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Customary International Law Status of the Enumerated Crimes of Article 5 of the Extraordinary Chambers in the Courts of Cambodia Law and Whether They are Prosecutable

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MEMORANDUM FOR THE OFFICE OF THE CO-PROSECUTORS
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

Issue: Customary International Law Status of the Enumerated Crimes of Article 5 of the Extraordinary Chambers in the Courts of Cambodia Law and Whether They are Prosecutable

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TABLE OF CONTENTS

I. Introduction……..8

A. Scope……..8

B. Summary of Conclusions…….....8

1. The prohibition of murder was part of customary international law during the period of 1975-1979.

2. The prohibition of extermination was part of customary international law during the period of 1975-1979.

3. The prohibition on enslavement was part of customary international law during the period of 1975-1979.

4. The prohibition on forcible deportation was part of customary international law during the period of 1975-1979.

5. The prohibition of imprisonment was part of customary international law during the period of 1975-1979.

6. The prohibition of torture was part of customary international law during the period of 1975-1979.

7. The prohibition of rape was part of customary international law during the period of 1975-1979.

8. The prohibition of persecution on political, racial, or religious grounds was part of customary international law during the period of 1975-1979.

9. The prohibition of other inhumane acts was part of customary international law during the period of 1975-1979.

10. The Enumerated crimes against humanity listed under article 5 of ECCC Law are prosecutable under article 5 of the ECCC Law.

II. Background ……...11

III. Legal Analysis…….....12

A. Customary International Law……..12

B. The Enumerated Crimes of Article 5 of the ECCC Law

1. Murder……..14

2. Extermination……..21

3. Enslavement…….....24

4. Deportation…….....30

5. Imprisonment……..34

6. Torture…….....39

7. Rape……...43

8. Persecutions on Political, Racial, or Religious Grounds……...47

9. Other Inhumane Acts…….50

C. The Question of Whether the Crimes Enumerated Under Article 5 of the ECCC Law are Prosecutable…….53

IV. Conclusion…….54

Table of Authorities

Statutes, Charters, Agreements, Treaties, and Rules

1. Affirmation of the Principles of International Law recognised by the Charter of the Nuremberg Tribunal. Resolution 95(I) of the United Nations General Assembly (adopted on December 11, 1946), available at www.icrc.org.

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I. INTRODUCTION

A. Scope

This memorandum analyzes whether each of the nine crimes against humanity enumerated in Article 5 of the Extraordinary Chambers of the Courts of Cambodia (ECCC) Law was part of customary international law during 1975-1979. More specifically, it considers whether the crimes against humanity of "murder," "extermination," "enslavement," "deportation," "imprisonment," "torture," "rape," "persecution on political, racial, or religious grounds," and "other inhumane acts" were part of customary international law during 1975-1979. In addition, this memorandum also analyzes whether these crimes are prosecutable under Article 5 of the ECCC Law.[1]*

B. Summary of Conclusions

1. The prohibition of murder was part of customary international law during the period of 1975-1979.

The prohibition of murder was part of customary international law during the period of 1975-1979. The prohibition of murder can be considered a widespread practice of states because it is outlawed under every legal system on Earth, and it has been considered as a crime against humanity by the United Nations and the major Allied Powers as early as 1945. The prohibition of murder can be considered *opinio juris* because states feel an obligation to prosecute it in their domestic courts and in the international tribunals.

2. The prohibition of extermination was part of customary international law during the period of 1975-1979.

1* Were the crimes against humanity enumerated in article 5 of the ECCC Law part of customary international law during 1975-1979? If yes, are these crimes prosecutable under article 5 of the ECCC Law?

The prohibition of extermination was part of customary international law during the period of 1975-1979. The prohibition of extermination can be considered a widespread practice of states because it is recognized as a crime against humanity under numerous international and national legal systems and agreements, and it has been enumerated as a crime against humanity in every international tribunal. It is *opinio juris* because states have felt an obligation to prosecute and punish it in those tribunals.

3. The prohibition on enslavement was part of customary international law during the period of 1975-1979.

The prohibition on enslavement was part of customary international law during the period of 1975-1979. The prohibition on enslavement has become the practice of states because the international community has created numerous international instruments that expressly forbid enslavement. The prohibition of enslavement has become *opinio juris* because it has been prosecuted and punished in the International Military Tribunal (IMT), the International Military Tribunal for the Far East (IMTFE), Control Council Law No. 10, the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the ECCC.

4. The prohibition on forcible deportation was part of customary international law during the period of 1975-1979.

The prohibition on forcible deportation was part of customary international law during the period of 1975-1979. The prohibition of forcible deportation was part of the widespread practice of states during 1975-1979. The prohibition of forcible deportation meets the *opinio juris* requirement because states have felt a legal obligation to prosecute forcible deportation throughout the last 65 years.

5. The prohibition of imprisonment was part of customary international law during the period of 1975-1979.

The prohibition of imprisonment was part of customary international law during the period of 1975-1979. The prohibition of arbitrary imprisonment was part of the widespread practice of states during 1975-1979. Numerous international instruments prohibit arbitrary imprisonment. It is *opinio juris* because the international community has prosecuted arbitrary imprisonment as a crime against humanity under Control Council Law No. 10, the ICTY, the ICTR, the SCSL, and the ECCC.

6. The prohibition of torture was part of customary international law during the period of 1975-1979.

The prohibition of torture was part of customary international law during the period of 1975-1979. The prohibition of torture was both part of the widespread practice of states, and *opinio juris*. International instruments such as the Convention against Torture indicate the widespread practice of states, while the formation of the International Tribunals to prosecute and punish this crime indicates that it has become *opinio juris*.

7. The prohibition of rape was part of customary international law during the period of 1975-1979.

The prohibition of rape was part of customary international law during the period of 1975-1979. The prohibition of rape was part of the widespread practice of states during 1975-1979. This is evidenced by Article 44 of the Lieber Code, Control Council Law No.10, and Article 27 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (IV). The prohibition of rape meets the *opinio juris* requirement because states have felt a legal obligation to prosecute rape in multiple international tribunals. The international community has prosecuted and punished rape as a crime against humanity under Control Council Law No. 10, the ICTY, the ICTR, the SCSL, and the ECCC.

8. The prohibition of persecution on political, racial, or religious grounds was part of customary international law during the period of 1975-1979.

The prohibition of persecution on political, racial, or religious grounds was part of customary international law during the period of 1975-1979. The Charter of the International Military Tribunal, the Charter of the International Military Tribunal for the Far East, and Control Council Law No. 10 all evidence the fact that the prohibition of persecutions on political, racial, or religious grounds was part of the widespread practice of states. The prosecution and punishment of persecution on political, racial, or religious grounds by the IMT, the IMTFE, Control Council Law No. 10, the ICTY, the ICTR, and the ECCC all demonstrate that this prohibition is *opinio juris*.

9. The prohibition of other inhumane acts was part of customary international law during the period of 1975-1979.

The prohibition of other inhumane acts was part of customary international law during the period of 1975-1979. The Charter of the International Military Tribunal, the Charter of the International Military Tribunal for the Far East, and Control Council Law No. 10 all evidence the fact that the prohibition of other inhumane acts was part of the widespread practice of states. The prosecution and punishment of other inhumane acts by the IMT, the IMTFE, Control Council Law No. 10, the ICTY, the ICTR, and the ECCC all demonstrate that this prohibition is *opinio juris*.

10. The Enumerated crimes against humanity listed under Article 5 of ECCC Law are prosecutable under Article 5 of the ECCC Law.

The enumerated crimes against humanity listed under Article 5 of ECCC Law are prosecutable under Article 5 of the ECCC Law because all of the enumerated crimes were part of customary international law during the period of 1975-1979, and violations of customary international law are prosecutable in the ECCC.

II. BACKGROUND

Under the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea, Article 5 states, "The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed crimes against humanity during the period of 17 April 1975 to 6 January, 1979. Crimes against humanity, which have no statute of limitations, are any acts committed as a part of a widespread or systematic attack directed against a civilian population, on national, political, ethnical, racial, or religious grounds such as:

- murder;
- extermination;
- enslavement;
- deportation;
- imprisonment;
- torture;
- rape;
- persecutions on political, racial, or religious grounds;
- other inhumane acts.[2]

This memo will analyze these nine enumerated crimes and determine whether they were violations of customary international law during and 1975-1979. This memo will then determine whether these crimes are prosecutable under article 5 as listed above.

[2] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, adopted on 27 October 2004, U.N. Doc NS/RKM/1004/006[reproduced in accompanying notebook at Tab 12].

III. LEGAL ANALYSIS

A. Determination of Customary International Law

In order to determine whether the nine enumerated crimes were proscribed under customary international law, an understanding of what customary international law is and how it is determined is fundamental. According to Professor Michael Scharf[3], "Customary International Law constitutes a widespread practice of states followed out of a sense of legal obligation."[4] Professor Scharf goes on to explain, "To constitute customary international law, a practice must be followed repetitively by a relatively large number of states over a relatively long period of time. Customary International Law is made up of two components: (1) a widespread practice of states; and (2) *opinio juris* (a sense of legal obligation)."[5]

According to the comments of Section 102 in the American Law Institute's Restatement of the Foreign Relations Law of the United States, "The practice necessary to create customary law might be of comparatively short duration, but …it must be 'general and consistent.' A practice can be general even if it is not universally followed…"[6] The Restatement continues, "For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation…"[7]

Customary international law is determined in a number of ways. Professor Scharf explains, "Evidence of practice and *opinio juris* may be derived from the constitutional,

[3] Professor Scharf is the Director of the Fredrick K. Cox International Law Center at Case Western Reserve University School of Law.

[4] Michael Scharf, *A Primer on International Law*, (2009), at page 2 [reproduced in accompanying notebook at Tab 38].

[5] Id.

[6] American Law Institute, *Restatement of the Foreign Relations Law of the United States*, Third Edition, (1987). Comments to Restatement Section 102 [reproduced in accompanying notebook at Tab 40].

[7] Id.

legislative, and executive promulgations of states; diplomatic correspondence; official statements; votes in international organizations; and military actions."[8] Other sources of customary international law exist. Professor Scharf states that:

> Non-binding resolutions of international conferences or United Nations bodies (often thought of as soft law) may harden over time into legally binding international obligations. Treaties that have not yet been ratified by the required number of states to bring them into force, or which are in force but have not yet been ratified by a particular state, may nevertheless become binding if they are recognized as customary international law. Domestic and international judicial and arbitral decisions, as well as the writings of scholars, provide important evidence of the existence of a new rule of customary international law.[9]

B. The Enumerated Crimes of Article 5 of the ECCC Law

1. Murder

Murder is defined as, "the death of the victim resulting from an unlawful act or omission by the perpetrator."[10]

Murder was recognized as crime under customary international law during the period of 1975-1979. This determination is based on sources that fall under two main categories: 1.) Statutes, Charters, Agreements, Treaties, and Rules; and 2.) Case Law.

(a) The Prohibition of Murder as Evidenced Under Statutes, Charters, Agreements, Treaties, and Rules

Murder is prohibited under the legal systems of every country on Earth.[11] The prohibition of murder has been understood to be part of customary international law for many years. The

[8] Michael Scharf, *A Primer on International Law*, (2009), at page 2 [reproduced in accompanying notebook at Tab 38].

[9] Id.

[10] Prosecutor v. Kaing Guek Eav *alias* Duch, 001/18-07-2007/ECCC/TC, Judgment of July 26, 2010, at paragraph 331[reproduced in accompanying notebook at Tab 21].

first major evidence of this fact in the international context was in the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (Agreement), and in the Charter of the International Military Tribunal.[12] Under the Agreement, the United Kingdom of Great Britain and Northern Ireland, the Soviet Union, the Provisional Government of France, and the United States acted in the interests of all the United Nations to set up the International Military Tribunal at Nuremberg (IMT).[13] The Charter of the International Military Tribunal stated under Article 6:

> The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, in acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes….
> (c) Crimes against humanity – namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[14]

The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and the Charter of the International Military Tribunal both articulate for the first significant time, an international outrage against murder. This international outrage was so powerful that murder was defined as a crime against humanity and tried before the first international tribunal.

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[11] Steven R. Ratner, Jason S. Abrams, James L. Bischoff, Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy, Oxford University Press, (3rd ed. 2009), at page 72 [reproduced in accompanying notebook at Tab 36].

[12] Agreement for the Prosecution and Punishment of the Major War Criminals for the European Axis, and Charter for the International Military Tribunal, August 8, 1945, at page 1 [reproduced in accompanying notebook at Tab 2].

[13] Id; and Michael Scharf, *Supra*, at page 12 [reproduced in accompanying notebook at Tab 38].

[14] Charter for the International Military Tribunal, August 8, 1945, at Article 6 [reproduced in accompanying notebook at Tab 2].

The International Military Tribunal for the Far East (IMTFE) was established less than a year after the International Military Tribunal at Nuremberg.[15] The Charter for the IMTFE virtually matches the IMT's Charter in terms of the IMTFE's definition of crimes against humanity and reaffirms every crime that was contained in Article 6 of the IMT's Charter including murder.[16]

Less than a year after the creation of the IMT and the IMTFE, the United Nations General Assembly affirmed the principles of international law created by the IMT.[17] Resolution 95(I) states that the UN General Assembly "Affirms the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal…"[18] This resolution reaffirms the prohibition of murder under international law.

After the International Military Tribunal tried the major war criminals, other courts were created in order to try other war criminals.[19] Under Control Council Law No. 10, a new court was established to prosecute war criminals that were not brought to trial at the IMT.[20] Control Council Law No. 10 was signed by representatives of the United States, Great Britain, France,

[15] Charter for the International Military Tribunal of the Far East, 1946, at Article 5 [reproduced in accompanying notebook at Tab 4].

[16] Id.

[17] Affirmation of the Principles of International Law recognised by the Charter of the Nuremberg Tribunal. Resolution 95(I) of the United Nations General Assembly (adopted on December 11, 1946), at page 1 [reproduced in accompanying notebook at Tab 1].

[18] Id.

[19] Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace, and Crimes Against Humanity, December 20, 1945, at Article II(c) [reproduced in accompanying notebook at Tab 5].

[20] Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 10*, August 15, 1949; and Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace, and Crimes Against Humanity, December 20, 1945, at Article II(c) [reproduced in accompanying notebook at Tab 41 and 5].

and the Soviet Union and listed its own definition of crimes against humanity.[21] Under Article II(c) of Control Council Law No. 10, crimes against humanity are defined as, "Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial, or religious grounds whether or not in violation of the domestic laws of the country where perpetrated."[22] Again murder was recognized as a crime prohibited under international law.

(b) The Prohibition of Murder under the International Tribunals

(1) The International Military Tribunal

The recognition of murder as a crime against humanity under the Charter of the IMT was backed up and reinforced by the judgments of the Tribunal. In *Prosecutor v. Kaltenbrunner*, Kaltenbrunner was found guilty of committing the crime against humanity of murder when, as head of the Reich Security Head Office, he was involved with the killing of Jews, commissars, prisoners of war, and others who held views that were considered "ideologically hostile to the Nazi Regime."[23]

In *Prosecutor v. Frank*, Frank was convicted of committing murder as a crime against humanity when, as Governor General of the Occupied Polish Territory, he was involved in the murder of over 3,000,000 Polish Jews.[24]

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[21] Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace, and Crimes Against Humanity, December 20, 1945, at Article II(c) [reproduced in accompanying notebook at Tab 5].

[22] Id.

[23] Prosecutor v. Kaltenbrunner, International Military Tribunal [reproduced in accompanying notebook at Tab 22].

[24] Prosecutor v. Frank, International Military Tribunal [reproduced in accompanying notebook at Tab 16].

(2) The ICTY and ICTR

The case law of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are both relevant and applicable to determining what constituted customary international law during the period of 1975-1979.[25] According to the ECCC Trial Court in *Prosecutor v. Duch*:

> The legality Principle does not prevent the Chamber from determining an issue through a process of interpretation and clarification of the elements of a particular offense. Nor does it prevent the Chamber from relying on appropriate decisions which interpret particular ingredients of an offense. Specifically, the Chamber's reliance on decisions of international tribunals that post-date January 1979 does not contravene the principle of legality. Rather, these decisions provide interpretative guidance as regards the evolving status of certain offenses and forms of responsibility under international law.[26]

Professor Michael Scharf presented the argument that the judgments of the ICTY, the ICTR, and SCSL should all be determinative of the customary international law status of the offenses listed under Article 5 of the ECCC Law because there had not been a major shift in the interpretations of crimes against humanity from 1979 to the establishment of the Tribunals.[27] Because there were no international tribunals created between the conclusion of the IMT and the creations of the ICTY in 1993 and the creation of the ICTR in 1994, there could not have been any major shifts in the interpretations of what constitutes a crime against humanity in an international tribunal setting. This argument is evidenced by the reliance on the judgments of the IMT, IMTFE, and Control Council Law No. 10 in the judgments of both the ICTY and ICTR. When citing precedent to prosecute crimes against humanity, the ICTY and ICTR both draw their source of prosecution from these early tribunals. Cases in which the tribunals rely on the

[25] Prosecutor v. Kaing Guek Eav *alias* Duch, at para. 34 [reproduced in accompanying notebook at Tab 21].

[26] Id.

[27] This argument was presented to this writer in a meeting with Professor Scharf.

judgments of the IMT, IMTFE, and/or Control Council Law No. 10 include but are not limited to: *Prosecutor v. Furundzija, Prosecutor v. Kunarac, Prosecutor v. Vasiljevic,* and *Prosecutor v. Delalic*.[28]

The prohibition of murder under customary international law has been recognized in multiple cases.[29] One of the leading cases in international law on the subject of the customary international law status of murder is *Prosecutor v. Akayesu*. In *Prosecutor v. Akayesu*, Jean Paul Akayesu was convicted of committing murder as a crime against humanity when he was complicit in the killing of Tutsi civilians in the commune in which he was a bourgmestre.[30] When the Tribunal addressed the issue of whether Akayesu could be convicted of murder as a crime against humanity, they stated clearly and concisely that Akayesu could, in fact, be convicted of murder as a crime against humanity.[31] In making that decision, the Tribunal held that:

> The Chamber considers that murder is a crime against humanity…The International Law Commission discussed the inhumane act of murder in the context of the definition of crimes against humanity and concluded that the crime of murder is clearly understood and defined in the national law of every state and therefore there is no need to further explain this prohibited act.[32]

The ICTR considered the evidence for the prohibition of murder under customary international law to be so strong and so well understood that they need not spend any great length of time in its discussion. This holding was strengthened even more when the ECCC in the *Duch* opinion

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[28] Prosecutor v. Furundzija, IT-95-17/1-T, Judgment of Dec. 10, 1998; Prosecutor v. Kunarac, IT-96-23-T, Judgment of Feb. 22, 2001; Prosecutor v. Vasiljevic, IT-98-32-T, Judgment of Nov. 29, 2002; and Prosecutor v. Delalic, IT-96-21-T, Judgment of Nov. 16, 1998 [reproduced in accompanying notebook at Tabs 19, 26, 33, and 15].

[29] Prosecutor v. Vasiljevic, IT-98-32-T, Judgment of Nov. 29, 2002; and Prosecutor v. Akayesu, ICTR-96-4, Decision September 2, 1998 [reproduced in accompanying notebook at Tabs 15 and 14].

[30] Prosecutor v. Akayesu, at para. 12 [reproduced in accompanying notebook at Tab 14].

[31] Id at para. 587.

[32] Id.

held that the determination on the customary international law of murder held by the ICTR in the *Akayesu* judgment is determinative on the customary international law status of murder in the period of 1975-1979.[33]

(3) The ECCC

The ECCC trial chamber held in *Prosecutor v. Duch* that murder is, "a well-established crime under customary international law."[34]

(c) Conclusion

The prohibition of murder was part of customary international law during the period of 1975-1979. The prohibition of murder meets both of the state practice requirement and the *opinio juris* requirement necessary for it to be considered part of customary international law.

The prohibition of murder can be considered a widespread practice of states because murder is outlawed under every legal system on Earth, and it has been considered as a crime against humanity by the United Nations and the major allied powers as early as 1945.[35] The prohibition of murder can be considered *opinio juris* because states feel an obligation to prosecute perpetrators. This is evidenced by the prosecution of murder as a crime in the national courts of every country in the world, and by the prosecution of murder on the international stage in the IMT, the IMTFE, Control Council Law No. 10, the ICTY, the ICTR, the SCSL, and the ECCC in the *Duch* judgment.

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[33] Prosecutor v. Kaing Guek Eav *alias* Duch, at para. 331, footnote 601 [reproduced in accompanying notebook at Tab 21].

[34] Id at para 331.

[35] Prosecutor v. Akayesu at para. 587; Charter for the International Military Tribunal; and Affirmation of the Principles of International Law recognised by the Charter of the Nuremberg Tribunal [reproduced in accompanying notebook at Tabs 14 and 2].

2. Extermination

Extermination is defined as, "An act, omission, or combination of each that results in the death of persons on a massive scale."[36]

Extermination was recognized as crime under customary international law during the period of 1975-1979. This determination is based on statutes, charters, agreements, treaties, rules, and case law.

(a) The Prohibition of Extermination under Statutes, Charters, Agreements, Treaties, and Rules

The prohibition of extermination under customary international law was first evidenced under the Charter of the International Military Tribunal in 1945.[37] Extermination was one of the enumerated offenses that constituted a crime against humanity under Article 6(c) of the IMT Charter.[38]

Extermination was also enumerated as a crime against humanity in 1945 and in 1946 under Control Council Law No. 10 and the International Military Tribunal for the Far East, respectively.[39]

(b) The Prohibition of Extermination under the International Tribunals

(1) The International Military Tribunal

[36] Prosecutor v. Kaing Guek Eav *alias* Duch, at para. 334 [reproduced in accompanying notebook at Tab 21].

[37] Article 6 of Charter for the International Military Tribunal [reproduced in accompanying notebook at Tab 2].

[38] Id.

[39] Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace, and Crimes Against Humanity, December 20, 1945, at Article II(c); and Charter for the International Military Tribunal of the Far East, 1946, at Article 5 [reproduced in accompanying notebook at Tabs 5 and 4].

The recognition of the offense of extermination as a crime against humanity first took place in the Charter of the IMT and in the judgments rendered under the Charter by the Tribunal. One case in which the Tribunal found the defendant guilty for his actions in relation to a program of extermination is in *Prosecutor v. Kaltenbrunner*. Kaltenbrunner was found guilty of having committed extermination when, as head of the RHSA, he was integral to the killings of over 3,000,000 Polish Jews.[40] The Tribunal stated:

> A special section under the Amt IV of the RHSA was established to supervise this program [the extermination of the Jews]. Under its direction, approximately six million Jews were murdered, of which two million were killed by Einsatzgruppen and other units of the Security Police. Kaltenbrunner had been informed of the activities of these Einsatzgruppen when he was a Higher SS and Police Leader, and they continued to function after he had become chief of the RHSA.[41]

The Tribunal held that "The RHSA played a leading part in the "final solution" of the Jewish question by extermination of the Jews."[42] This case clearly demonstrates the IMT's reaffirmation that extermination was a crime against humanity in 1945.

(2) The ICTY

The prohibition of extermination under customary international law was reaffirmed again under the judgments of both the ICTY and the ICTR. One of the leading cases dealing with extermination is *Prosecutor v. Kristic*, decided by the ICTY. In this case, Radislav Kristic was convicted of committing extermination when Kristic was responsible for the mass killings of Bosnian Muslim males of military age in the aftermath of the fall of Srebrenica.[43] The Tribunal

[40] Prosecutor v. Kaltenbrunner, International Military Tribunal [reproduced in accompanying notebook at Tab 22].

[41] Id.

[42] Id.

[43] Prosecutor v. Kristic, IT-98-33-T, Judgment of Aug. 2, 2001, at para. 504-505 [reproduced in accompanying notebook at Tab 24].

goes on to explain that the prohibition of extermination under customary international law is widely accepted.[44] The Tribunal states, "Extermination is also widely recognized as a crime against humanity in many international and national instruments."[45] Just as in the *Akayesu* analysis, the Tribunal felt that the prohibition on extermination is so widely accepted and understood, that a detailed analysis of its development in customary international law was unnecessary. And also like *Akayesu*, the holding in this case that extermination was unequivocally part of customary international law was affirmed by the ECCC in the *Duch* Judgment.

(3) The ECCC

The ECCC held that the prohibition of extermination is widely accepted as part of customary international law. In *Prosecutor v. Duch*, the Court held that the customary status of extermination, for the period of 1975-1979, was "undisputed."[46] The court cited the *Kristic* analysis listed above in its determination that the prohibition of extermination was part of customary international law.[47]

(c) Conclusion

The prohibition of extermination is clearly part of customary international law, and was so prior to 1975. The prohibition of extermination meets both the state practice requirement and the *opinio juris* requirement necessary for it to be considered part of customary international law.

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[44] Id at para 492.

[45] Id.

[46] Prosecutor v. Kaing Guek Eav *alias* Duch, at para. 334 [reproduced in accompanying notebook at Tab 21].

[47] Id.

The prohibition of extermination can be considered a widespread practice of states because it is recognized as a crime against humanity under numerous international and national legal systems and agreements, and it has been considered as a crime against humanity by the United Nations and the major allied powers as early as 1945.[48] The prohibition of extermination can be considered *opinio juris* because states feel an obligation to prosecute the occurrence of extermination. This is evidenced by the prosecution of extermination as a crime on the international stage in the IMT, the IMTFE, Control Council Law No. 10, the ICTY, the ICTR, the SCSL, and the ECCC.

3. Enslavement

Enslavement is defined as, "The exercise of any or all powers attaching to the rights of ownership over a person. Indicia of enslavement include 'control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality, and forced labor.'"[49]

Enslavement was recognized as a crime under customary international law during the period of 1975-1979.

(a) The Prohibition of Enslavement under Statutes, Charters, Agreements, Treaties, and Rules

[48] Prosecutor v. Kristic.; and Prosecutor v. Kaing Guek Eav *alias* Duch [reproduced in accompanying notebook at Tabs 24 and 21].

[49] Prosecutor v. Kaing Guek Eav *alias* Duch at para. 342, quoting Prosecutor v. Kunarac, Appeal Judgment at para. 119 [reproduced in accompanying notebook at Tab 21].

The prohibition of enslavement under customary international law was first evidenced under the Charter of the International Military Tribunal in 1945.[50] Enslavement was one of the enumerated offenses that constituted a crime against humanity under Article 6(c) of the IMT Charter.[51]

Enslavement was also enumerated as a crime against humanity in 1945 and in 1946 under Control Council Law No. 10 and the International Military Tribunal for the Far East, respectively.[52]

In 1948 the United Nations General Assembly (UNGA) adopted the Universal Declaration of Human Rights. In this document, the UNGA proclaimed an international standard for behavior with respect to the rights of people everywhere.[53] The Universal Declaration states:

> *The General Assembly*, Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.[54]

The UNGA goes on to state unequivocally, that enslavement is forbidden.[55] Under Article 4 of the Declaration, "No one shall be held in slavery or servitude; slavery and the slave trade shall be

[50] Charter for the International Military Tribunal [reproduced in accompanying notebook at Tab 2].

[51] Id.

[52] Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace, and Crimes Against Humanity, December 20, 1945, at Article II(c); and Charter for the International Military Tribunal of the Far East, 1946, at Article 5 [reproduced in accompanying notebook at Tabs 5 and 4].

[53] Universal Declaration of Human Rights, *opened for signature December 10, 1948*, G.A. Res. 217 (III 1948), (adopted on December 10, 1948) [reproduced in accompanying notebook at Tab 13].

[54] Id.

[55] Id.

prohibited in all their forms."[56] This declaration reaffirms the principles of the IMT, IMTFE, and Control Council Law No. 10, and reaffirms the belief that enslavement as a crime against humanity is understood as part of customary international law.

On September 3, 1953, Article 4 of the Universal Declaration of Human Rights was reaffirmed by the entering into force of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Under Article 4 of this Convention, "1. No one shall be held in slavery or servitude. 2. No one shall be required to perform forced or compulsory labor."[57] Although Cambodia was obviously not a party to this convention due to the fact that this convention was limited only to the countries of Europe, the convention nonetheless emphasizes the majority viewpoint of the international community that the prohibition of enslavement is understood to be part of customary international law.

On March 23, 1976, the International Covenant on Civil and Political Rights (ICCPR) entered into force.[58] Under Article 8 of the Covenant, "1. No one shall be held in slavery; slavery and the slave-trade in all of their forms shall be prohibited. 2. No one shall be held in servitude. 3.(a) No one shall be required to perform forced or compulsory labor."[59] This covenant again strengthens the international view the enslavement is prohibited under customary international law.

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[56] Id at Article 4.

[57] European Convention For the Protection of Human Rights and Fundamental Freedoms, *opened for signature November 4, 1950*, 312 U.N.T.S. 221 (entered into force on September 3, 1953) [reproduced in accompanying notebook at Tab 8].

[58] International Covenant on Civil and Political Rights, *opened for signature December16, 1966*, G.A. res. 2200A (XXI), 999 U.N.T.S. 171 (entered into force March 23, 1976) [reproduced in accompanying notebook at Tab 11].

[59] Id.

On July 18, 1978, the American Convention on Human Rights entered into force.[60] Under Article 6 of this convention, "1. No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women. 2. No one shall be required to perform forced or compulsory labor."[61]

Any one of these international instruments, taken alone, might not necessarily show that enslavement is prohibited, but taken together; they establish the international attitude that enslavement is prohibited under international law.

(b) The Prohibition of Enslavement under the International Tribunals

(1) The International Military Tribunal

The IMT recognized that enslavement constituted a crime against humanity in the IMT Charter.[62] The IMT strengthened this prohibition in its judgments. In *Prosecutor v. Sauckel*, the Tribunal found Sauckel guilty of crimes against humanity when Sauckel was found to have had overall responsibility for the slave labor program in Germany.[63]

In *Prosecutor v. Frick*, the Tribunal convicted Frick of crimes against humanity when it found that Frick, as Supreme Reich Authority in Bohemia and Moravia, allowed the slave labor program to continue in the territory under his control.[64]

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[60] American Convention on Human Rights, *opened for signature November 22, 1969*, 9 I.L.M. 673 (entered into force on July 18, 1978) [reproduced in accompanying notebook at Tab 3].

[61] Id at Article 6.

[62] Prosecutor v. Sauckel, International Military Tribunal [reproduced in accompanying notebook at Tab 29].

[63] Id.

[64] Prosecutor v. Frick, International Military Tribunal [reproduced in accompanying notebook at Tab 17].

In *Prosecutor v. Goering*, the Tribunal convicted Goering of crimes against humanity for issuing orders directing prisoners of war to be used as slave laborers and for demanding that Himmler move slave laborers into his aircraft factories.[65]

All of these judgments reinforced the understanding that by the end of the 1940s, enslavement was understood and accepted to be a crime against humanity.

(2) The ICTY

The prohibition against enslavement was again affirmed to be part of customary international law in *Prosecutor v. Krnojelac*. In this case the Tribunal held that, "the Trial Chamber is satisfied that the prohibition against slavery is customary in nature."[66]

The prohibition of enslavement was confirmed again in *Prosecutor v. Kunarac*. In this case the Tribunal also held that enslavement is part of customary international law.[67] In making this determination, the Tribunal found the prohibition of enslavement to be evidenced in the following: the 1926 Slavery Convention, the 1956 Supplemental Slavery Convention, the 1930 Forced and Compulsory Labor Convention, the 1957 Convention Concerning the Abolition of Forced Labor, the Charter of the International Military Tribunal, the Charter for the International Military Tribunal for the Far East, the Allied Control Council Law No. 10, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the

[65] Prosecutor v. Goering, International Military Tribunal [reproduced in accompanying notebook at Tab 20].

[66] Prosecutor v. Krnojelac, IT-97-25-T, Judgment of March 12, 2002, at para. 353 [reproduced in accompanying notebook at Tab 25].

[67] Prosecutor v. Kunarac, IT-96-23-T, Judgment of Feb. 22, 2001, at para. 539 [reproduced in accompanying notebook at Tab 26].

European Convention on Human Rights and Fundamental Freedoms, and the American Convention on Human Rights.[68]

(3) The ECCC

The ECCC has also held that enslavement constitutes a crime against humanity and was part of customary international law during the period of 1975-1979. In *Prosecutor v. Duch*, the court held that, "The prohibition against slavery is unambiguously part of customary international law."[69] Again, as with murder and extermination, the court felt that the prohibition against enslavement was so clear and unambiguous that it did not necessitate a lengthy or detailed analysis.

(c) Conclusion

The prohibition of enslavement was part of customary international law during the period of 1975-1979. The prohibition of enslavement can be considered part of the widespread practice of states because the Charters of the IMT and IMTFE, Control Council Law No. 10, the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights all demonstrate a continuous commitment to outlawing and prohibiting enslavement. The prohibition of enslavement meets the *opinio juris* requirement because starting with the IMT in 1945 and continuing through the International Tribunals of the present, the international community has demonstrated a fundamental

[68] Id at Paras, 519-533.

[69] Prosecutor v. Kaing Guek Eav *alias* Duch, para. 342 [reproduced in accompanying notebook at Tab 21].

determination to prosecute the crime of enslavement wherever and whenever it occurs. M. Cherif Bassiouni[70] shares this conclusion. He states:

> It is well established that prohibitions against slavery and slave-related practices have achieved the level of customary international law and have achieved *jus cogens* status. An array of conventions and treaties, both multilateral and bilateral in nature, contain these prohibitions and proscribe such practices in times of war and during peace.[71]

4. Deportation

Deportation is defined as, "The forced removal of a population from its home state to another state."[72] Deportation was recognized as a crime against humanity and was part of customary international law during the period of 1975-1979. This is evidenced by the prohibition of deportation in numerous international instruments and through the judgments of the IMT and the ICTY.

(a) The Prohibition of Deportation under Statutes, Charters, Agreements, Treaties, and Rules

The prohibition of deportation is recognized under numerous international instruments. Deportation was explicitly listed as a crime against humanity under the Charter for the IMT, the Charter for the IMTFE, and Control Council Law No. 10.[73]

Article 49(1) of the Geneva Convention Relative to the Protection of Civilian Persons in Times of War (IV) states, "Individual or mass forcible transfers, as well as deportations of

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[70] M. Cherif Bassiouni is the Professor of Law, DePaul University; President, International Association of Penal Law; President, International Institute of Higher Studies in Criminal Sciences.

[71] M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. Int'l L. & Pol. 445 (1990) [reproduced in accompanying notebook at Tab 39].

[72] Steven R. Ratner, Jason S. Abrams, James L. Bischoff, supra at page 73 [reproduced in accompanying notebook at Tab 36].

[73] Charter of the International Military Tribunal; Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace, and Crimes Against Humanity, December 20, 1945, at Article II(c); and Charter for the International Military Tribunal of the Far East, 1946, at Article 5.[reproduced in accompanying notebook at Tabs 2, 4, and 5].

protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."[74] Cambodia ratified the Geneva Conventions of August 12, 1949, on August 12, 1958, a full seventeen years before the period of 1975-1979.[75] The Geneva Conventions have been ratified by over 190 countries.[76] This clearly demonstrates the customary international law status of this Convention in that over 190 countries have chosen to recognize the prohibitions contained in the conventions.

Under Article 13 of the Universal Declaration of Human Rights, "1. Everyone has the right to freedom of movement and residence within the borders of each State. 2. Everyone has the right to leave any country, including his own, and to return to his country."[77] Although this Article does not explicitly prohibit the act of deportation, the act of forcibly deporting someone from his or her home state infringes on this recognized right of residence in one's own country.

Article 12 of the International Covenant on Civil and Political Rights states, "1. Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement, and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own…4. No one shall be arbitrarily deprived of the right to enter his own country."[78] This article demonstrates the international community's abhorrence to the act of the

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[74] Geneva Convention relative to the Protection of Civilian Persons in Time of War (IV), *opened for signature August 12, 1949*, 75 U.N.T.S. 135 (entered into force October 21, 1950) [reproduced in accompanying notebook at Tab 9].

[75] Signatories to the Geneva Conventions, available at http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P [reproduced in accompanying notebook at Tab 9].

[76] Id.

[77] Universal Declaration of Human Rights, *opened for signature December 10, 1948*, G.A. Res. 217 (III 1948), (adopted on December 10, 1948) [reproduced in accompanying notebook at Tab 13].

[78] International Covenant on Civil and Political Rights, *opened for signature December16, 1966*, G.A. res. 2200A (XXI), 999 U.N.T.S. 171 (entered into force March 23, 1976) [reproduced in accompanying notebook at Tab 11].

forced deportation of individuals from their home state. Although the Article does not specifically list the word "deportation," the Article nonetheless prohibits the actions of forcible deportation even if does not use the word deportation to describe those actions.[79]

All of these international instruments taken together show a continuous prohibition on forcible deportation, and recognize that forcible deportation is prohibited under customary international law.

(b) The Prohibition of Deportation under the International Tribunals

(1) The International Military Tribunal

The classification of forcible deportation as a crime against humanity in the Charter of the IMT was reaffirmed by the judgments of the Tribunal. In *Prosecutor v. von Schirach*, the Tribunal found von Schirach guilty of committing crimes against humanity when von Schirach, as Gauleiter of Vienna, deported 60,000 Jews from Vienna, Austria.[80] The Tribunal held, "The Tribunal finds that von Schirach, while he did not originate the policy of deporting Jews from Vienna, participated in this deportation after he had become Gualeiter of Vienna. He knew that the best the Jews could hope for was a miserable existence in the Ghettoes of the East. Bulletins describing the Jewish extermination were in his office."[81]

Other judgments of the Tribunal demonstrate the prohibition of forcible deportation. In *Prosecutor v. Frank*, the Tribunal found Frank guilty of crimes against humanity when Frank, as the Governor General of the Occupied Polish Territory, deported thousands of Poles, as slave

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[79] Id.

[80] Prosecutor v. von Schirach, International Military Tribunal [reproduced in accompanying notebook at Tab 34].

[81] Id.

laborers, to Germany.[82] In *Prosecutor v. Frick*, Frick was convicted of crimes against humanity for his actions in deporting Jews to the concentration camps for the purpose of extermination.[83] And, in *Prosecutor v. Sauckel*, Sauckel was convicted of crimes against humanity for his participation in the deportation of millions of people.[84] The court held that, "The evidence shows that Sauckel was in charge of a program which involved deportation for slave labour of more than 5,000,000 human beings, many of them under terrible conditions of cruelty and suffering."[85]

(2) The ICTY

The ICTY reaffirmed the prosecution of deportation as a crime against humanity and prohibited under customary international law. In *Prosecutor v. Krnojelac*, the Tribunal held that deportation as a crime against humanity was recognized as part of customary international law.[86]**.** In its judgment, the Tribunal held, "Deportation is clearly prohibited under international humanitarian law. While some instruments prohibit deportation as a war crime, it is also prohibited specifically as a crime against humanity, and it is enumerated as such under the Statute."[87] The Tribunal continues, "Deportation was originally prohibited as a crime against humanity in order to extend the jurisdiction of the Second World War tribunals to encompass acts committed against persons sharing the same nationality as the principle offenders. The

[82] Prosecutor v. Frank, International Military Tribunal [reproduced in accompanying notebook at Tab 16].

[83] Prosecutor v. Frick, International Military Tribunal [reproduced in accompanying notebook at Tab 17].

[84] Prosecutor v. Sauckel, International Military Tribunal [reproduced in accompanying notebook at Tab 29].

[85] Id.

[86] Prosecutor v. Krnojelac, IT-97-25-T, Judgment of March 12, 2002, at para. 473 [reproduced in accompanying notebook at Tab 25].

[87] Id.

content of the underlying offense, however, does not differ whether perpetrated as a war crime or as a crime against humanity."[88]

(c) Conclusion

Deportation was clearly understood to be prohibited under international law during the period of 1975-1979. The prohibition of forcible deportation was part of the widespread practice of states during 1975-1979. This is evidenced by the Charters of the IMT and the IMTFE, Control Council Law No.10, Article 49 of the Geneva Conventions IV, Article 13 of the Universal Declaration of Human Rights, and Article 12 of the International Covenant on Civil and Political Rights. The prohibition of forcible deportation meets the *opinio juris* requirement because states have felt a legal obligation to prosecute forcible deportation throughout the last 65 years. The international community has prosecuted forcible deportation as a war crime and crime against humanity in the IMT, the IMTFE, Control Council Law No. 10, the ICTY, the ICTR, and the SCSL.

5. Imprisonment

Imprisonment refers to "The arbitrary deprivation of an individual's liberty without due process of law."[89] The prohibition on arbitrary imprisonment was part of customary international law during the period of 1975-1979. This is evidenced by numerous international agreements and instruments, and by the judgments of the international tribunals.

(a) The Prohibition of Imprisonment under Statutes, Charters, Agreements, Treaties, and Rules

[88] Id.

[89] Prosecutor v. Kaing Guek Eav *alias* Duch, at para. 347 [reproduced in accompanying notebook at Tab 21].

The customary international law status of the prohibition of arbitrary imprisonment can be determined through the analysis of numerous international instruments. Although arbitrary imprisonment was not listed as a crime against humanity in the IMT Charter or the IMTFE Charter, it was explicitly listed a crime under Control Council Law No. 10.[90]

Article 9 of the Universal Declaration of Human Rights states that, "No one shall be subjected to arbitrary arrest, detention or exile."[91]

Article 9 of the International Covenant on Civil and Political Rights states that, "Everyone has the right to liberty and security of person." No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."[92]

Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states that, "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty…"[93]

Article 7(3) of the American Convention on Human Rights states that, "No one shall be subject to arbitrary arrest or imprisonment."[94]

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[90] Charter of the International Military Tribunal; Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace, and Crimes Against Humanity, December 20, 1945, at Article II(c); and Charter for the International Military Tribunal of the Far East, 1946, at Article 5 [reproduced in accompanying notebook at Tabs 2, 5, and 4].

[91] Universal Declaration of Human Rights, *opened for signature December 10, 1948*, G.A. Res. 217 (III 1948), (adopted on December 10, 1948) [reproduced in accompanying notebook at Tab 13].

[92] International Covenant on Civil and Political Rights, *opened for signature December16, 1966*, G.A. res. 2200A (XXI), 999 U.N.T.S. 171 (entered into force March 23, 1976) [reproduced in accompanying notebook at Tab 11].

[93] European Convention For the Protection of Human Rights and Fundamental Freedoms, *opened for signature November 4, 1950*, 312 U.N.T.S. 221 (entered into force on September 3, 1953) as amended by Protocol No. 3, E.T.S. 45, Protocol No. 5, E.T.S. 55, and Protocol No. 8, E.T.S. 118, and Protocol No. 11, E.T.S. 155 (Protocols 3, 5, 8, and 11 were entered into force on September 21, 1970, on December 20, 1971, on January 1, 1990, and on January 11, 1998, respectively) [reproduced in accompanying notebook at Tab 8].

[94] American Convention on Human Rights, *opened for signature November 22, 1969*, 9 I.L.M. 673 (entered into force on July 18, 1978) [reproduced in accompanying notebook at Tab 3].

Articles 42 and 43 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (IV) also outlaws arbitrary imprisonment.[95]

Although individually these instruments might not prove that arbitrary imprisonment is prohibited under customary international law, all of these international instruments, taken together, demonstrate the international community's understanding that arbitrary imprisonment is in fact prohibited under customary international law. The fact that the bringing into force of these instruments spans a time frame of over 30 years also demonstrates the understanding that the prohibition of arbitrary imprisonment under customary international law is ongoing and continuous.

(b) The Prohibition of Imprisonment under the International Tribunals

(1) Control Council Law No. 10

Under Control Council Law No. 10, defendants were convicted of the crime against humanity of imprisonment. One such group of defendants was the defendants in *Prosecutor v. Pohl*. In this case, the Tribunal found a majority of the defendants guilty of committing the crime against humanity of imprisonment, when as members of the WVHA (one of the twelve main departments of the SS), they were responsible for the administration of the concentration camps and of the concentration camp inmates.[96]

(2) The ICTY

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[95] Geneva Convention relative to the Protection of Civilian Persons in Time of War (IV), *opened for signature August 12, 1949*, 75 U.N.T.S. 135 (entered into force October 21, 1950) [reproduced in accompanying notebook at Tab 9].

[96] Prosecutor v. Pohl, Control Council Law No. 10; *USA v. Pohl, et al. Summary of Judgment*, available at http://www.ushmm.org/wlc/en/article.php?ModuleId=10007075 [reproduced in accompanying notebook at Tabs 28 and 42].

The ICTY has also recognized the prohibition of arbitrary imprisonment as a crime against humanity. The Tribunal prosecuted the crime against humanity of imprisonment for the first time in *Prosecutor v. Kordic*, and concluded that Dario Kordic and Mario Cerkez were guilty of arbitrarily imprisoning Bosnian Muslims.[97]

The ICTY expanded this determination in *Prosecutor v. Krnojelac*. In *Prosecutor v. Krnojelac*, the Tribunal held that arbitrary imprisonment constituted a crime against humanity.[98] In making their judgment the Tribunal found certain instruments persuasive.[99] The Tribunal stated:

> The Charters of the Nuremberg and Tokyo Tribunals did not specify imprisonment as a crime, but it was defined as a crime against humanity in Article II(c) of Control Council Law No. 10. The right of an individual not to be deprived of his or her liberty arbitrarily is also enshrined in a number of human rights instruments, both international and regional.[100]

These instruments that the Tribunal points to in finding that arbitrary imprisonment must be considered a crime against humanity are: Article 9 of the Universal Declaration of Human Rights, Article 9 of the ICCPR, Article 5 of the European Convention for the Protection of Human Rights, and Article 7 of the American Convention on Human Rights.[101] The analysis of the Tribunal in this case clearly demonstrates that imprisonment was understood to be a crime against humanity in 1945 with the passing of Control Council Law No.10, and has continued to be regarded as prohibited under the numerous international instruments that were created prior to the decision of the ICTY in this case.

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[97] Prosecutor v. Kordic, IT-95-14/2-T, at para. 800 [reproduced in accompanying notebook at Tab 23].

[98] Prosecutor v. Krnojelac, IT-97-25-T, at para 112 [reproduced in accompanying notebook at Tab 25].

[99] Id at para 109.

[100] Id.

[101] Id.

(3) The ECCC

The ECCC has held that imprisonment was considered a crime against humanity in 1975 and was part of customary international law.[102] In *Prosecutor v.* "*Duch*," the court held, "The customary status of the prohibition of arbitrary imprisonment under international law initially developed from the laws of war and is supported by human rights instruments."[103] The court goes on to hold that the defendant was guilty of intentionally and arbitrarily imprisoning thousands of detainees.[104] In support of their conclusion that imprisonment constituted a crime against humanity for the period of 1975 to 1979, the court noted that the judgments of the ICTY in both *Prosecutor v. Kordic* and *Prosecutor v. Krnojelac* were persuasive.[105]

(c) Conclusion

Arbitrary imprisonment was prohibited under international law during the period of 1975-1979. The prohibition of arbitrary imprisonment was part of the widespread practice of states during 1975-1979. This is evidenced by Control Council Law No.10, Articles 42 and 43 of Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Article 9 of the Universal Declaration of Human Rights, Article 9 of the International Covenant on Civil and Political Rights, Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 7(3) of the American Convention on Human Rights. The prohibition of arbitrary imprisonment meets the *opinio juris* requirement because states have felt a legal obligation to prosecute arbitrary imprisonment throughout the last 65 years. The

[102] Prosecutor v. Kaing Guek Eav *alias* Duch, at para 347 [reproduced in accompanying notebook at Tab 21].

[103] Id.

[104] Id at para 351.

[105] Id at para 347.

international community has prosecuted arbitrary imprisonment as a crime against humanity in Control Council Law No. 10, the ICTY, the ICTR, the SCSL, and the ECCC.

6. Torture

Torture is defined as, "The infliction, by an act or omission, of severe pain or suffering, whether physical or mental."[106] The Prohibition of torture was part of customary international law during the period of 1975-1979. This is evidenced through Control Council Law No. 10, the Geneva Conventions, multiple international agreements prohibiting torture, and the judgments of the international tribunals.

(a) The Prohibition of Torture under Statutes, Charters, Agreements, Treaties, and Rules

While the Charters of the IMT and IMTFE do not explicitly list torture as a crime against humanity, it was listed as a crime against humanity under Control Council Law No. 10.[107] Tedford Taylor[108] wrote in his report on Control Council Law No. 10 to the Secretary of the Army that, "the provisions of the London Charter and Control Council Law No.10 closely parallel each other, and the underlying principles are identical. The first trial [Nuremberg] and the 12 following trials [Control Council Law No. 10], therefore, form a single sequence based on common principles."[109]

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[106] Prosecutor v. Kaing Guek Eav *alias* Duch, at para 352 [reproduced in accompanying notebook at Tab 21].

[107] Charter of the International Military Tribunal; Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace, and Crimes Against Humanity, December 20, 1945, at Article II(c); and Charter for the International Military Tribunal of the Far East, 1946, at Article 5 [reproduced in accompanying notebook at Tabs 2, 5, and 4].

[108] Brigadier General in the U.S. Army, Chief Counsel for War Crimes in 1945.

[109] Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 10*, at page 107[reproduced in accompanying notebook at Tab 41].

Under Article 31 of Geneva Convention Relative to the Protection of Civilian Persons in Time of War (IV), "No physical or moral coercion shall be exercised against protected persons, particularly to obtain information from them or from third parties."[110] Under Article 32:

> The High Contracting Parties specifically agree that each of them is prohibited from taking any measures of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.[111]

Torture is prohibited under Article 5 of the Universal Declaration of Human Rights. It states, "No one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment."[112]

Torture is also prohibited under Article 7 of the ICCPR. It states, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[113]

In 1975 the UNGA passed resolution 3452, the Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[114] Under Article 2 of this resolution, "Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offense to human dignity and shall be condemned as a

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[110] Geneva Convention relative to the Protection of Civilian Persons in Time of War (IV), *opened for signature August 12, 1949*, 75 U.N.T.S. 135 (entered into force October 21, 1950) [reproduced in accompanying notebook at Tab 9].

[111] Id at Article 32.

[112] Universal Declaration of Human Rights, *opened for signature December 10, 1948*, G.A. Res. 217 (III 1948), (adopted on December 10, 1948). [reproduced in accompanying notebook at Tab 13].

[113] International Covenant on Civil and Political Rights, *opened for signature December16, 1966*, G.A. res. 2200A (XXI), 999 U.N.T.S. 171 (entered into force March 23, 1976) [reproduced in accompanying notebook at Tab 11].

[114] Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature December 9. 1975*, UNGA Res. 3452 [reproduced in accompanying notebook at Tab 7].

denial of the purpose of the Charter of the United Nations and as a violation of the of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights."[115]

In 1987, the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment entered into force.[116] One hundred and forty-four countries are parties to this convention.[117] This convention reaffirms the principles of the Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and adds in more prohibitions in order to better prohibit the occurrence of torture around the world.[118]

All of these international instruments demonstrate that torture was clearly prohibited under customary international law during the period of 1975-1979.

(b) The Prohibition of Torture in the International Tribunals

(1) The ICTY

The ICTY has held that torture is a crime against humanity and its prohibition is part of customary international law.[119] In *Prosecutor v. Furudzija*, the Tribunal addressed whether torture was part of customary international law. The Tribunal held, "The proposition is warranted

[115] Id at Article 2.

[116] Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *opened for signature on December 10, 1984*, 24 I.L.M. 535 (entered into force on June 29, 1987) [reproduced in accompanying notebook at Tab 6].

[117] Id.

[118] Id.

[119] Prosecutor v. Furundzija, IT-95-17/1-T, Judgment of Dec. 10, 1998.; and Prosecutor v. Delacic, IT-96-21-T, Judgment of Nov. 16, 1998. [reproduced in accompanying notebook at Tabs 19 and 15].

that a general prohibition against torture has evolved in customary international law."[120] The Tribunal continues by holding:

> Torture was not specifically mentioned in the London Agreement of 8 August 1945 establishing the International Military Tribunal at Nuremberg, hereafter "London Agreement", but it was one of the acts expressly classified as a crime against humanity under article II(1)(c) of Allied Control Council Law No. 10, hereafter "Control Council Law No.10." As stated above, the Geneva Conventions of 1949 and the Protocols of 1977 prohibit torture in terms.
>
> That these treaty provisions have ripened into customary rules is evinced by various factors. First, these treaties and in particular the Geneva Conventions have been ratified by practically all States of the world. Admittedly those treaty provisions remain as such and any contracting party is formally entitled to relieve itself of its obligations by denouncing the treaty (an occurrence that seems extremely unlikely in reality); nevertheless the practically universal participation in these treaties shows that all States accept among other things the prohibition of torture. Secondly, no State has ever claimed that it was authorised to practice torture in time of armed conflict, nor has any State shown or manifested opposition to the implementation of treaty provisions against torture. When a State has been taken to task because its officials allegedly resorted to torture, it has normally responded that the allegation was unfounded, thus expressly or implicitly upholding the prohibition of this odious practice.[121]

The Tribunal concludes by holding, "It therefore seems incontrovertible that torture in time of armed conflict is prohibited by a general rule of international law.[122]

The ICTY reaffirms the belief that torture is prohibited under customary international law in *Prosecutor v. Delalic*. In this case, the Tribunal holds that, "There can be no doubt that torture is prohibited by both conventional and customary international law."[123]

(2) The ECCC

The ECCC has held that torture was part of customary international law during the period of 1975-1979. In *Prosecutor v.* "*Duch*," the court held, "The prohibition on torture has acquired

[120] Prosecutor v. Furundzija, IT-95-17/1-T, at para 137 [reproduced in accompanying notebook at Tab 19].

[121] Id at 137-138.

[122] Id at 139.

[123] Prosecutor v. Delacic, IT-96-21-T, at para 452 [reproduced in accompanying notebook at Tab 15].

the status of a peremptory or non-derogable principle of international law."[124] In determining this question, the court held:

> The crime of torture is proscribed and defined by numerous international instruments, including the 1975 United Nations General Assembly Declaration on Torture, adopted by consensus, and the 1984 Convention against Torture. The definition in the 1984 Convention against Torture, which closely mirrors that of the 1975 General Assembly Declaration, has been accepted by the ICTY as being declaratory of customary international law. The Chamber accordingly finds that this definition had in substance been accepted as customary by 1975.[125]

(c) Conclusion

Torture was clearly understood as prohibited under customary international law during the period of 1975-1979. The prohibition of torture was part of the widespread practice of states during 1975-1979. This is evidenced by Control Council Law No.10, Articles 31 and 32 of Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights, Article 2 of the Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. The prohibition of torture meets the *opinio juris* requirement because states have felt a legal obligation to prosecute torture in multiple international tribunals. The international community has prosecuted and punished torture as a crime against humanity in Control Council Law No. 10, the ICTY, the ICTR, the SCSL, and the ECCC.

7. Rape

[124] Prosecutor v. Kaing Guek Eav *alias* Duch, at para 352 [reproduced in accompanying notebook at Tab 21].

[125] Id at 353.

Rape is defined as, "The sexual penetration, however slight of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or the mouth of the victim by the penis of the perpetrator, where such sexual penetration occurs without the consent of the victim."[126] Rape was prohibited under customary international law during the period of 1975-1979.

(a) The Prohibition of Rape under Statutes, Charters, Agreements, Treaties, and Rules

Rape was prohibited as early as 1863.[127] Under Article 44 of the Instructions for the Government of Armies of the United States in the Field (Lieber Code), "All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense."[128] Although this code is outdated and applied only to the U.S. Army, it demonstrates the fact that there was a prominent view that rape was a war crime and should be punished as such.

Although rape was not enumerated as a crime against humanity in the Charters of the IMT or IMTFE, it was enumerated as a crime against humanity under Control Council Law No. 10.[129] M. Cherrif Bassiouni argues that even though rape was not explicitly listed in the Charters

[126] Id at para. 362.

[127] Instructions for the Government of Armies of the United States in the Field (Lieber Code), (April 24, 1863) [reproduced in accompanying notebook at Tab 10].

[128] Id.

[129] Charter of the International Military Tribunal; Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace, and Crimes Against Humanity, December 20, 1945, at Article II(c); and Charter for the International Military Tribunal of the Far East, 1946, at Article 5 [reproduced in accompanying notebook at Tabs 2, 5, and 4].

of the IMT or IMTFE, "Both Charters contained the term "inhumane treatment." Under general principles of law, rape and sexual assault clearly constitute inhumane treatment."[130]

Rape was explicitly prohibited under the Geneva Conventions.[131] Under Article 27 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (IV), "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."[132] According to Kelly D. Askin[133] "There is now a broad consensus that serious violations of the Geneva Conventions can carry criminal liability and be punished as crimes of war."[134]

(b) The Prohibition of Rape in the International Tribunals

(1) The ICTY

The ICTY has held that rape is prohibited under customary international law, and that it constitutes a crime against humanity.[135] In *Prosecutor v. Furundzija*, the Tribunal directly addressed the customary international law status of rape. The Tribunal held, "The prohibition of

[130] M. Cherif Bassiouni & Peter Manikas, The Law of the International Criminal Tribunal for the Former Yugoslavia, (1996), at page 589 [reproduced in accompanying notebook at Tab 35].

[131] Geneva Convention relative to the Protection of Civilian Persons in Time of War (IV), *opened for signature August 12, 1949*, 75 U.N.T.S. 135 (entered into force October 21, 1950) [reproduced in accompanying notebook at Tab 9].

[132] Id at Article 27.

[133] Director of the International Criminal Justice Institute.

[134] Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 Berkeley Journal of International Law 288 (2003) [reproduced in accompanying notebook at Tab 37].

[135] Prosecutor v. Furundzija, IT-95-17/1-T; Prosecutor v. Delacic, IT-96-21-T; and Prosecutor v. Kunarac, IT-96-23-T [reproduced in accompanying notebook at Tabs 19, 15, and 26].

rape and serious sexual assault in armed conflict has also evolved in customary international law."[136]The Tribunal continues holding,

> While rape and sexual assaults were not specifically prosecuted by the Nuremberg Tribunal, rape was expressly classified as a crime against humanity under article II(1)(c) of Control Council Law No. 10. The Tokyo International Military Tribunal convicted Generals Toyoda and Matsui of command responsibility for violations of the laws or customs of war committed by their soldiers in Nanking, which included widespread rapes and sexual assaults. The former Foreign Minister of Japan, Hirota, was also convicted for these atrocities. This decision and that of the United Military Commission in Yamashita, along with the ripening of the fundamental prohibition of "outrages upon personal dignity" laid down in common article 3 into customary international law, has contributed to the evolution of universally accepted norms of international law prohibiting rape as well as serious sexual assault. These norms are applicable in any armed conflict. It is indisputable that rape and other serious sexual assaults in armed conflict entail criminal liability of the perpetrators.[137]

In *Prosecutor v. Delalic*, the Tribunal holds, "There can be no doubt that rape and other forms of sexual assault are expressly prohibited under international humanitarian law."[138]

(2) The ECCC

The ECCC has held that rape constitutes a crime against humanity and that it was prohibited under customary international law during the period of 1975-1979.[139] In *Prosecutor v.* "*Duch*," the Chambers held that, "Rape has long been prohibited under customary international law."[140]

(c) Conclusion

[136] Prosecutor v. Furundzija, IT-95-17/1-T, at para. 168 [reproduced in accompanying notebook at Tab 19].

[137] Id at paras, 168-169.

[138] Prosecutor v. Delacic, IT-96-21-T, at para. 476 [reproduced in accompanying notebook at Tab 15].

[139] Prosecutor v. Kaing Guek Eav *alias* Duch, at para.361 [reproduced in accompanying notebook at Tab 21].

[140] Id.

The prohibition of rape was understood to be part of customary international law during the period of 1975-1979. The prohibition of rape was part of the widespread practice of states during 1975-1979. This is evidenced by Article 44 of the Lieber Code, Control Council Law No.10, and Article 27 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (IV). The prohibition of rape meets the *opinio juris* requirement because states have felt a legal obligation to prosecute rape in multiple international tribunals. The international community has prosecuted and punished rape as a crime against humanity in Control Council Law No. 10, the ICTY, the ICTR, the SCSL, and the ECCC.

8. Persecution on Political, Racial, or Religious Grounds

The prohibition of persecution on political, racial, or religious grounds was part of customary international law during the period of 1975-1979. Persecution on political, racial, or religious grounds is defined as, "large-scale and discriminatory offending in situations involving massive criminality but which may not entail the necessary physical destruction or exterminatory intent required for genocide."[141]

(a) The Prohibition of Persecution on Political, Racial, or Religious Grounds under Statutes, Charters, Agreements, Treaties, and Rules

The prohibition of persecution on political, racial, or religious grounds was evidenced by the Charters of both the IMT and the IMTFE, and by Control Council Law No. 10.[142] All three of these instruments specifically enumerated the crime of persecution on political, racial, or

[141] Id at para. 374.

[142] Charter of the International Military Tribunal at Article 6; Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace, and Crimes Against Humanity, December 20, 1945, at Article II(c); and Charter for the International Military Tribunal of the Far East, 1946, at Article 5 [reproduced in accompanying notebook at Tabs 2, 5, and 4].

religious grounds as a crime against humanity.[143] Persecutions on political, racial, or religious grounds are clearly understood to be a crime against humanity.

(b) The Prohibition of Persecution on Political, Racial or Religious Grounds in the International Tribunals

(1) The International Military Tribunal

The International Military Tribunal reaffirmed the prohibition of persecution on political, racial, or religious grounds through the judgments of the Tribunal. In *Prosecutor v. Goering*, the Tribunal found Goering guilty of persecution on religious grounds for Goering's actions in persecuting the Jews in Europe.[144] The Tribunal held, "Goering persecuted the Jews, particularly after the November, 1938 riots, and not only in Germany where he raised the billion mark fine as; stated elsewhere, but in the conquered territories as well."[145]

In *Prosecutor v. Streicher*, the Tribunal found that Streicher committed persecution on religious grounds when, through his speeches and articles, he preached the persecution of the Jews.[146] The Tribunal held that he, "incited the German people to active persecution."[147]

(2) The ICTY

The ICTY has held that persecution on political, racial, and religious grounds constitutes a crime against humanity.[148] In *Prosecutor v. Kupreskic*, the ICTY held that persecution on

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[143] Id

[144] Prosecutor v. Goering, International Military Tribunal [reproduced in accompanying notebook at Tab 20].

[145] Id.

[146] Prosecutor v. Streicher, International Military Tribunal [reproduced in accompanying notebook at Tab 31].

[147] Id.

[148] Prosecutor v. Kupreskic, IT-95-16-T, Judgment of Jan. 14, 2000; and Prosecutor v. Krnojelac, IT-97-25-T, Judgment of March 12, 2002 [reproduced in accompanying notebook at Tabs 27 and 25].

political, racial, or religious grounds is part of customary international law.[149] The Tribunal held that persecution can consist of acts enumerated in article 5, but persecution can also consist of acts not enumerated under crimes against humanity or anywhere else in the ICTY statute.[150] In *Prosecutor v. Krnojelac*, the Tribunal held that any act may be charged as a persecution, even acts not listed in the ICTY Statute but, "Such acts or omissions must reach the same level of gravity as the other crimes against humanity enumerated in Article 5 of the Statute."[151] By this analysis, it appears that the prohibition of persecution on political, racial, or religious grounds is understood to be part of customary international law.

(3) The ECCC

The ECCC has held that persecution constituted a crime against humanity during the period of 1975-1979.[152] In *Prosecutor v.* "*Duch*," the Chambers held, "Persecution has long been proscribed as a crime under customary international law."[153] In making this determination, the court pointed to the Charter of the IMT, the Charter of IMTFE, and Control Council Law No. 10 as being evidence of the customary international law nature of persecution.[154]

(c) Conclusion

The prohibition of persecutions on political, racial, or religious grounds was part of customary international law during the period of 1975-1979. The Charter of the International

[149] Prosecutor v. Kupreskic, IT-95-16-T, at para. 615 [reproduced in accompanying notebook at Tab 27].

[150] Id at para. 614.

[151] Prosecutor v. Krnojelac, IT-97-25-T, at para. 434 [reproduced in accompanying notebook at Tab 25].

[152] Prosecutor v. Kaing Guek Eav *alias* Duch, at para. 374 [reproduced in accompanying notebook at Tab 21].

[153] Id.

[154] Id.

Military Tribunal, the Charter of the International Military Tribunal for the Far East, and Control Council Law No. 10 all evidence the fact that the prohibition of persecutions on political, racial, or religious grounds was part of the widespread practice of states. The prosecution and punishment of persecution on political, racial, or religious grounds by the IMT, the IMTFE, Control Council Law No. 10, the ICTY, the ICTR, and the ECCC all demonstrate that this prohibition is *opinio juris*. With both requirements met, the prohibition of persecutions on political, racial, or religious grounds must have been part of customary international law during the period of 1975-1979.

9. Other Inhumane Acts

The prohibition of other inhumane acts was part of customary international law during the period of 1975-1979. Other inhumane acts are defined as a, "residual offense which is intended to criminalise conduct which meets the criteria of a crime against humanity but does not fit within one of the other underlying crimes. The act must be 'sufficiently similar in gravity to the other enumerated crimes' to constitute an inhumane act."[155]

(a) The Prohibition of Other Inhumane Acts under Statutes, Charters, Agreements, Treaties, and Rules

The prohibition of other inhumane acts in customary international law was evidenced by the Charters of both the IMT and the IMTFE, and by Control Council Law No. 10.[156] All three of these instruments specifically enumerated the crime of other inhumane acts as crimes against

[155] Id at para. 367.

[156] Charter of the International Military Tribunal at Article 6; Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace, and Crimes Against Humanity, December 20, 1945, at Article II(c); and Charter for the International Military Tribunal of the Far East, 1946, at Article 5. [reproduced in accompanying notebook at Tabs 2, 5, and 4].

humanity.[157] Other inhumane acts were clearly understood to be crimes against humanity in 1945.

(b) The Prohibition of Other Inhumane Acts in the International Tribunals

(1) The ICTY

The prohibition of other inhumane acts was reaffirmed by the ICTY. In *Prosecutor v. Delalic*, the Tribunal held that, "As with torture, there can be no doubt that inhuman treatment is prohibited under conventional and customary international law."[158] The Tribunal expanded on this holding in *Prosecutor v. Kordic*. In *Kordic*, the Tribunal holds:

> It is not controversial that the category "other inhumane acts" provided for in Article 5 is a residual category, which encompasses acts not specifically enumerated. Trial Chambers have considered the threshold to be reached by these other acts in order to be incorporated in this category, reaching similar conclusions as to the serious nature of these acts.[159]

The Tribunal continues:

> Acts such as "mutilation and other types of severe bodily harm," "beatings and other acts of violence," and "serious physical and mental injury" have been considered as constituting inhumane acts. The Trial Chamber in Kupreskic took a broader approach of which acts may fall into the category of other inhumane acts in concluding that acts such as the forcible transfer of groups of civilians, enforced prostitution, and the enforced disappearance of persons may be regarded as "other inhumane acts."[160]

The Tribunal is essentially holding that offenses are recognized as "other inhumane acts" when they are as serious as the rest of the enumerated crimes against humanity, but are not otherwise specifically enumerated as a crime against humanity.

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[157] Id.

[158] Prosecutor v. Delacic, IT-96-21-T, at para. 517 [reproduced in accompanying notebook at Tab 15].

[159] Prosecutor v. Kordic, IT-95-14/2-T, at para. 269 [reproduced in accompanying notebook at Tab 23].

[160] Id at para. 270.

(2) The ECCC

The ECCC has held that the prohibition on other inhumane acts was part of customary international law during the period of 1975-1979.[161] In *Prosecutor v.* "*Duch*," the Chambers held, "The customary status of this crime [other inhumane acts] is also well established."[162] The Chambers continues, "For an inhumane act to be established, it must be proved that the victim suffered serious harm to the body or mind, and that the suffering was the result of an act or omission of the perpetrator."[163] The Chambers goes on to hold, "Examples of inhumane acts which have been found to constitute crimes against humanity include forcible displacement and forcible transfer, severe bodily harm, detention in brutal and deplorable living conditions, as well as beatings and other acts of violence."[164] The Chambers seems to be suggesting that because the crime of "other inhumane acts" was established as part of customary international law by the 1975, any offense found to constitute an inhumane act under the analysis the court utilizes, is part of customary international law during the period of 1975-1979 as well.

(c) Conclusion

The prohibition of other inhumane acts was part of customary international law during the period of 1975-1979. The Charter of the International Military Tribunal, the Charter of the International Military Tribunal for the Far East, and Control Council Law No. 10 all evidence the fact that the prohibition of other inhumane acts was part of the widespread practice of states. The prosecution and punishment of other inhumane acts by the IMT, the IMTFE, Control Council

[161] Prosecutor v. Kaing Guek Eav *alias* Duch, at para. 367 [reproduced in accompanying notebook at Tab 21].

[162] Id.

[163] Id at para. 368.

[164] Id at para. 370.

Law No. 10, the ICTY, the ICTR, and the ECCC all demonstrate that this prohibition is *opinio juris*. With both requirements met, the prohibition of other inhumane acts must have been part of customary international law during the period of 1975-1979.

C. The Enumerated Crimes against Humanity listed Under Article 5 of ECCC Law are Prosecutable Under Article 5 of the ECCC Law.

The enumerated crimes against humanity listed under Article 5 of ECCC Law, namely murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial, or religious grounds, and other inhumane acts were all part of customary international law in the period of 1975-1979. These crimes, as customary international law, are prosecutable under Article 5 of the ECCC Law.

Customary international law is prosecutable.[165] The ECCC in *Prosecutor v.* "*Duch*," held, "As regards relevant sources of international law applicable at the time, the Chamber may rely on both customary and conventional international law, including the general principles of law recognised by the community of nations."[166] The court continues stating:

> Article 1 of the ECCC Law empowers the ECCC to "bring to trial senior leaders of [DK] and those who were most responsible for the serious crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.[167]

The tribunal in Nuremberg held that it, "is not essential that a crime be specifically defined and charged in accordance with a particular ordinance, statute, or treaty if it is made a crime by

[165] Id at para. 30.

[166] Id.

[167] Id at para. 13.

international convention, recognized customs and usages of war, or the general principles of criminal justice common to civilized nations generally."[168]

Because all of the enumerated offenses under Article 5 of the ECCC law were unequivocally part of customary international law in the period of 1975-1979, Article 5 is prosecutable.

IV. CONCLUSION

All nine of the enumerated crimes of Article 5 were considered customary international law during the period of 1975-1979. The prohibitions of these crimes were part of the widespread practice of states because the international community created numerous international instruments meant to prohibit the occurrence of these crimes. The prohibitions of these crimes were also *opinio juris* because the international community of states has made it a priority to prosecute and punish the perpetrators of these acts. With the creation of the IMT in 1945, the ICTY in 1992, the ICTR in 1993, the SCSL in2002, and continuing through the ECCC at present, the prosecution of war criminals and human rights violators has been one of the international community's top priorities. All of these crimes were clearly customary international law during the period of 1975-1979.

The crimes enumerated under Article 5 are also prosecutable under Article 5. They form part of customary international law, and the ECCC has held that customary international law is a legitimate source to utilize in the prosecution of perpetrators of crimes against humanity.

[168] U.S. v. List, II *Trials of War Criminals Before the International Military Tribunal*, Nuremberg, 14 November 1945-1 October 1946, 1239; as Quoted in Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 Berkeley Journal of International Law 288 (2003) [reproduced in accompanying notebook at Tab 37].