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A CONCEPTUAL OVERVIEW**

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DEFENSES TO WAR CRIMES: A CONCEPTUAL OVERVIEW

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ABSTRACT. As international criminal law continues to grow in importance, defenses to charges of war crimes are taking on a generic standardization that covers prosecutions in national courts as well as in international tribunals. This paper briefly discusses the most important defenses and their theoretical interconnections. Substantive defenses include superior orders, command responsibility, *tu quoque*, military necessity, proportionality, and reprisals. Jurisdictional defenses applicable in national tribunals include personal jurisdiction, subject-matter jurisdiction, and double jeopardy.

As international criminal law continues to grow in importance, defenses to charges of war crimes are taking on a generic standardization that affects trials in national courts as well as in international tribunals. This paper briefly discusses the most important defenses and some of their theoretical interconnections.

In keeping with the universal character of war crimes, national tribunals from all over the world and the several international tribunals that have been established in recent years have treated each other's decisions as having precedential value. Thus there has been a co-evolution of war-crimes doctrine. Because of this welcome interfertilization, it would be misleading here to attempt to track separately the developments in national and

^{*} Leighton Professor of Law, Northwestern Law School. Lead defense counsel at The Hague for Dr. Milan Kovacevic, the first person indicted for the crime of genocide by an international tribunal.

international prosecutions for war crimes. A lawyer defending an accused person before either type of tribunal needs to become familiar with the full range of available defenses and the strategic trade-offs among them.

National tribunals permit certain jurisdictional defenses that do not arise in international prosecutions for war crimes. Hence, after a discussion of the common substantive defenses, this paper will briefly consider the particular jurisdictional defenses that may arise in national tribunals.

I. SUBSTANTIVE DEFENSES

A. Superior Orders

International law, like nearly all systems of domestic law, does not allow a “defense” of superior orders. Yet anyone who was ordered to commit an illegal act will raise such a “defense.” If he does so, his plea will be taken as an affirmative response to the indictment. A court typically will accept the plea in partial mitigation of punishment for the crime. Moreover, defense counsel should stress “superior orders” at the plea-bargaining stage prior to trial, for even though it is not a legal defense it is a psychological defense that could jeopardize the prosecution’s case.

The defendant’s plea that he was just following orders is strongest when defendants are common foot soldiers and gets progressively weaker for defendants with higher and higher rank. (Every Nazi official claimed to be following Hitler’s orders.) At

the three thousand prosecutions in Europe following the Second World War, prosecutorial discretion was exercised so that no one below the rank of sergeant was charged with committing a war crime.

Defense counsel for persons accused of war crimes should raise the plea of superior orders at the trial and not wait until the sentencing stage after trial. This advice seems to contradict the previously mentioned principle that superior orders may only be assessed in mitigation of punishment. For there is always a chance that the Tribunal might hold that that in the heat of battle, an illegal order could have overwhelmed the recipient to the extent of compromising his volition. Since the prosecutor must prove intent (*mens rea*), it remains a (remote) possibility that a superior's orders in a particularly difficult war context might be taken as disproof of criminal intent.

In the many trials in the Far East following World War II, one may read in the transcripts considerable discussion of the defendants' conduct in obeying the principles of the Empire and the Emperor and of loyalty to the generals in the field without often encountering the phrase "superior orders." What in effect happened was that counsel introduced the concept of superior orders without using the vocabulary, undoubtedly because the tribunals might have ruled such arguments out of order if they came labeled as "superior orders" arguments. This tactic clearly is an important one for the defense in any trial where superior orders could be a factor on the merits of the case.

The plea of superior orders would be far more difficult for a person accused of terrorism, due to the lack of a military command structure. A terrorist seems to be a person acting under his own volition, quite unlike a soldier in the field responding to his commander's orders. The defendant would have to convince the tribunal that he was

acting under a mental compulsion, that the “cause” he was fighting for—not himself—was the “cause” of his act. Such a defense would probably be a waste of time.

B. Command Responsibility

Command responsibility is the other side of the coin of superior orders. An accused person who committed no war crimes himself may nevertheless be held responsible for the acts of his subordinates under international law if (a) he is their military commander, (b) he knew or had reason to know that the crimes were taking place or about to take place, and (c) he was in a position to prevent or mitigate those crimes but failed to do so.

An apparent paradox arises if the concept of command responsibility is coupled with that of superior orders. Resolving this paradox will shed light on both of these concepts. Suppose A, an officer in command, orders B, a soldier, to shoot an innocent civilian. B, following the order, kills the civilian. We have seen above that if B is indicted for committing a war crime, he has no defense of superior orders. He simply should not have obeyed the order because it was an illegal order under international criminal law. Now comes the paradoxical part of the example. If A is indicted for ordering the commission of a war crime, can A defend on the ground that his order was null and void when given and hence A cannot legally be held responsible for B’s subsequent illegal act? Moreover, doesn’t the fact that B is held 100% responsible for the war crime (because B has no defense of superior orders) mean that 100% of the criminal responsibility has been used up and there is nothing left for indicting A?

Although there are other arguments and considerations that may be adduced,¹ the bottom line is that A's position is logically correct and therefore A cannot be convicted of giving the order to B to commit the war crime. However, if we look closely at the definition of command responsibility stated above, we see that A has nevertheless committed a war crime. The crime did not consist of ordering B to kill the civilian. Instead, A is held responsible since he was (a) in a position to prevent or mitigate that crime, and (b) he knew or had reason to know that under the circumstances B was likely to commit the crime—in other words, it was reasonably foreseeable that B would obey the order even if it was illegal.

Let us now consider in turn the above-stated elements of command responsibility. (a) A person must be the military commander of the subordinates whose acts constituted war crimes. A titular commander may nevertheless prove that he was not the actual commander. In the Far Eastern trial of Admiral Toyoda, although the admiral was charged with the command of 20,000 naval troops in Manila that committed atrocities against Filipino civilians, in fact it was shown that the real command lay in General Yamashita and not in Admiral Toyoda.² The admiral was acquitted. The Commission in Toyoda's case did not need to reach the issue of knowledge because it found a lack of superior responsibility.

Element (b) is the famous “knew or had reason to know.” General Yamashita—who was appointed in 1944 the supreme commander of all navy and army forces in the Philippines—was charged with knowing or having reason to know of the atrocities being

¹ For a full statement of the original paradox and additional arguments, see Anthony D'Amato, *Superior Orders vs. Command Responsibility*, 80 *American J. Int'l L.* 60(1986), <http://anthonydamato.law.northwestern.edu/Pages-papers-AJIL/superior-orders-vs-command-responsibility.pdf>

² See Major William H. Parks, *Command Responsibility for War Crimes*, 62 *Military L. Rev.* 1, 23 (1973).

committed against civilians in Manila by soldiers of the Imperial Japanese Navy. Since he allegedly did not take any direct action to stop these rampages, he was found guilty of command responsibility by the Far East Tribunal and sentenced to death.³ Although American defense counsel assigned to him worked indefatigably on his behalf, their defense theory was misconceived. They argued that there was no evidence showing that Yamashita knew or had reason to know of the murders, rapes, mutilations, and pillages of the Japanese soldiers against the Filipino citizens of Manila. The Tribunal was not persuaded on this point. It was clear that Yamashita, an Army General, was sent to Manila to restore discipline that the previous Naval commanders had failed to maintain. It is hardly credible that he had no idea of the widespread crimes against the Filipinos.

A further mistake in defense strategy concerning element (c) adversely affected Yamashita's case. The prosecution had argued that there was no evidence of orders given or steps taken by General Yamashita to prevent or punish the on-going war crimes against the civilian population. The defense tried to rebut this charge by producing testimony that General Yamashita had fired his Chief of Military Police because there were reports of abuses that the Chief failed to address. The Tribunal found this evidence to be skimpy and unimpressive. The defense team should have argued that General Yamashita in fact adopted the optimal strategy under the circumstances, which was to address the sailors' unruly behavior indirectly. As soon as he landed on the island, the General instituted a severe spit-and-polish regimen where everyone of his subordinates had to act strictly according to formal military procedure and moreover were charged with seeing that their own subordinates did likewise. This was the only way to bring

³ *In re Yamashita*, 327 U. S. 1 (1946).

order and discipline to the Japanese armed forces—from the top on down. The defense team should have argued to the Tribunal—whose judges were themselves experience military officers—that when soldiers are funning amok and committing crimes, there is no way to stop them except by enforcing a policy of strict military discipline. What Yamashita did was a necessary prerequisite to stopping the war crimes.

Yamashita’s conviction, and its affirmance by the United States Supreme Court, has created a very difficult precedent for persons accused of command responsibility for war crimes. It seems to place in jeopardy even those commanders who have tried but failed to stop subordinates from committing war crimes. The Yamashita Case has been a motivating factor among the Defense Department officials under President George W. Bush in their campaign of dissuading the United States from joining the new International Criminal Court. They have every legal reason (as distinct from moral reasons) to fear for their personal safety with a precedent like the Yamashita Case on the books.

The Yamashita precedent has also played a major role among the civilian and military leaders of Serbia, Bosnia, and Croatia in the recent three-cornered civil war in former Yugoslavia.⁴ All during the war their lawyers advised them to make a “paper record” of their orders, instructions, rulings, and directives that were related to the specific goal of outlawing war crimes, creating tribunals for those persons who committed those crimes, and overseeing their punishment. The commanders were also advised to distance themselves as much as possible from the war crimes that were being

⁴ See, e.g., Anthony D’Amato, *Peace vs. Accountability in Bosnia*, 88 Am. J. Int’l L. 500 (1994), available at <http://anthonydamato.law.northwestern.edu/Pages-papers/peace-account-bosnia.pdf> . For additional detail about the motivations of the leaders, see Andrew A. Rosen, *D’Amato’s Equilibrium: Game Theory and a Re-Evaluation of the Duty to Prosecute under International Law*, 37 N.Y.U.J. Int’l L. & Politics 79 (2004), at <http://anthonydamato.law.northwestern.edu/Pages-papers3A/Rosen-equilibrium.pdf>

committed on the ground. Hence the appearance of “paramilitary forces”—civilians who entered towns in advance of the regular army and looted, tortured, and killed the residents. These paramilitary forces were said to be acting autonomously and not under the military command of the army. Hence the generals and civilian leaders of the army could provide some evidence, if indicted, that they factually lacked control and hence should not be charged with the specific crime of command responsibility for the commission of war crimes.

Terrorist leaders, who flout all laws and are liable to be shot on sight by the police, will hardly be deterred by the rules of command responsibility. However, as an academic point, it might be worth briefly pointing out that terrorist organizations are so informally structured, if they are structured at all, that a prosecutor might be hard-pressed to prove a leader’s command responsibility. However, at a slightly lower level of proof, it would be easy to show that the leader was engaged in a criminal conspiracy and that he aided and abetted the persons in his organization who committed war crimes.

C. Tu Quoque

The claim of *tu quoque*—that nationals of the prosecuting state are not being prosecuted for similar acts—is a plea in avoidance. It is not strictly speaking a defense to the indictment, and in this sense it is like the plea of superior orders. In response to a plea of *tu quoque*, the prosecutor will argue that such a fact is extrinsic to the present trial. "Prosecutorial discretion" may account for the lack of prosecutions in the other cases, but that does not mean that the present indictment should be dismissed. The tribunal will

surely agree.

Yet a claim of unfairness made an impression on the Nuremberg Tribunal when the attorney for Admiral Karl Dönitz, responding to the charge of failing to rescue survivors from vessels he had torpedoed, stated that United States Admiral Chester Nimitz had similarly ordered his submarines not to rescue Japanese survivors in the Pacific campaign. It was victory of a sort for defense counsel inasmuch as the Tribunal, in sentencing Admiral Dönitz to ten years imprisonment, held that it excluded the charge of failing to rescue. However, many scholars believe that the ten-year sentence was itself excessive and thus may have included, despite the Tribunal's disclaimer, a sense by the judges that Dönitz was guilty of failing to rescue.

Admiral Dönitz's overworked counsel should not have invoked the *tu quoque* plea because a better plea exists on the same facts (and may often exist in similar situations): that customary international law regarding shipwrecked sailors itself changed during World War II. During World War I, and in the first two years of World War II, it was a war crime for a submarine to sink a vessel and then fail to pick up the survivors. But with the dramatic increase in air power, submarine commanders in the process of rescuing survivors were met with bombardment from the air. At that point it became suicidal for submarine commanders to remain afloat long enough to rescue enemy survivors. After a number of Admiral Dönitz's U-boats were bombed in the course of rescue operations, he called a halt to the practice.⁵ Presumably Admiral Nimitz, on the other side of the world, issued a similar order. Thus the important argument was not that

⁵ Neither Dönitz nor his counsel, nor any of the judges at the Tribunal, were aware that the frequency with which Allied planes showed up during submarine rescue missions was not due to luck. Rather, as was revealed years later, the Allies had cracked the German "Enigma" code which enabled Allied radio operators to listen in and decode all German naval messages. Thus the Allies were able to pinpoint the German rescue operations and "luckily" show up at the crucial moment when the U-boats were surfaced.

Nimitz was doing the same thing, but that the combined practice of Dönitz and Nimitz pointed to a new rule of international customary law (based on the practice of states), namely, that due to new technology the practice of rescuing survivors at sea was no longer a violation of international criminal law.

D. Military Necessity

“Military necessity” as a putative defense to war crimes is so all-encompassing that few courts will take it seriously. After all, military forces try to win wars; they do not typically issue commands that are cost-ineffective. Therefore everything they do is a matter of military necessity. They do not waste ammunition on non-military targets; they do not sink cruisers carrying tourists. To be sure, these observations are negated for terrorist organizations. They deliberately target non-combatants. Nearly everything they do is cost-ineffective from a military standpoint. But their goals are political, not military.

A war-crimes defendant need not prove strict cost-effectiveness. Considerable latitude is given to commanders in the field to judge what appeared to them at the time to have been reasonable and prudent from a military standpoint. They are not required to abstain from an act because of its brutality or its infliction of grave punishment upon the enemy if the act is justifiable from a military perspective and is not *per se* a war crime. The bombing of munitions factories is justifiable by military necessity even though many workers and their families will inevitably be killed.

The framers of Hague Convention IV of 1907 astutely omitted any mention of “military necessity” in their milestone compilation of war crimes, save for the single use

of the phrase “military necessities” in a minor provision relating to relief societies for prisoners of war.⁶ The military lawyers who hastily drafted the Charter of the Nuremberg Tribunal (1945) included at the end of the War Crimes provision: “devastation not justified by military necessity.”⁷ Perhaps the military-necessity qualification was included to cover over the so-called “strategic” bombardment of European cities by Allied air forces. The qualification was included with a little embellishment in the now definitively-regarded Rome Statute of the International Criminal Court: “Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”⁸

Some light may be thrown on the concept of military necessity by considering the Holocaust and the fire-bombing of Tokyo. German military leaders at the time regarded Hitler’s genocidal campaign as impeding the war effort, refused to help whenever they could, and withheld guns and ammunition to the civilians engaged in effectuating the Holocaust. Thus it would be impossible to claim that the Holocaust was a matter of military necessity. By the same token, it was not even a war crime, as it was external to the war and contrary to its military purpose.

The same cannot be said of General Curtis LeMay’s campaign to terrorize the Japanese people by dropping napalm bombs on the northern suburbs of Tokyo which, at the time (March 10, 1945), was one of the most congested residential areas in the world. Hundreds of thousands of homes, and all the women, children, and elderly persons in and around them, were reduced to ashes. There were no military personnel, installations, or

⁶ Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, Annex: Art. 15.

⁷ Charter of the Nurnberg International Military Tribunal, Art. 6(b), August 8, 1945.

⁸ Rome Statute of the International Criminal Court, Art. 8(2)(iv), U.N. Doc. A/conf.183/9*

munitions in the firebombed area. LeMay's justification was "military necessity"⁹: the bombing would be so wanton and ferocious that it would surely impel the Japanese government to surrender. Anything that would bring the war to an end would save countless lives and hence was clearly a military necessity.¹⁰ Yet by this "logic," the commission of any war crime—much less the biggest deliberate war crime of World War II—would be an act of terror designed to remove all hope from the victims and their families and frighten them into surrendering. Hence the very idea of "military necessity" as a war-crimes defense could neutralize every war crime. Even the limited use of the term—in the definition of devastation or destruction of property, as illustrated above—should probably be reconsidered when the Rome Statute is revised.

E. Proportionality

Both prosecution and defense will often encounter the doctrine of proportionality. Perhaps the best way to introduce that doctrine is to contrast it to military necessity. Consider a hypothetical case of a densely populated residential area containing in its midst a small military target such as an armory of a military light-vehicle facility. Bombing the area of the armory, although causing great collateral damage to civilians, might be justified under military necessity. But under the doctrine of proportionality, there would be a tighter cost/benefit analysis. The "cost" would be the civilians who

⁹ Of course, after the war, LeMay was not prosecuted; indeed, he ran for Vice President on the Independent ticket in 1968.

¹⁰ The 'psychological' justification of the fire-bombing by LeMay and his superiors seems deranged. How could they expect the Japanese people to surrender unconditionally to a nation that could contemplate and carry out such an unprecedented atrocity? The fire bombing in fact only intensified the will of the Japanese people to resist the Allies at any cost.

would be killed or wounded in the attack. If the “benefit” is slight compared to that cost, then it is possible for the prosecutor to convince the tribunal that the person who ordered the bombing committed a war crime. The analysis became much more complex during the Israeli-Lebanese War of August 2006. The Hezbollah organization in Lebanon launched many rockets against Israel during that conflict. Some Israeli spokespersons alleged that the mobile rocket launchers were often deliberately moved by the Hezbollah into densely populated centers in order to “shield” them with civilians. The Hezbollah wanted to create a dilemma for the Israeli Air Force: dropping bombs just to take out one rocket launcher might put the pilots at risk of future prosecution for war crimes in the event of extensive collateral damage to civilians. So far there have been no war-crimes prosecutions in the aftermath of that conflict.¹¹

The concept of proportionality has a special role to play in determining the legitimacy of war-time reprisals, our next topic.

F. Reprisals

Prior to 1860, reprisals played a large role in the conduct of warfare. A reprisal is an act that is illegal in itself, but becomes legal when taken in retaliation (under some constraints to be discussed below) against an illegal act by the other side. For example, if nation A arbitrarily and illegally executes 20 prisoners of war of B’s nationality, then B

¹¹ Given the many allegations and counter-allegations during the Israeli-Lebanese War, and the spotty media coverage, essential facts are still unknown that a future tribunal would need to consider. For example, were rocket launchers deliberately moved into population centers in order to shield them with human bodies? Many bombs exploded in highly populated areas in Lebanon; the Israeli pilots invariably contended that every bomb hit a military target. However, many Lebanese citizens said at the time that they would not dare allow Hezbollah to move a rocket launcher into a populated area simply because its presence would attract Israeli bombardment.

could engage in a reprisal consisting of executing 20 to perhaps 25 prisoners of A's nationality. Both sides may hope that the threat of reprisals will deter each of them from executing prisoners. Yet once the tit-for-tat reprisals begin, they might escalate to the point of killing all prisoners of war on both sides. In short, it is dangerous to attempt to protect a rule by allowing for retaliatory infringement of the same rule.

With the slow development of individual accountability for war crimes that began in the American Civil War and saw expression in the Lieber Code, the ambit of legitimate reprisals was increasingly constrained. If the threat of punishment after the war could be enough to deter violations of the laws of war during combat, then the justification for additional illegal acts by way of reprisal must erode. The Geneva Conventions of 1949, for instance, prohibit reprisals against protected persons.

Yet sometimes civilians or other protected persons are not entirely innocent. A classic example can occur when a country is occupied and a sniper kills a foot soldier in the street below. In reprisal, the occupying power selects ten civilians and executes them in the town square. There are several factors entering into the possible justification of such a reprisal. First, the sniper would not have been able to get away with it unless the citizens (for example, the occupants of the apartment building from which the sniper acted) shielded him. Second, the occupying power made a good faith effort to track down the sniper. Third, the reprisal must be proportionate. Killing a hundred civilians in reprisal for one sniper's attack would be clearly disproportionate.¹²

In the trial of Hans Albin Rautner before a national tribunal of the Netherlands

¹² When SS Obergruppenführer Reinhard Heydrich was assassinated in May 1942 by trained Czechoslovakian agents, Hitler ordered a reprisal against the French town of Lidice even though there was no connection between the town and the assassination. All 162 men and boys in Lidice were shot.

after the Second World War,¹³ Occupied Dutch citizens had engaged in acts of violence against German soldiers. German reprisals were then taken against Dutch citizens at random. The tribunal recognized that the occupying power had a right to answer violent resistance by retributive action, but found that Rautner's reprisals were taken for purposes of revenge and not as a deterrent. The conclusion was based on the fact that Rautner made no attempt to arrest the actual perpetrators of the resistance actions but rather killed hostages at random.

G. Other Defenses

The defenses that have been covered in this Chapter are those that may generally be asserted under international law when a person is accused in a national court of violating international law. They stem not from the laws of the forum state, but rather from the same source that the forum state invokes in its indictment—namely, international criminal law.

However, defense counsel must take into account other defenses that arise under the particular laws of the forum state. The above enumeration and discussion of generally available defenses under international law should not be construed as preempting or replacing or otherwise averting recourse to defenses available in any criminal action under the laws of the forum state.

¹³ 14 U.N. War Crimes Commission, War Crimes Reports 92-131 (1947).

In addition, defenses available under the general principles of criminal law are of course available in war-crimes prosecutions such as self-defense, juvenile status at the time of the act, mental disability or incompetence, or physical coercion.

II. JURISDICTIONAL DEFENSES IN NATIONAL COURTS

A. Jurisdiction over the Person

If the defendant is a national of the forum state, his jurisdictional defenses, if any, will depend on the laws of the forum state. He has no nonfrivolous jurisdictional defense under international law. However, if the defendant is a non-national, he may at least claim that the forum lacks jurisdiction over his person. He might raise a claim of immunity if he has diplomatic or consular status. However, in a decision by the International Court of Justice in 2002, it appears that customary international law will only recognize immunity against war-crimes prosecutions for heads of state or foreign ministers, and then only during their terms in office.¹⁴

Even less likely to succeed is a defendant's claim that he was forcibly abducted into the forum state in order to be prosecuted for war crimes. Indeed, such abductions could be part of a nation's policy. In 1986, United States Secretary of State George Shultz urged consideration of a policy of physical abduction of suspected terrorists from

¹⁴ Congo v. Belgium, ICJ Judgment of 14 February 2002.

Middle Eastern nations that might be giving them sanctuary. The decision of the Israeli Supreme Court in the Eichmann Case seems to have invalidated all claims of jurisdiction by abduction.

Adolf Eichmann had been living incognito in Argentina when he was tracked down by Israeli agents and forcibly put on a plane and taken to Israel for trial. The agents were clearly exercising Israeli police powers within Argentine territory and hence committing an international tort against Argentina. At the trial in Israel, the agents testified that Eichmann went voluntarily, while Israel claimed that the abductors were not agents of Israel but mere citizens who were acting on their own. Both of these claims served to blunt the charge that Israel had violated Argentina's sovereignty. Nevertheless, the claims were not credible to the world community. The Security Council of the United Nations passed a resolution requesting Israel to "make appropriate reparation" to Argentina.¹⁵ Inasmuch as international law governs relations among nations, Eichmann himself was just a pawn in the game. Israel itself had committed a tort against Argentina for which appropriate reparation must be paid. As for Eichmann, his personal presence whether in Argentina or Israel was a matter of international indifference.

Although international law at present does not allow an abducted defendant to object to a court's jurisdiction over his person, international law is moving in the direction of recognizing individuals as well as states as subjects of the law. Indeed, international criminal law itself recognizes rights both of victim and accused. Accordingly there should be some room for a defendant to object to his physical abduction. The basis for the claim would be the right of all citizens to be secure in their private lives from physical abduction by the agents of foreign powers. Suppose, for

¹⁵ S.C. Res. June 23, 1960, U.N. Doc. S/4349.

example, that a blameless person were kidnapped in the United States and taken to a foreign country where he was charged with being the great-grandson of a long deceased political opponent of the regime, and that guilt devolved upon him through his blood line. Although the indictment may be absurd, it would be life-threatening to the accused person. Surely cases can be imagined which would argue for giving an individual standing to object to the assertion by a foreign court of jurisdiction over his person when he was physically abducted by agents of the foreign power. Ironically, the increasing consideration internationally of trials in absentia might operate to secure the privacy rights of the accused person. If appropriate procedures are worked out for war crimes trials in absentia, accused persons may maintain their private residences (perhaps in hiding), while working through their designated attorneys at trial. Trials in absentia would expedite international criminal prosecutions against persons who are now in hiding. If the tribunal finds them guilty, then and only then will they be subject to arrest either by international or national police officers. If the accused person dislikes this procedure, it is of course open to him to appear voluntarily at trial.

One final argument regarding jurisdiction over the person should be mentioned even though it is perhaps only a historical curiosity. Eichmann's attorney argued that the forum state itself was not in existence at the time of Eichmann's alleged crimes, and hence Israeli courts could not have jurisdiction over him. In response, the court held that Eichmann's crimes were against the Jewish people as a whole, and therefore jurisdiction existed because the state of Israel was established in part to vindicate the rights of the Jewish people. The court's reasoning amounted to special pleading. The same result could have been reached under customary international law: that crimes against humanity

are subject to universal jurisdiction. War crimes and crimes against humanity are crimes against all nations. Thus, under this broader rationale, Eichmann was properly convicted for his crimes against humanity, including of course his crimes against Jews. The Israeli court's judgment made it appear that the court was seeking revenge; the broader rationale would indicate that the court was simply applying international law in what in 1960 would have been an innovative way.

B. Jurisdiction Over the Subject Matter

A person accused of war crimes or crimes against humanity committed abroad might claim that he did not violate the law of the forum state and hence the court lacks subject-matter jurisdiction over him. Such a claim will probably fail for any of three reasons. First, there is the above-mentioned rule of universal jurisdiction which a court might invoke as the controlling test of subject-matter jurisdiction.¹⁶ Second, the forum state may have incorporated in its Constitution the international rules prohibiting war crimes and crimes against humanity.¹⁷ Third, the forum state may have statutes that parallel in wording the international rules prohibiting war crimes and crimes against humanity.¹⁸

If the only legal basis for a nation's prosecution is "universal jurisdiction," a defendant will surely try to argue the general prohibition against *ex post facto* criminality—that he cannot be prosecuted for an act which was not a crime within the court's jurisdiction when he committed it. The idea of *ex post facto* or retroactive

¹⁶ See the leading case of *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980) (allegation of torture).

¹⁷ For example, Article 25 of the Constitution of the Federal Republic of Germany.

¹⁸ For example, the United States of America.

criminality is generally expressed in international criminal law as the prohibition of *nullen crimen sine lege*—the conduct must be a crime at the time it takes place. However, it is expressed, the argument has more emotional force if the crime itself is a new one, as was arguably the case for “crimes against humanity,” the fourth count alleged at the Nuremberg Tribunal following the Second World War. Of the twenty-two major Nazi war criminals tried at Nuremberg, two (Streicher and von Schirach) were convicted solely on the basis of the fourth count, and although their crimes arguably could be subsumed under an aggravated war crimes charge,¹⁹ the *ex post facto* argument was rejected by the tribunal. There were sixteen convictions under the fourth count in total, and the general response of international publicists since 1947 has been to accept the appropriateness of the “crimes against humanity” or “genocide” category.²⁰ Perhaps the most substantial basis for that acceptance is the theory that genocide was always clearly criminal in fact, and when international law finally recognized it as a crime at Nuremberg in name and in theory, that recognition was not *ex post facto*. The defendants at Nuremberg could hardly claim that they did not know what they did was wrong; rather they could only claim that they did not know a court would punish them for it. Thus, even if we concede that in this regard the defendants were taken by surprise, their surprise was *that* they were being punished and not *whether* they deserved being punished.

Nevertheless there is always a possibility that a newly defined crime might unfairly be applied in a case where a defendant had no reason to know that it would be

¹⁹ For an elaboration of this argument, see Anthony D'Amato et al., *War Crimes and Vietnam: The "Nuremberg Defense" and the Military Service Resister*, 57 Calif. L. Rev. 1055, 1062-63 (1969), reprinted in *The Vietnam War and International Law: The Widening Context* 407 (R.A. Falk, ed., 1972), and available at <http://anthonydamato.law.northwestern.edu/Pages-papers2/war-crimes-vietnam-nuremberg-defense.pdf>

²⁰ See M. Cherif Bassiouni, *International Law and the Holocaust*, 9 Calif. W. Int'l L. 201, 221-22 (1979).

deemed a crime. One should not dismiss all *ex post facto* objections as frivolous, because a case could arise where it is indeed a meaningful defense. In such a case, the defendant ought to argue that the same international law that defines the crime contains within it the principle of justice prohibiting the truly retroactive application of criminal laws, and that such a principle of the just law of nations should operate to bar the assertion of subject-matter jurisdiction.

C. New Problems of Double Jeopardy

Uncharted waters lie ahead in international criminal law if a defendant pleads that he has already been tried for war crimes or crimes against humanity and hence cannot be tried again for the same crimes. However, there is no rule of international customary law prohibiting double jeopardy.

What if a defendant is acquitted in T-1 (the first trial) and then is convicted in T-2 which takes place in another country? What if he is convicted in both T-1 and T-2, but the sentence in T-2 is more harsh? What if trial T-1 takes place in absentia whereas the defendant is present in T-2? What if a defendant is convicted in T-1 while personally present, and then acquitted in T-2 in absentia? What if T-1 or T-2 is an international tribunal and the other a national tribunal—will the international tribunal's decision control the result irrespective of whether it is the first court or the second court to try the defendant?

Although customary international law will not help the defendant in double-jeopardy prosecutions, there may be room for the defendant to argue that double jeopardy

is barred by “general principles of international law.” These general principles are not the same as custom; they are a tertiary source of international law after custom and treaties.²¹ They have only been applied rarely in international cases, but nearly all applications have been with respect to jurisdictional or procedural matters. In the Erdemovic Case, the International Criminal Tribunal for Former Yugoslavia, sitting in The Hague, reversed a conviction below on the ground that the accused person’s guilty plea was not a fully informed plea.²² Although the rules of the Tribunal were silent on this point, the Appellate Division found as an empirical matter that most states require an informed plea in their domestic criminal prosecutions. This general procedure, then, was “lifted out” of domestic law and applied to the International Criminal Tribunal by virtue of “general principles of international law.” Accordingly, a defendant facing double jeopardy would be well advised to survey the constitutions and statutes of the nations of the world to see if there is a large majority of states that prohibit placing a defendant in legal jeopardy twice for the same crime.

Under Article 20 of the Rome Statute of the International Criminal Court, an acquitted person may not be tried for the same crime unless the previous trial can be shown to have been a sham.

²¹ See Art. 38, Statute of the International Court of Justice.

²² Erdemovic Case, International Tribunal for Former Yugoslavia, No. IT-96-22-A, 7 Oct. 1997.

CONCLUSION

Looking forward, the most important developments in the area of defenses to war crimes will probably arise from either new technology or problems connected with terrorism. However the past 150 years have also seen dramatic changes in military technology and well as new threats posed by irregular or guerrilla warfare. Yet war-crimes doctrine, although continuously refined, did not undergo any fundamental change. This relative lack of doctrinal change is beneficial in light of the purpose of the international law of war crimes, which is to deter those crimes. The clearer and more stable the doctrine, the higher its deterrent value.