
CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW
INTERNATIONAL WAR CRIMES PROJECT
INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

MEMORANDUM FOR
THE OFFICE OF THE PROSECUTOR

ISSUE 1: THE RELEVANCE OF THE EICHMANN,
BARBIE, AND FINTA TRIALS FOR THE ICTR

Prepared by:
Requel Cross
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I. Introduction and Summary of Conclusions¹

A. Issues

This memorandum assesses and evaluates the holdings and dicta from three domestic trials held for breaches of international criminal law. The first part of this memorandum addresses the trial of Adolf Eichmann. The second part of this memorandum considers the trial of Imre Finta. The third part of this memorandum discusses the trial of Klaus Barbie.

B. Summary of Conclusions

(1) The Trial of Adolf Eichmann

There are four major issues the Court addressed in the *Eichmann* case. First, the Court determined whether there existed a basis of jurisdiction to try Adolf Eichmann. The Court held that crimes against humanity are so heinous jurisdiction to try this crime is universal. Second, the Court considered whether a “superior orders” defense could be used by the defense. The court held the “superior orders” defense is a defense and the appropriate test for determining whether a defendant’s “superior orders” defense is proper is whether the defendant knew the order was “manifestly unlawful.” The Court also considered the issue of whether the prosecution of Eichmann was a violation of the principle of non-retroactivity. The Court found that crimes against humanity were recognized law at the time of the Nazi atrocities and therefore there is no violation of the principle of non-retroactivity. Lastly, the Court addressed the issue of whether an “Act of

¹ ISSUE 21: Research and analyze trials held in domestic jurisdictions against Accused charged, effectively, for breaches of international criminal law (e.g. The Trial of Adolph Eichmann). Assess and evaluate holdings and dicta relevant to those laws as they pertain to trials at the ICTR. It is envisaged that three students each take one or two domestic trials and each prepare a separate research memorandum.

State” defense could absolve Eichmann of liability. The Court held an “Act of State” defense will not absolve an individual from criminal liability.

(2) The Trial of Imre Finta

The Canadian Court addressed four separate issues in the *Finta* case. First, the Court made a determination as to the proper actus reus the prosecution would need to establish to find Finta liable for crimes against humanity and war crimes. The Court imposed a higher threshold for the requisite actus reus than required under the law. The Court also addressed the proper mens rea the prosecution needed to establish. Again, the Court required the prosecution to establish a higher mens rea than enumerated under the law. The third issue the Court considered was when a defendant may make use of the “superior orders” and “mistake of fact” defenses. The Court allowed impermissible use of both the “superior orders” and “mistake of fact” defenses. Lastly, the Court permitted the jury to hear inflammatory cross-examination and prejudicial comments in defense’s closing argument.

(3) Klaus Barbie

The French Court considered three important issues in the *Barbie* case. First, the Court addressed the issue of whether there existed a statute of limitations for crimes against humanity. The Court concluded there is no statute of limitations for crimes against humanity. The Court also considered the issue of whether the case against Barbie should be dismissed based on the improper capture of the defendant. The Court made clear the capture of Klaus Barbie was proper and did not create grounds for dismissal of his case. Third, the Court discussed who must be a victim in order to prosecute an individual for crimes against humanity. The Court held that an individual may be

prosecuted for crimes against humanity committed against civilian individuals not considered combatants.

One should note all the issues considered in the cases of *Eichmann*, *Finta*, and *Barbie* are relevant to prosecutions currently taking place at the special court in Rwanda. First, *Eichmann* establishes the rule of universal jurisdiction to try certain crimes of international law. The ICTR will prosecute war crimes and crimes against humanity and the basis of jurisdiction for prosecuting both crimes is universal jurisdiction. Also, *Eichmann* articulates when a defendant may raise the “superior orders” defense. Defendants prosecuted by the ICTR will argue they cannot be held liable for their crimes because they were only following orders. Based on the rule articulated in *Eichmann* the defense of superior orders can only be raised in very limited situations. The *Finta* trial sets forth the actus reus and mens rea the prosecution must establish before finding a defendant guilty. *Finta* creates higher thresholds for both the actus reus and mens rea and imposes a greater burden for prosecution to overcome. Prosecutors at the ICTR will not be held to the same burden established in *Finta*. Lastly, *Barbie* addresses how a defendant is brought before the court. *Barbie* suggests a questionable capture of a defendant may not result in dismissal of the case. This holding is very pertinent to prosecutions at the ICTR. If the defendant is kidnapped or lured and brought before the court this may not result in a dismissal.

II. Factual Background

Some of the gravest breaches of international criminal law occurred against the Jewish people during World War II under Nazi Germany. By the fall of the Nazi regime over six million Jewish people had lost their lives. As a result of this tragedy, many

former officials in the Nazi regime were prosecuted in courts all over the world for various breaches of international criminal law.

During World War II Eichmann served as a Nazi official assigned to the secret police.² Eichmann was in charge of “the final solution of the Jewish Problem,” and sent millions of men, women and children to death camps.³ After the war ended Eichmann fled to Argentina, where he was apprehended by Israeli officials.⁴ The Israeli officials abducted him and took him to Israel to stand trial on charges of war crimes. Eichmann was convicted and sentenced to execution. Eichmann died by hanging in 1962, two years after he was convicted.⁵

Imre Finta was a key Nazi official responsible for rounding up men, women and children and sending them to concentration camps such as Auschwitz and Strasshof. Finta was charged with both war crimes and crimes against humanity. Finta was tried in Canada and acquitted.⁶

Klaus Barbie was born in 1913. By age twenty he was already heavily involved in the Nazi regime. At age twenty-two Barbie joined the S.S. corps.⁷ He was steadily promoted and during World War II he was working in the Section of Jewish Affairs in the Netherlands.⁸ In 1942, Barbie became head of the Gestapo Intelligence Agency.⁹ He

² The Trial of Adolf Eichmann, District Court of Jerusalem, Criminal Case No. 40/61 (1960). [hereinafter Eichmann Materials]. [Reproduced in the accompanying notebook at Tab 5].

³ Id.

⁴ Id.

⁵ Id.

⁶ Prior to Finta prosecution by Canada for war crimes and crimes against humanity, a Holocaust survivor named Sabina Citron accused Finta of various atrocities during the war. When Finta denied the accusations Citron sued Finta for libel and won. The plaintiff was awarded \$30,000. Finta then tried to sue a CTV broadcast, who reported Finta was a war criminal, for libel. Finta withdrew his suit and was ordered to pay court costs. David Matas, *The Case Of Imre Finta*, 43 U.N.B. L.J. 281, 281 (1994). [Reproduced in the accompanying notebook at Tab 16].

⁷ Jean-Olivier Viout, *The Klaus Barbie Trial And Crimes Against Humanity*, 3 HOFSTRA L. REV. & POL’Y SYMP. 155, 155-56 (1999). [Reproduced in the accompanying notebook at Tab 22].

⁸ Id.

was nicknamed the “Lyon butcher,” and used his position to murder countless Jews. Barbie escaped after the war and was tried in absentia. He was sentenced to two death sentences.¹⁰ In the early 1970’s, France became aware that Barbie was living in Bolivia under an assumed name.¹¹ France made a formal request for extradition, but Bolivia denied the request because of the absence of an extradition treaty between the two countries.¹² On February 6, 1986, under the direction of a new government in Bolivia, Barbie was thrown out of Bolivia and sent to Guyana where he was apprehended by French officials.¹³ Barbie was tried in France and sentenced to life in prison on July 4, 1987.¹⁴

These trials represent three instances where individuals accused of crimes against humanity and war crimes were prosecuted in domestic courts. Although the world vowed after World War II never again to allow such atrocities against humanity to occur, they continue to take place in many countries all over the world.¹⁵ The Rwandan Tribunal (“ICTR”) is one center where justice is being sought for victims of crimes against humanity.

⁹ *Id.* at 156.

¹⁰ Barbie left after the collapse of Nazi Germany. Therefore, he was not present during the prosecution. “Because Barbie had escaped after the war, both trial proceedings were conducted in absentia and resulted in convictions and two death sentences which were ordered by the Permanent Military Tribunal in Lyon on April 29, 1952 and November 25, 1954, respectively. Both sentences were subject to the twenty-year statute of limitations, which is the rule in ordinary French criminal procedure.” *Id.*

¹¹ *Id.*

¹² Even though there was an absence of an extradition treaty between France and Bolivia some argued assuming there was a treaty Barbie still could not be extradited because the twenty year statute of limitations had lapsed. *Id.* at 157.

¹³ *Id.* at 161-62.

¹⁴ *Id.* at 155.

¹⁵ “The study that we have been conducting at the Human Rights Law Institute indicates that during the twentieth century the total number of victims of conflicts of a noninternational character—internal conflicts and victimization by tyrannical regimes—has exceeded 170 million persons killed....It is estimated that in the past fifty years, more than 200 conflicts of a noninternational character—internal conflicts and victimization by tyrannical regimes—have resulted in more than 86 million civilians killed.” Lluís Paradell Trius, *Effectuating International Criminal Law Through International And Domestic Fora: Realities, Needs and Prospects*, 91 AM. SOC’Y INT’L L. PROC. 259, 259-60 (1997). [Reproduced in the accompanying notebook at Tab 24.]

III. Legal Discussion

A. Eichmann

(1) Crimes Against Humanity As Universal Offenses.

In order to prosecute an individual for a criminal offense the prosecution must first establish they have jurisdiction to try the individual. If the court finds jurisdiction is lacking the case must be dismissed. In the case of Adolf Eichmann, he argued the court in Jerusalem lacked jurisdiction to try his case and therefore a dismissal of the charges was warranted.¹⁶

The district court in Jerusalem found they had jurisdiction to try Adolf Eichmann for the alleged atrocities he committed during World War II under the Nazi regime. The Court based its decision on the principle of *universal jurisdiction*. Universal jurisdiction means that there are some crimes that are so heinous in nature and a violation of the laws of all countries that any country can prosecute the alleged offender.¹⁷ There need not be any connection between the prosecuting country and the offender. Universal jurisdiction varies from all other basis of jurisdiction because there is no connection or nexus between the offender and prosecuting state.¹⁸

The Court stated in referring to Eichmann's actions "...their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled,

¹⁶ Eichmann Materials, *supra* note 2. [Reproduced in the accompanying notebook at Tab 5].

¹⁷ Matthew Lippman, *Enforcing The Convention: The Eichmann Case*, 15 ARIZ. J. INT'L & COMP. L. 415, 473 (1998). [Reproduced in the accompanying notebook at Tab 26].

¹⁸ The Court stated in the alternative they had jurisdiction to try Eichmann under the theory of protective jurisdiction. Protective jurisdiction is establishing by proving a strong and sustained connection between the criminal's activities and the prosecuting state. Furthermore, the prosecution must establish the alleged crimes threatened the national security and harmed Israel. Eichmann perpetrated his crimes against the Jewish People and Israel, the prosecuting country, is the recognized homeland of the Jews. As a result, the prosecution was able to establish protective jurisdiction. *Id.* at 473-74.

pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant.”¹⁹

The Court relied on various authorities to justify exercising jurisdiction over Eichmann. First, the Court relied on natural law. The Court stated “It is therefore the moral duty of every sovereign state to enforce the natural right to punish, possessed by the victims of the crime whoever they may be, against criminals whose acts have violated in extreme form the law of nature or the law of nations.”²⁰ The Court made clear that the crimes committed by Eichmann were not crimes against the state of Israel alone but crimes against all nations.

The Court also cited The Convention for the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”). The Convention was adopted on December 9, 1948 and stated under Article 1 that “All Contracting Parties confirm that genocide, whether committed in time of peace or in time of war is a crime under international law, which they undertake to prevent and to punish.”²¹ Israel was a party to this Convention and therefore had jurisdiction to prosecute Eichmann for his crimes.²²

Lastly, the Court found universal jurisdiction to try Eichmann under the Advisory Opinion issued by the International Court of Justice with respect to the Genocide Convention. The advisory opinion was adopted May 28, 1951, and stated genocide

¹⁹ *Id.* at 474.

²⁰ Eichmann Materials, *supra* note 2. [Reproduced in the accompanying notebook at Tab 5].

²¹ *Id.*

²² One should note that the Convention for the Prevention and Punishment of the Crime of Genocide provides a clear definition of genocide. “In the present Convention genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic or religious group as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.” *Id.*

was a violation of international law and states had universal jurisdiction to prosecute offenders accused of these acts.

The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as a crime under international law involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (1) of the General Assembly, December 11th, 1946). The first consequence arising from this conception is that the principles underlying the Convention are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation in order to liberate mankind from such an odious scourge (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope. It was in fact approved on December 9th, 1948, by a resolution which was unanimously adopted by fifty-six states.²³

The Court's holding and the reasons articulated for the holding are applicable to current prosecutions occurring in Rwanda. When a defendant raises a challenge regarding the Court's jurisdiction the prosecution must first establish the crime falls under the definition of "war crimes" or "crimes against humanity."²⁴ The prosecution should face little difficulty in establishing the atrocities committed fall under these definitions considering between 500,000 and 1 million people were killed because of their ethnicity.²⁵ Once it is established the crimes constituted violations of

²³ *Id.*

²⁴ Crimes against humanity are defined as "Atrocities and offenses, including, but not limited to, murder, extermination enslavement, deportation, imprisonment, torture, rape or other inhuman acts committed against any civilian population or persecution on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated." War crimes are defined as "Murder, ill-treatment or deportation to forced labour or for any other purpose, of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas; killing of hostages; plunder or public or private property; wanton destruction of cities, towns or villages, and devastation not justified by military necessity." *Id.*

²⁵ Following the assassination of Rwanda's president between 500,000 and 1 million people were killed in a genocide. The victims were both Tutsi's and moderate Hutus. It is believed this massacre wiped out 15% of Rwanda's population. Thousands of individuals have been arrested in Rwanda since 1994 and have been accused of war crimes. Given the number of people killed and the manner in which they died, universal jurisdiction to try these perpetrators should not be hard to establish. William A. Schabas, *Prosecuting International Crime: Justice, Democracy, and Impunity in Post-genocide Rwanda*, 7 CRIM. L.F. 523, 524-26 (1996). [Reproduced in the accompanying notebook at Tab 29].

international law, it follows that there is universal jurisdiction to try the alleged perpetrators.²⁶

(2) The “Superior Orders” Defense Can Only Be Successful If The Defendant Did Not Know The Order Was “Manifestly Unlawful.”

The “Superior Orders” defense states that a defendant cannot be held liable for carrying out the orders of his superior even if the defendant’s actions constituted illegal acts. The “Superior Orders” defense first surfaced during World War I when German combatants argued they were absolved from liability because they were following orders. One commander of the Royal Navy argued the military would crumble if every time an individual was given an order he could take upon himself not to perform the order if he thought it might be illegal or morally impermissible.²⁷

Karl Neumann, a Lieutenant in the German Navy, was the first individual to successfully use the “Superior Orders” defense. Neumann was responsible for ordering the sinking of a hospital ship, the *Dover Castle*, which resulted in the deaths of six crew members.²⁸ Neumann had relied on an internal memorandum, issued by

²⁶ Universal jurisdiction exists to try all persons alleged to have committed violations of international law. In the past there has been a reluctance to use universal jurisdiction as the basis of jurisdiction. However, recently the ICC enacted a statute that specifically outlines all crimes under international law which are subject to prosecution under universal jurisdiction. Jonathan I. Charney, *Progress in International Criminal Law?*, 93 A.J.I.L. 452, 452-56 (1999). [Reproduced in the accompanying notebook at Tab 23].

²⁷ “Commander Sir Graham Bower of the Royal Navy argued in 1915 that submarine officers and crews sinking merchant vessels should not be held liable: the blame does not rest with them, but with their superiors. According to Bower, the military could not function under circumstances in which every subordinate...was permitted or required to constitute himself a judge of the legality or morality of the orders received from his superiors...To make him responsible...would strike at the foundations of discipline in every army or navy in the world. Low-level combatants were ill-equipped to evaluate the context of a command. An order might appear invalid but in fact be legally justified as an act of reprisal. The extension of criminal culpability would condemn soldiers to the often conflicting commands of domestic and international law.” Matthew Lippman, *Conundrums Of Armed Conflict: Criminal Defenses To Violations Of The Humanitarian Law of War*, 15 DICK. J. INT’L. L. 1, 4-5 (1996). [Reproduced in the accompanying notebook at Tab 25].

²⁸ *Id.* at 8.

his superiors, which stated the vessel was being used as a war ship. The Court concluded Neumann was entitled to raise the “Superior Orders” defense.²⁹

At the trial of Major Benno Crusius, the defendant argued his execution of enemy prisoners was ordered by his superior. The German Supreme Court convicted Crusius and said

A defendant might rely on the superior orders defense in those instances in which he harbored a good faith belief in the legality of an otherwise illicit command. Such a claim was barred in those instances in which the order contravened a ‘simple’ and ‘universally-known’ rule of international law. A combatant carrying out such a command was presumed to possess criminal intent. A soldier’s subjective and false belief in the existence of an illegal order also was not adjudged exculpatory. The superior orders defense was likewise inapplicable in those instances in which a subordinate independently and intentionally exceeded the scope of a criminal command. The fact that a combatant had acted in response to an illegal order, or believed in good faith that such an order had been issued, was considered in mitigation of punishment. Combatants were not charged with a duty to investigate or question an order and were able to rely on the facial validity of a command.³⁰

At the trial of Adolf Eichmann, the defendant raised the “Superior Orders” defense. Eichmann argued he could not be held criminally responsible for his actions because he was obeying orders.³¹ The Court allowed Eichmann to raise this defense stating the “superior orders” defense was recognized by both the United Nations and all civilized countries.³² The Court articulated the test to be used when determining whether a “Superior Orders” defense will be successful. The test is whether the defendant knew the order was “manifestly unlawful.” The test requires each court to conduct an individual case-by-case analysis.³³

²⁹ “The Admiralty Staff was the highest service authority over the accused. He [Neumann] was in duty bound to obey their orders in service matters. So far as he did that, he was free from criminal responsibility. Therefore he cannot be held responsible for sinking the hospital ship *Dover Castle* according to orders. *Id.* at 8.

³⁰ *Id.* at 11-12.

³¹ Eichmann Materials, *supra* note 2. [Reproduced in the accompanying notebook at Tab 5].

³² *Id.*

³³ *Id.*

Eichmann was permitted to use the “Superior Orders” defense, but he was unsuccessful. The Court rejected his argument that he was only following orders.

The District Court determined that the accused [Eichmann] well knew that the order for the physical extermination of the Jews was manifestly unlawful and...in carrying out this order he engaged in criminal acts on a colossal scale. He made no effort to reduce the scope or severity of this crime and performed his duties at every stage...whole-heartedly and willingly. Eichmann was no cipher, he displayed innovation and initiative in implementing the Nazi’s pernicious policies and plans. He was a man on a mission to ensure that even a single Jew would not survive.³⁴

The Court made it clear that the “Superior Orders” defense would not absolve an individual of liability when the acts committed were clearly violations of international law. The crimes Eichmann committed against innocent Jewish individuals could not be construed as legal under the law. Furthermore, the Court pointed out that Eichmann was considered a superior. In many instances he was the very person ordering the atrocities.

The analysis and holding in the *Eichmann* case is relevant to the current prosecutions occurring in Rwanda. Defendants will continue to raise the “Superior Orders” defense. The tribunal must apply a case-by-case analysis. It must be determined whether the defendant knew at the time he committed the acts that his actions were manifestly unlawful.³⁵ The tribunal should consider factors such as: the position and title of the defendant, the nature of the actions taken, and the result from the defendant’s actions.

(3) The Trial of Eichmann Did Not Violate the Principle of Non-Retroactivity.

³⁴ *Id.*

³⁵ Note that a manifestly illegal order is defined as “...one that offends the conscience of every reasonable, right-thinking person and must be obviously and flagrantly wrong.” Lippman, *supra* note 27, at 51. [Reproduced in the accompanying notebook at Tab 25].

The principle of non-retroactivity is often referred to as “maxim nullum crimen sine lege.” Translated, this phrase means there can be no crime without a law. “A person can not be charged with an offense unless that offense existed in law at the time of the act.”³⁶ This principle follows closely in line with the prohibition against application of a criminal sanction ex post facto. In other words, laws cannot be created after the act is completed making it criminal.³⁷ The rationale most often advanced for the principle of non-retroactivity is fairness. It is unfair to punish an individual for an act that was not criminal at the time it was committed.

The prohibition against punishing a defendant for an act that was not criminal at the time committed is followed and generally accepted by the international community. Article 15 of the International Covenant of Civil and Political Rights (“ICCPR”) states: “(1) No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense under national or international law at the time when it was committed.”³⁸ However, there is an important recognized exception to the general rule. The exception states: “Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”³⁹ The Court focused on this exception in the *Eichmann* case and concluded that his prosecution was not a violation of the principle of non-retroactivity.

³⁶ Bradley E. Berg, *The 1994 I.L.C. Draft Statute for an International Criminal Court: A principled Appraisal of Jurisdictional Structure*, 28 CASE W. RES. J. INT’L L. 221, 233 (1996). [Reproduced in the accompanying notebook at Tab 214].

³⁷ *Id.* at 233.

³⁸ *Id.* at 234.

³⁹ *Id.*

During Eichmann's trial, the defense argued the defendant could not be held liable for committing acts that were not criminal at the time committed. "The defense said that the person who commits the act which the appellant is accused did not have a criminal intent (*mens rea*), because he did not and could not know that the act he was doing was a criminal act."⁴⁰ Eichmann was tried under the Nazis and Nazi Collaborators (Punishment) Law, referred to as Israeli Law. Section 1(a) of Israeli Law provides:

"A person who has committed one of the following offenses:
(1) during the period of the Nazi regime in a hostile country, carried out an act constituting a crime against the Jewish people; (2) during the period of the Nazi regime, carried out an act constituting a crime against humanity, in a hostile country; (3) during the period of the Second World War, carried out an act constituting a war crime, in a hostile country; is liable to the death penalty."⁴¹

The law Eichmann was charged under was not enacted until 1950, after Eichmann allegedly committed the atrocities. The Court found that indeed the law Eichmann was charged under was not enacted until after Eichmann had committed the crimes. However, nevertheless the Court held Eichmann responsible and found his prosecution did not violate the prohibition against retroactive application of the law. The Court based their decision on the exception articulated above. The Court noted that even though the crimes committed by Eichmann were not explicitly enumerated as crimes under the law they were crimes of natural law and international customary law.⁴² As a result, the Court found the defendant had the necessary *mens rea*

⁴⁰ Eichmann Materials, *supra* note 2. [Reproduced in the accompanying notebook at Tab 5].

⁴¹ *Id.*

⁴² The crimes were violations of customary international law. "The abhorrent crimes defined in this Law are crimes not under Israeli law alone. These crimes which offended the whole of mankind and shocked the conscience of nations are grave offenses against the law of nations itself (*delicta juris gentium*). *Id.*

(criminal intent) when committing the crimes and he could be held liable. The Judge writing the opinion stated

It cannot be said that the perpetrators of the crimes defined in the Law in question “could not have a mens rea because they did not and could not know that what they were doing was a criminal act. The extensive measures taken by the Nazis to efface the traces of their crimes, such as the disinterment of the dead bodies of the murdered and their cremation into ashes, or the destruction of the Gestapo archives before the collapse of the Reich, clearly prove that the Nazis knew well the criminal character of their enormities. A law that authorizes the punishment of Nazis and their collaborators does not conflict, through its retroactive application, with the rules of natural justice in the words of the President, on the contrary, it enforces the dictates of elementary justice.”⁴³

The holding and analysis of the Court on this issue has modern day application in the current prosecutions taking place in Rwanda. Defendants will be unlikely to raise the argument their case should be dismissed based on retroactive application of the law because the international crimes for which they are prosecuted are clearly articulated in the Genocide Convention and the Statute of the International Tribunal for Rwanda. The prosecutor can argue defendants’ knew the crimes they were committing were illegal and illicit acts. The prosecutor can argue the defendant knew systematic rape, which only recently has been recognized as a war crime, was illegal and not a natural result in war. *Eichmann* principles can be applied to any war crime if the prosecution can prove the defendant knew his acts were illegal and illicit. However, in the event this defense is raised by a defendant the prosecutor has a strong argument to refute the defense. Assuming *arguendo* the defendant is being prosecuted for a crime which is not clearly articulated as such the defendant can still be prosecuted because the crime is a violation of natural law and international customary law. There is widespread support for the argument torture and acts such as

⁴³ *Id.*

amputations violate international law. There can be no doubt the defendant possessed the requisite mens rea when committing these illegal acts.

(4) The Act of State Defense Will Not Absolve An Individual From Criminal Liability.

The “Act of State” defense is based on the theory that “the act performed by a person as an organ of the state or a responsible official acting on the government’s orders-must be seen as an act of the state only.”⁴⁴ In other words, only the state can be responsible for acts committed by the individual on behalf of the state. The perpetrator cannot be held criminally responsible.

Defense counsel argued Eichmann could not be held liable because the acts committed by him were in the course of duty and therefore constitute “Acts of State.”⁴⁵ The Court rejected defense’s argument stating:

It was submitted that international law is concerned with the actions of sovereign states, and provides no punishment for individuals; and further, that where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the state. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon states has long been recognized.⁴⁶

The Court also relied on the holding of *Ex Parte Quirin*. The Supreme Court of the United States made clear that individuals and not abstract entities are punished for violations of international law.⁴⁷ Individuals, even if acting under the orders of the

⁴⁴ *Id.*

⁴⁵ “Learned counsel seeks to negate the jurisdiction of the state by contending that the crimes attributed to the Accused in Counts 1-12 had been committed, according to the indictment itself, in the course of duty, and constitute ‘Acts of State,’ acts for which according to his contention, only the German state is responsible.” *Id.*

⁴⁶ *Id.*

⁴⁷ “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced... The principle of international law which, under certain circumstances, protects the representatives of a state, cannot be

state, are not immune from liability when the orders violate international law.⁴⁸ The Court provided further rationale for their decision and argued all individuals committing these crimes would go unpunished if they were allowed to argue they were only following orders.⁴⁹ Lastly, the Court cited the United Nations Assembly Resolution of December 11, 1946, Principle No. 3, which says, “The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.”⁵⁰

The “Act of State” doctrine is relevant to prosecutions occurring in Rwanda. Individuals may argue they were organs of the state acting on behalf of the state and therefore they are immune from liability. However, this defense cannot succeed. The *Eichmann* Court stated:

The state, and those acting on its behalf, bear criminal responsibility for such violations of international law as by reason of their gravity, their ruthlessness, and their contempt for human life place them within its territory, the responsibility of the state and of the individuals responsible for the ordering and the execution of the outrage would be of a criminal character... It is impossible to admit that individuals, by grouping themselves into states and thus increasing immeasurably their

applied to acts which are condemned as criminal by international law.” *Ex Parte Quirin*, 317 U.S. 1 (1942). [Reproduced in the accompanying notebook at Tab 19].

⁴⁸ “The official position of defendants, whether as heads of states, or responsible officials in government departments, shall not be considered as freeing them from responsibility, or mitigating punishment.” “On the other hand, ... individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state, if the state, in authorizing action, moves outside its competence under international law.” *Eichmann Materials*, *supra* note 2. [Reproduced in the accompanying notebook at Tab 5].

⁴⁹ “Any state officer irrespective of his rank or function would necessarily go unpunished if his acts of state were considered internationally as the sovereign acts of a legal person. The person who really acted on behalf of the state would be twice removed from penal justice, since the entity whom he represented, by its very nature would be doubly immune from punishment, once physically and once legally. The natural person escapes scot-free between the legal loopholes of state personality and state sovereignty. But then, this reasoning in respect of these too much laboured juristic conceptions should not be carried into the province of penal law. Immunity for acts of state constitutes the negation of international criminal law which indeed derives the necessity of its existence exactly from the very fact that acts of state often have a criminal character for which the morally responsible officer of state should be made penally liable.” *Id.*

⁵⁰ *Id.*

potentialities for evil, can confer upon themselves a degree of immunity from criminal liability and its consequences which they do not enjoy when acting in isolation.⁵¹

B. Finta

(1) Higher Thresholds Than Required Under The Law For The Requisite Actus Reus Were Imposed.

Finta was charged under the Canadian Criminal Code with crimes against humanity and war crimes. Crimes against humanity are against one's own people and are defined as

Murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at the that time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognized by the community of nations.⁵²

War Crimes are against another nation's people and are defined as

An act or omission that is committed during an *international* armed conflict, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law applicable in international armed conflicts.⁵³

Every crime has an actus reus that is defined under the law. The actus reus is the criminal conduct required to be present in order to find an individual guilty of a crime. "For example, the actus reus of a war crime or crime against humanity includes the requirement of particular circumstances, such as that the alleged offenses occurred during an international conflict; that the alleged offenses were directed at certain objects, as when actions otherwise permissible if directed against enemy

⁵¹ *Id.*

⁵² Irwin Cotler, *War Crimes Law And The Finta Case*, 6 S.C. L.REV. 577, 581-82 (1995). [Reproduced in the accompanying notebook at Tab 21.]

⁵³ *Id.*

soldiers are war crimes if directed against civilians or prisoners; or that in the case of crimes against humanity, the alleged offense was directed at any civilian population or any identifiable group.”⁵⁴ In the *Finta* case, the Canadian Court imposed a higher threshold for the actus reus than required under the law. This made it harder for prosecutors to meet the burden necessary to convict Finta of the crimes he allegedly committed.

There are six specific instances where the Court imposed a higher standard regarding the actus reus component of the crime. First, Judge Cory stated “...those persons indicted for having committed crimes against humanity or war crimes stand charged with committing offenses so grave that they shock the conscience of all right-thinking people. The stigma that must attach to such a crime is overwhelming.”⁵⁵ The Court phrased this statement in a manner that leads one to believe that “shock the conscience” is the proper standard.⁵⁶ The Canadian Legislature did not impose a “shock the conscience” standard when defining crimes against humanity and war crimes.⁵⁷

The second instance where the Court improperly characterized the actus reus of the crimes was when the Court stated “Thus, with respect to crimes against humanity the additional element is that the inhumane acts were based on discrimination against or the persecution of an identifiable group of people.”⁵⁸ Again the Court has imposed a requirement that is not required under Canadian Law. In this case, the Court added

⁵⁴ Irwin Cotler, *International Decision*, 90 A.J.I.L. 460, 467 (1996). [Reproduced in the accompanying notebook at Tab 20.]

⁵⁵ *Id.*

⁵⁶ “This standard is found nowhere in treaties such as the 1907 Hague Convention or the 1949 Geneva Convention.” *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

the element of discrimination. Canadian Law mandates the crimes be against a certain group of people, but the added element of discrimination is not required.⁵⁹

The third instance where the Court improperly characterized the actus reus of the crimes alleged was when Judge Cory stated

What distinguishes a crime against humanity from any other criminal offense under the Canadian Criminal Code is that the cruel and terrible actions which are essential elements of the offense were undertaken in pursuance of a policy of discrimination or persecution of an identifiable group or race. With respect to war crimes, the distinguishing feature is that the terrible actions constituted a violation of the laws of war.⁶⁰

The Court improperly defined the actus reus as requiring “cruel” and “terrible” actions.⁶¹ This is a higher threshold than defined under the Canadian Criminal Code.

Fourth, a higher burden for proving the actus reus component of the crime was imposed when the Court stated “upon conviction, the accused...will suffer the particularly heavy public opprobrium that is reserved for these offenses. Further the sentence...will reflect the high degree of moral outrage....”⁶² There is no requirement imposed under the Canadian Criminal Code that suggests a prosecutor must establish, in order to prove actus reus, that the public condemns or is angry about the defendant’s actions.⁶³

Fifth, the Court said “Section 7(3.71) cannot be aimed at those who killed in the heat of battle or in defense of their country. It is aimed at those who inflicted

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ “Yet a canvass of the essential elements of war crimes and crimes against humanity under international law demonstrates that not all war crimes—such as pillage and impermissible targeting of protected sites or property—require “cruel” or “terrible” actions. To invoke such thresholds for international crimes may well prejudice the prosecution of war crimes, since the “higher” threshold limits the capacity to prosecute, while contracting the circle of potential defendants.” *Id.*

⁶² *Id.*

⁶³ *Id.*

immense suffering with foresight and calculated malevolence.”⁶⁴ In order to determine whether an improper actus reus was articulated by the Court one must consider the language of Section 7(3.71) of the Canadian Criminal Code. This section states

(3.71) Notwithstanding anything in this Act or any other Act, every person who, either before or after the coming into force of this subsection, commits an act or omission outside Canada that constitutes a war crimes or a crime against humanity and that, if committed in Canada, would constitute an offense against the laws of Canada in force at the time of the act or omission shall be deemed to commit that act or omission in Canada....⁶⁵

As indicated by this passage, war crimes and crimes against humanity can be committed during battle. The Canadian Criminal Code does not recognize the limited principle articulated by the Judge in *Finta*.⁶⁶

Lastly, the Court throughout the opinion used language such as “untold misery,” “immense suffering,” and “requisite added dimensions of cruelty and barbarism.” Use of this language suggested these were all required elements of the actus reus when in fact they were not.⁶⁷

The mischaracterization of the requisite actus reus for both crimes against humanity and war crimes are of vital importance to prosecutions underway in Rwanda. Prosecutors will have the task of proving both the requisite actus reus and mens rea for the alleged crimes. Often this can be a high burden for prosecutors to meet. However, prosecutors cannot have the bar raised after the actus reus has clearly been defined under the law. Imposing a higher standard creates two problems. First, it will be more difficult for the prosecutors to make their case which will translate into fewer convictions. Second, the

⁶⁴ *Id.*

⁶⁵ Cotler, *supra* note 52, at 581. [Reproduced in the accompanying notebook at Tab 21].

⁶⁶ Cotler, *supra* note 54, at 468. [Reproduced in the accompanying notebook at Tab 20].

⁶⁷ *Id.*

prosecutors will be unprepared to make their case if the actus reus is changed during the case. Prosecutors will only prepare to meet the burden established under the law.

Changing the requirements will no doubt create substantial problems. Prosecutors should carefully analyze the law and make sure a higher threshold is not being imposed by the Court. One should note prosecutors in Rwanda may have an easier time establishing the actus reus of crimes against humanity because the Court has dispensed with the requirement there be any connection between the acts and an armed conflict.⁶⁸

(2) The Court in the Finta Case Erroneously Characterized the Necessary Elements For Establishing Mens Rea.

Finta was charged under the Canadian Criminal Code Sections 7(3.71)- 7(3.76). The Code makes no reference to the requisite mens rea that must be established by the prosecution in order to convict the defendant. It has been noted that "...this lack of express discussion of the requirement is largely because nobody ever really thought that there was a need for an individual mens rea that went beyond that required for the basic nature of the conduct, whether that be murder, assault, robbery or kidnapping."⁶⁹ The problem in the *Finta* case is the Court determined the prosecution must establish both the mens rea for the individual criminal offense, such as murder, and also the mens rea for crimes against humanity and war crimes.⁷⁰

Under international law the appropriate mens rea for crimes against humanity and war crimes is knowledge-the defendant knew or should have known. What mental state must the prosecution establish with respect to both crimes against humanity and war crimes?

⁶⁸ Bruno Simma & Andreas I. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 A.J.I.L. 302, 309-10 (1999). [Reproduced in the accompanying notebook at Tab 15].

⁶⁹ *Id.*

⁷⁰ *Id.*

“The mental element required to be proven to constitute a crime against humanity is that the accused was aware of or willfully blind to facts or circumstances which would bring his or her acts within the definition of a crime against humanity.”⁷¹ “Similarly for war crimes the Crown would have to establish that the accused knew or was aware of facts that brought his or her action within the definition of war crimes, or was willfully blind to the facts.”⁷²

The Court did not use these standards but instead applied the mens rea standard required for domestic offenses.⁷³ Applying the mens rea standard for domestic offenses as opposed to the international mens rea was an error. In addition, the Court applied the wrong mens rea standard for the domestic offense. One of the crimes for which Finta was charged with was manslaughter. Under the Canadian Criminal Code the mens rea necessary to prove manslaughter is “reasonable foreseeability of bodily harm.”⁷⁴ However, the Court applied the mens rea standard articulated under the offense of murder, which is “subjective foreseeability.”⁷⁵ The problem with this is clear. Finta was on trial for manslaughter, not murder, and when the Court imposed the mens rea standard used for murder they gave the impression murder and not manslaughter is a war crime.⁷⁶

The Court presiding over the cases being heard in Rwanda should use the international mens rea standard when hearing cases of crimes against humanity and war crimes. First,

⁷¹ *Id.* at 471.

⁷² *Id.*

⁷³ The Court made a mistake in not applying the same mens rea standard they articulated as the correct standard. Simma and Paulus stated “[a]fter stipulating an international mens rea, the Court then ignores the actual international mens rea standard; and if, after substituting a domestic mens rea standard for an international one, it then invokes an erroneous domestic mens rea standard.” *Id.* at 470.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ “Thus, the Court’s determination that section 7(3.71) is aimed at those who inflicted immense suffering with foresight and calculated malevolence, combined with the mens rea principle of subjective foreseeability for the crime of murder, may (however inadvertently) allow the inference to be drawn that manslaughter cannot be a war crime.” *Id.*

using the international standard creates uniformity among the numerous prosecutions occurring. Second, prosecutors will have no doubt as to what they must establish to meet the requisite mens rea requirement.

(3) The Court Permitted Improper Use of the “Obedience to Superior Orders” and “Mistake of Fact” Defenses.

The “mistake of fact” defense suggests an individual is not liable for the crimes committed if the defendant was operating under an incorrect factual assumption. The “mistake of fact” defense is not an accepted defense under international law and should not be used as a basis to acquit.⁷⁷ Traditionally, defendants that argue their crimes were committed under an incorrect factual assumption were still held responsible for their actions. However, the Court in *Finta* permitted defense counsel to present this defense. Defense counsel was allowed to introduce statements that there was “a general publicly-stated belief in newspapers in Hungary that Jews were subversive and disloyal to the war efforts of Hungary.”⁷⁸ This defense is dangerous because it suggests that if the defendant committed his acts based on this mistaken belief he could not have formed the mental intent necessary to convict. “An accused who committed crimes under international law against Jews because of the “Zeitgeist” of anti-Semitism would arguably not have the mens rea requisite for those international crimes; indeed, the Zeitgeist could seemingly authorize a heat of battle or in defense of one’s country understanding of his or her acts.”⁷⁹

⁷⁷ Cotler, *supra* note 52, at 635. [Reproduced in the accompanying notebook at Tab 21].

⁷⁸ *Id.* at 633.

⁷⁹ *Id.* at 634.

In addition to improperly permitting the “mistake of fact” defense the courts also erroneously allowed the “superior orders” defense.⁸⁰ The “superior orders” defenses, if successful, allows a defendant to escape criminal liability by arguing he was just following the orders of his superior. The “superior orders” defense, as discussed above, is recognized under international law.⁸¹

Finta was permitted to argue at trial that he was only following orders and therefore he could not be held liable. However, there are several problems with allowing defense counsel to use this defense. First, the defense is not available when it is clear the orders given were manifestly unlawful. In this case, Finta tortured and murdered countless individuals. Furthermore, the individuals were innocent Jews who were considered non-combatants. Clearly, the orders were manifestly unlawful and a violation of international law. Based upon this fact alone the Court should not have permitted Finta and defense counsel to present a “superior orders” defense.⁸² The second problem with allowing the defense in this case is that Finta was the individual in charge. In other words, it is unlikely Finta was the one receiving orders but instead more probable he was the person giving orders.

⁸⁰ Trius, *supra* note 15, at 268. [Reproduced in the accompanying notebook at Tab 24].

⁸¹ *R. v. Finta*, 1 S.C.R. 701 (1994). [Reproduced in the accompanying notebook at Tab 7].

⁸² “In the case of superior orders, there is an awkward conflict involving military discipline, criminal deterrence and fairness to the accused. Military personnel undergo a training regimen that emphasizes, above all, the need to obey and not to question military orders. Meanwhile, the laws of war impose an obligation to question those very same orders. Prosecutors have attempted to escape this dilemma by distinguishing reasonable orders from clearly aberrant ones, though this itself assumes that some notion of reasonableness or moral choice persists in war-time conditions even in the face of an often brutal, degrading and dehumanizing process of military indoctrination. In *United States v. Calley*, the defense pointed out that the reasonable person, no matter how it is defined, had long since left the battlefield by the time Calley and his platoon entered My Lai and began the notorious massacre.” Gerry Simpson, *Adjudicating Violence: Problems Confronting International Law And Policy On War Crimes And Crimes Against Humanity*, 60 ALB. L. REV. 801, 817-18 (1997). [Reproduced in the accompanying notebook at Tab 17].

The International Criminal Tribunal in Rwanda must carefully limit the instances where they allow the introduction of a “superior orders” defense. If the orders were manifestly unlawful and a violation of international law the defense cannot be introduced. Also, the “mistake of fact” defense is not recognized under international law and should not be permitted to be used.

(4) Improper Cross-Examination and Closing Arguments Were Permitted.

One remedy the Canadian Court could have imposed when counsel made an inappropriate statement during trial may have been to instruct the jury to disregard the statements and lend them no weight during deliberations.⁸³ In the *Finta* case defense counsel made a series of inflammatory statements and the Court failed to correct the situation.

Douglas Christie, defense counsel, stated “You had better have moral certainty if you are to convict, because if somebody 45 years from now puts you on trial in another country for persecuting Imre Finta and that country might be as hostile to Jews as we are to Nazis, who would you be calling? Don’t call me. You never know in this crazy world, what we do today is lawful and might be some kind of crime tomorrow.”⁸⁴ Through these remarks, defense counsel was asking the jury to consider whether what the Nazi’s did was morally wrong, or just illegal. The problem with defense counsel’s comments is that it has already been determined that crimes against humanity are morally wrong. The acts Finta was charged with are crimes of international law. “As these norms of international law are basic to humanity, to say that tomorrow crimes against humanity may cease to be crimes, as Christie did, is to say that tomorrow humanity may

⁸³ Cotler, *supra* note 52, at 636-41. [Reproduced in the accompanying notebook at Tab 21].

⁸⁴ David Matas, *The Case of Imre Finta*, 43 U.N.B. L.J. 281, 282 (1994). [Reproduced in the accompanying notebook at Tab 16].

cease to be human.”⁸⁵ The Judge simply brushed aside defense counsel’s comments stating he was entitled to his opinion and his comments were not really relevant.⁸⁶ The Judge failed to explain the significance of crimes against humanity and war crimes under international law.⁸⁷

Defense counsel also made a number of religious and ethnic prejudicial comments during the course of the trial. Counsel made references to the New Testament of the Bible. The comments made by counsel portrayed the Jews as a Christ killer.⁸⁸ Defense counsel also referred to the Jews as greedy and vengeful.⁸⁹ Each of these comments are inappropriate statements by defense counsel designed to appeal to prejudices the jury might have. Again, the Judge did nothing to repair the harm caused by counsel’s statements.⁹⁰

Improper cross-examination and prejudicial statements made by counsel may not have the same negative impact at the ICTR, because the ICTR does not have juries but instead judges that make determinations regarding innocence and guilt. As a result, it is more

⁸⁵ *Id.* at 283.

⁸⁶ Cotler, *supra* note 52, at 636-41. [Reproduced in the accompanying notebook at Tab 21].

⁸⁷ “War crimes and crimes against humanity are malum in se, not malum prohibitum. Crimes malum in se are wrong in themselves, while crimes malum prohibitum are wrong only because they are prohibited. The Law Reform Commission of Canada has written that crimes malum in se are not only punishable by law, but also meriting punishment. They argue that such crimes are not just forbidden, they are also wrong. To ignore these crimes is to be less than human and to do nothing about such crimes is tantamount to condoning them. Therefore to be fully human means responding when such crimes are committed. The Law Reform Commission also noted that only a minority of criminal offenses are malum in se. The majority of crimes are malum prohibitum and are not necessarily wrong in themselves, but are prohibited for expediency. The Commission objected to diluting the basic message of criminal law by jumbling together wrongful acts and acts prohibited for simple convenience. The Commission reasoned that of we do so we may end up thinking that real crimes are not more important than mere regulatory offenses. Yet, Douglas Christie did exactly that. He equated war crimes and crimes against humanity to mere regulatory offenses which may be gone or different tomorrow. The trial judge said nothing to sort out the jumble Christie presented to the jury.” Matas, *supra* note 84, at 284-85. [Reproduced in the accompanying notebook Tab 16].

⁸⁸ *Id.* at 285.

⁸⁹ Cotler, *supra* note 52, at 636-41. [Reproduced in the accompanying notebook at Tab 21].

⁹⁰ “The judge, again, was either oblivious to what Christie was doing or failed to appreciate its significance.” Matas, *supra* note 84, at 287. [Reproduced in the accompanying notebook at Tab 16].

likely judges will be able to separate appropriate statements about evidence and facts from inappropriate prejudicial remarks.

C. Barbie

(1) **There is No Statute of Limitations For Prosecutions of Crimes Against Humanity.**

Klaus Barbie was indicted by the French Government for various international crimes including crimes against humanity and war crimes. Barbie committed these crimes while serving as the head of the Gestapo Intelligence Agency. However, Barbie was not tried for these offenses until decades after the fall of Nazi Germany. As a result, Barbie and defense counsel argued at trial that his prosecution was barred by the statute of limitations. In particular, Barbie stated 18 U.S.C. Section 3186 required an indictment be brought within five years of the commission of the offense.⁹¹ Because the prosecution did not comply with statutory requirements the indictment must be dismissed. However, the prosecution argued certain offenses were never subject to a statute of limitations. The prosecution argued that under the Uniform Code of Military Justice, prosecutions for crimes such as mutiny, aiding the enemy, conspiracy, and crimes against humanity could not be barred by the statute of limitations.⁹² Defense counsel countered the prosecution's argument by claiming that only in 1964 did the French Legislature pass a law stating that crimes against humanity were not subject to a statute of limitations.⁹³ The defendant argued that because the alleged crimes were committed before this law was passed the

⁹¹ Arthur J. Goldberg, *Klaus Barbie And The United States Government*, 19 HARV. C.R.-C.L. L. REV. 1, 6 (1984). [Reproduced in the accompanying notebook at Tab 13].

⁹² Allan A. Ryan, *Klaus Barbie And The United States Government: A Reply To Mr. Justice Goldberg*, 20 Harv. C.R.-C.L. L. Rev. 71, 73 (1985). [Reproduced in the accompanying notebook at Tab 11].

⁹³ "In a law enacted on December 26, 1964, the French legislature declared that crimes against humanity, due to the very nature of these crimes, are not subject to the statute of limitations." Jean-Olivier Viout, *The Klaus Barbie Trial And Crimes Against Humanity*, 3 Hofstra L. & Pol'y Symp. 155, 159 (1999). [Reproduced in the accompanying notebook at Tab 22].

effect of the law cannot be applied retroactively.⁹⁴ Ryan, an author writing about the *Barbie* trial, stated “[t]he defense attorney noted that the Charter of the Nuremberg Tribunal defining crimes against humanity did not contain a time limitation for the crime it defined. Absent such a time limitation and relying on the non-retroactivity of French criminal law, the twenty-year statute of limitations should apply to Barbie.”⁹⁵ The Court considered the issue of whether the statute of limitations applies to the crimes Barbie is charged with and whether it bars prosecution. The Court declared there is no statute of limitations for crimes against humanity and therefore the indictment against Barbie was not dismissed. Furthermore, the Court stated “the incrimination of crimes against humanity is in accordance with the general principles of law recognized by the civilized nations...as such these crimes escape the principle of retroactivity.”⁹⁶

The Court struck down the defendant’s argument based on four factors. First, the Court found the 1964 law passed by the French legislature declaring there is no statute of limitations for prosecutions of crimes against humanity is an extension of the London Agreement signed into effect in 1945.⁹⁷

Second, the Court relied on the language from the London Agreement and determined there was no statute of limitations for crimes against humanity.⁹⁸

The purpose of the London Agreement was to prosecute and punish the great war criminals of the European powers of the Axis. The London Agreement also provided for the establishment of an International Military Tribunal to sit in

⁹⁴ The principle of non-retroactivity is embraced both in the Declaration of Human Rights and the preamble to the French Constitution. *Id.*

⁹⁵ *Id.* at 159-60.

⁹⁶ Guyora Binder, *Representing Nazism: Advocacy And Identity At The Trial Of Klaus Barbie*, 98 YALE L.J. 1321, 1131 (1989). [Reproduced in the accompanying notebook at Tab 18].

⁹⁷ “By expressly referring to the Charter of the International Military Tribunal of Nuremberg, which was annexed to the London Agreement, and which is itself integrated into the French national legal system, the 1964 French law necessarily proceeds from this Charter, especially with regard to its scope.” Viout, *supra* note 93, at 160. [Reproduced in the accompanying notebook at Tab 22].

⁹⁸ *Id.*

Nuremburg. This Nuremburg Tribunal was charged with judging the war criminals whose offenses have no particular geographic location. The Charter of the International Tribunal in Nuremburg was annexed to the London Agreement and provided for three categories of crimes which were defined in the Charter: Crimes Against Peace..., War Crimes..., and Crimes Against...⁹⁹

Third, the Court relied on the European Convention of Human Rights and Fundamental Freedoms, which states in Article 60 that “the right to benefit from the statute of Limitations does not constitute a human right or a fundamental freedom.”¹⁰⁰

Lastly, the Court stated the 1964 law, eliminating a statute of limitations for crimes against humanity, was already a part of French National law. As a result, defense counsel was incorrect in asserting the claim that prosecuting Barbie would be a violation of the principle of non-retroactivity. The idea there is no statute of limitations for crimes against humanity was established long before 1964.¹⁰¹

The holding and dicta of the Court in the *Barbie* case has modern day application to prosecutions currently occurring at the International Criminal Tribunal in Rwanda. The Court in *Barbie* made clear there is no statute of limitations for crimes against Humanity. This rule favors the prosecution and allows indictments to be issued years and decades after an alleged offense occurs. In the event a defendant raises the argument his prosecution is barred by the statute of limitations the Tribunal need only cite *Barbie*. One should note that while a prosecution may not be barred by lack of a statute of limitations, the earlier the prosecution commences the better. The prosecution will have an easier time locating witnesses and evidence if the prosecution takes place sooner rather than later.

⁹⁹ *Id.* at 157-58.

¹⁰⁰ *Id.* at 160-61.

¹⁰¹ *Id.* at 161.

(2) The Capture of Barbie was Proper and Did Not Create Grounds for the Dismissal of his Case.

During the trial much attention was paid to the circumstances surrounding the capture by French officials of the defendant. Like many war criminals, Barbie fled the state where he committed various atrocities after the war ended.¹⁰² Barbie went to live in Bolivia.¹⁰³ When France received notice Barbie was living in Bolivia they made a extradition request, which was not honored.¹⁰⁴ On November 3, 1982, an international warrant of arrest was issued for the defendant.¹⁰⁵ For years the defendant remained at large. On February 6, 1986, a new government took over in Bolivia and they expelled Barbie. He was placed on a plane headed for Guyana and when the plane landed he was arrested immediately.¹⁰⁶ Defense counsel argued this was an illegal arrest and as a result the case against the defendant must be dismissed.

The Court dismissed defense counsel's argument and found Barbie's capture legal. The Court based their decision on a United Nations Resolution dated February 13, 1946. The Court stated, "This Resolution, adopted by all members of the United Nations Organization including Bolivia, recommended that each nation take all measures Necessary to punish the crimes specified in the text, and that each nation make sure that the individuals thought to be responsible for such crimes be expelled to the countries where the crimes were perpetrated in order that the individuals be judged and punished in accordance with the laws of such countries."¹⁰⁷

¹⁰² Binder, *supra* note 96, at 1326. [Reproduced in the accompanying notebook at Tab 18].

¹⁰³ *Id.*

¹⁰⁴ Viout, *supra* note 93, at 161. [Reproduced in the accompanying notebook at Tab 22].

¹⁰⁵ "However, it was impossible to circulate this warrant of arrest for Barbie through Interpol because Article 3 of the Statutes of Interpol provides that it can offer assistance only for crimes involving a breach of general, ordinary, criminal law." *Id.*

¹⁰⁶ *Id.* at 161-62.

¹⁰⁷ *Id.* at 162-63.

Defendant's facing charges of violations of international law have long argued their cases should be dismissed because of an illegal arrest. In *United States v. Insull*, the defendant argued he was illegally and unlawfully brought to the jurisdiction. The defendant was on a ship leaving Greece and when the boat stopped in Bosphorus for supplies he was apprehended by Turkish authorities.¹⁰⁸ He was then delivered to an agent of the United States.¹⁰⁹ The Court held that the defendant did not have a right to challenge jurisdiction. The Court stated that if the countries where the United States agents entered to abduct the defendant wanted to protest they would be permitted.¹¹⁰ However, a defendant by himself cannot raise this defense.¹¹¹

The Court also faced a similar situation in *United States v. Unverzagt*. The defendant argued he was illegally kidnapped and abducted from Vancouver and brought to the United States to face charges of mail fraud.¹¹² He argued he could not be removed from a sovereign country until British Columbia gave permission. The Court held that if the rights of the defendant had been violated that was a matter between the country which abducted him and the sovereign country from where he was taken.¹¹³

The issue of how a defendant is brought before a court is of vital importance to the

¹⁰⁸ *United States v. Insull*, 8 F. Supp. 310, 311 (Ill. 1934). [Reproduced in the accompanying notebook at Tab 8].

¹⁰⁹ The Court stated “[w]hile this defendant was conducting himself in a peaceable and lawful manner as a passenger on the S.S. Maiotis, and while said steamship was at anchor, and flying the flag of Greece, Turkish police came upon said Greek vessel, and without legal authority, and over the protest of the captain of the S.S. Maiotis, forcibly seized and removed this defendant therefrom without his consent against his will, and took this defendant to shore and incarcerated him in a prison in Istanbul.” Then, “...without his consent and over his protest, and there delivered to Burton Y. Berry, an agent of the government of the United States of America.” *Id.*

¹¹⁰ *Id.* at 314-15.

¹¹¹ A similar situation arose in *United States v. Mulligan*. In that case the defendant was extradited from France to the United States and then re-extradited to Canada. The defendant argued this was illegal. The Court upheld the extradition as legal. *United States v. Mulligan*, 76 F.2d 511 (1935). [Reproduced in the accompanying notebook at Tab 6 and Tab 7].

¹¹² *United States v. Unverzagt*, 299 F. 1015, (1924). [Reproduced in the accompanying notebook at Tab 10].

¹¹³ *Id.*

ICTR. Many times war criminals flee the country after their regimes are defeated. As a result, the ICTR will face the issue of whether a defendant was illegally obtained and brought before the court. The ICTR will likely be able to dismiss each of these objections because the country from where the defendant was taken must be the one to raise the objection, not the individual taken. However, even if the country raises an objection it can be defeated by a diplomatic note promising not to repeat the behavior. In other words, the country accused of taking the defendant could send the complaining country a note stating they apologize and will not repeat the conduct in the future.

(3) An Individual May Be Prosecuted For Crimes Against Humanity Against Civilian Individuals And Individuals Considered Combatants.

The issue the Court considered was “whether Crimes Against Humanity can be applied to any individual victim, or is it reserved only for those victims who were not fighting in the war.”¹¹⁴ The prosecution argued that Barbie’s crimes were targeted at two groups, the Jewish community and combatants fighting in the war. The prosecution argued that both groups must be treated alike. Defense counsel argued Barbie may have committed acts of crimes against humanity against the Jews, but Barbie could not be held liable for crimes against humanity committed against combatants.¹¹⁵ Defense counsel stated “...these two categories of victims could not be treated alike since crimes against humanity involved an international element and required that such crimes be committed on victims selected precisely because they belonged to a race or selected specifically because of their religious and political opinions.”¹¹⁶

The lower court agreed with defense counsel and stated

¹¹⁴ Viout, *supra* note 93, at 163. [Reproduced in the accompanying notebook at Tab 22].

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 164.

While Barbie was clearly guilty of having committed arrests, tortures, and deportations of civilians, these crimes could not be considered crimes against humanity because the victims were members of the Resistance. The Resistance was an organization which could be equated to a combat unit subject to the rules and customs of war.

The French Supreme Court disagreed and found Barbie guilty of Crimes Against Humanity of both civilians and non-combatants. The Court reasoned that there is no need to make a distinction between the victims because it is the intention of the defendant when committing the acts that matters.¹¹⁷

Crimes against humanity include inhumane acts and persecutions committed in a systematic manner against people belonging to a particular race or religious community in the name of a State which is carrying out its policy of ideological hegemony. It also includes inhumane acts and persecutions committed against adversaries of this policy, no matter what form this opposition may take. These crimes against humanity are not applicable to the statute of limitation's as set forth in the Charter of the International Tribunal of Nuremburg—even though these crimes would equally be qualified as war crimes according to the text.¹¹⁸

The Court's reasoning has current day application to prosecutions taking place at the ICTR. Many times the victims of these crimes will be combatants. However, the ICTR can proceed with prosecutions against defendants for crimes against humanity even when the victims are combatants. The key element the prosecution must focus on is the intent of the defendant when committing these acts. Analysis of whether the victim was an innocent civilian or a combatant is unnecessary. More often than not the atrocities for which the defendants will be prosecuted involve acts committed against members of an opposing political party. However, the acts are considered crimes against humanity and war crimes nevertheless.

IV. Application to the ICTR

¹¹⁷ “There is no need to make a distinction between those crimes committed against the civilian populations and those crimes committed against combatants, since it is the intention of the perpetrator of the crimes and not the quality or motives of the victims that determine the nature of the persecution committed.” *Id.*

¹¹⁸ *Id.*

A. Application of *Eichmann* to Current Prosecutions at the ICTR

The District Court in Jerusalem held in *Eichmann* that jurisdiction to try certain violations of international law including genocide, crimes against humanity, and war crimes is universal. The Statute of the International Tribunal of Rwanda has limited the ICTR's jurisdiction to try certain violations of international law.¹¹⁹ What falls under the jurisdiction of the ICTR? The ICTR has jurisdiction to prosecute serious violations of international law either that took place in Rwanda or crimes in which the defendants are nationals of Rwanda.¹²⁰ Serious violations of international law include both genocide and crimes against humanity. Genocide is defined under the ICTR Statute as

Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: a) killing members of the group; b) causing serious bodily or mental harm to members of the group; c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) imposing measures intended to prevent births within the group.”¹²¹

Crimes against humanity are defined under the ICTR Statute as

[An] attack against any civilian population on national, political, ethnic, racial or religious grounds including: a) murder; b) extermination; c) enslavement; d) deportation; e) imprisonment; f) torture; g) rape; h) persecutions on political, racial and religious grounds; i) other inhumane acts.¹²²

It can be argued it is easier to establish jurisdiction under the principle of universal jurisdiction articulated in *Eichmann*. However, the ICTR has a limited purpose. The ICTR was set up to prosecute specific offenses impacting Rwanda. As long as the prosecution meets the above definitions for genocide and crimes against humanity and

¹¹⁹ U.N. S.C. Res. 955 (8 Nov. 1994). [Reproduced in the accompanying notebook at Tab 30].

¹²⁰ *Id.*

¹²¹ *The Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T. [Reproduced in the accompanying notebook at Tab 4].

¹²² *Id.*

involves Rwanda territory or Rwandan nationals there should be no difficulty in establishing jurisdiction.

In *Eichmann*, the District Court of Jerusalem analyzed the issue of whether a defendant can be granted act of state immunity. The ICTR Statute anticipated defendants would argue they cannot be held liable for their individual acts because they were performing these acts under orders from a sovereign state. The ICTR Statute deals with this issue in Article 6, Individual Criminal Responsibility. Article 6 states

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation, or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.¹²³

Therefore, the ICTR Statute clearly prohibits a defendant from raising the act of state defense in an attempt to escape criminal liability. The rule in Article 6 of the ICTR Statute is consistent with the District Court of Jerusalem's position taken in *Eichmann*.

The drafters of the ICTR Statute also anticipated defendants would attempt to raise a "superior orders" defense. In the *Eichmann* case the court was faced with the issue of whether "superior orders" is a valid defense. As noted above, the essence of a "superior orders" defense is defendants cannot be held criminally liable for their actions because they were following the orders of their superiors. Eichmann was not permitted to raise the defense because the Court determined it was clear the defendant knew or should have known the orders were manifestly unlawful. Furthermore, Eichmann was a superior himself and it is unlikely he was receiving orders but instead giving orders.

The ICTR Statute states

¹²³ *Id.*

The Fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.¹²⁴

The ICTR Statute takes a similar position to the one articulated by the Court in *Eichmann*. The ICTR Statute states a manifestly unlawful test must be employed when analyzing a “superior orders” defense. However, the ICTR Statute adds a statement not considered in *Eichmann*. The ICTR may in its’ discretion consider the “superior orders” defense as a mitigating factor at the time of sentencing. The ICTR Statute reaffirms the principle that “the fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility.”¹²⁵

B. Application of *Finta* to Current Prosecutions at the ICTR

The Canadian Court in *Finta* was faced with the issue of the appropriate actus reus for crimes against humanity. After defining the appropriate actus reus under Canadian Law, the Court imposed a higher threshold. The ICTR Statute clearly articulates the actus reus which must be established by prosecutors in order to find the defendant liable for crimes against humanity. The actus reus of crimes against humanity as defined in the ICTR Statute is an act “committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds.”¹²⁶ The actus reus for crimes against humanity established in the ICTR Statute closely mirrors the

¹²⁴ *Id.*

¹²⁵ Alexander K.A. Greenawalt, *Rethinking Genocidal Intent: The Case For A Knowledge-Based Interpretation*, 99 COLUM. L. REV. 2259, 2279 (1999). [Reproduced in the accompanying notebook at Tab 12].

¹²⁶ Simon Chesterman, *An Altogether Different Order: Defining The Elements Of Crimes Against Humanity*, 10 DUKE. J. COMP. & INT’L L. 307, 309 (2000). [Reproduced in the accompanying notebook at Tab 28].

actus reus for crimes against humanity established in the Rome Statute.¹²⁷ One major difference between the Rome Statute and the ICTR Statute is the ICTR statute requires the act be done on discriminatory grounds. The Rome Statute does not have this same requirement.¹²⁸ The ICTR Statute also has a “widespread or systematic” requirement.¹²⁹ Prosecutors at the ICTR must establish both these requirements in order to prove the necessary requisite actus reus.

The ICTR Statute also addresses the requisite mens rea that must be established by the prosecution in order to find the defendant guilty. The requisite mens rea is *intent*.¹³⁰ The prosecution must establish the mental state of the defendant was an intent to “destroy, in whole or in part, a national, ethnical, racial, or religious groups....”¹³¹ In the case of *Prosecutor v. Ignace Bagilishema*, the ICTR reiterated the holding that the proper mens rea is intent and failure to establish intent will result in an acquittal.¹³²

C. Application of *Barbie* to Current Prosecutions at the ICTR

One of defense’s arguments in the *Barbie* case was that the case should be dismissed because the defendant was improperly captured and brought before the court. This issue is of vital importance to the ICTR because it is unlikely defendants will voluntarily appear before the court when facing serious charges that carry possible sentences of life in prison or death.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 312-13.

¹³⁰ ICTR Statute, *supra* note 119, at Article 2. [Reproduced in the accompanying notebook at Tab 30].

¹³¹ *Id.* See also Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 A.J.I.L. 573 (1999). [Reproduced in the accompanying notebook at Tab 19].

¹³² *The Prosecutor v. Ignace Bagilishema*, ICTR-95-1A-T. [Reproduced in the accompanying notebook at Tab 3].

This issue was addressed in the context of the ICTR in *Ntakirutimana v. Reno*.¹³³ The defendant was charged by the ICTR with genocide and other violations of international law. The ICTR made an extradition request to the United States and the request was granted. The defendant argued the request was improperly granted because there was no extradition treaty between the United States and the ICTR.¹³⁴ The United States Court of Appeals held extradition of the defendant was proper pursuant to 18 U.S.C.S. Section 3186.¹³⁵ The Court stated

The U.S. Constitution, while expounding procedural requirements for treaties alone, apparently contemplates alternate modes of international agreements since U.S. Const. Art 1, refers to other international devices that may be used by the federal government. Of necessity, the President may enter into certain binding agreements with foreign nations not strictly congruent with the formalities required by the U.S. Constitution's Treaty Clause, U.S. Const. Art. II.. More specifically, a treaty or statute may confer the power to extradite.¹³⁶

The Court also made the point that pursuant to the agreement between the United States and the ICTR, the ICTR only needed to present “information sufficient to establish that there is a reasonable basis to believe that the person sought has committed the violation or violations for which surrender is requested.”¹³⁷ Because the ICTR established there was probable cause to believe the defendant was responsible for genocide and other violations of international law, surrender was proper. When questions arise during current prosecutions at the ICTR regarding the circumstances regarding the surrender of a defendant, *Ntakirutimana* must be used as a model to resolve these questions.

V. Conclusion

¹³³ *Elizaphan Ntakirutimana v. Janet Reno, et al*, 184 F.3d 419, 421 (1999). [Reproduced in the accompanying notebook at Tab 1].

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 426.

¹³⁷ *Id.* at 427.

Looking at the holdings from the *Eichmann, Finta, and Barbie* trials together provide valuable insight that may be applied to trials currently taking place at the ICTR. The *Eichmann* trial clearly articulated that any country can prosecute an individual charged with crimes of international law. In other words, there is universal jurisdiction to try crimes against humanity. Furthermore, there is no statute of limitations for the prosecution of these crimes. Also, the Court made clear a “Superior Orders” defense can only be applied in certain situations. Lastly, a defendant cannot rely on an Act of State defense and be absolved from criminal liability.

The ICTR can learn from the mistakes made in the *Finta* trial. The Court imposed higher thresholds for both the mens rea and actus reus. The Court also improperly permitted use of the “Superior Orders” and “Mistake of Fact” defense. The guidelines set forth in *Eichmann* were ignored by the Court. Lastly, the Court allowed inflammatory cross-examination. The Court did nothing to rectify the damage created by these inappropriate remarks.

The *Barbie* trial again reaffirmed the idea that there is no statute of limitations for crimes against humanity. Furthermore, the Court made clear that an individual may be prosecuted for crimes against humanity when the victims are either civilians or combatants. Lastly, the Court dealt with the issue of an improper capture of a defendant and ruled that was not grounds for dismissal of the case.

All of these cases are helping deal with cases brought before the ICTR.

