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The Nuremberg Military Tribunals and the origins of International Criminal Law

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CHAPTER 16: Legacy

INTRODUCTION

The previous chapters examined the origins of the Nuremberg Military Tribunals, the law that they applied, and the fate of the defendants that they convicted. This chapter examines the legacy of the tribunals through the prism of the goals the trials were designed to achieve. Section 1 focuses on retribution, the judges' primary goal. It asks – extending the discussion in Chapters 14 and 15 – whether the defendants convicted in the trials received their just deserts. Section 2 questions whether the trials achieved the two interrelated goals that Telford Taylor viewed as equally, if not more important, than retribution: creating an enduring historical record of the atrocities of the Nazi regime and exposing the German people to those atrocities. Finally, Section 3 asks whether the NMT trials have had a positive impact on the development of international criminal law.

I. RETRIBUTION

The NMT judgments reflect a single-minded, if not entirely successful, devotion to the idea that the principal goal of a criminal trial is to separate the guilty from the innocent and to impose sentences that reflect the moral culpability of the convicted.[1] That devotion is evident in every aspect of the tribunals' jurisprudence, from their rigorous application of the presumption of innocence to their desire – recalling Judge Wilkins' description – "not only to impose a sentence that would fit the guilt of the individual defendant but also bring about uniformity in the sentences."

Did the tribunals achieve retributive justice? A categorical answer to that question is not possible, because retributive justice is not a unitary phenomenon. On the contrary, it has at least four indices in the context of a criminal trial: (1) whether suspects selected for trial were more deserving of prosecution than suspects who were not selected[2]; (2) whether convicted defendants were, in fact guilty; (3) whether acquitted defendants were, in fact, innocent; and (4) whether the sentences imposed on guilty defendants reflected their culpability.[3]

A. Selectivity

As Mark Drumbl has noted, the retributive function of international tribunals is often "hobbled by the fact that only some extreme evil gets punished, whereas much escapes its grasp, often for political reasons anathema to Kantian deontology."[4] The NMTs were no different, for all of the reasons discussed in Chapter 3. Most obviously, of the 2,500 "major war criminals" identified by the OCC, only 177 ever stood trial – a mere 7%. That retributive shortfall would have been troubling even if the 177 defendants had represented the most major of the "major war criminals." But that seems unlikely, given how many important suspects were not prosecuted solely

[1] R. v. M.(C.A.) [1996] 1 S.C.R. 500, quoted in Prosecutor v. Kordić and Čerkez, IT-95-14/2-A, Judgment, para. 1075 (17 Dec. 2004).
[2] DRUMBL, 151.
[3] See, e.g., CHARLES K.B. BARTON, GETTING EVEN: REVENGE AS A FORM OF JUSTICE 49-50 (1999).
[4] DRUMBL, 151.

for financial, temporal, or logistical reasons – Fritz Bartels, the head of the Reich Central Office of Health Leadership, because he arrived in Nuremberg after the indictment in *RuSHA* had already been filed; Karl Wolff, Himmler's Chief of Staff, because Dulles has promised him immunity; Field Marshals von Brauchitsch, von Manstein, and von Rundstedt, because Clay ordered Taylor not to prosecute them; and so on.

B. Convicting the Innocent

In general, the convictions themselves appear to have been retributively just. There is no obvious example of a defendant in the trials who should have been acquitted but was not, and the tribunals acquitted 35 of the 177 defendants, an acquittal rate (20%) that exceeds both the IMT's (13%) and the ICTY's (15%). The tribunals also acquitted another 11 defendants (6%) on all charges other than criminal membership. Those statistics do not exclude the possibility of a wrongful conviction, but they at least indicate that the judges took their obligation to avoid convicting the innocent very seriously.

C. Acquitting the Guilty

By contrast, the tribunals' high rate of acquittal does suggest that guilty defendants might have avoided conviction. There is no question that the reliability of the OCC's selection process was undermined by the office's lack of time and personnel, the amount of evidence that the attorneys and analysts had to process, and the questionable reliability of some of that evidence. As noted in Chapter 3, for example, Marrus argues that "overly hasty prosecution" based on "insufficient evidence" explains the high number of acquittals (seven) in the *Medical* case. That said, given the vast number of major war criminals the OCC had to choose from, it seems unlikely that one out of every five indicted suspects (and one out of every four, if we limit consideration to the crimes against peace, war crimes, and crimes against humanity) was factually innocent of the charges against him. Indeed, although it is always difficult to identify wrongful convictions, at least some wrongful acquittals are readily apparent, such as the twelve defendants in *Flick* and *Farben* who were acquitted of slave-labor charges because the tribunals believed – despite all evidence to the contrary – that they were entitled to a defense of necessity.[5]

D. Just Punishment

Finally, it is difficult to argue that the punishment of the convicted defendants was retributively just. The sentences themselves were generally consistent, even if some defendants likely deserved longer sentences (Joel in the *Justice* case; Lammers in *Ministries*), while others likely deserved shorter ones (Loerner in *Pohl*). But were they fair? Drumbl has pointed out that although international crimes are considered more serious than their domestic counterparts, "sentences for multiple international crimes are generally not lengthier than what national jurisdictions award for a serious ordinary crime."[6] That disparity is particularly glaring concerning the sentences imposed by the NMTs. It is difficult to imagine that a court in Poland or the U.S. would have sentenced a defendant who worked thousands of slaves to death in his factories to 12 years in prison (Alfried Krupp's sentence) or a defendant who was

[5] See Chapter 9.
[6] DRUMBL, 155.

responsible for the murder of thousands of innocent people to 15 years (General Felmy's sentence in *High Command*).

Despite such concerns, the NMTs at least deserve praise for attempting to impose fair and consistent sentences. The same cannot be said of McCloy's clemency decisions, which left an indelible stain on the tribunals' legacy. It is impossible to argue that Willy Seibert deserved 15 years imprisonment instead of death, given that he had been Ohlendorf's deputy in Einsatzgruppen D, which had murdered at least 90,000 Soviet Jews. Similarly, there was no retributive justification for reducing the sentence of Gottlob Berger, the architect of the vicious Dirlewanger Brigade, from 25 years (itself overly lenient) to a mere 10 years.

Worse still, because of the liberal good-conduct and parole programs created by the U.S. after the tribunals shut down, very few of the convicted defendants ever served even a fraction of their modified sentences. To take only the most obvious example, seven defendants were facing life sentences after McCloy's clemency decisions in January, 1951: List and Kuntze from the *Hostage* case; Biberstein, Klingelhofer, Ott, Sandberger from *Einsatzgruppen*; and Reinecke from *High Command*. List was released from prison in late 1952; Kuntze was released in early 1953; Klingelhofer was released in late 1956; and the others were all released in early 1958. In practice, therefore, a life sentence meant as few as three and no more than 10 years – a result that is impossible to reconcile with retributive principles.

II. THE DOCUMENTARY AND DIDACTIC FUNCTIONS

Taylor agreed with the judges that it was critically important for "just punishment [to] be imposed on the guilty."[7] But he made clear in the opening minutes of the *Medical* trial that he had far greater ambitions for the trials:

> The mere punishment of the defendants, or even of thousands of others equally guilty, can never redress the terrible injuries which the Nazis visited on these unfortunate peoples. For them it is far more important that these incredible events be established by clear and public proof, so that no one can ever doubt that they were fact and not fable… It is our deep obligation to all peoples of the world to show why and how these things happened.[8]

This statement articulated two different but interrelated goals. The first was documentary: creating a historical record of the Nazis' atrocities. The second was didactic: educating a still-skeptical public about those atrocities.

By any standard, the documentary goal was a spectacular success. As noted in the Introduction, more than 1,300 witnesses testified during the trials, the parties introduced more than 30,000 documents into evidence, and the judgments run more than 3,800 pages. In the aftermath of the trials, only the most committed apologist could maintain that the Holocaust – and the Nazis' other crimes beyond number – were "fable, not fact."

[7] Medical, Prosecution Opening Argument, I TWC 27.
[8] Id.

The didactic goal, however, was an equally spectacular failure. When Taylor spoke about the "peoples of the world," he was thinking about the German people in particular – as he said later in his opening argument, "I do not think the German people have as yet any conception of how deeply the criminal folly that was Nazism bit into every phase of German life, or of how utterly ravaging the consequences were. It will be our task to make these things clear."[9] It is difficult, of course, to determine precisely what effect the NMT trials had on the views of ordinary Germans; the trials were only one part of the U.S. war-crimes program, extending the work of the IMT and functioning alongside the much-maligned concentration-camp trials and the increasingly unpopular denazification boards.[10] But it is clear that the war-crimes program as a whole failed to reduce either support for National Socialism or the prevalence of racist attitudes toward Jews and other minorities – two critical indicia of whether the program was having its desired didactic effect. OMGUS conducted a series of public-opinion polls on both subjects in Germany between 1945 and 1949. In 1946, an average of 40% of Germans believed that National Socialism was a good idea badly carried out. By 1948, the average had risen to 55.5%.[11] At the same time, the percentage of Germans who believed that National Socialism was a bad idea dropped, on average, from a high of 41% to a low of 30%.[12] Racist views did not show a similar increase, but they also did not markedly decrease: 61% of Germans held racist views in December 1946, and 59% still held such views in mid-1948.[13]

Given the Germans' unyielding resistance to the war-crimes program, American efforts to use the NMT trials for didactic purposes might have been doomed from the beginning. The Americans did not help themselves, though, by failing to make the trials' vast documentary record available to the Germans in their own language. Taylor had always been convinced that the educative function of the trials depended on the documentary function; he began to lobby the American government to publish the proceedings in both German and English as early as May 1948, arguing in a report to Royall, the Secretary of War, that although the "re-education of Germany" would be "far from easy," the one thing that the Army could do was "make the facts available to German historians, so that future generations of Germans will be able to grasp the full and malignant import of the Third Reich."[14] Indeed, he warned Royall that the entire NMT project would be "truncated and incomplete" if the documentary record of the trials was "left in the dust on the top shelf out of reach."[15]

Unfortunately, the Army was never committed to a German publication project. Although Royall allocated $317,000 to the OCC in July 1948 to prepare selected trial proceedings in both languages, the project called for an English set that was twice as long as the German one and did not guarantee that the German set would be

[9] Id. at 29.
[10] Merritt and Merritt note that acceptance of denazification among ordinary Germans declined from approximately half in the winter of 1945 to little more than a sixth in January 1949. ANNA J. MERRITT & RICHARD L. MERRITT, PUBLIC OPINION IN OCCUPIED GERMANY: THE OMGUS SURVEYS, 1945-49, 37 (1980).
[11] Id. at 295, Survey 175, June 1949.
[12] Id. at 32.
[13] Id. at 239-40, Survey 122, 22 May 1948.
[14] Quoted in TAYLOR, FINAL REPORT, 116 (Appendix A).
[15] Id. at 115, 117.

published.[16] The Army later agreed to equalize the length of the German and English volumes, which the OCC dutifully prepared, and briefly entertained the possibility – at the OCC's urging – of having a German publishing house underwrite the publication project.[17] Nevertheless, in October 1949, the Army pulled the plug on the project completely, claiming that the German volumes were "of insufficient value to the military to warrant their publication."[18]

That rationale was, in fact, Army-speak for the belief that publishing the trial proceedings would needlessly complicate American efforts to enlist Germany in the fight against communism.[19] Indeed, as the occupation of Germany wore on, American occupation authorities became increasingly open about why they wanted to allow the trial proceedings to – as Taylor put it – "sink into oblivion."[20] In July 1952, for example, Samuel Reber, the Assistant High Commissioner, argued against restarting the German publication project on the ground that publishing trial materials would remind Germans of the "war-criminals problem" at a time when "[i]t is our primary purpose… to prevent this issue from becoming an obstacle to ratification of the Bonn Agreements and European Defense Treaty and to forestall its developing into a serious impediment to future military cooperation."[21]

Because the publication project was never revived, the Germans had almost no access to the trial proceedings. As of August 1952, only two German institutions had a significant collection of German-language materials. The University of Goettingen possessed a complete set of trial records and made them available to the public, but they were unbound and unindexed. The University of Heidelberg had about 75% of the transcripts and exhibits, although some of them were in English instead of German. The University had paid to have the records bound and was preparing indexes by hand, but had no plans to make them publicly available.[22] Indeed, ironically enough, the most widely available American war-crimes document was McCloy's Landsberg Report, which presented the trials in an extremely unflattering light. According to Hebert, the translation of the Landsberg Report quickly became the "authoritative" German document on the trials.[23]

The German publication project was not the only casualty of the Cold War. The Army also did everything it could to avoid publicizing Taylor's Final Report, which criticized OMGUS for its "lack of planned effort to utilize the documents and other evidence disclosed at the trials so as to advance the purposes of the occupation"[24] and claimed that any effort to "soft pedal" Nuremberg to protect German-American relations would, in fact, "play into the hands of those Germans who do not want a democratic Germany."[25] Taylor submitted the report to the Secretary of the Army in August 1949, but the Army did not inform the press that it was available until

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[16] HEBERT, HIGH COMMAND, 179.
[17] Id.
[18] Id. at 180. The Army discontinued publication of the American volumes at the same time, but reversed itself when Congress allocated additional funds for the project. Id.
[19] See id. at 181-82.
[20] TAYLOR, FINAL REPORT, 111.
[21] Quoted in HEBERT, HIGH COMMAND, at 182.
[22] Id. at 182-83.
[23] Id. at 181.
[24] TAYLOR, FINAL REPORT, 106.
[25] Id. at 112.

November 8. The Army also made only one copy of the report available for inspection and required reporters to read it at the Pentagon – a significant deviation from standard Army practice, which was to provide copies of important reports to reporters well in advance of their official release date.[26] The Army's slow-walking of the report had its intended effect: as a *New York Post* article entitled "Taylor Report on Nazi Crimes Buried Without Honor" noted, the national press largely ignored it.[27]

III. THE ORIGINS OF INTERNATIONAL CRIMINAL LAW

Although Taylor grew increasingly pessimistic about the didactic function of the trials, he never wavered in his belief that the tribunals' jurisprudence would have a profound influence on the development of international criminal law. As he said in his preliminary report to Secretary Royall:

> Many perplexing problems of international legal procedure have been met and answered in the course of these trials, and many profoundly important substantive questions have received the considered judgment of experienced jurists. International penal law – like the Anglo-Saxon common law, from which our most cherished legal institutions derives – is growing by the case method. The trials of major war criminals at Nurnberg… will be looked to by diplomats and international jurists just as the decisions of our own courts are looked to by our statesmen and lawyers.[28]

As Taylor predicted, "diplomats and international jurists" have indeed consistently relied on the judgments when addressing new and difficult jurisprudential issues. Most often, that reliance has been positive. The modern conception of crimes against humanity, for example, is deeply indebted to the judgments in the *Justice* and *Einsatzgruppen* trials. In some cases, though, reliance on the judgments has had a negative effect. The Rome Statute's reliance on a subjective *mens rea* for the war crime of "excessive incidental death, injury, or damage," for example, reflects the *Hostage* tribunal's problematic acquittal of Lothar Rendulic.

A. Customary International Law

Although international and domestic courts have consistently relied on the NMT judgments to determine the state of customary international law,[29] they have exhibited considerable uncertainty concerning their authority. A number of courts simply finesse the issue, stating that the judgments "contribute" to customary international law without identifying the weight of their contribution.[30] Other courts view the judgments as evidence of U.S. practice, no more important than the decisions of any national court. And still others treat the judgments as the decisions of an international tribunal, entitling them to considerably more authority than national decisions.

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[26] Charles van Devander, *Taylor Report on Nazi Crimes Buried Without Honor*, NEW YORK POST, 21 Nov. 1949, TTP-5-3-3-24, at 4.
[27] Id.
[28] Quoted in TAYLOR, FINAL REPORT, 116 (Appendix A).
[29] See, e.g., Prosecutor v. Hadžihasanović, IT-01-47-T, Judgment, para. 72 (15 Mar. 2006); Karins v. Parliament of Latvia, Constitutional Review, Case No. 2007-10-0102, para. 25.5 (2007).
[30] See, e.g., Khulumani v. Barclay Nat'l Bank, Ltd., 504 F.3d 254, 273 (2d Cir. 2007).

The disagreement between the majority and Judge Cassese in *Erdemović* provides a striking example of the debate. The primary issue in the case was whether customary international law permitted a defendant to invoke duress as a defense to murder. In rejecting the existence of such a customary rule, Judges McDonald and Vohrah – writing for the majority – acknowledged that the *Einsatzgruppen* tribunal had stated that "[n]o court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever." They nevertheless held that the judgment was no more authoritative than the decisions of British and Canadian military tribunals that reached the opposite conclusion, because the NMTs were of "questionable" international character and had applied American law instead of "purely international law."[31] By contrast, as part of his argument that customary international law did permit duress as a defense to murder, Judge Cassese insisted that the NMT judgments were entitled to much greater weight than decisions of national military tribunals. In his view, because Law No. 10 was "an international agreement among the four Occupying Powers (subsequently transformed, to a large extent, into customary international law), the action of the courts established or acting under that Law acquire[d] an international relevance that cannot be attributed to national courts pronouncing solely on the strength of national law."[32]

The ICTY Appeals Chamber reaffirmed McDonald and Vohrah's position in *Kunarac*,[33] and some domestic courts have reached the same conclusion. In *Polyukhovich*, for example, the High Court of Australia refused to consider *Justice* an "authoritative statement of customary international law" because "Law No. 10 and the tribunals which administered it were not international in the sense that the Nuremberg Charter and the International Military Tribunal were international."[34] Other courts, however, have adopted Cassese's position. The ECCC, for example, held in *Case No. 2* that the NMTs "offer an authoritative interpretation of their constitutive instruments and can be relied upon to determine the state of customary international law."[35] Similarly, the Second Circuit held in *Doe v. Unocal* that, in Alien Tort Claims Act cases, it "should apply international law as developed in the decisions of international criminal tribunals such as the Nuremberg Military Tribunals for the applicable substantive law."[36]

With regard to the substantive crimes and modes of participation enumerated in Law No. 10, Cassese's position is clearly the superior one. Although McDonald and Vohrah are correct that the NMTs were not international tribunals, that does not mean, as Cassese notes, that they were domestic American courts that applied domestic American law. On the contrary, they were inter-Allied special tribunals that applied Law No. 10, which reflected – according to the tribunals – customary international law. As a result, although the NMT judgments may not carry the same weight as the IMT judgment, they are certainly more authoritative than the decisions

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[31] Prosecutor v. Erdemović, IT-96-22-Tbis, Joint Separate Opinion of Judges McDonald and Vohrah, paras. 53-54 (7 Oct. 1997).
[32] Id., para. 27, Separate and Dissenting Opinion of Judge Cassese.
[33] See Prosecutor v. Kunarac, IT-96-23 & IT-96-23/1-AAC, Judgment, para. 98 n. 188 (12 June 2002).
[34] Polyukhovich v. Commonwealth, 172 CLR 501, Opinion of Justice Brennan, para. 62 (14 Aug. 1991).
[35] Case No. 2, 002/19-09-2007-ECCC/OCIJ (PTC 38, Public Appeals Decision on Joint Criminal Enterprise, para. 60 (20 May 2010).
[36] See, e.g., Doe v. Unocal, 395 F.3d 932, 948 (9th Cir. 2002).

of "ordinary" national military tribunals concerning substantive crimes and modes of participation.

The situation is more complicated, however, concerning defenses. The NMTs did not base their willingness to apply particular defenses on customary international law; they looked instead to "fundamental principles of justice which have been accepted by civilized and adopted by civilized nations generally." The *Krupp* and *Flick* tribunals were willing to permit the defendants to argue duress, for example, because they concluded that "the rule finds recognition in the systems of various nations"[37] and that "[t]his principle has had wide acceptance in American and English courts and is recognized elsewhere."[38] Similarly, the *Hostage* tribunal accepted the defense of superior orders because "the municipal law of civilized nations generally sustained the principle at the time the alleged criminal acts were committed."[39] That is a critical difference: because the tribunals were applying municipal law instead of "purely international law" with regard to the defenses, their decisions regarding the availability and interpretation of specific defences – including duress – are entitled to no more weight than the decisions of national military tribunals.[40]

Cassese, it is important to note, is not the only judge who has overestimated the value of NMT decisions when determining the customary status of a particular rule or principle. A number of international and domestic courts – including the ICTY in other cases – have made the same mistake. In *Rwamakuba*, for example, the ICTR Appeals Chamber relied exclusively on *Justice* and *RuSHA* to hold that customary international law permitted a defendant to be convicted of genocide via joint criminal enterprise.[41] Similarly, in *Blagojevic and Jokic*, four NMT judgments were the only pre-1993 legal sources that the ICTY's Trial Chamber I-A cited to establish that customary international law criminalized "other inhumane acts" as a "residual category of crimes against humanity."[42] Neither decision is necessarily incorrect, but the truncated nature of their analyses of customary international law is nevertheless impossible to justify.[43] Far better in this regard is *Abdullahi v. Pfizer, Inc*., in which the Second Circuit cited the *Medical* tribunal's condemnation of nonconsensual medical experimentation as a crime against humanity and then pointed out that, "since Nuremberg, states throughout the world have shown through international accords and domestic law-making that they consider the prohibition… identified at Nuremberg as a norm of customary international law."[44]

B. The Principle of Non-Retroactivity

Despite the fact that NMTs were the first tribunals to insist that the principle of non-retroactivity was a limit on sovereignty, not simply a principle of justice, courts have

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[37] Krupp, IX TWC 1436-37.
[38] Flick, VI TWC 1200.
[39] Hostage, XI TWC 1236.
[40] See Claus Kress, *Erdemović*, in CASSESE (ED.), OXFORD COMPANION, at 661.
[41] Prosecutor v. Rwamakuba, ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, paras. 16-22 (22 Oct. 2004).
[42] Prosecutor v. Blagojević, IT-02-60, Judgment, para. 624 (17 Jan. 2005). Even worse, the Trial Chamber cited to the indictments in those cases, not to the judgments, despite claiming that the NMTs had entered convictions for other inhumane acts. Id. at para. 624 n. 2027.
[43] See generally Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT'L L. 925, 933-46 (2008).
[44] 562 F.3d 163, 179 (2d Cir. 2009).

only occasionally mentioned the judgments when addressing retroactivity issues. In *Vasiljević*, an ICTY Trial Chamber cited the *Justice* case for the proposition that the principle requires a charged crime to be "defined with sufficient clarity under international law… to have been sufficiently foreseeable and accessible."[45] That citation is incorrect: the *Justice* tribunal was the only tribunal that considered non-retroactivity to be a principle of justice – and a relaxed principle at that, one that was satisfied as long as the defendant should have known his act was wrongful.[46] The ICTY Appeals Chamber made the same mistake in *Milutinović*, with the same judgment, when it held that convicting a defendant of "serious criminal offenses" via JCE did not run afoul of the *nullum crimen* principle.[47] By contrast, in *Polyukhovich*, the High Court of Australia correctly cited the *Hostage* case for the idea that a defendant "may not be charged with crime for committing an act which was not a crime at the time of its commission."[48]

C. Evidence and Procedure

Courts have largely ignored the NMT judgments concerning evidence and procedure – and the primary exception is problematic. In *Tadić*, the Appeals Chamber held that it had the "inherent power" to punish "conduct which interferes with its administration of justice," even though the ICTY Statute was silent concerning contempt. In defense of that conclusion – which has been criticized by scholars[49] – it noted that the NMTs had "interpreted their powers as including the power to punish contempt of court."[50] That was a misleading statement, because Article VI(c) of Ordinance No. 7 specifically empowered the tribunals to "deal summarily with any contumacy." Their contempt power, therefore, was anything but "inherent."

D. Aggression

The NMT judgments have had an important impact on the development of the crime of aggression. Most notably, there is now no question that "invasions" – armed attacks that are not resisted by the attacked State – are "acts of aggression" that can give rise to individual criminal responsibility. The International Law Commission's 1954 Draft Code of Offences Against the Peace and Security of Mankind criminalized "[a]ny act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence."[51] The Draft Code's definition of aggression went far beyond Article 6(a) of the Nuremberg Charter, which was limited to wars of aggression.[52] But it was very much in keeping with the tribunals' criminalization of the invasions of Austria and Czechoslovakia. Article 8*bis*(2) of the Rome Statute, adopted in 2010, also specifically includes "[t]he invasion or attack by the armed forces of a State of the

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[45] Prosecutor v. Vasiljević, IT-98-32-T, Judgment, para. 201 (29 Nov. 2002).
[46] See Chapter 5.
[47] Prosecutor v. Milutinović, IT-99-37-AR72, Decision on Motion Challenging Jurisdiction – Joint Criminal Enterprise, para. 39 (21 May 2003).
[48] Polyukhovich, para. 46.
[49] See generally Michael Bohlander, *International Criminal Tribunals and Their Power to Punish Contempt and False Testimony*, 12 CRIM. L. FORUM 91-118 (2001).
[50] Prosecutor v. Tadić, IT-94-1-A-AR77, Appeals Judgment on Allegations of Contempt, para. 14 (27 Feb 2001).
[51] ILC, Draft Code of Offences Against the Peace and Security of Mankind with Commentaries, art. 2 (1954).
[52] See YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENSE 125 (2001).

territory of another State" in the category of acts of aggression that can give rise to individual criminal responsibility.[53] Article 8*bis*(2)'s criminalization of invasions reflects the influence of the NMTs – although the language is borrowed from General Assembly Resolution 3314, Article 5(2) of Resolution 3314 limited "crimes against international peace" to "wars of aggression."

The criminalization of invasions has influenced national courts, as well. In *Karins v. Parliament of Latvia*, Latvia's Constitutional Court considered whether the Soviet Union's peaceful deployment of troops in Latvia in June 1940, to which the Latvian Parliament consented under duress, constituted an act of aggression. The Court held that it did, specifically citing *Ministries* for the proposition that "lack of resistance to the invasion of another State does not necessarily mean that no such invasion has taken place."[54]

The tribunals' adoption of a leadership requirement for crimes against peace has also had a significant impact on modern doctrine. Article 16 of the 1996 Draft Code of Crimes specified that aggression could only be committed by a "leader or organizer," which the ILC defined as someone who had "the necessary authority or power to be in a position potentially to play a decisive role in committing aggression."[55] Similarly, Article 8*bis*(1) of the Rome Statute limits the crime to individuals who were "in a position effectively to exercise control over or to direct the political or military action" of the State responsible for an act of aggression.

The drafters of the Rome Statute's definition of aggression have claimed that Article 8*bis*(1) is consistent with the jurisprudence of the NMTs.[56] In fact, the Article's "control or direct" requirement is considerably more restrictive than the "shape or influence" requirement adopted by the tribunals. As I have noted elsewhere, the "control or direct" requirement excludes the prosecution of private economic actors such as industrialists, even though the tribunals – and the IMT – insisted that such actors could be complicit in aggression.[57]

Article 8*bis* and the jurisprudence of the NMTs also differ, it is important to note, in terms of *mens rea*. As discussed in Chapter 8, the tribunals held that participating in an act of aggression was criminal only if the defendant knew that the act was illegal under international law, a requirement that permitted a defendant to argue mistake of law. By contrast, Element 2 of the Elements of Crimes adopted alongside Article 8*bis* specifically provides that "[t]here is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations."[58] Unlike with the leadership requirement, the drafters of Article 8*bis* do not claim that Element 2 is consistent with the NMTs' jurisprudence. But they also have not explained why they have deviated from the

[53] Resolution RC/Res. 6, 11 June 2010, at 2.
[54] Karins v. Parliament of Latvia, para. 25.5.
[55] ILC, Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries, art. 16, at 43 (1996).
[56] See, e.g., Proposal submitted by Belgium, Cambodia, Sierra Leone and Thailand, PCNICC/2002/WGCA/DP.5 (8 July 2002).
[57] Kevin Jon Heller, *Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression*, 18 EUR. J. INT'L L. 477, 489-91 (2007).
[58] Resolution RC/Res. 6, at 5.

mens rea adopted by the tribunals, whose analysis of the essential elements of aggression remains unequalled in its systematicity.

E. War Crimes

The NMT judgments have made significant contributions to three areas of modern war-crimes jurisprudence: (1) the treatment of unlawful combatants; (2) hostage-taking and reprisals; and (3) the definitions of individual war crimes.

1. Lawful Combatants

In his Final Report, Taylor claimed that the *Hostage* tribunal's refusal to extend belligerent status to "ununiformed guerrillas and franc-tireurs" would "stimulate efforts to reconsider the provisions of the Hague and Geneva Conventions relating to this controversial question."[59] Once again his predictive skills were lacking: although the Third Geneva Convention of 1949 (GC III) makes clear that "militias and other volunteer corps" that are not part of the armed forces can qualify as lawful combatants, Article 4(2) requires partisans to satisfy the same four requirements as Article 1 of the Hague Regulations. That said, the tribunals likely influenced the drafters of the Article 4(2) concerning partisan activity in occupied territory. According to Pictet, it was "generally considered" that the Hague Regulations permitted partisans to be recognized as lawful combatants only during the period of invasion.[60] Article 4(2), by contrast, explicitly permits partisan groups that qualify as lawful combatants to operate "in or outside their own territory, even if this territory is occupied." That change is consistent with the NMT judgments, which never relied on the invasion/occupation distinction to deny partisans combatant status. Indeed, the *Hostage* tribunal specifically held that "certain band units in both Yugoslavia and Greece complied with the requirements of international law entitling them to the status of a lawful belligerent" even though it considered both countries to be occupied at the time.[61]

The NMTs also likely influenced the adoption of Article 5 of GC III, which provides that "[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." That provision had no analogue in the Hague Regulations, but it is consistent with the judgments, which uniformly held that captured partisans were entitled to a fair judicial process to determine whether they were, in fact, unlawful combatants.

2. Hostage-Taking and Reprisals

The tribunals were notoriously less progressive regarding the execution of civilian hostages and reprisal prisoners, although it is clear that they upheld the practice solely because they believed that customary international law permitted it.[62] Indeed, the

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[59] TAYLOR, FINAL REPORT, 223.
[60] JEAN S. PICTET, COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF PRISONERS OF WAR 59 (1960).
[61] Hostage, XI TWC 1244.
[62] Id. at 1251.

Hostage tribunal decried "the complete failure on the part of the nations of the world to limit or mitigate the practice by conventional rule" and stated that it was "self-evident" that "international agreement is badly needed in this field."[63]

Unlike Taylor with partisans, the tribunal got its wish: Article 33 of the Fourth Geneva Convention of 1949 (GC IV) prohibits subjecting civilians to reprisals,[64] and Article 34 prohibits taking civilians hostage.[65] It seems likely that those provisions were motivated by the NMT judgments. Taylor noted in his Final Report that the *Hostage* judgment generated widespread outrage in Europe and the UK,[66] and Pictet's commentary on Article 34 cites Lord Wright's seminal article on the killing of civilian hostages,[67] which severely criticized the *Hostage* judgment for approving the practice.[68]

3. Individual Crimes

The ICTY has often relied, not always accurately, on the NMT judgments or on Law No. 10 when addressing specific war crimes. In some cases, the Tribunal has used those sources to establish the criminality of a particular act under customary international law. In *Blaškić*, for example, the Appeals Chamber relied on *High Command* to hold that forcing POWs to perform dangerous work qualifies as a war crime.[69] Similarly, in *Furundžija*, the Appeals Chamber held that "the international community has long recognized rape as a war crime" based in part on the fact that "rape was prosecuted as a war crime under Control Council Law No. 10"[70] – an erroneous claim, given that Law No. 10 only prohibited rape as a crime against humanity and that none of the defendants in the trials were ever charged with rape.[71]

In other cases, the ICTY has relied on the judgments or Law No. 10 to establish the definition of a particular war crime. In *Naletilić & Martinović*, Trial Chamber I cited *Krupp* for the idea that plunder applies not only to "acts of appropriation committed by individual soldiers for their private gain," but also to "large-scale seizures of property within the framework of systematic economic exploitations of occupied territory."[72] And in *Kordić & Čerkez*, the Appeals Chamber justified not limiting the war crime of plunder to occupied territory by pointing out that Law No. 10 did not contain such a requirement.[73] That was a questionable citation: as discussed in Chapter 9, the *Farben*, *Krupp*, and *Ministries* tribunals each dismissed plunder charges on the ground that the acts in question took place outside of occupied territory.[74]

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[63] Id. at 1251-52.
[64] GC IV, art. 34.
[65] Id., art. 33.
[66] TAYLOR, FINAL REPORT, 108.
[67] Lord Wright, *Killing of Hostages*, 309.
[68] PICTET, COMMENTARY ON GC III, 229.
[69] Prosecutor v. Blaškić, IT-95-14-A, Judgment, para. 589 (29 July 2004).
[70] Prosecutor v. Furundžija, IT-95-17/1-A, Judgment, para. 210 (21 July 2000).
[71] The *Čelebići* trial judgment made a similar error, wrongly claiming that the London Charter prohibited rape as a crime against humanity. *Čelebići*, Trial Judgment, para. 476. Rape made its first appearance as a crime against humanity in Law No. 10.
[72] Prosecutor v. Naletilić and Martinović, IT-98-34-T, Judgment, para. 619 (31 Mar. 2003).
[73] Kordić & Čerkez, Appeals Judgment, para. 78.
[74] See Chapter 9.

The NMTs' most important contribution to war-crimes jurisprudence concerns medical experimentation. The *Medical* tribunal's articulation of the "Nuremberg Code," particularly its first principle that experiments can only be conducted with the subject's "voluntary consent,"[75] led the drafters of the Geneva Conventions of 1949 to prohibit medical experimentation as a grave breach of the Conventions in both international and non-international armed conflicts.[76] Those provisions, in turn, led to the adoption of Articles 8(2)(b)(x) and 8(2)(e)(xi) of the Rome Statute, which deem such experimentation a war crime. The Nuremberg Code has also been adopted in the U.S. by the Department of Defense, the American Medical Association, and the National Institutes of Health.[77]

F. Crimes Against Humanity

The modern conception of crimes against humanity owes an incalculable debt to the work of the NMTs, particularly concerning the disappearance of the nexus requirement and the development of the contextual elements of crimes against humanity – although, as noted below, the ICTY's reliance on the judgments has been both selective and problematic. The judgments have also had a significant effect on the definition of specific crimes.

1. The Nexus Requirement

International tribunals have consistently cited the NMTs as evidence that customary international law no longer requires crimes against humanity to be committed "in execution of or in connection with" war crimes or crimes against peace. At the ICTY, the Appeals Chamber relied on the text of Law No. 10 for the disappearance of the nexus in *Tadić*,[78] while in *Kupreškić* Trial Chamber II cited Law No. 10 and the *Einsatzgruppen* and *Justice* judgments.[79] At the ECCC, the Trial Chamber in *Case No. 1* relied on the same three sources as *Kupreškić*.[80] And in *Arellano et al. v. Chile*, the Inter-American Court of Human Rights relied solely on the *Justice* case.[81]

These citations are problematic, however, because all three courts failed to acknowledge that the *Flick* and *Ministries* tribunals each read the nexus requirement into Law No. 10. Neither *Tadić* nor *Arellano* cite those judgments at all, while *Kupreškić* and *Case No. 1* ignore *Ministries* and relegate *Flick* to a footnote. Such selective citation would be impossible to justify even if *Justice* and *Einsatzgruppen* were as authoritative as *Flick* and *Ministries*. But that is clearly not the case, given that the former, unlike the latter, addressed the nexus requirement only in dicta. It is thus an open question to what extent the NMTs support the elimination of the nexus from the customary definition of crimes against humanity.

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[75] Medical, II TWC 181.
[76] See JEAN S. PICTET, COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 224 (1958)
[77] See In re Cincinnati Radiation Litigation, 874 F. Supp. 796, 821 (S.D. Ohio 1995).
[78] Tadić, IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 140 (2 Oct. 1995); see also Prosecutor v. Tadić, IT-94-1-T, Decision on the Defence Motion on Jurisdiction, para. 79 (10 Aug. 1995) (citing *Einsatzgruppen*).
[79] Prosecutor v. Kupreškić et al., IT-95-16-T, Judgment, para. 577 (14 Jan. 2000).
[80] Case No. 1, 001/18-07-2007/ECCC/TC, Judgment, para. 292 (26 July 2010).
[81] Arellano et al. v. Chile, IACHR Series C, No. 154, Preliminary Objections, para. 96 (26 Sept. 2006).

2. Contextual Elements

a. Widespread or Systematic

Modern tribunals have also ignored the NMTs' insistence that an attack on a civilian population must be both widespread *and* systematic to qualify as a crime against humanity. Indeed, in *Kordić and Čerkez*, the ICTY's Trial Chamber III summarily rejected a defense claim that, in light of the *Justice* case, customary international law required a conjunctive test. According to the Chamber, it was "generally accepted that the requirement that the occurrence of crimes be widespread or systematic is a disjunctive one."[82]

That claim, however, reflects an unconvincing description of the state of customary international law at the time the ICTY was created. The Chamber justified its position by citing to the trial judgments in *Tadić* and *Blaškić*, but *Blaškić* cited no pre-1993 legal sources in defense of the disjunctive test,[83] and *Tadić* cited only one: the IMT's comment in the judgment that the persecution of the Jews before the war was "a record of consistent and systematic inhumanity on the greatest scale."[84] That statement, however, was not only dicta – as the Trial Chamber itself recognized by quoting the ILC to that effect[85] – it is actually phrased *conjunctively*.

In light of the ICTY's failure to cite a single pre-1993 source of law that actually supports its "widespread or systematic" requirement, it is impossible to defend the Tribunal's decision to ignore the NMT judgments. After all, the Chambers have consistently relied on the judgments in other contexts; the NMTs were the first tribunals to develop the contextual elements of crimes against humanity in a systematic fashion; and in contrast to the split over the nexus requirement, the tribunals uniformly agreed that the test was conjunctive. The Tribunal's adoption of a disjunctive requirement thus seems to have been driven not by methodological concerns, but by the desire to make crimes against humanity as easy as possible to prosecute – a prototypical example of what Darryl Robinson has pejoratively described as the ICTY's "victim-focused teleological reasoning."[86]

The ICC has also adopted the "widespread or systematic" requirement. A small number of delegations, including France and the United Kingdom, favored a conjunctive test at the Rome Conference, but did not object to a disjunctive test once the Conference agreed to adopt a definition of "attack" that included a policy requirement.[87] The inclusion of the policy requirement in Article 7(2)(a) means that, as discussed below, the ICC's conception of crimes against humanity is closer to the NMTs' than the ICTY's.

b. The Policy Requirement

In *Kunarac*, the ICTY Appeals Chamber rejected the defense's claim that crimes against humanity had to have been committed pursuant to a "plan or policy." In its

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[82] Prosecutor v. Kordić & Čerkez, IT-95-14/2, Judgment, paras. 175, 178 (26 Feb. 2001).
[83] Prosecutor v. Blaškić, IT-95-14-T, Judgment, para. 207 (3 Mar. 2000).
[84] IMT JUDGMENT, 60.
[85] Prosecutor v. Tadić, IT-94-1-T, Judgment, para. 648 (7 May 1997).
[86] Robinson, 933.
[87] WILLIAM SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 143 (2010).

view, "[t]here was nothing in the Statute or in customary international law at the time of the alleged acts" – 1992-1993 – "which required proof of the existence of a plan or policy to commit those crimes."[88] It cited a variety of legal sources in defense of that conclusion, ranging from Article 6(c) of the London Charter to the Secretary-General's Report on the Security Council resolution that created the ICTY.[89]

Bill Schabas has convincingly demonstrated that the Appeals Chamber misrepresented the vast majority of the sources it cited in "famous footnote" 114 and conveniently omitted a number of sources that would have undermined its claim that the pre-ICTY customary definition of crimes against humanity did not contain a policy requirement.[90] Although not mentioned by Schabas, *Kunarac* similarly misused Law No. 10 and the NMT judgments. The Appeals Chamber cited Law No. 10 as evidence that a policy was not required, but failed to mention that it was designed to "give effect to the terms" of the London Charter,[91] which specifically limited the category of potential defendants to persons "acting in the interests of the European Axis countries, whether as individuals or as members of organizations."[92] Even worse, the Chamber simply disregarded the *Justice* tribunal's adoption of the policy requirement – a position taken by the *Einsatzgruppen*, *Ministries*, and *Medical* tribunals, as well – on the ground that *Polyukhovich*, the High Court of Australia case, had ostensibly shown that the judgment did not consitute "an authoritative statement of customary international law." As discussed earlier, however, *Polyukhovich* wrongly assumed that the NMTs were national courts applying domestic law. The Appeals Chamber was also willing, a mere 25 paragraphs later, to rely exclusively on *Pohl* to hold that enslavement as a crime against humanity did not require mistreatment.[93]

Unlike the ICTY, the ICC has specifically incorporated a policy requirement into its definition of crimes against humanity. According to Article 7(2)(a) of the Rome Statute, an "attack against any civilian population" means the commission of multiple acts "pursuant to or in furtherance of a State or organizational policy." The Elements of Crimes add that "[s]uch a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action."[94] Read together, the Rome Statute and Elements of Crimes adopt a definition of "State policy" that is essentially equivalent to the one adopted by the *Justice* tribunal, which held that the policy in question must be "government organized or approved." It is slightly narrower, however, than the *Einsatzgruppen* tribunal's policy requirement, which expanded the definition to include "indifference" and "impotence." The former criminalizes widespread and systematic attacks that are tolerated by the government but not actively encouraged, while the latter expands the category of crimes against

[88] Kunarac, Appeals Judgment, para. 98.
[89] Id., para. 98 n. 114.
[90] See William A. Schabas, *State Policy as an Element of International Crimes*, 98 J. CRIM. L. & CRIMINOLOGY 953, 960-67 (2008).
[91] Law No. 10, Preamble.
[92] London Charter, art. VI.
[93] Kunarac, Appeals Judgment, para. 123.
[94] Elements of Crimes, art. 7, Introduction, para. 3 n.6.

humanity to include attacks committed by non-state actors that the government would like to prevent but cannot.

The NMTs' approach to the policy requirement is particularly interesting in light of the Rome Statute's extension of crimes against humanity to include attacks committed pursuant to an "organizational policy." According to the ICC Pre-Trial Chamber, any non-state actor that is capable of committing a widespread or systematic attack can satisfy the "organizational policy" requirement.[95] That is a controversial interpretation: some scholars believe that Article 7 excludes non-state actors completely,[96] while others believe that it includes only "state-like" non-state actors such as FARC or the Palestinian Authority.[97] Although obviously not binding on the ICC, which is a treaty-based tribunal, *Justice* supports the former approach, while *Einsatzgruppen* supports the latter. Both judgments agree, however, that the international community's interest in prosecuting crimes against humanity does not extend to attacks committed by non-state actors that can be adequately addressed by the affected state.

3. Individual Crimes

Courts have consistently cited the NMTs when addressing specific crimes against humanity. In some cases, they have relied on the tribunals to interpret an element common to all such crimes. In *Tadić*, for example, the Appeals Chamber relied, *inter alia*, on the text of Article II(c) of Law No. 10 to reverse the Trial Chamber's holding that all crimes against humanity have to be committed with discriminatory intent.[98] More often, though, courts have relied on the tribunals to establish the customary existence or customary definition of a specific crime against humanity.

a. Extermination

In *Vasiljević*, Trial Chamber II relied on Law No. 10 as evidence that customary international law criminalizes extermination as a crime against humanity.[99] It also cited the *Medical*, *Justice*, and *Einsatzgruppen* judgments for the idea that a defendant is guilty of extermination only if he was personally responsible – however remotely or indirectly – for a significant number of deaths.[100]

b. Enslavement

Two courts have cited *Pohl* for the proposition that enslavement as a crime against humanity does not require the individuals enslaved to be mistreated: the ICTY

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[95] See, e.g., Prosecutor v. Katanga & Chui, ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 Sept. 2008, para. 398.

[96] See, e.g., BASSIOUNI, I THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: INTRODUCTION, ANALYSIS, AND INTEGRATED TEXT 151-52 (2005)

[97] See Schabas, *State Policy*, 972; see also Kevin Jon Heller, *Situational Gravity Under the Rome Statute*, in FUTURE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE 227, 237 (Carsten Stahn & Larissa van den Herik, eds., 2010). Judge Kaul took the same position in his dissenting opinion in *Situation in Republic of Kenya*. See Situation in Republic of Kenya, ICC-01/09, Dissenting Opinion of Judge Hans-Peter Kaul, 31 Mar. 2010, para. 51.

[98] Tadić, Appeals Judgment, para. 289. Interestingly, the Trial Chamber had imposed the requirement despite acknowledging that neither Law No. 10 nor the *Medical* tribunal imposed it. See Tadić, Trial Judgment, para. 651.

[99] Vasiljević, Trial Judgment, para. 221.

[100] Id. at para. 222.

Appeals Chamber in *Kunarac*,[101] and the Economic Community of West African States' Community Court of Justice in *Korau v. Niger*.[102] The Community Court of Justice went even further, rightly using *Pohl* to insist that "involuntary servitude" is slavery even "with the provision of square meals, adequate clothing, and comfortable shelter."[103]

c. Deportation

In *Stakić*, the ICTY Appeals Chamber relied primarily on Judge Phillips concurrence in *Milch* and the *Krupp* tribunal's subsequent adoption of that concurrence to hold that deportation requires the forcible displacement of persons across a de jure or de facto state border.[104] As noted in Chapter 9, however, the *High Command* tribunal specifically held that cross-border transfer was not required.[105] Judge Schomburg also noted in his separate and partially dissenting opinion in *Naletilić & Martinović*, which agreed with *Stakić* on the cross-border requirement, that the *RuSHA* tribunal convicted defendants of forcible evacuations had taken place solely within Poland and Germany.[106]

d. Imprisonment

In *Krnojelac*, Trial Chamber II relied on Law No. 10 to establish the customary status of imprisonment as a crime against humanity.[107]

e. Torture and Rape

A number of courts have relied on Law No. 10 to establish that torture is a crime against humanity under customary international law, including the ICTY,[108] the Inter-American Court of Human Rights,[109] and a federal district court in the United States.[110] The same ICTY Trial Chamber and the same district court also relied on Law No. 10 to establish the customary status of rape as a crime against humanity.[111]

f. Persecution

The NMT judgments have had a particularly significant impact on the ICTY's understanding of the crime against humanity of persecution. In *Kupreškić*, for example, Trial Chamber II relied on *High Command* and *Ministries* to hold that any of the acts listed in Article 5 of the ICTY Statute, such as murder and deportation, can also qualify as persecution when committed with discriminatory intent[112]; relied on the *Justice* case and *Flick* to hold that "lesser forms" of persecution not covered by Article 5, such as "attacks on political, social, and economic rights," qualify as crimes

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[101] Kunarac, Appeals Judgment, para. 123.
[102] Korau v. Niger, Merits, ECW/CCJ/JUD/06/08, para. 79 (27 Oct. 2008).
[103] Id.
[104] Prosecutor v. Stakić, IT-97-24-A, Judgment, para. 291 (22 Mar. 2006).
[105] See Chapter IX.
[106] Prosecutor v. Naletelić & Martinović, IT-98-34-A, Judgment, Separate and Partially Dissenting Opinion of Judge Schomburg, para. 12 (3 May 2006).
[107] Prosecutor v. Krnojelac, IT-97-25-T, Judgment, para. 109 (15 Mar. 2002).
[108] Prosecutor v. Furundžija, IT-95-17/1-T, Judgment, para. 137 (10 Dec. 1998).
[109] Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1353 (N.D. Ga. 2002).
[110] Castro Prison v. Peru, IAHCR Series C, no. 160, Merits, para. 402 (25 Nov. 2006).
[111] Furundžija, Trial Judgment, para. 168; Mehinovic, 198 F. Supp. 2d at 1353.
[112] Kupreškic, Trial Judgment, paras. 594-98.

against humanity as long as they are "of an equal gravity" to the acts in Article 5[113]; and relied on the *Justice* case to hold that the gravity of lesser acts of persecution "must not be considered in isolation but examined in their context and weighed for their cumulative effect."[114] Similarly, in *Kvočka*, the Trial Chamber cited *Ministries*' condemnation of persecutory acts such as excluding Jews from educational opportunities for the idea that "acts that are not inherently criminal may nonetheless become criminal and persecutorial if committed with discriminatory intent."[115]

Those are all accurate citations. By contrast, in *Tadić*, the Trial Chamber cited *Flick* for the proposition that "offences against industrial property" cannot qualify as persecution even when committed with discriminatory intent.[116] That is a correct reading of *Flick* – but it overlooks the fact that, as discussed in Chapter 10, both *Ministries* and *Pohl* reached the opposite conclusion.[117] The Appeals Chamber made an even more glaring mistake in *Blaškić* when it used *Flick* to question whether the plunder of industrial or personal property was sufficiently grave to qualify as persecution. That use not only overlooks *Ministries* and *Pohl* concerning industrial property, it ignores the fact that *Ministries*, *Pohl*, and *RuSHA* all agreed – and *Flick* itself suggested – that the discriminatory theft of personal property is a crime against humanity.

G. Genocide

The NMTs have had little impact on the modern crime of genocide, most likely because the judgments dealt with genocide as a crime against humanity in a rather cursory manner. The international community was also negotiating the terms of the Genocide Convention at the same time as the trials were being held. That said, the *Justice* case represents the first example of a trial in which defendants were specifically convicted of genocide – a symbolically important development. The ICTR Appeals Chamber also rightly cited *Justice* in *Rwamakuba* for the idea that genocide "was treated as a crime under customary international law" during World War II.[118]

H. Conspiracy and Criminal Membership

The NMTs' approach to conspiracy and criminal membership played a role in *Hamdan v. Rumsfeld*, in which the U.S. Supreme Court held that the military commissions created by the Bush administration violated both the Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions. Justice Stevens, writing for a plurality of the Court, cited the trials as evidence that conspiracy is not a war crime triable by a military commission.[119] By contrast, Justice Thomas argued in his dissent that the criminal-membership convictions in the *Medical* case justified

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[113] Id. at paras. 611-19.
[114] Id. at para. 615. With the ICTY's characteristic sloppiness, Trial Chamber II cited the prosecution's opening argument, not the judgment. The judgment nevertheless supports the Trial Chamber's conclusion. See Justice, III TWC 1063.
[115] Prosecutor v. Kvočka, IT-98-30/1-T, Judgment, para. 186 (2 Nov. 2001).
[116] Tadić, Trial Judgment, para. 707.
[117] See Chapter 10.
[118] Rwamakuba, Appeals Judgment, para. 22.
[119] 548 U.S. 557, 611 n. 40 (2006).

charging Hamdan with criminal membership in Al-Qaeda.[120] That was a clever but irrelevant use of the *Medical* case, because Hamdan was not actually charged with criminal membership.

I. Modes of Participation

The NMT judgments have influenced the current definitions of four different modes of participation in a crime: (1) ordering; (2) joint criminal enterprise; (3) aiding and abetting; and (4) command responsibility. "Taking a consenting part" has also played a minor – and somewhat confused – role at the ICTY.

1. Ordering

In *Blaškić*, the ICTY Trial Chamber relied on *High Command* to hold that ordering does not require a military commander to give the order directly to the soldier who commits the *actus reus* of the crime.[121] It also used *High Command* to suggest that commanders who pass along orders of their superiors that they knew were criminal or were criminal on their face are equally guilty of ordering the underlying crime.[122]

2. Joint Criminal Enterprise

The NMTs' jurisprudence concerning enterprise liability has had relatively little effect on modern JCE doctrine. International tribunals have generally relied on the NMTs to establish the customary status of particular forms of JCE. In *Tadić*, the ICTY Appeals Chamber cited *Einsatzgruppen* as an example of "basic' JCE (JCE I) – a correct interpretation of the tribunal's position, although the Chamber actually cited the prosecution's opening argument instead of the judgment.[123] In *Case No. 2*, the ECCC relied on Law No. 10, *Justice*, and *RuSHA* for the existence of JCE I and "systemic" JCE (JCE II) under customary international law.[124] Finally, in *Rwamakuba*, the ICTR Appeals Chamber cited *Justice* and *RuSHA* as evidence that customary international law permits a defendant to be convicted of genocide via JCE I.[125]

These citations are clearly justified, although it is important to note that the tribunals did not specifically distinguish between "basic" and "systemic" JCEs. That does not mean that *Case No. 2* was wrong to cite the NMT judgments for the customary status of JCE II; the *Pohl* tribunal clearly considered the concentration-camp system to be a systemic JCE, as indicated by its rejection of Fanslau's claim that convicting him for playing a "minor" role in the system constituted guilt by association:

> As the officer in charge of personnel, [Fanslau] was as much an integral part of the whole organization and as essential a cog in its operation as any other of Pohl's subordinates. He was in command of one of the essential ingredients of successful functioning. This has no relation to "group condemnation," which has been so loudly decried. Personnel were just as important and essential in the whole nefarious plan as

[120] Id. at 696 (Thomas, J., dissenting).
[121] Blaškić, Trial Judgment, para. 282.
[122] Id., para. 282 n. 508.
[123] Tadić, Appeals Judgment, para. 200 and n. 245.
[124] Case No. 2, Appeals Decision on JCE, paras. 65-69.
[125] Rwamakuba, Appeals Judgment, paras. 15-22.

> barbed wire, watch dogs, and gas chambers. The successful operation of the concentration camps required the coordination of men and materials, and Fanslau to a substantial degree supplied the men.[126]

The ICTY takes the position that JCE II is "a variant" of JCE I, because it equally relies on a complex and carefully designed division of labor.[127] The *Pohl* tribunal's emphasis on the "coordination" that was required to execute the "nefarious plan" behind the concentration camps indicates that it would likely have agreed.

One ICTY case has also relied on the NMT judgments to define the elements of JCE. In *Brđanin*, the Appeals Chamber relied on *Justice* and *RuSHA* to hold that the principal perpetrator of a crime does not have to be a member of the JCE and that, as a result, the prosecution does not have to prove that the defendant and the principal perpetrator agreed to commit the crime.[128] It also relied on *Einsatzgruppen* and *Justice* to reject a defense claim that, as a mode of participation, JCE applies only to small-scale enterprises.[129]

It is not surprising that international tribunals have not relied more extensively on the NMTs' enterprise jurisprudence, given the significant differences between that jurisprudence and modern JCE doctrine. Most obviously, they differ in terms of *mens rea*: whereas enterprise liability required the prosecution to prove only that the defendant knew about the criminal enterprise, JCE I requires the prosecution to prove that the defendant intended to commit the planned crimes[130] and JCE II requires the prosecution to prove that the defendant intended "to further the criminal purpose of that system."[131] Moreover, unlike modern JCE doctrine,[132] the *Pohl* tribunal rejected the idea that the requisite knowledge of a criminal enterprise could be inferred "solely from the official title" that a defendant held.

Enterprise liability and JCE also differ in terms of *actus reus*. Modern JCE doctrine does not impose a qualitative limitation on the *actus reus* of JCE: except in the rare situation of an "opportunistic visitor" to a prison camp,[133] any contribution to the functioning of a JCE will satisfy the participation requirement, regardless of the defendant's position in the enterprise.[134] By contrast, the NMTs specifically limited responsibility for executing a criminal enterprise to defendants who possessed a certain degree of authority and discretion with regard to the actions that connected them to the enterprise.

Although not surprising, it is unfortunate that international tribunals have largely ignored the NMTs' approach to enterprise liability. Jens Ohlin has convincingly argued that the ICTY's refusal to distinguish between "co-perpetrating" and "aiding and abetting" a JCE,[135] insisting that "minor participants are just as guilty as

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126 Pohl, V TWC 998.
127 See, e.g., Prosecutor v. Vasiljevic, IT-98-32-A, Judgment, para. 98 (25 Feb. 2004).
128 Prosecutor v. Brđanin, IT-99-36-A, paras. 414-15 (3 Apr. 2007).
129 Id. at para. 422.
130 Tadić, Appeals Judgment, 228.
131 Prosecutor v. Kvočka, IT-98-30/1-A, para. 198 (28 Feb. 2005).
132 See, e.g., Stakić, Appeals Judgment, para. 65.
133 See Kvočka, Appeals Judgment, para. 599.
134 See id., para. 97.
135 The ICTY Trial Chamber drew that distinction in *Kvočka*, holding that members of a JCE who shared the intent to commit the planned crimes qualified as co-perpetrators, while members who

architects, hangers-on just as liable as organizers," is inconsistent with the principle of culpability.[136] By contrast, as we have seen, the NMTs insisted on precisely that distinction: the co-perpetrator/aider-and-abettor distinction mirrors the creator/executor distinction that was central to enterprise liability. From a culpability standpoint, therefore, enterprise liability is far superior to JCE.

3. Aiding and Abetting

International and domestic courts have often looked to the NMT judgments for guidance concerning aiding and abetting, but they have rarely done so accurately. To begin with, courts have often misunderstood how the tribunals distinguished between different modes of participation. In *Čelebići*, for example, the ICTY Appeals Chamber cited *High Command* for the idea that a Chief of Staff could be held "directly liable for aiding and abetting" if he was involved in drafting illegal orders issued by his commanding officer.[137] In fact, all of the tribunals considered such drafting as a form of ordering, not as aiding and abetting – a difference that could have a significant impact at sentencing. The ICTY Trial Chamber made a similar error in *Furundžija*, using Fendler's conviction in *Einsatzgruppen* to argue that the tribunals adopted a "substantial effect" test for the *actus reus* of aiding and abetting. In fact, Fendler was convicted because he took a consenting part in the extermination program, not because he aided and abetted it.

Furundžija's problems, however, go beyond eliding the difference between aiding and abetting and taking a consenting part. The Trial Chamber also failed to recognize that, as discussed in Chapter 12, the tribunals treated aiding and abetting as a form of participation *in a criminal enterprise*, not as an independent mode of participation in a crime. If the principles were the same, the mistake would be unimportant. But they are not: the tribunals not only held that the *actus reus* of enterprise liability was satisfied by *any* contribution to the enterprise, they also limited enterprise liability to defendants who possessed sufficient "authority and discretion" regarding their actions. Having a "substantial effect" on a crime would thus not have been enough for the tribunals to hold a defendant responsible for participating in a criminal enterprise; indeed, although Schwerin von Krosigk "furnished the means by which the concentration camps were purchased, constructed, and maintained" – clearly a substantial effect – the *Ministries* tribunal acquitted him because he had no discretion concerning the funds he disbursed.

Domestic courts have also incorrectly found a substantial-effect requirement for aiding and abetting in the NMT judgments – often, not surprisingly, by simply citing *Furundžija*. An example is *In re South African Apartheid Litigation*,[138] which also erroneously used Rasche's acquittal in *Ministries* to claim that the provision of "fungible resources" such as money and building materials, to the perpetrator of a crime cannot qualify as "substantial assistance."[139] That conclusion is impossible to

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did not share that intent but knowingly contributed to the JCE qualified as aiders-and-abettors. Kvočka, Trial Judgment, paras. 282, 284. The Appeals Chamber disagreed, insisting on the traditional undifferentiated approach to JCE. Kvočka, Appeals Judgment, para. 91.

[136] Jens D. Ohlin, *The Co-Perpetrator Model of Joint Criminal Enterprise*, 14 *Annotated Leading Cases of the Int'l Crim. Tribs*. 739, 742 (2008).

[137] Prosecutor v. Delalić (Čelebići), IT-96-21-A, Judgment, para. 260 (20 Feb. 2001).

[138] 617 F. Supp. 2d 228, 258 (S.D.N.Y. 2009).

[139] Id.

reconcile with *Pohl*, in which Tribunal II held Tschentscher responsible for participating in the concentration-camp program because he had allocated "food and clothing" to the camps.[140]

Courts have generally done a better job with the *mens rea* of aiding and abetting. *Furundžija* correctly cited *Einsatzgruppen* for the idea that the defendant possesses the requisite mental state as long as he knows his actions will assist the principal perpetrator commit a crime; the intent to assist is not required.[141] *In re South African Apartheid Litigation* used *Flick*, *Einsatzgruppen*, and *Ministries* to reach the same conclusion.[142] By contrast, as noted in the Introduction, *Talisman Energy* – which implicitly overruled *In re South African Apartheid Litigation* – incorrectly relied on *Ministries* to hold that "international law at the time of the Nuremberg trials recognized aiding and abetting liability only for purposeful conduct."[143]

4. Command Responsibility

The NMTs have had a profound effect on the development of command responsibility. To begin with, the judgments helped establish the doctrine in both conventional and customary international law. The delegates to the 1977 Diplomatic Conference in Geneva included command responsibility in Article 87 of the First Additional Protocol – the first conventional recognition of command responsibility[144] – in part because of the *Hostage* case.[145] The ILC cited *Hostage* and *High Command* as a reason to include "responsibility of the superior" in the 1996 Draft Code of Crimes.[146] And in *Čelebići*, the ICTY Trial Chamber cited *Hostage*, *High Command*, and the *Medical* case to establish the customary existence of command responsibility[147] and relied on *Flick* to extend command responsibility "to individuals in non-military positions of superior authority."[148]

The ICTY has also consistently relied on the judgments to define the elements of command responsibility: (1) the existence of a superior/subordinate relationship; (2) the superior's awareness of his subordinates' crimes; and (3) the superior's failure to prevent or punish his subordinates.

a. Superior/Subordinate Relationship

In *Čelebići*, Trial Chamber II cited *Hostage*, *High Command*, and *Pohl* for the proposition that a superior's de facto authority over subordinates is sufficient for command responsibility; de jure authority is not required.[149] It also rejected the prosecution's argument, which was based on the *Hostage* case, that de facto authority exists as long as the superior has the ability to exercise "substantial influence" over an alleged subordinate. The Chamber rightly pointed out that the prosecution was citing

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[140] Pohl, V TWC 1015.
[141] Furundžija, Trial Judgment, para. 237.
[142] 617 F. Supp. 2d at 260.
[143] 582 F.3d 244, 259 (2d Cir. 2009).
[144] RICHARD L. LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY 134 (1982).
[145] YVES SANDOZ ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS 1020 (1987).
[146] 1996 Draft Code, Commentaries, at 25.
[147] Prosecutor v. Delalić (Čelebići), IT-96-21-T, Judgment, para. 138 (16 Nov. 1998).
[148] Id., paras. 359-60, 363.
[149] Id., at paras. 372-74.

to the *Hostage* tribunal's discussion of the responsibility of commanding generals, not tactical commanders. According to the Chamber, unlike commanding generals, who have responsibility over all of the units in the territory under their control, tactical commanders are responsible only for the actions of units under their "effective control."[150] The Appeals Chamber later interpreted the *Hostage* judgment the same way.[151]

The Appeals Chamber also relied on the *Hostage* judgment in *Hadžihasanović*. The prosecution argued that a superior could be held responsible for failing to punish crimes that were committed by subordinates before he assumed command over them. The Chamber correctly rejected that argument, citing the *Hostage* tribunal's conviction of Kuntze – which was based on crimes committed by his troops after he replaced Field Marshal List as the commander-in-chief of the 12th Army – as evidence that customary international law did not support such a dramatic extension of command responsibility.[152]

b. Mens Rea

The ICTY has rarely relied on the NMT judgments for the *mens rea* of command responsibility, most likely because the tribunals did not take a consistent position on that issue. The primary exception is *Čelebići*, in which the Trial Chamber relied on *High Command* to reject the prosecution's claim that a superior could be presumed to have knowledge of widespread criminal acts by his subordinates,[153] and the Appeals Chamber relied on *Hostage* and *Pohl* to hold that superiors do not have a duty under customary international law to discover crimes committed by their subordinates.[154] The Appeals Chamber's conclusion, it is important to note, is based on an incorrect reading of the *Hostage* judgment: Tribunal V specifically held that a commanding general is obligated "to require and obtain complete information" about crimes committed in the territory under his command[155] and that "[a] corps commander must be held responsible… for acts which the corps commander knew or ought to have known about."[156] The *Medical* tribunal also imposed a duty to discover on superiors, which the Appeals Chamber failed to mention.

c. Failure to Prevent or Punish

In *Blaškić*, the Appeals Chamber relied on the *Hostage* tribunal's statement that "a commanding general of occupied territory is charged with the duty of maintaining peace and order, punishing crime, and protecting lives and property within the area of his command" to hold that failing to prevent crimes and failing to punish their perpetrators were separate theories of liability.[157] Trial Chambers have also often relied on *Hostage* and *High Command* to identify specific omissions that qualify as the failure to prevent (such as the "failure to issue orders bringing the relevant

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[150] Id., para. 648.
[151] Čelebići, Appeals Judgment, para. 258.
[152] Prosecutor v. Hadžihasanović, IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, para. 50 (16 July 2003).
[153] Čelebići, Trial Judgment, paras. 385-85.
[154] Čelebići, Appeals Judgment, para. 229.
[155] Hostage, II TWC 1271.
[156] Id. at 1303.
[157] Blaškić, Appeals Judgment, para. 82.

practices into accord with the rules of war")[158] and the failure to punish (such as the failure "to conduct an effective investigation").[159]

5. Taking a Consenting Part

The idea of "taking a consenting part" in a crime, which was included in Law No. 10 and regularly applied by the NMTs, has simply disappeared from international criminal law. It is not clear why, although it may well be that TCP's "ability to influence" requirement, which is obviously broader than command responsibility's "effective control" requirement, casts too wide a net for modern sensibilities. Interestingly, the prosecution blurred the lines between TCP and command responsibility in *Čelebići*, citing the *Hostage* case for the idea that an individual's ability to exert "substantial influence" over someone who was not a de jure or de facto subordinate was enough to establish command responsibility.[160] Both the Trials Chamber and the Appeals Chamber rejected that argument, insisting – correctly – that effective control was the minimum required.[161]

J. Defenses

Courts have used the NMT judgments to determine the limits of three defenses: (1) *tu quoque*, (2) necessity/duress, and (3) military necessity.

1. Tu Quoque

In *Kupreškić*, Trial Chamber II cited *High Command* as evidence that the defense of *tu quoque* was "universally rejected" by the post-World War II tribunals.[162]

2. Necessity/Duress

Courts have consistently looked to the NMT judgments to determine the elements of the duress defense. In *Finta*, the Supreme Court of Canada followed *Einsatzgruppen* by holding that a defendant could invoke duress only if he had been faced by an "imminent, real, and inevitable" threat to his life.[163] In *Doe v. Unocal*, the U.S. Court of Appeals for the Ninth Circuit adopted the *Krupp* tribunal's definition of necessity and suggested that, like Krupp, Unocal had pushed to expand its operations in Myanmar knowing that doing so "would require the employment of forced labor."[164] And in *Erdemović*, the ICTY Trial Chamber relied on *Einsatzgruppen*, *Flick*, and *High Command* to hold that a defendant could argue duress only if he had been "deprived of his moral choice" by the threat of "imminent physical danger."[165]

Erdemović, of course, involved a defendant accused of participating in a mass execution of civilians. The debate in the Appeals Chamber over whether duress was available as a defense to murder focused, to a significant extent, on the NMT judgments. Judges McDonald and Vohrah, rejecting that idea for the majority,

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[158] See, e.g., Prosecutor v. Halilović, IT-01-48, Judgment, para. 89 (16 Nov. 2005) (citing *Hostage*).
[159] See, e.g., Prosecutor v. Strugar, IT-01-42, Judgment, para. 376 (31 Jan. 2005) (citing *High Command*).
[160] Čelebići), Trial Judgment, para. 648.
[161] Čelebići), Appeals Judgment, para. 258.
[162] Kupreškić, Trial Judgment, para. 516.
[163] R v. Finta, [1994] 1 S.C.R. 701, 837.
[164] Doe v. Unocal, 395 F.3d 932, 948 (9th Cir. 2002).
[165] Prosecutor v. Erdemović, IT-96-22-T, Sentencing Judgment, para. 17-18 (29 Nov. 1996).

acknowledged that the *Einsatzgruppen* tribunal's accepted such a defense, but insisted that the judgment was inconsistent with other authorities from the post-World War II era.[166] By contrast, Judge Cassese insisted – wrongly, as discussed above – that *Einsatzgruppen* was more authoritative than the national cases cited by the majority and that the judgment indicated that customary international law did not create a "murder" exception to the general availability of the necessity defense.[167]

Although Cassese overstated the authority of the NMT judgments regarding defenses, the *Einsatzgruppen* approach to duress has had a considerable influence on the ICC. In contrast to ICTY jurisprudence, Article 31(1)(d) of the Rome Statute specifically permits a defendant to invoke duress as a defense to murder.

3. Military Necessity

In *Galić*, Trial Chamber I correctly cited the *Hostage* case for the idea that a defendant cannot invoke military necessity as a defense to a violation of a rule of IHL that does not specifically take such necessity into account – there, the categorical prohibition of intentional attacks on civilians or civilian objects.[168] In *Krstić*, by contrast, the Trial Chamber erroneously relied on *Hostage* to suggest that whether military necessity justified a defendant's actions is an objective test.[169] In fact, the *Hostage* tribunal held that a defendant was entitled to acquittal as long as he "honestly conclude[d]" that his actions were militarily necessary.

Although *Krstić* misread *Hostage*, its conclusion was sound. A strong case can be made that a subjective test of military necessity underprotects civilians against disproportionate attacks.[170] Unfortunately, the *Hostage* tribunal's rejection of a "reasonable military commander" test continues to have a pernicious impact on international criminal law. The Rome Statute's "war crime of excessive incidental death, injury, or damage," for example, requires the defendant to "make the value judgment" that a planned attack would be disproportionate, thus requiring the acquittal of a commander who honest believed that the attack expected incidental harm was not clearly excessive relative to the expected military advantage.[171]

K. Sentencing

The NMT judgments also played a role in *Erdemović* concerning the relative gravity of war crimes and crimes against humanity. McDonald and Vohrah took the position for the majority that crimes against humanity were more serious than war crimes, citing Telford Taylor's explanation in *Einsatzgruppen* that the difference between the

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[166] Erdemović, Appeals Judgment, McDonald and Vohrah Separate Opinion, paras. 43-45.
[167] Id., Separate and Dissenting Opinion of Judge Cassese, paras. 27-28.
[168] Prosecutor v. Galić, IT-98-29-T Judgment, para. 44 (5 Dec. 2003).
[169] Prosecutor v. Krstić, IT-98-33-T, Judgment, para. 526 (2 Aug. 2001).
[170] See Jessica C. Lawrence & Kevin Jon Heller, *The First Ecocentric Environmental War Crime: The Limits of Article 8(2)(b)(iv) of the Rome Statute*, 20 GEO. INT'L ENV. L. REV. 61, 78 (2007).
[171] Rome Statute, Element of Crimes, art. 8(2)(b)(iv), 132 n. 37. Some delegations insisted at PrepCom that whether an attack was "clearly excessive" should be determined from the perspective of the reasonable military commander. See Knut Dörmann, *Preparatory Commission for the International Criminal Court: The Elements of War Crimes*, 82 INT'L REV. RED CROSS, 461, 473-74 (2001). Footnote 37, however, specifically creates an exception to the general rule in the Elements of Crimes that mental elements do not require a perpetrator to make value judgments. Rome Statute, Element of Crimes, General Introduction, para. 4.

two categories of crimes is that the former, unlike the latter, can be committed in peacetime and require "systematic violations of fundamental human rights."[172] Judge Li disagreed in his separate and dissenting opinion, arguing that war crimes were more serious than crimes against humanity by contrasting the death sentences imposed by the IMT for the former with Rothaug's life sentence for the latter in the *Justice* case. [173] Li's argument is questionable, to say the least: none of the defendants were sentenced to death in the *Justice* case, not even those that were convicted of war crimes, and all of the defendants sentenced to death by the NMTs were convicted of both war crimes and crimes against humanity.

That does not mean, of course, that the NMTs considered crimes against humanity to be more serious than war crimes. Indeed, in his separate opinion in *Tadić*, Judge Robinson cited *Milch* and *Hostage* for the idea that the two categories of crimes are equally serious.[174] That is a plausible reading of the judgments; after all, Lautz was sentenced to 10 years in the *Justice* case despite being one of two defendants in the trials convicted of genocide. McDonald and Vohrah's position in *Erdemović* is nevertheless not without merit, given the tribunals' insistence that crimes against humanity, unlike war crimes, had to be widespread, systematic, *and* committed pursuant to government policy.[175]

The ICTY has also relied on the judgments with regard to less controversial issues. In *Čelebići*, the Appeals Chamber relied on the *Justice* case for the idea that a defendant can be convicted of both war crimes and crimes against humanity for the same acts, because the two types of crimes have different elements.[176] And in *Erdemović*, the Trial Chamber cited with approval the *Hostage* tribunal's statement that mitigation "is more a matter of grace than of defence"[177] and relied on *Einsatzgruppen* and *High Command* in support of its conclusion that it was entitled to treat superior orders as a mitigating factor[178] – a questionable interpretation of the former, given that the *Einsatzgruppen* tribunal acknowledged superior orders as mitigating only if the order in question was not manifestly illegal.

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[172] Erdemović, Appeals Judgment, Judgment, McDonald and Vohrah Separate Opinion, para. 24.
[173] Id., Li Separate and Dissenting Opinion, para. 22.
[174] Prosecutor v. Tadić, IT-94-1-T*bis*-R117, Sentencing Judgment, Separate Opinion of Judge Robinson, 4 (11 Nov. 1999).
[175] The ICTY currently considers the two categories of crimes to be equally grave. The ICTR, by contrast, considers crimes against humanity to be more serious than war crimes. See Allison Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415, 469-70 (2001).
[176] Čelebići, Appeals Judgment, para. 411.
[177] Erdemović, Sentencing Judgment, para. 46.
[178] Id. at para. 52.