Reflections on the Problem of Individual Responsibility for Violations of Human Rights

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When a government, with full knowledge of the implications of what it is doing, enacts a law that manifestly violates some of the obligations that State has undertaken under an international human rights instrument — for example, a law ordering the covert murder of political opponents and their families or ordering torture to extract information — the legislation, whatever its internal juridical force, has no juridical effect with regard to that State's obligation under conventional or customary international human rights obligations. To contend otherwise would signal the end of international law, for if a state could unilaterally release itself from its international obligations, those obligations would be meaningless. However the actions may be characterized domestically, if the State secures implementation of the legislation which is inconsistent with an international convention, that State violates international law.

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But what are the implications of this proposition for the internal implementation of an internationally unlawful legislative act? No law can implement itself. Violations of domestic and international law can only be implemented by human beings. Without their collaboration, the legislation in question would remain a dead letter. In the past, governments that were bent on achieving objectives that violated international commitments and international human rights obligations were able to ensure the functionaries who would actually implement the legislation that they would not be held responsible. This was accomplished by means of the Doctrine of the Defense of Superior Orders. As soldiers in Shakespeare's *Henry V* put it,

> We know enough, if we know we are the King's subjects. If his cause be wrong, our obedience to the King wipes the crime of it out of us.

Fortunately, the Doctrine of the Defense of Superior Orders is no longer a defense against war crimes, crimes against humanity and other international crimes, indicative of the international community's readiness to assess individual responsibility for such crimes.

I.

The unique nature of human rights treaties has required the addition of individual responsibility to traditional state responsibility. Ordinarily, treaties involve undertakings by states to do or refrain from doing certain prescribed things with regard *to each other*. While the performance of obligations under the treaty necessarily requires changes in the internal law of the performing state and while a failure to make those arrangements will result in a violation of the treaty, the performance of the treaty or compensation for failure to perform will take place *at the international level* to the benefit of the injured state.

Human rights treaties also involve a contractual relationship between two or more states, but the direct beneficiaries are, in contrast, nationals *within* the performing state. Performance, non-performance and/or failure to provide appropriate compensation

must all take place *within* the state. A violation of an international human rights instrument effected by domestic legislation can have no juridical effect with regard to the continuing international obligations of the state concerned. *But it will have little practical meaning at the domestic or municipal level, where the performance of human rights obligations must actually occur.* Indeed, a finding that a national law, manifestly violative of international legal obligations, has no effect on the continuing validity and vigor of those international obligations, for all of its importance, actually ignores the central aim of human rights law because the state enacting the legislation may still accomplish its unlawful objective, "lawfully" within its territory and under its municipal law.

The normatively gray gap between international and national law produces one of the crueler ironies of international protection of human rights: the actual perpetrators of violations escape personal responsibility. Let me explain. The usual paradigm of a human rights violation involves a person, functioning as an official of a government, depriving another person or persons of their human rights. At the international level, responsibility is not ascribed to the individual who has himself violated the rights or precipitated the violations, but rather to the state in which the violations took place. Where there are broad and persistent patterns of violations by governments, the many groups and individuals in the State who are victims of the violations actually suffer twice: first, in being the victims and second, in *their* obligation to participate, with all other citizens, in paying compensation. For the "state" is a metaphysical abstraction. When we say that the State is responsible and must compensate, we are really saying that the citizens of the State, including the victims, must pay to compensate for human rights violations. The individuals actually responsible for the violation escape any specific punishment.

This cruel paradox undermines the important anticipatory deterrent effect of all law and especially human rights law. Officials who contemplate that a violation of human rights serves their purposes or that of their superiors need have no fear that they are violating

international law. *They* are not violating any law, international or national. It is that abstract entity called the state that is acting in violation of international law. And if compensation is later required, it is that same entity that will pay. Nor are the actual perpetrators violating their national law. To the contrary. They are complying with it!

To fill this normative gap, contemporary international law has been driven, virtually inexorably, toward the ascription of individual responsibility, alongside classic state responsibility, for a distinct group of international crimes. The issue is not one of substituting individuals for the State with regard to responsibility for violation of human rights norms. It is, rather, the addition to state responsibility of a coordinate personal responsibility. The resulting "dual responsibility" may be illustrated by an example from the war in Bosnia-Herzegovina. The United Nations War Crimes Commission concluded that certain persistent and systematic violations of human rights, such as genocide (referred to euphemistically as "ethnic cleansing") or systematic rape of Muslim women, have been undertaken as a matter of state policy. Such behavior is an international crime and a war crime which engages the responsibility of the government of former Yugoslavia.[1] *In addition, it engages the personal responsibility of the senior officials who ordered it as well as the lowest ranks who actually implemented it.*[2] Thus, to speak of personal responsibility with regard to the violation of a fundamental human rights norm in no sense absolves the state of its collective or corporate responsibility. Rather, for international crimes, there are now several levels of additional responsibility.

The very *raison d'être* of international human rights law drives international law in the direction of individual responsibility. If we do not say that officials who consciously implement national laws whose implementation constitutes international crimes are person-

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1 See, e.g., *Order on Further Requests for the Indication of Provisional Measures in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, I.C.J. (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)) (Sept. 13, 1993), reprinted in, 32 *I.L.M.* 1599 (1993).

ally responsible, then no one will be responsible and there will be no deterrence.

II.

Individual responsibility for human rights violations is well grounded in international law. In the *Justice* case, the Nüremberg Military Tribunal tried sixteen members of the Nazi justice system, including high-level officials in the Ministry of Justice, public prosecutors *and judges*, for commission of war crimes *and* crimes against humanity.[3] The Tribunal held that, although defendants were acting in their official capacity and pursuant to and in full compliance with national law which they believed was the applicable law, they bore individual responsibility for war crimes and crimes against humanity.[4] National law did not serve as a shield for these individual acts. The *Justice* case stands for two important and interrelated propositions that find expression in many international instruments. First, one's official position will no longer preclude individual criminal responsibility. The London Charter, which established the International Military Tribunal at Nüremberg, provides in Article 7,

> The official position of defendants, whether as Heads of State, or responsible officials in governing departments, shall not be considered as freeing them from responsibility, or mitigating punishment.[5]

In elaborating this principle, the Nüremberg Tribunal stated that

> The principles of international law, which under certain circumstances, protects the representatives of a state, cannot

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2 *See* U.N. Sec. Council Res. 827, at ¶ 2 (May 25, 1993), *reprinted in*, 32 *I.L.M.* 1203, 1204 (1993).

3 *Trials of War Criminals: The Justice Case*, Tribunal III, Case 3, Nüremberg Military Tribunal (U.S. v. Altstoetter).

4 *Id.*, at 984.

5 *Charter of the International Military Tribunal*, August 8, 1945, 82 U.N.T.S. 279, 59 Stat. 1554, at art. 7 (hereinafter "London Charter").

> apply to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.[6]

Principle III of the "Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal," ("Principles of Nüremberg") which were adopted by the International Law Commission in 1950, provides,

> The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.[7]

Article 13 of the ILC's Draft Code of Crimes Against the Peace and Security of Mankind reiterates this proposition:

> The official position of an individual who commits a crime against the peace and security of mankind, and particularly the fact he acts as head of State or Government, does not relieve him of criminal responsibility.[8]

The state no longer serves as an impenetrable shield for the individual perpetrator.

The *Justice* case also triggered an erosion of the superior orders defense. Domestic legislation is one of the modes through which a government issues orders. The judges implicated in the *Justice* case were found guilty in spite of their following national laws or the

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6 "Judgment and Sentences", October 1, 1946, 41 *American Journal of Int'l Law* 172 (1947).

7 "Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal", *Yearbook 1950*, Volume II, 374-8, Doc. A/1316, paras. 95-127.

8 *Draft Report of the International Law Commission on the Work of its Forty-Third Session*, U.N. Doc. A/CN.4.L.464.Add.4 (1991).

orders of their government. The *Justice* case, therefore, implicitly rejects the superior orders defense. The authoritative elimination of the superior/government order defense was first articulated in Article 8 of the London Charter,

> The fact that the Defendant acted pursuant to order of his Government or superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.[9]

Likewise, Principle IV of the Principles of Nüremberg prepared by the International Law Commission of the United Nations states,

> The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.[10]

This proposition retains its normative standing. Article 11 of the most current version of the ILC's Draft Code of Crimes Against the Peace and Security of Mankind affirms,

> The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility if, in the circumstances at the time, it was possible for him not to comply with the order.[11]

That individuals bear responsibility, even if following government orders, is further evidence that the state is no longer a protective shield for the individual. As in the *Justice* case, the international norms that reject the compliance with superior/government orders

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9 *London Charter*, art. 8.

10 1950 Y.B. Int'l L. Comm'n Pt. II 374, U.N. Doc. A/CN.4/Ser.A/1950.

11 *Id.*,*supra* nota 8.

defense to international criminal charges also apply to individuals committing international crimes by complying with and furthering some national legislative instrument. Through eroding the defense of superior orders and through explicit provision for personal responsibility on the part of government officials, international law has generated a well-developed norm of individual responsibility.

III.

The key question, then, is not *whether* individuals can be held individually responsible for certain internationally proscribed acts, but rather under what circumstances and for which types of behavior individuals will incur such responsibility. Although the London Charter prescribed individual responsibility for international crimes, the only delineated international crimes, *eo nomine*, in that instrument were crimes against peace, war crimes, and crimes against humanity.[12] Subsequent international legal norms have augmented these categories. The category of crimes against humanity, interpreted in the Nüremberg setting as applicable to war-time conduct only, has since been broadened to include massive human rights violations occurring in times of peace. The Convention on the Prevention and Punishment of the Crime of Genocide, adopted unanimously and widely ratified, affirms, in Article I, that "genocide," whether committed during war *or peace*, is a crime under international law and states, in Article IV, that "[p]ersons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials, or private individuals."[13]

Efforts to include apartheid among the crimes against humanity culminated in 1973, when the U.N. General Assembly opened the International Convention on the Suppression and Punishment of the

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12 *London Charter*, art. 6.

13 *Convention on the Prevention and Punishment of the Crime of Genocide*, adopted unanimously Dec. 9, 1948, entered into force Jan. 12, 1951, 78 U.N.T.S. 277 (hereinafter "Genocide Convention").

Crime of *Apartheid* for signature.[14] Article I of the Apartheid Convention declares that "apartheid is a crime against humanity"[15] and, quite logically, Article III ascribes international criminal responsibility to "individuals, members of organizations, institutions and State representatives" for directly or indirectly perpetrating commission of the crime.[16]

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, while not explicit in its characterization of torture as an international crime, does assess individual responsibility. Article 2(3) states: "An order from a superior officer or a public authority may not be invoked as a justification of torture."[17] This explicit rejection of the shield of officialdom signals the Convention's intention to assess individual responsibility for committing torture. The Inter-American Convention to Prevent and Punish Torture has a similar provision in its Article 4: "The fact of having acted under orders of a superior shall not provide exemption from the corresponding criminal liability."[18]

Likewise, the Declaration on the Protection of All Persons against Enforced Disappearances, approved by the U.N. General Assembly on December 18, 1992, states, in Article 6(1) that orders or instructions from a public official, whether that public official is civil, military or otherwise, cannot be invoked to justify an enforced disappearance.[19]

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14 *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 13 *I.L.M.* 50 (1974), entered into force July 18, 1976, ratified by 84 States as of September 1986 (hereinafter "Apartheid Convention").

15 *Id.*, art. I.

16 *Id.*, art. III.

17 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Art. II(3), U.N. Doc. A/RES/39/46, adopted by consensus by the G.A. Dec. 10, 1984, entered into force June 26, 1987, reprinted in, *Basic Documents on Human Rights* 38 (Ian Brownlie, ed., 3d ed., 1992) (hereinafter "Convention Against Torture").

18 *Inter-American Convention to Prevent and Punish Torture*, adopted Dec. 9, 1985, entered into force Feb. 28, 1987, reprinted in, *Basic Documents on Human Rights*, at 531 (Ian Brownlie, ed., 3d ed., 1992).

19 *Declaration on the Protection of All Persons against Enforced Disappearances*, G.A. Res. 47/13 (Dec. 18, 1992), reprinted in, 32 *I.L.M.* 903 (1992).

The Convention on Forced Disappearance of Persons, prepared by the Inter-American Commission on Human Rights, states that any justification based on obedience to superior orders is inadmissible.[20]

The trend of including serious human rights violations, all of which are proscribed by the American Convention, in the category of international crimes is codified in Article 19 of the International Law Commission's Draft Articles on State Responsibility. Article 19 defines an international crime as:

> a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide, and apartheid.[21]

The ILC's deliberate use of "such as" before delineating the individual human rights violations that constitute international crimes indicates that the peace-time notion of an international crime is not a closed category. It is evolving.

The most current attempt to delineate those acts amounting to international crimes reflects this evolution. The ILC's Draft Code of Crimes Against the Peace and Security of Mankind holds individuals responsible for numerous international crimes, including, but not limited to, genocide, apartheid, colonial domination, systematic or mass violations of human rights, international terrorism, and illicit traffic in narcotic drugs.[22] Article 21 of the Draft Code ascribes individual responsibility for the commission of any of the following human rights violations: "murder; torture; establishing or maintaining over persons a status of slavery, servitude, or forced labor; persecution on social, political, racial, religious or cultural grounds in

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20 *Inter-American Convention on Forced Disappearance of Persons*, AG/Doc. 3171/94 (June 10, 1994), Resolution approved by the General Assembly in its 24th Session.

21 *Draft Articles on State Responsibility*, [1976] 2 Y.B. Int'l L. Comm'n Pt. 2, at 75, U.N. Doc. A/CN.4/Ser.A/1976/Add.1 (Pt. 2).

22 *Id. supra* nota 8.

a systematic manner or on a mass scale; and deportation or forcible transfer of the population."[23]

Other crimes may have been added, by implication, to the category of international crimes by inclusion in the growing list of offenses for which universal jurisdiction is appropriate. Even if the term "international crime" is not used, universal jurisdiction is one of the indicators of an international crime, which is definitionally a delict that any State is entitled to punish it. The editors of the Ninth Edition of *Oppenheim's International Law*, Judge Jennings and Alan Watts, list as giving rise to universal jurisdiction "offenses of an international character of serious concern to the international community as a whole, which it is accepted may be punished by whichever State has custody of the offender."[24]

> [P]iracy is a well-established example of jurisdiction exercisable on such a universal basis. Other offenses in respect of which universal jurisdiction is often said to exist include war crimes, possibly terrorism and the most serious violations of human rights such as torture, and, as a result of treaties, grave breaches of the Geneva Conventions of 1949, a hijacking and sabotage of aircraft and apartheid.[25]

Through its ability to delineate circumstances in which universal jurisdiction is appropriate, the Security Council of the United Nations, acting under its Chapter VII authority, may also create new international crimes.[26] In Resolution 748,[27] for example, the Security Council indicated that it viewed the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Avia-

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23 *Id.*, art. 21.

24 *Oppenheim's International Law* Vol. I at 469 (Jennings and Watts, eds., 9th ed. 1992).

25 *Id.* at 469-70.

26 *Charter of the United Nations*, 59 Stat. 1031 (1945), adopted June 26, 1945, entered into force, Oct. 24, 1945 (hereinafter "UN Charter").

27 U.N. Sec. Council Res. 748 (March 31, 1992), reprinted in, 31 *I.L.M.* 749 (1992).

tion[28] as creating a universal jurisdiction against persons accused of violating the Convention. By virtue of Articles 25 and 103 of the United Nations Charter,[29] the Security Council can and probably has created new international criminal and universal jurisdictional law.

Genocide, apartheid, torture, slavery, enforced disappearances, and systematic and mass violations of human rights are clearly among a growing category of human rights violations that are also crimes against humanity. As international crimes, these human rights violations should clearly engage the individual responsibility of the perpetrator.

IV.

Although individual responsibility is firmly embedded in international law, individual responsibility can occur only when the violation of a particular provision of an international instrument is also an international crime. Given this conclusion, we return to this paper's central question: what are the internal effects of a domestic law that patently violates international legal obligations? A violation of each and every one of the provisions of human rights instruments does not *per se* engage the personal responsibility of the perpetrator. Only where general international law has transformed some of the prescriptions of an international human rights instrument into international crimes, will individual responsibility result. In the inter-American human rights system, where the American Convention on Human Rights is the primary governing instrument,[30] the following are examples of violations for which individual responsibility would be assessed.

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28 *Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570.

29 UN Charter, arts. 25 & 103.

30 *American Convention on Human Rights* (1969), reprinted in, *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L./V./II.71, doc. 6, rev. 1 (1987) (hereinafter "American Convention").

Were a State to enact, for example, a national law purporting to authorize and require police and military personnel to use torture, the State would not only violate Article 5 of the American Convention,[31] the Universal Declaration of Human Rights,[32] and the Convention Against Torture, but those who actually implemented the legislation would be committing an international crime. Since torture is an international crime, he may not invoke a defense of superior orders and he may not claim he is only complying with national law. The powerful precedent of the *Justice* case before Nüremberg, disposes of that particular defense. The torturer engages his personal responsibility under international law.

Certain violations of Article 6 of the American Convention,[33] which guarantees freedom from slavery, will also constitute international crimes in addition to being violations of the Convention, generating both State responsibility and individual responsibility for those who actually implemented the State's orders. By the same token, certain violations of Article 7, the right to liberty, would constitute international crimes.[34] Where, for example, a government instructs certain military units to create secret prisons, whose detainees are not listed on any official registry, the State giving the orders would be responsible corporately. But both the Inter-American Court and the Inter-American Commission on Human Rights have held that a forced disappearance, in addition to being a violation of the Convention, is an international crime.[35] Thus the individuals who implemented the State's orders would also be responsible.

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31 *Id.*, art. 5.

32 *Universal Declaration of Human Rights*, Dec. 10, 1948, G.A. Res. 217A(II), U.N. Doc. A/810, reprinted in, *Basic Documents on Human Rights* (Ian Brownlie, ed., 3d ed., 1992).

33 American Convention, art. 6.

34 American Convention, art. 7.

35 See *Velásquez Rodríguez Case*, Inter.-Am. Court H.R., Series C, Decisions and Judgments, No. 4, ¶ 153 (1988), reprinted in, 28 I.L.M. 294; see also 1985 Inter.-Am. Y.B. on H.R. (Inter.-Am. Comm'n on H.R.) 368, 686, 1102.

But even if an international crime is at issue, an individual's responsibility will not be engaged absent the requisite *mens rea*. Individual responsibility will occur when the violation of the Convention by the State is manifest, such that the individual official called upon to implement the order of the State can be under no illusion that what he is being called upon to do is an international crime. Thus, for example, were a State to establish *secret* orders to torture certain suspects in order to extract information from them, the very fact that the orders were secret and those who were implementing them were instructed and understood that they were not to reveal what they were doing to anyone would confirm that both those giving the orders and those receiving and implementing them were fully aware that what they were doing was improper. In this respect, *mens rea* would be evident from the very circumstances of the case.

When a State consciously and intentionally legislates or otherwise establishes policy manifestly inconsistent with the obligations it has assumed in a convention, such that officials and functionaries of that government are ordered, under color of law, to implement those violations, the personal responsibility of those functionaries is engaged if the violations in question constitute international crimes.

V.

Holding government officials responsible in their individual capacities for human rights violations is not a mere academic or rhetorical exercise. Important practical effects flow from a conception of personal responsibility. One of the major functions of criminal law is deterrence. By clearly stating what sorts of behavior are impermissible and indicating the degree of intensity of social disapproval of that behavior by a specification of the criminal sanctions that will ensue, the community informs all of its members of the rules governing conduct. For those community members, for whom knowledge of what is right is sufficient to guide their behavior, the law provides a guideline for what is right. For those whose social conscience is less developed and for whom a mere indication of what is

right is unlikely to lead to such behavior, the unequivocal communication of the criminal sanctions that will ensue acts as a deterrent. In this respect, the development in international law of new doctrines ascribing individual responsibility for international crimes fills an important *lacuna*. As long as those inclined to order or to implement State action that constituted international crimes knew that they would enjoy impunity, the deterrent function of law, as explained above, was plainly frustrated. The development of the notion of individual responsibility for international crimes repairs that problem.

Furthermore, once a human rights violation rises to a crime against humanity, the international crime is subject to universal jurisdiction, and all states inherit a general duty to prosecute or extradite. For example, the *United Nations Resolution on War Criminals* calls upon states to "intensify their co-operation in the collection and exchange of information which will contribute to the detection, arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity."[36] Subsequent U.N. resolutions assert that states, regardless of the site of the crime, have a duty to investigate, try, and punish perpetrators, but states have the right to try their own nationals.[37]

Other international instruments explicitly provide for universal jurisdiction. The Common Provisions of the 1949 Geneva Conventions state:

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed . . . such grave

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36 *United Nations Resolution on War Criminals*, Dec. 15, 1970, U.N.G.A. Res.2538 (XXIV).

37 *United Nations Resolution on the Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, Dec. 3, 1973, U.N.G.A. Res. 3074 (XXVIII), reprinted in, 13 *I.L.M.* 230 (1974). See also, *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, art. IV, 754 U.N.T.S. 73, *reprinted in*, 8 *I.L.M.* 68 (1969).

breaches, and shall bring such persons, regardless of their nationality, before its own courts.[38]

Likewise, the Apartheid Convention asserts that State Parties which acquire jurisdiction over an individual accused of apartheid may prosecute, try and punish such an individual "whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State."[39]

On the national level, several countries have statutorily institutionalized universal jurisdiction.[40] National courts also rely upon universal jurisdiction. In the *Eichmann Case*, Israeli courts employed universal jurisdiction in prosecuting the notorious architect of Nazi war crimes.[41] In *Filártiga v. Peña Irala*, using the Alien Tort Claims Act, the U.S. courts embraced universal jurisdiction to prosecute a Paraguayan national accused of torturing another Paraguayan national.[42]

If states choose not to prosecute an individual suspected of committing an international crime, they have the coordinate duty to extradite that individual. Several human rights conventions fortify

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38 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Aug. 12, 1949, art. 49, 6 U.S.T. 3115, 3146; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, Aug. 12, 1949, art. 50, 6 U.S.T. 3219, 3250; *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, art. 129, 6 U.S.T. 3317, 3418; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Aug. 12, 1949, art. 146, 6 U.S.T. 3517, 3616.

39 *Apartheid Convention*, arts. IV & V.

40 *Alien Tort Claims Act*, 28 U.S.C. § 1350. The Australian War Crimes Amendment Act of 1988 provides for universal jurisdiction for all international crimes committed between September 1, 1939 and May 8, 1945. War Crimes Amendment Act, 1989 Aust. Acts 926 (1988). Canadian statutes provide for universal jurisdiction for all war crimes or crimes against humanity regardless of the time frame during which they were committed. 1987 Can. Stat. 1107.

41 "The jurisdiction to try crimes under international law is universal." Attorney-General of the Government of Israel v. Eichmann (Dist. Ct. Jerusalem) (1961), 36 Int'l L. Rep. 5.

42 *Filártiga v. Peña Irala*, 630 F.2d 876 (2d Cir. 1980).

this duty to extradite.[43] The U.N. Convention on Torture, by providing the legal basis for extradition, serves as a surrogate extradition treaty if none is in force.[44] Other conventions explicitly exclude the application of the political crimes exception included in most extradition treaties when the issue is the commission of an international crime.[45]

Beyond the duty to prosecute or extradite, clarifying that there is individual criminal responsibility for human rights violations that amount to international crimes renders them imprescriptible *jure gentium* and insusceptible to national statutes of limitations. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity states, "No statutory limitation shall apply to . . . [c]rimes against humanity . . . *apartheid*, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide."[46] Similar regional conventions are presently in effect.[47]

CONCLUSION

Holding individuals responsible for international crimes, notwithstanding their official status or the color of national law under

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43 See e.g., *Genocide Convention*, art. IV, Dec. 9, 1948, 78 U.N.T.S. 277; *Apartheid Convention*, arts. VI, XI, Nov. 30, 1973, U.N.G.A. Res. 3068 (XXVIII), 28 U.N. GAOR Supp. (No. 30), at 75, U.N. Doc. A/9030 (1973); *Convention Against Torture*, arts. IX, X, XI, Dec. 7, 1984, U.N. Doc. A/RES/39/46.

44 *Convention Against Torture*, art. 8(2).

45 Art. VII of the U.N. Genocide Convention states, "Genocide and the other acts enumerated in Article III shall not be considered as political crimes for the purpose of extradition." Genocide Convention, Art. VII. Likewise, Article XI of the Apartheid Convention states that the political offense exception contained in extradition treaties has no effect when dealing with the crime of apartheid. Apartheid Convention, Art. XI.

46 *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 754 U.N.T.S. 73, reprinted in, 8 *I.L.M.* 68 (1969).

47 *Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes*, E.T.S. No. 82, Jan. 25, 1974, reprinted in, 13 *I.L.M.* 540 (1974).

which they may have purported to operate, is not a new development in international law. This development can be traced clearly from the *Justice* case before the Nüremberg Tribunal, through the London Charter and the further codification of the Nüremberg Principles by the United Nations International Law Commission. It is reflected in the International Law Commission's Draft Code, in Article 19 of the Draft Convention on State Responsibility and, above all, is confirmed by the resounding rejection in contemporary international law of the defense of Superior Orders.

What is relatively new, however, is the crystallization of an international norm that now explicitly includes human rights violations among the international crimes for which individuals bear responsibility. The key question is, therefore, under what circumstances do individuals bear responsibility, in addition to the continuing responsibility of the State. The London Charter and the law of war have indicated one broad class of delicts that give rise to individual responsibility. The Genocide Convention, the Apartheid Convention, the Convention Against Torture, the ILC's Draft Code of Crimes Against the Peace and Security of Mankind, and the growing category of delicts subject to universal jurisdiction indicate the intention of the international community to ascribe individual responsibility to the most serious human rights violations. The international community's recognition of such human rights violations as crimes against humanity, triggering perpetrators' individual responsibility, will significantly fortify the deterrent effects of human rights law. Then, and only then, will prospective victims reap the benefits that law can offer.