and justice collapsed the wall of silence, impunity, oblivion, and forgiveness established by decades of impunity. Starting in 2004 Argentinian state began to give official responses to their historical demands regarding gross violations of human rights committed during the military dictatorship (1976-1983). Thanks to the declassification of secret intelligence documents and military files and the support to witnesses and victims' trials began all over the country against perpetrators in tune with the highest standards of international human rights law.

The trial of individuals responsible for international crimes presents enormous technical difficulties. The classic positivist legal systems of the late 18th and 19th centuries did not foresee massive crimes committed by individuals in high positions of power such as genocide, war crimes and crimes against humanity. It was only with the creation of international tribunals in Nuremberg and Tokyo, and later with the ad hoc tribunals, that specific procedures and mechanisms for judging these large - scale crimes began to take hold. With the sanction of the RS and the ICC decisive progress was made, marking a turning point in the international fight against impunity, with legal and political social derivations that reach the present.

This are complex processes that need the academia to improve and achieve their full development through the study and analysis of their jurisprudence and doctrine. Precisely from there arises the need to address issues such as the responsibility of military leaders and hierarchical superiors in a comparative perspective. This method helps us to study, understand, disseminate, and contribute to the progressive development of International Human Rights Law and International Criminal Law in the fight against impunity and the strengthening of international justice based on international cooperation and dialogue.

Especially in these days, it is necessary to redouble intellectual efforts generating debates, presenting proposals, and strengthening the commitment of the academic and legal community specialized in the matter to provide new and better technical tools to guarantee memory, peace, truth and justice and the government of International Human Rights Law.

II. Individual Responsibility in International Law

Until Second World War international public law had the states as the central subject of concern. After the Holocaust, the center of the scene was occupied by the international protection of the individuals. It was in the 20th century, with the development on international law that human person become a subject of international law, overcoming to that all-powerful conception of the Hegelian state.[1] We can find the roots of international protection of the individual in the Kantian conception of person as an end in 17th and 18th century. The prevailing legal positivism in modern states systematized this conception within their respective legal systems during the 19th and early 20th centuries, reinforcing the centrality of the individual as a subject of law. This legal evolution reached its peak with the Universal Declaration of Human

[1] Antonio Augusto Cançado Trindade, *The Human Person as a Subject of International Law: Advances in its International Legal Capacity in the First Decade of the 21st Century*, 46(1) IIDH MAGAZINE 270 (2007), at 274-279.

Rights in 1948[2] when the primitive barbarism of the human being in the Nazi concentration camps was exposed to the world.

The central question is: how can such heinous crimes be committed against human beings? It is then that the direct responsibility of the individual bursts onto the international legal scene. Individual responsibility was established, and the duties imposed by international law were defined. The consolidation of the international criminal personality of individuals, as active subjects, as well as passive subjects of international law, strengthens responsibility (accountability) in international law for abuses perpetrated against human beings. On the other side, individuals are also bearers of duties under international law, reflecting the consolidation of their international legal personality. The statute of the Nuremberg International Military Tribunal (Charter of the International Military Tribunal) agreed upon in the London Agreement by the victorious powers of World War II was the birth certificate of International Criminal Law. The confirmation of the law applied at Nuremberg took place at the International Criminal Tribunal for the Far East in Tokyo between 1946 and 1948. Then, in the post-war period, the international criminal law applied by these military tribunals was validated, in turn, by Law no. 10 on the "Punishment of Persons who are guilty of having committed war crimes, crimes against peace or crimes against humanity of December 20, 1945", known as Law no. 10 Allied Control Council with jurisdiction over 4 occupation zones. On 13 February 1946, the UN General Assembly adopted Resolution 3 (I), in which it became aware of the definition of war crimes, crimes against peace and crimes against humanity as contained in the Statute of the Military Tribunal of Nuremberg on 8 August 1945. Later, that same year, Resolution no. 95 (I) of 11712/1946, confirmed the principles of international law recognized by the Statute of the Nuremberg Tribunal and its judgment. Later, the system for prosecuting individuals responsible for crimes was reinforced by the sanctions of the ICTR and ICTY Statute. Currently by the RS and the creation of the ICC. Since then, International Criminal Law (ICL) achieved a significant advance in the commitment pursued by the international community to fight against impunity, thus reaffirming, once again, the condition of the individual not only as a holder of rights but also as a subject of individual criminal responsibility.

Genocide, crimes against humanity, war crimes, forced disappearances, ethnic cleansing, massacres, torture - known as core crimes - among others, are international crimes, regardless of how they may be considered in domestic law of the states. One of the great advances of the ICL was to consider *stricto sensu* individuals subjected to criminal sanctions and not the States to which they belonged. It is the people who bear criminal responsibility individually, regardless of whether they are State agents. This new conception of individual criminal responsibility for international crimes was the great advance that international law had in recent years.

We can cite three different levels of evolution in international courts of the notion of individual criminal imputation for international crimes. The first level of individual criminal responsibility implemented in the Nuremberg and Tokyo Tribunals. The second level took place with the ad hoc creation of the ICTY and the ICTR. Finally, the third stage that began with the creation of the ICC. In this type of crime, where criminal organizations, generally but not necessarily state-owned are involved, the responsibility of the superior is usually complex, and the doctrine was not always able to respond to the questions and difficulties raised.[2] The doctrine of criminal responsibility of the superior and its legal conceptualization in the Rome

[2] Daniel Turack, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law by Elies Van Sliedregt*, 33(2) CAPITAL UNIVERSITY LAW REVIEW 525 (2004), at 526.

Statute was a response to the limitations presented by the concepts of authorship and participation to capture the responsibility of the superior.

III. Evolution of the Criminal Responsibility of the Hierarchical Superior

The position of the hierarchical superior has shifted throughout the jurisprudence in international courts. The Nuremberg jurisprudence has limited the criminal responsibility of superiors for the acts of subordinates to generals and commanding officers, excluding military personnel without such command from liability. The Tokyo Court limited liability to cabinet members. The ICTY has demanded a "position of authority" or a "hierarchical power". Its antecedents go back, as a general principle, to international humanitarian law. In the Regulation Annex to the Convention IV of The Hague of 1907, it was already mentioned that the superior should exercise a responsible command in relation to his subordinates.[3]

The qualitative jump in this matter was given by the ICTY Statute and its jurisprudence. The Statute established the individual criminal responsibility in arts. 7.1, and 7.3, which established the responsibility of the superior for acts committed by his subordinate as "responsibility by command". This doctrine also established that the person who planned, instigated or perpetrated the of crimes did not necessarily have to be the perpetrator of the *actus reus* of any of those crimes, but rather had to have

> […] the criminal intention, which is directly or indirectly, the intention that this act be committed […] In order for the perpetrator of the actus reus to act, there must be a previous plan or an order […] and there must be evidence that demonstrates the connection between the instigation and the *actus reus* of the crime. [4]

Thus, one or several people could be the ones who designed the criminal plan, with a division of roles both in its preparatory phase and in its execution.

Until then there were coincidences both in the doctrine and in the jurisprudence that the superior should be the one who had a certain "level of leadership" and command. But it was with the sanction of the RS and the creation of the ICC where certain ambiguities were overcome and a clear and simple formula was established that referred to the "superior and subordinate" that was not limited only to responsibility at the leadership level. The RS also expanded the power of the subject who was responsible for his hierarchical position at the command level (power of command or "command"), giving the norm a more solid structure with a more precise wording.

It is important to clarify that the attribution of criminal responsibility in the international criminal law must be distinguished from the same in national criminal law. While in the latter case a specific criminal result caused by the individual act of a person is normally punished, international criminal law creates responsibility for acts committed in a context of collective violence, or in a systematic or generalized manner, as is often the case with war crimes, genocide and crimes against humanity. As they are complex facts that are very difficult to investigate, the individual's own contribution to the harmful result is not always evident because it usually operates within the framework of organized power structures, which range from

[3] KAI AMBOS, THE GENERAL PART OF INTERNATIONAL CRIMINAL LAW. BASIS FOR A DOGMATIC ELABORATION (2002), at 299.

[4] ICTY, The Prosecutor v. Tihomir Blaškic, IT 95-14T, Judgment, Trial Chamber (Mar. 3, 2000), para. 278.

armed organizations - state or not - and which carry out diverse actions in very complex fields of action, often indeterminate.

One of the most relevant aspects of the ICC jurisprudence on the individual responsibility of an accused for an act that he did not commit as a direct perpetrator occurs in the decision confirming charges in the case *Katanga and Ngudjolo Chui* case no. ICC-01/04-01/07 of September 30, 2008 and in the confirmation of charges decision in the case *Lubanga* case no. ICC-01/04-01/06 of January 29, 2007. Two fundamental aspects stand out here: 1) the ratification of the provisions of the decision confirming charges in the *Lubanga* case regarding the adoption through art. 25(3)(a) of the theory of mastery of the fact as distinctive criterion between authorship and participation and; 2) the use for the first time in the history of the Court of mediate co-authorship, as a result of the joint application of co-authorship based on functional co-domain of the fact and mediate authorship by domain of organized power structures.

Neither Germain Katanga nor Mathieu Ngudjolo Chui was considered to have materially committed any of the crimes that took place during the attack on Bogoro region, but rather their role was to ensure the execution of the attack by discussing the details with the commanders in charge of leading troops on the ground, providing weapons. They lead the deployment of his forces and give the orders to attack the population. The defendants made their contributions through the armed groups that they managed both *de jure* and *de facto,* thus complying with the requirement of a hierarchical structure with fungibility of its members, as required by mediate authorship through structures of power. The success of the attack depended on the joint and coordinated action of these two-armed groups of different ethnic groups. Being Lendus and Ngitis, the combatants only responded to orders from the chiefs who were of their ethnic group. Since it was not possible to identify to which armed group the direct perpetrators of the attacks belonged, because the subordinates of one would not carry out the orders of another, nor could it be established that Katanga and Ngudjolo Chui had participated directly in the attack, SCP I decided apply the concept of indirect co-authorship based on the functional domain and indirect authorship through the structure of power.

For this reason, due to the great development of the theme in the international arena, I believe it is important to describe and comment on how individual responsibility was analyzed in the trials against those responsible for crimes committed during the Argentine dictatorship (1976-1983).

Although the cases analyzed so far took place on the African continent after the entry into force of the RS, we must remember that in Latin America during the 1960s, 1970s and 1980s there was also a history of similar criminal acts that they could have been included, without any difficulty, in any of the crimes established by the ICC. We said that the spirit of this research work was to generate a contribution that would reinforce communication, cooperation and the comparison of experiences in the judgment of this type of facts with the aim of using the best possible tools in pursuit of the universal fight against impunity. To that end, I believe it is essential to analyze the local Argentine experience on the responsibility of the superior in the prosecution of state crimes. In the case of this article, I will work on two cases: the *Juicio a las Juntas* or case 13/84 and the ESMA Trial.[5]

IV. The Judicial Treatment of the Responsibility of the Superior in the Crimes of the Argentine Military Dictatorship (1976-1983). "ESMA Trial" and *Juicio a las Juntas*

[5] Also known as "ESMA Megacausa" "ESMA III" or "ESMA Unificada" no.1282, TOF 5.

As in many Latin American countries, the institutional political history of the Argentine Republic was crossed by the horrors of a military dictatorship between 1976 and 1983. We call this process "*state terrorism*" because as the opposite of the rule of law. A systematic extermination plan based on secrecy and terror was structured from the state. The tragic result was around 30,000 murdered disappeared detainees, of all ages and social status, most of them thrown alive into the sea after unspeakable processes of physical and mental torture or shot and clandestinely buried.

With the mobilization of broad sectors of the Argentine people accompanying the historical claims of the human rights movement, the process of transition from dictatorship to democracy reached one of its fundamental milestones and the first treatment of the horrors of the recent past through the *Juicio a las Juntas* in the mid-1980s.

In this process we found the bases of the application of the doctrine established a few decades later in arts. 23 and 28 of the RS. It was proved, based on numerous testimonies and expert evidence substantiated in oral and public hearings, the organization of clandestine operations executed by illegal structures directed by the commanders in chief of the Argentinean military for the persecution and disappearance of people. The existence of a criminal plan devised from the highest levels of the Argentine state to commit crimes such as homicides, illegal deprivation of liberty, torture and theft of babies, among other massive violations of human rights, was proven. The judges of the *Juicio a las Juntas* were inspired and influenced by a criterion for attributing criminal responsibility the theory of mediate authorship by an organized power structure, based on the judgement of Nazi criminal in Nuremberg Trials. On this factual basis, the judges concluded that

> […] the instrument used by the man behind is the system itself that he manages discretionally, a system that is made up of expendable men based on the proposed purpose. The domain is not then over a concrete will, but over an 'indeterminate will', whatever the executor, the event will still occur.[6]

But in the *Juicio a las Juntas* only the Commanders-in-Chief and a few high rank generals were convicted. It was proved the existence of a systematic plan of extermination at the national level, using military bases and police stations and centers of detention and torture. Kidnappings were planned there, detainees were tortured[7] and disappeared through "death flights" the Argentinean final solution. Among this torture centers, in the middle of Buenos Aires city there was one emblematic: the Navy Higher Mechanics School (ESMA). When an attempt was made to advance to the responsibility of middle and lower commands in the *Juicio a las Juntas*, quartering's and attempted coups occurred. During that time military still maintained a significant share of power that managed to considerably condition the democratic order. Due to the strong pressure exerted by the armed forces against this trials, impunity laws were enacted,[8] which together with presidential pardons, prevented the punitive claim and the continuation of investigations of these crimes. As a reaction of resistance to the prevailing impunity, the human rights movement found the so-called "Truth Trials" as the only existing hybrid judicial channel to obtain truth and respond to the claims of victims and relatives of

[6] Federal Criminal and Correctional, Trial of the Military Juntas, 13-1984, Appeals Chamber of the Federal Capital, Judgment (Dec.9, 1985).
[7] Sex crimes, appropriations of minors, robberies were also committed.
[8] Due Obedience Law no. 23,521 and Full Stop Law 23,492 were enacted on 23 December 1986 and 6 April 1987, respectively.

crimes of the dictatorship and search for the disappeared. Based on the Right to Truth, these processes allowed to recover evidence and to claim the search of disappeared bodies. [9]

After decades, in the beginning of the 21st Century the impunity process was reversed. After 2005, Argentina started a new era which can be called "The memory, truth and justice process",[10] characterized by the annulment of impunity laws and nullity of military pardons, backed by international human rights law which sparked the re-opening of new trials against, medium and low rank military officers.[11] According to the Egyptian jurist of Armenian origin Sèvane Garibian

> Argentina has the particularity of having experienced – since the dawn immediately after the military dictatorship – practically all of the legal tools known in the treatment of massive violations of Human Rights: self-amnesty followed by investigation commission (1983), criminal trial (1985) followed by new amnesties (1986-87), presidential pardon (1990), repeal of amnesties for being considered unconstitutional by the Supreme Court of Justice and reopening of criminal proceedings (2005).[12]

Many of these sentences qualified the acts constituting crimes against humanity, although for another minority group of judges they were qualified as "genocide".[13] These trials are an open space for witnesses, victims, survivors, families, and the community in general to testify in public a legal proceeding endorsed by the National Constitution and International Human Rights Law. The testimonies heard in these trials are not only procedural acts but also true instances of reparation and an exercise of collective memory. But on a strictly procedural level, testimonial statements are fundamental evidence to hold the perpetrators accountable.

How are individuals prosecuted in this trials? Which is the most efficient mechanism to apply different models of criminal imputation? How are applied? Here is when International Criminal Law receipted by the Argentine legal system provides tools based on the principle of cooperation and comparative analysis helping to improve criminal imputation to high, middle and low rank responsible and ensure the best way to prosecute them.

In the ESMA Trial, that took place between 2012 and 2017 more than 54 individuals were prosecuted, most of them medium and low rank officers who served at the ESMA. Among them there was a group of criminals - some resounding as Astiz, Acosta, Donda, Pernías, Cavallo - who had been benefited by the impunity laws in the eighties and later with the reopening of in

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[9] A fundamental role in this process was played by Professor Juan Méndez of the American University Washington College of Law. Thanks to the Trials for the Right to the Truth, the son of survivors of the Armenian genocide Gregorio Hairabedian initiated a Trial for the Right to the Truth of the Armenian Genocide in 2001 and an Argentine federal judge ruled in his favor in April 2011, judicially recognizing the Genocide Armenian, www.verdadyjusticia.org.ar.

[10] According to official calculations of the Attorney General of the Nation, from the reopening of the trials until 2021, a total of 631 trials were registered, in which 1,044 individuals were founded guilty and 162 innocents. Many of these sentences qualified the acts constituting crimes against humanity, although for another minority group they were qualified as "genocide", see *Son 1044 las personas condenadas en 264 sentencias en causas por crímenes de lesa humanidad*, FISCALES (Sept. 24, 2021), https://www.fiscales.gob.ar/lesa-humanidad/son-1044-las-personas-condenadas-en-264-sentencias-en-causas-por-crimenes-de-lesa-humanidad/.

[11] The pardons were rendered null, and void and the Due Obedience and Full Stop laws were declared unconstitutional. The Supreme Court of Justice of the Nation issued the rulings *Arancibia Clavel* (Ruling 327: 3312) of 24 August 2004 on application of the principle of imprescriptibly of crimes against humanity, *Simón* (Ruling 328: 2056) on the unconstitutionality of the laws of due obedience and full stop of 14 June 2005 and *Mazzeo* (Ruling 330:3248) on the unconstitutionality of the pardons of 13 July 2007, among others.

[12] Sèvane Garibian, *The Legal Consecration of Forgotten Witnesses: The Argentine Judge Against the Armenian Genocide*, 92 LECTURES AND ESSAYS FACULTY OF LAW UNIVERSITY OF BUENOS AIRES 279 (2015), at 279-297.

[13] *Son 1044 las personas condenadas*, *supra* note 10.

this trial, prosecuted again. One of the most relevant characteristics of the ESMA Trial was that it was possible to demonstrate the structural functioning of the repression of the Argentine Navy during the dictatorship. The most innovative part of this process was having realized the implementation of the final stage of the extermination plan through the death flights. Throughout five years of oral debate, hundreds of witnesses, forensic experts, survivors and relatives testified. And one of the difficulties raised during the trial was related to which theory of attribution of responsibility should be applied, taking into account the multiplicity of behaviors and the different degrees of participation of the accused depending on the number of attributed acts and the organic position they occupied – whether within their official or clandestine face- within the structure of the force. The different positions in this regard and the differences between the parties revived discussions on the international jurisprudence that we have seen so far, adding in this trial a new tension on the application of the doctrine of the Joint Criminal Enterprise (JCE) and the theory of mastery of the fact through the organized structures of power. Many defendants rejected the transfer of *ad hoc* international criteria to local jurisprudence. But the Court convicted most of the accused applying as a criterion of attribution of responsibility the theory of mastery of the fact through devices of organized power, analyzed by Roxin for the immediate authors, and the subsequent theory of successive functional co-authorship for the direct participants. In this way, the validity of this doctrine was ratified in local Argentine jurisprudence which necessarily leads to reflect on the effectiveness of continuing to use this institute and to concentrate efforts on a correct attribution of responsibility based on the application of the functional domain of the act and mediate authorship through organized power structures as used by the ICC in the *Katanga* and *Lubanga* cases.

The long road of the fight for memory, truth and justice paid off. Based on the evidence collected over so many years in the ESMA Trial, the existence of a structural plan for the annihilation of the Argentine Navy, based in the ESMA, was proven, in which the highest command to the last non-commissioned officer participated. Based on this doctrine, not only were the direct perpetrators punished, but those who directed the extermination plan from their naval desks were held criminally responsible. In this sense, it was correct that the analysis of the participation of the defendants in the ESMA Trial was formulated in terms of a functional co-authorship verified within the structure of an organized apparatus of power, whose scope of action has been separated from the right, and where the members of the same had a defined and positive willingness to carry out the illicit act planned together.

It is necessary to frame these debates in the context of the local experience of prosecuting international crimes, the analysis of which serves to improve the technical tools both at the national and international levels. The trial experiences at these two levels provide an ideal framework for a broad debate and an exchange of experiences that lead to the strengthening of the global principles of the fight against impunity and the defense of international human rights law. This is precisely where the international cooperation between jurisdictions that Prof. Cancado Trindade referred to as "judicial dialogue and coordination" serves as a connecting point and conceptual framework.

The globalization of justice and the globalization of the persecution of barbarism could be the axis of the criminal policy of the ICC. Powerful and rich experiences such as the ESMA Trial in Argentina, arise debates and productions around criminal doctrine institutes. The implementation of human rights in the internal sphere of the states, as well as the effectiveness of certain evidentiary standards, the role of the victims in the process and the role of judges and defenders could function as a beacon and guide for current and future processes where crimes of this magnitude are judged, especially the International Criminal Court.

V. Conclusion

Since 1948, the original mission of the Universal Declaration of Human Rights was the universalization of constitutive rights of human dignity. Hannah Arendt said that human rights were not simply a fact, but a constructed fact, a human invention, which was in a constant process of construction and deconstruction. They were the law of the weakest against the law of the strongest. A counterpower against absolutism and authoritarian barbarism. In the field of international criminal law, from Nuremberg to the ICC, this process had advances and setbacks. Without a doubt, the creation of the ICC and the trials of criminals of the dictatorship in local Argentine oral courts honors the implementation of international human rights law in the domestic sphere, leading to a great advance in the history of international law.

In times like ours, where the homogeneous and pure global conception of the German jurist Carl Schmitt seems to prevail with the rise of nationalism and fascism in many countries, it is key to reinforce the commitment of the states, civil society and international organizations for the protection of human rights in the international fight against impunity and in the implementation of international human rights law. We should be inspired by those advances achieved by the emancipatory struggles for human dignity, which in 1948 provided effective responses to the atrocities committed by Nazism. These same struggles of the Argentine human rights organizations so that the state would render accounts to society for the crimes committed by the military dictatorship between 1976-1983 and that there be truth and justice in memory.

The fight for the effective fulfillment of human rights, truth, memory and justice against impunity is not a straight path defined a priori. Underlying processes in continuous development that open and consolidate spaces of struggle for human dignity and universal justice.

Latin America, a continent that has a lot to say about the suffering of its people from atrocities and the horror of state crimes. Perhaps those who live in other latitudes can look towards the American continent and see how a history of death, terror and authoritarianism in the peoples of Latin America has led in many cases to processes of transition from dictatorships to democracies that managed to address their past and present on the basis of peace, law and unrestricted respect for human rights. A clear example of this process can be seen in Argentina, where took place he permanent mobilization and sustained claim of the human rights movement with the support of the national state and international organizations.

In Greek mythology, King Sisyphus was punished by the gods to climb a mountain by pushing a giant rock and lower it again, like this for all eternity, as a constant process in eternal movement. The eternal struggle towards the mountain tops is like the struggle for human rights, enough to fill the human heart. It may seem absurd because the struggle for human rights has no end and it cannot have an end. The fight for universal justice and the defense of human rights in the 20th century has been similar to that of Sisyphus. A constant and eternal struggle, full of efforts and frustrations. Sometimes absurd. Although the true absurdity is the gross violations of human rights, which supposes, as in the case of genocide, to eliminate from the face of the earth a social group determined, it always failed because perpetrators cannot erase the memory of people. The claims and struggles in defense of human rights leaves marks and create memory. The international protection of human rights and the defense of the human rights of life and human dignity, the search for justice and the end of impunity, will never be absurd, although it often seems like an impossible mission.

Sisyphus's rock leaves its traces every time it descends from the mountain.

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Crimes Against Humanity in Nigeria: A Case of the Activities of *Boko Haram*/Islamic State in West African Province

by Cyril Ezechi Nkolo[*]

ABSTRACT**:** It is a global knowledge that the *Boko Haram* Terrorists and its offshoot of the Islamic State in West African Province have been fighting Nigerian security forces, especially in the North East of Nigeria since 2009. These terrorists in pursuit of their plan/policy have displaced millions of Nigerians, murdered thousands of innocent civilians, maimed, pillaged, raped, tortured and destroyed civilian objects with impunity. The crux of this paper is to investigate whether crimes against humanity have been committed by the activities of the *Boko Haram* terrorists in Nigeria and, where it is committed whether the International Criminal Court can prosecute and sanction the perpetrators. The paper copiously demonstrated that the *Boko Haram* terrorists committed crimes against humanity in all its ramifications via their activities in Nigeria. The common place where the citizens of Nigeria assemble often are market places, restaurants, churches, mosques, motor parks, schools and colleges. Unfortunately, it is these places that became targets by the *Boko Haram* terrorists killing civilians who were *horse de combat* as well as destruction of civilian objects and consequently, committed crimes against humanity. The paper also shows that the Federal Government of Nigeria led by Muhammed Buhari is handling the *Boko Haram* terrorists with kid-glove. Consequently, the Federal Government is unable or unwilling to prosecute and sanction the *Boko Haram* perpetrators for reasons best known to them. It is therefore, recommended that the International Criminal Court should step in to prosecute and sanction the *Boko Haram* terrorists for the heinous crimes committed against thousands of innocent civilians in Nigeria to ensure justice and assuage the spirits of the innocent people the terrorists killed like goats.

KEYWORDS: *Actus Reus*; Armed conflict; Crimes Against Humanity; Criminal Responsibility; *Mens Rea*.

I. Introduction

The *Boko Haram* terrorists and its offshoot of Islamic State in West African province have been fighting Nigerian security forces, especially in the Northeast for over a decade now, displacing more than twenty million people, killing, raping, torturing, kidnapping, pillaging, transferring them, and converting them to slaves. These groups have also attacked villages, killing civilians and innocent people with impunity. They also attack civilian objects such as churches, mosques, schools, shops, hospitals, killing civilians, Correctional Centres, kidnap and collect ransom from their victims.

The terrorists invade the area in large numbers simultaneously attacking villages and settlements.[1] All these attacks have kept occurring without any strong coordinated and

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[1] Levinus Nwabughiogu, *Soldiers Killing: Reps Calls for Redeployment of More Soldiers to Taraba*, VANGUARD NEWSPAPER (July 21, 2022).

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consistent intervention from the security agencies, especially since the soldiers were attacked by the terrorists and the commanding officer of the 93 Battalion abducted.[2] These acts and omissions of the parties, the Nigerian security agencies and the *Boko Haram* terrorists in the conflict amount to crimes like murder, causing grievous bodily harm, malicious destruction of property, terrorism and even treason.[3] There are copious laws in Nigeria to punish such serious crimes in Nigeria but the Government is not willing or lack the capacity to do so. Accordingly, these terrorists parade the country, particularly the North East killing civilians, raping, pillaging and destroying civilian objects unchallenged and with impunity. On Sunday June 5, 2022, terrorists launched ferocious attack on Catholic faithful at St. Francis Catholic Church, Owo, Ondo State, killing scores and injuring many others. No one has been arrested and brought to book for these heinous crimes. The terrorists strike at any location of their choice, killing and maiming innocent, law abiding citizens and the government pretends to be helpless.[4]

From the foregoing, it is very obvious that the terrorists and Nigerian security agencies have not only committed acts in conflict with the domestic laws as articulated above but have also committed crimes against the International Humanitarian Law, particularly Crimes Against Humanity and War Crimes. The crux of this paper is to investigate whether crimes against humanity have been committed by the activities of the *Boko Haram* Terrorists and, if so, whether the International Criminal Court can prosecute and sanction the terrorists who committed the offence/crime.

II. Conceptual Clarifications

A. *Boko Haram*

Boko Haram is a combined term derived from Hausa and Arabic languages. The term *Boko* comes from the Hausa word *Animist* meaning western or non-Islamic education. The Arabic word *Haram* means, western education is a sin. *Book Haram* is a controversial Islamic Militant Group that seeks the imposition of Sharia Law and practices on Nigeria beginning with Northern States of Nigeria.[5] By and large, it is a terrorist or militant group that abhors western education, western culture and scientific explanations to certain natural happenings.

The group was founded by one Mohammed Yusuf. It is targeted to abolish the secular nature of the Nigerian society and to replace it with an Islamic State, by establishing a sharia system of government in the country. It is equally against western education and the teaching of modern science. These ideas are anti-Islam, according to Yusuf.[6] Thus, the *Boko Haram* terrorists were against western education and culture hence, they perceived its teachings as contrary to tenets of Islam. Consequently, western education and current democratic government should be overthrown and replaced with a theocratic state premised on the Sharia doctrine.

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[2] *Id*.

[3] FIGHTING ON THE SIDE OF LAW AND JUSTICE: LEGAL ESSAYS IN HONOUR OF PROFESSOR G. O. S. AMADI, CHUKWUNONSO OKAFOR (Chukwunonoso Okafọ, Simon U. Ortuanya, Chukwunweike A. Ogbuabor eds., 2016), at 276.

[4] Ikechukwu Amaechi, *Murder of Catholic Priests: Nigerian State is Complicit*, VANGUARD NEWSPAPER (July 21, 2022).

[5] Aigba Aondifa, *Human Rights and Terrorism in Nigeria: A Focus on the Boko Haram Insurgency*, 4 CALABAR LAW JOURNAL 120 (2016), at 126

[6] Dennis Nwabuisi, *History and Origin of Boko Haram*, BLOGSPOT (Jan. 15, 2012), http://nwabuisidenis.blogspot.con.ng/2012/01/history-and-origin of boko-haram people.html.

B. Armed Conflict

Armed conflict is defined as a state of open hostility between two countries or between a country and an aggressive force. A state of armed conflict may exist without a formal declaration of war by either side.[7] From the definition above, it is clear that what constitutes armed conflict is a matter of law.[8] Also, implied in the definition is that armed conflict is classified into two broad categories viz, International Armed Conflict (IAC) and Non-International Armed Conflict.[9] International Armed conflict is deemed to exist where the circumstances meets the thresh hold provided by Article 2 Common to the Geneva Convention. The article provides that: in all cases of declared war between two or more States Parties to the convention even if the state of war is not recognized by one of the parties involved and all situations of partial or total occupation of the territories of parties to the convention even if the occupation is met with no armed resistance.[10] In *The Prosecutor v Tadic*,[11] the International Criminal Tribunal for former Yugoslavia held that armed conflict is deemed to exist wherever there is a resort to armed force between states. Thus, in an International Armed Conflict, that is any resort to armed force by the state against another may constitute armed conflict within the contemplation of Article 2 Common to the Geneva Convention notwithstanding the level of intensity of the conflict.[12] An armed conflict is international if it takes place between two or more states, such as the current war between Russia and Ukraine.

On the other side of the coin is non-International Armed Conflict. According to Common Article 3, Non-International Armed Conflicts applies to armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties.[13] An internal armed conflict or non -international armed conflict may be defined as armed conflict that takes place in the territory of a state and which does not qualify as an International armed conflict as articulated above.[14] Put differently, it is a protracted armed conflict between government authorities and organized armed groups or between such groups within a state.[15] Article 8 (2)(f) states that: "the concept of armed conflicts not of an international character" include, armed conflict that take place in the territory of a state when there is protracted armed conflict between government authorities and organized armed groups or between such groups.[16]

Non-international armed conflicts are generally covered by Article 3 Common to the General Conditions and by Additional Protocol 11.[17] The existence of non-international or internal armed conflict triggers the application of International Humanitarian Law as the law of

[7] BLACK'S LAW DICTIONARY (Bryan A. Garner ed., 2014), at 129.
[8] Elijah O. Okebukola, *Calibrating the Legal Obligation in the Ongoing Non-International Armed Conflict in Nigeria*, BOKO HARAM AND INTERNATIONAL LAW (John-Mark Iyi, Hennie Strydom eds., 2017), at 82.
[9] Elijah O. Okebukola, *Legal Regime for The Protection of Civilians and Civilian Objects During Armed Conflict*, 3(1) NASARAWA JOURNAL OF PUBLIC AND INTERNATIONAL LAW 251 (2016), at 252
[10] Art. 2 Common to the Geneva Conventions.
[11] ICTY, Prosecutor v. Dusko Tadic, 11-94-1-AR 72, Appeals Chamber, Judgment (Oct. 2, 1995), para. 70.
[12] Okebukola, *Calibrating the Legal Obligation*, *supra* note 8, at 252.
[13] Vitus M. Udegbalem, *An Appraisal of International Humanitarian Law*, 2(3) INTERNATIONAL REVIEW OF LAW AND JURISPRUDENCE 100 (2020), at 106
[14] KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW (2006), at 137
[15] ICTY, Prosecutor v. Dusko Tadic, IT-01-47-AR72, Appeal Chamber, Decision on Interlocutory appeal, (July 7, 2003), para. 7
[16] MARK O. UNEGBU, FROM NUREMBERG CHARTER TO ROME STATUTE: JUDICIAL ENFORCEMENT OF INTERNATIONAL HUMANITARIAN, LAW (2015), at 192
[17] *Id*., at 191.

armed conflict regulating the limits on which the parties to an armed conflict may conduct hostilities and protect all persons affected by the conflict. It applies whenever there is a protracted armed violence within the territory of a state between government forces and organized armed groups or between such groups.[18] As observed by Unegbu, the purport of Common art. 3 and Additional protocol 11 is to extend the principles applicable in international wars to non-international armed conflict.[19] Additional protocol also applies to armed conflict and further provides that: non-international armed conflicts are armed conflicts which take place in the territory of High Contracting Party between its armed forces and dissident armed forces or their organized armed groups which, under responsible command, exercise such control over parts of its territory as to enable them to carry out sustained and concerted military operations to implement this protocol.[20] Humanitarian Law on war is provided by the Additional protocol 11 and art. 82(f) of the Rome Statute of International Criminal Court. Art. 8(2)(e) of the Rome Statute is very eloquent on this. In line with the traditional humanitarian law, these articles exclude crimes committed in situations of International or non-international disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of similar nature from the concept of war crimes. The International Court for Yugoslavia in Tadic Decision,[21] established two major criteria for an armed conflict to qualify as a Non-International Armed conflict under Common art. 3 thus:

> (i) The armed conflict must be protracted; this is also known as the "intensity principle";
> (ii) the armed group(s) must be organized.

These criteria are used for the purpose of differentiating between armed conflict on the one hand and banditry, unorganized or short-lived insurrections on the other hand.[22]

A juxtaposition of the basic legal elements of non-international or internal armed conflict as constituted by the Rome Statute, art. 8(2)(f), art. 3 Common to the Geneva Convention and Additional Protocol and the activities of the *Boko Haram* Terrorists/ISWAP shows that the armed conflict between the Government of Nigeria and *Boko Haram* qualifies as Non-International Armed Conflict. *Boko Haram* activities in Nigeria has lasted for over a decade and is increasing in intensity every minute of the day. The element of protractedness of the conflict as required by the law is patently manifest with regard to the *Boko Haram* activities. The present insistent wave of terrorists' attacks on Nigerians and the Nigerian State usually ascribed to *Boko Haram* over a decade has called the Nigerian national security apparatus to arm, challenging them.[23]

Other elements as required by the law to declare an armed conflict as non-international armed conflict include the following:

> The armed group(s) must be organized, it must be under a responsible command, exercise such control over a part of the territory to enable them to carry out sustained and concerted military operations.

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[18] ICTY, The Prosecutor v. Fatmir Limaj, IT-03-66-T, Trial Chambers, Judgment (Nov. 30, 2005), para. 84.
[19] Unegbu, *supra* note 16, at 191.
[20] Art. 1(1) Additional Protocol II to the Geneva Convention (June 8, 1977).
[21] ICTY, Prosecutor v. Dusko Tadic, Appeals Chamber, *supra* note 11, para. 70.
[22] ICTY, Prosecutor v. Dusko Tadic, IT-94-1-7, Trial Chambers, Judgment (May 7, 1997), para. 526.
[23] Adedoyin Akinsulore, *The Boko Haram Syndrome and the Nigerian's National Security Crises: A Socio-Legal Appraisal*, 16(1) UNIVERSITY OF BAMM LAW JOURNAL 199 (2015), at 199.

These elements are conspicuously present in the activities of the *Boko Haram* Nigeria. *Boko Haram* has a very superb structure and command. Since the demise of their founder in 2012, they always have a very fine command structure and organogram. They are also in control of some parts of states in North-East of Nigeria that even pay taxes to them such as Damaturu in Bornu State and up till today control Damaturu junction road. Contrary to the claims that no Local Government Area in Bornu State is under the control of *Boko Haram* Insurgents, the Speaker of Bornu State House of Assembly, Abdulkarim Lawan, has said that two Local Government Areas are being controlled by the terrorists. He identified the affected local government Areas as Guzamala and Kukawa in Bornu North Senatorial District. Consequently, Lawan appealed to the Federal Government and the military to dislodge the terrorists.[24] Furthermore, as Defence Head Quarters said they are looking for Turji and announced a ₦5 million price on him, the notorious bandit leader was exercising his authority in his area of control by imposing ₦20 million "protection levy" on Moriki Community which is located 33 kilometers along Kaura Namaoda – Shinkafi road, Turji imposed N20 million levy on the villagers and asked them to pay the money on or before Sunday 27th November 2022 or face his wrath… The villagers imposed ₦ 6,500 on every household to raise the money. The villagers were able to raise ₦10.6 million which they took to the place where Turji requested them to bring it. On reaching the spot where the money was to be delivered, seven Turji boys who rode on motorcycle appeared and demanded for the ₦20 million but ₦10.6 million was given to them. When the attention of Turji was drawn to the amount the villagers brought, Turji became angry and ordered that those who brought the incomplete money should be arrested and taken to one of his camps at Jirariforst stranding Zurmi and Shinkafi Local Government Areas.[25] Their activities in Nigeria since 2009 have been concerted and sustained military operation. From all ramifications, the armed conflict between the Federal Government of Nigeria and the dissident terrorists group known as *Boko Haram* Terrorists and its off short ISWAP, can be safely described as Non-International Armed Conflict.

It is obvious from the examination above that armed conflict between the Federal Government of Nigeria and the dissident group known as *Boko Haram* terrorists/ISWAP meets all the criteria for non-international or internal armed conflict. Accordingly, the International Humanitarian Law principles governing non-international conflicts apply *Mutatis Mutandis* to non-international armed conflict in Nigeria. Consequently, all individuals or groups that offend the International Humanitarian Law should be prosecuted and punished by the state or by the International Criminal Court where the state is not willing to do so.

C. Crimes Against Humanity

Crimes against humanity has been variously defined by statutes and scholars. According to Schweb, crime against humanity is defined as a crime against the humaneness that offends certain general principles of law and which becomes the concern of the International Community.[26] The terminology crimes against humanity was used in non-technical sense as far back as 1915 in the declaration of May 28, 1915 of the Governments of France, Greet Britain and Russia denouncing the massacres of American population by the Turkish government as

[24] Ndahi Marama, *Boko Haram in Control of Two Bornu Local Government Areas, Speaker Cries Out*, VANGUARD NEWSPAPER (Dec. 11, 2022).
[25] Ndahi Marama, *Turji Imposes ₦20 Million Protection Levy on Residents*, VANGUARD NEWSPAPER (Dec. 3, 2022).
[26] Egon Schwelb, *Crimes Against Humanity*, BRITISH YEARBOOK OF INTERNATIONAL LAW (1946), at 178.

crimes against humanity and civilization for which all the members of the Turkish Government were held responsible.[27] Crimes against humanity were prosecuted at Nuremberg and Tokyo trials after the Second World War.[28]

The Black's Law Dictionary defined Crime Against Humanity as a brutal crime that is not an isolated incident but that involves large and systematic actions, often cloaked with official authority and that shocks the conscience of humankind.[29]

The Rome Statute of the International Criminal Court defines crimes against humanity in art. 7[30] in the following words:

> (1) For the purpose of this Statute, Crime Against Humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. The enumerated acts are.
> (a) Murder,
> (b) Extermination
> (c) Enslavement
> (d) Deportation or forceful transfer of population
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law.
> (f) Torture
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity.
> (h) Persecution against 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,
> (i) Enforced disappearance of persons,
> (j) The crime of apartheid,
> (k) Other inhuman acts of a similar character intentionally causing great suffering or serious injury to the body or to mental or physical health.
> For avoidance of doubt, the Statute goes further in paragraph 2 to define and give meanings to the terms, concepts, phrases, and words used in defining crimes against humanity to paragraph 1 of Article 7. In this direction, Article 7 (2)[31] provides:

For the purpose of para. 1:

> (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population pursuant to or in furtherance of a state or organizational policy to commit such attack.
> (b) "Extermination" includes the intentional inflection 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.
> (c) "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;

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[27] *Id*., at 181.
[28] KITTICHAISAREE, *supra* note 14, at 85.
[29] BLACK'S LAW DICTIONARY, *supra* note 7, at 453.
[30] Rome Statute (July 17, 1998), See also Darryl Robinson, *Defining Crime Against Humanity at the Rome Conference*, 93(1) AMERICAN JOURNAL OF INTERNATIONAL LAW 43 (1999), at 43.
[31] Rome Statute (July 17, 1998).

(d) "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.
(e) "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.
(f) "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. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.
(g) "Persecution" means the intentional or severe deprivation of fundamental rights contrary to the international law by reason of the identity of the group or collectivity.
(h) The crime of apartheid means inhumane acts of a character similar to those referred to in paragraph 1, 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.
(i) "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 on the fate or where about of those persons, with the intention of removing them from the protection of law for a prolonged period of time.[32]

The essential ingredients for crime against humanity, flowing from the above definition and elucidation of concepts are as follows: (i) the perpetrator, through his actions, must have caused serious physical or mental suffering; (ii) the acts must be part of a wide spread or systematic attack; (iii) the attack must be directed against a civilian population; (iv) the act must be on discriminatory ground; (v) the perpetrator must possess intention and knowledge of the wider context in which the offence takes place.[33]

D. Elements of Crime against Humanity

1. *Actus Reus*

The *actus reus* of crime against humanity comprise commission of an attack that is inhumane in nature and character, causing great suffering, or serious injury to body or mental or physical healthy; the act is committed as part of a widespread or systematic attack and the act is committed against members of the civilian population.[34]

Implicit in the *actus reus* of crime against humanity is that the inhumane act must be committed as part of a wide spread or systematic attack directed against any civilian population. A widespread attack is an attack directed against a multiplicity of victims while systematic attack is an attacked carried out pursuant to a pre-conceived policy or plan.[35]

In other words, wide spread attack means massive, frequent, large-scale action, carried out collectively with considerable seriousness directed against a multiplicity of victims while systematic means thoroughly organized and following a regular pattern on the basis of a

[32] Rome Statute (July 17 1998).
[33] ICTR, Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, Trial Chamber, Judgment (Sept. 2, 1998).
[34] ICTR, Prosecutor v. Alfred Musema, ICTR-96-13--T, Trial Chamber, Judgment (Jan. 27, 2000), para. 201
[35] ICTY, Prosecutor v. Dusko Tadic, Appeals Chamber, *supra* note 11, para. 648.

common policy. Furthermore, the act(s) must be committed in armed conflict. An act as well as an omission can constitute the *actus reus* of crime against humanity[36].

D.2 *Mens Rea*

According to Kriangsak, in addition to the specific elements contained in each individual crime against humanity, in order to transform a crime into a crime against humanity, the perpetrator must knowingly commit the crime in the sense that he must understand the overall or broader context in which his act occurs.[37] Such a perpetrator must have actual or constructive knowledge that his act or acts are part of a widespread or systematic attack on a civilian population and pursuant to a policy. Article 7(1) of the International Criminal Court is very eloquent on this. It provides that crime against humanity must be committed by the perpetrator with the knowledge of the attack directed against a civilian population.[38] Article 30 provides that for the purposes of this Article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.[39] Knowledge is therefore, an awareness or understanding a fact, a state of mind in which a person has no substantial doubt about the existence of a fact.[40] Thus, knowledge entails that the perpetrator understands clearly his actions and consciously and deliberately embarks on the prohibited act.

D.3 Civilian Population

Armed conflict involves diverse participants and affects all in the geographical space in which it occurs.[41] To appreciate the nitty-gritty of the rule of International Humanitarian law with regard to the protection of civilians during armed conflict, it is pertinent to understand the legal concept of the term civilian.

Civilians are persons who are not members of organized armed forces or armed group of a party to an armed conflict and do not participate directly in the hostilities.[42] A civilian for the purposes of armed conflict is a person who is not a member of armed forces or group and does not directly participate in hostilities. The Geneva Conventions and their Protocols in 2009 clarified the import of the concept of direct participation in hostilities. The Guidance issued by the 2009 Geneva Convention distinguished between members of an organized armed group or groups and persons who did not directly participate in hostilities or who do so on temporal, spontaneous and sporadic basis.[43] Under the rule formulated by the Guidance, the most decision point in distinguishing civilian groups participating in direct hostility is the concept of continuous combat function.[44] Under the principle of continuous combat function, a person is considered liable to attack if he performs a continuous operation for the group involved in the

[36] ICTY, Prosecutor v, Dusko Tadic, IT-94-1-A, ICTY Appeal Chambers, Judgment (July 15, 1999), para. 271.
[37] KITTICHAISAREE, *supra* note 14, at 90.
[38] Art.7(1) of ICC Statute.
[39] Art. 30(3) of the ICC Statute.
[40] GARNER, *supra* note 29, at 1003.
[41] Okebukola, *Calibrating the Legal Obligation*, *supra* note 8, at 253.
[42] *Id*.
[43] Jelena Pejic, *Extra-Territorial Targeting by Means of Armed Drones: Some Legal Implications, Scope of the Law in Armed Conflict*, INTERNATIONAL REVIEW OF THE RED CROSS (2015).
[44] *Id*.

hostilities.[45] Conversely, where such a person engaged in continuous combat function terminates his association with a group participating in Non-international Armed Conflict, such a person immediately becomes a civilian and is protected from a direct attack arising from the conduct of hostilities.

All persons who are not taking part in hostilities are to be humanely treated and are protected from acts that threaten their health, physical and mental wellbeing. Such prohibited acts include torture, mutilation, any form of corporal punishment, collective punishment, acts of terrorizing, hostage taking, degrading treatment, rape, enforced prostitution, and slavery in all forms.[46] Common Article 3 provides *inter alia*:

> Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wound, detention or any other course shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex or wealth or any other similar criteria. Thus, "civilian must be given a broad definition to cover not only the general population, but also members of the armed forces who are *hors de combat*.[47]

III. Criminal Responsibility for Crimes against Humanity

Criminal responsibility is defined as the quality or condition of being answerable or accountable. It means liability to punishment as for an offence.[48] The underlying basic assumption of individual criminal responsibility is founded upon the principle of personal culpability, that is, no one may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other participated (*nulla poena sine culpa*).[49] Thus, criminal responsibility envisages a breach of the moral standard of the community before such a person could be held criminally responsible.

Under Customary International Law and general principles of criminal law, individuals may be held criminally liable for their participation in the commission of offence in any of the several capacities or modes of participation.[50] Art. 7(1) of the ICTY Statute and art. 6(1) of the ICTR Statute under the heading "Individual Criminal responsibility" stipulate:

> A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in these Statutes shall be individually responsible for the crime.[51]

Art. 25 of the International Criminal Court, under the heading "Individual Responsibility" provides in paras. 1 and 2 that, the ICC shall have jurisdiction over natural persons, and that a person shall be individually responsible for a crime within the ICC's jurisdictions.

The obvious implication of the Statutes and authorities examined above is that perpetrators of crime against International Humanitarian Law can be individually held liable

[45] *Id*.
[46] Art. 4(1)(2) of Additional Protocol II to Geneva Convention (June 8, 1977).
[47] ICTY, Prosecutor v. Tadic, *supra* note 31, para. 636.
[48] GARNER, *supra* note 29, at 1506.
[49] ICTY, Prosecutor v. Dusko Tadic, *supra* note 36, para. 264.
[50] ICTR, Prosecutor v. Clement Kayishema and Obed Ruzindana, ICTR-95-1-T, Chamber II, Judgment (May 21, 1999), para. 195.
[51] *Id*.

for the offence such perpetrator(s) committed under ICC Statute as well as under the domestic Law. Capturing this point more pungently, the Nuremberg International Military Tribunal observed as follows: art. 25 of the ICC Statute recognizes individual criminal responsibility for International Crimes. Crimes Against International Law are committed be men, not by abstract entities and only by punishing individuals who commit such crimes can the provisions of International Law be enforced.[52]

Accordingly, the ICC is empowered and obliged, if satisfied beyond reasonable doubt that the accused has committed the crimes as charged in the indictment, to convict the accused under the appropriate head of criminal responsibility. Consequently, the *Boko Haram* Terrorists/ ISWAP are liable to be tried and punished by the ICC for any breach of the International Humanitarian law as provided in the ICC Statutes for crime against humanity.

IV. Examination of the Activities of *Boko Haram vis-a-vis* the Elements of Crime Against Humanity

This Segment examines the criteria for crime against humanity as stipulated in art. 7(1) of the ICC Statute against the activities of *Boko Haram* in Nigeria with a view to ascertaining whether they are within the ambit of Crimes Against Humanity.

A. *Actus Reus* of the Offence of Crime against Humanity

As articulated above, the *actus reus* of crime against humanity comprises the commission of an attack that is inhumane in nature and character, causing great suffering or serious injury to the body or mental or physical health. The act is committed as part of a widespread or systematic attack and committed against civilian population. While widespread attack implies massive, frequent, large-scale action, carried out collectively with considerable seriousness directed against multiplicity of victims, systematic means thoroughly organized and following a regular pattern on the basis of a common policy and must be committed in an armed conflict.

A panoramic survey of the activities of the *Boko Haram* Terrorists in Nigeria shows that their activities are in tandem with the *actus reus* of the crime against humanity. The killing of 199 people by *Boko Haram* Terrorists with explosive devices on 20th of September, 2015 at Munguno Onion market, Borno State is a widespread attack directed against civilian population.[53] Also, the killing of 75 persons by *Boko Haram* Terrorists by the use of explosive at a mosque and viewing centre near Ajilari Cross, Maiduguri on 20th September, 2015 is also a widespread attack on the civilian population.[54] On Sunday, June 5, 2022, *Boko Haram* Terrorists launched a ferocious attack on Catholic Faithful at St. Francis Catholic Church, Owo, Ondo State killing scores and injuring many others.[55] In April 2014, 270 girls from government college, Chibok were attacked, kidnapped and taken to unknown destination by the *Boko*

[52] Nuremberg International Military Tribunal, Judgment (Sept. 30, 1945); *Two Hundred and Seventeenth Day. Monday. 30 September 1946*, in TRIALS OF MAJOR WAR BEFORE THE INTERNATIONAL MILITARY TRIBUNAL VOL. 22 (1947), at 411.

[53] Amnesty International Report, *Boko Haram: Civilians Continues to be at Risk of Human Rights Abuses by Security Forces*, AFR 44/2428/2015 (Sept 24, 2015).

[54] *Id*.

[55] Amaechi, *supra note* 4.

Haram terrorists.[56] No fewer than 28 persons have been reportedly killed by rampaging bandits in Southern Kaduna communities on Sunday 18th of December, 2022 and also razed several houses. The affected communities include Malagum and Sokwong of Lagro in Kaura Local Government of Kaduna.[57]

These attacks by the *Boko Haram* terrorists are inhumane in nature and character. It is also a truism that it must have caused great suffering and injuries to the victims mentally and physically. Many of them were killed and therefore died untimely and in pains. Further, the attacks were a part of widespread attacks directed on a civilian population. All the attacks as shown were attacks on civilian population. Furthermore, the *Boko Haram* attacks on the civilian population are systematic pursuant to preconceived policy/plan. According to the founder Mohamed Yusuf, the preconceived plan/policy of the *Boko Haram* Terrorists is mainly to Islamize Nigeria and expunge the present secular nature of the country as stipulated in the constitution. The group's objective is also to change the current Western system of education and replace it with Islamic education. The group hate anything Western education and are prepared to do anything possible to ensure the realization of the objectives. It is very obvious that the group is superbly organized and has a very clear plan/policy which they are pursing, that is the Islamization of Nigeria.

The *Boko Haram* Terrorists belong to the *Salafists* Jihadists group that propagate a version of Islam that forbids any interaction with the Western world. Its philosophy and ideology are not embraced by other Muslims and they have been criticized for their use of force.[58] The present insistent wave of terrorists' attacks on Nigerians and the Nigerian State usually ascribed to be the work of *Boko Haram* has called the Nigerian national Security apparatus to arm, challenging them and testing them to the brink ever than before.[59] All these attacks were committed in the course of armed conflict. The dastard acts of the *Boko Haram* Terrorists are in tandem with the *actus reus* of the crimes against humanity. Accordingly, the activities of the *Boko Haram* terrorists satisfied the *actus reus* of crimes against humanity. The ICC should, therefore, prosecute and punish them where the Nigerian government failed to try them as it is the case in Nigeria today.

B. *Mens rea*

The basic mental element in the crime against humanity is that the perpetrator must knowingly commit the crime in the sense that he understands the overall or broader context in which his act occurs.[60] Such a perpetrator's knowledge may be actual or constructive. In other words, the perpetrator must be aware and clearly understands his actions and consciously and deliberately embark on the prohibited act(s). Harping on the *mens rea* of the offence of crime against humanity, the Appeal's Chamber in the case of *Prosecutor v. Dusko Tadic*[61] held that the perpetrator must have actual and constructive knowledge that his act or acts is or are a part of a widespread or systematic attack against a civilian population and pursuant to a plan/policy.

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[56] Aondofa Aligba, *Human Rights and Terrorism in Nigeria: A Focus on the Boko Haram Insurgency*, 17(1) THE CALABER LAW JOURNAL 147 (2016), at 147.
[57] Ibrahim Hassan, *Bandits Kill 28 in Kaduna, Security Personnel, Terrorists Die in Zamfara State*, VANGUARD NEWSPAPER (Dec. 20, 2022).
[58] *Id*.
[59] *Id*.
[60] ICTY, Prosecutor v. Tadic, *supra* note 35; see also KITTICHAISAREE, *supra* note 14, at 90.
[61] ICTY, Prosecutor v. Dusko Tadic, *supra* note 36, para. 273.

The *Boko Haram* Terrorists who commit the *actus reus* of the Crime Against Humanity do so with the full knowledge of the consequences of their actions and that their acts forms part of a widespread or systematic attack directed against the civilian population. That is the islamization of Nigeria. The knowledge of the *Boko Haram* Terrorists of the consequences of their actions/acts are underscored by their courage and boldness in claiming responsibility for attacks in various parts of Nigeria, especially in large scale attacks where many people were killed and abducted. The group claimed responsibility for the attacks and abduction of the Chibok girls as well as the Abuja-Kaduna Railway attack.

The fact that the *Boko Haram* terrorists are fully aware and knowingly commit the act of a wide spread or systematic attack directed against a civilian population is further depicted by the quantum of joy exuding/exhibited by them whenever they succeed in a large horrendous attack on civilian population, killing, maiming and abducting hundreds of them which they take into captivity and treat with the crudest indignity ever imagined with impunity. Also, their exclamation or praise whenever they succeed in large operation such as *Allahuakbar*, meaning that Allah is the greatest, shows that they are praising and thanking Allah for giving them success in their plan or policy, which is the Islamization of Nigeria.

Having established the fact that the *actus reus* of the *Boko Haram* Terrorists acts are in tandem with the requirement of the offence and that they have necessary *mens rea* of the offence implies that one of the fundamental elements of the criminal law, the coincidence of the *actus reus* and the *mens rea* in order to culminate to crime has been established. Consequently, it could be safely concluded that the *Boko Haram* Terrorists have committed the offence of crime against humanity via their acts which they knowingly committed. In his own observation Fatou Bensouda, prosecutor of ICC after his investigation concluded, that there is reasonable basis to believe that *Boko Haram* Terrorists have committed crime against humanity, especially murder and persecution.[62]

This conclusion is predicated on the fact that the *Boko Haram* Terrorists attacks on civilian population are massive, frequent and carried out collectively with considerable seriousness and directed against a multiplicity of victims. Furthermore, the attack on civilian population is thoroughly organized and followed a regular pattern on the basis of a common policy since 2009. Alive to this feature of *Boko Haram* activities, Bloom posited, that women and girls have become swords mobilized and weaponised to carry out attacks, while also been used as powerful *Boko Haram*'s ideology.[63]

C. Murder

Murder as a crime against humanity under the ICC Statute is seen as the unlawful killing of a human being as a part of widespread or systematic attack against a civilian population of which the victim is a member. The requisite elements of this crime are that the victim is dead as a result of an unlawful act or omission of the accused or his subordinate who, at the time of killing, intended to kill or cause grievous bodily harm to the deceased with the knowledge that such bodily harm was likely to cause the victim's death, and was reckless whether death ensued or not.[64]

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[62] Imani Gandy, *If Boko Haram Sells Nigerian's Girls, Is That a Crime?*, REALITY CHECK (Aug. 10, 2022) http://rhrealitycheck.org/article/2014/05/30 boko haram-sells-nigerias-girls-crime.

[63] Mia Bloom, Hilary Matfess, *Women as Symbol and Swords in Boko Harams Terror*, 6(1) PRISM 104 (2016), at 105.

[64] Rome Statute.

The activities of the *Boko Haram* Terrorists in Nigeria since 2009 are in tandem with the elements of murder as required under the ICC Statute. The intentional killing and causing of grievous harm on thousands of Nigerians, especially civilians amount to murder under the ICC Statutes. Capturing this aspect of the *Boko Haram* activities, the ICC prosecutor, Fatou Besoude reported that, members of the *Boko Haram* sect have committed crime against humanity of murder and persecution.[65] The *Boko Haram* attack on Federal Government College Damaturu is very horrifying and tingle the ears. The commissioner of police in the State, and Sanisu Reofai reported that: the gunmen from Islamist group short or burnt to death 59 pupils in a boarding school in the North-East Nigeria, overnight, some of the students bodies were burnt to ashes [66]: fresh bodies have been brought in, more bodies were discovered in the bush after the students that escaped with bullets died from the injuries.[67] The schools 24 buildings, including staff quarters were completely burnt to the ground.[68] Since 2012, more than 10,000 women and girls have been abducted, with the most horrifying cases been the attacks on the Girls Secondary School Chibok in which about 276 girls were abducted in April 2014 and the replica attack on the Girls Secondary School in Dapchi leading to the abduction of over a hundred girls in February, 2018.[69]

On Sunday, June 5, terrorists launched a ferocious attack on Catholic faithful's at St. Francis Catholic Church, Owo, Ondo State killing scores and injuring many others. The terrorists strike at any location of their choice, killing and maiming law-abiding citizens, and government pretends to be helpless.[70] The *Boko Haram* Terrorists indeed have committed crimes against humanity and should be punished accordingly.

D. Torture

Torture is proscribed as a crime against humanity.[71] Torture is defined as 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 or incidental to, lawful sanction.[72] The requirement of official involvement is not an element of torture under art. 7(1)(f). This is due to the fact that torture could be inflicted on victims by non-state actors. This definition of torture is in all fours with the activities of the *Boko Haram* Terrorists, who have inflicted service pains and suffering upon Nigerian citizens for over a decade now. In Gombe, the *Boko Haram* terrorists rounded up residence out of their homes, approximately 58 people outside the house of the village head. The gunmen told the people to lie down on the street and short them. Others were shot in their homes as they tried to flee.[73] This mode of execution of innocent citizens of Nigeria by the terrorists constitute cruelty of the highest order and amount to dehumanizing treatment and physical torture to the victims of the attack, as well as psychological torture to eyewitnesses

[65] Gandy, *supra* note 62.
[66] Ibrahim Mselizza, *59 Students Attack in Nigeria – Some Burnt to Ashes*, GLOBAL POST AMERICA WORLD NEWS, (Feb. 25, 2014).
[67] *Id*.
[68] *Id*.
[69] Sam Olukoya, *Women and Girls Preyed on as the Spoils of War*, GLOBAL ISSUES (Apr. 25, 2019), https://www.globalissues.org/news/2019/04/25/25239.
[70] Amaechi, *supra* note 4.
[71] Art. 7(1)(f) of the ICC Statute.
[72] Art. (7)(2)(e) of the ICC Statute
[73] Amnesty International Report, *supra* note 53.

and members of the families that watched their loved ones executed in this cruel manner, by *Boko Haram* Terrorists.[74]

The insurgents had in a new viral video released week end, flogged the remaining 41 passengers abducted aboard the Abuja-Kaduna Train attack on 28 March, 2022, and threatened that the hapless victims in their den would be sold off as slaves, if their demands were not met by the government.[75] By these acts, the *Boko Haram* Terrorists' have committed the offence of torture under ICC Statute and should be accordingly, prosecuted and sanction in the accordance with the law. Again, taking civilians into captivity demanding for ransom as well as torturing them amounts to imprisonment and severe deprivation of their physical liberty.

E. Attack on civilian objects

The *Boko Haram* Terrorists contrary to the International Humanitarian Law governing Non-international Armed conflicts and the ICC Statute most of the time directed their widespread attack on civilian objects and civilians. The common places where citizens of Nigeria assemble often are marketplaces, restaurants, churches, mosques, motor parks, schools and colleges. Unfortunately, it is these places that became targets by the *Boko Haram* Terrorists, thereby committed the offence of crime against humanity.[76] The attacks on Western schools, colleges and kidnapping of pupils and teachers of these school amounts to crime against humanity.[77] The attack on Kuje Correctional Centre by the *Boko Haram* Terrorists which is a civilian object is very horrifying.

> In the dastardly night-time assault, the terrorists who were armed with explosive and automatic weapons shattered the gates of the prison without any resistance, freely opened fire on anyone who tried to struggle with them before taking charge of the facility for more than two hours. When the dust cleared, the scene was a mess, the blood of the five persons slain by the terrorists was splattered on all of the ground.[78]

Also, two persons were killed by the bandits in the early morning invasion of Abdulselam Abubakar General Hospital, Gulu in Lapai Local Government Area of Niger State on the 18th day of October, 2022.[79] These attacks were directed against civilian objects.

F. Rape and Sexual Slavery

Rape and Sexual slavery are prohibited under art. 7(1)(g) of the ICC Statute. Rape is defined as a physical invasion of a sexual nature committed on a person under circumstance which are coercive. It may or may not involve sexual intercourse. Rape is also defined as:

(i) Penetration, however slight:

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[74] Aligba, *supra* note 5, at 142.
[75] Johnsobosoco Agbakwuru, *Terrorists Flog 40 Kidnapped, Train Victims in Fresh Video*, VANGUARD NEWSPAPER (July 25, 2022).
[76] Aligba, *supra* note 5, at 146
[77] *Id*.
[78] Jannamilu Luminous, *Moles of Terrorists in Security Forces Behind Prison Breaks*, VANGUARD NEWSPAPER (June 23, 2022).
[79] Wole Mosadomi, *Bandits Invade, Kill 2, Abduct Scores in Niger*, VANGUARD NEWSPAPER (Oct. 19, 2022).

> (a) of the vagina or anus by the penis of the perpetrator or any other object used by the perpetrator;
> (b) of the mouth of the victim by the penis of the perpetrator.
> (ii) by coercion or force or threat of force against the victim.[80]

On the other hand, sexual slavery entails the perpetrator taking hold of the victims and confined them in a particular place, treating the victims as personal property and subject them to repeated rapes and sexual assault. Confirming the commission of crime against humanity under this subheading, rape and sexual slavery by *Boko Haram* Terrorists, Olusola,[81] maintained that:

> With extreme ideology of total domestication of females, the sect has wantonly and systematically targeted women and girls with many either abducted or killed. As compared to their male counterpart, the anguish, cruelty, and suffering that the group directs at females are of a different kind.[82]

Key aspects include the degrading and inhuman treatments meted out to women such as rape and sexual molestation of different gradients, repeated sexual intercourse and other forms of depravity.[83]

It is a notorious fact that *Boko Haram* Terrorists abduct woman, young and old, took them to their den where they converted them to their personal property and repeatedly have sexual intercourse with them forcefully with guns without the victims' consent who are afraid of being killed. Leah Sharibu is a case in point. It is very obvious that the *Boko Haram* Terrorists copiously committed crime against humanity for rape and sexual slavery as constituted under art. 7(1)(g).

G. Imprisonment or other Severe Deprivation of Physical Liberty.

Art. 7(1)(e) of the ICC Statute proscribes imprisonment or other severe deprivation of physical liberty in violation of Fundamental Rules of International law. The abduction of girls and women by the *Boko Haram* Terrorists which is done on regular basis since 2009 amounts to imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of International Law. This in turn amount to crime against humanity.

V. Conclusion

This paper examined Crimes Against Humanity in Nigeria *vis-à-vis*, the activities of *Boko Haram* Terrorists. It is very obvious from our discourse in this paper that the *Boko Haram* Terrorists have committed basic elements and features of crimes against humanity as provided under art. 7 (1) of the ICC Statute. This is manifestly clear from their activities which are in breach of art. 7 (1) of the ICC Statute and all the Additional protocols on the conduct of armed conflict in a non-international armed conflict. These include: it is an aggressive terrorist group fighting the government of Nigeria with a view to overthrowing the government of Nigeria in

[80] ICTY, Prosecutor v. Furundzija, IT-95-17/1, Trial Chambers, Judgment (Dec. 10, 1998), para. 185.
[81] Olusola Adegbite, Oreoluwa Oduniyi, Ayobami Aluko, *International Human Rights Law and the Victimization of Women by Boko Haram Sect*, 11(2) AFRICAN JOURNALS ONLINE 44 (2020), at 48.
[82] Joan Mbagwu, Anne O. Alaiyemola, *Gender Issues and the Boko Haram Insurgency in Nigeria*, 9(2) AFRICA JOURNAL OF GENDER AND DEVELOPMENT 87 (2015), at 91
[83] *Id.*

order to establish an Islamic state, the armed conflict by the *Boko Haram* Terrorists is copiously protracted, commencing since 2009 till date. It is widespread and systematic attacks directed against civilian population and civilian objects pursuant to a preconceived policy or plan.

The *Boko Haram* terrorists abducted, raped and sexually enslaved Nigerian girls and women. The group also, murdered thousands of civilians via their bombs attacks and sacking villages, churches, mosques, schools and correctional centers. The attack on Kuje Correctional Centre, the attack and abduction of Abuja-Kaduna bound train as well as the attack at St. Francis Catholic church Owo, Ondo State are cases on this point.

It is also clear from our discourse that the Nigerian criminal justice System and processes are unable and unwilling to prosecute and sanction these *Boko Haram* perpetrators. The Federal Government appears to be empowering and encouraging them. Government pays them huge sums of money in the name of ransom. Those who were arrested were given amnesty under the guise of rehabilitating them while those charged to court were set free for reasons best known to the government.

The Federal Government of Nigeria under Mohammadu Buharis is handling the terrorists with kid-glove. Alive to thus attitude of the government, Fasan wrote that:

what needs to be added is that, there is something mysterious about the attitude of the Buhari administration has adopted towards them. This attitude explains the clear ambivalence at the heart and the manner the so-called war against terrorism, banditry and the general insecurity in the country, has been conducted.[84]

The latest star in this circus is Alhaji Lai Muhammed, the Minister of Information, who has been tantalizing Nigerians with statistics that bear no name tags. He had the nerve to tell us that no less than 96 names have been identified as sponsors of terrorism in Nigeria. Yet, he lacked the balls to name even one of them. This strengthens the notion out there that many of the sponsors have direct and indirect connections in the highest places in government if they are not themselves politicians of note.[85]

VI. Recommendations

In view of the fact that the government of Buhari administration is treating the *Boko Haram* Terrorists with kid-glove and consequently, unable and unwilling to prosecute and sanction them in accordance with the laws of the land, we hereby highly recommend that the International Criminal Court should appoint a prosecutor to investigate and prosecute the terrorists for crimes against humanity which they committed with absolute impunity.

The Federal Government of Nigeria should desist from romancing dinning and encouraging the terrorists but should re-strategies and employ all resources within its disposal to decimate the terrorists to save Nigerians from the killings, abductions, rapping and displacement of innocent Nigerians.

[84] Rotimi Fasan, *Abuja's List of Sponsors of Terrorism*, VANGUARD NEWSPAPER (Feb. 9, 2022).
[85] *Id*.

The Ratification of the Rome Statute: The Next Step in Establishing an American Equalitarian Legal Order?

by Ian L. Courts[*]

ABSTRACT: For much of the 19th and 20th centuries, America has grappled with making progress in race relations. Apartheid is generally defined as systemic laws and practices that target one race against another and discriminate between races. It is my theory that the ratification of the Rome Statute, specifically art. 7(j), may be the next step in establishing what former civil rights pioneer and American jurist William Henry Hastie Jr. penned "an equalitarian legal order". In this piece, I will discuss what Hastie's "equalitarian legal order" is, and why the American legal system needs an equalitarian legal order, and how art. 7(j) of the Rome Statute's crimes against humanity's anti-apartheid provisions may be the next step in continuing Hastie's aforestated legal order. In addition, I will highlight the American legal and political hurdles that inhibit the ratification of the Rome Statute in the United States. Lastly, I will discuss how international customary law compels the United States judiciary to adopt the Rome Statute's antiapartheid provisions into American jurisprudence.

KEYWORDS: Apartheid; Equalitarian Legal Order; International Law; Rome Statute; U.S. Jurisprudence.

I. Introduction

For much of the 19th and 20th centuries, America has grappled with making progress in race relations. America's racial struggle has manifested itself in the Atlantic Slave Trade, Antebellum Slavery, Jim Crow, and the 20th Century's civil rights era. America has tried several times, with varying measures of success, to remedy its racial past. The Executive Branch, notably through President Abraham Lincoln's Emancipation Proclamation[1] that freed Black Americans in the rebellious Confederate States, and President Lyndon Banes Johnson's War on American poverty,[2] has tried to push America toward greater racial equality. Additionally, Congress, through the passage of the 19th Century's Civil rights Amendment, notably the 13th Amendment,[3] which outlawed slavery except as a sanction for a crime, and the 14th Amendment,[4] which granted Black Americans citizenship and prohibited states from being able to pass discriminatory laws based on race, and the 15th Amendment[5] which granted Black

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[1] US, 1791-1991 Record Group 11, Emancipation Proclamation (Jan. 1, 1863).

[2] *See* PRESIDENTIAL RECORDINGS OF LYNDON B. JOHNSON DIGITAL EDITION (David G. Coleman, Kent B. Germany, Guian A. McKee, Marc J. Selverstone eds., 2010); *See also* Robert Rector, Rachel Sheffield, *The War on Poverty After 50 Years*, THE HERITAGE FOUNDATION (Sept. 15, 2014), https://www.heritage.org/poverty-and-inequality/report/the-war-poverty-after-50-years.

[3] US, Constitution (Mar. 4, 1789), amend. XIII.

[4] *Id.*

[5] *Id.*

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Americans the right to vote, to the Voting Rights Act of 1965[6] that repealed many states' restrictive voting laws, and the Civil Rights Act of 1964 that authorized Congress to combat racial discrimination in privately owned public spaces through its Interstate Commerce Clause powers;[7] all these legislative measures has tried to move the country toward greater racial equality. Similarly, the Supreme Court, through *Brown v. Topeka Co Board of Education* (1954),[8] which banned racial discrimination in public education, and *Heart of Atlanta Motel, Inc v. U.S.* (1964),[9] which allowed Congress to enforce the Civil Rights Act of 1964, thus making it illegal for private companies to discriminate in its public spaces and businesses, and *Loving v. Virginia,* (1967)[10] which overturned anti-miscegenation laws in the country thus allowing citizens to marry whom they pleased regardless of racial identity; has tried to push the nation forward regarding race relations.

However, despite the substantial progress, these remedies have made in interpersonal racial relationships, they have struggled to achieve racial equity. The American racial equity gap is prominent, especially in the criminal justice system. Black Americans are disproportionately represented in American prisons. Moreover, young Black American men are more likely to have a negative experience with law enforcement than White American men.[11] As was demonstrated on a massive scale in 2020 with the murder of George Floyd, Americans in the 21st century have reckoned that the American criminal justice system is broken, and the preceding racial remedies have not dealt effectively with the issue of racial inequality.

All may not be lost; America's answer to its racial equity gap within its legal system may come through international statutory law, specifically art. 7(j) of the Rome Statute of the International Criminal Court. In detail within this piece, I will discuss how the Rome Statute was drafted and ratified to combat international war crimes, genocide, and crimes against humanity.[12] One of the statute's enumerated crimes against humanity is apartheid.[13] Apartheid is generally defined as systemic laws and practices that target one race against another and discriminate between races. It is my theory that the ratification of the Rome Statute, specifically art. 7(j), may be the next step in establishing what former civil rights pioneer and American jurist William Henry Hastie Jr. penned "an equalitarian legal order".

In this piece, I will discuss what Hastie's "equalitarian legal order" is, and why the American legal system needs an equalitarian legal order, and how art. 7(j) of the Rome Statute's crimes against humanity's anti-apartheid provisions may be the next step in continuing Hastie's aforestated legal order. In addition, I will highlight the American legal and political hurdles that inhibit the ratification of the Rome Statute in the United States. Lastly, I will discuss how international customary law compels the United States judiciary to adopt the Rome Statute's antiapartheid provisions into American jurisprudence.

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[6] US, Pub. L. 89-110, 79 Stat. 437, Voting Rights Act of 1965 (Aug. 6, 1965).
[7] US, Pub. L. 88-352, 78 Stat. 241, Civil Rights Act of 1964 (Jul. 2, 1964). *See also generally*, U.S. Constitution (Mar. 4, 1789), art. 1, sec. 8, cl. 3.a.
[8] U.S. Supreme Court, Brown v. Topeka Co Board of Education, 347 U.S. 483, Appeal Chamber, Judgment (May 17, 1954).
[9] U.S. Supreme Court, Heart of Atlanta Motel Inc. v. U.S., 379 U.S. 241, Appeal Chamber, Judgment (Dec. 14, 1964).
[10] U.S. Supreme Court, Loving v. Virginia, 388 U.S. 1, Appeal Chamber, Judgment (June 12, 1967).
[11] LeShae Henderson, Elizabeth Hinton, Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA EVIDENCE BRIEF 1 (May 2018), https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf.
[12] ICC, Rome Statute of the International Criminal Court (July 1, 2002).
[13] *Id*.

II. What Is an "Equalitarian Legal Order", and Why Do We Need It?

Judge William Hastie, a Black American civil rights pioneer, and the first Black federal jurist penned the phrase "equalitarian legal order" in his 1973 article.[14] In the article, he describes the advocacy of Thurgood Marshall, Charles Hamilton Houston, Constance Baker Motley, and many other early attorneys in fighting the American Jim Crow System. Hastie highlights their triumphs and obstacles in obtaining an "equalitarian legal order". Hastie stops short of providing an explicit definition of what an equalitarian legal order is, but from his writing, Thurgood Marshall's judicial philosophy, and Charles Hamilton Houston's teaching I have compiled a workable definition that I will describe later in this section.

Justice Thurgood Marshall's one of the leading Black American jurists known for his lifework in advocating for equality under the law developed an important philosophy concerning "equalitarianism". Justice Marshall's legal philosophy was firmly rooted in legal positivism.[15] Legal Positivism is defined as a philosophy that recognizes law as a social construct, meaning that society defines and determines what "the law" is.[16] Marshall's form of legal positivism relies on the belief that law can be changed to be more equitable by a society that believes in moral and social equality of all persons, regardless of race. Marshall also believed that not only does society change the law, but law itself changes over time the moral attitudes of its adherents.[17] Marshall's positivist attitude is clearly depicted in his crowning achievements *Brown v. Board of Topeka Education*; and *Furman v. Georgia*.[18]

Mr. Charles Hamilton Houston was a prominent legal educator, and the father of American civil rights advocacy in the 20th century.[19] Mr. Houston taught Thurgood Marshall and worked closely with Judge Hastie.[20] Houston legal philosophy was rooted in a hybrid of natural law and legal positivism. Houston believed that all persons are endowed with inalienable rights given by God, but also in the ability of Black lawyers to socially engineer a more equitable society for Black Americans.[21]

Based on these founding fathers of Black Equalitarian Thought, I have framed a definition of an "equalitarian legal order" as a system of laws that recognizes the inalienable right of the equality for all persons, and the legitimacy of all laws that further and produce equitable societal outcomes, regardless of race. Furthermore, a legal system is anti-equalitarian when it does not recognize the natural right of equality for all men, and/ or creates legal outcomes that discriminate between persons based on race. I argue that in a global setting, "equalitarianism" is rooted in the natural law idea that all persons are endowed by God with inalienable rights.[22] Additionally, under a positivist view the law should reflect common practices *unless* those practices have a racially discriminatory impact. Rights are embedded in every individual

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[14] William H. Hastie, *Toward an Equalitarian Legal Order*, THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, 407 BLACKS AND THE LAW 18 (1973), at 18-31.
[15] D.A. Jeremy Telman, *The African-American Interest in Higher Law in the Supreme Court: Justices Marshall and Thomas*, 31(1) TEMP. INT'L & COMP. L.J. 289 (2017) at 290.
[16] Reginald Parker, *Legal Positivism*, 32(1) NOTRE DAME LAW 31 (1956).
[17] Telman, *supra* note 15.
[18] U.S. Supreme Court, Furman v. Georgia, 408 U.S. 238, Appeal Chamber, Judgment (June 29, 1972).
[19] GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983).
[20] Ian L. Courts , *Justice in Black: William Hastie and Thurgood Marshall's Fight for an Equalitarian Legal Order*, 43(1) NC CENT. L. REV. 77 (2020), at 77.
[21] Hamilton Houston, *Charles Hamilton Houston*, 27(3) NEW ENGLAND LAW REVIEW 595 (1993), at 595.
[22] James A.C. Grant, *The Natural Law Background of Due Process*, 31(1) COLUM. L. REV 56 (1931).

regardless of race; and the law should protect those embedded rights; and when a law or legal system's effects either contradicts or restricts the inalienable rights *and* causes unjustifiable distinctions the law is immoral and illegitimate.

A. Why Do We Need an Equalitarian Legal Order?

America has made much progress in terms of the legal recognition of Black Americans since William Hastie's early civil rights advocacy. Notedly, Black Americans largely exercise their right to vote, are considered an important voting block, and the rate of Black American representation in political offices has increased.[23] However, despite this progress in the legal and political treatment of Black Americans within the latter 20th and 21st centuries−there are still significant disparities in the American system concerning Black American rights and wellbeing. These areas of disparities are salient throughout the Black American experience, but I will be focusing on three areas, the disproportionate impact of the American arrest and incarceration rates on Black Americans, the disparity in economic standing between Black Americans and White Americans, and the lack of resources in public education especially within urban school districts with majority Black American students. Each of these modern disparities are vestiges of American Apartheid, and cannot easily be remedied solely by American institutions especially during a time where Critical Race theory is a political byword, our governmental institutions polarized, and racial consciousness is derisively described as "woke". America's Apartheid vestiges especially concerning their impact on Black Americans may be remedied by international law, specifically the ratification of the Rome Statute's antiapartheid provisions.

According to a study published by the University of California Davis Law Review, "Blacks are arrested for marijuana at a higher rate […] while making up around 13% of the U.S. population, they account for 24% of marijuana arrests".[24] The study concludes that "people of color disproportionately arrested for drugs; Such disparities are likely due to the types of drugs targeted by law enforcement and not due to any racial group's greater involvement in the drug trade".[25] Moreover, through the lens of race, many people's assumptions about the American justice system are formed, shaped, and cemented. Because of the American justice system's disproportionate impact on Black Americans, as reflected in the countries racial incarceration and arrest rates, it is a vestige of American apartheid in need of a global remedy. Similarly, America's Apartheid vestiges impact the economic state of Black Americans. Black Americans are more likely than White Americans to live at or below the poverty rate.[26] Furthermore, Black American wealth is declining at a fast pace compared to previous generations.[27] Black American home ownership has significantly declined, which is largely due

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[23] Sara Atske, Anna Brown, *Black Americans Have Made Gains in U.S. Political Leadership, But Gaps Remain*, PEW RESEARCH CENTRE, RACE AND ETHNICITY TOPICS (Jan. 22, 2021), https://www.pewresearch.org/fact-tank/2021/01/22/black-americans-have-made-gains-in-u-s-political-leadership-but-gaps-remain/.

[24] Joseph Kennedy, Issac Unah, Kasi Wahlers, *Sharks and Minnows in the War on Drugs: A Study of Quantity, Race, and Drug Type in Drug Arrests*, 52(1) U.C. DAVIS L. REV. 729 (2018), at 730.

[25] *Id*.

[26] US, Poverty Statistics, Federal Safety Net (2018): "While the poverty rate for the population as a whole is 11.4% the rate varies greatly by race. Blacks have the highest poverty rate at 19.5% and non-Hispanic whites the lowest at 8.2%. The Poverty rate for Blacks and Hispanics is more than double that of non-Hispanic Whites".

[27] Dedrick Asante-Muhammad, Chuck Collins, Josh Hoxie, Emanuel Nieves, *The Road to Zero Wealth: How The Racial Wealth Divide Is Hollowing Out America's Middle Class*, PROSPERITYNOW.ORG (Sept. 2017),

to shrinking wages and decreasing wealth.[28] As a Black American one is more likely to be denied access to public grants, and loans to purchase a home or fund a business-both being avenues to build generational wealth.[29] Addressing economic inequity between Black Americans and White Americans, and the lack of American political appetite to address the disparity issue, requires us to examine the potential that international law provides in remedying America's apartheid remnants.

Accordingly, the same disparities exist within America's public school systems within its urban, predominantly Black American student areas. Schools with predominantly Black American students struggle for funding and access to quality education materials.[30] Additionally, standardized test scores among Black American students remain low compared to White American students. Further, these racial disparities are demonstrated in high school graduation rates being significantly lower for Black American men compared to White American male students.[31] Educational access and quality are major contributions to economic success, and avoidance of criminal justice system entanglement, however in both access and quality Black American students suffer. America's educational system's racial disparities are another vestige of American apartheid in need of a potential international law remedy.

As highlighted above America in many instances has moved to a largely post-racial society; yet it is still impacted by the vestiges of its apartheid past, and Black Americans feel the brunt force of America's apartheid remnants. For Hastie, Marshall, and Houston's "equalitarian" legal society to become an objective reality within America, we need to examine the potential opportunity international law, namely, the Rome Statute's art. 7 Antiapartheid provisions, may have on remedying the vestiges of American apartheid.

III. The Rome Statute's & International Law's "Equalitarian" Provisions

In this part of the discussion, I will examine what I coined the Rome Statute of the International Criminal Court's "equalitarian" provisions, specifically art. 7. Additionally, I will discuss the broader global scope of apartheid as interpreted under international law. The Rome Statute defines the crime of apartheid as

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https://prosperitynow.org/resources/road-zero-wealth. The report found that the median wealth of black Americans will fall to zero by 2053 if current trends continue.

[28] Troy Green, *U.S. Homeownership Rates Experiences Largest Annual Increase on Record, Though Black Homeownership Remains Lower than a Decade Ago*, NATIONAL ASSOCIATION OF RELATORS (Feb. 23, 2022), https://www.nar.realtor/newsroom/u-s-homeownership-rate-experiences-largest-annual-increase-on-record-though-black-homeownership-remains-lower-than-decade-ago: "Though, the homeownership rate for Black Americans (43.4%) is lower than in 2010 (44.2%) and nearly 30 percentage points less than White Americans (72.1%)".

[29] Jefferey Mckinney, *New Report: Black Americans 84% More Likely to Be Denied a Mortgage than Their White Counterparts, Black Enterprise*, BLACK ENTERPRISE (Jan. 16, 2022), https://www.blackenterprise.com/new-report-black-americans-84-more-likely-to-be-denied-a-mortgage-than-their-white-counterparts/.

[30] JONATHAN KOZOL, THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA (2006).

[31] Schott Foundation for Public Education, http://blackboysreport.org/: "Only 52 percent of Black males and 58 percent of Latino males who graduated in 2010 received high school diplomas compared to 78 percent of their White male counterparts".

> inhumane acts of a character similar to those referred to in paragraph 1, 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.[32]

The crime of apartheid is classified as a crime against humanity, a collection of actions that the drafters of the statute deem serious violations of international order. I find it important to note, that I am not arguing that the United States is presently committing apartheid "attacks" or actions as defined under the Rome Statute but that its prior commission under Antebellum and later Jim Crow, have created systemic disparities between Black Americans and White Americans, effecting Black American criminal justice, economic wealth, and educational access thus resulting in vestiges or remnants of apartheid.

The Rome Statute's inclusion of the crime of apartheid is *in part* based on the global community's response to South African apartheid, and the International Convention on the Suppression and Punishment of the Crime of Apartheid (ICSPCA). Both the South African model, and ICSPCA's definition of apartheid are important to understanding why apartheid was included as an explicit crime against humanity, and why it is salient to my argument that the Rome Statue's antiapartheid provisions could be the next step in remedying American apartheid vestiges.

When the term "apartheid" is mentioned, many today think of 20th century South Africa under the National Party's regime. South Africa's apartheid system is the most well-known and studied case on the administration of the crime of apartheid. Moreover, the legacy of South Africa's apartheid regime served as the catalyst of the United Nation's International Convention on the Suppression and Punishment of Apartheid in 1973.[33] This discussion will not extensively discuss South African apartheid because of the voluminous research and study on South Africa's apartheid regime.

In the 20th Century, South Africa was a nation divided by class and race eerily similar to the United States under Antebellum and Jim Crow. South Africa's apartheid system divided persons on race to specific geographic zones, prohibited cross-racial marriages, and banned cross-racial public gatherings.[34] South Africa's apartheid regime culminated thousands of South African civilian deaths. Additionally, South African apartheid created a generation of societal and economic disparities among its Black and White civilians.[35] The global community, including the United States, largely condemned South African apartheid and worked to remove the South African apartheid regime.[36] The legacy of South African apartheid has fueled Black American critical race theory, and the Rome Statute's inclusion of the crime of apartheid as a crime against humanity. Moreover, South Africa's apartheid and subsequent reconstruction serves as an example of the potential the Rome Statute's antiapartheid provisions can play in mitigating and remedying American apartheid vestiges specifically concerning the modern social and economic state of Black Americans.

Accordingly, The ICSPCA's existence was a global response to South African apartheid, moreover, the drafting of the Apartheid Convention by the United Nations General Assembly caused much debate specifically concerning its scope. Some in the General Assembly viewed

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[32] ICC, Rome Statute of the International Criminal Court (Jul. 1, 2002), art. 7(1)(j)(h).
[33] Matthew Lippman, *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later*, 8(1) TEMPLE INTERNATIONAL AND COMPARATIVE LAW JOURNAL 1 (1994), at 11.
[34] Elizabeth S. Landis, *South African Apartheid Legislation I: Fundamental Structure*, 71(1) THE YALE LAW JOURNAL 1 (1961).
[35] PUMLA GOBODO-MADIKIZELA. A HUMAN BEING DIED THAT NIGHT: A SOUTH AFRICAN WOMAN CONFRONTS THE LEGACY OF APARTHEID (2004).
[36] Gernot Köhler, *Global apartheid*, 4(2) ALTERNATIVES 263 (1978).

the ICSPCA as specifically limited to responding to South African apartheid, while others viewed the ICSPCA as a global condemnation of apartheid activity, including racial discrimination among any state.[37] The ICSPCA defined apartheid as "inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination".[38] Additionally, the ICSPCA further defines "inhuman acts" as those that "[are] committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons systemically oppressing them".[39] Further, the ICSPCA listed acts that would fall under the Convention's apartheid definition such as:

Inhuman treatment and arbitrary arrest of members of a racial group; deliberate imposition on a racial group of living conditions calculated to cause physical destruction; legislative measures that discriminate in the political, social, economic and cultural fields; measures that divide the population along racial lines by the creation of separate residential areas for racial groups; the prohibition of interracial marriages; and the persecution of persons opposed to apartheid.[40]

The ICSPCA's apartheid definition could be reasonably expanded to include vestiges of American Apartheid including this discussion's focal areas of the overincarceration and arrest of Black Americans, dwindling Black American wealth, and lack of quality in Black American education, and educational access.

However, the Rome Statute's antiapartheid provisions do not explicitly address disparate impacts, or vestiges of apartheid systems but the ICSPCA, which the Rome Statute's apartheid provision were based upon, provide a salient international legal greenlight to the potential of bringing apartheid-vestige litigation under the framework that a state's prior apartheid actions, have lasting systemic effects or "attacks" on the targeted civilian groups and their descendants who endured the systemic oppression. The modern state of Black Americans is a direct result of the impact and a vestige of America's Antebellum and Jim Crow−Apartheid system. Moreover, Black Americans aside from the Civil Rights Amendments and Voting Rights acts of the late 19th and mid-20th centuries have largely not been compensated or remedied for the impact of America's *de jure* and *de facto* apartheid. The International Criminal Court has not produced any significant case law concerning a modern application of the Rome Statute's apartheid provisions.[41] This lack of international jurisprudence serves as an opportunity for Black Americans to develop international jurisprudence to expand the Rome Statute's apartheid provisions to include systemic impact of a state's prior apartheid actions. Furthermore, because the United States, nor any of its domestic states, has not answered in a court of law for its Antebellum slavery, or Jim Crow-apartheid, the ratification of the Rome Statute could open up both domestic and international forums for cases concerning the vestiges of American apartheid. Accordingly, Black Americans' standing to bring apartheid-vestige suits rests on customary international law evidenced by the global community's response to South African apartheid, and subsequent creation of the International Convention on the Suppression and Prevention of the Crime of Apartheid, condemns apartheid actions and its vestiges. Moreover,

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[37] John Dugard, *Convention on the Suppression and Punishment of the Crime of Apartheid*, 1 UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW (2008).
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] Clive Baldwin, *Human Rights Watch Responds: Reflections on Apartheid and Persecution in International Law*, BLOG OF THE EUROPEAN JOURNAL OF INTERNATIONAL LAW (July 9, 2021), https://www.hrw.org/news/2021/07/09/human-rights-watch-responds-reflections-apartheid-and-persecution-international-law.

apartheid's explicit codification in the Rome Statute provides statutory-treaty authority to bring lawsuits against states where apartheid actions are actively taking place, or where apartheid conditions including discriminatory vestiges occur, despite whether the state has ratified the Rome Statute or not. America's apartheid vestiges can arguably be classified as violations of international customary, and treaty law under the Rome Statute or international human rights law.[42]

IV. Legal Hurdles to the Ratification of the Rome Statute within the United States

Despite Black Americans', *arguable* international standing for bringing a claim against the United States for its vestiges of American apartheid within the International Criminal Court, there are domestic legal hurdles that make a reality of legal accountability within domestic U.S. courts unlikely. The legal hurdles to the ratification of the Rome Statute by the United States come from each of the three branches of the American government, the Executive, Legislative, and Judiciary. Moreover, each of the American federal governmental branches have a history of opposition to international law, and including specifically the International Criminal Court. This part of the discussion will focus on the varying degrees of opposition each of the branches of the American government have participated in concerning international law, and the Rome Statute.

First, the Rome Statute of the International Criminal Court is a multilateral treaty meaning that several states consented and participated in its drafting, and ratification and based on its terms it is binding "between a large number of states, usually (though not always) denoting participation by a majority of the world's states".[43] The United States signed the Rome Statute but never ratified the statute, thus essentially the Rome Statute has no legal authority within the United States.[44]

A. Executive Branch and the Rome Statute

In 2000, President Bill Clinton signed the Rome Statute despite hesitation within his administration concerning the court's potential impact on U.S. diplomatic and military interests. Furthermore, the Clinton administration actively lobbied against the adoption of the statute, despite participating in the discussion concerning the crimes and scope of the Statute, and voted against adoption in 1998 at the Rome Statute Convention.[45] However, with President Clinton's signing of the Rome Statute, it sent a message to the global community that the United States would not be an adversary to the court nor its functions, but not quite an ally either.

Contrastingly, the Bush Administration took a more active and direct approach in opposing the court, including pushing for the passing of the American Service-Members' Protection Act, which provided immunity for military personnel from international courts and

[42] Christina Majaski, *Statute of Limitations*: *Definition, Types, and Example*, INVESTOPEDIA (Nov. 22, 2022). *See* OHCHR, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (Nov. 11, 1970).
[43] Legal information institute, *Multilateral Treaties*, https://www.law.cornell.edu/wex/multilateral_treaties.
[44] William J. Clinton, *Statement on the Rome Treaty on the International Criminal Court*, 1 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 37 (Dec. 31, 2000), at 4, https://www.govinfo.gov/.
[45] Michael P. Scharf, *Results of the Rome Conference for an International Criminal Court Archived*, 3(10) THE AMERICAN SOCIETY OF INTERNATIONAL LAW (1998), insights.

tribunals.[46] However, the Bush Administration's tone toward the International Criminal Court slightly shifted with its support of the International Criminal Court's investigation of the Darfur, Sudan atrocities.[47]

While the Obama Administration was largely cooperative with the International Criminal Court, there was still not a push for ratification of the Rome Statute. The Obama Administration asserted that it was a cooperative observer of the Court, and even pledged to assist the court in its Rome Statute-mandated activities.[48]

The most tenuous relationship between an American presidential administration and the International Criminal Court was that of the Trump Administration. The Trump Administration continuing in part the hostilities of the Bush Administration went one step further by sanctioning and revoking the visas of the International Criminal Court including Fatou Bensouda, the International Prosecutor for authorizing an investigation into the U.S. for potential war crimes relating to its handling of the Afghanistan crisis.[49]

Currently, the Biden Administration's relationship with the International Criminal Court remains nascent, and is yet developing what tone his administration will take in its relations with the Court. However, it is reasonable to deduce that Biden will take a route similar to the Obama administration, though this is not a guarantee.

The discussion above demonstrates that the United States' Executive Branch has largely remained a significant hurdle to ratification of the Rome Statute. However, its hesitation remains largely linked to the United States' military and intelligence actions, while ignoring or overlooking potential civil or criminal liability for apartheid conditions existing within the country via the vestiges of American apartheid. Whether prior administrations, or future administrations will seriously examine the possibility of Rome Statute ratification, Executive support for ratification is likely null, thus posing a significant hurdle to Rome Statute ratification but not as unsurmountable as actual ratification by the U.S. Senate.

B. Congressional Hurdles

In the United States, the Senate is the body entrusted with the power to provide "advise and consent" to the President on treaties by a two-thirds vote in favor of ratification.[50] The U.S. Congress, which encompasses both the U.S. Senate and U.S. House of Representatives, has largely been in opposition to the Rome Statute since its adoption by the global community. The congressional resistance to the Rome Statute is both bipartisan and deeply entrenched in the body − which in a time of increasing partisanship; bipartisan resistance shows the significant hurdle ratification of the Rome Statute has in the halls of Congress. In response to the Rome Statute Congress has passed numerous pieces of legislation to nullify any potential affect the treaty would have. The most significant act by Congress against the International Criminal Court is the American Service-Members' Protection Act (ASMPA).

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[46] *See* US, Pub. L. 107-206, 116 Stat. 820, American Service-Members' Protection Act (Aug. 2, 2002).
[47] UNSC, S/RES/1593, on Referring the Situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court (Mar. 31, 2005).
[48] Harold Hongju Koh, Stephen J. Rapp, *U.S. Engagement with the ICC and the Outcome of the Recently Concluded Conference*, U.S. DEPARTMENT OF STATE-DIPLOMACY IN ACTION (June 15, 2010) https://2009-2017.state.gov/j/gcj/us_releases/remarks/2010/143178.htm.
[49] Marlise Simons, Megan Specia, *U.S. Revokes Visa of I.C.C. Prosecutor Pursuing Afghan War Crimes*, THE NEW YORK TIMES (Apr. 5, 2019).
[50] US, Constitution (Mar. 4, 1789), art. II, sec. 2.

The American Service-Members' Protection Act also known as the Hague Invasion Act, was passed in response to the 2002 establishment of the International Criminal Court. The purpose of the act was to

> protect United States military personnel and other elected and appointed officials of the United States government against criminal prosecution by an international criminal court to which the United States is not party.[51]

The Bush Administration, and Congressional leaders feared that the International Criminal Court's capacity to try American military leaders and soldiers for perceived criminal activities. U.S. Senator, Jesse Helms of North Carolina, and U.S. Representative Tom DeLay of Texas, introduced the Act, both were encouraged by the Bush administration to propose the Act, while also having their own reservations concerning the Court's potential to try U.S. citizens.[52] The Act authorized the President of the United States to "use all means necessary and appropriate to bring about the release of any U.S. or allied personnel being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court".[53] The Act further prohibited state and federal cooperation with the International Criminal Court, the extradition of any person from the U.S. to the Court, and military aid to countries who ratified the Rome Statute.[54] The ASMPA remains the law of the land, as it was passed by both the U.S. House and U.S. Senate and signed into law by President George W. Bush in 2002. The Acts provisions serves as the clearest example of domestic hurdles to the Rome Statute's ratification.

C. Passive Judicial Refrain

The judicial branch of the United States has largely deferred questions of international law, and foreign policy to Congress and the Presidency. However, the judiciary has had to adjudicate international issues before it. Most notably, extradition law routinely finds it way before the Supreme Court of the United States, and in some cases positions the U.S. judiciary in contrast with other international tribunals.

The United States Supreme Court in *Medellin v. Texas* considered whether the state of Texas had violated the Vienna Convention on Consular Relations (1963) rights of Jose Medellin, a Mexican national who participated in the brutal rape and killing of two American nationals within Texas. The Vienna Convention required that foreign nationals arrested in a foreign country be informed of their rights to have their home embassy or consulate notified of their arrest and that any disputes arising under the convention be resolved by the International Court of Justice.[55] The Supreme Court held that the Vienna Convention was not self-executing, and therefore required Congress to take additional measures to give it the force of law.[56]

The Supreme Court's decision stood in direct contrast to the decision of the International Court of Justice in *United States v. Avena*. In *Avena*, the International Court of Justice held that the United States violated its obligations under the Vienna Convention by not informing the

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[51] *See* US, American Service-Members' Protection Act, *supra* note 46.
[52] Coalition for the ICC, *US Congress Passes Anti-ICC "Hague Invasion Act": American Servicemembers' Protection Act to be Signed by President Bush*, COALITION FOR THE ICC (2002).
[53] *See* US, American Service-Members' Protection Act, *supra* note 46.
[54] *Id.*
[55] UNTS, 21 U.S.T. 77, T.I.A.S. 6820, Vienna Convention on Consular Relations, (Apr. 24, 1963).
[56] U.S. Supreme Court, Medellin v. Texas, 552 U.S. 491, 507, 128 S. Ct. 1346, 1357, 170 L. Ed. 2d 190, Appeal Chamber, Judgment (Mar. 25, 2008).

nationals "without delay" of their right to notify the Mexican embassy of their arrest.[57] The ICJ asserted its jurisdiction under the provisions of the Vienna Convention and demanded that the United States provide the nationals with review and reconsideration of the Mexican nationals' convictions and sentences. Jose Medellin, one of the 51 nationals prosecuted without being notified of his rights under the Vienna Convention, filed a writ for *habeas corpus* in United States federal courts.

The Supreme Court's *Medellin* decision also contrasted President Bush's legal view that the Vienna Convention required that the International Court of Justice determine conflicts under the Convention. Moreover, the Supreme Court relied on U.S. precedent, which arguably has been historically prejudicial against foreign intervention; clearly, the Supreme Court in Medellin did not want to cede its power. Thus, in relying on Chief justice Marshall's precedent in *Foster* v. *Neilson*, 2 Pet. 253, 315 (1829), the Court distinguished between self-executing and non-self-executing treaties to preserve its jurisdiction as the final arbiter of U.S. law and shake oversight from international tribunals.[58] The Supreme Court's rationale did not necessarily have to do with the Convention's obligations because those were clear but mainly had to do with preserving the Supreme Court's jurisdictional role and limiting the power of the ICJ.[59]

The Court is largely passively resistant to reliance on international law or its adoption and application to federal jurisprudence. The Court has recognized that ratified treaties are incorporated into federal law but hesitated to include other bodies of international law. The Court recognized its role as both a domestic court, and uniquely international court but limits its international jurisprudential power to cases presented before under light of U.S. Constitutional scrutiny.[60] Under the Court's judicial passivism concerning international law, and the absence of ratification of the Rome Statute by the U.S. Senate, the Court as a hurdle to the Rome Statute, and this discussion's assertion that it is the next step in the remedying of American apartheid vestiges, is fairly nascent and theoretically ripe. The Court *may* have a hurdling effect on the Rome Statute and the advancement of litigation to dismantle the vestiges of American apartheid, if the Rome Statute was ever ratified but at this point the Court is largely a nonplayer in the analytical framework and potential opposition to the statute's ratification.

Despite the significant hurdles existing within the United States' political institutions concerning the ratification of the Rome Statute specifically art. 7's antiapartheid provisions, there are positive impacts potential ratification of the Rome Statute would have on the progress toward an Equalitarian legal order.

V. The Judiciary's Mandate Under the Constitution and International Customary Law to Adopt the Rome Statute's Antiapartheid Provisions in U.S. Jurisprudence

The judiciary of the United States has largely propelled the movement of the country toward William Hastie's "equalitarian legal order". Namely, through decisions such as *Brown v. Topeka Board of Education* 347 U.S. 483 (1954), and *Furman v. Georgia* 408 U.S. 238 (1972),

[57] ICJ, Mexico v. United States of America, 2004 I.C.J. 12-128, Judgment (Mar. 31, 2004).
[58] U.S. Supreme Court, Medellin v. Texas, *supra* note 56.
[59] *Id.*
[60] James J. Lenoir, *International Law in the Supreme Court of the United States*, 7(4) MISS. L.J. 327 (1935), at 328. "Sitting as it were, as an international, as well as domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand". See U.S. Supreme Court, Kansas v. Colorado, 185 U.S. 125, 147, L.ed 838, 22 S. Ct. 552, Judgment (Apr. 7, 1902).

and *Reynold v. Sims* 377 U.S. 533 (1964), the judiciary has taken significant steps toward addressing America's then de jure and de facto apartheid system. Moreover, William Hastie and his civil rights attorney contemporaries viewed the judiciary of the United States as the medium to "change the racist character of our legal order".[61] According to Judge Hastie, the National Association for the Advancement of Colored People's campaign to end racial segregation within the United States focused on public education, Black American access to the ballot box, residential segregation, and financial discrimination.[62] For there to be an advancement of Hastie's equalitarian legal order American must address the disparities in Black American wealth, the overincarceration and arrest of Black Americans, and the disparity in access to quality public education for Black Americans. The disparities in the aforementioned areas are vestiges of American apartheid, and as discussed above were focal areas Judge Hastie and other early civil rights advocates fought to mitigate and improve. However, despite almost a century of lawsuits within American courts relying on U.S. law, Black Americans find themselves largely within a similar predicament. Yes, *de jure* discrimination has largely ended but the systemic oppression continues, as a vestige of America's apartheid past. The next step in advancing Judge Hastie's Equalitarian legal order is the ratification of the Rome Statute's antiapartheid provisions, or a judicial incorporation of the Rome Statute's apartheid provisions within federal jurisprudence.

The federal courts may incorporate into American common law, the "law of nations" specifically the customary law and statutory law prohibiting apartheid. As Professor Thomas Lee states "[t]he Constitution's allocation of powers−understood in historical context and as applied by the Supreme Court in practice−requires U.S. courts to apply some rules of customary international law".[63] Arguably, because of the dire situation concerning Black American life & liberty within the country due to the vestiges of American Apartheid, the Supreme Court is compelled to adopt within its jurisprudence customary law concerning apartheid and its vestiges.

Many may find my previous statement outrageous, dangerous or without basis within American jurisprudence, however, I argue that the precepts of international legal positivism evidenced through customary law compel our courts to uphold the law of nations, and adopt the Rome Statute's antiapartheid provisions. Under American judicial precedent the "law of nations" included customs, and conventions also known as treaties, of which each consisted of the conventional law of nations, and is included in the Framer's understanding of international law.[64] Furthermore, the U.S. Constitution explicitly codifies the "conventional law of nations" within the U.S. government's enforcement authority under Congress's power to "define and punish Piracies and Felonies committed on the high seas, and Offences against the Law of Nations".[65]

Accordingly, the modern principle of *jus cogens*, which is a legal doctrine that recognizes international norms as evidence of international law, and therefore are binding even on contrasting domestic law.[66] Furthermore, the doctrine of *jus cogens* compels that the U.S.

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[61] Hastie, *supra* note 14.
[62] *Id.*
[63] Thomas H. Lee, *The Law of Nations and the Judicial Branch*, 106(1) THE GEORGETOWN LAW JOURNAL 1707 (2018).
[64] *See generally* Sarah H. Cleveland, William S. Doge, *Defining and Punishing Offenses Under Treaties*, 124(7) YALE L. J. 2202 (2015).
[65] US, Constitution (Mar. 4, 1789), art. I, sec. 8, cl. 10.
[66] Legal information institute, *Jus Cogens definition*, https://www.law.cornell.edu/wex/jus_cogens#:~:text=Definition,overriding%20principles%20of%20international%20law.

Supreme Court adopt and incorporate into its jurisprudence the international criminal law norms, including the Rome Statute's antiapartheid provisions within federal law. *Jus cogens* is derived in part from the Vienna Convention on the Law of Treaties which provides:

A treaty is void if, at the time for its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[67]

Similarly, the United States Constitution incorporates the "law of treaties" into the jurisprudence of the United States

> this Constitution, and the Law of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land […].[68]

The Framers largely understood that the conventional law of nations, including treaties, formed the basis of federal law and was supreme and preemptory to diverging state law.[69]
Furthermore, the Framers incorporated into art. III "Treaties" into the law the judicial branch is implored to interpret.[70] The Founders inclusion of treaty law, which they understood as encompassing the law of nations into art. III's judicial interpretation manifests their intent for international customary law to be apart of American federal law.

Additionally, the Judiciary Act of 1789 explicitly references the "law of nations" when defining the jurisdiction of federal district courts.[71] The Framers considered the law of the nations, and treaty law as jurisdictional issues that the federal courts should routinely apply and interpret.

As discussed above, the customary conventional law of nations is as much a part of the United States' jurisprudence, thus the judiciary can and should incorporate the Rome Statute's antiapartheid provisions specifically to address the vestiges of American apartheid affecting Black Americans.

The customary law of the international community, especially international courts and tribunals has routinely used reparations as remedy to systemic harm. The International Criminal Court defines reparations as

> relieving the suffering and affording justice to victims not only through the conviction of the perpetrator by this Court, but also attempting to redress the consequences of genocide, crimes against humanity, and war crimes.[72]

The International Criminal Court, along with other tribunals view the grant of reparations as

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[67] UN, 1155 U.N.T.S. 331-334, Vienna Convention on the Law of Treaties (Jan. 27, 1980), art. 53.
[68] US, Constitution (Mar. 4, 1789), art. VI, cl. 2.
[69] *See generally* Thomas H. Lee, *supra* note 63.
[70] US, Constitution (Mar. 4, 1789), art. III, sec. 2, cl. 1.
[71] US, 1 Stat 73, Judiciary Act of 1789, codified as amended at 28 U.S.C. Section 1350 (2012): "[The district courts] shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States".
[72] Linda M. Keller, *Seeking Justice at the International Criminal Court: Victims' Reparations*, 29(2) T. JEFFERSON L. REV. 189 (2007).

> essential criterion for the restoration of social harmony between communities which have been [in conflict] with each other and a sine qua non for the establishment of deep-rooted and lasting peace.[73]

Additionally, the International Criminal's Rules of Procedure & Evidence, expands access to reparations to direct victims, and indirect victims "including family members, . . .other persons who suffered personal harm as a result of these offences".[74] Moreover, the International Criminal Court has articulated that reparations should be given without "adverse distinction on the grounds of race, colour, national, ethnic or social origin".[75] Furthermore, the Court has articulated that compensation is applicable when:

> i) the economic harm is sufficiently quantifiable; ii) an award of this kind would be appropriate and proportionate (bearing in mind the gravity of the crime and the circumstances of the case); and iii) in view of the availability of funds, this result is feasible.[76]

Reparations are a pivotal tool to address harm created by American's overincarceration and criminalization of Black Americans, the Black American wealth gap, and the lack of access to consistently sufficient quality education in Black American households across the country. The vestiges of American apartheid can be remedied by the judicial authorization for reparations to foundational Black Americans in this country. Furthermore, the International Criminal Court has articulated that compensation should be afforded when the harm faced by victims includes the following:

> […] b. Moral and non-material damage resulting in physical, mental and emotional suffering;
> c. Material damage, including lost earnings and the opportunity to work; loss of, or damage to, property; unpaid wages or salaries; other forms of interference with an individual's ability to work; and the loss of savings;
> d. Lost opportunities, including those relating to employment, education and social benefits; loss of status; and interference with an individual's legal rights.[77]

Black Americans have suffered under the vestiges of American apartheid economically, socially, and within the criminal justice system. However, the International Criminal Court's reparations provisions provides a potential tools and legal framework to mitigate the harm suffered.

The U.S. judiciary's adoption of the Rome Statute's antiapartheid provisions as a component of the law of nations, which the Framers considered incorporated into American law, is the next step in the advancement of an Equalitarian legal order.

VI. Conclusion

[73] *Id.*
[74] ICC Rules of Procedure & Evidence, Rule 85(a)(b).
[75] ICC Order for Reparations, 4. Dignity, non-discrimination and non-stigmatization, at 4-20, https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2015_02633.PDF.
[76] *Id*., at 8-20, "compensation numerical 37".
[77] *Id*., at 9-20, "compensation numerical 40 (b-d)".

The fight for racial equity, and remedying systemic injustice did not end with Judge Hastie's generation. The fight for the advancement of an equalitarian legal order continues in the 21st Century. The Rome Statute's antiapartheid provisions provide the legal framework and authorization for advancing Black American civil, economic, political, and social progress in this country. Accordingly, despite the political obstacles that make ratification difficult, the American judiciary is implored by the Framers and international law to incorporate the Rome Statute's antiapartheid provisions to mitigate the vestiges of American apartheid. As the Reverend Dr. Martin Luther King stated "the arc of moral universe bends toward justice".[78] However, justice that is real and attainable comes when "higher law informs positive law grounded in social realities".[79] As William Hastie penned "in 1930 a few persons had planned and initiated the campaign to change the racist character of our legal order".[80] In 2022, almost a century later the call for the next step in the advancement of William Hastie's equalitarian legal order needs similar courageous leaders to challenge our political and legal system to ratify, and adopt the Rome Statute, and international customary law's antiapartheid provisions to combat apartheid's American vestiges.

[78] Martin Luther King Jr., *Sermon at Temple Israel of Hollywood*, AMERICAN RHETORIC (Feb. 26, 1965), https://www.americanrhetoric.com/speeches/mlktempleisraelhollywood.htm.
[79] Telman, *supra* note 15.
[80] Hastie, *supra* note 14.

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Corporate Criminal Liability and Complicity in Crimes Against Humanity: Case Note on Recent French Jurisprudential Developments

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ABSTRACT: This article provides insight into corporate criminal liability as construed in French criminal law. It discusses specifically the history and contingency of the development of corporate criminal liability in French law and its legacy considering the decision of the *Cour de cassation* in the *Lafarge* cases. These landmark decisions are the first of their kind rendered by a supreme court anywhere in the world. They acknowledge that corporations, and no longer only directors of companies or corporations, may be found guilty of aiding and abetting terrorism if they have funded known terrorist organisations for business purposes. The decisions also clarify the limited circumstances where interest groups may be founded to bring private prosecutions to this effect. Given the foregoing, this paper outlines in detail the decisions of the *Cour de cassation* in *Lafarge*, analyses and contextualises their significance, and offers a long view that considers possible international developments.

KEYWORDS: Alien Tort Claims Act (ATCA); Corporate Criminal Liability; Crimes Against Humanity; International Criminal Court (ICC); Lafarge; Terrorist Organisations.

I. Introduction

Corporate criminal liability denotes the vicarious liability of a legal person for the acts of its stakeholders (i.e., directors, officers, employees, and agents) if they commit an illegal act within the scope of their duties with an intention to benefit the undertaking.

Before the reform of the French Penal Code of 1810 in 1994 known as *Code pénalancien*, French law allowed undertakings to ride roughshod over prescribed rules of conduct sanctioning criminal behaviour. The reason was the terseness of *Code pénalancien* regarding the criminal liability of corporations and the lack of clear statutes enshrining corporate criminal liability in positive law. Therefore, the criminal division of the *Cour de cassation* emphasised a *jurisprudence constante* whereby:

> On principle, a legal person cannot incur penal liability; nothing can be suffered to support it but positive law. Whatever inconveniences, therefore, may follow from the decision…given the lack of provisions allowing judges to uphold a presumption of penal liability against businesses, corporate criminal liability cannot be sustained. Hence, it follows that [the stakeholders of the company, even acting within the scope of their duties, cannot invoke the corporate veil to elude their liability. They are sole] liable for the criminal acts they commit, not the corporation.[1]

The decision of the Court relied on implicit and explicit justification. The first was the lack of statutory provisions sanctioning corporate criminal liability overtly or implicitly. It

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[1] Cour de Cassation, 72-90.424, Chambre criminelle, Judgment (Mar. 15, 1973); Cour de Cassation, 73-92.815, Chambre criminelle, Judgment (Feb. 6, 1975), https://www.legifrance.gouv.fr/juri/id/JURITEXT000007059502/.

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relied on arts. 111-114 of *Code pénalancien* whereby criminal law must be interpreted strictly when the law is clear and absolute. As a result, the criminal courts could not exercise discretion unlike their civil counterparts which are required to do so even if there is no statute providing for the situation brought before them.[2] For criminal cases, French law only allows judicial discretion in certain restricted cases where the law is unclear, convoluted, inaccurate, or erroneous.[3]

Until the reform of French criminal law in 1994, French statutory law acknowledged corporate criminal liability only in restricted cases. Instances included the sanction of undertakings that had actively engaged into collaboration with the Nazi occupant during World War II (WWII). In this instance, the law ordered their immediate liquidation and the forfeiture of their assets to the French Republic after the war.[4] Another instance includes the imposition of criminal fines on companies that paid dividends to their shareholders exceeding the dividend pay-out ratio formula provided under art. 3 of *Law no.82-660 of 30 July 1982 on prices and revenues*.[5] Otherwise, scarce were the statutory provisions that held companies accountable for the illegal acts of their representatives committed within the scope of their duties.

French doctrinal writers emphasised the untenability of this jurisprudence, especially given the avowal of the criminal division of the *Cour de cassation* - the French Supreme Civil and Criminal Court - that undertakings have legal personality. They should, therefore, be held accountable for the acts that are undertaken on their behalf, even criminal ones. Many stressed the unfairness of the refusal of imputing criminal liability to legal persons who engage more and more in criminal acts sometimes without their directors even knowing about the offences alleged against them, especially where liability is strict and incurred for negligence or omission. It is how the French legislative assembly undertook to reform French criminal law in 1994, thus modernising French criminal law, increasing accessibility to the law, and improving the coherency and instrumental efficiency of French criminal policies.[6]

Ever since, French criminal law sanctions corporate liability under art. 121-2 *et seq.*, of the French Penal Code (*Code pénal nouveau*).[7] Art. 121-2 et seq. apply not only to natural

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[2] French Civil Code, art. 4:"*Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice*". My own translation: "*A judge who refuses to render a judgment under the premiss that the law is terse, obscure, or does not provide sufficiently for the case presented before them may be prosecuted for being guilty of denial of justice*".

[3] Cour de cassation, Chambre criminelle (Feb. 24, 1809), 14(41) BULLETIN DES ARRETS DE LA COUR DE CASSATION RENDUS EN MATIERE CRIMINELLE. ANNEE 1809 (1810), at 83-85, especially 84. *Code pénal ancien,* arts. 111-3 to 111-5; Jean-Christophe Saint-Pau, *L'interprétation des lois. Beccaria et la jurisprudence moderne*, 2 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PENAL COMPARE 272 (2015), at 273-285.

[4] *Loi no. 46-994, portant transfert et dévolution de biens et d'éléments d'actifs d'entreprises de presse et d'information* (May 11, 1946).

[5] *Loi no. 82-660 du 30 juillet 1982 sur les prix et les revenus*.

[6] JAQUES-HENRI ROBERT, DROIT PENAL GENERAL (2005), at 376; Corinne Mascala, Marie-Cécile Amauger-Lattes, *Les évolutions de la responsabilité pénale des personnes morales en droit de l'entreprise*, in LA PERSONNALITE JURIDIQUE (Bioy Xavier ed., 2013), at 291-304.

[7] French Criminal Code, art. 121-2*: "Les personnes morales, à l'exclusion de l'Etat, sont responsables pénalement, selon les distinctions des articles 121-4 à 121-7, des infractions commises, pour leur compte, par leurs organes ou représentants. Toutefois, les collectivités territoriales et leurs groupements ne sont responsables pénalement que des infractions commises dans l'exercice d'activités susceptibles de faire l'objet de conventions de délégation de service public. La responsabilité pénale des personnes morales n'exclut pas celle des personnes physiques auteurs ou complices des mêmes faits, sous réserve des dispositions du quatrième alinéa de l'article 121-3*". [Translation] Legal persons, apart from the State, are criminally liable for the offences committed on their account by their organs or representatives, according to the distinctions set out under articles 121-4 and 121-7. However, local public authorities and their interest groups incur criminal liability only for offences committed during their activities which may be exercised through public service delegation conventions. The criminal liability of legal

persons but also to legal persons except for the French state. Although French administrative bodies such as councils and local authorities can be held criminally liable, they can only be held criminally liable for the offences committed by their representatives within the scope of their duties if these duties are subject to public service delegation conventions. Examples include the situations where a *municipal* police officer (i.e., local authority law enforcement agent) commits an offence that engages the vicarious criminal liability of the local authority for which they work.

That notwithstanding, *Law no. 2004-204 of 9 March 2004 adapting justice to the evolutions of criminality* systematised the criminal liability of public authorities other than the state. It purports to align the regime applicable to non-state legal persons with that of devolved state legal persons. Accordingly, the criminal liability of legal persons – whatever their nature – depends on the demonstration that the offence committed by a representative of the legal person was done with an intention to benefit the legal person in and of itself rather than the personal interests of the representative(s). Though, it does not exclude the personal criminal liability of the representative of the legal person according to art. 121-2 of the French Penal Code *in fine*; whether the representative committed the criminal act themselves or merely aided and abetted it.[8]

In this context, in a decision dated 7 September 2021, the criminal division of the *Cour de cassation* partially annulled two decisions of the *Chambre de l'Instruction*[9] of 24 October 2019 (case no. 19-87.031) and 7 November 2019 (case no. 19-87.367) exonerating the French industrial company Lafarge for aiding and abetting crimes against humanity through the illegal financing of the Islamic State in Iraq and the Levant (ISIL).[10] It is the first time that a criminal court, more so a supreme court, acknowledges that a legal person can be held criminally liable for crimes against humanity anywhere in the world. It sets a *precedent* whereby a legal person financing a terrorist organisation can be subject to prosecution even though its representatives did not condone expressly or participate directly in the acts of the terrorist organisation it financed.

In addition, the *Cour de cassation* argued that complicity in the perpetration of crimes against humanity is characterised when the legal person and its representatives committed or intended to commit such a crime whether through aid, assistance, or facilitation. It is irrelevant whether the legal person and its representatives supported or condoned the acts perpetrated by the organisation it financed. More so, since the wilful payment of monies to an entity whose sole and known purpose is to commit crimes suffices in and of itself to characterise the offence.

Against this background, the present case note discusses, analyses, and critiques the implications of the decisions of the *Cour de cassation* of 7 September 2021. It focuses on the acceptableness of its foundations, how it features in the general academic jurisprudence surrounding corporate criminal liability in France, and its global impact as it sets up a unique

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persons does not exclude that of any natural persons who are perpetrators or accomplices to the same act, subject to the provisions of the fourth paragraph of art. 121-3.

[8] French Criminal Code, art. 121-2 cited above.

[9] The Chambre de l'Instruction (Prosecution Chamber) – formerly the Chambre de l'Accusation (Accusation Chamber) – is a criminal division of the French Courts of Appeals. It is the only second-degree prosecution juridisction in the French legal system. It hears appeals against the decisions made by *procureurs d'instruction* (public prosecutors) and *juges des libertés et de la détention* (liberty and custody judges) to prosecute or incarcerate individuals. French Penal Code, Chapitre II : *De la chambre de l'instruction: juridiction d'instruction du second degré,* arts. 191-230.

[10] Cour de cassation, 19-87.367 and 19-87.03, Chambre criminelle - Formation de section, Judgment (Sept. 9, 2021).

precedent capable of influencing international developments in other jurisdictions as seen by the recent conviction of Lafarge in the US on the same charges.[11]

II. Facts

Lafarge SA is an industrial company registered in France that specialises in cement production, construction aggregates, and concrete. It built cement works in Jalabiya (Aleppo, Syria) worth hundreds of millions of Euros. The plant became operative in 2010. The cement plant was owned and operated by one of its sister companies, Lafarge Cement Syria (LCS) registered under Syrian law and owner of the plant to the tune of 98%.

Between 2012 and 2015, the land on which the plant was built experiencedfighting and was occupied by several armed groups including ISIL. During this period, the Syrian employees of LCS carried on their work while foreign senior leadership was evacuated to Egypt in 2012 from where it continued to run the subsidiary undertaking. Housed in employer-provided accommodation, Lafarge's Syrian staff faced several risks including extortion and kidnapping by various armed groups including ISIL.

LCS paid monies, through intermediaries, to the various persons and factional forces that successively controlled the region and could compromise the undertaking's activities. An emergency evacuation of the plant took place in September 2014, shortly before ISIL took hold of it.

On 15 November 2016, Sherpa – a French law interest group – and the European Centre for Constitutional and Human Rights (ECCHR) – an independent, non-profit legal and educational organisation – as well as eleven Syrian employees of LCS initiated private criminal and indemnification prosecutions against Lafarge before the Paris Examining Magistrate for:

- the financing of a terrorist undertaking;
- complicity in crimes against humanity;
- the abusive exploitation of someone else's work, and;
- recklessness.

III. Procedure

On 9 June 2017, the French Public Prosecutor's Office requested of the Paris Examining Magistrate that they launch an open investigation into allegations of endangerment, financing of a terrorist undertaking, and the subjection of several persons to work conditions that are incompatible with human dignity.

Bruno Lafont, Lafarge's general director between 2007 and 2015, was indicted on 8 December 2017. He petitioned the Examining Magistrate to dismiss Sherpa and ECCHR's private prosecution. Conversely, the Examining Judge ascertained the validity of the prosecutions by order on 18 April 2018 which Lafont appealed. Likewise, Jean-Claude

[11] Office of Public Affairs, *Lafarge Pleads Guilty to Conspiring to Provide Material Support to Foreign Terrorist Organizations,* UNITED STATES DEPARTMENT OF JUSTICE (Oct. 18, 2022), https://www.justice.gov/opa/pr/lafarge-pleads-guilty-conspiring-provide-material-support-foreign-terrorist-organizations.

Veillard, Lafarge's Director for Security between 2008 and 2015 was indicted on 1 December 2017 on the same charges. Similarly, for Frédéric Jolibois, LCS's director between 2008 and 2015. In turn, Lafarge was indicted on 28 June 2018 for complicity in crimes against humanity, the financing of a terrorist undertaking, and endangerment per the recommendation of Paris' Public Prosecutor's Office.

On 31 May 2018, Jean-Claude Veillard brought a formal petition before the *Chambre de l'Instruction* to declare the proceedings null. Likewise, Frédéric Jolibois brought a formal petition before the same jurisdiction on 1 June 2018 to declare the procedure null including his indictment.

Following, two Yazidis victims of ISIL lodged applications to join the parties to the proceedings on the same charges on 30 November 2018 which prompted Lafarge to lay another formal petition before the *Chambre de l'Instruction* on 27 December 2018 to declare the proceedings invalid and nullify its indictment.

In turn, the *Chambre de l'Instruction* of Paris' Appellate Court rendered three judgments on 24 October 2019 declaring invalid the criminal indemnification proceedings launched by Sherpa and ECCHR, which they appealed.

IV. Decisions and *Ratio Decidendi*

A. Case no. 19-87.031 (*Lafarge I*)

1. Grounds for Appeal

Sherpa and ECCHR argued the unlawfulness of the dismissal of their private prosecutions according to arts. 2, 2-4, 2-9, 2-22, 121-7, 212-1, 591, and 593[12] of the French Code of Penal Procedure (FCPP). They allow collective private prosecutions initiated by interest groups if they demonstrate all of the following:

- causality between the facts supporting the petition and the damage they have incurred,
- the damage incurred is an offence sanctioned in the French Penal Code (FPC), including where they act on behalf of natural persons who are alleged victims.

Sherpa and ECCHR contended that an offence may prejudice an interest group directly and personally depending on its purposes, functions, and the collective interests that they represent per their articles of association according to art. 2 FCPP. As a result, they challenged the decision of the Court of Appeal that relied on two earlier decisions of the criminal division of the *Cour de Cassation*[13] to assert that they had no *locus standi*. They argued that the *Chambre* misapplied arts. 2-23 and 2 FCPP which empower collective entities to initiate private

[12] French Code of Penal Procedure, art. 2-9: "Any interest group lawfully registered for at least five years on the date of offence proposing through its constitution to assist the victims of offences may exercise the rights granted to the civil party in respect of the offences falling within the scope of article 706-16, where a prosecution has been initiated by the public prosecutor or by the injured party".

[13] Cour de Cassation, 16-86.868, Criminal Division, Judgment (Oct. 11, 2017); and Cour de Cassation, 17-80.659, Criminal Division, Judgment (Oct. 11, 2017).

prosecutions based only on the fulfilment of a functional test, including where they obtain the express consent of the persons they represent to act on their behalf per art. 2-22 FCPP. More so, when the interest group represents parties to the proceedings whose individual claims have been declared admissible.

Therefore, Sherpa and ECCHR contended that the Court violated arts. 2, 3, 4, 5, 6, and 9 of the European Convention on Human Rights (ECHR), especially Article 6§1, by depriving them disproportionately of their right of access to a judge and right to take part in proceedings on the ground that they had to demonstrate a singular prejudice *distinct* from the collective interests that they represent.

2.Decision

The *Cour de Cassation* affirmed the decision of *Chambre de l'Instruction* to dismiss Sherpa and ECHR's private prosecutions on the ground that art. 2 FCPP was of strict interpretation and neither Sherpa nor ECHR had personally and directly incurred any prejudice other than indirectly through the collective interests that they represent. The *Chambre de l'Instruction* did not engage Article 6§1 ECHR, especially given that the European Court of Human Rights (ECHR) ruled that the ECHR neither warrants a right to 'private revenge' nor a right to private prosecutions by third parties in the interest of public order (i.e., *actiopopularis*).[14]

The Court ascertained that an interest group may only exercise *actio popularis* in the limited circumstances provided for under arts. 2-1 et seq. FCC whereby:

> Any interest group lawfully registered for at least five years on the date of offence, proposing through its constitution to combat racism or to assist the victims of discrimination grounded on their national, ethnic, racial or religious origin, may exercise the rights granted to the civil party in respect of, first, discrimination punished by arts. 225-2 and 432-7 of the Criminal Code and the creation or the possession of the files prohibited under art. 226-19 of the same code, and, secondly, the intentional offences against the life or physical integrity of persons, threats, theft, extortion, and destruction, defacement and damage, committed to the prejudice of a person because of his national origin, or his membership or non-membership, real or supposed, to any given ethnic group, race or religion.
>
> However, where the offence has been committed against a person as an individual, the interest group's action will only be admissible if it proves it has obtained the consent of the person concerned or, where the latter is a minor, the consent of the person holding parental authority him or that of his legal representative, where such consent may be given.[15]

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[14] ECtHR, Perez v France, Application 47287/99, Grand Chamber, Judgment (Feb. 12, 2004), para. 70; and ECtHR, Sigalas v Greece, Application no. 19754/02, Grand Chamber, Judgment (Sept. 22, 2005), para. 28.

[15] French Code of Penal Procedure, art. 2-1: "*Toute interest group régulièrement déclarée depuis au moins cinq ans à la date des faits, se proposant par ses statuts de combattre le racisme ou d'assister les victimes de discrimination fondée sur leur origine nationale, ethnique, raciale ou religieuse, peut exercer les droits reconnus à la partie civile en ce qui concerne, d'une part, les discriminations réprimées par les articles 225-2 et 432-7 du code pénal et l'établissement ou la conservation de fichiers réprimés par l'article 226-19 du même code, d'autre part, les atteintes volontaires à la vie et à l'intégrité de la personne, les menaces, les vols, les extorsions et les destructions, dégradations et détériorations qui ont été commis au préjudice d'une personne à raison de son origine nationale, de son appartenance ou de sa non-appartenance, vraie ou supposée, à une ethnie, une race ou une religion déterminée. Toutefois, lorsque l'infraction aura été commise envers une personne considérée individuellement, l'intérêts group ne sera recevable dans son action que si elle justifie avoir reçu l'accord de la personne intéressée ou, si celle-ci est mineure, l'accord du titulaire de l'autorité parentale ou du représentant légal, lorsque cet accord peut être recueilli. Toute fondation reconnue d'utilité publique peut exercer les droits*

At the same time, the *Cour de cassation* emphasised that in principle, art. 2-9 FCPP prevents neither Sherpa nor ECCHR from initiating a civil action in respect of the offences provided under art. 706-16 where the prosecution has been initiated by the public prosecutor or by the injured party.

However, the Court also added that the *Chambre de l'Instruction* erred on the side of procedure when it dismissed Sherpa and ECCHR's claim on the ground that the inadmissibility of Sherpa and ECCHR's proceedings before the Paris Examining Magistrate per art. 85 FCPP also invalidated the public prosecution launched by the Public Prosecutor's Office on two grounds. First, the invalidity of the private prosecution may only also invalidate the public prosecution where criminal proceedings may only be initiated on the complaint of the victim, their legal representative, or assignee. Second, art. 2-9, 1 FCPP does not subject the admissibility of the proceedings to the prior complaint of the victim but merely requires that the articles of association of the entity representing them meet a functional test.

Howbeit, the *Cour de cassation* partially overturned the decision of the *Chambre de l'Instruction* per art. L411-3 of the French Code on Judicial Organisation on the ground that: 1) while an interest group may represent victims and launch private prosecution on their behalf, 2) they may only do so *by intervention* with permission of the court and with the express consent of the victim or that of their legal representatives if they are a minor per arts. 2-9, 1 and 2-22 FCPP. Sherpa and ECCHR failed to meet these requirements.

B. Case no. 19-87.367 (*Lafarge II*)

1. Grounds for appeal

Now turning to the indictment of Lafarge and its directors. The *Cour de Cassation* heard an appeal from ECCHR against the decision of the *Chambre de l'Instruction* of 7 November 2010 annulling the indictment of Frédéric Jolibois and Jean-Claude Veillard for endangerment and declaring that they had no *locus standi*.

ECCHR contended that art. 80-1 CFPP provides that the Examining Magistrate may place, under judicial examination, only those persons against whom there is *strong and concordant evidence* making it probable that they may have participated, as a perpetrator or accomplice, in the commission of the offences they are investigating. It does not require that the alleged perpetrator has participated in the full realisation of the crime that is being prosecuted.

ECCHR further based their appeal on arts. L. 4121-3, R. 4121-1 et seq., and R4141-13 of the French Labour Code. They contended that the duty of prudence that these articles enshrine impose a duty of care on employers to provide a safe environment to their staff which Lafarge's director failed to do. The evidence submitted reveals that Veillard, as Director for Security, did not observe his duty to protect the health and safety of his staff while he had power and authority over them and the necessary means to do so *de facto* by delegation. Therefore, the interest groups contended that the *Chambre de l'instruction* violated arts. 80-1, 591, 593 FCPP, and arts. 121-6, 121-7, and 223-1 FPC.

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reconnus à la partie civile dans les mêmes conditions et sous les mêmes réserves que l'interest group mentionnée ++au présent article. En cas d'atteinte volontaire à la vie, si la victime est décédée, l'interest group doit justifier avoir reçu l'accord de ses ayant-droits''.

In addition, Sherpa and ECCHR appealed the decision of the *Chambre de l'Instruction* that declared their plea inadmissible and annulled the indictment of Lafarge for aiding and abetting crimes against humanity. They argued that the quashing of decisions no. 2018/05060 and 2019/02572 of 24 October 2019 in decisions no. 19-87.031 and no. 19-87.040 had for its effect to annul the decision of the *Chambre* declaring that Sherpa and ECCHR had no *locus standi*.

More so, ECCHR appealed the decision of the *Chambre de l'instruction* annulling Lafarge's indictment for aiding and abetting terrorism on the ground that art. 421-2-2 FCP provides that terrorism is characterised by the mere act of financing a terrorist organisation by providing it with, collecting, or managing funds, securities or property of any kind or by giving it advice for this purpose or knowing that they were intended to be used for the perpetration of an act of terrorism irrespective of whether it actually takes place.[16] Hence, it follows that the decision of the *Chambre* violated arts. 80-1 FCCP and 421-2-2 FPC and misinterpreted art. 421-2-2 FPC by holding that LCS could not be prosecuted unless a terror act had actually taken place although it knew that the monies it paid ISIL could be used to commit a terror act.

Conversely, Lafarge appealed the decision of the *Chambre de l'instruction* refusing to overturn its indictment for endangerment on the ground that it had no power, authority, and direction over LCS' staff. They further contended that the mere fact that the two companies were linked through their capital shares, even to the tune of 98.7%, and the fact that Lafarge had strong decision-making powers over the corporation do not, in themselves, establish a relationship akin to employment between Lafarge and LCS' staff. More so, since the *Chambre de l'instruction* failed to establish that the employment contracts between LCS and its staff were a sham; that is, an attempt to disguise an alleged employment contract between Lafarge and the Syrian staff hired under Syrian law and employed by LCS. But also given the fact that Syrian employment law does not contain similar stringent requirements for security and safety befalling employers. Hence, Lafarge cannot be vicariously liable for LCS' staff, thereby contending that the *Chambre*:

- misapplied arts. L. 1221-1, R. 4121-1, R. 4121-2, R. 4121, and R. 4141-13 FLC, art. L. 225-1 of the French Commercial Code (FCC) and art. 223-1 FPC,
- failed to substantiate its decision per arts. 223-1 FPC and 80-1 FCPP.

In addition, ECCHR and the civil parties appealed the decision of the *Chambre de l'instruction* to annul the indictment of Lafarge for aiding and abetting crimes against humanity on the ground that the *Chambre* failed to draw all the conclusions from the evidence which showed that Lafarge wilfully and repeatedly financed ISIL irrespective of whether that financing was only intended to ensure business contingency in war-torn Syria. They contended that the *Chambre de l'instruction* failed to draw all the conclusions from its own observations, thus violating arts. 80-1, 591, and 593 FCPP, and arts. 121-3, 121-6,121-7, and 212-1 FPC. More so, since the evidence submitted showed that Lafarge had probable cause to know that ISIL would inevitably avail itself of the aid provided to perpetrate terror acts and that it would, thereby, be participating, as a perpetrator, in the realisation of such acts whether they happened.

[16] French Criminal Code, art. 421-2-2: "*Constitue également un acte de terrorisme le fait de financer une entreprise terroriste en fournissant, en réunissant ou en gérant des fonds, des valeurs ou des biens quelconques ou en donnant des conseils à cette fin, dans l'intention de voir ces fonds, valeurs ou biens utilisés ou en sachant qu'ils sont destinés à être utilisés, en tout ou partie, en vue de commettre l'un quelconque des actes de terrorisme prévus au présent chapitre, indépendamment de la survenance éventuelle d'un tel acte*".

It appears so from the minutes of the weekly meetings of the Comity for Safety in Syria in which Lafarge's senior leadership took part and the many reports published during the same period by the Independent International Commission of Inquiry on the Syrian Arab Republic appointed by UNHRC which investigated ISIL's actions. Moreover, complicity does not require that the accomplice shared the same intent as the main perpetrator. The test is realised by aiding and abetting the realisation of a crime wilfully, especially when the accomplice could have foreseen the realisation of such a crime or the aggravation that their aid would cause, especially considering the propaganda video released by ISIL showing beheadings of civilians and other atrocities.

2.Decision

The *Cour de cassation* held that the criminal division of the same Court wrongly declared ECCHR's plea inadmissible in its decision of 7 September 2021 no. 19-87.031, thus wrongly overturning the decision of the Paris Appellate Court of 24 October 2019. The Court, however, asserted that the decision could not be quashed on the ground that the annulment of Veillard's indictment was justified given there was insufficient evidence that his role as Director for Security – which entailed assessing potential threats to Lafarge's operating plants – also entailed safeguarding the health and safety of Lafarge's staff. The Court ascertained that the duty of safety sanctioned under arts. L. 4121-3, R. 4121-1 et seq. of the French Labour Code applies only to employers. Since Veillard had not been entrusted whether in writing or orally with the performance of those duties on behalf of Lafarge, he could not be found guilty.

In addition, the Court acknowledged the *sovereign* discretion of the *Chambre de l'Instruction* in considering that Lafarge and LCS could have been coaxed into negotiating, even indirectly, with ISIL and the Al Nusrah Front (ANF) without intending or knowing that such funds, security, or property would be used, in whole or in part, for the commission of acts of terrorism.

Further, turning to whether Lafarge or LCS had endangered the lives of LCS's employees, the Court held that Lafarge controlled 98.7% of LCS' capital. The Court noted that the *Chambre de l'Instruction* was right to consider that it was serious evidence of Lafarge's direct control over LCS and its employees given LCS' lack of autonomy and Lafarge's constant interference with LCS' social and economic management per the *jurisprudence constante* of its Social Affairs Division.[17] However, the Court considered that it was insufficient to deduce from that that French Labour Law was the applicable law. The *Chambre* should have first determined the *lex fori* in the context of the alleged employment relationship between Lafarge and the Syrian employees per art. 8 and 9 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) and other international provisions. Then, the *Chambre* should have determined whether the applicable law contained any duty as to security or prudence akin to art. 223-1 FPC and the *jurisprudence constante* that it warrants in this regard.[18] Hence, the Court quashed the decision of the *Chambre* on the ground of its erroneous choice of law.

Finally, considering whether Lafarge had been an accomplice to crimes against humanity, the Court questioned whether complicity in the perpetration of crimes against humanity should be construed specially (*lex specialis*) or generally per the general rules provided under art. 121-

[17] Cour de Cassation, 15-15.493, Social Affairs Division, Judgment (Nov. 6, 2016), especially Bull. 2016, 147; also, Cour de Cassation, 18-13.769, Social Affairs Division, Judgment (Nov. 25, 2020).
[18] Cour de Cassation, 18-82.718, Criminal Division, Judgment (Nov. 13, 2019).

7 FPC (*lex generalis*). Noting that crimes against humanity are the most serious of crimes, the Court ruled that the finding of complicity cannot be limited strictly to aiding and abetting or facilitating their preparation or realisation knowingly. It should also cover knowledge that the main perpetrators will commit or intends to abet such a crime and that its perpetration or realisation is facilitated through the aid or assistance provided according to art. 6 of the Charter of the International Military Tribunal.[19] More so since art. 121-7 FPC neither requires that the accomplice of crimes against humanity belongs to the organisation that commits it nor that they condone the concerted plan to attack a civil group. It does not minimise the offence of crimes against humanity which is subject to strict conditions. It merely broadens the scope of complicity in relation to crimes against humanity. Otherwise, the Court argued, many acts of complicity would remain unsanctioned whereas it is often the multiplication of such acts of complicity that permits the characterisation of a crime against humanity.

Given that art. 121-7 FPC does not limit complicity to a specific crime or require that the accomplice has a particular character, the Court ruled that it applies indiscriminately to both legal and natural persons. Hence, by contending that ISIL had committed crimes against humanity known by Lafarge,[20] the *Chambre de l'Instruction* failed to draw all relevant conclusions from its own observations whereby Lafarge was guilty of aiding and abetting terrorism. It is so, even if Larfarge's intention was only to safeguard its operations. Such acts underpin Lafarge's complicity, especially as it knew of ISIL's actions and had probable cause to believe that the monies paid to ISIL were likely to be used, in whole or in part, for the commission of any of the acts of terrorism listed in art. 212-1 FPC whatever the mobiles and whether such an act took place.

Therefore, the Court declared Lafarge to be an accomplice in the perpetration of crimes against humanity and quashed the decision of the *Chambre de l'Instruction* on the other grounds, thereby referring the case to the Paris Appellate Court for a different panel of judges to render a final decision consistent with its ruling.

V. Critique

In *Lafarge I***,** as detailed above, the criminal division of the *Cour de cassation* ruled on the admissibility of Sherpa's and ECCHR's applications filed as civil parties during the judicial investigation.

The admissibility of Sherpa and ECCHR's civil party applications represents a major issue as far as it both determines the extent of the formal indictment of Lafarge for financing a terrorist enterprise and complicity in crimes against humanity. The issue of admissibility also conditions the participation of Sherpa and ECCHR in the investigation (i.e., access to the file, contestation of the orders made by the investigating judge, request for instruments) as well as the outcome of their appeals before the *Cour de cassation*.[21]

[19] Cour de Cassation, 96-84.822, Criminal Division, Judgment (Jan. 23, 1997), Bull. crim. (1997), para. 32.
[20] E.g., the execution of a 15-year-old boy for blasphemy, abductions, hostage-taking, murders and executions without trial, mistreatments and torture, the execution of hundreds of men in Tabqa 80km away from the plant on 2 September 2014, the beheading of young members of the *al-Cha'aitat* tribe on 30 August 2014 for refusing to swear allegiance to ISIL, the arrestation of Kurds, and the publication of multiple reports attesting to ISIL's perpetration of crimes against humanity such as by the Independent International Commission of Inquiry on the Syrian Arab Republic appointed by UNHRC or UN Security Council Resolution 2170/2014.
[21] Jean-Patrick Capdeville, *Affaire Lafarge: précisions sur l'information judiciaire ouverte pour complicité de crime contre l'humanité,* 10 ACTUALITÉ JURIDIQUE 149 (Oct. 2021).

Under French law, art. 2 FCCP allows anyone who has *personally suffered a prejudice directly caused by the alleged infringement* to claim damages before civil courts. Article 3 FCCP provides that the claimant may bring a civil action at the same time as criminal proceedings, before the same court. A civil action is admissible for all types of damage, whether material, physical or moral, resulting from the alleged infringement. However, the *Cour de cassation* regularly holds that bringing a civil action is a qualified right. Therefore, lower courts must exercise strict scrutiny when ascertaining whether the conditions set out in articles 2 and 3 FCCP are fulfilled.[22]

Interest groups may also institute a civil action before criminal courts.[23] However, the lawmaker does not recognise a general right for interest groups to bring proceedings before courts. By exception, art. 2-4 FCCP provides that any interest group that has been established for at least five years and aims to *combat crimes against humanity and war crimes* may exercise the rights recognised to civil parties. Art. 2-9 FCCP makes similar provisions for interest groups that have been established for at least five years and aim *to assist the victims* of the offences provided for in art. 706-16 FCCP.[24] However, this provision also requires that either the prosecutor, or the victim, initiates prosecution before criminal courts while interest groups may only join the proceedings and institute a civil action by way of intervention (i.e., *ex parte*). The differences between these provisions, therefore, justify why the criminal division achieved distinct results when assessing the admissibility of Sherpa's and ECCHR's applications.

Regarding the civil party application about the indictment of Lafarge for complicity in crimes against humanity, the central question is that relating to Sherpa's and ECCHR's articles of association. Pursuant to the principle of strict interpretation of criminal law,[25] trial courts must refer to the terms of the articles of association and interpret their meaning.[26] According to case law, the admissibility of an interest group's civil party application depends on its purpose and object[27]. First Advocate General Desportes[28] asserts that the statutory object cannot be too broad. It must also be clear enough so there is no ambiguity as to its scope of action.

The *Cour de cassation* assessed the motives that the investigation chamber invoked when ruling on the admissibility of Sherpa's and ECCHR's application both in the light of the principle of strict interpretation and the observations of the First Advocate General. In this context, Sherpa's statutes indicate that its objective is "to prevent and combat economic crimes"[29] while ECCHR's is "sustainably [to] promote international humanitarian law and human rights as well as to assist persons or groups of persons who have been affected by human rights violations."[30] If the criminal division did not consider Sherpa's statutory object to fall

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[22] Cour de cassation, 92-81.432, Criminal Division, Judgment (9 Nov., 1992).
[23] French Code of Penal Procedure, art. 2-1. *Supra* note *15*.
[24] This includes inter alia the offence of individual terrorist enterprise; financing à terrorist enterprise and public glorification of terrorism.
[25] French Criminal Code, art. 111-4: *"La loi pénale est d'interprétation stricte".*
[26] Capdeville, *supra* note 21.
[27] Cour de cassation, 70-90.558 P, Criminal Division, Judgment (14 Jan., 1971).
[28] Cour de cassation, 19-870.31, 19-870.36, 19-870.40, 19-873.62, 19-87.367,19-873.76, Criminal Division, opinion of first Advocate General Desportes, Judgment (Sept. 7, 2021).
[29] Sherpa's Statutes, art. 3: *"Sherpa a pour objet de prévenir et combattre les crimes économiques. Sont entendus par crimes économiques : Les atteintes aux droits humains (droits civils, politiques, économiques, sociaux ou culturels), à l'environnement et à la santé publique perpétrées par les acteurs économiques ; les atteintes sous toutes leurs formes à l'intégrité des Etats, des collectivités publiques, des établissements publics ou du service public, notamment la corruption et les flux financiers illicites, qui aggravent les écarts de développement et mettent en péril la stabilité des Etats (...)".*
[30] ECCHR statutes, art. 2: *"L'objet de l'association est de promouvoir durablement le droit international humanitaire et les droits humains ainsi que d'aider les personnes ou les groupes de personnes qui ont été affectées*

within the scope of art. 2-4 FCCP, such was the case for ECCHR. This is how the *Cour de cassation* declared Sherpa's civil action inadmissible, but ECCHR's application admissible.

This solution is consistent with European case law concerning the role of civil parties in criminal proceedings. Indeed, in *Perez v. France*,[31] the European Court of Human Rights restated that "the civil party cannot be considered as the adversary of the public prosecutor, nor moreover necessarily as its ally, their role and their objectives being clearly distinct". It is, therefore, to avoid *action popularis* that both FCCP provisions and case law frame the right for interest groups to institute a civil action during criminal proceedings. Their action is supposed to draw attention to an attack on the collective interests they are defending and not to pursue repressive purposes. Construing the articles of association of an interest group in an extensive manner would have the effect of distorting the provisions of the law by admitting that any interest group with a vague statutory object may exercise civil action.

Regarding the admissibility of the civil party application about the indictment for financing a terrorist enterprise, the *Cour de cassation* invoked both procedural and substantive arguments. On the procedural side, Sherpa's and ECCHR's applications were inadmissible because art. 2-9 FCCP requires interest groups to become civil parties by way of intervention only. Under this provision, only the public prosecutor or the victim (natural person) may initiate public action. In this case, the eleven former Lafarge employees should have filed a complaint in which they demonstrated a direct and personal prejudice resulting from the payment of funds by Lafarge to ISIL armed groups. Unless the public prosecutor initiates public action themselves with a view of prosecuting Lafarge for financing a terrorist enterprise, persons alleging direct and personal prejudice resulting from Lafarge's financing of a terrorist enterprise must prove and aver it.

However, it is not an easy task as the financing of a terrorist enterprise is an autonomous offence which exists regardless of any terrorist act being committed. Due to the remote, or even non-existent, causal link between the financing of the terrorist enterprise and the prejudice suffered by former employees, it would have been impossible to demonstrate the direct nature of the prejudice. Such a pitfall can only compromise the admissibility of a civil party's application.

Differently, the decision of the *Cour de cassation* in *Lafarge II* is one of a kind. It is the first time that the *Cour de cassation*, more so a supreme court, has ruled on the intentional element of complicity in crimes against humanity regarding legal persons.

In French criminal law, art. 121-7 FPC defines the mechanism of complicity by providing that:

> The accomplice to a felony or a misdemeanour is the person who knowingly, by aiding and abetting, facilitates its preparation or realisation. Any person who, by means of a gift, promise, threat, order, or an abuse of authority or powers, provokes the commission of an offence, or gives instructions to commit it, is also an accomplice.

Applicable to crimes and misdemeanours, complicity is an autonomous offence based on a logic of assimilation to the main offence. Before ascertaining the conditions for complicity,

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par les violations des droits humains (...) Cela peut prendre la forme d'un soutien aux victimes ou aux organisations de victimes de violations des droits humains dans le besoin, mais aussi d'une mobilisation de l'opinion publique pour les besoins des victimes, que ce soit dans un cas particulier [ou] dans un cas plus général (...)".

[31] ECtHR, Perez v. France, Application 47287/99, Grand Chamber, Judgment (Dec. 2, 2004); ECtHR, Sigalas v Greece (preliminary objections), Application 19754/02, Grand Chamber, Judgment (May 22, 2005); ECtHR, Berger v. France, Application 48221/99, Grand Chamber, Judgment (Dec. 3, 2002), para. 38.

judges must find "a primary punishable act"[32] on which the accomplice's actions are going to graft on to. As remote as the act of complicity might be, when judges find complicity, the accomplice incurs the same penalties as the main perpetrator of the offence.[33]

In *Lafarge II*, the debate concerns the approach trial judges shall adopt when assessing the intentional element of complicity. While art. 121-7 FPC sanctions the support given to the perpetrator of the main offence, it is still necessary to determine the degree of intentionality necessary to characterise complicity.[34] Should judges adopt an objective approach according to which knowingly supporting a criminal plan suffices to retain complicity? Or should it be determined whether the accomplice takes part in the concerted plan implemented by the perpetrator? In practice, this question arises as far as there are different degrees of support for perpetrating the offence. The accomplice may as well intend for the criminal plan to succeed just as they can be indifferent to its realization.[35]

First Advocate General Desportes[36] considers that the link between the payment of funds to criminal organisations and their actions is too indirect to characterise, from the outset and on its own, complicity by aid or assistance within the meaning of art. 121-7 FPC. He adds that it is because the financing of a terrorist enterprise cannot be analysed on its own as an act of complicity because the lawmaker created a distinct offence in art. 421-2- 2 FCP.[37]

Appreciating the reasons given by the investigating chamber, the *Cour de cassation* ruled, nevertheless, in favour of an objective approach. It specifies that the knowledge that Lafarge's executives had of the abuses committed by ISIL is sufficient to characterise the intentional element of complicity. Whether Lafarge's executives condoned ISIL's ideology is irrelevant. Therefore, the disbursement of funds to ISIL factions with the sole purpose of preserving the continuity of commercial activity is not such as to exclude Lafarge's complicity in crimes against humanity.[38]

This decision is in line with previous case law regarding the application of art. 6 of the Charter of the International Military Tribunal.[39] In the *Papon* case, the criminal division of the *Cour de cassation* already considered it was neither necessary for the accomplice to have belonged to the organisation nor for the accomplice to adhere to the concerted plan to find complicity in crimes against humanity.[40] This interpretation of the intentional element of complicity calls for a couple of remarks.

On the one hand, the decision of the criminal division ensures the full effectiveness of the sanction of crimes against humanity by ensuring that legal persons cannot invoke business reasons to elude complicity. It is now clear that legal persons shall increase their vigilance towards entities with whom they enter into business to avoid the risk of becoming complicit in

[32] French translation: "*fait principal punissable*".
[33] French Criminal Code, art. 121-6: *"Sera puni comme auteur le complice de l'infraction, au sens de l'article 121-7"*.
[34] Laurent Saenko, *L'affaire Lafarge ou le risque de la complicité objective de crime contre l'humanité*, RECUEIL DALLOZ 45 (2022).
[35] Yves Mayaud, *L'affaire Lafarge dans sa dimension attentatoire aux personnes*, RSC-JOURNAL OF CRIMINAL SCIENCE AND COMPARATIVE CRIMINAL LAW 827 (2021), at 828-833.
[36] Cour de cassation, 19-870.31, 19-870.36, 19-870.40, 19-873.62, 19-87.367, 19-873.76, Criminal Division, Opinion of first Advocate General Desportes (Sept. 7, 2021).
[37] Financing a terrorist enterprise.
[38] Cour de cassation, 19-87.367, Criminal Division, Judgment (Sept. 7, 2021), para 79.
[39] Cour de cassation, 19-87.367, Criminal Division, Judgment (Sept. 7, 2021), para 68.
[40] Cour de cassation, 96-84.822, Criminal Division, Judgment (Jan. 23, 1997).

crimes against humanity. This precedent should encourage legal persons operating in conflict zones to refrain from dealing with entities whose criminal acts are notorious.[41]

On the other hand, lower courts shall remain cautious when referring to this precedent. The assessment of Lafarge's knowledge of the criminal acts must proceed from serious and consistent evidence[42] to justify a formal accusation. It is, therefore, necessary to ascertain that the facts characterising the main offence rely on sufficient evidence to demonstrate the "criminal imprint" of the accomplice. However, it is sometimes difficult to determine how informed the accomplice is at the investigation stage.[43] In any case, the control of the *Cour de cassation* is restricted. As a supreme court, it can only assess whether the reasons trial judges invoked are sufficient and without contradiction; in principle, it cannot substitute its assessment for theirs save in rare instances.[44]

VI. European and International Perspectives: Looking Back and Forward

The absolute ban on States committing crimes against humanity, genocide, and war crimes is secured by numerous instruments of international law as well as *ius cogens*.[45] Thanks to the establishment of the International Criminal Court, individuals can be found guilty of committing, or being complicit in, these crimes as well.[46] The absentees in this legal landscape are corporations.

The possibility that the behaviour of a corporation can indeed contribute to crimes against humanity has been readily acknowledged.[47] Yet, until the *Lafarge* case, compensation for these

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[41] Mayaud, s*upra* note 35.

[42] French Code of Penal Procedure, art. 144: *"La détention provisoire ne peut être ordonnée ou prolongée que si elle constitue l'unique moyen : 1. De conserver les preuves ou les indices matériels ou d'empêcher soit une pression sur les témoins ou les victimes, soit une concertation frauduleuse entre personnes mises en examen et complices ; 2. De protéger la personne mise en examen, de garantir son maintien à la disposition de la justice, de mettre fin à l'infraction ou de prévenir son renouvellement ;3° De mettre fin à un trouble exceptionnel et persistant à l'ordre public provoqué par la gravité de l'infraction, les circonstances de sa commission ou l'importance du préjudice qu'elle a causé. Toutefois, ce motif ne peut justifier la prolongation de la détention provisoire, sauf en matière criminelle ou lorsque la peine correctionnelle encourue est supérieure ou égale à dix ans d'emprisonnement."*

[43] Saenko, *supra* note 34.

[44] Except in limited circumstances where it can substitute its assessment for theirs but only in civil cases. See art. 411-3 of the French Code of judicial organisation: "The Court of Cassation may quash without referral when the cassation does not imply a new ruling on the merits. It may also, in civil matters, rule on the merits when the interest of a good administration of justice justifies it."

[45] Rome Statute, arts. 5-8; Kenneth S. Gallant, *Corporate Criminal Responsibility for Human Rights Violations: Jurisdiction and Reparations,* in PROSECUTING CORPORATIONS FOR VIOLATIONS OF INTERNATIONAL CRIMINAL LAW: JURISDICTIONAL ISSUES (Sabine Gless, Sarah Emdin eds., 2017), at 47-78.

[46] Rome Statute, art. 25(1).

[47] Gallant, *supra* note 45, at 48-49; Madeline Young, *Lafarge's Case Cemented: Holding Corporations Liable for Crimes Against Humanity,* 36 EMORY INTERNATIONAL LAW REVIEW 1 (2021), at 8; Jelena Aparac, *Business and Armed Non-State Groups: Challenging the Landscape of Corporate (Un)accountability in Armed Conflict,* 5(2) BUSINESS AND HUMAN RIGHTS JOURNAL 270 (2020), at 273; Jan Wouters, Hendrik Vandekerckhove, *A Different Type of Aid: Funders of Wars as Aiders and Abettors under International Criminal Law*, 213 LEUVEN UNIVERSITY WORKING PAPER 1 (2019), at 8, 15; Danielle Olson, *Corporate Complicity in Human Rights Violations under International Criminal Law*, 1 INTERNATIONAL HUMAN RIGHTS LAW JOURNAL 2 (2015), at 2-4; Wolfgang Kaleck, Miriam Saage-Maaß, *Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and its Challenges*, 8 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 699 (2010), at 701; UN High Commissioner for Human Rights, Res. 26/22, Guidance to Improve Corporate Accountability and Access to Judicial Remedy for Business-Related Human Rights Abuse (May 10, 2016), at 13-21.

international crimes had been limited to the criminal liability of directors or other high-ranking staff of the devious corporation and civil liability claims.[48] The corporation itself could not be found guilty under international treaties between State actors, and the proposal to subject them to the jurisdiction of the ICC was rejected.[49] This means that the responsibility for introducing enforceable norms and trying corporations for committing or being complicit in crimes against humanity lies with individual States and their domestic courts. This complementary role of national criminal jurisdictions in the prosecution of the most serious crimes of international concern is enshrined under Article 1 of the Rome Statute.[50]

In domestic jurisdictions, the concept of corporate criminal liability is said to have originated in the early 1900s in the USA, but its practical relevance remained limited to crimes that took place within the territory of a jurisdiction.[51] Corporate criminal liability for international crimes has a much shorter history of only a few decades, the reason being that liability for international crimes brings the complexity of establishing jurisdiction and proving corporate involvement in another territory, which is often convoluted.[52]

Therefore, it was not until the 21st century that corporate criminal liability for international crimes was introduced in national jurisdictions. Since then, some jurisdictions, including Switzerland and the Netherlands, have attempted to prosecute corporations for their involvement in crimes against humanity.[53] Due to the practical difficulties of prosecution, including obtaining and evaluating evidence, however, none of these authorities have proceeded with bringing any actual cases to court, so the cases did not result in corporate criminal liability for the actors involved.

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[48] Kaleck, Saage-Maaß, *supra* note 47, at 700; Olson, *supra* note 47, at 4-5, 8-10; Hendrick Van der Wilt, *Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities*, 12 *CHINESE JOURNAL OF INTERNATIONAL LAW* 43 (2013).

[49] International Commission of Jurists, *Report of the International Commission of Jurists Expert Legal Panel on Corporate complicity in International Crimes*, CORPORATE COMPLICITY AND LEGAL ACCOUNTABILITY (2006); Clapham Andrew, *The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL (Menno Kamminga, Saman Zia-Zarifi eds., 2000) at 139-195; Olson, *supra* note 47.

[50] Olson, *supra* note 47, at 6; Wouters, Vandekerckhove, *supra* note 47, at 15-19;

[51] Olson, *supra* note 47, at 4; Wouters, Vandekerckhove, *supra* note 47, at 15; Susanne Beck, *Corporate Criminal Liability*, in OXFORD HANDBOOK OF CRIMINAL LAW (Markus D. Dubber, Tatjana Hörnle eds., 2014), at 560-582; James G. Stewart, *The Turn to Corporate Criminal Liability*, 47 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 121 (2014), at 132.

[52] Although an increasing number of countries, including France, claims universal jurisdiction for the most severe crimes, including crimes against humanity; Gallant, *supra* note 45, at 53, 70; Bruce Zagaris, *Crimes against Humanity*, 37 INTERNATIONAL ENFORCEMENT LAW REPORTER 356 (2021), at 357-358; Emma M. Van Gelder, Cedric M.J. Ryngaert, *Vervolging van ondernemingen voor schendingen van de mensenrechten: mogelijkheden naar Nederlands strafrecht,* 3 TIJDSCHRIFTVOOR BIJZONDER STRAFRECHTEN HANDHAVING 118 (2017), at 119-123.

[53] Jan Wouters, Hendrik Vandekerckhove, *supra* note 47, at 15-18; Beck, *supra* note 51, at 566; Stewart, *supra* note 51, at 123-125; Kathi L. Austen, *The Pillage of Eastern Congo Gold: A Case for the Prosecution of War Crimes,* 16(5) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 963 (2013): Bénédict de Moerloose, *Challenging the Pillage Process: Argor-Heraeus and Gold from Ituri*, LEGAL REMEDIES FOR GRAND CORRUPTION (Nov. 7, 2016): "In November 2013, the Swiss federal prosecutor's office investigated a complaint against the Swiss gold refining company, Argor-Heraeus, that accused the company of laundering the proceeds of Congolese gold that was pillaged during the Congolese war in 2004 and 2005" and "In 2009 and 2010, the Dutch authorities investigated a criminal complaint which accused the company Lima Holding B.V. of complicity in the construction of the Wall between Israel and Palestine". Adriana E. González, Marta S. Navarro*, Corporate Liability and Human Rights: Access to Criminal Judicial Remedies in Europe,* in BUSINESS AND HUMAN RIGHTS IN EUROPE (Angelica Boninfanti ed., 2018), at 223-233.

In several jurisdictions, corporate complicity in crimes against humanity is predominantly dealt with through civil liability cases. The best example is the possibility to claim compensation under the Alien Tort Claims Act (ATCA) in the USA. This act establishes federal jurisdiction when '(1) an alien sues (2) for a tort that is (3) committed in violation of the law of nations, or of a treaty of which the United States is a signatory'.[54] If an American court establishes that a corporation aided or abetted these wrongful doings, it will be liable to pay punitive damages to the claimant. Examples include an action against the Union Oil Company of California (UNOCAL) which was found liable to pay damages because they relied on the Myanmar military to protect their pipelines,[55] and a case against Shell which was accused of colluding with the Nigerian authorities to torture and kill activists who opposed the company's operations because of the environmental damages it caused in the Niger Delta which led to a significant settlement between the parties.[56]

Under the ATCA procedure, US courts can establish corporate liability for international wrongdoings, but this does not lead to criminal sanction. Action under the ATCA is also rarely successful. In a case against Chevron (i.e., *Chevron Lawsuit*), for instance, the District Court for the Northern District of California ruled that it is not unreasonable to rely on local (Nigerian) authorities to break up a (peaceful) demonstration on business premises, thus dismissing the lawsuit.[57] In *In re South African Apartheid Litigation*, several major European banks were accused of financing the Argentinian junta and the South African apartheid regimes. Here, the United States District Court for the Southern District of New York did not accept causality between the funds that were paid and the crimes that were committed by the receiving regimes, so the requirement of aiding and abetting was not fulfilled.[58] The latter two cases are demonstrative of the difficulty of establishing corporate criminal liability globally. The first case shows that it must be accepted that corporations pursue their own commercial activities within the public domain, which also includes a right to rely on public authorities to protect those activities. The second case shows that the contribution to criminal activities must be substantial. In each instance, the relevant district court, as a federal court of the United States, eventually decided that there was insufficient causality between the provision of funds and the crimes committed by the respective regimes.

In this international context with increasing scrutiny of corporate complicity in international crimes and crimes against humanity and an increasing willingness to hold them criminally liable, the *Lafarge* case is a welcome development. In this respect, the judgment of the *Cour de cassation* is definitely a milestone in at least three ways. First, because it establishes corporate criminal liability in crimes against humanity rather than merely individual criminal

[54] Kaleck, Saage-Maaß, *supra* note 47, at 703.
[55] According to the US court, this cooperation included practical assistance, including providing forced labour for the construction and maintenance of the pipeline, which was a direct consequence of relying on the Myanmar military. There was thus a causality between petitioning protection and the occurrence of forced labour among the local people; United State District Court, Case of Doe v. Unocal, Judgement (June 8, 2009); Kaleck, Saage-Maaß, *supra* note 47, at 704.
[56] United State District Court, Wiwa v. Royal Dutch Petroleum, Anderson and Shell Petroleum, Southern District of New York, Settlement Agreement (June 8, 2009); Kaleck, Saage-Maaß, *supra* note 47, at 704.
[57] United State District Court, Bowoto v. Chevron C 99-02506 SI, Northern District of California, Judgment (Dec. 1, 2008); Kaleck, Saag-Maaß, *supra* note 47, at 705.
[58] Kaleck, Saag-Maaß, *supra* note 47, at 706; Young, *supra* note 47, at 9; Tery Nemeroff, *Untying the Khulumani Knot: Corporate Aiding and Abetting Liability under the Alien Tort Claims Act after Sosa*, 40 COLUMBIAN HUMAN RIGHTS LAW REVIEW 231 (2008), at 232-239; Juan Pablo Bohoslavsky, Veerle Opgenhaffen, *The Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship*, 23 HARVARD HUMAN RIGHTS JOURNAL 157 (2010), at 158-203.

liability or civil liability.[59] Secondly, because it adopted a novel approach to the meaning of intention to establish *mens rea* and culpability.[60] Thirdly, because contrary to the US federal courts, it accepted financing of a terrorist organisation as sufficient to establish *actus reus*.[61]

The French example soon got a follow-up when the United States Department of Justice indicted Lafarge for conspiring to provide material support to foreign terrorist organisations. Lafarge pleaded guilty to conspiring to provide material support to foreign terrorist organisations and was sentenced to pay $778 million in fines and forfeiture.[62] As in France, this was the first time that the US sanctioned corporate entities for aiding and abetting a foreign terrorist group.

The increased willingness of domestic courts to try these cases to establish corporate criminal liability for complicity in crimes against humanity is also illustrated by another pending case. In the case of *Doe v. Chiquita Brands International*, Chiquita is accused of 'funding, arming, and otherwise supporting terrorist organizations in Colombia in their campaign of terror against the population […] to maintain its profitable control of Colombia's banana growing regions'.[63] It allegedly aided and abetted, condoned, and even participated in this joint criminal enterprise with the United Self-Defense Forces of Columbia (AUC) and other paramilitary groups.[64] The criminal procedure follows upon a settlement that was reached in a tort case that was based on the Alien Tort Claims Act, where the company admitted to financing the AUC, which is responsible for widespread killings, torture, forced disappearances and crimes against humanity.[65]

The comparison with the case of Nicaragua against the USA is easily made. The International Court of Justice found that the American support for the anti-Sadinista "Contras" in the rebellion against the Nicaraguan government violated the obligation of customary international law not to intervene in the affairs of another State or use force against another State.[66] The difference is, of course, that Chiquita is not a State, but a corporation. Furthermore, it only admitted to financing the AUC, which the ATCA had earlier found insufficient to establish causality between the corporation's behaviour and the crimes against humanity that were committed by the Argentinian junta and the South-African apartheid regime.[67] The

[59] Zagaris, *supra* note 47 at 356-358; Aparac, *supra* note 47, at 270-275; Benedita Sequeira, *The Lafarge Case: Tackling Corporate Impunity in the Battlefield,* 26(3) REVISTA ELECTRÓNICA DE DIREIT (2021)*,* at 87-107.

[60] See previous Section and Olson*, supra* note 47, at 8; Van der Wilt, *supra* note 48, at 70; Wouters, Vandekerckhove, *supra* note 47, at 11-15.

[61] Young, *supra* note 47, at 11-13 discusses the relationship between complicity to crimes against humanity through the provision of funds and the act of financing a terrorist organisation as a separate crime. An important difference between the two is that the allegation of financing a terrorist organisation only requires knowledge, whereas complicity in crimes against humanity requires intent. The broad interpretation of the concept of 'intention' provided by the court de cassation in the current case might render this distinction obsolete, which leaves the question if there are any situations of financing terrorism that do not establish complicity to crimes against humanity as well. Also see Aparac, *supra* note 47, at 271.

[62] United States District Court, United States of America v. Lafarge S.A. and Lafarge Cement Syria S.A., 22-CR-444 (WFK), Southern District of New York, Plea Agreement (Oct 18, 2022); Bruce Zagaris, Michael Plachta, Alex Mostaghimi, *Counterterrorism and International Human Rights*, 38(1) INTERNATIONAL ENFORCEMENT LAW REPORTER 442 (2022), at 443-449.

[63] United States District Court, Jane Doe and others v. Chiquita Brand International District, 20-3244, Court of New Jersey, Complaint and Demand for Jury Trial (Mar. 25, 2020), para. 2.

[64] Young, *supra* note 48, at 9-10.

[65] Kaleck, Saage-Maaß, *supra* note *47.*, at 708-709. Also see pts. 140-166 of the complaint. A total of fifteen claims for relief were submitted.

[66] ICJ, Nicaragua v. the USA, Order on provisional measures (10 May, 1984); ICJ, Nicaragua v. the USA, Judgment (June 27, 1986).

[67] Kaleck, Saage-Maaß, *supra* note 48, 706; Young, *supra* note 48, at 9.

question is whether US criminal courts will consider the French judgment in *Lafarge* greatly persuasive to decide differently and find Chiquita liable for its complicity in these crimes.

Closer to Europe, the French judgment could have consequences for corporations that trade with or fund the Russian government or companies directly involved in the war against Ukraine, whose actions have been formerly qualified as terrorist attacks by the UN General Assembly.[68] Aiding and abetting crimes against humanity committed by the Russian regime could thus lead to further developments in corporate criminal accountability. Following *Lafarge* and maybe *Doe v. Chiquita Brands International*, even mere financial support could be sufficient to hold corporations accountable, thus underlying the importance of the French judgment in the wider development of corporate criminal liability and pursuing justice.

VII. Conclusion

The decision of the *Cour de cassation* in *Lafarge I* and *II* establishes an important new legal development in the construction of corporate criminal liability. It departs from previous legal interpretation whereby corporate entities cannot be found guilty of or liable for committing crimes against humanity, an offence befalling only natural persons heretofore. While the decision of the court limits the role of interest groups to that of an interested outside party, the decisions, read as a whole, establish a welcome development buttressing corporate ethical behaviour. It places the onus on transnational corporations to set up prevention programmes to limit criminal risks when operating in conflict areas[69]. Reading between the lines, companies have a moral duty not to lend their support to acts of crimes against humanity. Should any doubt remain, they must deploy all the necessary means to be fully informed of actions conducted by the entities with whom they have business relations. Failing that, *Lafarge* and the developing case law opens the door to corporate criminal liability for crimes against humanity and willful or negligent violations of human rights.

[68] UNGA, Res. 2463, Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations, recalling the obligation of States under art. 2 of the UN Chart to refrain from the threat or use of force against the territorial integrity of a State (Oct. 12, 2022); Zagaris, Plachta, Mostaghimi, *supra* note 62.

[69] Emmanuel Daoud, Gabriel Sebbah, *La Cour de cassation ouvre la voie à une mise en examen de Lafarge pour complicité de crime contre l'humanité,* DALLOZACTUALITÉ (Sept. 13, 2021).

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Prosecution of Suspects of Atrocity Crimes Committed During the Liberation War of Bangladesh Through the "Functional Participation" Theory Derived from the *Demjanjuk* Case in Munich

by Md Mustakimur Rahman[*]

ABSTRACT: Collecting primary evidence for investigations can be challenging due to a significant time gap between crimes and investigations, leading to lost, destroyed, or unreliable evidence. As a result, establishing guilts of individuals for primary or direct liability can be challenging, especially if they are low-level offenders, as prosecutors may need direct and primary evidence to prove *actus reus* and *mens rea*. However, having direct or primary evidence to prove secondary liability or guilt for indirectly committing crimes may not always be necessary. This is because some liabilities, such as accessories or aiding and abetting, may not be directly connected to the actual commission of crimes; thus, indirect evidence, such as documentary or expert evidence, may be sufficient to prove guilts. For example, in Germany, John Demjanjuk was convicted of remote atrocity crimes based on an identification card indicating his service status, the nature of the military operation, which included mass murder at the camp, and the daily activities of a camp guard. Imposing direct liability and proving guilt was challenging due to a lack of eyewitnesses; thus, the prosecutor applied the "functional participation" approach for jointly committed crimes. When imposing accountability, the court focused on the perpetrator's *function* rather than their actions. The approach taken by the court implies that being functionally involved in a crime is enough to hold someone responsible, even if they were not physically present or in contact with victims. Can the approach applied in the *Demjanjuk* case, which has only been utilized in Germany so far, be employed to hold accountable those responsible for atrocity crimes committed in other regions? In Bangladesh, for example, the Pakistani Army and local Bengali perpetrators carried out a massacre in 1971. Obtaining primary evidence against many accused may be difficult as over 60 years have passed since the war's end. Although Bangladesh has begun prosecuting local suspects, Pakistan has yet to act against its military. This research aims to see if the "functional participation" theory applies to Pakistani Army officers engaged in the 1971 massacre in Bangladesh.

KEYWORDS**:** Criminal Liability; Functional Participation" Theory; International Crimes Tribunal; John Demjanjuk Trial; Temporally Distant International Crime.

I. Introduction

The common perception of prosecuting decades-old atrocity crimes is that considering the significant passage of time, particularized evidence of culpability will be necessary to establish guilt beyond a reasonable doubt. Thus, such prosecutions conjure up the image of the eyewitness survivor testifying in court as to the defendant's cruelties from decades ago or the yellowing aged document that attests to the defendant's firing bullets or ordering deportations. But the 2009-2011 trial in Munich of John Demjanjuk, a Ukrainian who served as a guard at

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the Nazi death camp of Sobibór, changed all that.[1] In 2009, Demjanjuk was investigated for crimes committed during World War II, over 70 years ago.

Due to the significant time gap between the crimes and the investigation, there were no eyewitnesses to testify against him. Consequently, the prosecutors held him liable as an accessory rather than a direct perpetrator. He was eventually convicted as an accessory to the murder of 28,060 Jews at Sobibór.[2] In fact, he was the first defendant convicted of distant atrocity crimes with no evidence of his being involved in the death of any specific victim. Instead, his guilt was proved based on an identification card showing his position at Sobibór death camp, the nature of the military operation, including mass killing at the camp, and the ordinary tasks of a camp guard.

In this case, as stated above, what is worth mentioning is that there was no eyewitness testimony against Demjanjuk. Instead, the testimonies were from historians[3] to fathom the composition of the death camp, functions, and roles of the camp guards. Without a doubt, a judgment without eyewitness testimony stands out among other judgments. Still, it begs whether the "functional participation" theory derived from the Demjanjuk case represents a hope for prosecuting temporally atrocity international crimes (TDACs) committed elsewhere.

In the 1970s, for example, a massacre took place in Bangladesh. The massacre began in March 1971, with the launch of "Operation Searchlight", a codename for a planned military operation carried out by the Pakistan Army to suppress the Bengali nationalist movement.[4] The warfare lasted until 16 December 1971, but soon before the end, the Pakistani Army targeted and executed 1,000 intellectuals and professionals in Dhaka, including doctors, attorneys, and engineers.[5] Thus, there is no doubt that the Pakistani Army is to blame for the horrific murders.

On the other hand, it is essential to note that the crimes were committed in 1971, over 60 years ago. As a result, many eyewitnesses have either passed away or are unable to provide testimony due to memory loss. Due to the lack of primary evidence, individual guilt for committing direct crimes would, thus, be difficult. As a result, one possible way to impose liability is to hold individuals accountable as accessories, similar to what was done in the case of Demjanjuk. Nonetheless, although Bangladesh has begun prosecuting local suspects since 2010,[6] the government of Pakistan has yet to take action against its military. This paper investigates whether the "functional participation" doctrine applies to any Pakistani Army involved in the 1971 massacre in Bangladesh.

Sections II.A and II.B of this paper illustrate the "functional participation" paradigm. It contains a brief history of the concept as well as how it relates to the Rome Statute's concept of "modes of liability". Section II.C focuses on Demjanjuk's trial in Munich, its verdict, and the application of the "functional participation" theory to demonstrate the paradigm's limited

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[1] Madeline Chambers, *Nazi Guard Demjanjuk Wheeled into Munich Trial*, REUTERS (Nov. 3, 2009), www.reuters.com/article/us-germany-demjanjuk-idUKTRE5AS2D920091130.

[2] LAWRENCE DOUGLAS, THE RIGHT WRONG MAN: JOHN DEMJANJUK AND THE LAST GREAT NAZI WAR CRIMES TRIAL 1 (2016).

[3] *Id*., at 107.

[4] Suzannah Linton, *Completing the Circle: Accountability For the crimes of the 1971 Bangladesh War of* Liberation, 21(2) CRIMINAL LAW FORUM 191 (2010), at 195.

[5] Kimtee Kundu, *The Past Has Yet to Leave the Present: Genocide in Bangladesh*, HARVARD INTERNATIONAL REVIEW (Feb. 1, 2023), https://hir.harvard.edu/the-past-has-yet-to-leave-the-present-genocide-in-bangladesh.

[6] Bangladesh passed the International Crimes (Tribunals) Act in 1973 in response to the heinous crimes committed in 1971 to bring legal action against those suspected of having committed war crimes during the war in 1971 between Bangladesh (then known as East-Pakistan) and Pakistan (then known as West-Pakistan). Both in 2009 and 2013, this law was amended. The Bangladeshi government formed the "International Crimes Tribunal Bangladesh (ICT-BD)" in 2010 to bring these alleged war criminals to justice.

application. Section II.D depicts the slaughter committed in Bangladesh in 1971. According to Nitin Pai, the atrocity committed by the Pakistani Army was divided into three parts throughout 1971: 1) Operation Searchlight; 2) Search and Destroy; and 3) Scorched Earth.[7]

In Section II.E, the author's objective is to depict the Bangladeshi liberation war using Nitin Pai's approach. This Section is included to distinguish between various types of crimes and the methods used by perpetrators to commit them. By making this distinction, the author will better assess whether any atrocity's parts fall within the "functional participation" paradigm. Moreover, this Section will also briefly cover the attempt taken by the Bangladeshi government to prosecute local suspects involved in the massacre committed during the war of 1971. Section II.E will also examine the crimes committed in 1971 and their patterns. The goal is to discern if any of the Pakistani Army's actions can be classified as falling under the "functional participation" doctrine. The paper concludes (Section III) by arguing that, while the entire liberation war would not meet the criteria of the "functional participation" paradigm, some of those who committed crimes during "operation searchlight" and "scorched earth" may qualify based on the nature and pattern of killing.

II. The Theory of "Functional Participation"

Kai Ambos categorizes participation into three distinct types: direct perpetration as an individual, co-perpetration with another, and perpetration through another person.[8] Direct commission means that the person committed the crime without involving anyone else.[9] The Rome Statute has moved away from the joint criminal enterprise (JCE)[10] theory and introduced a new type of joint liability known as "co-perpetration" under art. 25(3)(a). Co-perpetration is now considered a distinct form of perpetration rather than being included in the concept of complicity.[11] When a crime is committed through another person, it means that the actual perpetrator is being used as a tool or instrument by someone else who is the mastermind or operates from behind the scenes.[12] There are additional types of participation outlined in arts. 25(3)(b)-(d). Since this paper focuses on "functional participation", which is related to but distinct from "co-perpetration" as defined by the Rome Statute, we will not explore other types of participation.

A. Historical Overview and Domestic Practice of the "Functional Participation" Theory

[7] Nitin Pai, *The 1971 East Pakistan Genocide – A Realist Perspective*, INTERNATIONAL CRIMES STRATEGY FORUM (2008).
[8] Kai Ambos, *General Principles of Criminal Law in The Rome Statute*, 10(1) CRIMINAL LAW FORUM 1 (1999), at 8; art. 25(a) of the Rome Statute of the International Criminal Court.
[9] INTERNATIONAL CRIMINAL LAW: CASES AND COMMENTARY 327 (Antonio A. Cassese, Guido G. Acquaviva, Mary Fan, Alex A. Whiting eds., 2011).
[10] Joint criminal enterprise (JCE) is a form of responsibility that the ad hoc tribunals have widely employed. It entails committing crimes where a group of individuals with a shared intention engage in unlawful activities that are executed either collectively or by some members of the group. See: ICTY, The Prosecutor v. Duško Tadić, IT-94-1, Appeals Chamber (July 15, 1999), para. 190.
[11] Ambos, *supra* note 8.
[12] Claus Roxin, *The Dogmatic Structure of Criminal Liability in the General Part of the Draft Israeli Penal Code*, 30(1) ISRAEL LAW REVIEW 71 (1996).

In Dutch and German law, "functional participation" and "*Organisationsherrschaft*" concepts have been developed over the time.[13] The Dutch concept has taken hold in the field of economic crime, and it is premised on the theory that individuals who, in a functional capacity, "effectuate" crimes, rather than those who, usually as subordinates or workers, follow out instructions or orders, should be held accountable.[14] The concept has been refined in Dutch criminal law through case law. The lower threshold for criminal responsibility demands that the accused accept the crimes as part of the usual flow of events, implying that they were aware that these or similar crimes had occurred.[15]

On the other hand, Roxin defines "*Organisationsherrschaft*" or "control over an organization" as a criminal doctrine holding a perpetrator responsible for controlling the direct perpetrator's will.[16] This doctrine defines a principal as someone who uses the power structure to commit crimes and is so immersed in it that they can instruct their subordinates. Additionally, Roxin believes that the principal's initiative would be insignificant, and instead, the crucial factor would be the circumstances surrounding their ability to direct a subordinate section of the structure.[17]

In contrast, an accessory is an individual who lacks control and power and whose actions do not independently propel the structure forward.[18] They are cogs of the homicide machine and can be easily replaced.[19] In a system that operates like a machine, every individual's role impacts the likelihood of committing a crime. The chain of command functions autonomously at various levels.[20] Moreover, according to this doctrine, not only the individuals who physically commit the crime are considered perpetrators, but also those who control or mastermind the offense, even if they are not present at the scene.[21]

Although the "functional participation" concept originated in Germany, it has influenced criminal law in other nations. The Supreme National Tribunal of Poland,[22] for example, was responsible for not only direct perpetration but also moral aiding and abetting, as well as incitements.[23] Some of the defendants, notably Greiser and Höss, claimed that they had not committed any crimes and could not be held responsible for the actions of those formally reporting to them, especially given the large number of them.[24] However, the Tribunal

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[13] Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5(1) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 83 (2007), at 179-183; ID., DER ALLGEMEINE TEIL DES VÖLKERSTRAFRECHTS: ANSÄTZE EINER DOGMATISIERUNG (2003), at 590-594.

[14] Harmen van der Wilt, *Joint Criminal Enterprise and Functional Perpetration*, in SYSTEM CRIMINALITY IN INTERNATIONAL LAW (Andre Nollkaemper, Harmen van der Wilt ed., 2009), at 178.

[15] *Id*.

[16] Gerhard Werle, Boris Burghardt, *Introductory Note*, 9(1) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 191 (2011), where Werle discussed Roxin's explanation of crimes as part of organized power structures.

[17] CLAUS ROXIN, TÄTERSCHAFT UND TATHERRSCHAFT (2017), at 248.

[18] Claus Roxin, *Straftaten im Rahmen organisatorischer Machtapparate*, 110 GOLTDAMMER'S ARCHIV FÜR STRAFRECHT 193 (1963), at 204.

[19] Igor Vuletic, *"The Organised Structure of Power" and Economic Crime "FIMI-Media" Case and a View from the Croatian Perspective*, 2(2) JOURNAL OF LAW AND CRIMINAL JUSTICE 133 (2014), at 137.

[20] Fabian Bernhart, Alexander Tanner *et al.*, *300,000 Counts of Aiding and Abetting Murder*, 21(4) GERMAN LAW JOURNAL 743 (2020), at 768.

[21] Kai Ambos, *Command Responsibility and Organisationsherrschaft: Ways of Attributing International Crimes to the 'Most Responsible'*, in SYSTEM CRIMINALITY IN INTERNATIONAL LAW (André Nollkaemper, Harmen van der Wilt eds., 2009), at 142.

[22] The Supreme National Tribunal of Poland was created on 22 January 1946, to deal with war crimes committed during WWII.

[23] Supreme National Tribunal of Poland, Josef Bühler, Sygn. GK 196, Judgment (July 10, 1948), para. 11, at 19-20, in Cyprian and Sawicki, 1962, at. 83-85.

[24] Supreme National Tribunal of Poland, Rudolf Hoess, Judgment (Apr. 2, 1947), para. 58 ff.

countered this train of thought by stating that proof of *dolus eventualis* was sufficient to ascribe a crime, implying that the offender, while not intending to commit the crime, foresaw the potential of doing so and thus accepted that it would occur.[25]

According to the Polish Tribunal, an individual who became a member of a criminal group, where complete obedience and discipline were expected, had already assumed responsibility for carrying out the orders given by that group.[26] Furthermore, the moment of joining the group, not the moment of accepting the order, was essential for such people.[27] Moreover, the Tribunal also declared that its purpose was to recognize that modern international crimes encompass more or less numerous groupings of offenders and communities with varying degrees of direct culpability.[28]

For example, the decision in the *Fischer* case emphasized that by joining a criminal organization with a statutory duty of cooperation, assistance, obedience, and, at the executive level, initiative, a person bore responsibility for everything the group accomplished, which translated into personal responsibility.[29] The Tribunal further said that if a person joined the organization willingly and fulfilled administrative tasks, they were unquestionably liable for the group's criminal conduct, regardless of who did them.[30]

Apart from the Polish Tribunal, the "functional participation" doctrine was indirectly applied in the trial of Eichmann. Eichmann's lawyer, Dr. Servatius, has long claimed that his client was nothing more than a cog in the machine.[31] He had not physically carried out the crimes. His actions appeared legitimate, and he had only followed orders. Furthermore, he could not have averted the heinous crimes if he had stood aside because others would have happily taken his position.[32] The court, however, rejected the argument, stating that functional participation turns the protective shield into an offensive weapon by using someone's function as a starting point for determining their culpability.[33] The court in Eichmann further said that the officials are critical to the system's operation and success. The concept of functional participation sheds light on how the accused is linked to certain offenses, helping to clarify *actus reus*.[34]

B. Nexus Between the "Functional Participation" Doctrine and Contemporary International Criminal Law

As previously mentioned, the concept of "*Organisationsherrschaft*" originated in Germany and applied only domestically. However, a comparable doctrine has also been established in ICL, although it is not identical. One example is art. 7(1) of the ICTY Statute.[35] Kai Ambos claims

[25] Supreme National Tribunal of Poland, Ludwig Fischer *et al.*, Judgment (Mar. 3, 1947), para. 38, at 42, published in TADEUSZ CYPRIAN, JERZY SAWICKI, SIEDEM WYROKÓW NAJWYŻSZEGO TRYBUNAŁU NARODOWEGO (1962), at 44.
[26] *Id*.
[27] *Id*.
[28] Supreme National Tribunal of Poland, Artur Greiser, Judgment (July 9, 1946), para. 72, available at www.legal-tools.org/uploads/tx_ltpdb/Greiser_PolandSupremeNationalTribunal_Judgment_report__07-07-946__E__04.pdf.
[29] *Id*.
[30] *Id*.
[31] HANNA ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1964), at 135-150.
[32] *Id*.
[33] *Id*., at 289.
[34] *Id*.
[35] Statute of the International Criminal Tribunal for the Former Yugoslavia (May 25, 1993).

that art. 7(1)[36] of the ICTY satisfies all the criteria outlined in the German philosophy of *Organizationsherrschaft*.[37] He argued that:

> A solid legal basis in the term 'committed' in Article 7(1) ICTY Statute since 'commission' in this sense means that a person 'participated, physically or otherwise directly or indirectly, in the material elements of the crime charged through positive acts or, based on a duty to act, omissions, whether individually or jointly with others'. This includes, as indirect commission, perpetration by means and is as such *Organisationsherrschaft*.[38]

Another example is the Joint Criminal Enterprise (JCE) theory, which the ICTY Appeals Chamber introduced during the *Tadić* case.[39] JCE refers to co-perpetration, where individuals collaborate towards a common criminal objective and commit the crime.[40] Perpetrators who collaborate to commit a crime are responsible and should be held accountable for their actions, according to this doctrine.[41]

Generally, courts must follow the basic principle of criminal law: a person can only be held accountable for their actions.[42] However, JCE is a crucial tool in assigning responsibility to those involved in criminal activity through oppressive criminal organizations or structures.[43] This ensures that multiple perpetrators are held accountable for participating in different ways at different times to accomplish large-scale criminal conduct.[44]

There are three categories of accountabilities under the doctrine of JCE: the basic, the systematic, and the extended form of JCE.[45] The primary form of involvement is when a group organizes to carry out a crime, which is executed based on a "common design". The accused must have consented to commit the crime with other members to meet the common design criteria.[46] The second type of JCE is the systemic form of a collaborative criminal enterprise. In this type of accountability, the prosecution does not require evidence of a formal or informal agreement among the participants but must demonstrate their compliance with a repressive system.[47] On the other hand, the third, or so-called extended version of JCE, involves criminal responsibility for crimes committed by other people beyond the purview of the common plan.[48]

Three factors constitute the three objective components of this form of culpability based on a JCE: the presence of a group of people; the existence of a common plan, design, or purpose; and the accused party's participation in the JCE through any "form of assistance in, or

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[36] Art. 7(1) of the ICTY Statute states that "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime".
[37] Ambos, *Joint Criminal Enterprise and Command Responsibility*, *supra* note 13, at 182.
[38] *Id*.
[39] ICTY, The Prosecutor v. Dusko Tadic, IT-94-1-A, Appeals Chamber, Judgment, (July 15, 1999), paras. 185.229.
[40] *Id*., paras. 187-188,
[41] Antonio Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, 5(1) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 109 (2007), at 110.
[42] According to the "culpability" principle, a person is responsible for whatever he has done in committing a crime. See Mirjan Damaska, *The Shadow Side of Command Responsibility*, 49(3) AMERICAN JOURNAL OF COMPARATIVE LAW 455 (2001).
[43] GIDEON BOAS, JAMES L. BISCHOFF, NATALIE L. REID, FORMS OF RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW, Vol. I (2010), at 9.
[44] *Id*.
[45] ICTY, The Prosecutor v. Milomir Stakic, IT-97–24-A, Appeals Chamber, Judgment (Mar. 22, 2006), para. 65.
[46] ICTY, The Prosecutor v. Multinovid, IT-99-37- AR72, Appeals Chamber, Decision on Dragoljub Ojdani's Motion Challenging Jurisdiction-Joint Criminal Enterprise (May 21, 2003), para. 23.
[47] ICTY, The Prosecutor v. Kmojelac, IT-97-25-A, Appeals Chamber, Judgment (Sept. 17, 2003), para. 96
[48] *Id*., para 204.

contribution to, the execution of the common purpose".[49] While all three forms of JCE are subject to the exact objective requirements, each category has unique subjective requirements.[50] For example, the co-perpetrators must share a mutual intention to establish JCE I. In contrast, for JCE II, each perpetrator must have personal knowledge of the abusive behaviour pattern.[51] For JCE III, the subjective requirement is the perpetrator's intention.[52]

JCE is given considerable importance in the legal rulings of ICTY, ICTR, SCSL, ECCC, and STL.[53] However, the ICC does not recognize the JCE doctrine, although co-perpetration, a similar common-purpose responsibility, has been included in the Rome Statute under art. 25(3)(a). Co-perpetration or joint perpetration is if person A conducts the crime jointly with person B or with a group of others, A is a joint perpetrator and responsible for the crime committed jointly.[54] Joint "multiple" and "functional" perpetrations are two analytical subcategories of joint perpetration.[55] When numerous people carry out the same criminal act in accordance with a common plan, this is known as joint multiple perpetrations. For example, two people abduct the victim, each holding a knife, and torture and stab the victim to death before disposing of the body simultaneously. In this case, the joint culprits participated in the unlawful act of torture and were directly responsible for the victim's death.[56]

When numerous people undertake distinct acts or responsibilities in the same criminal business, this is known as joint functional participation. One person, for example, kidnaps the victim, other tortures and eventually stabs the victim to death, and a third person disposes of the body according to the original plan. The two initial people committed separate crimes, but all three people were involved in the criminal operation and contributed to and caused the crimes as joint (functional) perpetrators because of the common plan.[57] When evidence is insufficient to prosecute a defendant for individual perpetration, the "functional participation" doctrine comes into play to deal with crimes committed jointly. This doctrine could be especially important in international criminal law because committing an international crime often necessitates many perpetrators.

One of the common aspects of "functional participation", JCE, and co-perpetration doctrines is the "common plan". However, in the "co-perpetration" doctrine, the common plan serves as the foundation for a mutual attribution of the various contributions, making each co-perpetrator accountable for the entire crime. On a more objective level, two conditions must be met: the existence of a common plan between two or more people and each co-coordinated perpetrator's significant contribution results in the achievement of the crime's objective

[49] Ambos, *Joint Criminal Enterprise and Command Responsibility*, *supra* note 13, at 160.
[50] *Id*.
[51] *Id*.
[52] *Id*., at 161.
[53] SCSL, The Prosecutor of the Special Court v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu, SCSL-2004-16-A, Appeal Chamber, Judgment (Feb. 22, 2008), paras. 72-75; SCSL, The Prosecutor v. Sesay *et al*., SCSL-04-15-A, Appeal Chamber, Judgment (Oct. 26, 2009), paras. 474-475; ECCC, The Prosecutor v. Kaing Guek Eav alias Duch, 001/18-07-2007/ECCC/TC, Trial Chamber, Judgment (July 26, 2010), paras. 504-517; ECCC, The Co-Prosecutor v. Nuon Chea and Khieu Samphan, 002/19-09-2007/ECCC/TC, Trial Chamber, Judgment, (Aug. 7, 2014), paras. 690-691; STL, STL-11-01/I/AC/R176bis, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Feb. 16, 2011), paras. 236-249.
[54] TERJE EINARSEN & JOSEPH RIKHOF, A THEORY OF PUNISHABLE PARTICIPATION IN UNIVERSAL CRIMES (2018), at 105.
[55] *Id*.
[56] *Id*.
[57] *Id*.

components.[58] On the subjective side, all suspects must be aware of and accept that carrying out their common plan may fulfill the objective aspects of the crime; they must be aware of the factual circumstances that allow them to manage the crime jointly.[59] According to the assertion, each co-perpetrator makes a significant contribution that ensures the material components of the crime are met. Every co-perpetrator performs a specific task that contributes to the execution of the crime.[60]

In contrast, under the "functional participation" doctrine, the physical perpetrator does not need to act as a mere instrument in the hands of the person in charge; they may be a reasonably independent agent.[61] To hold an employer or superior responsible for an offense committed by their subordinate, it is necessary that the offense occurred during the organization's regular operations and that the employer or superior could have taken steps to stop their subordinate from continuing to commit the wrongful act.[62] To be clear, the person responsible for a crime does not necessarily have to be knowingly involved. They may be unaware that their actions are against the law, or they may not have the necessary skills to carry out the crime.[63]

In a nutshell, the "functional participation" theory is an extended form of criminal accountability that is unique and can be applied to identify individual responsibilities within the context of system criminality. Now let us talk about applying this doctrine in the case of John Demjanjuk in Munich and why it was necessary.

C. The Trial of John Demjanjuk in Munich

Finding evidence for individual convictions in many cases of decades-old crimes may be difficult, but using the "functional participation" doctrine and convicting the perpetrators for crimes committed jointly with a common purpose may be viable even without direct evidence. This is what unfolded in John Demjanjuk's case. In Munich, there were no eyewitnesses to testify against Demjanjuk, so the prosecutor had to rely on other sources of evidence, such as documents and expert testimony. However, it is crucial to examine how the prosecutor established the case without the testimony of witnesses. The following sections delve deeper into the case to uncover the supporting details of Demjanjuk's guilt.

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[58] Thomas Weigend, *Intent, Mistake of Law, and Co-perpetration in the Lubanga Decision on Confirmation of Charges*, 6(3) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 471 (2008).
[59] *Id*.
[60] ICC, The Prosecutor v. Bemba *et al.*, ICC-01/05-01/08-3399, Trial Chamber III, Judgment (June 21, 2016), paras 68–69; ICC, The Prosecutor v. Bemba *et al*, ICC-01/05-01/13-2276, Appeal Chamber, Judgment (Mar. 8, 2018), paras. 782-785.
[61] Ambos, *Command Responsibility and Organisationsherrschaft: Ways of Attributing International Crimes to the 'Most Responsible'*, *supra* note 21, at 145-166.
[62] Harmen van der Wilt, *On Functional Perpetration in Dutch Criminal Law: Some Reflections Sparked off by the Case Against the Former Peruvian President Alberto Fujimori*, 4(11) ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 615 (2009), at 617.
[63] *Id*., in the Professor Wilt's article he discusses the well-known *Milk and Water* case; United States Supreme Court, NJ 1916, Judgment (Feb. 14, 1916), para. 681. The defendant was charged with providing contaminated milk through a third party in this case. The accused's servant was the one who committed the crime, but he did not know that the milk was tainted because he was not given access to its ingredients. Although the Supreme Court defined the offense as "if a substance has been added", the accused was found guilty of being involved in the crime through an intermediary. This was a scenario where he was found guilty of being participated not directly but functionally. See paras. 616-617.

1. Background of John Demjanjuk

John Demjanjuk, a Ukrainian by birth, was captured by German forces in 1942 and kept as a prisoner of war (POW) in Ukraine.[64] Afterward, he was recruited by the Schutzstaffel (SS) and served as a guard in various concentration camps.[65] After WWII, Demjanjuk spent a few years as a displaced person in Europe's Displaced Persons (DP) camps and then immigrated to the United States with his family in 1952.[66] Before the US Department of Justice accused him of being a war criminal, he led a happy life in the United States.[67]

His US citizenship was revoked in 1981, and subsequently, in 1986, he was deported to Israel for his involvement as a camp guard known as "Ivan the Terrible".[68] In 1987, his trial in Jerusalem began. Surprisingly, several eyewitnesses identified him in court, albeit incorrectly, after a long period of the Holocaust. The District Court of Jerusalem convicted him in 1988 based on eyewitness testimony and documentary evidence.[69] Demjanjuk then filed an appeal, claiming that the eyewitnesses at Jerusalem District Court had misidentified him and that he was not the "Ivan the Terrible".[70] However, the Israeli Supreme Court overturned his sentence based on new evidence, and later, he was returned to the United States in 1993.[71] He was, however, deported to Germany for his second trial.

2. The Trial in Munich

Demjanjuk was arrested in 2009 after landing in Germany. Instead of a principal perpetrator, he was charged as an acessory to the murder of around 28,000.[72] Because there was no direct evidence of murder, he could not be charged as a principal perpetrator under the German Criminal Code (*Strafgesetzbuch*, StGB). Section 25(1) of the German Criminal Code states that "whoever commits an offense themselves or through another incurs a penalty as an offender", whereas an accessory is whoever intentionally induces another to commit an unlawful act (abettor) incurs the same penalty as an offender or whoever knowingly assists another in the intentional commission of an illegal act incurs a penalty as an aider.[73]

Furthermore, in Germany, no one is accountable for murder unless they meet the requirements of Section 211 of the German Criminal Code. Section 211(2) of the Code states that

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[64] United States District Court, United States v. Demjanjuk, C77-923, Appeal Chamber of Ohio, Judgement (June 23, 1981), paras. 1363-64.
[65] David Cohen, *The Passage of Time, the Vagaries of Memory, and Reaching Judgment in Mass Atrocity Cases*, in OLD EVIDENCE AND CORE INTERNATIONAL CRIMES (Morten Bergsmo, Cheah Wui Ling eds., 2012.
[66] United States District Court, *Demjanjuk, supra* note 64, paras. 1363-64; DOUGLAS, *supra* note 2, at 227.
[67] The Special Master, No. 85–3435 (6th Cir.), Report on Demjanjuk v. Petrovsky (1993), at 27.
[68] Cohen, *supra* note 65.
[69] STEPHAN LANDSMAN, CRIMES OF THE HOLOCAUST: THE LAW CONFRONTS HARD CASES (2005), at 160.
[70] Cohen, *supra* note 65.
[71] Lawrence Douglas, *The Historian's Trial: John Demjanjuk and the Prosecution of Atrocity*, in THE PALGRAVE HANDBOOK OF STATE - SPONSORED HISTORY AFTER 1945 (Berber Bevernage, Nico Wouters eds., 2018), at 539.
[72] Initially, the number was 27,900 and later the number was amended to 28,060; see DOUGLAS, *supra* note 2, at 143; *Id*., *supra* note 71, at 539; Cohen, *supra* note 65.
[73] Sections 26 and 27(1) of the German Criminal Code (Translation provided by Prof. Dr Michael Bohlander), https://www.gesetze-im-internet.de/englisch_stgb/.

> a murderer under this provision is someone who kills a person out of a lust to kill, to obtain sexual gratification, out of greed or otherwise base motives, perfidiously or cruelly or by means constituting a public danger or to facilitate or cover up another offence.

This section outlines that a person can be held guilty for murder as a principal perpetrator (*Täter*) if they physically kill someone with the "inner conviction".[74]

Because there was no available witness to testify against Demjanjuk, nor any evidence of specific murder was presented before the court, section 211 could not apply to him.[75] However, individuals who knowingly supported or assisted in the killing are considered accomplices to murder.[76] Although Demjanjuk was charged as an accessory, proving his guilt without definite evidence and witness testimony was challenging. In fact, no junior officer had ever been punished in Germany before Demjanjuk without direct involvement in any crime.[77]

Therefore, in order to prosecute Demjanjuk, the German prosecutor had to use a novel strategy that had never been used in Germany to indict someone for crimes committed during WWII. The strategy addressed two issues: 1) prosecutors had to demonstrate a link between Demjanjuk and the massacre of 28,060 individuals at Sobibór (the only purpose of the Sobibór death camp was to kill people), and 2) Demjanjuk was aware of the atrocity.[78] To grasp the link between Demjanjuk and the 28,060 deaths, it was first necessary to determine the nature and structure of the Sobibór camp.[79] This was no easy feat, but with the assistance of documentary evidence, Dieter Pohl, a Klagenfurt professor, determined that Sobibór was a death camp with the sole objective of killing civilians.[80]

Historians had to first look through the historical archives in order to assess the nature of the Sobibór death camp. Second, in 2009, prosecutors discovered documentation verifying Demjanjuk's five-and-a-half-month stint as a guard at the Sobibór death camp in 1943.[81] On the other hand, his activities throughout his tenure at Sobibór were not documented. It was challenging to say if he killed anyone directly or assisted others in killing while working in the camp. In Germany, proving guilt without exposing the specific conduct of each suspect was implausible.

Nonetheless, in the Munich case, the prosecution applied a ground-breaking strategy that transformed the entire criminal liability jurisprudence. Based on the Sobibór death camp's understanding, the German prosecution argued that "all Sobibór guards participated in the

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[74] KERSTIN FREUDIGER, THE LEGAL PROCESSING OF NAZI CRIMES (2002), at 169.
[75] Cohen, *supra* note 65.
[76] Douglas, *supra* note 72, at 542.
[77] Benjain Schulz, War *Crime Investigations: We Don't Pursue Nazis, We Pursue Murderers*, SPIEGEL ONLINE INTERNATIONAL (Feb. 21, 2014) at https://www.spiegel.de/international/germany/germany-continues-investigations-into-suspected-auschwitz-helpers-a-954897.html.
[78] Charles Hawley, *'Blood Must Flow': Searching for the Perpetrators of a WWII Massacre*, SPIEGEL ONLINE INTERNATIONAL (Feb. 1, 2013), www.spiegel.de/international/europe/a-german-prosecutor-looks-for-those-behind-nazi-era-massacre-in-france-a-881019.
[79] Jack Ewing, Alan Cowell, *Demjanjuk Convicted for Role in Nazi Death Camp*, THE NEW YORK TIMES (May 12, 2011), www.nytimes.com/2011/05/13/world/europe/13nazi.
[80] In Demjanjuk, the court stated that: "The three extermination camps Treblinka, Belzec, Sobibor served only to one purpose; the mass murdering of the European Jewry. In this way any activity of the defendant as well as of any other camp guard was a contribution to the final purpose of the extermination camp, irrelevant if on the ramp [...], during forcing the imates through the "Schlauch" to gas chambers, [...];during guarding of working units, which maintained the camp in good condition"; see: David Kohout, *Statutory Limitation of Crimes under International Law: Lessons Taken from the Prosecution of Nazi Criminals in Germany after 1945 and the New Demjanjuk Case Law*, 3(1) INTERNATIONAL COMPARATIVE JURISPRUDENCE 37 (2007), at 49; Douglas, *supra* note 72, at 543.
[81] *Id*.

killing process. Demjanjuk was a Sobibór guard. Therefore, Demjanjuk participated in the killing process".[82] Despite the fact that Demjanjuk's identity card indicates his participation in the camp, it was insufficient to establish his guilt. His involvement in the camp was voluntary, which also needed to be confirmed by the prosecution.

Prosecutors used expert witnesses to uncover his involvement at the camp, and the expert witnesses discovered that those who received training at Trawniki were treated as employees rather than detainees.[83] According to Peter Black, the Trawniki camp guards had received salary and paid leave. They were provided with uniforms, weapons, and regular days off.[84] Black also identified one guard, Victor Bogomolow, who asked and received approval to be discharged from guard duty because he was unfit for the job.[85] He also revealed that around 1,000 Trawniki guards had never returned from their leaves and had avoided their guard duty. It's also worth noting that people who quit their jobs were no longer pursued.[86] Therefore, it is reasonable to articulate that Demjanjuk was not forced to work as a guard at Sobibór. Based on several records and historians' testimonies, the court concluded that Demjanjuk had served freely and could flee the camp, which he did not do.[87]

Instead of eyewitnesses, the historians convinced the court that all camp guards participated in the killings because it was their job.[88] Demjanjuk was also found to have played a voluntary role in the massacre of almost 28,000 individuals at Sobibór, according to the court. Using the "functional participation" doctrine in the Munich trial was unquestionably a watershed moment in the history of international criminal law. Indeed, in the Munich trial, this theory was essential in unravelling the complexities of the Demjanjuk case.[89] He was the first defendant to be convicted of distant atrocity crimes, notwithstanding the lack of evidence connecting him to the murder of a specific victim. Instead, to establish guilt, the prosecution used evidence of Demjanjuk's identity card, nature, and the everyday tasks of the death camp.

According to Lawrence Douglas, "the Demjanjuk case marked an important departure in the way in which the German legal system approached cases dealing with "functionaries".[90] Indeed, it was the first time a court stated that in the case of state-sponsored violence, responsibility should not be assessed based on direct actions but rather by the perpetrator's *function*.[91] This striking conclusion of the Munich court suggests that a criminal conviction can be secured only based on a perpetrator's functions, which a prosecutor can prove using documentary evidence and expert witnesses such as historians.

Demjanjuk was found guilty in 2011 and sentenced to five years in jail. However, while his appeal was pending, he died ten months after the ruling.[92] Therefore, he remained innocent under German law due to his incomplete appeal.[93] Nonetheless, the "functional participation" theory has been applied in subsequent prosecutions involving WWII crimes.

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[82] *Id*., at 544.
[83] Douglas, *supra* note 2, at 227.
[84] Peter Black, *Foot Soldiers of the Final Solution. The Trawniki Training Camp and Operation Reinhard*, 25(1) HOLOCAUST AND GENOCIDE STUDIES 1 (2011), at 14.
[85] *Id*., at 1, 15.
[86] Douglas, *supra* note 2, at 227.
[87] Kohout, *supra* note 80, at 37, 49.
[88] Douglas, *supra* note 72, at 544.
[89] *Id*.
[90] Ewing & Cowell, *supra* note 79; Bronwyn Leebaw, *Justice and the Faithless: The Demand For Disobedience in International Criminal* Law, 24(2) EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS 344 (2018), at 359.
[91] Douglas, *supra* note 72, at 546.
[92] MARY FULBROOK, RECKONINGS: LEGACIES OF NAZI PERSECUTION AND THE QUEST FOR JUSTICE (2018), at 349.
[93] *Id*.

3. Prosecution of Other Nazi Suspects in Post Demjanjuk

Oskar Gröning, a former SS member, was an accountant at Auschwitz camp and had worked there since 1942.[94] His document states that he willingly joined the SS and desired to work as an accountant.[95] In addition, he was in charge of the newly arrived prisoners" belongings.[96] Although there was no evidence to indicate that Gröning killed anyone or participated in the killing process, the prosecution successfully argued using the "functional participation" approach, as we saw in the Demjanjuk case.[97] For example, even though he had no direct connection to the perpetrators or victims, his presence at the dropping ramp assisted in the deaths of thousands of people, as per the argument. Following the argument, the court stated that Gröning joined voluntarily and worked as an accountant for the Nazi dictatorship, and therefore, he was responsible for mass murder.[98] The court then found him guilty of being an accessory to the murder of 300,000 Jews in 2015. The German Federal Court of Justice dismissed his appeal in 2017.[99]

The Demjanjuk principle was applied in Bruno's case too. Bruno was a former SS guard who served at the Stutthof concentration camp from 1944 to 1945.[100] Again, there was no evidence that Bruno had killed anybody personally, but the prosecutor argued that his presence at the camp assisted others in killing the innocent.[101] He was found guilty of aiding and abetting the murder of 5,230 prisoners.[102] Similarly, Johann Rehbogen, a former SS guard, could have faced a full trial in 2018 with no connection to any specific crime, but his trial was postponed due to his unfitness.[103]

4. Functional Participation Theory And its Application by the ICC

Although not directly, in a few contexts, the ICC have endorsed the German doctrine of "functional control over the act" and embraced the liability mode of co-perpetration ("*funktionelle Tatherrschaft*"). For instance, in *Lubanga*, the court concluded that co-

[94] Kohout, *supra* note 80, at 37, 49.
[95] Pavlos Andreadis-Papadimitriou, *Assistance in Mass Murder under Systems of Ill-Treatment: The Case of Oskar* Groning, 15(1) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 157 (2017), at 161.
[96] Bernhart *et al*., *supra* note 20, at 745; Matthias Geyer, *An SS Officer Remembers: The Bookkeeper from Auschwitz*, SPIEGEL ONLINE (May 9, 2005), web.archive.org/web/20070302085046/http://www.spiegel.de/international/spiegel/0,1518,355188,00.
[97] Thomas Douglas, *Punishing Wrongs from the Distant Past*, 38 LAW AND PHILOSOPHY 335 (2019), at 342.
[98] Bernhart *et al*., *supra* note 20, at 743, 745.
[99] FULBROOK, *supra* note 82, at 350.
[100] Samuel Osborne, *Bruno Dey: Former Nazi guard says 'misery and horror' of regime still haunt him*, THE INDEPENDENT (Oct. 22, 2019), https://www.independent.co.uk/news/world/europe/bruno-dey-nazi-trial-concentration-camp-guard-holocaust-stutthof-a9165726.html.
[101] *Id*.
[102] *Id*.
[103] Russell Hope, *Johann Rehbogen: Former SS guard, 94, on Trial over Deaths at Stutthof Concentration Camp,* SKY NEWS (Nov. 6, 2018), https://news.sky.com/story/johann-rehbogen-former-ss-guard-94-on-trial-over-deaths-at-stutthof-concentration-camp-11546199.

perpetration based on shared control over the crime is rooted in the concept that two or more people can commit a crime when they work together to carry it out.[104]

Thus, although each participant depends on the other to carry out their respective tasks, they all share total control over the crime because failing to complete one of the perpetrators' assigned tasks could prevent the crime from being committed.[105] The Pre-Trial Chamber in Lubanga made it clear that individuals who "control over the commission of the offense" – that is, those who "control the will of those who carry out the objective aspects of the offense (commission of the crime through another person, or indirect perpetration)" – are perpetrators.[106]

In *Bemba*, the court stated that,

> What is required is a "normative assessment of the role of the accused person", to determine "whether the accused had control over the crime, by virtue of his or her essential contribution to it and the resulting power to frustrate its commission, even if that essential contribution was not made at the execution stage". The decisive consideration for determining whether an accused person must be qualified as a co-perpetrator is whether the individual contribution of the accused within the framework of the agreement was such that without it, the crime could not have been committed or would have been committed in a significantly different way.[107]

Even in the case of *Rombhot*, the notion of co-perpetration and participation was clearly defined. In this case, the ICC claimed that it is likewise impossible to grasp the charges if the co-offenders are not identified.[108] The concept of co-perpetration, which is based on joint control of the crime, derives from the idea that two or more people may commit a crime more effectively when they work together to carry out the necessary tasks.[109]

As a result, even though each participant depends on the other to commit the crime, they all share control because any of them may prevent the crime from being committed by not completing their assigned task.[110] In *Katanga*, the Chamber concluded that the essential coordinated contribution provided by each co-perpetrator resulting in the realization of the objective aspects[111] of the crime is the objective need for co-perpetration based on joint control over the crime.[112] That court also stated that:

> Designing the attack, supplying weapons and ammunitions, exercising the power to move the previously recruited and trained troops to the fields, and/or coordinating and monitoring the activities of those troops, may constitute contributions that must be considered essential regardless of when are they exercised (before or during the execution stage of the crime).

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[104] ICC, The Prosecutor v. Lubanga, ICC-01/04-01/06-803, Pre-Trial Chamber I, Decision on the confirmation of charges (Jan. 29, 2007), para. 341.
[105] *Id*.
[106] *Id*., at para. 332.
[107] ICC, The Prosecutor v. Jean-Pierre bemba Gombo *et al*., ICC-01/05-01/13 a a2 a3 a4 a5, Appeal Chamber, Judgment (March 8, 2018) para. 820.
[108] ICC, The Prosecutor v. Alfred Rombhot Yekatom and Patrice-Edouard Ngaïssona, ICC 01/14-01/18, Trial Chamber V, Motion to Dismiss Co-Perpetration Mode of Liability (June 22, 2020), para. 33.
[109] *Id*.
[110] *Id*.
[111] The objective aspect means essential contribution by each co-perpetrator resulting in the realization of the objective elements of the crime.
[112] ICC, The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC- 01/04-01/07, Pre-Trial Chamber I, Decision on the confirmation of charges (Oct. 14, 2008), para. 524.

According to this assertion, the prosecution is not required to produce evidence showing how the suspect acted during the execution stage. If the accused made any contributions that facilitated the crime, he might be held accountable. The description mentioned above states that, despite not doing much, the ICC occasionally emphasized the German doctrine of "control over the crime". Although the doctrine is ineffective mainly in international criminal law, it seems there is room to apply it to the massacre in Bangladesh in 1971.

D. The Liberation War of Bangladesh and the Prosecution of the Suspects of Crimes Committed During the Liberation War

The Liberation War of Bangladesh was one of the most shocking events of the twentieth century.[113] The Army's onslaught was equally indiscriminate and vindictive elsewhere in East Pakistan.[114] The war started on 25 March 1971, and ended on 16 December 1971. Over nine months, the Pakistani military and their Bengali accomplices slaughtered 30 million Bengalis. Additionally, it is estimated that up to 200,00 Bengali women had been raped.[115] The Rajakar, Al Badr, Al Shams, and other local death squads collaborated with Pakistan's occupying force to commit genocide in Bangladesh.[116] According to Nitin Pai, this genocide has three parts:1) operation searchlight, 2) search and destroy, and 3) scorched earth.[117]

1. The "Operation Searchlight"

Pakistan launched "Operation Searchlight", a massive military attack on the East's capital city of Dhaka, on 25 March 1971.[118] This was the first onslaught on Bengali nationalism, and Dhaka University was one of the main targets.[119] In addition, police and Bengali paramilitary headquarters, slums and squatter settlements, and Hindu-majority areas were all designated as priority targets.[120] The military started Operation Searchlight to crush Bengali nationalism. According to the Hamoodur Rahman Commission Report, "no pitched battle was fought in Dhaka on 25 March. Excessive force was used on that night. Army personnel acted under the influence of revenge and anger during the military operation".[121] Hundreds of unarmed individuals were slain in the first two days of army operations in Dhaka, including students of Dhaka University.[122]

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[113] WILLEM VAN SCHENDEL, A HISTORY OF BANGLADESH (2009), at 161.
[114] *Id*., at 163.
[115] Amir-Ul Islam, *Towards the Prosecution of Core International Crimes before the International Crimes Tribunal*, in OLD EVIDENCE AND CORE INTERNATIONAL CRIMES 216 (Morten Bergsmo, Cheah Wui Ling eds., 2012); JEFFREY S. BACHMAN, THE UNITED STATES AND GENOCIDE (RE)DEFINING THE RELATIONSHIP (2017), at 98.
[116] *Id*.
[117] Pai, *supra* note 7.
[118] BEN KIERNAN, BLOOD AND SOIL: A WORLD HISTORY OF GENOCIDE AND EXTERMINATION FROM SPARTA TO DARFUR (2007), at 575.
[119] Islam, *supra* note 115, at 220.
[120] Rounaq Jahan, *Genocide in Bangladesh* in CENTURIES OF GENOCIDE, ESSAYS AND EYEWITNESS ACCOUNTS (Samuel Totten, William S. Parsons eds., 2012), at 225.
[121] Iqbal Husnain, *Denying the Denial: Reappraisal of 'Genocide' in East Pakistan*, 16(4) ARTHA-JOURNAL OF SOCIAL SCIENCES 1 (2017), at 14.
[122] Jahan, *supra* note 120.

The first attack on Bengali students began at Dhaka University's Iqbal and Jagannath Halls, which were the dormitories of the University.[123] Any students who survived the bombing of these dormitories were cruelly killed down or stabbed to death with bayonets. Two hundred students and seventeen teachers were slain, tortured, or humiliated by the Pakistani military in Iqbal Hall alone. Hundreds more were killed, tortured, or humiliated by the Pakistani Army, regardless of religion or gender.[124]

On 28 March, the death toll in the countryside had risen to 15,000 people.[125] During the Comilla cantonment massacre on 27-28 March, "seventeen Bengali Officers and 915 men were just slaughtered by the flip of one Officer's fingers", according to a post-war Pakistan government commission.[126] While the precise number of civilians killed in Operation Searchlight is unknown, Christopher Hitchins estimates that "at least ten thousand civilians were butchered in the first three days".[127] The most deadly attacks occurred in Chittagong, Khulna, Jessore, and Santahar, ten Mymensingh villages where people were armed with guns, swords, spears, and daggers in Dinajpur. Murders of women and children, as well as kidnappings, were regular events.[128]

Operation Searchlight was the first phase of the war, which was, however, lasted only approximately six weeks.[129] After the targeted elites were largely assassinated, the West Pakistani military administration, commanded by the President, turned its attention to the ordinary people who strongly supported the Awami League's – the winning political party of Bangladesh – calls for self-determination and independence.[130] This was the second phase of the war, called "search and destroy".

2. The "Search and Destroy"

The second phase of the battle, known as "search and destroy", took place mainly in the countryside, with troops burning down entire towns on suspicion of supporting rebel fighters or as a deterrent.[131] For both the Bengali nationalists and the Pakistani government, long-term planning was the second phase of the liberation war. During this time, the Pakistani Army largely entrenched into its own strongholds, with intermittent operations in rural areas to punish locals for sheltering freedom fighters. The troops also indulged in widespread pillage and rape of women and girls. During the second phase of the war, the Pakistani Army used systematic and organized rape as a particular weapon of war.[132] Girls and women were also kidnapped and gang-raped in special camps administered by Army. Many of the rape victims were murdered

[123] ICT-BD, The Chief Prosecutor v. Motiur Rahman Nizami, ICT-BD 3-2011, Judgment (June 24, 2014), para. 292.
[124] ANIS AHMED, BANGLADESH 1971: WAR CRIMES, GENOCIDE AND CRIMES AGAINST HUMANITY OPERATION SEARCH LIGHT: THE TARGETS (2018), at 2; DAVID LOSHAK, PAKISTAN CRISIS. (1071), at 88-126; Simon Drings, *Eyewitness Account of Operation Searchlight*, THE DAILY TELEGRAPH (Mar. 31, 1971).
[125] LOSHAK, *supra* note 124.
[126] VAN SCHENDEL, *supra* note 113, at 163.
[127] CHRISTOPHER HITCHINS, BANGLADESH: THE TRIAL OF HENRY KISSINGER (2001), at 44.
[128] Christian Gerlach, *Crowd Violence in East Pakistan/ Bangladesh 1971–1972*, in GENOCIDE AND MASS VIOLENCE IN ASIA: AN INTRODUCTORY READER (Frank Jacob ed., 2019), at 25.
[129] Jahan, *supra* note 120, at 255.
[130] Philip Hensher, *The War Bangladesh Can Never Forget*, INDEPENDENT ONLINE (Feb. 19, 2013), www.independent.co.uk/news/world/asia/the-warbangladesh-can-never-forget-8501636.
[131] Pai, *supra* note 7, at 4.
[132] Jahan, *supra* note 120, at 255.

or committed suicide as a result of their trauma. During the genocide of 1971, it is estimated that around 200,000 girls and women were raped.[133]

According to Schanberg, by late June 1971, the mass murders had turned less indiscriminate and more planned.[134] He claimed that missionaries in Bangladesh's remote districts reported atrocities on a near-daily basis. According to one missionary, over a thousand Hindus were slaughtered in one day in the southern district of Barisal. According to another missionary, a gathering to accomplish reconciliation was called in the northern Sylhet area. Troops arrived as a crowd gathered and shot 300 Hindus.[135] Apart from destroying entire areas where insurgent actions had occurred, killing, burning, raping, and looting took place across the country.[136] The second phase of the battle was the most extensive. When Pakistan realised they were going to lose the combat, they devised a plan to eliminate the country's intellectuals. According to the plan, Pakistan carried out the third and last phase of the war.

3. The "Scorched Earth"

The third phase, which lasted from October to 16 December, saw India and Pakistan go to war, with the Pakistan army's eastern command, led by Gen Niazi, surrendering to a joint India-Bangladesh force led by Lieutenant-General Jagjit Singh Aurora.[137] However, in the last week of the war, the Pakistani government engaged in its most violent and deliberate genocidal campaign when its defeat was nearly imminent. The Pakistani military planned to eliminate the most recognized and influential intellectuals and professionals in each city and town to deprive the future nation of its most competent leadership.[138] Between 12 and 14 December, a number of intellectuals and professionals — professors, doctors, engineers, writers, and so on — were abducted and murdered.[139] Two days before Pakistan's surrender, 800-1,000 intellectuals were killed in Dhaka.[140]

According to multiple witnesses examined in the *Motiur Rahman Nizami* case, Al-Badr Bahini members collaborated with the Pakistani Army to exterminate the intellectuals.[141] Furthermore, according to a report titled 'British M.P says senior Pakistani army officers organised murder of intellectuals' published in The Hindustan Times,

> Ten senior Pakistani army officers were responsible for organising the recent murders of a large number of people, especially intellectuals, in Dacca, Mr. John Stonehouse, British Labour M.P, told PTI in an interview here this morning (New Delhi, December 20).[142]

However, it is worth noting that Pakistani military commanders were not the only ones to blame. There were also Bengalis who aided the Pakistani administration. The Pakistani

[133] SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE (1993).
[134] Sydney H. Schanberg, *West Pakistan Pursues Subjugation of Bengalis*, NEW YORK TIMES (July 14, 1971).
[135] *Id*.
[136] *Id*.
[137] Pai, *supra* note 7 at 4.
[138] Jahan, *supra* note 120, at 256.
[139] Sarmila Bose, *Anatomy of Violence: Analysis of Civil War in East Pakistan in 1971*, in 40(41) ECONOMIC AND POLITICAL WEEKLY 4463 (Oct. 8, 2005), at 4467.
[140] Pai, *supra* note 7 at 4; ICT-BD, The Chief Prosecutor v. Professor Ghulam Azam, ICT-BD 6-2011, Judgment (July 15, 2013), paras. 82, 203.
[141] Nizami, *supra* note 123, para. 296.
[142] ICT-BD, The Chief Prosecutor v. (1) Ashrafuzzaman Khan and Naeb Ali Khan [absconded] & (2) Chowdhury Mueen Uddin [absconded], ICT-BD 1-2013, Judgment (Nov. 3, 2013), para. 84.

government purposefully recruited Bengali collaborators during the second phase of the war. Many Islamist political parties and organizations opposed the Awami League, such as the Muslim League and the *Jamaat-e-Islami* (JI), which worked with the Army.[143] Peace committees were formed in various cities and towns, and *rajakars* (armed volunteers) were raised and given weaponry under their supervision to combat the freedom fighters. During the period of 12–14 December, 1971, two armed vigilante organizations – *Al-Badr* and *Al-Shams* – were trained and led the arrest and execution of the intellectuals.[144]

4. Prosecution of the Suspects of Crimes Committed During the 1971 War

The International Crimes (Tribunals) Act 1973 was passed by the government of the newly formed nation of Bangladesh in 1973 following the war.[145] However, no such action was taken by any government to prosecute the suspect until 2008. In 2008, the War Crimes Fact Finding Committee released a list of 1,597 individuals deemed criminals. This list included influential ministers, parliamentarians, and political figures from two major political parties.[146] Eventually, in 2009, the government of Bangladesh established a tribunal under the International Crimes Tribunal (Tribunals) Act of 1973 to prosecute those suspects.[147] Since 2010, the Tribunal has been in operation. Although civilians and the Pakistani Army were involved in the massacre, the Bangladeshi Tribunal is prosecuting local collaborators, but the Pakistani Army.[148]

Notably, Pakistan has not yet held its Army accountable for its actions. However, since the crimes were committed over half a century ago, it may prove challenging for the Pakistani government to gather original evidence. Nonetheless, there may still be opportunities to prosecute certain army officers as indirect perpetrators or accessories of murder under the functional participation doctrine, which does not always require direct evidence in certain situations.

E. Application of "Functional Participation" Theory in the 1971 Massacre

The accused's role is paramount in determining guilt when dealing with system criminality in international criminal law.[149] It perfectly captures their contribution to the crime and sheds a clear light on the *actus reus*.[150] Moreover, establishing the offender's intent is crucial in the context of a crime. Their knowledge and motives provide evidence of their *mens rea*. So, the prosecutor is obligated to prove the defendant's guilt based on the notion of "functional participation", which requires the presentation of numerous elements. Based on the nature of the "functional participation" approach, the theory may apply to the suspects if four

[143] Jahan, *supra* note 120, at 258.
[144] *Id*.
[145] The Parliament of Bangladesh passed the International Crimes (Tribunals) Act, 1973 (Act No. XIX of 1973) to detain, prosecute, and punish those who are accountable for committing genocide, crimes against humanity, war crimes, and other offenses under international law.
[146] Zakia Afrin, *The International War Crimes (Tribunal) Act, 1973 of Bangladesh*, INDIAN YEARBOOK OF INTERNATIONAL LAW AND POLICY (2009), at 342.
[147] Investigation Agency, International Crimes Tribunal, Bangladesh, Public Security Division, Ministry of Home Affairs, Bangladesh, http://ictbdinvestigation.portal.gov.bd/.
[148] Afrin, *supra* note 146.
[149] Van der Wilt, *supra* note 62, at 619.
[150] *Id*.

requirements are met. They are 1) a specific crime, 2) a common plan, 3) a contribution (direct or indirect), and 4) a plurality of perpetrators. Let us evaluate these four criteria in the context of Bangladesh's Liberation War.

1. A Specific Crime

The first and most important requirement is a particular crime. It has been observed that extermination camps such as Treblinka and Sobibór had only one goal: to exterminate Jews.[151] This goal indicates that those who worked in the camps participated in the mass murders of Jews. Similarly, several incidents may be recorded in Bangladesh's atrocities, notably the massacre at Dhaka University's Iqbal Hall during the first phase of the war, which was "operation searchlight". The Pakistani military killed two hundred students and seventeen teachers in Iqbal Hall.[152] The target of Iqbal was nothing but a killing mission. Another tragedy was the extermination of intellectuals in large numbers. Nearly 1,000 intellectuals were slaughtered in Dhaka just two days before Pakistan's surrender.[153] Again, the sole purpose was to exterminate the intellectuals. Therefore, anyone involved in the process of exterminating intellectuals should be held accountable.

2. A Common Purpose or Plan

Regarding the case of Denjanjuk, Professor Dieter Pohl of Klagenfurt established that Sobibór was a death camp with the common plan of killing Jews.[154] The German prosecution argued that, based on the Sobibór death camp's understanding, "[a]ll Sobibór guards participated in the killing process. Demjanjuk was a Sobibór guard. Therefore, Demjanjuk participated in the killing process".[155] Similarly, the attack on the University of Dhaka was intended to put an end to the student movement by killing them, which they did in the Iqbal Hall. Furthermore, the assassination of intellectuals was a deliberate massacre designed to murder the most well-known and influential scholars and professionals in each city and town, depriving the future nation of its most capable leadership.[156] However, one could argue that no concrete evidence exists of a plan to eliminate intellectuals. In those circumstances, the perpetrators should not be prosecuted under the common plan notion. In this regard, the Bangladeshi war crimes tribunal stated that planning and carrying out unlawful conduct cannot be a physical act.[157] There may be no documentary evidence that such a strategy was designed.

The existence of a plan is deduced from the totality of circumstances and pertinent information. So it is irrelevant to request proof of where, when, who, and how the plan was designed.[158] It is reasonable to infer that such a planned pattern of collective elimination of the *intellectual class* could not have been launched and carried out without a common purpose and

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[151] Kohout, *supra* note 80, at 37.
[152] Ahmed, *supra* note 124; Simon Drings, *Eyewitness Account of Operation Searchlight*, THE DAILY TELEGRAPH (Mar. 31, 1971); Loshak, *supra* note 124, at 88-126.
[153] Pai, *supra* note 7, at 4.
[154] Lawrence Douglas, *The Historian's Trial: John Demjanjuk and the Prosecution of Atrocity*, in THE PALGRAVE HANDBOOK OF STATE-SPONSORED HISTORY AFTER 1945 (Berber Bevernage, Nico Wouters eds., 2018), at 543.
[155] *Id*., at 544.
[156] Jahan, *supra* note 120, at 256.
[157] ICT-BD, The Chief Prosecutor v. Ashrafuzzaman Khan *et al*, supra note, 142, para. 75.
[158] *Id*.

plan.[159] The Tribunal also stated that the killing of selected intellectuals was a systematic and calculated "large-scale killing", resulting from a strategy designed to undermine the Bengali nation's existence.[160] Moreover, according to the *Mujahidi* case, the killing of intellectuals resulted from a common plan.[161]

Nonetheless, one could claim that there is no indication that Pakistani soldiers directly killed any civilian or intellectual in the massacre of Iqbal Hall. It makes no difference whether the Pakistani armies directly killed anybody. Suppose it is possible to prove that the Pakistani militaries' common purpose was to kill civilians. In that case, they must be held guilty, even if not as direct perpetrators but as accomplices.

3. A Group of Perpetrators

The "functional participation" theory does not apply to a single perpetrator of a single crime. It must be a serious crime involving a group of perpetrators, each playing a different role, but they all have a common aim. Responsibility for a crime committed jointly is a type of criminal responsibility that appears to be well-suited to address the criminal liability of all participants in a common criminal plan.[162] This theoretical model is made up of two parts.

First, it acknowledges that parties to a crime committed jointly are responsible for each act committed by their associates within the enterprise's limits. Second, it states that if one party acts outside the enterprise's boundaries, the other will only be held liable if they know the activity.[163] Furthermore, if a crime is committed jointly and

> where, however, the accused knows that his assistance is supporting the crimes of a group of persons involved in a joint criminal enterprise and shares that intent, then he may be found criminally responsible for the crimes committed in furtherance of that common purpose as a co-perpetrator.[164]

According to the "functional participation" paradigm, every culprit within the group who is aware of a probable crime is accountable, even if he is not a direct perpetrator. Demjanjuk, for example, was a camp guard, and there was no evidence that he killed anyone. Similarly, Oskar Gröning, A former Nazi SS guard, worked as an accountant at *Auschwitz*, but no evidence indicates he killed anyone or participated in the execution process.[165] On the other hand, the prosecution claimed that their functions contributed to the murder of the Jews.[166]

In Bangladesh, the Pakistani government and military formed a number of intermediary forces, such as the Razakars, the *Al-Badar*, the *Al-Shams*, the Peace Committee, and so on, primarily to work alongside the Pakistani occupation army in identifying and eliminating all those perceived to be pro-liberation, individuals belonging to minority religious groups, particularly Hindus, political groups affiliated with the Awami League and Bangalee

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[159] *Id*., paras. 75, 91.
[160] *Id*., para. 78.
[161] ICT-BD, The Chief Prosecutor v. Ali Ahsan Muhammad Mujahid, ICT-BD 4-2012, Judgment (July 17, 2013), para. 602.
[162] Cassese, *supra* note 41, at 110.
[163] Beatrice Krebs, *Joint Criminal Enterprise*, 73(4) THE MODERN LAW REVIEW 578 (2010).
[164] ICTY, The Prosecutor v. Limaj *et al*., IT-03-66-T, Trial Chamber, Judgment (Nov. 30, 2005), para. 510.
[165] Kohout, *supra* note 80, at 37, 49.
[166] Thomas Douglas, *Punishing Wrongs from the Distant Past*, 38(4) LAW AND PHILOSOPHY 335 (2019), at 342.

intellectuals, and unarmed civilian population.[167] These committees and groups were formed to execute the common plans of the Pakistani occupation army. Therefore, one could claim that in Bangladesh, the group(s) that took part in the Iqbal Hall assassination mission and the killing of intellectuals should be held accountable for their co-perpetration.

The court ruled that, as the leader of the *Al-Badar* group, accused Ali Ahsan Muhammad Mujahid could not escape responsibility for the deaths of intellectuals.[168] He was subsequently convicted of intellectuals, although there was no evidence of him directly killing any intellectual.[169] Thus, whether or not the culprit directly killed someone is irrelevant. His participation as a group member aided other assailants in the murder of intellectuals. Similarly, under the "functional participation" theory, Pakistani troops that belonged to a specific military group assisted in slaughtering intellectuals or Iqbal Hall may be held accountable.

4. Contribution

Although only some members of the group may physically commit the crime, the participation and contribution of the other group members are often significant in aiding the commission of the crime. Furthermore, physical involvement in commissioning the principal offense is not always required to incur guilt. The act and conduct of the accused are sufficient to constitute part of the attack if it has a substantial link to the commission of the primary crime.[170] Moreover, in the *Mujahidi*, the Tribunal stated that "conduct, act, behaviour and the level of influence and authority of the accused together, which have been convincingly proved, are thus qualified to be the constituent of 'participation' too…".[171]

The Tribunal further stated that the moral weight of such participation is sometimes equal to, if not greater than, that of those physically carrying out the crimes.[172] However, convicting someone based on the "functional participation" approach is extremely difficult. Under the common purpose notion, the prosecutor must demonstrate that the perpetrator was employed at the crime scene and contributed to the crime either directly or indirectly.[173]

In the case of *Abdus Sattar*, the Bangladeshi war crimes tribunal stated that "the word 'committed' is not meant to exclude participants who had not themselves executed the crimes at the crime scene".[174] Therefore, it is not necessary to ascertain the substantial or significant nature of an accused's role in the crime to establish his liability as a co-perpetrator. An accused must have performed an act or omission contributing to the common criminal purpose.[175] For example, the prosecution demonstrated that Demjanjuk worked as a guard at a specific extermination camp and is thus liable for the camp's operations since all of them working in the camp had a common plan. Similarly, the culprits who took part in the mass murder of Iqbal Hall or intellectuals could be held guilty for the massacre.

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[167] Mujahid, *supra* note 161, para. 12.
[168] *Id*., para. 57.
[169] *Id*., para. 446.
[170] ICTY, The Prosecutor v. Duško Tadić, IT-94-1, Trial Chamber, Judgment (May 7, 1997), para, 691.
[171] Mujahid, *supra* note 161, para. 265.
[172] ICTY, The Prosecutor v. Duško Tadić, IT-94-1-A, Appeal Chamber, Judgment (July 15, 1999), para.191.
[173] ICTY, The Prosecutor v. Miroslav Kvocka *et al*., IT-98-30/1-T, Trial Chamber, Judgment (Nov. 2, 2001), para. 49.
[174] ICT-BD, The Chief Prosecutor v. Md. Abdus Sattar and Tipu Sultan, ICT-BD 5-2018, Judgment (Aug. 8, 2018), para. 373.
[175] ICTY, The Prosecutor v. Miroslav Kvocka *et al*., *supra* note 173, para. 421.

According to the reasoning, the perpetrator's contribution assisted in completing the killing operation. It would make no difference if the offender did not directly kill any of the Iqbal Hall victims. The perpetrator might be a guard or someone who assisted other criminals in killing the victims. Under the "functional participation" approach, anybody who assisted or killed in the murder of intellectuals should be held accountable. He could have been someone who transported intellectuals from one site to another, or he could have been the one who killed them. In the *Mujahidi* case, the Bangladeshi war crimes tribunal stated that:

> "concerned in the commission" refers to an indirect degree of "participation" and a person can be held concerned in the commission of an act of criminal offence by an organisation or group of individuals even if he is not found to be present at the crime site but took such a part in the preparation of such crime by his act or conduct providing abetment with intent to further its [plan of attack] object.[176]

Although there was no proof that Mujahidi was present in the killings of intellectuals, the appellate division of the Bangladesh Supreme Court convicted Mujahidi for planning, aiding, instigating, abetting, and facilitating the massacre.[177]

According to the preceding analysis, while not all perpetrators would be held guilty under the "functional participation" doctrine, some might be. Specifically, the murders of intellectuals and victims of Iqbal Hall since these missions were conducted comprehensively and organized.

III. Conclusion

Nuremberg did not prosecute junior officers; therefore, many junior officers who committed crimes during WWII could live their lives without fear of being tried in Germany. Despite this, it took more than 60 years to develop a new direction to pursue those other than top-level commanders engaged in the mass murder of Jews.[178] This new path paved by the Munich trial has established a new approach that might apply to all offenders, regardless of their rank. Indeed, this new approach has modified the definition of a war criminal from one who gives orders to one who participates in the killing process.[179]

Without a doubt, the Demjanjuk principle solved a complex puzzle of WWII historical atrocities with the help of many Nazi documents and historians' testimonies. Nonetheless, this is a recent development in the field of dealing with temporally distant crimes. Indeed, this paradigm's reliability is demonstrated by applying the "functional participation" doctrine in other trials in Germany. As a result, the doctrine might be applied to other crimes committed elsewhere, i.e., the liberation war of Bangladesh.

Although Bangladesh began investigating culprits residing in the country in 2010, they are all civilians who participated in the massacre in 1971. The principal perpetrators are the Pakistani Army, who have never been tried in Pakistan or elsewhere. It may be argued that convicting low-ranking officers for their participation would be challenging due to the difficulty in handling eyewitnesses and other related evidence.

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[176] Mujahid, *supra* note 161, para. 446.
[177] ICT-BD, The Chief Prosecutor v. Ali Ahsan Muhammad Mujahid, ICT-BD 4- 2012, Appeal Chamber, Judgment (June 1, 2015), para. 191.
[178] Jennifer Snyder, *A New Definition of A War Criminal: Present Day Nazi War Criminal Prosecutions*, 16(1) CHICAGO-KENT JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 163 (2016), at 177.
[179] *Id*.

While it is true that finding eyewitnesses after fifty years of atrocity would be challenging, Pakistan might still prosecute their Army based on documentary and historical evidence, similar to the Demjanjuk and Bruno or Oskar Gröning trials. For example, according to the preceding narrative, the "functional participation" theory may apply to defendants who committed crimes during the first and third phases of the 1971 massacre. It is not impossible to identify the Army that participated in the mass murder in Iqbal Hall. In this case, documentary evidence could be helpful. Furthermore, historians may assist in the discovery of the killing strategy of Iqbal Hall and intellectuals.

To summarize, dealing with temporally distant international crimes may be challenging but not impossible. Bangladesh, Cambodia, Senegal, and Argentina are just a few examples of countries dealing with decades-old crimes. Furthermore, the trials of John Demjanjuk, Bruno Dey, and Oskar Gröning suggest that prosecution without eyewitnesses is feasible. When there is no eyewitness to testify, the "functional participation" theory may help discover old truths, as it helped in the cases of Demjanjuk and others. Similarly, the "functional participation" approach may help address the riddle of Bangladesh's liberation war. It may be possible to ascertain which army commanders took part in the Iqbal Hall operation and extermination of intellectuals using documentary evidence. If it is promising, then prosecution may be conceivable.