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INTERNATIONAL WAR CRIMES PROJECT

MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR

ISSUE 3: THE *TU QUOQUE* DEFENSE

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I. Introduction and Summary of Conclusions

A. Issues[1]

i. The Admissibility of *Tu Quoque* as a Defense

This memorandum addresses the legitimacy of *tu quoque* as a defense against the charges of crimes against humanity, genocide, or war crimes in proceedings before the International Criminal Tribunal for Rwanda (hereon referred to as "ICTR").[2] Aspects considered include the historical basis, theoretical background, nature and scope of the *tu quoque* defense in international law.

To complete the task of analyzing this defense, this memorandum reviews the use of *tu quoque* as a defense throughout history. The case law that this memorandum considers is restricted to that of international criminal proceedings, beginning with pre-Nuremberg proceedings and continuing through to the issues raised in *Prosecutor v. Kupreskic*.[3]

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[1] Issue 3 presented by the office of the prosecutor: Advice on the historical basis, nature and scope of the *Tu Quoque* defense at international law. Specifically, analyze and address the issues raised in Prosecutor v. Kupreskic, IT-95-16-T, Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*, Judicial Supplement 2, February 17, 1999.

[2] SCOR Res. 955, U.N. SCOR (8 Nov. 1994) [herein after "ICTR Statute"]. The International Criminal Tribunal of Rwanda Statute states that these are crimes under which the ICTR has jurisdiction. The ICTR Statutes gave the ICTR jurisdiction over genocide, crimes against humanity, and violations of Article 3 common to the Geneva Conventions of August 12, 1949 for the protection of war victims, and of Additional Protocol II thereto of June 8, 1977, committed in the territory of Rwanda, and over Rwandan citizens responsible for such violations committed in the territory of neighboring states, between January 1 and December 31, 1994. During this period, members of the Hutu ethnic group attacked and massacred members of the Tutsi ethnic group and Hutu sympathizers. *Id*. [Reproduced in the accompanying notebook at Tab 1].

[3] Prosecutor v. Kupreskic, NO. IT-95-16-T, ICTY T. Ch., Decision on Evidence of the Good Character of the Accused and the Defense of *Tu Quoque*, Judicial Supplement 2, February 17, 1999 [hereinafter "*Kupreskic*"] (see relevant section below concerning the case). Judgments and other documents pertaining to the cases of the International Criminal Tribunal for the Former Yugoslavia (ICTY) are available online at <http:// www.un.org/icty/ind-e.htm>. [Reproduced in the accompanying notebook at Tab 12].

ii. The Admissibility of *Tu Quoque* as a Mitigating Factor

This memorandum also considers whether, if not a defense, the *tu quoque* principle should be a mitigating factor considered at the time of punishment to lessen the sentences of the defendants. Throughout the history of international criminal proceedings, a few defenses have been used to mitigate the punishment of the defendant while not completely justifying their actions. If the defendants at the ICTR chose to raise the principle of *tu quoque* in connection to the events occurring in Rwanda, the ICTR will have to determine whether to ignore this defense entirely or whether to allow it to lessen some of the defendants' criminal culpability.

B. Summary of Conclusions

i. The Tribunal's Statute Gives Little Guidance on the Admissibility of the *Tu Quoque* Defense; The ICTR Must Consult Case Law

International statutory law does not offer much guidance regarding the admissibility of the *tu quoque* defense under international law.[4] As a result, the ICTR needs to look to jurisprudence from other international criminal courts. Unfortunately, only a few previous courts have addressed the admissibility of *tu quoque* as a defense. Cases from the Nuremberg Tribunal and the International Criminal Tribunal for the former Yugoslavia (hereon in referred to as "ICTY") will prove the most useful in helping the ICTR examine this issue, but the ICTR must also make allowances for the difference in time and circumstances. The ICTR must look to jurisprudence from other international

[4] *See* ICTR Statute, *supra* note 1. [Reproduced in the accompanying notebook at Tab 1].

criminal trials, but must examine those decisions in the light of the customary law of the day.

ii. <u>**In General, Current International Law Created from International Jurisprudence have not found *Tu Quoque* to be a Valid Defense or a Mitigating Factor when Determining the Punishment for International Criminal Offenses**</u>

Although very few cases have dealt with the defense of *tu quoque*, it appears from that limited case law and the ideals upon which international law is based that *tu quoque* is an inadmissible defense against the type of crimes prosecuted against at the ICTR. The only time that *tu quoque* might arguably have been a successful defense in an international tribunal occurred in the case of Admiral General Karl Donitz.[5] However, even if this case could be judged as having allowed a *tu quoque* defense, international law has developed and evolved since its infancy during the 1940s' Nuremberg Tribunal. The decision by the ICTY in *Kupreskic* unequivocally states that *tu quoque* does not constitute a defense against international crimes. *Kupreskic*'s conclusion concerning *tu quoque* is consistent with the greater goals promoted through universal humanitarian law. International humanitarian law strives to help establish and maintain a peaceful world without mass violence. Excusing the wrongdoing or lessening the punishment for a crime of the magnitude dealt with in the ICTR due to another committing the same wrongdoing hinders this progression towards peace.[6] Instead of excusing an offense due to a *tu quoque*

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[5] *See* ROBERT K. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW 188 -189 (1962) (evaluating the legal basis of the International Military Tribunal in Nuremberg, whether individual liability existed for the crimes listed in the Nuremberg Charter, and the legal basis for the declarations on criminal organizations). [Reproduced in the accompanying notebook at Tab 34].

[6] *See* David Weissbrodt, *An Introduction to the Sources of International Human Rights Law*, C399 ALI-ABA 1, Address at the University of Minnesota Law School ABA presentation,

argument, the ICTR should investigate and possibly prosecute any and all perpetrators of crimes under its jurisdiction. This investigation should result regardless of whether this perpetrator is the current defendant or a new defendant acting in a similar manner.

II. Factual and Theoretical Background

A. Definition of *Tu Quoque*

Tu quoque literally means "thou also."[7] The defense of *tu quoque* refers to the argumentation where one party judges the actions of a second party to which the second party replies: "You cannot fairly criticize me on that basis, for you are just as bad. You are doing the same thing yourself."[8] In a *tu quoque* defense, the accused attempts to justify their actions by pointing to the fact that the state being inflicted with harm or the state making the accusation of wrongdoing is behaving in the same (possibly illegal) way as the accused state and its responsible leaders.[9]

November 10, 1989 (addressing the basis background to and development of international humanitarian law). [Reproduced in the accompanying notebook at Tab 45].

[7] H. Wayne Elliot, *Hostages of Prisoners of War: War Crimes at Dinner*, 149 MIL. L. REV. 241, 267 (1995) (discussing the *tu quoque* principle in relation to what should be done about the seizing of United Nations personnel and holding them as hostages in Bosnia). [Reproduced in the accompanying notebook at Tab 37].

[8] DOUGLAS WALTON, THE PLACE OF EMOTION IN ARGUMENT 212 (The PA State Univ. Press, 1992) (comparing and contrasting the *tu quoque* argument with that of an *ad hominem* argument). [Reproduced in the accompanying notebook at Tab 32].

[9] *See* WAR CRIMES IN INTERNATIONAL LAW 269 (Yoram Dinstein & Mala Tabory, ed., Martinus Nijhoff Publishers, 1996) (discussing a variety of issues raised on a Colloquium held at Tel-Aviv University concerning how the world has dealt with war crimes thus far and where the future of these issues may take the world). [Reproduced in the accompanying notebook at Tab 17].

Tu quoque is a retributive argument which roots as far back as the Old Testament's "an eye for an eye, and a tooth for a tooth" contention.[10] However, the *tu quoque* defense differs from the biblical retribution. In the biblical context, justice is to be taken against the inflictor of the original harm. In *tu quoque*, an innocent third party, completely separate and distinct from the offender of the original violation, may be the one inflicted by the offense and harm.[11]

The toleration of a defense of *tu quoque* in international law results in the justification of a party's violation of law. Under the rational *of tu quoque*, one state's violation of international law would result in an "allowable" reciprocal violation by another state.[12] Once one state had violated a law dictated by international law, the other state would be excused from following such a regulation as well and would not be judged according to that regulation of international law.[13] This "allowable" violation would not need to qualify as a reprisal, as explained below. The reasoning behind a *tu quoque* defense results in a situation where neither state would view its actions to be bound by the

[10] *Exodus* 21-24.

[11] *See* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 460-461 (Martinus Nijhoff Publishers, 1992) (examination of the history and evolution of 'crimes against humanity' during post World War II prosecutions in order to establish the legal validity of 'crimes against humanity.' Within this context, the author remarks on the *tu quoque* defense and, in particular, on its relation to the defense of reprisal and on the non-applicability of both defenses to 'crimes against humanity.'). [Reproduced in the accompanying notebook at Tab 16].

[12] *See* Covey Oliver, *German and Swiss Cases*, 57 AM. J. INT'L L. 139, 140 (1963) (analyzing a case where the accused, a former officer in the German Army, participated in the shooting of Russian slave laborers in 1945 and was convicted of murder and sentenced to life imprisonment. The author summarized that there exists no general principle of retaliation in international war for the accused to excuse his actions and the principle of *tu quoque* was generally rejected throughout the Nuremberg trials of war criminals.). [Reproduced in the accompanying notebook at Tab 41].

[13] *See* A. VON KNIERIEM, THE NUREMBERG TRIALS 313 (1959) (examining the relation of reprisals and the defense of *tu quoque* in the context of being a special concern in international law and international criminal court proceedings). [Reproduced in the accompanying notebook at Tab 31].

regulations of international law. This suspension of international law would continue until the situation had escalated to some breaking point, most likely war, or if occurring during war, mass atrocity.[14]

B. Theoretical Background and Similar Defenses: Reciprocity and Reprisal

The defense of *tu quoque* may be seen as deriving from the broader theory of reciprocity. No agreement, statute, or treaty sets out a precise meaning of reciprocity, but Black's Law Dictionary defines it as "mutuality; …relations existing between two states when each of them gives…the other certain privileges, on condition that [it]…shall enjoy similar privileges at the hands of the latter state."[15] Generally, reciprocity involves acting in the same way that another has already acted.[16] Borrowing Robert Axelrod's expression, reciprocity is a "tit-for-tat strategy."[17] This type of strategy creates an incentive to honor agreements even when no established authority exists for enforcement through governing bodies.[18] However, the reciprocity theory, which creates a mutual relationship established

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[14] *Id*.

[15] BLACK'S LAW DICTIONARY 879 (6th ed. 1991). [Reproduced in the accompanying notebook at Tab 47].

[16] ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984) (examining reciprocity in an economic context and demonstrating the advantage of a cooperative strategy with people choosing to have repeated interactions over the strategy commonly studied in the Prisoner's Dilemma situation). [Reproduced in the accompanying notebook at Tab 15].

[17] *Id*.

[18] *See* Francesco Parisi & Nita Ghei, *The Role of Reciprocity in International Law*, CORNELL INT'L L. J., forthcoming 2002. Can also be found at <http:// papers.ssrn.com.> (examining both the definitions for different forms of reciprocity found in international law and the characteristics of specific types of interaction between countries during game theory strategies and the relationship between these two theories. The authors conclude that despite the occasional failure, reciprocity is "important enough to be considered a meta-rule of the system of international law – an essential element in its functioning."). [Reproduced in the accompanying notebook at Tab 42].

for the benefit of each state, can also escalate to the negating of an agreement. When a state feels the other state in the reciprocal relationship has broken their agreement, the latter state also may break that agreement. Without the upholding of agreements, reciprocity theory quickly leads to acts of retaliation.

International humanitarian law has already greatly departed from relying on reciprocity, which may be seen by reviewing both the obsolete *si omnes* clause and the question of belligerent reprisals.[19] In early law of war treaties, the *si omnes* clause provided that if one party to a conflict was not party to the instrument, it would not apply to the relations between all parties to the conflict.[20] This *si omnes* clause, originating in the 1907 Hague Convention, threatened the validity of the prosecutions at Nuremberg. At Nuremberg, the defense raised the argument that since several of the belligerent states were not parties to the Convention, this participation clause excluded application of the Convention.[21] The International Military Tribunal responded that although the Convention did create new law at the time of its inception, "by 1939 these rules laid down in the

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[19] *See* BASSIOUNI, *supra* note 11, at 449 – 460. [Reproduced in the accompanying notebook at Tab 16].

[20] *See, e.g.*, Convention [No. IV] on the Laws and Customs of War on Land, with annex of regulations, Oct. 18, 1907, art. 2 (stating "the provisions contained in the regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.") (herein after referred to as the "Hague Convention"). [Reproduced in the accompanying notebook at Tab 2].

[21] *See* Quincy Wright, *Legal Aspects of the U-2 Incident*, 54 AM. J. INT'L L. 836, 850 (1960) (focusing on the incident of an United States' U-2 plan flying into the territory of the Soviet Union in 1960 and the legality of how both nations handled the incident under international criminal law, especially looking at past international events that helped develop such international law). [Reproduced in the accompanying notebook at Tab 46].

Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war."[22]

This participation requirement was explicitly reversed in the Geneva Convention of 1949. This Convention applies its regulations to all parties involved in a conflict.[23] In Article 1, the Convention provides that "[t]he High Contracting Parties undertake and respect and ensure respect for the present Convention in all circumstances,"[24] rejecting the theory of reciprocity and insisting on the automatic application of the Conventions. Additionally, Article 2(3) of the 1949 Geneva Convention dictates that even if a party involved in the conflict is not a party to the Convention, "belligerents shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provision thereof."[25] This established that even if a party accepts the Convention only for the specific conflict, the Convention is still binding. These articles have since been held as declaratory of customary law.[26]

Reprisals are the form of reciprocal behavior that occurs most frequently in international incidents. *Tu quoque* is similar to the frequently cited retributive action of

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[22] Trial of German Major War Criminals, 1946, Cmd. 6964, Misc. No. 12 at 65, *quoted in* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 39 (1989). [Reproduced in the accompanying notebook at Tab 23].

[23] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949 (herein referred to as the "Geneva Convention"). [Reproduced in the accompanying notebook at Tab 6].

[24] *Id*.

[25] *Id*.

[26] *See* DR. LYAL S. SUNGA, INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS 17 – 20 (Martinus Nijhoff Publishers, 1991) (examining the evolution of customary law as it impacts war crime proceedings of individuals). [Reproduced in the accompanying notebook at Tab 30].

reprisal in that both depend on a violation of international law. However, the "difference lies in the fact that the principle of *tu quoque* is invoked not for the purpose of inducing the enemy to desist from its unlawful conduct," as reprisal is, "but as an estoppel against the enemy's subsequent attempt to call into question the lawfulness of the same kind of conduct of the other side."[27] According to the *Naulilaa* Case:

> A reprisal is an act of self-help by the injured State, responding – after an unsatisfied demand – to an act contrary to international law committed by the offending State. It has the effect of suspending momentarily, in relation to the States, the observance of the rule of international law in question. It is limited by common human experiences and the rule of good faith, applicable in the relations between the two States. It would be illegal in the absence of a prior act contrary to international law justifying it. Its object is to effect reparation from the offending State for the offense or a return to legality by the avoidance of further offenses.[28]

As prescribed in the *Naulilaa* case, actions qualifying as legal reprisals were restricted by certain limitations. First, a reprisal must be an act of redress taken by a state against another state's delinquency.[29] Second, the reprisal could only occur after an "unsatisfied demand" was made to the delinquent state to act in compliance with international law. Third, the state acting under the right of reprisal needed to ensure it acted in a proportional and reasonable way to the offense inflicted upon it. If these controls on the acting state

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[27] KNIERIEM, *supra* note 13, at 312. [Reproduced in the accompanying notebook at Tab 31].

[28] Naulilaa Case (Port v. Germ.) 2 R. Int'l Arb. Awards 1012 (1928) *quoted in* LESTER B. ORFIELD & EDWARD D. RE, CASES AND MATERIALS ON INTERNATIONAL LAW 909 (Bobbs- Merrill Comp., Inc., 1969) (giving examples of hostile measures that fall short of declaring war in this overall review of the theories and development of international law). [Reproduced in the accompanying notebook at Tab 25].

[29] *See id*.

were met, a state could claim that its otherwise unlawful actions were taken as a reprisal and that state would incur no responsibility for such actions.[30]

International law still recognizes reprisal action of one state against another law breaking state, but the domain of legitimate reprisals has decreased greatly over the course of the twentieth century. The 1929 POW Convention prohibited reprisals against prisoners of war.[31] The 1949 Geneva Convention prohibited reprisals against all persons, installations, or property protected by its provisions.[32] These provisions included the wounded, the sick, and shipwrecked, medical personnel and objects, prisoners of war, and civilian populations in an occupied territory.[33] In 1977, the Additional Protocol I to the Geneva Conventions, Relating to the Protection of Victims of International Armed Conflicts, prohibited reprisals against the entire civilian population, individual civilians and civilian objects.[34] Thus, modern treaties have reduced legitimate reprisals to those against armed forces.

Reprisals against armed forces are accepted as long as they are implemented to force "the adversary to conduct himself according to international law."[35] The two most

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[30] *Id*.

[31] Convention Relative to the Treatment of Prisoners of War, July 27, 1929, art. 82, 47 Stat. 2021, 118 LNTS 303 (hereon in referred to as "POW Convention"). [Reproduced in the accompanying notebook at Tab 3].

[32] Geneva Convention, *supra* note 23. [Reproduced in the accompanying notebook at Tab 6].

[33] *Id*.

[34] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature Dec. 12, 1977, 1125 U.N.T.S. 3-608 (1979), *reprinted in* 16 I.L.M. 1391 (1978) (herein after referred to as "Additional Protocol I"). [Reproduced in the accompanying notebook at Tab 7].

[35] WAR CRIMES IN INTERNATIONAL LAW, *supra* note 9, at 268. [Reproduced in the accompanying notebook at Tab 17].

important aspects of carrying out a reprisal are 1) the state's instigation to act came from another state's unlawful action and 2) the reprisal classifies as proportional reasonable response.[36] Homicide may even be considered a proportional response. In a present day example, many would consider the actions of the United States against Al Quida to be a proportional response to the death and destruction of the September 11th attack on America. In contrast, this required proportionality did not exist in the *Einsatzgruppen-Fall* incident, a supposed reprisal action where the Nazis sent 859 of 2,100 Jews to death for the murder of 21 German soldiers.[37]

International law has attempted to limit what constitutes a legitimate reprisal in order to avoid a situation of an "endless chain of reprisals [where] the entire law of warfare would be subverted."[38] International criminal law developed as a result of worldwide death and destruction. The international community's well-known cry of "Never Again" after the extermination of six million Jews during the Holocaust gave the impetus to institutionalize international law.[39] The hope was that Nuremberg would create a legacy of judicial response to atrocities so potential perpetrators of war crimes would realize the world would no longer sit ideally by and allow people to suffer.[40] Aggressive and sometimes violent acts classified as reprisals do not support the realization of this goal.

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[36] BASSIOUNI, *supra* note 11, at 448. [Reproduced in the accompanying notebook at Tab 16].

[37] *See* WAR CRIMES IN INTERNATIONAL LAW, *supra* note 9, at 268. [Reproduced in the accompanying notebook at Tab 17].

[38] KNIERIEM, *supra* note 13, at 310. [Reproduced in the accompanying notebook at Tab 31].

[39] *See* MICHAEL P. SCHARF, BALKAN JUSTICE xiii (Carolian Academic Press, 1997) (examining the implementation of international criminal law through the *Tadic Case*, the first case at the ICTY). [Reproduced in the accompanying notebook at Tab 28].

[40] *Id*.

The U.S. Chief Prosecutor at Nuremberg, Justice Jackson, explains the narrowing of legitimate reprisals in that, "a deliberate violation of international law cannot be shielded as a reprisal. Specific acts must be reprisals for specific acts under the [limitations] I have pointed out. You cannot vindicate a reign of terror under the doctrine of reprisals."[41]

III. Legal Discussion

A. Statutory Regulation of the *Tu Quoque* Defense

International statutory law does not offer much guidance regarding the admissibility of the *tu quoque* defense under international law.[42] Neither the Rwanda Tribunal Statute nor the Yugoslavia Tribunal Statute addresses the question of defenses to international war crimes. As a result, the Rwanda Tribunal will have to decide whether this defense, as well as defenses such as coercion, lack of moral choice, mental incapacity or minimum age requirements, may be raised by a defendant after consulting general principles of law.[43]

Due to the lack of unequivocal evidence concerning whether the *tu quoque* defense is admissible, the jurisprudence of previous war crimes trials may provide some guidance as to the validity of a defendant raising a *tu quoque* argument as a defense to war crimes.

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[41] Justice Jackson *quoted in* KNIERIEM, *supra* note 13, at 311. [Reproduced in the accompanying notebook at Tab 31].

[42] *See* VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 272 (Transnational Publishers, Inc. 1998)(explaining the permissibility of raising certain defenses in the ICTY and the ICTR as dictated through statutes and general principles of international law). [Reproduced in the accompanying notebook at Tab 24].

[43] *Id*. at 275. (The authors quote statements made by the Secretary-General's report that "the International Tribunal itself will have to decide on various personal defenses which may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon general principles of law recognized by all nations.").

The issue of precedents (*stare decisis*) for international criminal tribunals was discussed by the ICTY in *Prosecutor v. Aleksovski*.[44] The court concluded that in the administration of criminal law, the court would depend on previous decisions, except with circumspection, as to assure that certainty and predictability in criminal law can be ensured.[45] However, "international tribunals are not bound by past doctrines; they must apply customary international law as it stands at the time of the commission of offenses."[46] For example, in *Tadic*, the court determined that it must analyze the offense of crimes against humanity as it existed when the crime was committed and not necessarily refer to the definition of crimes against humanity as created by the Nuremberg Trials.[47] Therefore, the ICTR may and should look to jurisprudence from other international criminal trials, but must examine those decisions in the light of the customary law of the day.

In particular circumstances, a handful of courts have rejected a defense, but still accepted the claim as an allowable mitigating circumstance.[48] One example of such a situation occurred when a defendant claims that his act, while illegal under international law, was legal under state law. The United Nations War Crimes Commission stated that, "[T]he general attitude taken by the courts and by the war crimes legislation of various

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[44] NO. IT – 95 - 14/1-T, ICTY App. Ch., Judgment, Mar. 24, 2000. [Reproduced in the accompanying notebook at Tab 11].

[45] *Id*. at paras, 89-115.

[46] KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 50 (Oxford Univ. Press, 2001) (analyzing international criminal law in light of the latest developments, including the jurisprudence of the ICTY and the ICTR and determining the application of precedent in the context of international criminal law). [Reproduced in the accompanying notebook at Tab 19].

[47] NO. IT – 94 – 1, ICTY T. Ch., Judgment, Oct. 2, 1995. [Reproduced in the accompanying notebook at Tab 13].

[48] *See* MORRIS & SCHARF, *supra* note 42, at 280. [Reproduced in the accompanying notebook at Tab 24].

countries to this plea has been…[that] the plea does not constitute a complete defense to a charge but may be admitted as a circumstance justifying mitigation of sentence."[49] If *tu quoque* is inadmissible as a defense, the ICTR must decide whether to rely on previous precedent allowing some defenses to be mitigating factors and follow suit by allowing *tu quoque* to serve as a mitigating factor in the punishment for crimes in Rwanda.

B. Scope of the *Tu Quoque* Defense: A Historical Analysis

i. Application: Pre- World War II

As discussed above in regards to reprisals, the defense of *tu quoque* qualified as a justification for the actions of states that went against international agreements prior to World War II. Since the Nuremberg Tribunal was the first time the states of the world created an ad hoc international criminal tribunal set up to prosecute international criminals, there exists very little case law on which to rely on and interpret the admissibility of the defense of *tu quoque* prior to Nuremberg. However, the admissibility of this defense can be deducted from the wide acceptance of the very similar action of reprisal prior to Nuremberg and from the justifications of certain actions throughout history that seem to rely on *tu quoque* arguments.[50] An example from the First World War came when Great Britain justified its use of poison gas against Germany by stating that Germany had done the same. Great Britain did not expect Germany to stop its use of such gas, but instead used this rational as a justification of its actions after the fact so as to avoid judgment.[51]

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[49] *Id*.

[50] *See* BASSIOUNI, *supra* note 11, at 449 – 454. [Reproduced in the accompanying notebook at Tab 16].

[51] *See* KNIERIEM, *supra* note 13, at 313. [Reproduced in the accompanying notebook at Tab 31].

ii. <u>The Defense of *Tu Quoque* in Relation to the Tribunals at Nuremberg and Tokyo</u>

a. <u>Application at the Nuremberg and Tokyo Tribunals</u>

In general, neither the International Military Tribunal at Nuremberg nor at Tokyo welcomed a defendant claiming a defense of *tu quoque*. In fact, the Nuremberg Tribunal never actually directly alluded to this defense at all and Tokyo's proceedings disallowed it entirely.[52] In all of the proceedings before the Nuremberg Tribunal, only on one occasion did the defense of *tu quoque* possibly receive a positive result for the defendant. This one occasion was in the case of Grand Admiral Karl Donitz, Commander-in-Chief of the German Navy from 1943 and succeeding to the position of Head of State from Hitler in 1945.[53] Since the time of these two Tribunals, history has judged the legality of the Tribunals and their ability to be objective in an extremely skeptical and harsh manner.[54] The Tribunals' disallowing of the *tu quoque* defense continues to be one of the main criticisms of the Tribunal.

One of the greatest pieces of evidence that continually receives a spotlight when critics make the argument that Nuremberg implemented victor's justice comes from the conviction of Admiral Karl Donitz. Donitz was convicted of waging aggressive war and

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[52] *See* KITTICHAISAREE, *supra* note 46, at 272. [Reproduced in the accompanying notebook at Tab 19].

[53] *See* WERNER MASER, NUREMBERG: A NATION ON TRIAL 153 (Richard Barry, trans., 1980) (analyzing the Nuremberg Trial in connection to how judgment was carried out and considering the position that Nuremberg holds in history today). [Reproduced in the accompanying notebook at Tab 22].

[54] *See* Jonathan Turley, *Transformative Justice and the Ethos of Nuremberg*, 33 LOY. L.A. L. REV 655, 669 671 (2000) (regarding the Trial at Nuremberg in respects to how the critics judge its legality and what lasting impact the tribunal continues to have today). [Reproduced in the accompanying notebook at Tab 43].

war crimes and received ten years in prison for these crimes. The portion of the Tribunal's judgment dealing with Donitz has been described as "long, disjointed and not very consistent,"[55] which is attributed to the fact that Judge Biddle, the American judge who favored completely acquitting Donitz, partly due to Donitz's use of a *tu quoque* defense, wrote this portion of the judgment.[56]

During World War II, regulations of how to conduct warfare at sea were prescribed by the London Protocol. The London Protocol of 1930 specifies that before attacking a merchant vessel, a submarine must assure that the passengers, crew, and ship's papers are secured in a safe site.[57] This standard cannot be satisfied by allowing the crew of the attacked vessel to simply be placed in lifeboats, unless the attack occurs at a point near land or another vessel that is in a position to take the sailors on board.[58]

At Nuremberg, Donitz was charged with ordering the waging of unrestricted submarine warfare as against the regulations set down by the London Protocol. The prosecution argued that German U-Boats failed to follow the requirements of warning merchant ships of an impending attack. Donitz's instituting of "operational zones" in which a general warning had been given to all vessels entering certain waters, thus making

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[55] Smith, *Reaching Judgment* 247-265 *as quoted in* HOWARD S. LEVIE, TERRORISM IN WAR: THE LAW OF WAR CRIMES 63 (Oceana Publ'n, Inc., 1993) (examining the events from World War I to the present to demonstrate the progress and development of international criminal law and to show how war crimes have been successfully deterred from such international proceedings). [Reproduced in the accompanying notebook at Tab 21].

[56] *Id*.

[57] Proce's Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of April 22, 1930, Nov. 6, 1936, T.S. 29, 31 AM J. INT'L L. 137 (Supp. 1937). [Reproduced in the accompanying notebook at Tab 4].

[58] *Id*.

an individual warning unnecessary, did not satisfy regulations under international law that existed prior to World War II. As stated by the prosecutor for the case,

> with some exceptions in the early days of the war, no regard was taken for the safety of the crews or passengers of sunk merchant ships, and the announcement claiming a total blockade of the British Isles merely served to confirm the established situation under which U-boat warfare was being conducted without regard to the established rules of international warfare or the requirements of humanity.[59]

The most incriminating example of Donitz's disregard for the London Protocol came from the *Laconia* Order. Donitz issued this order after one of his submarines sank the British vessel *Laconia*.[60] In it, he forbade German naval ships from rescuing survivors, helping them into lifeboats or providing them with food or water. The order ended with "Be hard."[61]

The defense countered the prosecution's case with two justifications for Donitz's actions. First, the defense argued that the security of the submarine is the guiding rule at sea, a threat of air attack often made rescues too risky. In support of this argument, the defense submitted for evidence the circumstances leading up to and surrounding the *Laconia* Order. Donitz claimed the only reason he issued the order was that "American aircraft had attacked his submarines while the crews were trying to rescue the *Laconia*'s

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[59] DREXEL A. SPRECHER, INSIDE THE NUREMBERG TRIAL: A PROSECUTOR'S COMPREHENSIVE ACCOUNT, Vol. 2 982 (University Press of America, 1999) (summarizing, through a detailed description, the events, arguments, rationales, and goals occurring throughout the trial at Nuremberg). [Reproduced in the accompanying notebook at Tab 29].

[60] *See* JOSEPH E. PERSICO, NUREMBERG: INFAMY ON TRIAL 223 (Viking Press, 1994) (examining the establishment of the International Military Tribunal, the prosecution and defenses' cases and the final judgments of the historical proceedings through the eye of a general historian). [Reproduced in the accompanying notebook at Tab 26].

[61] *Id*.

survivors."[62] After the attack of one of his submarine during this incident and a reprimand from Hitler, Donitz gave the order that submarine's should not surface to save the sailors of struck ships.

The second justification for Donitz's actions relied on a clever variation of a *tu quoque* argument, although the defense never explicitly labeled it as such. Donitz claimed he gave the *Laconia* Order as a result of knowing that American navy officers' policy in regard to attacked ships was identical as that found in the *Laconia* Order.[63] In support of this assertion, Donitz's defense council secured evidence from U.S. Admiral Chester Nimitz, commander of the American Fleet in the Pacific, in which the Admiral admitted that the American Navy had instituted a similar policy of unrestricted submarine warfare in the Pacific Ocean from the first day that America entered the war.[64] Nimitz also admitted that the U.S. Navy had used operational zones in the Pacific Ocean similar to the zones used by the German Navy in the Atlantic. However, Donitz's defense council, knowing the Tribunal's dislike of *tu quoque* arguments, did not claim that the Tribunal should not judge Donitz's wrongful actions of waging unrestricted submarines warfare since America acted in a similar illegal manner. Instead, he argued that neither the German's nor the American's unrestricted submarine warfare was illegal, since "the universality of these acts demonstrated that the laws of war had changed through practice so as to free them of their illegal character."[65] Unrestricted submarine warfare did not break the regulations of

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[62] *Id*.

[63] *Id*.

[64] *See* KNIERIEM, *supra* note 13, at 313. [Reproduced in the accompanying notebook at Tab 31].

[65] James L. Weingarter, *Otto Skorzeny and the Laws of War*, 55 J. of Mil. History 207, 217 (1991) (examining the cases and background of Otto Skorzeny and nine other defendants at the

international criminal law, as dictated through general practices, and Donitz could not be guilty of an offense that was not a crime.[66]

Although never explicitly stating that it allowed this *tu quoque* defense, the Nuremberg Tribunal did not convict Donitz for the crime of waging unrestrictive submarine warfare.[67] The Tribunal determined that Donitz had in fact violated the London Protocol in that, "[i]f the commander cannot rescue, then…he cannot sink a merchant vessel and should allow it to pass unharmed before his periscope."[68] However, despite breaking the regulations set out by the Protocol, Donitz did not receive any punishment for this particular offense. With no further explanation, the Tribunal "assessed no penalty on [the unrestricted submarine warfare] aspect of the case because the same practice had been followed by the navies of Great Britain and the United States."[69] However, for some unexplained reason, the Tribunal failed to apply this same reasoning to the charge of employing operational zones, which the allies also employed. Additionally, the Tribunal never spoke to whether this precedent of allowing a *tu quoque* defense to excuse the breaking of international law established *tu quoque* as a valid defense for international crimes.[70]

Nuremberg Tribunal and how these trials contributed to the development of international law). [Reproduced in the accompanying notebook at Tab 44].

[66] BASSIOUNI, *supra* note 11, at 460 – 462. [Reproduced in the accompanying notebook at Tab 16].

[67] MASER, *supra* note 53, at 153. [Reproduced in the accompanying notebook at Tab 22].

[68] 1 TMWC 313 *quoted in* LEVIE, *supra* note 55, at 67. [Reproduced in the accompanying notebook at Tab 21].

[69] LEVIE, *supra* note 55, at 67. [Reproduced in the accompanying notebook at Tab 21].

[70] *Id*.

Tu quoque arguments arose in other International Military Tribunal cases at Nuremberg, but with much less success than witnessed during the Donitz case. The very first time the defense appeared in Nuremberg came during the *Flick* Case.[71] The defense council in Flick attempted to argue that the Germans behavior was no more blameworthy than that of America and the other allies.[72] The Tribunal did not allow this defense, and Flick received seven years of imprisonment for the running of his industry with forced foreign labor. In the *Einsalzgruppen* Case,[73] the Tribunal disposed of the *tu quoque* argument by stating:

> Then it was submitted that the defendants must be exonerated from the charge of killing civilian populations since every Allied nation brought about the death of noncombatants through the instrumentality of bombing. Any person, who, without cause, strikes another may not later complain if the other in repelling the attack uses sufficient force to overcome the original adversary. That is fundamental law between nations as well. [74]

In claiming the use of a reprisal, the court deflects a *tu quoque* defense. Additionally, the *High Command* trial judgment clearly stated that under general principles of law, an accused does not absolve himself from a crime by showing that another has committed a similar crime.[75] To avoid any judgment or embarrassment regarding how the Allies fought

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[71] United States v. Friedrich Flick, 6 TWC 1197, *reproduced in* LEVIE *supra* note 55, at 524. (The Tribunal accused the defendants with participation in forcible deportations of nationals of occupied territories to Germany to work in the Flick-owned mines and factories, illegal seizure of properties in France and the Soviet Union, and crimes against humanity for prosecuting Jews. This case served as one of the few war crimes trials that allowed the defense of necessity although it did not allow the defenses attempts at a tu quoque or reprisal defense). [Reproduced in the accompanying notebook at Tab 21].

[72] *See id*.

[73] *Id*.

[74] 4 TWC 466, *reprinted in* LEVIE *supra* note 55. [Reproduced in the accompanying notebook at Tab 21].

[75] *See id*.

the war, the Nuremberg Tribunal effected many different rationales to deflect *tu quoque* arguments raised by the German defendants and left behind a confused and ambiguous jurisprudence for subsequent courts to follow. However, at Nuremberg, the defense of *tu quoque* generally did not constitute a defense against war crimes.

The Tribunal at Tokyo provided a more uniform regard for the defense of *tu quoque*: it was forbidden in every case. The Tokyo Charter, establishing the Tokyo Tribunal, required the Tribunal to confine the trial to an "expeditious hearing of the issues" and prevent any action causing "unreasonable delay."[76] Due to these provisions, all evidence concerning the illegal behavior of the Allied Powers was ruled as irrelevant. A witness of the Tokyo Tribunal remarked that, "If a defense counsel went in the direction of the '*tu quoque*' argument…he was stopped by the Court."[77] The judges at the Tribunal feared that the admissibility of a *tu quoque* defense would open the door to a flood of arguments concerning the firebombing of Tokyo and the nuclear bombardment of Hiroshima and Nagasaki.[78] In order to avoid such a situation, *tu quoque* defenses received no standing what-so-ever at the Tokyo Tribunal.

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[76] See Charter for the International Military Tribunal for the Far East, art. 13(b), Apr. 26, 1946, T.I.A.S No. 1589, 4 Bevans 27 (herein after referred to as "Tokyo Charter"). [Reproduced in the accompanying notebook at Tab 5].

[77] B.V.A. ROLING, THE TOKYO TRIAL AND BEYOND: REFLECTIONS OF A PEACEMONGER 60 (Antonio Cassese ed., 1993) (explanation of the creation of and events at the Tokyo Trial provided by the Dutch international lawyer, B.V.A. Roling, who served as one of the judges at that International Tribunal). [Reproduced in the accompanying notebook at Tab 27].

[78] Makau Muta, *From Nuremberg to the Rwanda Tribunal: Justice or Retribution?*, 6 Buff. Hum. Rts. L. Rev. 77, 81 (2000) (concluding that the establishment of a Tribunal at Rwanda is irrelevant to the reconstruction and normalization process underway in Rwanda and allows the Tutsi's a "moral plane upon which to exact their revenge on the Hutus," as was seen in previous international criminal tribunals). [Reproduced in the accompanying notebook at Tab 39].

b. **Arguments for the Application of the *Tu Quoque* Defense at Nuremberg and Tokyo**

From day one of the Nuremberg and Tokyo Tribunals, critics have voiced dissatisfaction and skepticism concerning the way the Tribunals implemented "justice." These critics, both at the time of the Tribunals and since, have condemned the Tribunals' policy of ignoring the *tu quoque* defense.[79] Most of the arguments voiced focus on the failings of the Nuremberg Tribunals, but these arguments can just as easily be applied to the Tokyo Tribunals. The arguments for the validity of the *tu quoque* defense help support the Nuremberg Tribunal critics' broader claims of injustice stemming from the Tribunal's application of laws that did not exist at the time that the offenses were committed. The Tribunal is simply perceived by many as enforcing victor's justice. [80]

The most important criticism of Nuremberg, which was widely voiced at the time and ever since, is that it violated a fundamental principle of law by holding the defendants accountable for acts that had not been designated in advance as crimes.[81] The charge of waging aggressive war was particularly vulnerable to this complaint. In addition, the concept of crimes against humanity was a novelty in international law, though it had certain antecedents.[82] At Nuremberg, only the charges of war crimes, such as killing

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[79] *See* Turley, *supra* note 54. [Reproduced in the accompanying notebook at Tab 43].

[80] BASSIOUNI, *supra* note 11, at 130-132. [Reproduced in the accompanying notebook at Tab 16].

[81] Quincy Wright, *The Law of the Nuremberg Trial*, *in* INTERNATIONAL LAW IN THE TWENTIETH CENTURY 630 (Leo Gross ed., 1969) (commenting on the development of and trials from international law during this last century and the role that the Nuremberg Trials play in this development). [Reproduced in the accompanying notebook at Tab 33].

[82] *See* BASSIOUNI, *supra* note 11, at 1-3. [Reproduced in the accompanying notebook at Tab 16].

prisoners of war, clearly involved the application of established international law that was known before the crimes were committed to be binding on the parties to the conflict.[83]

The second main criticism concerning Nuremberg is that the International Military Tribunal simply instituted victor's justice and the defendants did not receive a fair and objective trial. An aspect of the complaint about victor's justice is that the victorious allies during World War II themselves committed many acts during the war which contained similarities and were comparable to the acts that the Nazis were being prosecuted against as being war crimes.[84] The bombing of Dresden and Hamburg created firestorms that killed many tens of thousands of civilians in these cities.[85] In Japan, atrocities such as the atomic bombs dropped on Hiroshima and Nagasaki, as well as many other examples of air attacks by the allies, killed great numbers of civilians indiscriminately.[86] At least, arguably, such massive and violent attacks were also prohibited at the time of Nuremberg by the provisions of the Fourth Hague Convention of 1907 barring the "bombardment, by whatever means, of towns, villages, dwellings or buildings which are undefended."[87] If Germans were being prosecuted for waging aggressive war, which did not constitute a crime prior to the International Military Tribunal in Nuremberg, how were the Americans

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[83] *See* KITTICHAISAREE, *supra* note 46, at 129 -137. [Reproduced in the accompanying notebook at Tab 19].

[84] WRIGHT, *supra* note 81, at 630. [Reproduced in the accompanying notebook at Tab 33].

[85] *See* Micheal Legg, *Indigenous Australians and International Law: Racial Discrimination, Genocide and Reparations*, 20 BERK. J. INT'L L. 387, 417 (2002) (looking at the development of international law, specifically in how it effects indigenous Australian groups). [Reproduced in the accompanying notebook at Tab 38].

[86] *Id*.

[87] Hague Convention, *supra* note 20. [Reproduced in the accompanying notebook at Tab 2].

and other Allied Powers not also guilty for similar acts, especially acts that were clearly crimes under international law prior to Nuremberg?[88]

The fact that the allies were not also prosecuted for their possible war crimes helps support the accusation that Nuremberg and Tokyo were simply victor's justice and suggests the need for ways to protect the defendants' rights and create equal justice under international criminal law and international humanitarian law. One such way to help insure that judgments from international courts are fair is by possibly allowing the admissibility of *tu quoque* as a defense. The equitable principle of "unclean hands" states if one party has dirty hands due to their wrongful conduct, that party is barred from judging another party's wrongdoing.[89] To insure the fairness of judging all parties equally, one who has wronged does not have a morally superior position to stand above and judge another's wrongs. Many critics believe that the Allies in World War II did not have the right, due to their own atrocities committed during the war, to stand above and judge the German and Japanese conduct or, at the very least, should have considered the German and Japanese conduct in relation to their own actions.

iii. The Treatment of the *Tu Quoque* Defense by the ICTY

The ICTY recently had the opportunity to examine the issue of *tu quoque* as a defense. The case of *Kupreskic* arose out of an attack in central Bosnia on April 16,

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[88] *See* Turley, *supra* note 54. [Reproduced in the accompanying notebook at Tab 43].

[89] *See* Erin Daly, *Between Punitive and Reconstructive Justice: The GACACA Courts in Rwanda*, 34 NYU J. INT'L L. & P. 355, 362-363 (2002) (providing a brief background to the events taking place in Rwanda in 1994 and describing the Gacaca program as presently envisioned by the Rwandan government so as to point to some of the advantages of the system, as well as some of its recognized shortcomings). [Reproduced in the accompanying notebook at Tab 36].

1993.[90] In the attack, Bosnian Croat forces killed more than one hundred Bosnian Muslim civilians, injured over twenty-four people, and destroyed property, including two mosques.[91] Count 1 of the amended indictment charged that from October 1992 until April 1993 the six codefendants engaged in "the planning, organizing and implementing of an attack which was designed to remove or 'cleanse' all Bosnian Muslims."[92] The six defendants allegedly helped the attack by participating in military training and arming themselves; evacuating Bosnian Croat civilians the night before the attack; organizing soldiers, weapons and ammunition in and around the village of Ahmici-Santici; preparing their homes and the homes of their relatives as staging areas and firing locations for the attack; and, by concealing from the other residents that the attack was imminent.[93]

The claim that arose from these events alleged that the six defendants committed a crime against humanity by violating Article 5(h) of the ICTY Statute. This article gives the ICTY jurisdiction over those committing "persecutions on political, racial and religious grounds" since such actions are prescribed as crimes against humanity.[94] The Trial Chamber found the mass murders and other violence was a "well-planned and well-organized" attack against Muslim civilians, orchestrated by Croat forces, to expel all

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[90] *Kupreskic*, *supra* note 3, at 436 – 39 (Oct. 23, 2001). [Reproduced in the accompanying notebook at Tab 12].

[91] *Id*.

[92] *Id*., at para. 83 (quoting amended indictment, para. 9).

[93] *Id*.

[94] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Art. 5(h), UN Doc. S/25704, annex (1993), 32 ILM 1192 (1993). [Reproduced in the accompanying notebook at Tab 8].

Muslims from the village of Ahmic. All but one of the defendants were found guilty of crimes against humanity.[95]

During the fact-finding process, the Trial Chamber took into consideration the background events that lead to the April 16, 1993 murders. The violence relating to this case grew out of greater troubles and violence infecting all of the former Yugoslavia with many different groups vying for power or independence. In the particular region concerned, the tension between the Muslims and Croats rapidly intensified in 1992. The rise in tension resulted in a "policy of discrimination" by both groups against each other. Many members of both groups were murdered throughout the area during this time.[96] The Trial Chamber found that the Croats planned the massacre of the civilians of Ahmici for the purpose of "ethnic cleansing." Specifically, the attack objective was to "destroy as many Muslim houses as possible, to kill all the men of military age, and thereby prompt all the others to leave the village and move elsewhere." [97]

The Trial Chamber discussed the validity of a defense of *tu quoque* against the accusations that the defendants had breached international humanitarian law and committed crimes against humanity. In the Tribunal's view, the defense council indirectly or implicitly relied upon the *tu quoque* principle. The Tribunal saw this defense as

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[95] *Kupreskic*, *supra* note 3. [Reproduced in the accompanying notebook at Tab 12].

[96] SCHARF, *supra* note 39, at 27-29 (describing the background to and the escalation of the tension and violence throughout the former Yugoslavia). [Reproduced in the accompanying notebook at Tab 28].

[97] *Kupreskic*, *supra* note 3. [Reproduced in the accompanying notebook at Tab 12].

amounting to "saying that breaches of international humanitarian law, being committed by the enemy, justify similar breaches by a belligerent."[98]

The Tribunal used the strongest of language in rejecting the notion that this *tu quoque* argument could be used as a defense for an accusation of crimes against humanity. It stated that a *tu quoque* defense is "fallacious and inapplicable" in international humanitarian law. Explaining further, international humanitarian law "lays down absolute obligations, namely obligations that are unconditional or in other words not based on reciprocity." The Tribunal found not only support for this in Common Article 1 of the Geneva Conventions,[99] but also in the "progressive trend toward the so-called 'humanization' of international legal obligations." The Tribunal finished its discussion of this issue by concluding that international humanitarian law norms, particularly those pertaining to war crimes, crimes against humanity, and genocide, are peremptory norms of international law or "jus cogens," and thus are non-derogable.[100]

iv. <u>The ICC's Treatment of Defenses</u>

In 1998, the international community adopted the Rome Statute, which outlined the formation of the world's first independent and permanent International Criminal Court (the "ICC"). The preamble of the Rome draft statute expresses the desire "to further

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[98] *Id*.

[99] Geneva Convention, *supra* note 23 (commenting on the Common Article 1 of 1949 Geneva Conventions which provides that "the high contracting parties undertake to respect…the present convention *in all circumstances* (emphasis added)). [Reproduced in the accompanying notebook at Tab 6].

[100] *Kupreskic*, *supra* note 3. [Reproduced in the accompanying notebook at Tab 12].

international cooperation to enhance the effective prosecution and suppression of crimes of international concern".[101] The ICC is intended to exercise jurisdiction only over the most serious crimes of international concern and to be complementary to national criminal justice systems. The Rome Statute became effective on July 1, 2002, and it is expected that the Court will be operational in the first half of 2003.

A defendant may avoid criminal responsibility in the context of ICC prosecution under certain circumstances set out by Article 31 of the statute. Many of the grounds for excluding criminal responsibility under the Statute are already recognized in most jurisdictions of the world, as well as under international criminal law. Under the common law system, these factors are frequently described as defenses. The "defenses" enumerated in the statute are mental disease, intoxication, duress, and self-defense.[102] Each of these defenses is set out in detail in Article 31. If construed as exhaustive, this list does not include *tu quoque* defenses as being a viable defense for crimes prosecuted by the ICC.[103]

IV. Challenge for ICTR: Avoiding the Criticisms of the Past While Creating Justice for the Victims and Promoting the Goals of the ICTR

The UN Security Council resolved to form the ICTR as a result of the serious violations of international humanitarian law that occurred in Rwanda and claimed the life

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[101] U.N. National Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 1998, A/Conf. 183/2/Add.1. [Reproduced in the accompanying notebook at Tab 9].

[102] Rome Statute of the International Criminal Court, Article 31. [Reproduced in the accompanying notebook at Tab 10].

[103] Since the ICC will not be fully operational until 2003, there as of yet exists no case law determining whether this enumerated list of defenses will actually be considered exhaustive.

of more than 500,000 victims in a period of 100 days.[104] The majority of the atrocities came from the hands of Hutu extremists against the Tutsi and moderate Hutu, but the victims were not completely innocent.[105] There have been claims that members of the Rwandan Patriotic Army (RPA), most of who are Tutsi, either during or after the massive killings, also committed grave breaches of international humanitarian law.[106] In implementing justice, the ICTR faces many of the same challenges that the previous courts persecuting war crimes faced.[107] How can an international court pursue justice objectively and not just implement a form of victor's justice? Is it fair to prosecute only the main perpetrators of one group while ignoring the atrocities committed by other parties?

If relying on the Donitz case from Nuremberg, the ICTR might have a precedent for allowing Hutus found guilty of genocide and other war crimes to avoid punishment due to a *tu quoque* defense that Tutsis also committed genocide and violated international humanitarian law. As described above, Donitz did not receive punishment for his act of unrestricted submarine warfare due to the similar conduct of the Allies in their waging of unrestricted submarine warfare.[108] However, this *tu quoque* argument has three main faults when examined in relation to the events of Rwanda. First, Donitz's argument did not state

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[104] Mark Huband, *Rwanda – The Genocide, in* CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW 312 - 315 (Roy Gutman and David Rieff, ed., 1999) (addressing the issues surrounding crimes of war through an easy to use A – Z guide). [Reproduced in the accompanying notebook at Tab 18].

[105] *Id*.

[106] *See* Dr. Emmanuel Nyemera, *One-Sided Justice at the Rwanda Tribunal*, *reprinted on* The Emperor's New Clothes: Piercing a Fog of Lies, http://emperors-clothes.com/analysis/rwanda.htm. [Reproduced in the accompanying notebook at Tab 40].

[107] *See* Daly, *supra* note 89, at 363. [Reproduced in the accompanying notebook at Tab 36].

[108] *See* MASER, *supra* note 32, at 153. [Reproduced in the accompanying notebook at Tab 22].

that the Americans use of unrestricted submarine warfare made the Tribunal unable to judge his actions.[109] Rather, the American's use of similar techniques demonstrated that the customary law of submarine warfare had evolved and such action was no longer a breach of international law.[110] The defendants at the ICTR will not be able to argue that customary law had changed in their situation to make genocide or other war crimes acceptable norms for which they cannot be judged. The type of horrific crimes witnessed in Rwanda will never be acceptable as customary law regardless of how many times such atrocities are committed.

Second, the more recent precedent established in *Kupreskic* unquestionably denies the existence of a defense due to a *tu quoque* argument.[111] The court's strong and harsh language states that *tu quoque* defenses have no place in international criminal courts. Even if the Donitz case is seen as a precedent allowing a successful *tu quoque* defense or mitigation of a war crime, *Kupreskic* completely reverses that judgment and establishes a new policy of non-admittance of *tu quoque* defenses.[112]

The third fault with submitting a defense of *tu quoque* at the ICTR comes from the establishment and evolution of international criminal and international humanitarian law since its inception at Nuremberg. Nuremberg instituted international criminal law and created a precedent for all prior international criminal courts.[113] However, the Tribunal at

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[109] *See* Weingarter, *supra* note 65, at 217. [Reproduced in the accompanying notebook at Tab 44].

[110] *Id*.

[111] *See Kupreskic*, *supra* note 3. [Reproduced in the accompanying notebook at Tab 12].

[112] *Id*.

[113] *See* Wright, *supra* note 81, at 630. [Reproduced in the accompanying notebook at Tab 33].

Nuremberg had to face two main obstacles while creating this international precedent. First, before Nuremberg, the offense of crimes against humanity did not exist and the Laws of War protected prisoners from other countries but not civilians of the same nation from each other.[114] Second, while wanting to punish the Germans and Japanese for their actions, the Allies did not want to bring further attention to their own "unclean hands" from their own possibly illegal actions. By prosecuting Germans and Japanese for actions that were, one, not previously crimes and, two, similar to the Allies own actions during the war, the Tribunal had a delicate path to cross. The Tribunal strove to balance the need for punishing the Germans and Japanese with the need to appear that the trials were fair and justice was being served. This difficult balancing task might have made the Tribunal's willing to take certain conditions into account that the Tribunal did not wish to be viewed as defenses in the future. The lack of explanation by the Tribunal for their decision not to punish Donitz for his waging of unrestricted submarine warfare is evidence of the court's attempt to impart fair judgment while not providing language to be used to support the acceptance of *tu quoque* as a defense in future cases.

Unlike the situation at Nuremberg, which was made up of judges from countries with "unclean hands" creating new law after the event, the ICTR has the advantage of having international judges, not involved in the events in Rwanda, decreeing punishment for well-established crimes in international law.[115] The ICTR's judges can adjudicate the proceedings without worrying about claims of victor's justice. Additionally, the crimes under the jurisdiction of the ICTR are violations of international humanitarian law, which

[114] *See* BASSIOUNI, *supra* note 11, at 1-3. [Reproduced in the accompanying notebook at Tab 16].

[115] *See* Weissbrodt, *supra* note 6. [Reproduced in the accompanying notebook at Tab 45].

was created to be universal and apply without bias to all countries, nations, people, and ethnicities. The repeated cry of "never again" which has echoed through the twentieth-century spurred the international community towards the development of this law.[116] The law was meant as a mechanisms aimed at deterring war and punishing those responsible for the most heinous crimes associated with war.

Since this beginning of international humanitarian law, the rights of individual civilians have developed so as to insure the protection of all citizens. The General Assembly of the United Nations adopted numerous instruments to insure such human rights of all citizens. A number of human rights beliefs that have grown in popularity in the post – War period address the laws governing armed conflict.[117] However, "some of these principles have reached nonderogable status and are thus universally applicable in times of war as well as peace."[118] As stated in *Kupreskic*, "it became clear to states that norms of international humanitarian law were not intended to protect state interests; they were primarily designed to benefit individuals qua human beings."[119] This protection exists regardless of the who, when or why surrounding the situation. As described by the categorical imperative formulated by the philosopher Kant in the field of morals: one ought

[116] *See* SCHARF, *supra* note 39. [Reproduced in the accompanying notebook at Tab 28].

[117] Charles A. Allen, *Civilian Starvation and Relief During Armed Conflict: The Modern Humanitarian Law*, 19 GA. J. INT'L & COMP. L. 1, 47 (1989) (studying and analyzing the development of civilian protections in armed conflict and the codification of principles in the Civilians Convention, specifically in connection to the area of civilian starvation and relief). [Reproduced in the accompanying notebook at Tab 35].

[118] *Id*.

[119] *Kupreskic*, *supra* note 3. [Reproduced in the accompanying notebook at Tab 12].

to fulfill an obligation regardless of whether others comply with it or disregard it if states are to progress.[120]

All these developments establishing international humanitarian law that protects individuals and maintains the peace between nations would be frustrated if a defense of *tu quoque* was admissible in an international criminal tribunal. *Tu quoque* arguments justify heinous acts and make them unpunishable. In turn, not punishing such atrocities will serve to encourage more violent acts to take place. The deterrence aspect of the court is lost and the world returns to a time of one violent action leading to another.[121] To continue the progress made in international humanitarian law, *tu quoque* must remain inadmissible as a defense.

The ICTR was intended to bring justice to the most serious perpetrators of the genocide and other violations of international humanitarian law, contribute to the process of national reconciliation, and allow for the restoration and maintenance of peace and to ensuring that such violations do not reoccur.[122] For the ICTR to accomplish these goals and be perceived as an impartial court, the argument of *tu quoque* cannot be allowed as a defense or to mitigate a punishment. Any crimes that violate international law and are under the jurisdiction of the ICTR should be prosecuted by the ICTR. Instead of allowing a second party's crime to justify the first party's actions, the second party should also be judged. As found in the *Kupreskic* case, international humanitarian law norms, particularly

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[120] *See* SHARON ANDERSON-GOLD, UNNECESSARY EVIL: HISTORY AND MORAL PROGRESS IN THE PHILOSOPHY OF IMMANUEL KANT 55 (Albany St. Univ. Press, 2001). [Reproduced in the accompanying notebook at Tab 14].

[121] *See* VON KNIERIEM, *supra* note 13, at 313. [Reproduced in the accompanying notebook at Tab 31].

[122] ICTR Statute, *supra* note 2, at 1-2. [Reproduced in the accompanying notebook at Tab 1].

those pertaining to war crimes, crimes against humanity, and genocide, are peremptory norms of international law or “jus cogens,” and thus are non-derogable.[123] Prosecuting both sides in the conflict might be a controversial decision, but ultimately Rwanda’s national reconciliation might benefit from such truly impartial proceedings.

[123] *Kupreskic*, *supra* note 3. [Reproduced in the accompanying notebook at Tab 12].