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CURRENT ISSUES IN INTERNATIONAL CRIMINAL LAW

Reviewing:

M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, 2nd revised ed., The Hague: Kluwer Law, 1999, 610 pages.

Cherif Bassiouni's second revised edition of *Crimes Against Humanity in International Criminal Law* gives a comprehensive legal and historical analysis of crimes against humanity covering its emergence in positive international criminal law, its legal development and its theoretical foundations. The book is not limited to crimes against humanity but also refers to and analyses various – related or unrelated – problems of current international criminal law^{★★}. Thus, the reviewer is invited if not provoked to deal with the state of international criminal law in general, dedicating to the *opus magnum* not only a review but a more profound review essay.

In general, the book chooses the approach from the general to the specific, first describing the emergence, sources and philosophical foundations of “crimes against humanity” and international criminal law in general before coming to the analysis of the actual legal questions involved. Yet, the book always returns to the historical foundations and, in the last chapter, presents an account of national and international prosecutions which contains a lot of information and reflections already presented before. It would have been more elegant to give the book a greater consistency by better adjusting the different chapters to each other and, above all, avoiding unnecessary

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^{★★} See also the recent Introduction to international criminal law (2003) by the same author.

repetitions (some of which will also be referred to in the following review). At some points, it appears as if the different chapters had been written on different occasions at different times and have then been put together in the second edition without a final harmonisation. Still, this criticism refers to form rather than substance and should therefore not be overestimated. To do justice to this classic *opus* in the field of international criminal law a chapter-by-chapter analysis focussing on the substance is called for.

I. HISTORICAL BACKGROUND AND SOURCES OF THE LAW

Chapter 1 deals with the emergence of crimes against humanity in positive international law and analyses the post-World War II trials in Nuremberg and Tokyo and their legal bases, *i.e.*, the statutes of the International Military Tribunal (IMT), at Nuremberg, and the International Military Tribunal for the Far East (IMTFE), at Tokyo. The establishment of the IMT was the result of complex negotiations between the four allied powers who only agreed in that it was to be avoided that the trials were to turn the guilty Nazis into martyrs. Apart from that, the idea of a *legal* process to establish the guilt or innocence of the “major war criminals” was an American one while the other parties, especially the United Kingdom and the Soviet Union, would have preferred swift military trials and executions. In the end, the United States won the day since it was the only remaining real power after the atrocities of World War II and the Truman administration had a decisive commitment to a rule of law approach. Against the background of the hostility of the Bush administration towards the International Criminal Court, it cannot be overestimated that international criminal justice would never have come into existence without the post-World War II commitment of the United States administration at the time. Professor Bassiouni describes the difficult negotiation process with profound knowledge of the legal and political questions involved. He correctly states that United States president Harry Truman must “be credited with the outcome of legality over power” (p. 38). United States dominance also explains the common law tendency of the Charter of the IMT, in particular the adversarial structure of the trial. The “maximum divergence in legal concepts”, as noted by Justice Jackson, was finally resolved in favour of the common law and, as such, preceded a development which was only reversed in favour of a truly mixed procedure at the end of the 1990s with amendments to

the Rules of Procedure and Evidence¹ of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the establishment of the International Criminal Court (ICC).²

As to the establishment of the IMT and IMTFE, Bassiouni eloquently criticises the fact that “no one ever satisfactorily explained why in one case [Nuremberg] an international agreement was needed and in the other one [Tokyo] a military proclamation by a ... military commander was deemed sufficient”. As to the principle of legality (*nullum crimen, nulla poena sine lege*), he makes the interesting proposal that the Allies would have avoided some problems if they had applied the German Penal Code (*Reichsstrafgesetzbuch*) of 1871. He correctly notes that critics of the Nuremberg law because of its alleged violation of the principle of legality regularly overlook the fact that the Allies first had to reinstate the principle – the prohibition of analogy (*lex stricta*) – by abolishing the Nazis’ reference to the “sound instincts of the people” (*gesundes Volksempfinden*) in Section 2 of the 1935 Penal Code.³ On the other hand, it is true that the Nuremberg precedent would have been subject to less criticism if the Allies had confronted and solved the legal issues involved, especially with regard to the principle of legality, in a more convincing manner. Still, the overall assessment is a positive one. Individual responsibility for the commission of the most serious crimes was established⁴ and Nuremberg served as a precedent for the future in that the rule of law prevailed over pure vengeance.

Article 6(c) of the IMT-Statute for the first time identified and defined “crimes against humanity”. The United States had some problem with this codification, because it had objected the inclusion of crimes against humanity in the Versailles Peace Treaty of 1919. Further, the creation of a new crime which did not exist at the time of the commission of the alleged offences was hardly compatible with the principle of legality. Thus, article 6(c) was linked to crimes against peace (art. 6(a)) and especially war crimes (art. 6(b)), and the requirement that crimes against humanity be committed “before or during the war ... in execution of or in connection with any crime within the jurisdiction of

¹ Last amended on 6 April 2004, IT/32/Rev. 30 (available at <www.un.org/icty/>).

² For a detailed analysis see K. Ambos, *International Criminal Procedure: “Adversarial”, “Inquisitorial” or Mixed?*, 3 INT’L CRIM. L. REV. 1 (2003).

³ Art. 1 of the Law of 28 June 1935, *Reichsgesetzblatt*, at 839: “Bestraft wird, wer eine Tat begeht, die das Gesetz für strafbar erklärt oder die nach dem *Grundgedanken* eines Strafgesetzes und nach dem gesunden Volksempfinden Strafe verdient.”

⁴ Cf. K. Ambos, in I SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW 1 *et seq.* (G. McDonald & O. Swaak-Goldman, eds., 2000).

the Tribunal”. While this so called *war nexus* or connection obviously implied a considerable limitation of the application of crimes against humanity to the Nazi atrocities and had further consequences in the development of the law of crimes against humanity it must be accepted, as rightly stated by Bassiouni (at p. 29), as the will of the drafters of the Charter. At the same time, however, it must be recognized that this requirement is no longer part of the current law of crimes against humanity,⁵ as it was already removed by article II(c) of Control Council Law No. 10 (“CCL 10”) of 20 December 1945,⁶ and more recently by article 7 of the Rome Statute of the ICC.⁷

As to the sources of the law of armed conflict (chapter 2), a striking difference between crimes against humanity and war crimes exists in that the former did not constitute a recognized category of international law before World War II. This is the reason why the drafters of the Nuremberg Charter had to link crimes against humanity to war crimes, thereby limiting its scope of application to acts committed during an armed conflict. Against this background it is questionable whether “crimes against humanity” existed as part of “general principles of law recognised by civilized nations” long before 1945. Although, the evolution of the laws of armed conflict, aptly described by Bassiouni (p. 44 *et seq.*), shows that humanitarian principles developed over several centuries, these principles always referred to humane conduct during armed conflict. Although the term “crimes against humanity” goes back to the Turkish massacre of the Armenian population in 1915 and was also used in the “1919 Report of the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties for Violations of the Laws and Customs of War”, the concept existed only in the form of “principles” but not as a criminal offence whose definition must comply with certain

⁵ See, for a detailed analysis, K. Ambos & S. Wirth, *The Current Law of Crimes against Humanity*, 13 CRIM. L. FORUM 1,3 *et seq.* (2002).

⁶ Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, Official Gazette Control Council for Germany, p. 50 *et seq.*

⁷ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9, as corrected by the *procès-verbaux* of 10 November 1998 and 12 July 1999. The Statute entered into force 1 July 2002 and has, at the time of writing (1 May 2004), 93 States parties. The 18 judges of the ICC were elected in February 2003 and the General Prosecutor in June 2003 by the Assembly of State Parties. For further information in particular the first investigations see <www.un.org.law/icc> and <www.iccnw.org>.

minimum standards of legal certainty to be applicable in a criminal court.⁸ Bassiouni rightly states that the war crimes *nexus* in crimes against humanity's was motivated by concerns of legality (pp. 78, 80). In other words, the drafters wanted to strengthen the legitimacy of the concept by linking it to the long recognised category of war crimes. Thus, following the Charter's approach, crimes against humanity and war crimes overlap and their major difference lies in the fact that only the former can be committed against the nationals of the state. Indeed, given the Nazi atrocities against their own population, the need for an international crime covering these was obvious. Still, the emancipation of crimes against humanity from war crimes only started after 1945, with their recognition in various international instruments, and finally in article 7 of the ICC Statute. Thus, from a modern perspective of international criminal law, it is correct to affirm that crimes against humanity "is a separate category of international crimes and is not connected to war crimes" (p. 86).⁹

II. *NULLUM CRIMEN SINE LEGE* AND RELATED ISSUES

In chapter 3 Bassiouni deals with issues of legal philosophy involved in the making of the Nuremberg Charter. The author convincingly argues that only a concept of strict positivism could have considered the Nazi laws valid and, consequently, the law of the Charter in violation of the legality principle, especially the prohibition of *ex post facto* laws. All other schools of thought, from naturalism to pragmatism and utilitarianism, defended the validity of the Nuremberg laws and the prosecution of the Nazis, ultimately balancing the legal and moral interests involved: strict legality vs. impunity, law vs. morality, the latter prevailing over the former as legal substance prevails over form. Bassiouni himself follows the naturalist view since "a new law was needed to express the wrath and anger of the world at the Nazi regime ..." (p. 109). He does not, however, unlike many international lawyers, ignore the intricate problems involved with regard to the principle of legality and the Nuremberg prosecutions. He repeats that it would

⁸ The vagueness of the concept was the reason why the members from the United States of America distanced themselves from the findings of the 1919 Commission with regard to crimes against humanity: "The laws and principles of humanity vary with the individual, which ... should exclude them from consideration in a court of justice, especially one charged with the administration of criminal law" (cited by Bassiouni, at p. 65).

⁹ See K. Ambos & S. Wirth, *supra* note 5, pp. 4 *et seq.* (13).

have been possible to apply German law (the German Penal Code of 1871) to prosecute the war criminals and criticises the application of the law only to the vanquished. The latter aspect gains particular importance in light of the renewed debate about the war crimes of the Allies, especially the revenge bombing of German cities (Dresden etc.).¹⁰ The author further recognises the “legal imperfections” (p. 11) of the law of the Charter which were a product of the enormity of the human suffering caused by the Nazi regime.

The whole debate about the philosophical underpinnings of international criminal law is fundamental and receives much too little attention in the reception of Bassiouni’s works. In this part, Bassiouni presents himself as a profound expert on the different traditions of comparative criminal law and makes interesting observations about the common aspects of these traditions. He discusses the structural contradiction between positivist and customary international criminal law and thereby touches upon a question which is still a concern to (international) criminal justice, as can be seen from the debate about the legality of the jurisdiction of the *ad hoc* tribunals¹¹ and the scope of application of article 7 of the European Convention of Human Rights with regard to the justification of the border killings in the German Democratic Republic.¹²

In dealing with the principles of legality and the law of the Charter (chapter 4), Bassiouni first examines the criminal law of the world’s major criminal justice systems and reaches the conclusion that,

¹⁰ Cf. most recently J. Friedrich, *DER BRAND. DEUTSCHLAND IM BOMBENKRIEG 1940–1945* (2002).

¹¹ See *Prosecutor v. Tadic* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 79 *et seq.*, 141; *Prosecutor v. Tadic* (Case No. IT-94-1-T), Opinion and Judgment, 7 May 1997, paras. 577, 623.

¹² *Streletz, Kessler, Krenz v. Germany*, Judgment, 22 March 2001: punishability for (border killings) and European Convention of Human Rights, art. 7. See Helmut Kreicker, *ART. 7 EMRK UND DIE GEWALTSTATEN AN DER DEUTSCH-DEUTSCHEN GRENZE* (2002); Udo Ebert, *Völkerstrafrecht und Gesetzlichkeitsprinzip*, in *FESTSCHRIFT Müller-Dietz* 171 (Heike Jung *et al.*, eds., 2001); Gerhard Werle, *Rückwirkungsverbot und Staatskriminalität*, 54 *NEUE JURISTISCHE WOCHENSCHRIFT (NJW)* 3001 [2001]; Markus Rau, *Deutsche Vergangenheitsbewältigung vor dem EGMR etc.*, 54 *NJW* [2001] 3008; Winfried Hassemer, *Naturrecht im Verfassungsrecht*, in *FESTSCHRIFT TRECHSEL* 135 (Andreas Donatsch *et al.*, eds., 2002); Wolfgang Naucke, *Bürgerliche Kriminalität, Staatskriminalität und Rückwirkungsverbot*, in *FESTSCHRIFT TRECHSEL* 505 (2002); K. Ambos, *Artikel 7 EMRK, Common Law und die Mauerschützen*, 88 *KRITISCHE VIERTELJAHRESCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT* 31 (2003). The ECHR’s decision was recently confirmed by the UN Human Rights Committee, decision of 31 July 2003.

by 1945, “the principles of legality had become part of the general principles of law in western Europe, but were not yet universally accepted nor were they uniformly applied” (p. 137). Examining the principles – or better: principle – of legality more closely, one can argue that the prohibition of retroactive application of the criminal law (*lex praevia*) is universally recognised while the principle of certainty (*lex certa*) and the prohibition of analogy (*lex stricta*) as well as the *nulla poena* principle suffer considerable variations in common and civil law and in its subsystems. In fact, strictly speaking, common law would, by its very existence, violate the *nullum crimen* principle, at least its *lex scripta* component, since it consists partly, if not mainly, of unwritten, customary law. In addition, the – still existing – judicial law-making power of the courts in the United Kingdom runs counter to the prohibition of analogy.¹³ In any case, international criminal law always took a more liberal stance on these issues. Its evolution “resembles”, as Bassiouni puts it, “more that of the common law than that of the Romanist–Civilist–Germanic systems” (pp. 140–141). Indeed, international criminal law always conceived of *nullum crimen* in a rather subjective than objective sense limiting it to a rule of foreseeability and fairness for the accused. And, even if the criminality of a certain act could not be foreseen, the decisive question was whether the accused *should have foreseen* it, since the conduct, in any case, violated natural law and morality. Obviously, this conception transforms the former *principle* into a mere *rule* which is – it has been said before – but one element in a balancing of interests between material justice (*ius*) and legal certainty (*lex*) or, in the words of Hans Kelsen, between morality and legality.¹⁴ The rule no longer reads *nullum crimen sine lege*, but *nullum crimen sine iure*: no crime without (natural) law. The maxim is no longer the expression of strict positivism but it constitutes, as explicitly stated by the IMT,¹⁵ a principle of justice.

¹³ Cf. A.T.H. Smith, *Judicial Law Making in the Criminal Law*, 100 L.Q. REV. 46 (1984); M. Giles, *Judicial Law-Making in the Criminal Courts etc.*, [1992] CRIM. L.R. 407. See also K. Ambos, *supra* note 12, p. 31 *et seq.*

¹⁴ H. Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 CAL. L. REV. 530, 544 (1943); H. Kelsen, *Will the Judgement in the Nuremberg Trial Constitute a Precedent in International Law*, 1 INT'L L.Q. 153, 164–165 (1947).

¹⁵ 22 IMT 461–462. See also K. AMBOS, *DER ALLGEMEINE TEIL DES VÖLK-ERSTRAFRECHTS* 111 *et seq.* (2002), 2nd ed. 2004 (reviewed in English in 14 EUR. J. INT'L L. 205 (2003); 2 INT'L CRIM. L. REV. 409, 417–418 (2002); 1 JOURN. INT. CRIM. JUSTICE, 737 (2003); 1 THE ANNUAL OF GERMAN & EUROPEAN LAW (AGEL) 950 (2003)).

Nevertheless, questions remain and Bassiouni correctly dismisses some of the arguments put forward by the IMT and subsequent case law to defend the application of crimes against humanity to conduct prior to the entry into force of the Charter. Taken together, the four arguments in favour of the validity of the Charter conceive of the Charter as a purely declaratory instrument that only restates international criminal law and codifies crimes against humanity as a (jurisdictional) extension of war crimes. While this argument may save the legality of article 6(c) IMT Statute it has the negative side-effect of forever linking crimes against humanity to war crimes. This is a completely undesirable result. Moreover, the link already disappeared in article II(c) of Control Council Law No. 10 and is, as stated before, no longer required today (see art. 7, ICC Statute).¹⁶ Still, even from the more liberal perspective of “*nullum crimen sine iure*” and the application of penalties by analogy one cannot renounce the link because article 6(c) of the IMT Statute and article 5(c) of the IMTFE Statute “are premised on the analogy to the norms, rules and principles of international regulation of armed conflicts viewed in the totality of their historical development and in the context of the values they embody and the protections they seek to achieve” (p. 162). In other words, the substantial validity of crimes against humanity depends on the war crimes link, at least to the extent that the conduct to be criminalised occurred prior to the entry into force of the post-World War II codifications. This approach is a convincing compromise between strict positivism and naturalism, it adapts the *nullum crimen* principle “to the context and exigencies of international criminal law”.

It is questionable, though, whether the recourse to “general principles of law recognised by the community of nations” in article 15(2) of the International Covenant on Civil and Political Rights (ICCPR) (and article 7 of the European Convention on Human Rights (ECHR)) complies with this standard and satisfies the legality requirements. Bassiouni rightly points out that general principles cannot create international crimes because their lack of specificity would violate the minimum standards of legality; general principles may only be relevant in interpreting the content of legal terms such as “inhumane acts”. The European Court of Human Rights, in the GDR border killings cases, avoided this problem by considering the acts at hand as having been punishable already at the time of their commission according to article 7(1) of the European Convention

¹⁶ See *supra* note 7 and text.

(ECHR) (and article 15(1) of the ICCPR).¹⁷ In any case, the ICC Statute confirms the strict understanding of the *nullum crimen* principle, limiting the Court's jurisdiction to crimes committed after the entry into force for the State concerned (art. 11) and codifying both *nullum crimen* and *nulla poena* (arts. 22–24). As to *nulla poena*, articles 77 and 78 of the ICC Statute and Rule 145 of the ICC's Rules of Procedure and Evidence provide for the most precise sentencing framework achieved so far in international criminal justice.¹⁸

III. SUBSTANTIVE AND PROCEDURAL ISSUES

What Bassiouni calls “Post-Charter Legal Developments” (chapter 5) is in fact a *tour d'horizon* touching upon a wide range of different issues, most of which certainly deserve a more profound analysis. As to the substantive developments, first the author describes the work of the International Law Commission with regard to crimes against humanity. He emphasises the importance of the Commission's 1950 report on the so-called Nuremberg principles. At the same time he points out critically that the International Law Commission was always “sensitive ... to political currents” (p. 185) and did not freely interpret and elaborate the crimes but was “labouring under the long shadow of Nuremberg” (p. 188). While it is difficult to verify this criticism, Bassiouni is certainly correct in pointing out the various provisions of the 1991 Draft Code that were in clear violation of the principle of legality, especially in the sense of *lex certa*. Above all he refers to the crime of “wilful and severe damage to the environment” (art. 26), a codification which he considers as *the* “example of a normative provision that is overtly broad and ambiguous ...” (p. 190). Thus, unfortunately, Bassiouni's final assessment as to the work of the International Law Commission can hardly be challenged: It is not only true that the codification of the Special Part – in contrast to the General Part¹⁹ – lacks a golden thread (Bassiouni speaks of uncertainty and the perplexing vacillation of the drafters), it is also true that the Commission did not provide for a workable and

¹⁷ See *supra* note 12; crit. K. Ambos, *supra* note 12, p. 43.

¹⁸ In contrast, the sentencing frameworks of the ICTY's and ICTR's refer to the national laws of the former Yugoslavia and Rwanda: see art. 24 ICTY Statute and art. 23 ICTR Statute. For a general analysis see J.-C. Nemitz, *STRAFZUMESSUNG IM VÖLKERSTRAFRECHT* (2002); Van Zyl Smith, *Aspekte der Strafzumessung in der internationalen Strafjustiz*, 115 ZSFW 931(2003).

¹⁹ See, for a detailed analysis, K. Ambos, *supra* note 15, pp. 443–474.

convincing definition of crimes against humanity. Bassiouni puts it in a more diplomatic way, stating that the “problems with the definition ... have still not been fully resolved” (p. 193).

With respect to the codification of crimes against humanity in the statutes of the *ad hoc* tribunals for the former Yugoslavia and Rwanda, Bassiouni certainly possesses insider knowledge and therefore it is no surprise that he is able to explain convincingly the possible reasons for the different wording of article 5 of the Statute of the ICTY and article 3 of the Statute of the International Criminal Tribunal for Rwanda (ICTR).

As is well known, the most striking difference lies in the armed conflict requirement in the ICTY Statute. While this *nexus* is legally no longer necessary, it cannot be denied that it gives the ICTY Statute stronger legitimacy with a view to challenges based upon an alleged violation of the legality principle. In fact, as Bassiouni rightly states, article 5 of the ICTY Statute is, in this regard, “reminiscent of the war connecting element in Art. 6 (c)” (p. 196) of the Nuremberg Charter. This is not the only similarity. As both the IMT and the ICTY/ICTR statutes are *ad hoc* mechanisms designed to cope with certain historical and political situations, they were not drafted – or at least not only – to restate and further develop international criminal law. First and foremost, they “were tailored to fit the facts”.

In the light of these attempts and results of codification, article 7 of the ICC Statute must appear as a great step forward with “welcome” innovations. This does not mean, though, that all the difficult issues have been resolved. Rather, a considerable number of old and new issues appear if one looks beyond the quite obvious distinction between the context element (the *chapeau*) and the underlying crimes. Two major issues are already mentioned by Bassiouni in this part: on the one hand, the interpretation and relationship of the different elements of the context element of article 7 ICC and, on the other, the different modes of participation. As to the former, Bassiouni defines the international or jurisdictional element as the “cumulative effect” of the elements “attack”, “widespread or systematic” and “against any civilian population”. As to the modes of participation, the author distinguishes between three levels (policy makers and senior executors, mid-level facilitators and low-level executors) and requires “general intent” with regard to the first two levels and specific intent with regard to the third level. Obviously, these mere affirmations are not exhaustive and require a closer analysis. We will come back to them below when dealing with the general part.

Bassiouni finishes the substantive part of this chapter with the affirmation that “the protected human interests whose violations are criminalised in ‘crimes against humanity’ have become *jus cogens*” (p. 217). In my view, however, it is not sufficient to base such a far-reaching affirmation on a rather general discussion of the meaning of *ius cogens* and *erga omnes* obligations.²⁰ First, it would be necessary to identify the specific legal interests or human rights whose legal value as treaty or customary law or even *ius cogens* is to be examined. Secondly, a distinction must be made between the legal character of certain human rights provisions and the corresponding criminal offences, *i.e.*, the international crimes that intend to reinforce certain human rights guarantees with a penal sanction. It is by no means clear that the absolute and universal prohibition of a specific human rights violation, *e.g.*, the prohibition of torture, and, as a consequence, its recognition as a *ius cogens* norm, automatically entails the *ius cogens* character of the corresponding international crime. While such a “transfer” or conclusion may be possible in some cases, *e.g.*, torture,²¹ it requires a separate and detailed inquiry for each individual right or prohibition. Otherwise, the mere affirmation of the existence of an international crime appears as mere missionary writing. Finally, a distinction between an international and non-international (internal) conflict must also be drawn.²²

In the part on procedural developments, Bassiouni tries to support his substantive conclusions by a certain procedural framework which encompasses the duty to prosecute or extradite – one of Bassiouni’s favourite topics²³ –, the non-applicability of statutes of limitation and the exercise of universal jurisdiction. One moves on more

²⁰ See also M.C. Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMPORARY PROBLEMS 57 (1996), referred to in the book under review at p. 210, fn. 96.

²¹ *Prosecutor v. Furundzija* (Case No. IT-95-17/1-T), Judgment, 10 December 1998, paras. 147 *et seq.* (para. 156: a consequence of the *ius cogens* character of the prohibition is “that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture ...”). Cons., *e.g.*, Lord Browne-Wilkinson in *R. v. Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening)* (No. 3), [1999] 2 W.L.R. 827, [1999] 2 All E.R. 97 (H.L.).

²² For the internal conflict see Bruno Simma & Andreas Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT’L L. 302, 309–310 (1999).

²³ See, apart from the references given by Bassiouni himself, the fundamental work by M.C. Bassiouni & E. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* (1995).

solid ground in this field since there exist reliable bases in treaty and customary law with regard to crimes against humanity. Thus, it is, in principle, correct to extend the duty to prosecute or extradite to crimes against humanity although it would be more convincing to support a recourse to the national law and practice of eight States by corresponding footnote references. The non-applicability of statutory limitations to crimes against humanity is confirmed by article 29 of the ICC Statute.

As for universal jurisdiction, Bassiouni presents a detailed analysis of the relevant international criminal law conventions which necessarily leads to the conclusion that the treaty law is “inconsistent” (p. 232). In some cases, *e.g.*, the crime of genocide, the lack of a treaty basis for universal jurisdiction may be compensated by customary law but, as correctly stated by Bassiouni, state practice has recognised universal jurisdiction in most other cases only in a limited fashion.²⁴ In addition, the ICC Statute links the Court’s jurisdiction to the territoriality and active personality principle (art. 12) and thereby limits the ideally universal reach of the ICC to its State parties. Only in the case of a Security Council referral (art. 13(b)) may the ICC exercise universal jurisdiction, albeit limited to the situation defined in the corresponding chapter VII resolution. Against this background it is a little euphemistic for Bassiouni to consider the jurisdictional bases of the ICC “quasi-universal”. In any case, States are free to establish universal jurisdiction for the ICC crimes in their national systems and they may invoke the underlying rationale of the whole ICC regime, as best expressed in the preamble,²⁵ to do so.²⁶

²⁴ See the recent decision of the International Court of Justice *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 15 February 2002; see also *infra* note 92.

²⁵ See in particular paragraph 6 “recalling that it is the duty of *every* state [not only a State party!] to exercise its criminal jurisdiction over those responsible for international crimes” (emphasis added).

²⁶ Thus, for example, the new German “Code of Crimes against International Law” (*Völkerstrafgesetzbuch – VStGB*) which entered into force on 27 June 2002 (Bundesgesetzblatt 2002 I at 2254) provides, in section 1, for universal jurisdiction (Scope of application): “This Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein *even when the offence was committed abroad and bears no relation to Germany* (emphasis added; full English version of the Act, as well as translations into the other official languages of the United Nations, available at <www.iuscrim.mpg.de/forsch/online_pub.html>).

IV. THE SO-CALLED “INTERNATIONAL ELEMENT” AND RELATED ISSUES

The title of chapter 6 – “The International or Jurisdictional Element” – is somewhat misleading since it also deals with other topics. Bassiouni convincingly argues that an international element is necessary to distinguish international from national crimes. This element is the underlying “state action or policy” of crimes against humanity. While this is true, it is better to speak of a jurisdictional – instead of an international – element since the state action or policy is rarely international. This element is contained in the terms “widespread and systematic” and thereby excludes a merely quantitative standard, *i.e.*, in order to reach the specific quality implicit in crimes against humanity, more than a purely quantitative element – as exists, for example, in the case of mass killings – is necessary.²⁷ The international element is applicable both to state and – in the form of a mere policy – non-state actors. Yet, it has not only the function to distinguish crimes against humanity from national and other international crimes but also constitutes “the foundation block necessary to reach the authors of the decisions and the policy-makers that set in motion the chain of events” leading to crimes against humanity. Here the author returns to his former distinction (in chapter 5) of the different levels of participation and again requires for the policy makers general intent and for the “low-level executors” specific intent. These considerations are not convincing for various reasons.

First of all, Bassiouni’s distinction of the three “connected circles of criminal responsibility” in criminal law doctrine – material perpetrators, aiders and abettors and those ordering, commanding, inducing, soliciting, conspiring, etc. – does not correspond to the continental law understanding of participation, which basically distinguishes between forms of perpetration and complicity (*Taterschaft und Teilnahme*). As to perpetration, civil law distinguishes – as does article 25(3)(a) of the ICC Statute – between direct (material) perpetration, co-perpetration and perpetration using another (also called “perpetration by means”). The latter two categories are not covered by Bassiouni’s concept of pure material perpetration. If Bassiouni further refers to the French concept of the *auteur moral*, he uses a term which for its vagueness is not very helpful and should

²⁷ Cf. K. Ambos & S. Wirth, *supra* note 5, p. 30.

therefore not be used in modern criminal law. In fact, the moral author, as defined by Bassiouni (p. 248) – causing another person to commit a crime – is a person who instigates another, solicits or induces to commit a crime. On the other hand, the moral author could also be conceived as an indirect perpetrator who causes the material perpetrator to commit the crime because of his or her domination over the material perpetrator.²⁸ In criminal law theory these questions of terminology are related to questions of substance. It is not possible to define or develop a clear standard of criminal responsibility if the terminology and the forms of participation are themselves not clear. The more differentiated or sophisticated these forms are, the clearer the weight of the individual contribution to a certain criminal act can be assessed. In a way, this is recognised by article 25 of the ICC Statute which presents a compromise formula between common and civil law opting for a differentiation of the forms of participation and rejecting a purely unitarian model of participation.²⁹

Correct and clear terminology is equally or even more important for the highly complex field of intent.³⁰ To argue for a certain form of intent, whether general or specific intent, presupposes a definition of the concept of intent. Bassiouni apparently considers specific intent as a higher standard than general intent but he does not explicitly state what he understands by these two forms of intent and by “intent” in general. It appears from his reasoning that he equates general intent with the cognitive element of *mens rea*, i.e., knowledge, awareness, foreseeability, called *dolus directus* of the second degree in the Roman tradition; in contrast, specific intent is understood as the volitive

²⁸ In modern French criminal law doctrine the term *auteur moral* or *intellectuel* refers, on the one hand, to the specific offences of the special part of the Code Pénal in which a person causes another person to commit a crime (*faire commettre*, see Art. 211–1 CP for genocide; Art. 222–34 for drug trafficking). On the other hand and in a general sense, the term also covers all forms of (indirect) participation in which a person is not the material (direct) perpetrator but uses another person to commit a crime, either by way of perpetration by means or instigation (see Frédéric Desportes & Francis Le Guehec, *DROIT PÉNAL GÉNÉRAL* mn. 511 (9th ed., 2002); Roger Merle & André Vitu, *TRAITÉ DE DROIT CRIMINEL* mn. 535 (7th ed., 1997)).

²⁹ Cf. K. Ambos, *supra* note 15, p. 543 *et seq.*; K. Ambos, *Article 25*, in ICC COMMENTARY mn. 2 (O. Triffterer, ed.).

³⁰ See K. Ambos, *Some Preliminary Reflections on the Mens Rea Requirements of the Crimes of the ICC Statute and of the Elements of Crimes*, in: MAN’S INHUMANITY TO MAN. FESTSCHRIFT IN HONOUR OF A. CASSESE 11–40 (L.C. Vohrah et al., ed., 2003).

element, *i.e.*, the wish, desire, etc. to commit a certain act. The reasons why one or the other form of intent should be required are, according to Bassiouni, purely policy-related or prosecutorially motivated, *i.e.*, they are guided by the evidence necessary to prove one or the other form of intent. But why distinguish between the various participants in international crimes as to the *mens rea*? Why not, as a general rule, require intent in the sense of the cognitive and volitive element (see art. 30 of the ICC Statute) and modify this “general” intent only if the crime committed requires such a modification (as the crime of genocide does with regard to the *dolus specialis* to destroy a protected group)?

Be that as it may, this technical and methodological critique must not distract us from the major purpose and achievement of this chapter, namely to develop and identify the *criteria* that transform certain criminal acts into crimes against humanity. Bassiouni demonstrates that 322 multilateral instruments containing 25 categories of international crimes have certain common characteristics which, taken together, serve as guidance to identify crimes against humanity: their international or transnational character which poses a threat to the international community as a whole or to more than one state; their violation of commonly shared values; and their basis in state action or policy. The state action or policy itself is characterised by five elements of which, however, only the first four are still of relevance today:³¹ (1) the state action or policy must be based on discrimination against or persecution of an identifiable group, (2) the acts committed must be criminal under national law, (3) actively or passively encouraged by state agents and (4) carried out on a widespread or systematic basis. As to the highly practical question of state *involvement*, Bassiouni refers to conduct attributable to a state and extends this to omissions of state officials on the basis of the command responsibility doctrine, *i.e.*, the superior’s legal duty to act. Thus, in essence, active conduct on the part of the state is not necessary. If a duty to act exists, mere inaction is sufficient. The problem with this approach is not the result – it has been argued elsewhere that a policy of toleration of the crimes suffices³² – but the *standard* used. The command responsibility doctrine is about the individual responsibility of superiors for omission. It is not designed

³¹ The fifth element is the link to war, already discussed above.

³² K. Ambos & S. Wirth, *supra* note 5, p. 31 *et seq.*

as a standard for the quality of the policy necessary for crimes against humanity. In the same vein, as correctly stated by Bassiouni, the question of individual responsibility must not be confused with the question of the imputability of an individual's conduct to a state.

While the intensity of a state's involvement in a certain policy can be reduced to mere toleration, there still must be some form of state involvement, *i.e.*, the individual acts must be *attributed* to a state (or an organisation). This may even be more difficult as the dispute about the standard of attribution – effective or overall control – in the *Tadić* proceedings shows.³³ Bassiouni follows the minority view of the Trial Chamber (and thus the Appeals Chamber) in rejecting the ICJ's *Nicaragua* test of effective control³⁴ since this is only applicable with regard to the establishment of state responsibility. The *Nicaragua-Tadić* dispute concerned whether the state responsibility standard can be invoked to establish the international character of an armed conflict. Here a similar question arises, namely whether a “policy” as a prerequisite legal element of crimes against humanity exists. In both cases the existence of an element of the *actus reus* is at stake. Still, one might question the distinction be-

³³ The *Tadić* Trial Chamber followed the effective control test, as developed by the International Court of Justice in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, [1986] I.C.J. Reports 14, para. 115, requiring that the foreign state exercise effective control of a military or paramilitary group with respect to the specific operations of this group and by the issuance of specific instructions (*Prosecutor v. Tadić* (Case No. IT-94-1-T), Opinion and Judgment, 7 May 1997, para. 585). This test was rejected by the *Celebici* Trial Chamber and the *Tadić* Appeals Chamber since, *inter alia*, it was considered not appropriate for the question at hand, *i.e.*, the question of individual criminal – not state – responsibility (*Prosecutor v. Delalić et al.* (Case No. IT-96-21-T), Judgment, 16 November 1998, paras. 262–263; *Prosecutor v. Tadić* (Case NO. IT-94-1-A), Judgment, 15 July 1999, para. 103). Instead, a distinction was made between the persons or groups subject to control by the foreign state. For a profound analysis, see A. De Hoogh, *Articles 4 and 8 of the 2001 ILC Articles on State Responsibility etc.*, 72 BRIT. YB INT'L L. 255 (2001/2002), arguing, at pp. 264 *et seq.*, 275–266, that the Bosnian Serb army VRS and the Republika Srpska were *de facto* organs of the Federal Republic of Yugoslavia because “they operated within the organic structure of the FRY”. He further examines (at p. 277 *et seq.*) the question in light of article 8 of the International Law Commission's 2001 Draft Articles on State Responsibility, showing that the Commission does not follow the *Tadić* Appeals Chamber. See also Claus Kress, *L'organe de facto en droit international public etc.*, 105 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 93 (2001).

³⁴ *Ibid.*

tween effective and overall control as defended by the *Tadic* Appeals Chamber so as to distinguish between state and individual responsibility. The crucial question is not one of terminology – effective vs. overall – but of substance overall: What are the concrete criteria to impute or attribute a certain conduct to a state or organisation?

V. THE SPECIFIC CONTENTS OF CRIMES AGAINST HUMANITY AND THE QUESTION OF METHOD

In chapter 7, the author pursues the equally important and complex task of, first, explaining the method of identifying specific contents of crimes against humanity and, second, analysing the specific content of individual acts constituting crimes against humanity. Bassiouni starts with the “Nuremberg phase” (art. 6(c), IMT Statute), passes the “Security Council phase” (art. 5 and art. 3 of the ICTY and ICTR Statutes respectively) and finishes with the “universally negotiated phase” (art. 7, ICC Statute). *In concreto*, Bassiouni gives a very useful, albeit sometimes descriptive, historical and legal account of the following individual crimes: murder and extermination, enslavement, deportation, other inhumane acts (torture, unlawful human experimentation, rape and sexual violence), imprisonment, enforced disappearance of persons and *apartheid*. This is not the place for a detailed analysis of the individual crimes,³⁵ but it can be said that Bassiouni’s analysis makes clear that the most difficult task of the drafters – Bassiouni himself speaks of an “arduous task” (p. 366) – has always been to achieve a more or less specific codification of the legal elements of crimes against humanity which comply with the minimum standards of the principle of legality, in particular with the *lex certa* requirement. It is clear that the results are different in the different crimes but, in any case, article 7 of the ICC Statute constitutes a great improvement. Although it still contains some very vaguely drafted underlying acts, *e.g.*, *apartheid*, inhumane acts, etc., it serves as a good basis for implementing laws at the national level. A good example in this respect is the German “Code of Crimes against International Law” (*Völkerstrafgesetzbuch*) which contains

³⁵ For a (partial) analysis, referring to the book under review, see G. Mettraux, *Crimes Against Humanity in the Jurisprudence of the ICTY and ICTR*, 43 HARV. INT’L L.J. 237 (2002); K. Ambos & S. Wirth, *supra* note 5, p. 46 *et seq.*; K. Ambos, *Selected issues regarding the ‘Core Crimes’ in Int. Criminal Law*, 5 Int. Cr. L. Rev. (2005, forthcoming).

a codification of crimes against humanity that tries to comply with the strict standards of legality in German constitutional and criminal law.³⁶

From a theoretical perspective, more interesting is Bassiouni's explanation of the method used to identify the contents of crimes against humanity. At the centre of his reflections is the concept of "general principles of law" which, in his opinion, as already said, are not themselves capable of creating international crimes but serve as a useful means of interpretation. On the basis of an analysis of the

³⁶ Section 7 (crimes against humanity) of the VStGB, *supra* note 26, reads:

- (1) Whoever, as part of a widespread or systematic attack directed against any civilian population,
 1. kills a person,
 2. inflicts, with the intent of destroying a population in whole or in part, conditions of life on that population or on parts thereof, being conditions calculated to bring about its physical destruction in whole or in part,
 3. traffics in persons, particularly in women or children, or whoever enslaves a person in another way and in doing so arrogates to himself a right of ownership over that person,
 4. deports or forcibly transfers, by expulsion or other coercive acts, a person lawfully present in an area to another state or another area in contravention of a general rule of international law,
 5. tortures a person in his or her custody or otherwise under his or her control by causing that person substantial physical or mental harm or suffering where such harm or suffering does not arise only from sanctions that are compatible with international law,
 6. sexually coerces, rapes, forces into prostitution or deprives a person of his or her reproductive capacity, or confines a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population,
 7. causes a person's enforced disappearance, with the intention of removing him or her from the protection of the law for a prolonged period of time,
 - (a) by abducting that person on behalf of or with the approval of a state or a political organisation, or by otherwise severely depriving such person of his or her physical liberty, followed by a failure immediately to give truthful information, upon inquiry, on that person's fate and whereabouts, or
 - (b) by refusing, on behalf of a state or of a political organization or in contravention of a legal duty, to give information immediately on the fate and whereabouts of the person deprived of his or her physical liberty under the circumstances referred to under letter (a) above, or by giving false information thereon,
 8. causes another person severe physical or mental harm, especially of the kind referred to in section 226 of the Criminal Code,
 9. severely deprives, in contravention of a general rule of international law, a person of his or her physical liberty, or

(four) functions of general principles in international law and a distinction between the national and international sources of general principles Bassiouni reaffirms his earlier thesis that the universal condemnation of crimes against humanity as evidenced by general principles raises these principles and thus crimes against humanity to the level of *ius cogens*. On this basis Bassiouni can easily reject a violation of the prohibition of *ex post facto* application of the criminal law (*nullum crimen sine lege praevia*) by articles 5 and 3 of the ICTY and ICTR Statutes respectively, although problems of specificity (*lex certa*) cannot be concealed.

As to the concrete identification of the general principles, Bassiouni opts for an “inductive method of research” by which “one identifies the existence of a legal principle in the world’s major legal

³⁶ (Continued).

10. persecutes an identifiable group or collectivity by depriving such group or collectivity of fundamental human rights, or by substantially restricting the same, on political, racial, national, ethnic, cultural or religious, gender or other grounds that are recognized as impermissible under the general rules of international law shall be punished, in the cases referred to under numbers 1 and 2, with imprisonment for life, in the cases referred to under numbers 3–7, with imprisonment for not less than 5 years, and, in the cases referred to under numbers 8–10, with imprisonment for not less than 3 years.
- (2) In less serious cases under subsection (1), number 2, the punishment shall be imprisonment for not less than 5 years, in less serious cases under subsection (1), numbers 3–7, imprisonment for not less than 2 years, and in less serious cases under subsection (1), numbers 8 and 9, imprisonment for not less than 1 year.
- (3) Where the perpetrator causes the death of a person through an offence pursuant to subsection (1), numbers 3–10, the punishment shall be imprisonment for life or for not less than 10 years in cases under subsection (1), numbers 3–7, and imprisonment for not less than 5 years in cases under subsection (1), numbers 8–10.
- (4) In less serious cases under subsection (3) the punishment for an offence pursuant to subsection (1), numbers 3–7, shall be imprisonment for not less than 5 years, and for an offence pursuant to subsection (1), numbers 8–10, imprisonment for not less than 3 years.
- (5) Whoever commits a crime pursuant to subsection (1) with the intention of maintaining an institutionalised regime of systematic oppression and domination by one racial group over any other shall be punished with imprisonment for not less than 5 years so far as the offence is not punishable more severely pursuant to subsection (1) or subsection (3). In less serious cases the punishment shall be imprisonment for not less than 3 years so far as the offence is not punishable more severely pursuant to subsection (2) or subsection (4).

systems, or, more specifically, one searches for, under the national laws of different countries ..., an identity or commonality that exists with respect to a given principle” (p. 294). Thus, Bassiouni uses an inductive – in contrast to a deductive – method in the sense that he starts from the particular national systems representing the world’s major criminal justice systems and draws a general principle from their comparison. Yet, this principle, *i.e.*, the common crime in the world’s major systems, only rises to the level of an international crime by the already mentioned international element.

He considers the Romanist–Civilist–Germanic, the common law and the Islamic as the world’s major legal systems. Obviously, it is impossible to analyse the system of each of the more than 190 states existing today, and therefore one has to take more or less representative examples of each legal family without, however, ignoring the differences within one and the same legal family. In a similar vein, one cannot expect to find identical norms in each system but must be satisfied by a “comparative equivalence of normative provisions” (p. 298). Bassiouni calls this, referring to the law of extradition (principle of double criminality), an *abstract*, instead of a concrete, *approach*. Yet, this terminology is doubtful since the central question is quite “concrete”, namely, whether a certain conduct punishable in one state is also punishable in another. While the author’s methodological approach is, on the whole, convincing, one misses an analysis of the relationship of the traditional concept of general principles of international law within the meaning of article 38(1)(c) of the ICJ Statute with the new concept of sources of international criminal law introduced by article 21(l)(b) and (c) of the ICC Statute.³⁷ In fact, this new concept opts for a combination of customary law and general principles in the sense of a new category of “principles and rules of international law” (art. 21(l)(b) ICC Statute).

Consequently, the general principles have a twofold function: on the one hand, they contribute to the emergence of customary law as truly supranational rules; on the other hand, they constitute an autonomous subsidiary source of international criminal law in the sense of general principles derived from national laws according to article 21(l)(c) of the ICC Statute. Although this function is only subsidiary (“[F]ailing that”), it cannot be overestimated given the still rudimentary state of international criminal law.³⁸

³⁷ This provision is subsequently cited three times (!), at pp. 400, 408 and 419.

³⁸ Cf. K. Ambos, *supra* note 15, pp. 41, 43–44.

VI. ISSUES OF THE “GENERAL PART” OF INTERNATIONAL CRIMINAL LAW

With chapters 8 and 9, Bassiouni examines substantive international criminal law, first “Elements of Criminal Responsibility” and then “Defenses and Exonerations”. While the principle of individual criminal responsibility has long been recognised³⁹ and as such can be considered a general principle of law, the question of how to enforce the norms of international criminal law is a delicate one. In fact, until the creation of the ICC, enforcement lay basically in the hands of national courts (indirect enforcement model) and even the ICC – by way of the principle of complementarity (art. 17 ICC Statute) – gives priority to national jurisdictions. Thus, it is correct to conclude that the primacy of direct over indirect enforcement is not settled, the only exception being the primacy of the *ad hoc* tribunals established by the Security Council under chapter VII of the Charter of the United Nations. A related problem is the principle of the prohibition of double prosecution for the same facts (*ne bis in idem*). While it is clear that a decision by an international tribunal prevents a national court from adjudicating the same case it is less clear if an international tribunal is blocked by a decision of a national court. As a general rule this should be the case, especially if there is, as with the ICC and in contrast to the ICTY/ICTR, no primacy over national proceedings. A problem arises, however, if the national proceedings were not conducted impartially or independently, *i.e.*, if the very conditions of the complementarity rule have not been complied with (see art. 20(3) ICC Statute). Bassiouni refers to these problems but does not offer a profound analysis.

Instead he opts for a more detailed analysis of the question of individual vs. collective or group responsibility concluding that the “*ratione personae* of international criminal law applies to individuals and legal entities both private and public . . .” (p. 381). In fact, these observations only prepare the ground for a convincing criticism of the famous organisational responsibility established by articles 9 and 10 of the Statute of the International Military Tribunal, *i.e.*, the criminal liability because of membership in an organisation declared criminal by the IMT.⁴⁰ For the author this responsibility had neither a basis in

³⁹ See also K. Ambos, *supra* note 4, p. 6.

⁴⁰ Four organisations were found to be criminal, the SS, the Gestapo, the SD and the leadership of organisations of the Nazi Party (*Korps der politischen Leiter der Nazipartei*). “Absolved” were the SA, the Reich cabinet and the Military High Command (IMT, *supra* note 15, p. 497 *et seq.*; see also M.C. Bassiouni, p. 384, fn. 38).

international law nor did it satisfy the requirements of legality. He again stresses that it would have been “much simpler to have relied on German doctrines of imputed criminal responsibility and participation, and to have achieved a better result” (p. 386). This is true, not only for pure policy reasons, in particular the impact of this kind of group criminalisation on the German population, but also for the harm caused by pure membership liability to one of the bases of international criminal law: the principle of personal guilt. The IMT itself recognised this principle with its famous phrase that “criminal guilt is personal, and that mass punishments should be avoided”⁴¹ and therefore predicated the liability of a member of such an organisation on his or her voluntary membership and awareness of the crimes committed by this organisation.

More surprising is that Bassiouni then argues for an expansion of the concept of group responsibility to members of a (criminal) state’s bureaucratic apparatus. He wants to establish a “rebuttable presumption of knowledge of the consequences by all management level personnel in the bureaucratic apparatus” and an “objective test of reasonableness to determine what that person should have known ...” (p. 393). The author adduces in support of his argument the (doubtful) purposes of punishment, in particular deterrence and prevention,⁴² but does not convincingly explain how the principle of guilt and its procedural corollary, the presumption of innocence, shall be preserved.

Bassiouni then proceeds with some reflections on “criminal responsibility and the general part”. He correctly observes that a “general part”, *i.e.*, a system of general rules of attribution, albeit necessary, has not been comprehensively codified although certain general part elements can be identified from the case law of the IMT, IMTFE, ICTY and ICTR. One may add that these elements have been taken up by part 3 of the ICC Statute, although it does not offer a comprehensive codification and departs to some extent from such precedents. Interestingly, the reason such a codification was not achieved earlier was mainly political: the complex task of codifying a general part would certainly have prolonged and maybe even endangered the process of creating the *ad hoc* tribunals.

In essence, individual criminal responsibility in international criminal law raises the same issues as in national law. This is the very

⁴¹ IMT, *supra* note 15, p. 469, also cited in Bassiouni, p. 390.

⁴² See K. Ambos (in cooperation with C. Steiner), *On the Rationale of Punishment etc.*, in *LE DROIT PÉNAL À L'ÉPREUVE DE L'INTERNATIONALISATION* 305 *et seq.* (Marc Henzelin & Robert Roth, eds., 2002).

reason for the importance of general principles as an autonomous source of the law in the sense of article 21(l)(c) of the ICC Statute. Another reason is that international case law only deals with the general part issues on an *ad hoc* basis and even then rarely does more than to refer – very selectively – to national criminal law doctrines. As a result, the case law and the codifications do not provide for a system of general principles but only offer some elements which repeatedly arose in the post-World War II and ICTY/ICTR proceedings. In sum, “the sparse and eclectic general part norms of international criminal law need systematisation” (p. 446). An initial approach at such systematisation has been attempted elsewhere.⁴³ Therefore, I will limit myself to some critical remarks about those observations by Bassiouni with which I do not agree.

Bassiouni starts well in distinguishing between the level of responsibility and culpability and the corresponding *mens rea* of both levels. This is a highly important distinction and to have made it shows Bassiouni’s great expertise in comparative criminal law; an expertise which distinguishes him from most common law colleagues. The distinction made by Bassiouni goes back to the finalist school of thinking (above all represented by the German scholar Hans Welzel) which, overcoming the classical and neo-classical schools, discovered that human conduct is always purpose-orientated, *i.e.*, pursues a certain objective or goal. This means that human action is not only an objective cause for a given effect or result but also possesses a mental element, *i.e.*, the wish, desire, knowledge, etc., that the causal act produces a certain result. This goes hand in hand with the recognition of a normative concept of guilt or culpability: *culpa* is no longer (only) the intent to cause a certain result but the blameworthiness of the perpetrator’s conduct. If A kills B, he or she may have intended this result since A knew – cognitive element – that shooting a bullet in B’s heart would lead to B’s death and he or she also wanted – volitive element – this result. Another question is, however, whether B’s death can be blamed on A if, for example, A acted under drugs or suffered from a mental disease.

The distinction between (subjective) responsibility (*dolus*) and culpability also has consequences with regard to the relevance of a mistake or error and, above all, for the distinction between mistake of fact and of law. Unfortunately, Bassiouni does not clearly distinguish between facts

⁴³ K. Ambos, *supra* note 15, where first the case law (1st part, pp. 7–375) and then the codifications (2nd part, pp. 377–515) are analysed with a view to identify the general part elements. On this basis, a systematisation and refinement (*Dogmatisierung*) is attempted (3rd part, pp. 517–869). A Spanish version is in preparation.

and law since he wants to include in the intent “knowledge of the illegality or conscious wrongdoing” (p. 411). In reality, the lack of knowledge of the law constitutes a mistake of law and such a mistake leaves the intent as part of the responsibility (the *actus reus*) untouched. If a soldier kills an enemy *hors de combat* not knowing that this is a war crime he certainly acts with intent, knowing the result of his act and wanting this result. Another question is, however, if ignorance of the law can be blamed on the soldier. The traditional error or *ignorantia iuris* doctrine, still dominant in the common law, would answer the question without more in the affirmative since it is based on a presumption of knowledge of the law. You must know the law!

Obviously this is a fiction, for not all crimes are *mala in se* and as such known to everybody. In fact, the growing amount of special criminal laws produces more and more *mala prohibita* and the same holds true for international criminal law, at least as far as war crimes are concerned. Things are more complicated even if one includes grounds excluding criminal responsibility (“defences”) in the analysis since the scope and sometimes even the existence of defences are unknown to the citizen. Take for example the highly practical case of a soldier who kills a civilian on the basis of an order believing in its legality. The soldier acts with intent and in this sense commits the war crime of killing civilians in its objective (*actus reus*) and subjective (*mens rea*) sense. But what is the effect of this error, which is a mistake of law, on the validity and exonerating effect of the order? Article 32(2) of the ICC Statute provides in this respect for an exception from its strict *error iuris* rule with regard to article 33(1)(b) as far as war crimes are concerned (art. 32(2) *e contrario*). As a consequence, if the soldier does not know the unlawfulness of the order, such a mistake will be considered relevant (as negating his or her *mens rea*). While such a privilege for subordinates can only be explained with the balance of power and sense of compromise lying over the Rome negotiations, a generally more flexible approach with regard to mistake of law certainly finds a strong argument in the growing complexity of (international) criminal law. In the result, a criterion of avoidability or even reasonableness could make practical and just solutions possible on a case by case basis.⁴⁴ Bassiouni agrees

⁴⁴ See K. Ambos, *supra* note 15, p. 822 *et seq.* For a flexible approach with various examples, and taking into account the Elements of Crime (UN Doc. PCNICC/2000/1/Add. 2), also Claus Kreß, *Römisches Statut des Internationalen Strafgerichtshofs*, in *INTERNATIONALER RECHTSHILFEVERKEHR IN STRAFSACHEN* (Heinrich Grützner & Paul Günter Pötz, eds., 2nd ed., loose-leaf 56. set, 2002), vol. 4, before III 26, mn. 56, at p. 52.

with this, arguing for a qualified or rebuttable presumption of knowledge, invoking the standard of reasonableness. Article 32 of the ICC Statute, however, follows, in essence, the *error iuris* doctrine excluding the relevance of any mistake of law unless it negates the mental element or it refers, as just mentioned, to a superior order.

As for the highly relevant command responsibility doctrine, Bassiouni essentially presents a detailed account of the historical evolution from Sun Tzu (500 BC) to the relatively detailed codification of article 28 of the ICC Statute. Yet, while it is clear that the doctrine “has long been recognised” (p. 441), a refinement of its elements, *i.e.*, the actual conditions of criminal liability of the superior, needs still to be achieved.⁴⁵ Bassiouni, at least, mentions some of the issues currently under debate: the reasons for the higher standard for military as opposed to civilian superiors; the requirement of causation that becomes the more difficult to prove the higher one climbs up in the chain of command;⁴⁶ the mental element, in particular, the highly critical “should-have-known-standard”.⁴⁷ As has been demonstrated in detail elsewhere,⁴⁸ article 28 of the ICC Statute establishes a very broad liability of the superior as a direct perpetrator (principal) for the acts of third persons (the subordinates), thereby creating a kind of vicarious liability (*responsabilité du fait d'autrui*). Furthermore, it puts liability for the failure to intervene in the commission of crimes on an equal footing with (accomplice) liability for not adequately supervising subordinates and not reporting their crimes. Finally, the provision does not distinguish between preventive (supervision, timely intervention) and repressive (reporting the crimes) countermeasures of the superior.

Indeed, the superior’s liability is so broad that some kind of limitation must be imposed in order to avoid a violation of the principle of guilt. Thus, the German *Völkerstrafgesetzbuch*⁴⁹ distinguishes between, on the one hand, liability as a perpetrator (principal) for the failure to prevent subordinates from committing crimes (art. 4) and, on the other, accomplice liability for the (intentional or negligent) failure properly to

⁴⁵ For a first systematic attempt see K. Ambos, in I THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 823 *et seq.* (A. Cassese, P. Gaeta & J. Jones, eds., 2002); K. Ambos, *supra* note 15, p. 666 *et seq.*

⁴⁶ See Otto Triffterer, *Causality, a Separate Element of the Doctrine of Superior Responsibility etc.* ?, 15 LEIDEN J. INT’L I. 179 (2002).

⁴⁷ It is, however, a contradiction to speak of “knowledge that should have been known”; only facts can be known, knowledge exists or it does not.

⁴⁸ *Supra* note 45.

⁴⁹ *Supra* note 26.

supervise subordinates (art. 13) and failure to report crimes (art. 14).⁵⁰ Moreover, although conceptually a clear difference between liability for ordering, *i.e.*, a positive act, and for superior responsibility, *i.e.*, an omission, can be made, these forms of responsibility are not clearly delimited in the case law of the *ad hoc* tribunals. In fact, there is a tendency to use the superior responsibility doctrine (art. 7(3), ICTY Statute and art. 6(3), ICTR Statute) as a kind of fall-back liability for cases in which a positive act (art. 7(1), ICTY Statute and art. 6(1), ICTR Statute) cannot be proven.⁵¹ The issue was implicitly addressed for the first time by the ICTR in *Kayishema & Ruzindana*, where a Trial

⁵⁰ Section 4. *Responsibility of military commanders and other superiors*

- (1) A military commander or civilian superior who omits to prevent his or her subordinate from committing an offence pursuant to this Act shall be punished in the same way as a perpetrator of the offence committed by that subordinate. Section 13 subsection (2) of the Criminal Code shall not apply in this case.
- (2) Any person effectively giving orders or exercising command and control in a unit shall be deemed equivalent to a military commander. Any person effectively exercising command and control in a civil organisation or in an enterprise shall be deemed equivalent to a civilian superior.

Section 13. Violation of the duty of supervision

- (1) A military commander who intentionally or negligently omits properly to supervise a subordinate under his or her command or under his or her effective control shall be punished for violation of the duty of supervision if the subordinate commits an offence pursuant to this Act, where the imminent commission of such an offence was discernible to the commander and he or she could have prevented it.
- (2) A civilian superior who intentionally or negligently omits properly to supervise a subordinate under his or her authority or under his or her effective control shall be punished for violation of the duty of supervision if the subordinate commits an offence pursuant to this Act, where the imminent commission of such an offence was discernible to the superior without more and he or she could have prevented it.
- (3) Section 4 subsection (2) shall apply *mutatis mutandis*.
- (4) Intentional violation of the duty of supervision shall be punished with imprisonment for not more than 5 years, and negligent violation of the duty of supervision shall be punished with imprisonment for not more than 3 years.

Section 14. Omission to report a crime

- (1) A military commander or a civilian superior who omits immediately to draw the attention of the agency responsible for the investigation or prosecution of any offence pursuant to this Act, to such an offence committed by a subordinate, shall be punished with imprisonment for not more than 5 years.
- (2) Section 4 subsection (2) shall apply *mutatis mutandis*.

⁵¹ Cf. K. Ambos, in A. Cassese *et al.*, *supra* note 45, pp. 835–836; K. Ambos, *supra* note 15, pp. 670, 672.

Chamber held that article 6(3) only becomes relevant if the accused did not order the alleged crimes.⁵² It was also addressed by the ICTY in *Blaskic*, which held that “the failure to punish past crimes ... may, pursuant to Article 7(1)... also be the basis for [the commander’s] liability ...”.⁵³ Only recently, however, was the issue addressed *explicitly*. In *Kordic & Cerkez*, responsibility under article 7(1) was characterised as “direct” as compared to the rather “indirect” responsibility under article 7(3).⁵⁴ As a consequence, article 7(3) constitutes a *lex specialis* that excludes simultaneous conviction on the basis of article 7(1).⁵⁵ Similarly, the *Krstic* Trial Chamber held that “any responsibility under Art. 7 (3) is subsumed under Art. 7 (1)”, *i.e.*, superior responsibility is only of a subsidiary nature.⁵⁶

The applicability of the command responsibility doctrine in non-international armed conflicts raises another complex problem. While a commander’s responsibility in international conflicts may be based on customary law, starting with the post-World War II case law,⁵⁷ there is no conventional (written) or customary norm that can be invoked for such “indirect” responsibility in non-international conflicts. Thus, the question arises whether prosecution and conviction in such cases would be barred by the principle of legality (*nullum crimen sine lege*). Although the *Tadic* Appeals Chamber extended individual criminal responsibility to non-international conflicts, mainly invoking common article 3 of the Geneva Conventions,⁵⁸ it is difficult to apply this precedent to command responsibility since command responsibility is a special form of “indirect” responsibility for omission that is mentioned neither in common article 3 nor in any other norm of

⁵² *Prosecutor v. Kayishema & Ruzindana* (Case No. ICTR 95-1-T), Judgment, 21 May 1999, para. 223.

⁵³ *Prosecutor v. Blaskic* (Case No. IT-95-14-T), Judgment, 3 March 2000, para. 337.

⁵⁴ *Prosecutor v. Kordic & Cerkez* (Case No. IT-95-14/2-T), Judgment, 26 February 2001, paras. 366, 367, 369.

⁵⁵ *Ibid.*, paras. 370–371.

⁵⁶ *Prosecutor v. Krstic* (Case No. IT-98-33/T), Judgment, 2 August 2001, para. 605.

⁵⁷ K. Ambos, in A. Cassese et al., *supra* note 45, p. 807 *et seq.*

⁵⁸ *Prosecutor v. Tadic* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 128–137: “All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife” (para. 134).

international humanitarian law. Indeed, articles 86 and 87 of Additional Protocol I only apply to international conflicts. Notwithstanding, in *Hadzihasanovic et al.*, the ICTY Appeals Chamber,⁵⁹ confirming the Trial Chamber's view,⁶⁰ held that command responsibility for crimes committed in non-international conflicts is a logical consequence of the individual responsibility attached to these crimes.⁶¹ In addition, it referred in agreement to the analysis of the sources presented by the Trial Chamber.⁶² Still, if one assumes that this is the correct view, the principle of legality would bar a commander's prosecution for crimes committed before the day of the *Tadic* decision on jurisdiction, *i.e.*, 2 October 1995. The *Hadzihasanovic* Appeals Chamber seems to overlook *this* problem.

There is another critical point: While stretching the principle of command responsibility quite far with regard to the commander's responsibility in non-international conflicts, the Appeals Chamber opts for a more restrictive interpretation with regard to the second ground of appeal, *i.e.*, whether command responsibility extends to crimes committed before the superior assumed the command. On this point, the Chamber allows the appeal on the basis of a lack of state practice and *opinio juris* as well as a strict interpretation of the relevant provisions.⁶³ Yet, while it is certainly true that "criminal liability must rest on a positive and solid foundation of a customary law principle",⁶⁴ this applies to both grounds of appeal and does not justify the use of apparently different concepts of command responsibility with respect to the two issues. In fact, the right answer to the second issue lies in the correct understanding of the structure of the "concept" of superior responsibility. It establishes, as has been analysed in detail elsewhere⁶⁵

⁵⁹ *Prosecutor v. Hadzihasanovic et al.* (Case No. IT-01-47-AR72), Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 10 *et seq.*

⁶⁰ *Prosecutor v. Hadzihasanovic et al.* (Case No. IT-01-47-PT), Decision on Joint Challenge to Jurisdiction, 12 November 2002.

⁶¹ *Prosecutor v. Hadzihasanovic*, *supra* note 59, para. 18: "Customary international law recognizes that some war crimes can be committed ... in the course of an internal armed conflict; it therefore also recognizes that there can be command responsibility in respect of such crimes."

⁶² *Prosecutor v. Hadzihasanovic*, *supra* note 60, para. 67 *et seq.*; *Prosecutor v. Hadzihasanovic*, *supra* note 59, para. 27.

⁶³ *Prosecutor v. Hadzihasanovic*, *supra* note 59, para. 37 *et seq.* (45, 51).

⁶⁴ *Ibid.*, para. 52.

⁶⁵ K. Ambos, in A. Cassese *et al.*, *supra* note 45, pp. 850 *et seq.*

and correctly recognised in Judge Hunt's dissenting opinion,⁶⁶ a separate and distinct responsibility of the superior for his or her omission to intervene. This obligation arises, so to speak, in its own right as soon as the commander assumes command with regard to all crimes which still may be prevented or punished. In other words and with regard to the latter obligation, the commander is under an obligation to punish all crimes which are or should be known to him or her, independently of the time of their commission by the subordinates. Were it otherwise, it would be all too easy to strip the commander of his or her obligation to repress international crimes by changing the commander regularly and quickly. Consequently, the deterrent effect of the command responsibility doctrine with a view to future crimes would be severely undermined.

As to the "defences" (chapter 9), Bassiouni considers obedience to superior orders, compulsion, reprisals, *tu quoque* and the immunity of heads of state. The most classical and important of these defences is certainly the superior order defence. While the obedience to orders is a necessary ingredient of any military structure, allowing subordinates to rely on unqualified, blind or absolute obedience has long been abandoned in international criminal law. Bassiouni convincingly demonstrates how the defence has been restricted in national as well as in international law. As a result it is "no longer recognised by customary international law as an absolute defence" (p. 482). This goes hand in hand with Dinstein's famous "*mens rea* principle" according to which "the fact of obedience to orders constitutes not a defence *per se* but only a factual element that may be taken into account in conjunction with the other circumstances of the given case within the compass of a defence based on a lack of *mens rea*, that is, mistake of law or fact or compulsion".⁶⁷ Although one must slightly modify this principle in the light of the distinction between (subjective) responsibility and culpability, explained above, in that the order may not only exclude the *mens rea* but also – in the case of compulsion or duress this is even the rule – the subordinate's culpability,⁶⁸ its essence remains true. The order does not constitute a defence *per se* but only an element or a condition of other defences, in particular compulsion or duress. The fact that the defence has

⁶⁶ *Prosecutor v. Hadzihasanovic et al.*, Separate and Partially Dissenting Opinion of Judge David Hunt, 16 July 2003, para. 9.

⁶⁷ Y. Dinstein, *THE DEFENCE OF 'OBEDIENCE TO SUPERIOR ORDERS' IN INTERNATIONAL LAW* 88 (1965) (emphasis in the original); see also Bassiouni, pp. 461–462.

⁶⁸ Cf. K. Ambos, *supra* note 15, pp. 833–834.

never been recognised as such in international case law⁶⁹ confirms this view.

In reality, the IMT already recognised the intimate relationship between superior order and duress when it stated that the “true test ... is not the existence of the order, but whether moral choice was in fact possible”.⁷⁰ The possibility of a moral choice refers to the subordinate’s lack of freedom of will and this is the typical element of the defences of compulsion/duress which, in essence, exculpate the subordinate for having been forced or coerced to act against his or her will. In such a case, therefore, the subordinate may be excused, but not justified. We will come back to this important distinction. In light of this analysis, article 33 of the ICC Statute is a step backwards – Bassiouni speaks of a “roll back” (p. 481) – because the provision, in paragraph 1(a), attributes more weight to the order as such, implying that a legal obligation to obey exists. Ultimately, article 33 follows the manifest illegality principle.⁷¹ Still, it may be possible to bring the provision in line with the post-World War II developments by interpreting it restrictively. Also, the provision is not completely unreasonable. Given the considerable number of war crimes established in article 8 and their sometimes vague codification, it is reasonable to distinguish between orders to commit war crimes and orders to commit genocide and crimes against humanity declaring the latter to be *per se* manifestly unlawful (art. 33(2)). In the former case, a restrictive interpretation is called for, negating the manifest unlawfulness of the order only in exceptional cases, for example, in the case where the complex mix of legal and factual considerations makes it difficult for the soldier to judge whether a certain attack is “clearly excessive in relation to the concrete and direct overall military advantage anticipated” (art. 8(2)(b)(iv)). In such a case, however, the existence of the order is only one element of judging the soldier’s conduct; the other one is the pressure exerted on him or her to comply with the order. And this brings us again to the importance of the defence of compulsion or duress.

⁶⁹ *Ibid.*, summarising the case law at pp. 372–373.

⁷⁰ IMT, *supra* note 15, p. 465.

⁷¹ See also Claus Kreß, *War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice*, 30 ISRAEL YEARBOOK OF HUMAN RIGHTS 130, 150 (2000). On this principle, see MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 440 *et seq.*, 490 *et seq.* (1959); L.C. GREEN, *SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW* 237–238, 243 *et seq.* (1976).

Bassiouni's treatment of this defence is convincing, especially his correct distinction between common and civil law as to the different concepts of *coercion/compulsion* and *necessity*. The traditional common law, as still enunciated in the English law, has always distinguished between "duress by (human) threats" and "duress of (natural) circumstances",⁷² classifying the former as coercion/compulsion and the latter as necessity. Article 31(l)(d) of the ICC Statute tries to combine these concepts under the name of *duress*. The provision goes back to a Canadian proposal and is based on the famous *Finta* case⁷³ in which both defences (coercion and necessity) were characterised by the "imminent, real, and inevitable threats" required.⁷⁴ The problem with this approach is that it does not distinguish between justification and excuse and therefore leads to a great inflexibility in the borderline cases where a prevailing interest on the basis of a balancing of the interests at stake – the harm to be avoided and the one caused – cannot be easily determined. The classical situation is that of the so-called survival cases in which one or a few persons can only survive at the cost of another's life. Apart from the classical examples mentioned by Bassiouni (pp. 489–490) such a case, albeit in a modified form, came before the ICTY in *Erdemovic*.⁷⁵ The accused was apparently threatened with his own death and that of his family if he refused to kill innocent civilians. The question was whether, because of this threat, he should be exempted from criminal responsibility for the killings. While the Trial Chamber recognised duress as a defence under certain strict conditions,⁷⁶ the Appeals Chamber rejected it by a slight three to two majority.⁷⁷ *Erdemovic* was finally sentenced to 5 years imprisonment by Trial Chamber II,

⁷² See e.g., s. 42(3) of the Draft Criminal Code Bill (Law Commission 1989); for a comparative overview see K. Ambos, in A. Cassese *et al.*, *supra* note 45, pp. 1023 *et seq.*

⁷³ *R. v. Finta*, [1994] 1 S.C.R. 701, 88 C.C.C. (3d) 417, pp. 514 *et seq.* (C.C.C.).

⁷⁴ Cf. K. Ambos, in A. Cassese *et al.*, *supra* note 45, pp. 1010, 1036; K. Ambos, *supra* note 15, pp. 211–212, 838.

⁷⁵ See, for an analysis, K. Ambos, in A. Cassese *et al.*, *supra* note 45, pp. 1010 *et seq.*; K. Ambos, *supra* note 15, pp. 266 *et seq.*, both with further references.

⁷⁶ *Prosecutor v. Erdemovic* (Case No. IT-96-22-T), Sentencing Judgment, 29 November 1996, paras. 16–20.

⁷⁷ *Prosecutor v. Erdemovic* (IT-96-22-A), Judgment, 7 October 1997, para. 19. The majority view was expressed in the opinions of Judges McDonald and Vohrah, Judge Li consenting; the minority view in the opinions of Judges Cassese and Stephen.

which at least considered the duress situation as a mitigating factor.⁷⁸ As argued elsewhere,⁷⁹ a correct answer to the question at hand can only be achieved on the basis of the distinction between justification and excuse.⁸⁰ While an act (or omission) that leads to the death of another, innocent person can never *be justified*, i.e., always constitutes a wrong, it may be *excused*, i.e., may not be blamed on the perpetrator because of the enormous pressure imposed on him or her. It is therefore to be welcomed that article 31(l)(d) of the ICC Statute sets aside the Appeals Chamber's *Erdemovic* decision, leaving the possibility of an exemption from criminal responsibility even in this extreme case open.

As to the remaining defences examined by Bassiouni, it is fair to say that they have lost most of their practical significance in modern international criminal law. Reprisals (p. 491 *et seq.*), although not explicitly regulated in the ICC Statute, are only, if at all, allowed under strict conditions in international law: They must be ordered by the heads of state or military leadership in order to enforce or restitute a right, and not just as revenge; their use must be proportional and the ultimate resort, i.e., after a failed attempt to reach an amicable agreement and after prior warning; finally, humanitarian considerations must be taken into account.⁸¹ These restrictive conditions

⁷⁸ *Prosecutor v. Erdemovic* (IT-96-22-Tbis), Sentencing Judgment, 5 March 1998, paras. 8, 23.

⁷⁹ K. Ambos, in A. Cassese et al., *supra* note 45, pp. 1042 *et seq.*; K. Ambos, *supra* note 15, pp. 859 *et seq.*

⁸⁰ On the general importance of this distinction see A. Eser, *Justification and Excuse: A Key Issue in the Concept of Crime*, in I JUSTIFICATION AND EXCUSE. COMPARATIVE PERSPECTIVES 17 (A. Eser & G. Fletcher, eds., 1987); A. Eser, *Die Unterscheidung von Rechtfertigung und Entschuldigung: Ein Schlüsselproblem des Verbrechensbegriffes*, CRIMINAL LAW THEORY IN TRANSITION. FINNISH AND COMPARATIVE PERSPECTIVES 303 (R. Lahti & K. Nuotio, eds., 1992). See also G. FLETCHER, *RETHINKING CRIMINAL LAW* 454 *et seq.*, 759 *et seq.* (1978); G. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 74 *et seq.*, 80-81, 83 *et seq.* (1998), and the various international conferences on the issue organized by the Max Planck Institute for Foreign and International Criminal Law in Freiburg, Germany: I JUSTIFICATION AND EXCUSE. COMPARATIVE PERSPECTIVES 17 (A. Eser & G. Fletcher, eds., 1987; II JUSTIFICATION AND EXCUSE. COMPARATIVE PERSPECTIVES 17 (A. Eser & G. Fletcher, eds., 1987; II RECHTFERTIGUNG UND ENTSCHULDIGUNG (A. Eser & W. Perron, eds., 1991); IV RECHTFERTIGUNG UND ENTSCHULDIGUNG (A. Eser & H. Nishihara, eds., 1995).

⁸¹ See the International Law Commission's Draft Articles on State Responsibility, UN Doc. A/CN.4/L.602, arts. 50 *et seq.*

alone exclude reprisals as a means of justification for genocide or crimes against humanity.⁸² As to war crimes, the latest developments in international humanitarian law go in the direction of an extensive ban on reprisals. The Geneva Conventions contain various explicit prohibitions on reprisals in an international armed conflict.⁸³ These provisions reflect customary law and, taken together, ban reprisals against protected persons under the control of a party to the conflict.⁸⁴ Additional Protocol I goes one step further and excludes reprisals against civilians of the hostile party in an international armed conflict in general.⁸⁵ The ICTY accepted these new prohibitions as customary international law without distinguishing between international and non-international armed conflicts.⁸⁶ In a way, this finding goes back to the more general finding of the *Tadic* Appeals Chamber reaffirming the assimilation of humanitarian rules for international and non-international conflicts.⁸⁷ In the light of this development, it is fair to conclude that in any armed conflict, independent of its international or non-international character, a humanitarian minimum standard must be respected. This standard entails, as correctly affirmed by Bassiouni (p. 501), an absolute pro-

⁸² See German VStGB (*supra* note 26), motives, s. 2(f); for the German original, see ARBEITSENTWURF EINES GESETZES ZUR EINFÜHRUNG DES VStGB 28 (Bundesministerium der Justiz, ed., 2001).

⁸³ See: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, (1950) 75 UNTS 31, art. 46; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, (1950) 75 UNTS 85, art. 47; Geneva Convention Relative to the Treatment of Prisoners of War, (1950) 75 UNTS 135, art. 13(3); Geneva Convention Relative to the Protection of Civilians, (1950) 75 UNTS 287, arts. 33, 34, 147.

⁸⁴ Cf. F. Kalshoven, *Belligerent Reprisal Revisited*, 21 NETHERLANDS YB INT'L L. 43, 78–79 (1990); COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1372–1373 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann, Eds., 1987).

⁸⁵ Protocol Additional to the 1949 Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts, (1979) 1125 UNTS 3, arts. 51 *et seq.*, in particular arts. 51(6) and 75(2)(c).

⁸⁶ *Prosecutor v. Kupreskic et al.* (Case No. (IT-95-16-T), Judgment, 14 January 2000, paras. 527–536. Crit. C. Greenwood, *Belligerent Reprisals in the Jurisprudence of the ICTY and ICTR* in INTERNATIONAL AND NATIONAL PROSECUTIONS OF CRIMES UNDER INTERNATIONAL LAW 539 (Horst Fischer, Claus Kress & Sascha Rolf Lüder, eds., 2001), at p. 540 (“unfounded and ... unnecessary”), p. 550 (“unconvincing”) and p. 554 (“very thin basis”).

⁸⁷ *Prosecutor v. Tadic*, *supra* note 57, paras. 87 *et seq.*, 137.

hibition of reprisals against protected persons and certain protected objects.⁸⁸ The underlying rationale for this far reaching prohibition consists in the high potential of abuse of reprisals as a means of revenge against innocent civilians, as evidenced by the historical examples of World Wars I and II (p. 495 *et seq.*).

As to the *tu quoque* defence (p. 502 *et seq.*) it was already rejected at Nuremberg (pp. 503–504).⁸⁹ Most recently, the *Kupreskic* Trial Chamber⁹⁰ convincingly dismissed it as a consequence of the increasing humanisation of armed conflicts demanded by international humanitarian law and international criminal law: “This trend marks the translation into legal norms of the ‘categorical imperative’ formulated by Kant in the field of morals: one ought to fulfil an obligation regardless of whether others comply with it or disregard it.”⁹¹

As to the question of immunity of heads of state (p. 505 *et seq.*), Bassiouni’s elaboration cannot be quarrelled with because he only observes the issue from a supranational *perspective*, *i.e.*, from article 27 of the ICC Statute. This provision clearly rejects immunity in the case of the crimes within the jurisdiction of the ICC (genocide, crimes against humanity, war crimes and aggression), *i.e.*, *vis-à-vis* an international criminal court. The question is more complicated, though, from the perspective of the *indirect enforcement* of international criminal law, *i.e.*, the national prosecutions of heads of state or government officials. In this field, arguably, the tension between public international and international criminal law is at its peak, as demonstrated recently by the controversial ruling of the International Court of Justice in the *Belgium v. Congo* case.⁹² While the rationale of state and diplomatic immunity, *i.e.*, the preservation of the normal functioning of inter-state relations, must not lightheartedly be sacrificed for the sake of universal jurisdiction in each and any case of injustice on our planet, it must, on the other hand, not be overlooked that the international criminalisation of gross human rights violations

⁸⁸ Cf. K. Ambos, *supra* note 15, at pp. 374, 397 *et seq.* (402).

⁸⁹ See also K. Ambos, *supra* note 15, at p. 123 *et seq.*, 130.

⁹⁰ *Prosecutor v. Kupreskic*, *supra* note 86, paras. 511, 515 *et seq.*

⁹¹ *Ibid.*, para. 518.

⁹² *Democratic Republic of the Congo v. Belgium*, *supra* note 24, paras. 51 *et seq.* and *passim*; dissenting Higgins, Kooijmans and Buergenthal, Joint Separate Opinion, paras. 81 *et seq.* See also the critical reviews by A. Cassese and S. Wirth in 13 *EUR. J. INT’L L.* 853, 877 (2002); C. Kreß, 150 *GOLTDAMMER’S ARCHIV FÜR STRAFRECHT* 25 (2003); Guilherme de Aragao, in 15 *HUMANITÄRES VÖLKERRECHT* 77 (2002).

finds its most important field of application in the case of offenders at the government or leadership level. Thus, from the perspective of international criminal law, immunity cannot bar prosecution if the suspect, having resigned from his or her post, no longer exercises official functions and therefore does not represent the state concerned. A less state – but more human-being-orientated-approach would even limit the immunity for sitting heads of state and active members of government if the crimes at hand are so serious that the interest in prosecution and punishment must prevail over the normal functioning of international relations.⁹³ Obviously, the question cannot be decided *in abstracto*, but only on a case by case basis.

VII. CONCLUDING REMARKS

The final chapter 10 (p. 510 *et seq.*) presents a detailed historic account of international and national prosecutions from before World War I until the establishment of the ICTY and ICTR. The chapter contains interesting information, *e.g.*, that there have been 250 armed conflicts with 170 million casualties from World War II until the 1990s (p. 513), and attempts to reinforce the thesis of the book “that the application of international legal norms to individuals and their subjection to criminal responsibility for ‘crimes against humanity’ have been established under international law and, to a limited extent, in the practice of several states” (p. 514). While this attempt is successful, the place of the chapter is not very fortunate, since it contains multiple and repetitive references to the historical precedents already discussed in the first chapters. The criticism expressed at the beginning of this essay applies most strongly to this part. Be that as it may, it is to be welcomed that Bassiouni takes a differentiated view of the history of prosecutions and does not ignore the selective enforcement of international criminal law (p. 547 *et seq.*), criticising “the still arbitrary, ad hoc nature of the international legal system” (p. 552). Once again, he points to the one-sided prosecutions of German war crimes during World War I and World War II and inaction with regard to Allied crimes (p. 552 *et seq.*).

It is clear that the only remedy to this situation lies in the establishment and functioning of a permanent international criminal court. Indeed, Bassiouni has been for decades one of the champions

⁹³ Cf. K. Ambos, in I MÜNCHNER KOMMENTAR ZUM STRAFGESETZBUCH vor §§ 3–7 mn. 135 *et seq.* (2003).

of this idea and it is therefore not surprising that he concludes this chapter by a reference to his speech in Rome on 18 July 1998 (pp. 555–556), at the conclusion of the Diplomatic Conference, in which he, *inter alia*, stressed the historic breakthrough achieved by the adoption of the ICC Statute. Unfortunately, because of the date of publication, the chapter cannot cover the recent developments of decentralised prosecutions of international crimes by third states in the wake of the *Pinochet* case⁹⁴ and new approaches in international criminal justice within the framework of United Nations transitional administrations (Kosovo, East Timor) or of bilateral agreements (Sierra Leone, Cambodia).⁹⁵

Bassiouni's concluding assessment (p. 557 *et seq.*) is a recapitulation of many of the issues and thoughts developed before, once again, he defends article 6(c) of the IMT Charter against criticisms in light of the legality principle (p. 561 *et seq.*) and calls for a specialised convention on crimes against humanity (p. 568). At the same time, he argues for an international criminal court as an expression of "the higher values of our legal civilisation" (p. 576) rather than as a universal enforcement mechanism; enforcement should primarily rest with national legal systems (*ibid.*). While this is certainly correct and also in accordance with the complementarity principle (art. 17 ICC Statute), it is questionable whether a more detailed codification of crimes against humanity than article 7 of the ICC Statute can be achieved and if it is desirable at all. It took more than 50 years to codify crimes against humanity, and there have been 11 different formulations since 1945 (p. 567). It can safely be assumed that the codification reached at Rome – under difficult circumstances! – will serve for many years to come. Also, a more detailed codification in a separate instrument will not be desirable since it will preclude or make more difficult the development of the law on the basis of future cases to be decided by the ICC. If it is true that international criminal law is not static but dynamically developing on the basis of state practice and case law (pp. 559–560) it is sufficient to have a universally recognised codification such as article 7 of the ICC Statute. It may and will be further refined by national implementing laws, as for example the German one,⁹⁶ and serve as a good starting point for the ICC.

⁹⁴ For a detailed account, see LUC REYDAMS, *UNIVERSAL JURISDICTION* (2003).

⁹⁵ See *NEW APPROACHES IN INTERNATIONAL CRIMINAL JUSTICE* (K. Ambos & M. Othman, eds., 2003).

⁹⁶ See *supra* note 26 and 36.