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THE DUTY TO PUNISH HUMAN RIGHTS VIOLATIONS OF A PRIOR REGIME UNDER INTERNATIONAL LAW: POST-COMMUNIST TRANSITIONAL CASES

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ABSTRACT

The thesis traces the concepts of such crimes under international law as genocide and crimes against humanity, of individual and collective responsibility for these crimes, and identifies the place of crimes of former communist regimes in Central and Eastern Europe among them. The thesis examines the sources of a duty to investigate and to punish human rights violations of a prior regime in international treaty and customary law which is not affected by a succession of States. An analysis of different methods by which post-communist democracies of Central and Eastern Europe come to terms with their past gives evidence of lustration (screening); condemning a previous regime and banning its ruling party as a criminal organization; and criminal proceedings against Communist Party officials. With specific reference to the example of Ukraine, where there exist valid grounds for accountability of the previous communist regime, it is argued that during the transitional period , justice could be achieved by way of outlawing the Communist Party of Ukraine. The accountability of the previous communist regime would be much facilitated by involving international law standards and international investigating bodies.

RÉSUMÉ

La thèse envisage la conception des crimes internationaux tels que le génocide et les crimes contre l'humanité ainsi que la responsabilité individuelle et collective de ces crimes, elle identifie la place parmi eux des crimes des anciens regimes communistes. La thèse examine aussi les sources du devoir de procéder une enquête et punir l'ancien régime pour la violation des droits de l'homme en utilisant le droit international et de coutume qui n'est pas influencé par la succession des Etats. L'analyse de différentes voies dont les démocraties post-communistes de l'Europe Centrale et de l'Est mène à la nécessité de lustration (vérification); à la condamnation de l'ancien régime et l'interdiction de son parti dirigeant comme organisation criminelle et les procès criminels contre les fonctionnaires communistes. Sur l'exemple de l'Ukraine où il existe des raisons importantes pour diriger des poursuites contre l'ancien régime communiste il est prouvé que pendant la période transitoire la justice peut être atteinte en déclarant hors la loi le Parti Communiste de l'Ukraine ce qui pourrait être considérablement faciliter par l'emploi des standards de loi internationaux et les institutions international d'instruction.

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LIST OF ABBREVIATIONS

AJIL	American Journal of International Law
American Convention	American Convention on Human Rights
Brit. Y.B.Int'l L.	British Yearbook of International Law
Cal. L. Rev.	California Law Review
Case W. Res. J. Int'l L.	Case Western Reserve Journal of International Law
Ch.K.	Extraordinary Committee in the Soviet Union
Colum. Hum. Rts L.Rev.	Columbia Human Rights Law Review
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
CPSU	Communist Party of the Soviet Union
Draft Code 1991	1991 Draft Code of Crimes against the Peace and Security of Mankind
Draft Code 1996	1996 Draft Code of Crimes against the Peace and Security of Mankind
Draft Statute	Draft Statute for an International Criminal Court
EJIL	European Journal of International Law
E. Eur. Const. Rev.	East European Constitutional Review
European Convention	European Convention for the Protection of Human Rights and Fundamental Freedom
FRY	Federative Republic of Yugoslavia
G.A.	General Assembly
G.A.O.R.	General Assembly Official Records

Harv. H.R.J.	Harvard Human Rights Journal
HRLJ	Human Rights Law Journal
Hum. Rts. Q.	Human Rights Quarterly
ICC	International Criminal Court
I.C.J.	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
ILC	International Law Commission
I.L.M.	International Legal Materials
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
International Covenant	International Covenant on Civil and Political Rights
Int'l L. & Pol.	International Law and Politics
J. Const. L. E. & Cent.	Journal of Constitutional Law of East and Central
Eur.	Europe
J. Democracy	Journal of Democracy
KGB	Committee of State Security of the Soviet Union
L. & Contemp. Probs.	Law and Contemporary Problems
L. & Soc. Inquiry	Law and Society Inquiry
Leiden J. Int'l L.	Leiden Journal of International Law
L.N.T.S.	League of Nations Treaty Series
Mich. J. Int'l L.	Michigan Journal of International Law

NKVD	People's Commissariat of Internal Affairs
O.A.S.	Organization of American States
RCP	Russian Communist Party
Rome Statute	Rome Statute of the International Criminal Court
SC	Security Council
SCR	Supreme Court Reports
SFRY	Socialist Federative Republic of Yugoslavia
Temple Int'l & Comp. L.J.	Temple International and Comparative Law Journal
Tex. Int'l L. J.	Texas International Law Journal
U. Chi. L. Rev.	University of Chicago Law Review
UDF	Union of Democratic Forces in Bulgaria
Ukrainian Q.	Ukrainian Quarterly
U.N.T.S.	United Nations Treaty Series
West Ont. L. Rev.	West Ontario Law Review
Yale L.J.	Yale Law Journal

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In memory of my parents, Anna and Mykhailo Ivashchyshyn,

ten-year prisoners of Stalin labour camps

who now face God's justice.

INTRODUCTION

In 1932-33, over 6 million Ukrainians[1] were starved to death in a very fruitful country with the richest black soil in the world - the Ukrainian Soviet Socialist Republic which was a part of the Soviet Union. Followed by the absence of almost any reaction on the part of Western powers, the Communist Party of Ukraine which was inseparable from the Communist Party of the Soviet Union went on with its crimes against its own people which deserve the appellation "crimes against humanity." Not condemned and not prosecuted either on the national or international level, the Communist Party of Ukraine persists in blocking market reforms and jeopardizing democratic transition in modern Ukraine, which gained independence in 1991.

The recently issued Stephane Courtois's "Le livre noir du communisme" exposed the atrocities committed by the communist regimes around the world, and reminded the world that among these crimes was the horrendous famine-genocide of 1933 by means of which the Communist Party destroyed over six million Ukrainian lives.[2] Such extermination of a civilian population was already criminal in 1930's. As it was stated in *R.* v. *Finta* Case, it was "as much criminal in 1940 as it would be today under the laws of all so-called civilized nations."[3] However, this terror crime as well as other crimes against humanity committed by the Communist

[1] The number of victims differs in different sources and counts from 6 to 15 million deaths.
[2] S. Courtois et al., *Le livre noir du communisme: crimes, terreur et répression* (Paris: R. Laffont, 1997).
[3] See *R.* v. *Finta*, [1994] 1 S.C.R.

Party of Ukraine - the Soviet Union have never been prosecuted. The issue of prosecuting their authors inevitably raises the problem of existence under international law of the affirmative duty of states to prosecute grave human rights violations of a prior regime. While crimes against humanity as a paradigmatic category are not yet codified in a human rights treaty, and state practice does not confirm such a duty, the existence of the duty *to prosecute* human rights violations of a prior regime under international treaty and customary law is highly disputable. However, the thesis will argue that the duty *to investigate* and *to punish* grave human rights abuses of a prior regime does exist under international law.

Chapter 1 analyzes the category of crimes against humanity and genocide within the context of other crimes under international law. According to the statutes of international tribunals, draft codes of crimes against the peace and security of mankind, as well as the Rome Statute of the International Criminal Court, the category of crimes against humanity is constituted by the crimes of torture, enslavement and forced labour, persecution on social, political, religious or national grounds, deportation, and enforced disappearance, which are systematic or on a mass scale. All the aforementioned crimes were committed by the Communist Party of Ukraine - the Soviet Union. I will argue that responsibility for the crime of genocide and crimes against humanity which can be established by international treaty or customary law can take not only the form of criminal prosecution but also lustration (purging), outlawing former ruling party and other forms of responsibility. There exists a tendency in national jurisprudences toward

limitation of criminal proceedings and punishment for past human rights abuses which can be explained by political settlements. At the same time, collective responsibility of criminal organizations which exercised *de facto* power has been widely applied.

Chapter 2 will investigate the obligation to punish grave human rights violations of a prior regime under international customary law. Different arguments in favour of and against the existence of the duty of successor governments to prosecute past violations of human rights will be examined. I will argue that the duty to punish which emerges from treaty provisions, the practice of states, verbal statements of government representatives, resolutions of universal international organizations and national law provisions can be implemented in such forms as international and national criminal investigatory commissions, truth commissions, national lustration and other similar bodies. The focus will be on post-communist transitional democracies whose practice of dealing with the past confirms an international obligation to punish human rights abuses of a prior regime by way of condemning communist ideology and outlawing former Communist Parties. With specific reference to the example of Ukraine, where the issue of justice has not yet been dealt with, I will argue that fragile democracies, with nations weakened by genocide and numerous crimes against humanity, can not cope with the atrocities of the past without the international community's participation.

1. THE DUTY TO PUNISH GRAVE HUMAN RIGHTS VIOLATIONS UNDER INTERNATIONAL CRIMINAL LAW

A. GENOCIDE AND CRIMES AGAINST HUMANITY WITHIN THE CATEGORY OF CRIMES UNDER INTERNATIONAL LAW

The purpose of section A is to analyze the concepts of such crimes under international law as genocide and crimes against humanity, to trace the evolution of these concepts in international criminal law, and to identify the crimes committed by the Communist Party of Ukraine - the Soviet Union.

Unlike municipal law, which defines numerous activities as crimes, international law identifies a limited number of activities as criminal. While definitions of international crimes vary, "the term in its broadest sense comprises offences which conventional or customary law either authorizes or requires states to criminalize, prosecute, and/or punish."[4] Farooq Hassan[5] singles out such international criminal wrongs as war crimes, aggression by one state against another, the illegal use of certain kinds of weapons,[6] genocide,[7] war crimes

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[4] D.F. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime" (1991) 100 Yale L.J. 2539 at 2552.

[5] F. Hassan, "The Theoretical Basis of Punishment in International Criminal Law" (1983) 15 Case W. Res. J. Int'l L. 39 at 57-58.

[6] *Convention on the Prohibition , Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on their Destruction*, 27 U.N. G.A.O.R. Supp. (No.30) at 17, U.N. Doc. A/8189 (1970); *Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases of Bacteriological Methods of Warfare*, Doc. C. 362 M. 135 1927 IX (1927); *Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water*, 5 August 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433 ; etc.

[7] *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 227 (entered into force 12 January 1951).

against humanity,[8] and violations of the basic human rights by flagrant abuse of a state's authority such as apartheid[9] and racial discrimination.[10] He also speaks about the crimes committed by non-government and other private individuals consisting of slavery,[11] piracy,[12] hijacking,[13] unlawful actions against protected persons,[14] the taking of hostages,[15] unlawful transfers of national treasures, counterfeiting internationally-commercially negotiable papers,[16] and the transnational transportation of drugs.[17]

The recognition of piracy, violations of safe conduct and infringements of the rights of ambassadors, slave trade, drug traffiking as crimes under international law were important stages on the way of establishing the category of crimes under international law. A special role in this respect was played by the International

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[8] *Nuremberg: Charter of the International Military Tribunal* (1945) in N.J. Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vol. 3 (Washington, D.C.: United States Institute of Peace Press, 1995) 459.

[9] *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 30 November 1973, G.A. Res. 3068, 28 U.N. G.A.O.R. Supp. (No.30) at 75, U.N. Doc. A/9030 (1973) (entered into force 18 July 1986).

[10] *International Convention on the Elimination of All Forms of Racial Discrimination*, G.A. Res. 2106, 20 U.N. G.A.O.R. Supp. (No.14) at 47, U.N. Doc. A/6014 (1965).

[11] *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 7 September 1956, U.N. Doc. E/Conf. 24/23 (1957).

[12] For a contemporary definition of piracy , see the *Informal Composite Negotiating Text of the Law of the Sea Conference*, reprinted in 16 I.L.M. 1108, art. 101.

[13] *Convention on the Suppression of Unlawful Seizure of Aircraft*, 16 December 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105 (entered into force14 October 1971); *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, 23 September 1971, 24 U.S.T. 564, T.I.A.S. No.7570 (entered into force 26 January 1973).

[14] *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents*, 14 December 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, G.A. Res. 3166, 28 U.N. G.A.O.R. Supp. (No.30) at 146, U.N. Doc. A/9030 (1974) (entered into force 20 February 1977).

[15] *International Convention Against the Taking of Hostages*, 17 December 1979, G.A. Res. 34.146, 34 U.N. G.A.O.R. Supp. (No. 39), U.N. Doc. A/34/189 (1979).

[16] *International Convention for the Suppression of Counterfeiting Currency*, 20 April 1929, 112 L.N.T.S. 372 (1931).

[17] *Convention for the Suppression of Illicit Traffic in Dangerous Drugs, 198 L.N.T.S. 299 (1936).*

Military Tribunal at Nuremberg (hereinafter IMT).[18] The following acts were considered to be crimes coming within the jurisdiction of the Tribunal for which there was individual responsibility:

(a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties...;

(b) War Crimes: namely, violation of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory...;

(c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhuman 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.[19]

The parties to the London Agreement which created the IMT for the first time recognized 'crimes against humanity' as a separate category of crimes. The defendants were charged with having offended humanity itself. Being, like the pirate, *a hostis humani generis*, a person who committed a crime against humanity was usually a state official or agent who offended his own citizens in their own territory. However, some scholars consider that crimes against humanity

[18] *Supra* note 8.
[19] *Ibid.*, Article 6.

recognized by the IMT have not been effectively distinguished from war crimes. According to M. Cherif Bassiouni, "the rationale for 'crimes against humanity' was predicated on a theory of jurisdictional extension of war crimes. The reasoning was that war crimes applied to certain protected persons, namely civilians, in time of war between belligerent states, and 'crimes against humanity' merely extended the same 'war crimes' proscriptions to the same category of protected persons within a particular state, provided it is linked to the initiation and conduct of aggressive war or to war crimes. As a result of this interpretation, crimes committed before 1939 were excluded from prosecution."[20] Yet, these differences seem to be rather significant for distingushing crimes against humanity from war crimes.

The category of 'crimes against humanity' was also included in the *Charter of the International Military Tribunal for the Far East*[21] (hereinafter IMTFE) though there was a significant difference in interpreting the analyzed category in both Charters. While Article 6(c) of the IMT Charter provides that persecution on political, racial or religious grounds constitute 'crimes against humanity', Article 5(c) of the IMTFE includes only political and racial grounds of the crimes against humanity. As Bassiouni explains it, inclusion of religious grounds in the IMT Charter was necessary because of the Holocaust.[22] Another difference with respect to interpretation of 'crimes against humanity' in two Charters concerns the phrase "against any civilian population" which was eliminated from Article 5(c) of the

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[20] M. Ch. Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court" (1997) 10 Harv. H.R.J. 11 at 26.
[21] *Charter for the International Military Tribunal for the Far East*, 26 April 1946, T.I.A.S. No. 1589.
[22] *Supra* note 20 at 37.

Charter of IMTFE, thus expanding the class of persons beyond civilians only. This was done, according to V.A. Roling, to make it possible to punish for large-scale killing of military personnel in an unlawful war.[23]

However, as mass extermination of people on religious or ethnic grounds could be committed not only in time of war but also in time of peace, the necessity to codify such crimes arose. As a result, *the Convention on the Prevention and Punishment of the Crime of Genocide*[24] (hereinafter Genocide Convention) was adopted on December 9, 1948 which confirmed that genocide, whether committed in time of peace or in time of war, is a crime under international law. Article 2 of the Genocide Convention interprets genocide as the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group. Under Article 3, the punishment shall be given in the case of the commission of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, complicity in genocide.

Many scholars emphasized that systematic violations are often directed not only against national, ethnical, racial or religious groups, but also against political

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[23] V.A. Roling, "The Nuremberg and Tokyo Trials in Retrospect" in M.Ch. Bassiouni & V.P. Nanda, eds., *A Treatise on International Criminal Law* (1973) 590.
[24] *Supra* note 7.

groups, which were excluded from the Convention's definition of genocide.[25] According to Michael Scharf, the exclusion of "political groups" was due in large part to the fact that the Convention was negotiated during the Cold War, when the Soviet Union and other totalitarian governments feared that they would face interference in their internal affairs if genocide were defined to include acts committed to destroy political groups.[26] "An examination of the *travaux preparatoires* of the Convention reveals the compromises - born of politics and the desire to insulate political leaders from scrutiny and liability - that can occur when political bodies attempt to reduce customary law principles to positivistic expression. The exclusion of political groups from the Genocide Convention represents one such compromise."[27] Beth Van Schaack considers it to be the critical shortfall of the Genocide Convention, but as this Convention is not the sole authority on the crime of genocide, domestic and international adjudicatory bodies should apply the customary prohibition of genocide which is broader than the Convention's prohibition.[28]

The great man-made famine of 1932-33 in Ukraine which was a crime committed by the Communist Party of Ukraine - the Soviet Union against Ukrainians included all the features of genocide. However, the concept of the crime of genocide did not exist at that date. The term 'genocide' first appeared in

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[25] See *supra* note 4 at 2565; B. Van Schaack, "The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot" (1996) 106 Yale L.J. 2259 at 2262.
[26] M. Scharf, "The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes" (1996) 59 L. & Contemp. Probs. 41 at 45.
[27] B. Van Schaack, *supra* note 25 at 2261.
[28] *Ibid.* at 2261, 2262.

the indictment of the Major War Criminals in Nuremberg.[29] Still, extermination of millions of people was already criminal in 1930's. As it was stated in *R v. Finta* Canadian Supreme Court's decision, "[t]he rules created by the Charter of the IMT and applied by the Nuremberg Trial represented 'a new law.' The rule against retroactive legislation is a principle of justice. ... Justice required the punishment of those committing such acts in spite of the fact that under positive law they were not punishable at the time they were performed. It follows that it was appropriate that the acts were made punishable with retroactive force. ...we are not aiming to make acts, which were deemed innocent when committed, criminal now, such would be unacceptable retroactivity. But extermination of a civilian population, for instance, was already as much criminal in 1940 as it would be today under the laws of all so-called civilized nations."[30]

The issue of crime under international law has been actively analyzed since the question of the subject matter jurisdiction of an International Criminal Court (hereinafter ICC) arose. On the one hand, statutes establishing the *ad hoc* tribunals for the former Yugoslavia[31] (hereinafter ICTY Statute) and Rwanda[32] (hereinafter ICTR Statute) created by the Security Council (hereinafter SC) and to some extent the Draft Statute of the UN-International Law Commission (hereinafter ILC) for a

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[29] *Supra* note 4 at 2588.
[30] *Supra* note 3.
[31] *The Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991*, S.C. Res. 827 (1993), Rules of procedure and evidence adopted on 11 February, 1994, U.N. Doc. IT/32, 14 March 1994; 33 I.L.M. 1994, at 493ff.; amended in December 1996, IT/32/Rev. 3, 25 June 1996.
[32] *The Statute of the International Tribunal for Rwanda*, S.C. Res. 955 (1994), Rules of procedure and evidence adopted on 29 June 1995, ITR/3/Rev. 1; amended on 5 July 1996, ITR/3/Rev. 2.

permanent ICC[33] as well as the alternative draft to the the Draft Statute of the ILC[34] (Article 20 para.1) include those crimes which are "beyond any doubt part of customary law"[35]. This includes grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide, crimes against humanity, aggression.[36] The Draft Statute of the ILC also includes treaty crimes "of international concern" (Article 20) and alternative Draft Statute includes additional crimes according to annex.

Adopted by the United Nations Conference of Plenipotentiaries on the Establishment of an ICC in July 1998, *the Rome Statute of the International Criminal Court* (hereinafter Rome Statute) also confirmed that "[t]he jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole" (Article 5).[37] The jurisdiction of the ICC was established with respect to the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.

On the other hand, there exists a purely treaty approach to the jurisdiction of the ICC according to which only those crimes which are codified in international treaties can be considered international crimes. Thus, Bassiouni in his *Draft Statute of International Tribunal* includes within its jurisdiction 24 crimes which are based

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[33] *Draft Statute for an International Criminal Court*, Report of the ILC on the work of its forty-sixth session, 2 May - 22 July 1994, 49 U.N. G.A.O.R. Supp. (No. 10) at 29, U.N. Doc. A/49/10.
[34] *Draft Statute for an International Criminal Court - Alternative to the ILC Draft (Siracusa Draft)*, prepared by a Committee of Experts, Siracusa/Freiburg, July 1995.
[35] U.N. Doc. S/25704, para. 34.
[36] The crime of aggression is included within the specific crimes codified in the draft statute of ILC and alternative draft statute.
[37] "Rome Statute of the International Criminal Court" (17 July 1998), http://www.un.org/icc.

on 316 international instruments.[38] As a result, "*relatively* minor and practically irrelevant treaty 'crimes' such as 'offences against international civil maritime navigation', 'drug offences', and 'international traffic in obscene materials'"[39] are included within the jurisdiction of the court, while extra-legal executions and disappearances are not. Though the latter ones are not codified in treaties, they became part of international customary law. Another argument which Kai Ambos gives against a 'treaty approach' is that offences codified in international instruments are frequently too vague to be directly applicable in national law; therefore, they require an internal process of transformation. Instead, Ambos considers it much more consistent to extend subject matter jurisdiction only to those crimes whose recognition by general international law, including customary law, is beyond question, irrespective of their codification in international instruments.[40]

The position of the ILC is that the ICC should exercise jurisdiction "only over the most serious crimes of concern to the international community as a whole".[41] According to Ambos, such position of the ILC and the majority of States involved in the debate of the ICC jurisdiction is "a practical compromise between the politically feasible short term and legally desirable long-term objective..."[42]

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[38] M.Ch. Bassiouni, *Draft Statute of International Tribunal* (Toulous: AIDP/eres, 1993).
[39] K. Ambos, "Establishing an International Criminal Court and an International Criminal Code: Observations from an International Criminal Law Viewpoint" (1996) 7 EJIL 519 at 524.
[40] *Ibid.*
[41] *Supra* note 33.
[42] *Supra* note 39.

In the preliminary version of *the Draft Code of Crimes Against the Peace and Security of Mankind* approved in 1991 (hereinafter Draft Code 1991),[43] there is also no clear definition of the notion of crime under international law. Article 1 reads: "The crimes [under international law] defined in this Code constitute crimes against the peace and security of mankind". The Draft Code 1991 includes such international crimes as threat of aggression, intervention, colonial domination and other forms of alien domination, genocide, apartheid, systematic or mass violation of human rights, exceptionally serious war crimes, recruitment, use, financing and training of mercenaries, international terrorism, illicit traffic in narcotic drugs, wilful and severe damage to the environment.

Article 21 on systematic and mass violations of human rights of the Draft Code 1991 extended crimes against humanity to commitment or ordering the commission of murder, torture, establishing or maintaining over persons a status of slavery, servitude or forced labour, and persecution on social, political, racial, religious or cultural grounds in a systematic manner or on a mass scale, or deportation or forcible transfer of population. As it was interpreted in commentaries of the ILC, either one of two aspects - systematic or mass-scale in any of the acts enumerated in the draft article was enough for the offence to have taken place. Deportation or forcible transfer of population were listed separately, because the crime in itself necessarily entails a mass-scale element.[44]

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[43] *Draft Code of Crimes against the Peace and Security of Mankind*, Report of the ILC on the work of its forty-third session, 29 April - 19 July 1991, 46 G.A.O.R. Supp. (No. 10), U.N. Doc. A/46/10.
[44] *Ibid.*

Significantly, the concept of crimes against humanity was extended to all acts of this nature regardless of the circumstances and not confined to any conflict. This was particularly innovative, because until that time, crimes against humanity were not effectively distinguished from war crimes either in international conflicts or in conflicts within a particular state. This idea is also stressed in *The Prosecutor* v. *Dusco Tadic:* "It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict."[45]

An important issue raised by the 1991 Draft Code was that of the subjective circumstances of a crime. However, Article 4 formulating them in terms of "motives invoked by the accused"[46] was considered to be rather confusing, and it was eliminated in the *1996 Draft Code of Crimes Against the Peace and Security of Mankind*[47] (hereinafter Draft Code 1996).

As different from the Draft Statute of the ICC and the Draft Code 1991, Draft Code 1996 indicates five crimes under international law: aggression, genocide, crimes against humanity, crimes against UN and associated personnel, and war crimes as meeting the requirements of either being recognized by customary international law or threatening international peace and security. Genocide and war crimes, as mentioned above, also have a solid treaty basis while

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[45] International Criminal Tribunal for the Former Yugoslavia (Appeals Chamber): Decision in *Prosecutor* v.*Dusco Tadic*, 2 October 1995, in (1996) 35 I.L.M. 32, para. 141.

[46] Article 4 ran: "Responsibility for a crime against the peace and security of mankind is not affected by any motives invoked by the accused which are not covered by the definition of the crime".

[47] *Draft Code of Crimes against the Peace and Security of Mankind*, Report of the ILC on the work of its forty-eighth session, 6 May - 26 July 1996, 51 G.A.O.R. Supp. (No. 10) at 9, U.N. Doc. A/51/10.

crimes against humanity as the paradigmatic offence against mankind and aggression lack treaty basis. Article 18 of the Draft Code 1996 includes murder, extermination, torture, enslavement, persecution, institutionalized discrimination, deportation, disappearance, rape and other forms of sexual abuse as well as other inhuman acts within the category of 'crimes against humanity'.

The recently adopted Rome Statute refers the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, to crimes against humanity: murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, enforced disappearance of persons, the crime of apartheid, and other inhuman acts of a similar character internationally causing great suffering, or serious injury to body or to mental or physical health.[48] This list of crimes against humanity within the jurisdiction of ICC is the fullest and the most detailed one in comparison with other draft statutes of ICC and draft codes of crimes against peace and security of mankind.

[48] *Supra* note 37.

Crimes against humanity were also included within the jurisdiction of the ICTY which was established by Article 5 of the ICTY Statute.[49] Consequently, in the Tribunal's first trial held in the case of *Prosecutor v. Tadic*, Tadic was charged with grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war and/or crimes against humanity for his participation in the rape, murder, mistreatment and torture of Bosnian Muslim and Croat prisoners in the Omarska prison camp.[50]

Like the ICTY, the ICTR can prosecute for genocide (Article 2) and for crimes against humanity (Article 3).[51] The following crimes, when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds, fall within the jurisdiction of the Tribunal: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds, other inhumane acts. As the conflict in Rwanda was a civil war, the Rwanda Statute did not include articles on violations of the laws and customs of war and the Geneva Conventions of 1949 covering international conflicts. Such ommission of the words 'committed in armed conflicts, whether international or national in character' gave rise to the suggestion that the Rwanda Statute extended the scope of application of crimes against humanity from times of war to times of peace. However, as Daphna Shraga and Ralph Zacklin suggest, "that may very well be an arguable interpretation, nothing indicates that this was the express intention of the

[49] *Supra* note 31.
[50] *Supra* note 45.
[51] *Supra* note 32.

Council. ... Rather, 'crimes against humanity' were customarily recognized as applicable in *international* armed conflicts until, in the Statute of the Yugoslav Tribunal, they were extended to apply also to *non-international* armed conflicts. In omitting any reference to an armed conflict, of any kind, from the Statute of the Rwanda Tribunal, the Security Council may have further extended their application to time of peace. But in so doing, it advanced the law, and did not declare it, in the words of the Tribunal, to be a 'settled rule of customary international law'."[52]

On the other hand, according to Diane F. Orentlicher, there exist compelling reasons to punish crimes against humanity regardless of their nexus to war, just to vindicate constitutional principles of the international legal order.[53] This statement is confirmed by Justice Jackson's (Chief Counsel for the United States in Nuremberg) argument expressed in his opening speech before the IMT that a crime against humanity is an offence that becomes the concern of the international community not only when its repercussions literally traverse national borders, but also when (and because) it surpasses "in magnitude and savagery any limits of what is tolerable by modern civilization."[54]

As crimes committed by the Communist Party of Ukraine - the Soviet Union constituted, as it will be proved below, systematic and mass violations of human rights, even though they did not traverse national borders, there exist all

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[52] D. Shraga & R. Zacklin, "The International Criminal Tribunal for Rwanda" (1996) 7 EJIL 501 at 508, 509.
[53] *Supra* note 4 at 2590.
[54] *Opening Speech of Justice Robert H. Jackson*, Chief Prosecutor for the United States, 21 November 1945, II Trial of the Major War Criminals Before the International Military Tribunal (1947) at 127.

grounds to refer them to crimes against humanity. Since the Communist regime was extremely repressive in Ukraine in 1930's - 1960's, it is worth while mentioning that the concept of the crime against humanity existed at that time already. The term 'crimes against humanity' as the label for a category of crimes recognized under customary international law originated in the joint declaration of the governments of France, Great Britain, and Russia of May 28, 1915, denouncing the Turkish massacre of more than a million Armenians in Turkey as constituting 'crimes against civilization and humanity' for which the members of the Turkish Government would be held responsible.[55] In reality, however, they were not prosecuted.

As stated above, crimes against humanity constitute a paradigmatic category which is formed by murder, extermination, enslavement, deportation and some other crimes. Torture is included into the category of crimes against humanity in most statutes of international ad hoc tribunals, Rome Statute as well as draft codes of crimes against the peace and security of mankind. Though some scholars separate crimes against humanity and torture on the basis that the former have yet to be embodied in a specialized convention while latter has been codified,[56] it does not seem to be a serious argument for denying their 'whole and part' correlation. If torture was a systematic or mass practice it should be included among crimes against humanity. *The Convention Against Torture, and Other*

[55] *Supra* note 26 at 52.
[56] See M.Ch. Bassiouni, "Searching for Peace and Achieving Justice: The Need for Accountability" (1996) 59 L. & Contemp. Probs 9 at 14.

Cruel, Inhuman or Degrading Treatment or Punishment[57] (hereinafter 'Torture Convention') defines torture as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity (Article 1). As was commented by the ILC, isolated acts of torture, no matter how reprehensible as violations of human rights, do not come under the crimes against humanity as defined in the Draft Code 1991.[58] One member of the ILC, though agreed with the actual definition of torture given in the Torture Convention, noticed that possible perpetrators of the crime should not be limited solely to public officials or other persons acting in an official capacity. In his opinion, groups of private individuals could also perpetrate this crime.[59] Torture as a means of physical or mental suffering has been widely inflicted upon persons in Soviet prisons in the period of repressions.

Another violation of human rights included in the paradigm of crimes against humanity in most statutes of international tribunals as well as in Rome Statute of the ICC and draft codes of crimes against the peace and security of mankind is enslavement. The definition of slavery and servitude was given in a number of conventions.[60] In terms of Article 21 of the Draft Code 1991,

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[57] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 4 February 1985, (1984) 24 I.L.M. 535, 39 U.N. G.A.O.R. Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984) (entered into force 26 June 1987).
[58] *Supra* note 43.
[59] *Ibid.*
[60] See, e.g., *supra* note 11.

"establishing and maintaining over persons a status of slavery, servitude or forced labour" constitutes one of the crimes against humanity, i.e. "it is a crime under the present draft article not only to place persons in or reduce them to a status of slavery, servitude or forced labour but also to maintain them in that status, should they already be in such a situation when the Code enters into force."[61] The Draft Code 1991 is silent as to basing these crimes on racial, ethnic, religious or political grounds. As forced labour was widely used in the Soviet labour camps and it was a mass-scale and constant practice for many years, this crime constituting one of the crimes against humanity was also committed by communist agents in the former Soviet Union including the Ukrainian SSR.

Persecution on social, political, religious or cultural grounds, already a crime against humanity under the Nuremberg Charter,[62] has also been covered by Article 21 of the Draft Code 1991 when "committed in a systematic manner or on a mass scale by government officials or by groups that exercise de facto power over a particular territory and seek to subject individuals or groups of individuals to a life in which enjoyment of some of their basic rights is repeatedly or constantly denied. Persecution may take many forms, for example, a prohibition on practising certain kinds of religious worship, prolonged and systematic detention of individuals who represent a political, religious or cultural group, a prohibition on the use of a national language, even in private, systematic destruction of monuments or buildings representative of a particular social, religious, cultural or

[61] *Supra* note 43
[62] *Supra* note 8.

other group."[63] All these forms of persecution were widely used in the former Soviet Union.

Another violation of human rights included within the category of crimes against humanity is deportation, which in itself necessarily entails a mass-scale element. It has been extended in Article 21 of the Draft Code 1991 by 'forcible transfer of population.'[64] The Rome Statute also includes 'deportation or forcible transfer of population' within crimes against humanity subject to the jurisdiction of the ICC.[65] The ILC considers that a crime of this nature could be committed not only in time of armed conflict but also in time of peace. While deportation implies expulsion from the national territory, the forcible transfer of population could occur wholly within the frontiers of one and the same State with the aim of altering a territory's demographic composition for political, racial, religious or other reasons, or in an attempt to uproot a people from their ancestral lands. Some elements of the crime of genocide can be found in this crime as it was fairly noticed by one of the members of the ILC.[66] This was exactly what happened with hundreds of thousands of Ukrainians, especially from Western Ukraine, after World War II, who were forcibly transfered from their ancestral lands to the regions of Siberia and the Far East.

Another crime, which was characterized as a crime against humanity, is enforced disappearance of persons. As Orentlicher states, while such an expansion

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[63] *Supra* note 43.
[64] *Ibid.*
[65] *Supra* note 37.
[66] *Supra* note 43.

might enjoy the consensus necessary to establish a new rule of customary law within the Inter-American system,[67] a similar strong consensus probably has not yet emerged beyond the O.A.S. member countries.[68] The U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities has, however, suggested that the Economic and Social Council request the U.N. General Assembly to invite the ILC to consider including disappearances in its draft code of offences against the peace and security of mankind, with a view to declaring disappearances a crime against humanity.[69] As mentioned above, Article 18 of the Draft Code 1996 does include 'disappearance' within the category of 'crimes against humanity'. The Rome Statute of the ICC also extends crimes against humanity to 'enforced disappearance of persons' which means "the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time."[70]

There were efforts to broaden the category of 'crimes against humanity' by the apartheid conventions and resolutions,[71] though they failed to garner broad

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[67] See, e.g., *Draft Inter-American Convention on the Forced Disappearance of Persons*, Inter-American C.H.R. 352, OEA/ser.L./v/ii.74, doc. 10 rev. 1 (1988), art. 4.
[68] *Supra* note 4 at 2591.
[69] E.S.C.Res. 1982/12, U.N. Doc. E/1982/12.
[70] *Supra* note 37.
[71] See *supra* note 9; *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 26 November 1968, 754 U.N.T.S. 73, G.A. Res. 2391, 23 U.N. G.A.O.R. Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968) (entered into force November 1970); *Resolution Condemning the Policies of Racial Discrimination and Segregation Practised in South Rhodesia* G.A. Res. 2022, 20 U.N. G.A.O.R. Supp. (No. 14) at 150, para. 4, U.N. Doc.

consensus. In contrast to the Genocide Convention which was adopted unanimously, the resolutions condemning apartheid as a crime against humanity were adopted by a predominantly African-Asian majority, with most Western Nations abstaining.[72] Because of the similar reason of including apartheid and 'eviction' as crimes against humanity, *the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* was not supported by a majority of the U.N. member states.[73]

Though crimes against humanity have been recognized as crimes under international law in the statutes of IMT, IMTFE, ICTY and ICTR which had been created for persecution of persons responsible for serious violations of human rights, and in the Rome Statute of ICC and draft codes of crimes against the peace and security of mankind, the contents of the category of 'crimes against humanity' is still disputable and there exist different definitions of it. One of them was given by the ILC in its commentary on Article 20 of the Draft Statute of the ICC: "...the definition of crimes against humanity encompasses inhuman acts of a very serious character involving widespread or systematic violations aimed at the civilian population in whole or in part. The hallmarks of such crimes lie in their large-scale and systematic nature. The particular forms of unlawful acts ... are less crucial to the definition than the factors of scale and deliberate policy, as well as in their being targeted against the civilian population in whole or in part ... The term 'directed against any civilian population' should be taken to refer to acts

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A/6014 (1966); *Resolution Condemning the Policies of Apartheid and Racial Discrimination Practised by the Government of South Africa in South West Africa*, G.A.Res. 2074, 20 U.N. G.A.O.R. Supp. (No. 14), para. 4, U.N. Doc. A/6014 (1966), *etc.*

committed as part of a widespread or systematic attack against a civilian population on national, ethnic, racial or religious grounds. The particular acts referred to in the definition are acts deliberately committed as part of such an attack".[74]

Thus, the definition of the crime against humanity underwent great changes over the years. At first, as Ruti Teitel notices, the crime was conceptualized on an objective basis, as an offense defined in terms of classes of victims. At Nuremberg, for example, "the crime against humanity was defined by the protected status of civilians during wartime. Over time, the crime against humanity extended beyond attacks by states against foreign enemies to the abuses perpetrated against even their own civilians during peacetime. The contemporary conceptualization of the crime against humanity is toward a subjective, highly normative understanding, protecting against racial, ethnic, political, or religious persecution".[75]

There exists a substantial difference in the definitions of genocide and crimes against humanity in treaty law. As Orentlicher states, the conduct made punishable by the Genocide Convention does not require a nexus to war, and in that respect is broader than crimes against humanity as defined in the Nuremberg Charter. But the Convention's definition of genocide is narrower than the Charter's definition of crimes against humanity insofar as the former imposes an intent requirement that was not included in the Charter.[76] As the concept of crimes

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[72] See Goldenberg, "Crimes Against Humanity - 1945-1970" (1971) 10 West. Ont. L. Rev. 1 at 38.

[73] R.H. Miller, " The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity" (1971) 65 AJIL 476 at 477.

against humanity was extended to all acts of this nature not confined to any conflict, both genocide and crimes against humanity constitute separate crimes under international law.

Crimes against humanity defined in the Nuremberg Charter are offenses punishable in international law, as they violate elementary principles of humanity and threaten world peace. Their additional characteristic as different from common crimes is "state action or policy"[77], i.e. that these acts are carried out by state officials or their agents. However, this has been widened to include non-state groups as well as individuals.[78] Unlike war crimes, as Naomi Roht-Arriaza indicates, crimes against humanity need have no transnational element; and unlike genocide, they are not limited to cases in which an intent to destroy a racial, ethnic, or religious group can be proved.[79] As mentioned above, the notion of 'crimes against humanity' has been broadened in the ICTY and ICTR Statutes, the draft statutes of the ILC for a permanent International Criminal Court and in the draft codes of crimes against the peace and security of mankind. The Rome Statute of the ICC includes even broader list of crimes against humanity.

Thus, the crime of genocide and crimes against humanity have been recognized by international criminal law. They also constitute crimes under international customary law. Furthermore, genocide and some crimes which fall within the category of crimes against humanity have been codified in international

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[74] *Supra* note 33 at 76.
[75] R. Teitel, "Transitional Jurisprudence: The Role of Law in Political Transformation" (1996) 106 Yale L.J. 2009 at 2046-2047.
[76] *Supra* note 4 at 2586.

treaty law. These crimes are considered to be grave human rights violations committed on a mass scale. Because this thesis is concerned with the duty to punish grave human rights violations of prior communist regimes, our major concern will be with crimes against humanity and the crime of genocide committed by these regimes.

B. INDIVIDUAL RESPONSIBILITY FOR GRAVE HUMAN RIGHTS VIOLATIONS

The notion of individual responsibility for serious human rights violations remains a very fuzzy issue in international law at the moment. The purpose of this section is to analyze the concept of individual responsibility for genocide and crimes against humanity, to trace the development of this concept since Nuremberg, to examine the correlation of individual responsibility and responsibility of states, as well as the jurisdiction over genocide and crimes against humanity, and to indicate different forms of individual responsibility, including lustration as the most commonly used device for punishing former Communist Party leaders in Central and East European states.

The dilemma, which arises in international law out of the issue of responsibility for past regime wrongdoings, is that of state violations but individual

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[77] M.Ch. Bassiouni, *Crimes against Humanity in International Criminal Law* (Dordrecht, Netherlands: M. Nijhoff, 1992).
[78] *Supra* note 47.
[79] N. Roht-Arriaza, "Nontreaty Sources of the Obligation to Investigate and Prosecute" in N. Roht-Arriaza, ed., *Impunity and Human Rights in International Law and Practice* (New York, Oxford: Oxford University Press, 1995) 39 at 51.

penal responsibility for these violations. However, for a long time it was submitted, first, that international law is concerned with the actions of sovereign States, and provides no punishment for individuals or organizations, and second, that where the act in question is an act of State, those who carry it out are not personally responsible, but protected by the doctrine of the sovereignty of the State.[80]

The first attempt to break that unwritten rule was the 1919 Versailles Treaty, Articles 228-230 of which recognized the right of the Allied and Associated Powers to bring persons accused of committing acts in violation of the laws and customs of war to trial before military tribunals. A demand was submitted to Germany for the trial of 901 persons, but Germany refused to recognize it. As a compromise, the Allies accepted that Germany should prosecute a selected number of individuals. Of 45 names that were selected only 13 were actually tried. Of these, 6 were acquitted. The heaviest sentence imposed was four-years imprisonment.[81] Kaizer Wilhelm was also to be prosecuted under the Versailles Treaty, though he never was. Thus, despite the Allies' attempt to obligate Germany to hold its war criminals accountable, few trials were held.

The crucial role in recognition of international criminal jurisdiction over the person in international law was played by the IMT. As Teitel fairly points out, "the paradigm of accountability shifts from national to international processes and from the collective to the individual. After Nuremberg, for the first time under

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[80] Nurenberg War Crimes Trials (1947), 1 *Trial of the Major War Criminals* 171 in H.M. Kindred, ed., *International Law Chiefly as Interpreted and Applied in Canada*, 5th ed. (Emond Montgomery Publications Limited, 1993) at 448.
[81] See in H.M. Kindred, ed., *supra* note 80 at 449.

international law, the response to persecution implied delimiting state power through the concept of individual responsibility. Prosecutions of past regime leaders effect this transformation. The trial sanctions the past regime's wrongdoing, moving beyond the state to the individual, and from political to legal judgment."[82] Under Article 6 of the IMT Charter, the Tribunal had the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the crimes coming within the jurisdiction of the Tribunal.[83] Leaders, organizers, instigators and accomplices participating in the formulation or exercution of a common plan or conspiracy to commit any of those crimes were responsible for all acts performed by any person in execution of such plan.[84] At Nuremberg, neither the German State nor Government were ascribed guilt - only the NSDP, the Gestapo and other organizations.

As it was stated in "Official Transcript of the American Military Tribunal [Tribunal V] in the matter of the *United States of America* v. *Wilhelm von Leeb, et al.*" in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, "[t]he state being but an inanimate corporate entity or concept, it cannot as such make plans, determine policies, exercise judgment, experience fear, or be restrained or deterred from action except through its animate agents and representatives. It would be an utter disregard of reality and but legal shadow-boxing to say that only the state, the inanimate entity, can have

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[82] *Supra* note 75 at 2039.
[83] *See supra* note 8.
[84] *Ibid.*

guilt, and that no guilt can be attributed to its animate agents who devise and execute its policies."[85]

In the opinion of the IMT, "[t]he international law imposes duties and liabilities upon individuals as well as upon states... Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced. ...The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. Article 7 of the Charter expressly declares: 'The official position of defendants, whether as heads of State, or responsible officials in government departments, shall not be considered as freeing them from responsibility, or mitigating punishment.'"[86] Article 8 of the Charter specifically provides that "[t]he fact that the defendant acted pursuant to orders of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment."

The aim of the IMT was not only to determine whether certain acts infringed international law, but also whether criminal responsibility could have been attached to individuals for such infringments. As it was stated in the aforementioned *High Command Case* of the American Military Tribunal, "[f]or a

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[85] *Nuremberg: Excerpts from Tribunal Decisions (October 1946-April 1949)* in N.J. Kritz, ed., *supra* note 8 at at 464.
[86] *Supra* note 8 at 460.

defendant to be held criminally responsible, there must be a breach of some moral obligation fixed by international law, a personal act voluntarily done with knowledge of its inherent criminality under international law."[87] Criminal responsibility for drafting, transmitting, and implementing illegal orders of the defendants' superiors has been the object of thorough analysis by the IMT.

A turning point in the conceptualization of individual responsibility for crimes under the jurisdiction of the IMT was constituted by the *Nuremberg Principles*, which were formulated by the ILC at the request of the U.N. General Assembly.[88] For the first time in the Nuremberg Principles, responsibility for atrocities under international law was imposed upon individuals. As Principle I runs, "any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment". A 'head of state' or 'a responsible Government official' factor which used to be a defense based on sovereign immunity was no longer available for public officials, but instead, under Principle III, did not relieve them from responsibility under international law. Furthermore, 'due obedience' to orders which was a defence under traditional military rules, did not relieve them from responsibility under international law, according to Principle IV, provided a moral choice was in fact possible to him.

Individual responsibility was also imposed by the Genocide Convention,[89] under which persons charged with genocide were to be tried by a competent

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[87] *Supra* note 85 at 465.
[88] U.N. G.A. Res. 174 (II), 2 U.N. G.A.O.R. at 105, U.N. Doc. A/519 (1947).
[89] *Supra* note 7.

tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction (Article 6). Extradition can be granted by the Contracting Parties in accordance with their laws and treaties in force, though genocide shall not be considered as a political crime for the purpose of extradition (Article 7). The Convention applies only to those who have the specific intent literally to destroy, in whole or in part, a national, ethnical, racial or religious group as such (Article 2), and no matter whether persons committing genocide are constitutionally responsible, public officials or private individuals, they shall be punished (Article 4).

The "prosecute or extradite" formula is also used in the Torture Convention.[90] Under Article 4 of the Convention, each State Party shall make all acts of torture as well as attempts to commit torture and acts by any person which constitute complicity or participation in torture punishable by appropriate penalties, which take into account their grave nature. The Torture Convention obliges its parties to make torture punishable within their domestic jurisdictions (Article 5), to take a person alleged to have committed any offence referred to in Article 4 into custody or to take other legal measures to ensure his presence (Article 6), to submit the case to their competent authorities for the purpose of prosecution (Article 7) or to extradite suspected torturers under extradition treaties existing between States Parties or under the Torture Convention itself (Article 8), and to afford one another the greatest measure of assistance in

[90] *Supra* note 57.

connection with criminal proceedings, including the supply of all evidence at their disposal necessary for the proceedings (Article 9).

Orentlicher points to a difference in the language of the Torture Convention and the Genocide Convention. While the Torture Convention requires States Parties to "submit" cases involving allegations of torture to the "competent authorities for the purpose of prosecution", it does not explicitly require that a prosecution take place, let alone that punishment be imposed and served. On the other hand, the Genocide Convention explicitly provides that persons who commit genocide "shall be punished".[91] Orentlicher suggests that "the drafters presumably recognized that there might be legitimate reasons to terminate an investigation without proceeding to trial, such as lack of necessary evidence. They also apparently sought to respect the independence of national courts and the procedural rights of defendants by avoiding language that suggested that a particular outcome of prosecutions was required."[92] In spite of this slight difference in the wording of the two conventions, Orentlicher comes to the conclusion that both conventions "evince concern that appropriately severe penalties be imposed on persons convicted of those crimes", and they support "the claim that a post-conviction pardon might be permissible where an amnesty is not."[93] That is why Orentlicher analyzes the difference in the language of the two conventions, certainly not to misconstrue "the nature of the 'prosecute or extradite' formulation used in the Torture Convention" or to doubt "[t]he manifest

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[91] *Supra* note 4 at 2604.
[92] *Ibid.*
[93] *Ibid.*

intent of both conventions ... to ensure that persons convicted of genocide or torture serve harsh sentences", as Michael Scharf suggests.[94]

The Security Council Resolution establishing the International Criminal Tribunal for Rwanda[95] and the decision of the International Criminal Tribunal for the Former Yugoslavia in *the Tadic case*[96] both imposed individual responsibility for crimes committed in non-international conflicts. Thus, under Article 2 of the Statute of Rwanda Tribunal, persons can be prosecuted for committing, conspiracy to commit, direct and public incitement to commit, attempt to commit genocide and complicity in genocide. Those responsible for crimes against humanity (Article. 3) shall be prosecuted as well. Individual responsibility is imposed upon persons who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of the crimes mentioned above. Neither the official position of any accused person (whether as Head of State or Government or as a responsible Government official), nor the subordinate position relieve such person of criminal responsibility. However, the fact that an accused person acted pursuant to an order of a Government or of a superior may be considered in mitigation of punishment if the Tribunal determines that justice so requires (Article 6).

The concept of individual responsibility for crimes against the peace and security of mankind was further developed in the Draft Code 1991.[97] Article 3

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[94] *Supra* note 26 at 46, 47.
[95] *Supra* note 32.
[96] *Supra* note 45.
[97] *Supra* note 43.

imposes individual responsibility for committing a crime against the peace and security of mankind; aiding, abetting or providing the means for the commission of a crime, or conspiracy to commit a crime. Article 3 also deals with the responsibility and punishment of any individual who commits an act constituting an attempt which according to the interpretation of the ILC includes the following elements: (a) intent to commit a particular crime; (b) an act designed to commit it; (c) an apparent possibility of committing it; and (d) non-completion of the crime for reasons independent of the perpetrator's will.[98]

The ILC also touched the problem of correlation of individual and state responsibility as "the act for which an individual is responsible might also be attributable to a State if the individual acted as an 'agent of the State', 'on behalf of the State', 'in the name of the State or as a de facto agent, without any legal power."[99] As commented by the ILC, some members of the Commission supported the proposition that not only an individual but also a State could be held criminally responsible. Nevertheless, at its thirty-sixth session the ILC decided that the Draft Code should be limited at the current stage to the criminal responsibility of individuals.[100] At the same time, in commentary to Article 5 the ILC emphasized that the punishment of individuals who are organs of the State "certainly does not exhaust the prosecution of the international responsibility incumbent upon the State for internationally wrongful acts which are attributed to it in such cases by reason of the conduct of its organs'. The State may thus remain

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[98] *Ibid.*
[99] *Ibid.*
[100] *Ibid.*

responsible and be unable to exonerate itself from responsibility by invoking the prosecution or punishment of the individuals who committed the crime."[101]

Although the duty "to prosecute or extradite" exists in the Genocide Convention and the Torture Convention, it does not exist in treaty law with respect to crimes against humanity due to the fact that there is no specialized convention for such crimes.[102] Nor do these obligations explicitly exist, as Bassiouni states, with respect to common articles 3 of the 1949 Geneva Conventions, and Protocol II,[103] applicable to conflicts of a non-international character even though it can be argued that such obligations exist implicitly.[104]

In 1971 the United Nations General Assembly adopted the Resolution on War Criminals,[105] which affirmed that a State's refusal "to cooperate in the arrest, extradition, trial, and punishment" of persons accused or convicted of war crimes and crimes against humanity is "contrary to the United Nations Charter and to generally recognized norms of international law."[106] Another Resolution of the United Nations General Assembly adopted in 1973 concerned Principles of International Co-operation in the Detention, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity.[107] However, no specialized international instrument has been passed on the duty to prosecute or to

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[101] *Ibid.*
[102] M.Ch. Bassiouni, "Crimes against Humanity: The Need for a Specialized Convention" (1994) 31 Colum. J. Transnat'l L. at 457.
[103] *Protocol II Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, 12 December 1977, 1125 U.N.T.S. 609 (hereinafter Protocol II).
[104] *Supra* note 56 at 15-16.
[105] G.A.Res. 2840 (XXVI), 26 U.N.G.A.O.R. Supp. (No. 29), at 88, U.N. Doc. A/8429 (1971).
[106] See *supra* note 77 at 499-527.
[107] G.A.Res. 3074 (XXVIII), 28 U.N. G.A.O.R. Supp. (No.30) at 78, U.N. Doc. A/9030 (1973).

extradite persons guilty of crimes against humanity, and that is why, according to Bassiouni, it must be proven part of customary international law in the absence of a specific convention establishing such an obligation.[108] The 1968 U.N. *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*,[109] and the 1974 *European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes*[110] made this duty to prosecute or to extradite more effective even though the number of ratifications of the above mentioned conventions is still very limited.

Thus, individual responsibility for genocide and crimes against humanity can be established by international treaty or customary law. Most international instruments on crimes under international law recognize either the jurisdiction of a competent tribunal of a state in the territory of which the crime was committed or the jurisdiction of the international tribunal. Jurisdiction over crimes against humanity can be exercised by any state, which means that universal jurisdiction can be applied to such crimes. Many scholars and judicial bodies also consider that customary law establishes universal jurisdiction over the crime of genocide. The I.C.J., in an advisory opinion, has asserted that the principles underlying the Genocide Convention "are recognized by civilized nations as binding on States, even without any conventional obligations."[111] However, in practice only a few

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[108] *Supra* note 56 at 16.
[109] *Supra* note 71.
[110] *Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes (Inter-European)*, 25 January 1974, Europ. T.S. No.82 (not yet entered into force).
[111] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 I.C.J. 15 at 23.

states have recognized the application of the theory of universality and even if recognized, the theory does not always work. For example, when Canada tried to assert universal jurisdiction over World War II criminals, it was very difficult to prosecute, as its territory was not related to the place of war. Another example is Canada's refusal to consider prosecuting Pol-Pot. The United States of America approach was not to prosecute but to extradite war criminals back to their native countries. At the same time, with respect to terrorist acts against US citizens, the USA recognized the passive personality jurisdiction. Germany is taking an opposite approach, refusing to extradite as it is a potential of human rights abuse.

In reality, only few countries have enacted national legislation needed to prosecute genocide and crimes against humanity. Germany and Italy have included genocide as part of their criminal codes. France, Canada, the United Kingdom, and Australia have developed specialized legislation which includes retrospective application to World War II events. Australia has not been successful in any prosecutions although there had been three cases, all of them resulted in acquittal before trial.[112] The United Kingdom is in the process of prosecuting one case (Szymon Serafinowicz) under the United Kingdom War Crimes Act 1991. France has prosecuted three with one pending. And one case (*R.* v. *Finta*) has been prosecuted in Canada under the Canadian Criminal Law Amendment Act 1985 which amends the Canadian criminal code.[113]

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[112] *See* T.L.H. McCormack & G.J. Simpson, eds., *The Law of War Crimes: National and International Approaches* (1997) at 130-34.
[113] *Ibid.* at 29.

While speaking about individual responsibility for grave human rights violations of a prior regime on national level, it is worthwhile mentioning lustration[114] (purging) as a national policy of settling accounts with the past. This was widely used after World War II and remains the most commonly used device for punishing former communist leaders in Central and East European states. "Lustration" laws have been passed in most Central and East European states after the collapse of the Soviet Union. Their aim was to remove persons of the past regime from office.[115] However, the velvet revolutions in Czechoslovakia, Hungary, Poland and other post-communist states have not been followed by a massive removal of the exponents of the prior regime.

The number of unpatriotic citizens who suffered punishment in one or another form was about 100,000 in Belgium, 110,000 in The Netherlands, and 130,000 in France. The number of death penalties was 6,763 in France, 2,940 in Belgium, and 152 in The Netherlands. At the same time, France had a much higher number of extrajudicial killings: some 9,000 men and women were executed outside the legal process. The parallel figures for Belgium and The Netherlands were about 35 and 30.[116] By contrast, as it will be demonstrated below, only a few prosecutions have taken place in post-communist Central and East European states and even fewer of the perpetrators of the crimes against human rights faced justice.

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[114] The word "lustration" comes from Latin "lustratio(n)" and means "expiatory sacrifice, etc., purification". See C.T. Onions, ed., *The Oxford Dictionary of English Etymology* (Oxford: Clarendon Press, 1966) at 541.
[115] See generally *supra* note 8.
[116] *Ibid.* at 67.

In general, there has been a tendency in national jurisprudences toward the limitation of criminal proceedings and punishment. In Germany's border guards trials, suspension of sentences has been the norm, and of the 11 guards tried as of November 1992, only one has actually served time in jail. Many prosecutions in the Czech Republic culminated in suspended or conditional sentences. In Romania, all of the former Communist leaders and police jailed in connection with the December 1989 massacres were released over a two-year period, either on health grounds or as a result of presidential pardons. In Bulgaria, Todor Zhivkov failed to serve time for embezzlement, while others have been pardoned.[117] Bassiouni explains such practice of impunity by political settlements as "the political price paid to secure an end to the violence of ongoing conflicts or as a means to ensure tyrannical regime changes."[118]

C. JURISDICTION OVER ORGANIZATIONS FOR ABUSES OF HUMAN RIGHTS

There exists in international law the right to exercise legal and political control not only over individuals but also over organizations. International instruments codify not only crimes of private individuals but also of criminal organizations. Starting with the Nuremberg jurisprudence, some international and national insruments are aimed at preventing massive brutalities by a criminal government toward the people under its jurisdiction. However, responsibility of

[117] *See supra* note 75 at 2049.
[118] *Supra* note 56 at 12.

criminal organizations has attracted little attention so far. This section analyzes the notions of criminalization of an organization and criminality of its members, as well as banning a criminal organization, which, as different from the former one, does not lead to penal responsibility of individuals.

Crimes against humanity are most often committed by states either in a time of war against foreign enemies or during peacetime against their own civilians. The notion of a 'state' here refers to highest bodies of state power. East and Central European communist states used to be *de jure* republics with elected parliaments, though *de facto* they were ruled by Communist parties. That is why crimes against humanity in these states are attributed to their ruling organizations, the Communist parties. Another term which is used while speaking about agents of crimes against humanity is a 'regime' which is applied in this thesis as a synonym of a 'state'. A regime is the method of implementing the state's power. It can be either a democratic or totalitarian regime. The Communist Party ruling in Central and East European states represented a totalitarian regime as it was a one party regime. Thus, while speaking about human rights violations by a prior communist regime or by a communist state, Communist parties of these states will be defined as criminal organizations having committed those crimes.

According to Teitel, the crime against humanity has now received a highly normative understanding: protecting against racial, ethnic, political, or religious persecution. It "criminalizes the ultimate political offence: political persecution, the offence of enemy creation", and although "the crime against humanity is not

explicitly predicated on state involvement, persecution constitutes a crime of ideology of such magnitude that even where not overtly state-promoted, it is considered as having been committed against a backdrop of government policy.[119] A state is involved in the crime against humanity implicitly, and this implication "affects even the possibility of investigation, because of the likelyhood of state coverup and other obstruction of justice, and, as such, justifies lifting the ordinary space and time barriers to prosecution."[120] As in the crime against humanity jurisprudence the strongest sanction in law is invoked to condemn past state evil, Teitel fairly comes to the conclusion that the crime against humanity mediates individual and collective responsibility in the transition.[121]

Collective responsibility for a past regime's grave human rights violations has been widely attributed after World War II, as the crimes of the National Socialists and their collaborators wherein arose criminal accountability not only of individuals but also of the organization as a whole. Thus, the *Act for Liberation from National Socialism and Militarism*[122] has been adopted in Germany. Under Article 9 of the Nuremberg Charter of the IMT, "[a]t the trial of any individual member of any group or organization, the Tribunal might declare (in connection with any act of which the individual might be convicted) that the group or organization of which the individual was a member was a criminal organization. After receipt of the Indictment, the Tribunal shall give such notices as it thinks fit

[119] *Supra* note 75 at 2047.
[120] *Ibid.*
[121] *Ibid.* at 2047-2048.
[122] *Supra* note 8 at 390.

that the prosecution intends to ask the Tribunal to make such declaration and any member of the organization will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organization. The Tribunal shall have the power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard."[123] Thus, the Tribunal is vested with discretion as to whether it will declare any organization criminal. According to the interpretation given in *The Trial of the Major War Criminals* before The International Military Tribunal, "[t]his discretion is a judicial one and does not permit arbitrary action, but should be exercised in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided. If satisfied of the criminal guilt of any organization or group, this Tribunal should not hesitate to declare it to be criminal because the theory of "group criminality" is new, or because it might be unjustly applied by some subsequent tribunals. On the other hand, the Tribunal should make such declaration of criminality so far as possible in a manner to insure that innocent persons will not be punished."[124]

Article 10 of the Charter is as follows: "In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before the national, military or occupation courts. In any such case the

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[123] *Nuremberg: Charter of the International Military Tribunal* in Kritz, ed., *supra* note 8 at 460.
[124] *Criminal Organizations, Trial of the Major War Criminals before the International Military Tribunal* (1947), *supra* note 8 at 470.

criminal nature of the group or organization is considered proved and shall not be questioned."[125] As interpreted at *the Trial of the Major War Criminals* before the IMT, "the declaration of criminality against an accused organization is final, and cannot be challenged in any subsequent criminal proceeding against a member of the organization."[126]

An important issue touched by *the Trial of the Major War Criminals* concerned the definition of a criminal organization which "is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter."[127] According to the Trial's decision, the definition of the criminality of the members of a criminal organization should "exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organization."[128] As a result, the Tribunal declared to be criminal the following organizations: The Leadership Corps of the Nazi Party; the Gestapo; and the SD on the basis of their participation in War Crimes and Crimes against Humanity connected with the war. At the same time, the SA and the Reich Cabinet, which were also named by the prosecution as

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[125] *Ibid.* at 469.
[126] *Ibid.*.
[127] *Ibid.* at 470.
[128] *Ibid.*

criminal organizations, were not declared as such by the Tribunal. The members of the SA generally did not participate or even knew of the criminal acts of the SA. The Reich Cabinet was so small that members could be conveniently tried without resort to a declaration that the Cabinet of which they were members was criminal.[129]

The declaration of criminality of the organization by the Tribunal was really effective and that can be illustrated by Law Number 10 of the Control Council of Germany (1945), which provides that membership in categories of a criminal group or organization declared criminal by the International Military Tribunal is recognized as a crime.[130] Thus, the IMT criminalization of an organization leads to penal responsibility of individuals.

Collective responsibility for serious human rights violations can also be exercised through lustration and banning a criminal organization which, as different from the criminalization of an organization, do not lead to penal responsibility of its members. Thus, collective responsibility for crimes against humanity was applied in some European states after World War II. In cases of Belgium and the Netherlands people were disqualified, considered, as Luc Huyse emphasizes, not one by one but for their membership in a collaborationist group.[131] The Belgian government decided to deprive pro-German organizations collectively of their political and civil rights. In the Netherlands, all members of pro-German military

[129] *Ibid.* at 470-472.
[130] *Ibid.* at 469.
[131] L. Huyse, "Justice after Transition: On the Choices Successor Elites Make Dealing with the Past" (1995) 20 L. & Soc. Inquiry 51 at 63.

movements (and their spouses) automatically lost their Dutch citizenship and their numbers amounted to several tens of thousands.[132] However, the argument against such decisions was based upon the fact that in such cases the defendants were not - or only marginally - given a legal chance to invoke excuses that might exonerate them individually. Even if they were given that chance, they would be forced to collect evidence to prove their innocence, so that the burden of proof was reversed.[133]

In the second wave of political change in Southern Europe, as Teitel states, Greek and Portuguese juntas were brought to trial. Greece's trials were over its military police and they culminated in suspended or commutable sentences. In the third wave of political change, there were national trials in Latin America, East Europe, and Africa.[134] As far as the post-communist European states are concerned, "[t]o the extent past party practices could be shown to be corrupt and unlawful, the effort was to put Communism outside the bounds of legitimate political choice. Just as the trials of the eighteenth-century transitions from monarchic rule were used to attack the institution of kingship, so too in the twentieth century, transitional successor trials are used to delegitimate Communist rule."[135] However, as mentioned above, the number of these trials is not numerous.

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[132] *Ibid.*
[133] C. Offe, "Coming to Terms with Past Injustices" (1992) 33 Arch. Eur. Soc. at 199.
[134] *Supra* note 75 at 2041.
[135] *Supra* note 75 at 2043.

Banning criminal organizations turned out to be more successful. In Cambodia, for instance, *"Law on the Outlawing of the 'Democratic Kampuchea' Group"*[136] has been issued. In 1993, the Parliament of Czech Republic adopted *the Act on the Illegality of the Communist Regime and Resistance to It,*[137] which declared the Communist Party of Czechoslovakia to be "a criminal and contemptible organization" responsible "for the system of government in this country in the years 1948-1989, and particularly for the systematic destruction of the traditional values of European civilization, for the conscious violation of human rights and freedoms, for the moral and economic ruin combined with judicial crimes and terror against advocates of different opinions, the replacement of a prospering market economy with command management, the destruction of the traditional principles of ownership, the abuse of training, education, science and culture for political and ideological purposes, and the careless destruction of nature..." The Constitutional Court of Czech Republic in his decision on *The Act on the Illegality of the Communist Party*, answering the petition requesting to annul the Act, rejected the petitioners concept that the political regime from 1948 to 1989 in Czechoslovakia was legitimate. The arguments of the Court were that "even while there is continuity of 'old laws,' there is a discontinuity in values from the 'old regime,'" and "[t]he legitimacy of a political regime cannot rest solely upon the formal legal component because the values and principles upon which a regime is built are not just of a legal, but first of all of a political nature."[138]

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[136] *Supra* note 8 at 303.
[137] *Supra* note 8 at 366.
[138] *Ibid.* at 369-374.

The language of sanctions against the Communist Party of the Russian Soviet Federated Republic (hereinafter RCP) was even more clear: it was first suspended by the Decree[139] of President Yeltsin in August 1991, and then the activities of the Communist Party of the Soviet Union (hereinafter CPSU), the RCP were banned by the Decree of November 6, 1991.[140] These organizations were held responsible for dictatorship, absorption of the State, for a historical impasse into which the peoples of the Soviet Union were pushed, encroaching upon fundamental human and citizens' rights and freedoms recognized by the entire international community and other anti-human and anti-constitutional activities.

Such an 'organization-based' approach seems to be more successful than the 'offence-based' approach which leads to the trials of political leadership as well as the lowest rung of the totalitarian state, including the police and guards who committed offences. As practice demonstrates, the effectiveness of such offence-based approach is very low. Few trials over criminals responsible for grave violations of human rights were held, and even fewer resulted in sentences. On the contrary, banning a criminal organization not only has a symbolic meaning, but serves as a basis of making impossible the realization of any attempts to revive the analogous organization.

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[139] *Decree on Suspending the Activity of the Communist Party of the Russian Soviet Federated Socialist Republic* in *supra* note 8 at 432.

[140] *Decree on the Activities of the Communist Party of the Soviet Union and the Communist Party of the Russian Soviet Federated Republic* in *supra* note 8 at 434.

II. THE DUTY TO PUNISH GRAVE HUMAN RIGHTS VIOLATIONS UNDER INTERNATIONAL CUSTOMARY LAW

A. CUSTOMARY LAW ON THE DUTY TO PUNISH HUMAN RIGHTS VIOLATIONS

The obligation to punish grave human rights violations of a prior regime exists both in treaty and customary law. It is common knowledge that customary international law results from state practice which is followed from a sense of legal obligation and constitutes an objective aspect of customary international law, and a subjective aspect - *opinio juris*, which proves that states are acting because they believe they are bound to act.

For some scholars, an obligation to prosecute grave human rights violations exists without any doubts.[141] Bassiouni states that "[c]rimes against humanity, genocide, war crimes (under conventional and customary regulation of armed conflicts), and torture are international crimes that have risen to the level of *jus cogens*. As a consequence, the following duties arise: the obligation to prosecute or extradite; to provide legal assistance; to eliminate statutes of limitations; to eliminate immunities of superiors up to and including heads of states. Under international law, these obligations are to be considered as *obligatio ergo omnes*, the consequence of which is that impunity cannot be granted."[142]

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[141] See *supra* note 4; N. Roht-Arriaza, "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law" (1990) 78 Cal. L. Rev. 449; J. Kokott, "No Impunity fo Human Rights Violations in the Americas" (1993) 14 HRLJ 153; etc.
[142] *Supra* note 56 at 17.

Other scholars are more cautious in terminology and speak not about a duty to prosecute human rights violations in international law, but about "an emerging principle in international law that states have affirmative obligations in response to massive and systematic violations of fundamental rights."[143] These principles, according to Juan E. Mendez, oblige states to carry out four tasks in response to crimes against humanity, namely, to investigate, prosecute, and punish the perpetrators; to disclose to the victims, their families, and society all that can be reliably established about those events; to offer the victims adequate reparations; and to separate known perpetrators from law enforcement bodies and other positions of authority. Each of these four state obligations is both integral to a fair policy of accountability and yet separate and distinct from the other three, which dictates that if one of these duties is rendered legally or factually impossible, for example by a blanket amnesty law which prevents criminal prosecutions, the other duties remain in full force.[144]

Ambos considers that it is more convincing to build the argument in favour of a duty to punish extralegal executions and disappearances not on the ground of written law, but "on the more solid ground of the - newly developed - *general principles* doctrine according to which general principles are treated as an '*opinio iuris* without concordant state practice' and interpreted as an expression of the

[143] J.E. Mendez, "Accountability for Past Abuses" (1997) 19 Hum. Rts. Q. 255 at 259.
[144] *Ibid.*, at 261, 263.

'widespread sense that a legal rule is needed' taking into consideration the various soft law sources."[145]

On the other hand, some scholars sound rather sceptical about the existence of the norm which "supposedly establishes the duty of successor governments to selectively prosecute past violations of human rights" as "a necessary criterion for the validity of any norm of positive law, including positive international law, is the willingness of the governing institutions, in this case states and international bodies, to enforce it."[146] As Scharf argues, "notwithstanding an array of General Assembly resolutions calling for the prosecution of crimes against humanity and the strong policy and jurisprudential arguments warranting such a rule, the practice of states does not yet support the present existence of an obligation under customary international law to refraine from conferring amnesty for such crimes."[147]

However, the state practice supporting the existence of a duty to investigate and to punish grave human rights violations of a prior regime, though limited, still exists. And even those states, where governments have passed amnesty laws, "have not denied the existence of an obligation to investigate and prosecute, but rather have justified their acts as required by exigent circumstances that override the obligation."[148] There can be different situations and settlements,

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[145] K. Ambos, "Impunity and International Criminal Law. A Case Study on Colombia, Peru, Bolivia, Chile and Argentina" (1997) 18 HRLJ 1 at 6.
[146] C.S. Nino, "The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina" (1991) 100 Yale L.J. 2619 at 2621.
[147] *Supra* note 26 at 59.
[148] N. Roht-Arriaza, *supra* note141 at 496.

but the very existence under international law of a duty to punish human rights violations of a prior regime is significant for young democracies striving to establish justice. And it does seem realistic, contrary to Carlos Nino,[149] to hope that the international community, through external political pressure, can enforce the duty to punish past human rights abuses in case the existence of such a duty is recognized. For example, all post-communist Central and East European states aimed for becoming full members of the Council of Europe. If they were able to join the Council of Europe only after they had fulfilled their duty to punish grave human rights violations of a prior regime, much more would have been done in this respect.

Among sources suggesting an emerging obligation to investigate, prosecute, and provide redress under customary international law, Roht-Arriaza indicates (1) the treaty provisions; (2) diplomatic practice; (3) the customary law surrounding crimes against humanity; and (4) the practice of arbitral tribunals under the rules of state responsibility for the protection of aliens. All of these sources rely on the state practice in the external arena.[150] Judgments and opinions of international judicial tribunals, writings of scholars, resolutions of universal international organizations and national laws provisions can also serve as confirmation of a rule having become law through custom.

The treaty provisions, as a source of emerging duty to punish grave violations of human rights, can be found in a variety of international treaties. On

[149] *Supra* note 146, at 2638-2639.
[150] *Supra* note 79 at 40.

the one hand, there are such treaties of a general character as *the International Covenant on Civil and Political Rights*[151] (hereinafter International Covenant), *the American Convention on Human Rights*[152] (hereinafter American Convention), *the European Convention for the Protection of Human Rights and Fundamental Freedoms*[153] (hereinafter European Convention) which do not explicitly require States Parties to punish human rights violations but to respect and ensure the enumerated rights. Opinion of scholars as to the possible interpretations of the duty to ensure rights differs. Some scholars emphasize that during the negotiations of the International Covenant, the delegates specifically considered and rejected a proposal that would have required states to prosecute violators.[154] Indeed, the proposal of the delegate from the Philippines to add a new subparagraph to Article 2 (3), providing that "violators shall swiftly be brought to the law, especially when they are public officials", was rejected to ensure the broadest possible range of remedies for violations of human rights.[155]

Other scholars pay attention to the fact that nothing in the drafting history of the International Covenant is inconsistent with the duty to prosecute violations of the Covenant.[156] Moreover the Human Rights Committee, which was established to monitor compliance with the International Covenant, has interpreted

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[151] *International Covenant on Civil and Political Rights*, 16 December 1966, G.A. Res. 2200, 21 U.N. G.A.O.R. Supp. (No. 16) at 52, 999 U.N.T.S. 171.
[152] *American Convention on Human Rights*, 7 January 1970, O.A.S. Official Records, OEA/ser.K/XVI/1.1, doc. 65, rev. 1, corr. 1 (1970), *reprinted in* 9 I.L.M. 673 (1970).
[153] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5 (entered into force 3 September 1953).
[154] *Supra* note 26 at 49.
[155] U.N. ESCOR, Comm'n on Hum. Rts., 6th Sess. at 6, para. 24, U.N. Doc. E/CN.4/SR.195 (1950).
[156] *Supra* note 4 at 2571.

the obligation 'to provide a remedy' to include an obligation to investigate and punish violations of the Covenant. In a comment on Article 7, the Committee read this Article together with Article 2, and concluded that "States must ensure an effective protection through some machinery of control. Complaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation."[157]

Four communications issued by the Human Rights Committee are usually cited by scholars to support the position that the duty to ensure rights expressed in Article 2 (3) of the International Covenant implies a duty to prosecute violators. These are *Muteba* v. *Zaire*,[158] *Baboeram* v. *Suriname*,[159] *Quinteros* v. *Uruguay*,[160] and *Bleier* v. *Uruguay*[161] which require the governments of corresponding States to take effective steps to bring to justice persons found responsible.[162] Thus, in *Muteba* v. *Zaire*, the Human Rights Committee called on Zaire as the state party to the International Covenant to "provide effective remedies to the victim", including providing compensation for physical and mental injury and suffering caused by the inhuman treatment, conducting an inquiry into the circumstances of torture, punishing those found guilty of torture, and taking

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[157] 37 U.N. G.A.O.R. Supp. (No. 40) at 94, U.N. Doc. No. A/37/40 (1982).
[158] *Muteba v. Zaire*, Comm. No. 124/1982, 39 U.N. G.A.O.R. Supp. (No. 40) Annex XIII, U.N. Doc. A/39/40 (1984).
[159] *Baboeram v. Suriname*, Comm. Nos. 146/1983 and 148-154/1983, 40 U.N. G.A.O.R. Supp. (No. 40) Annex 10, para. 13.2, U.N. Doc. A/40/40 (1985).
[160] *Quinteros v. Uruguay*, Comm. No. 107/1981, 38 U.N. G.A.O.R. Supp. (No.40) Annex XXII, U.N. Doc. A/38/40 (1983).
[161] *Bleier v. Uruguay*,. Comm. No. R.7/30, 37 U.N. G.A.O.R. Supp. (No. 40) Annex X, U.N. Doc. A/37/40 (1982).
[162] See *supra* note 4 at 2572-2576.

steps to ensure that similar violations do not occur in the future. Similar conclusions were reached by the Human Rights Committee in *Bleier* v. *Uruguay* case concerning disappearances. It called on the Uruguayan government to take effective steps to establish what has happened to Eduardo Bleier since October 1975; to bring to justice any person found to be responsible for his death, disappearance or ill-treatment; and to pay compensation to him or his family for any injury which he has suffered; and to ensure that similar violations do not occur in the future. A different view is expressed by Scharf, who suggests that the Committee never actually concluded that there was an obligation to prosecute attendant to the duty to ensure the rights provided in the International Covenant.[163] However, phrases like "should bring violators to justice" do imply the duty to punish.

Like the International Covenant, the American Convention does not explicitly require States Parties to prosecute or punish violations of rights set forth in the Convention, though it has been interpreted by the Inter-American Court of Human Rights to impose on each State Party "a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."[164] In *Velasquez Rodriguez* case, the families of the victims tried to argue that the fact that Honduras had not

[163] *Supra* note 26 at 49.
[164] *Velasquez Rodriguez Case*, Inter-Am. Ct. H.R.(ser. C) No. 4, para. 174 (1988) (judgment).

prosecuted the authors of human rights violations was, in itself, a violation of the state's duty to ensure rights enumerated in the American Convention. The Court, however, rejected that argument. In sum, the Court found an affirmative obligation under the "ensure and respect" clause of the American Convention to prevent, invesigate, prosecute and punish grave violations of human rights.

The argument of Scharf is that "although the court said that '[s]tates must prevent, investigate and punish any violation of the rights recognized by the Convention', it did not specifically refer to criminal prosecution as opposed to other forms of disciplinary action or punishment."[165] As this thesis argues the existence of the duty to punish grave human rights violations of a prior regime, Scharf's argument does not contradict it. The point seems to lie in the difference between the terms "to prosecute" and "to punish". The latter one is broader as it implies "causing an offender to suffer for an offence" and "inflicting a penalty for an offence", but not necessarily "instituting legal proceedings against a person"[166] which is implied by the former one.

The Genocide Convention, which as of 1 January 1998 had 124 ratifications,[167] explicitly provides an obligation to punish persons committing genocide as defined in the Convention, whether they are constitutionally responsible rulers, public officials or private individuals (Article 4).[168] Article 5

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[165] *Supra* note 26 at 51.
[166] J. Pearsall & B. Trumble, eds., *The Oxford English Reference Dictionary*, 2nd ed. (Oxford, New York: Oxford University Press, 1996).
[167] J.-B. Marie, "International Instruments Relating to Human Rights: Classifacation and Status of Ratifications as of 1 January 1995" (1995) 16 HRLJ 75 at 82.
[168] *Supra* note 7.

calls on States to provide effective penalties for persons guilty of genocide or related offences, while Article 6 provides for trial by a competent tribunal.[169] As it was asserted in an advisory opinion of the International Court of Justice (hereinafter I.C.J.), the principles underlying the Genocide Convention "are recognized by civilized nations as binding on States, even without any conventional obligation."[170] *The Restatement (Third) of the Foreign Relations Law of the United States* (hereinafter Restatement) also suggests that "[a] state violates customary law if it practices or encourages genocide, fails to make genocide a crime or to punish persons guilty of it, or otherwise condones genocide. Parties to the Genocide Convention are bound also by the provisions requiring states to punish persons guilty of conspiracy, direct and public incitement, or attempt to commit genocide, or complicity in genocide, and to extradite persons accused of genocide."[171] Thus, customary law requires all states, even those who are not parties to the Genocide Convention, to punish persons who commit genocide.

The Torture Convention, which as of 1 January 1998 had 104 ratifications,[172] also requires that States Parties either extradite a person alleged to have committed torture or submit the case to its competent authorities for the ppurpose of prosecution (Article 7).[173] According to the Committee Against

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[169] *Ibid.*
[170] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15 at 23.
[171] *Restatement (Third) of the Foreign Relations Law of the United States*, para 702 (1987).
[172] *Supra* note 167 at 83.
[173] *Supra* note 57.

Torture,[174] which is the treaty body created by the Torture Convention, "[e]ven before the entry into force of the Convention against Torture, there existed a general rule of international law which should oblige all states to take effective measures to prevent torture and to punish acts of torture."[175]

The duty 'to extradite or to prosecute' is explicitly specified not only in the Genocide Convention and in the Torture Convention but also in treaties concerning disappearance, humanitarian law, apartheid, slavery, prostitution, piracy, hijacking, drug trafficking, and terrorism.[176] A duty to punish grave violations of physical integrity is another example of a provision implicitly included in a number of major international instruments[177] and rendered in instruments drafted recently[178].

The inclusion of similar provisions into a number of conventions can provide evidence of its being a customary norm. As Meron writes, the repetition of certain norms in many human rights instruments is itself an important articulation of state practice and may serve as a preferred indicator of customary status.[179] This ability of treaty provisions to become general rules of international

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[174] As of 1 January 1995, 37 states adopted Declarations recognizing the competence of the Commitee against torture to receive communications by a State Party against another State Party, and 35 states recognized the competence of the Committee against torture to receive communications from individuals. *Supra* note 167 at 83.

[175] *Decision on Admissibility, dated November 23, 1989, Regarding Communications nos. 1/1988, 2/1988 and 3/1988 (O.R., M.M. and M.S. v. Argentina), Report of the Committee Against Torture*, 45 U.N. G.A.O.R. Supp. (No. 44), at Annex VI, U.N. Doc. A/45/44, at 111 (1990).

[176] See *supra* note 77 at 788 *et seq.*

[177] *Supra* notes 151 (Articles 3, 7), 152 (Article 1, 3), 153 (Articles 1, 5).

[178] See, e.g., *the Inter-American Convention to Prevent and Punish Torture*, 9 December 1985, OEA/ser.A./42 (1986), 67 O.A.S.T.S., (entered into force 1987); a *Draft Declaration on the Protection of All Persons From Enforced or Involuntary Disappearances*, U.N. Doc. E/CN.4/1991.49.

[179] T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford, UK: Clarendon Press, 1989) at 92-93.

law creating binding obligations even for nonparties has been confirmed by the I.C.J. in a number of cases, for example, in the *North Sea Continental Shelf* case,[180] and the *Nottebohm* case.[181] In the latter case, for example, the Court drew on treaties to elucidate a notion of nationality in international law despite the fact that the parties to the dispute were not the parties to those treaties. In *Filartiga* v. *Pena-Irala*, the U.S. Court of Appeals in the Second Circuit reviewed possible sources of prohibiting torture in customary international law and emphasized treaties to confirm that torture constitutes a tort committed in violation of the law of nations.[182] However, some scholars do not agree that treaty provisions can bind nonparties through customary law with the exception of humanitarian treaties.[183]

A customary norm of international law can predate drafting of a treaty with an analogous norm. Prohibition of genocide can be an example of it. This norm was suggested as a *jus cogens* norm by the ILC in drafting *the Vienna Convention on the Law of Treaties.*[184] When the committee to draft the Genocide Convention was created, some members of the committee argued that as the crime was already prohibited by customary international law, a convention on the matter would weaken the principle rather than strengthen it as not all states would adhere to the Convention.[185] Indeed, the Genocide Convention merely reaffirmed that genocide

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[180] *North Sea Continental Shelf Cases* (W. Ger. v. Den.; W. Ger. v. Neth.) 1969 I.C.J. 3.
[181] *Nottebohm* (Liechtenstein v. Guat.) 1955 I.C.J. 4, 21-23 (Apr. 6, 1955).
[182] *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).
[183] See R.R. Baxter, "Multilateral Treaties as Evidence of Customary International Law" (1965-66) 41Brit.Y.B. Int'l L. at 275, 286.
[184] See Report of the Commission to the General Assembly, (1963) 2 Y.B. Int'l L. Comm. 187, 198-99.
[185] 2 U.N. G.A.O.R., 6th Comm., 39th mtg. at 20-21 (1948).

is prohibited by international law. However, as it was mentioned above, the Convention declares punishable not only the act of genocide but also conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide (Article 3).[186] Thus, all these acts are prohibited under the Genocide Convention. Customary law establishes universal jurisdiction over genocide and moreover requires all states to punish persons who commit genocide in their territory.

Another source suggesting the existence of the duty to punish human rights violations of a prior regime under customary international law is the practice of states. According to the Restatement, it includes diplomatic acts and instructions, public measures and governmental acts, and official statements of policy.[187] "States' attempts to initiate action against violators, verbal statements of government representatives, and resolutions and declarations are practices which may evince a customary international law obligation to investigate and prosecute."[188]

The Greek experience is often analyzed as the example of a state complying with the international duty to prosecute.[189] In October 1974, the government decreed that offences committed by the dictatorship would not be subject to amnesty, that the persons charged with committing such crimes would be tried,

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[186] *Supra* note 7.
[187] *Supra* note 171, para 102.
[188] N. Roht-Arriaza, *supra* note 141 at 492.
[189] *Ibid.* at 493-494.

and that former high officials would lose their pensions.[190] In January 1975, the Greek Parliament resolved that the crimes of the junta from 1967 on would not be subject to any statute of limitations.[191] In August 1975, eighteen officers were convicted after month-long public trials, and eleven received life sentences for high treason. In September, the first trial on charges of torture resulted in long prison sentences for the commanders of the junta's most notorious detention center, while lower-ranking officers were either given lighter sentences or were acquitted.[192] Even if this state practice was a response to domestic political concerns,[193] it was in compliance with the international duty to punish human rights violations of a prior regime and can support this obligation.

The state practice of granting amnesties to those who have committed crimes against humanity is provided as an argument against the present existence of an obligation under customary international law to prosecute these crimes.[194] Indeed, there are many examples when the international community or state governments agreed to amnesties for the perpetrators. Starting with a "*Declaration of Amnesty*" of all offences committed between 1914 and 1922 which accompanied *the Treaty of Lausanne*[195] and up till amnesty laws enacted in

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[190] J. Hertz, ed., *From Dictatorship to Democracy: Coping with the Legacies of Authoritarianism and Totalitarianism* (1982) at 258.
[191] *Ibid.* at 262-263.
[192] *Ibid.* at 264-265.
[193] This is the argument given by N. Roht-Arriaza, *supra* note 141at 493-494.
[194] *Supra* note 26 at 56-59.
[195] *Treaty of Peace beetween the Allied Powers and Turkey [Treaty of Lausanne]*,24 July 1923, LNTS 11, *reprinted in* 18 AJIL 1 (Supp. 1924).

Argentina,[196] El Salvador[197], and Uruguay,[198] the practice of states does not support the existence of an obligation to prosecute. However, according to Roht-Arriaza, amnesties do not contravene international duty to punish crimes against humanity as "punishment need not take the form of incarceration. Investigation itself, and disclosure of the identities of those involved, can be a form of punishment. So too can loss of rank, dismissal from a government post, loss of pension rights and monetary fines."[199] International and national criminal investigatory commissions, national lustration mechanisms and judicial redress for victims - all these are measures to implement the duty to punish human rights violations of a prior regime which have been used in state practice. Huyse also singles out such strategies of addressing the question of accountability as granting of unconditional amnesty to those who committed politically based crimes, and establishing Truth Commissions to investigate the fates, under the preceding regime, of individuals and of the nation as a whole, with the aim not to prosecute and punish but to fully disclose all human rights abuses.[200]

Adopting a law on the illegality of the former ruling criminal organization or issuing a decree banning such an organization which *de facto* ruled the country and thus making it responsible for crimes committed against its own people could become and, as practice of Central and East European States proves, often is

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[196] Argentina: Amnesty Law ("Law of National Pacification") in N.J. Kritz, ed., *supra* note 8.
[197] El Salvador: Law on General Amnesty for the Consolidation of Peace, *ibid.*
[198] Uruguay: Law Nullifying the State's Claim to Punish Certain Crimes ("Ley de Caducidad de la Pretension Punitiva del Estado"), *ibid.*
[199] N. Roht-Arriaza, *supra* note 141 at 509.
[200] *Supra* note 131 at 52-53.

another measure of discharging a duty to punish human rights violations of a prior regime.

Practice of states in their diplomatic relations is a further source suggesting the existence of an obligation under international customary law. The I.C.J. has focused in the *Nicaragua* case[201] and *Western Sahara* case[202] on verbal statements of government representatives to international organizations, the content of resolutions and declarations adopted by these organizations, and the consent of states to such instruments. According to R.R. Baxter, "[t]he firm statement by the State of what it considers to be the rule is far better evidence of its position than what can be pieced together from the actions of that country at different times and in a variety of contexts."[203] Thus, the U.S. government has repeatedly pressed governments of El Salvador, Guatemala, and Chile to prosecute serious human rights violations.[204] In 1987, El Salvador's representative informed the Human Rights Committee that President Duarte's government had abolished a police section suspected of human rights violations and had brought nearly 1000 members of the armed forces and security forces to trial for human rights violations.[205]

All the aforementioned testifies to the existence of a duty to punish grave human rights violations of a prior regime under international law. Treaty

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[201] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*, 1986 I.C.J. 14 (1986).
[202] *Western Sahara case*, 1975 I.C.J. 12, 30-37.
[203] *Supra* note 183 at 300.
[204] "U.S. Warns Salvador on Rights Cases" *New York Times* (7 January 1989) A3; "Guatemalan Says U.S. Is Unfair on Rights" *New York Times* (7 March 1990) 3; "Chile Agrees to Pay Compensation in Case of Diplomat Slain in U.S." *New York Times* (13 May 1990) 1.
[205] Human Rights Committee, 29th Sess., 719th mtg., *Consideration of Reports (El Salvador)*, p.4, U.N. Doc. CCPR/C/SR.719 (7 July 1987).

provisions, state practice, verbal statements of governmental representatives, resolutions and declarations taken together "support a finding that an obligation to investigate certain gross and systematic human rights violations and take judicial or administrative action against those responsible is now part of customary law."[206]

B. SUCCESSION OF STATES IN RESPECT OF THE DUTY TO PUNISH

The duty to punish human rights violations of a prior regime is inseparably connected with the issue of state or government succession. The change of the regime foresees either change of government when the state continues to exist, or the change of state, when one state is absorbed by another, becomes independent from another, or merges with another state The former case means state continuity, the latter is state succession. Post-communist transitions in Central and Eastern Europe give examples of state continuity as seen in Hungary, Poland, Bulgaria, and state succession as in the Czech Republic, Slovak Republic, former Soviet Union Republics.

"*Ratione materiae* succession usually involves treaty rights and obligations, territorial rights, membership in international organizations, and contractual rights and obligations including concessionary contracts, public debts, claims in tort, public funds and public property, nationality, private and municipal law rights, and the like. *Ratione personae* succession includes rights and obligations (i) between

[206] N. Roht-Arriaza, *supra* note 141 at 499-500.

the new State and the predecessor State; (ii) between the new state and third states; (iii) of the new State with respect to individuals (including legal persons)."[207] The duty to punish human rights abuses of a prior regime is related to both *ratione materiae* succession in the part of treaty rights and obligations and by *ratione personae*.

With respect to changes in the government, *Tinoco Arbitration* [208] cites Dr. John Basset Moore, who announced in his *Digest of International Law*, the general principle which became customary law: "Changes in the government or in the internal policy of a state do not as a rule affect its position in international law."

As examples of state succession in respect of treaties, Menno T. Kamminga gives Czechoslovakia, Yugoslavia and USSR.[209] While the dissolution of the Czech and Slovak Federal Republics in 1993 was comparatively unproblematic as two successor States ensured continuity of Czechoslovakia's obligations under the European Convention, the key difficulty with the dissolution of the Yugoslav Federation was whether the Federal Republic of Yugoslavia should be regarded as a continuation of the SFRY or as a new State. While the FRY itself took the former view, other States adopted the latter approach.[210] The Arbitration Commission of the Conference for Peace in Yugoslavia (Badinter Commission) issued the opinion that the FRY is a new State which cannot be considered as the

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[207] H.M. Kindred, ed., *supra* note 80 at 58.
[208] *Tinoco Arbitration* (Gr. Br. V. Costa Rica) (1923), 1 R.I.A.A. 375.
[209] M.T. Kamminga, "State Succession in Respect of Human Rights Treaties" (1996) 7 EJIL at 475-480.
[210] *Ibid.* at 476.

sole successor to the SFRY.[211] All the former SFRY Republics informed the UN Secretary-General that they considered themselves bound, by virtue of State succession, to the treaties to which the SFRY had been a party. Slovenia even made special efforts to inform the Human Rights Committee that victims of human rights violations committed by the former regime remained entitled to remedy from the successor State.[212] The jurisdiction of the European Convention was also extended to the former East Germany as a result of its unification with the former West Germany which has already been a party to the Convention.

As different from the FRY, the Russian Federation became the continuation of the former USSR. An interesting precedent was constituted by Ukraine and Belarus, who were founding members of the United Nations without being independent States. Having already been a party to many UN human rights instruments, Ukraine declared succession to the international treaties ratified by the former Soviet Union and Ukrainian SSR if they did not contradict the Constitution of Ukraine and the interests of the Republic.[213] Under Article 9 of the Constitution of Ukraine, "[i]nternational treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine. The conclusion of international treaties that contravene the Constitution of Ukraine is possible only after introducing relevant amendments to the Constitution of Ukraine."[214]

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[211] Opinion No. 10, 4 July 1992, reproduced in 31 I.L.M. (1992) 1488 at 1526.
[212] U.N. Doc. CCPR/C/79/Ad. 40 para. 6
[213] Про правонаступництво України: Закон України від 12 вересня 1991 р. //ВВР - 1991. - № 46, Ст. 617.
[214] *Constitution of Ukraine*, 28 June 1996 (1996) 52 Ukr. Q. 223 at 225.

The third category of the former Soviet Union Republics, singled out by Kamminga, comprises Estonia, Latvia and Lithuania which claimed to have restored the independence they lost when they were occupied by the USSR in 1940.[215] Without raising the question of State succession, they have accordingly informed the UN Secretary-General that they do not regard themselves as a party by virtue of the doctrine of State succession to any treaty entered into by the USSR.[216]

The concept of state responsibility applies to states and not to governments. According to Juliane Kokott, " [e]ven a drastic change in government does not exonerate a state from its international responsibility. Hence, a new democratic government remains responsible for the human rights violations committed under a past dictatorship."[217]

A different view on a responsibility of a democratically elected government either in condition of state succession or state continuity was expressed by Roht-Ariaza: the successor regime is not responsible for the grave human rights violations of its predecessors, yet it should perform its obligation to punish these violations[218]. This distinction is justified by the argument that "[w]ith no fear of retribution, each new regime can again succumb to the same repressive behavior. These problems can only be remedied by placing an affirmative obligation on the

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[215] *Supra* note 209 at 479.
[216] Communications from Estonia, dated 8 October 1991, from Latvia, dated 26 February 1993, and from Lithuania, dated 22 June 1995. *Multilateral Treaties Deposited with the Secretary-General.* Status as at 31 December 1995, 9.
[217] J. Kokott, *supra* note 141 at 158.
[218] N. Roht-Arriaza, *supra* note 141 at 461.

state to investigate and prosecute past rights violators."[219] It is also foreseen by customary international law: "A change in government does not relieve a state of its duties under international law."[220]

As communist Central and East European States ratified the International Covenant, the Genocide Convention, the Torture Convention and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, their successor States are bound by the duty to punish human rights violations of prior communist regimes under provisions of these treaties and under international customary law.

However, there are cases when successor States ratify human rights treaties after a change of regime, and only after most violations of human rights had been committed. Thus, Central and East European post-communist States have ratified the European Convention and some other human rights instruments in 1990's. Consequently, most cases coming from post-communist countries to the European Commission on Human Rights were rejected 'incompatible *ratione temporis*.' As Aeyal M. Gross states, "[t]hese rejections were often the result of the fact that the applications dealt with events that happened before the relevant country had recognized the right of individual petition under Article 25 of the Convention."[221] For example, a Hungarian applicant made an attempt to bring an old expropriation into the time frame of the European Convention arguing that the

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[219] *Ibid.*

[220] See *supra* note 164, para.184.

[221] A.M. Gross, "Reinforcing the New Democracies: The European Convention on Human Rights and the Former Communist Countries - A Study of the Case Law" (1996) 7 EJIL 89 at 90.

expropriation of land that happened in 1945 was a continuous act.[222] However, the European Commission considered it to be an instantaneous act, and rejected the application as the European Convention is only forward looking and will not be given a retrospective interpretation. Thus, the European Convention, as a rule, can not be helpful in correcting the past.

A different position was taken by the Inter-American Court of Human Rights. While claims of torture, disappearance, or summary execution are themselves inadmissable due to *ratione temporis*, claims that concern a legal duty to investigate and prosecute human rights violations are within the courts competence. The Inter-American Court of Human Rights has established that under the American Convention, "[t]he State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction to identify those responsible, impose the appropriate punishment and ensure the victim adequate compensation."[223] The Court emphasized that the duty to clarify the fate of someone who has disappeared, and to inform the victim's relatives of the results of these efforts, persists as long as the victims's fate remains uncertain. This decision was based upon the principle of the continuity of the State in international law according to which responsibility exists both independently of changes of government over a period of time and continuously from the time of the act that creates responsibility to the time when the act is declared illegal.

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[222] Application 21344/93, 30 June 1993.
[223] *Supra* note 164, Inter-Am. Ct. H.R. 35, OAS/ser. L/V/III. 19, doc. 13, app. VI (1988), para 174.

To sum up, post-communist Central and East European States have the duty to punish grave human rights violations of their prior regimes under international treaties which have been ratified by those prior regimes themselves and to which new states are successors.

C. STATE PRACTICES OF PUNISHING HUMAN RIGHTS ABUSES

1. TRANSITIONAL JUSTICE

The problem of correlation of law, politics and justice inevitably arises in periods of political change. According to Teitel, "a dilemma arises over adherence to the rule of law that relates to the problem of successor justice. To what extent does bringing the *ancient regime* to trial imply an inherent conflict between predecessor and successor visions of justice? In light of this conflict, is such criminal justice compatible with the rule of law? The dilemma raised by successor criminal justice leads to broader questions about the theory of the nature and role of law in the transformation to the liberal state."[224]

Many scholars consider that in transitional periods the main role is conferred on criminal justice as trials over human rights perpetrators are claimed to create a new legal order. The questions before courts in transitional societies usually concern the recognition of defenses that are based on prior regime law. Thus, the Berlin Trial Court in 1992 rejected the former German Democratic Republic's *Border Protection Law* because "the question presents itself whether

[224] *Supra* note 75 at 2018.

everything is right that is formally and interpretatively considered a right."[225] In another judgment of October 24, 1996, the Court stated that "the violation is so serious that it violates the legal convictions common to all nations regarding the value and dignity of the human being. For such a case, positive law must give way to justice."[226] Thus, in transitional periods the rule-of-law principle takes precedence over the prior regime laws.

Exercising criminal justice in transitional societies concerns statutory limitations to offences commited almost half a century ago. Alongside of the fact that all post-communist states have ratified *the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity* which entered into force in 1970, constitutional courts in many of these post-communist states have upheld new statutes authorizing prosecutions for offences of the prior regime. Thus, the statute of limitations was lifted in Poland in 1991 on crimes committed between 1946 and 1952.[227] Similar was the decision of the Constitutional Court of the Czech Republic upholding the *Act Regarding the Lawlessness of the Communist Regime and Resistance to It.*[228] The Constitutional Court of Hungary authorized 1956 prosecutions based upon offences constituting 'war crimes' and 'crimes against humanity' under international law.

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[225] Judgment of 20 January 1992, Landgericht [LG] (Berlin), (1992) 13 Juristen Zeitung 691, 692.
[226] Judgment of 24 October 1996, Bundesverfassungsgericht [BVerGE], http://www.uniwuerzburg.de/glaw/bvr94185.html (date accessed: 26 March 1997).
[227] P. Koza, "Former Security Officers Go on Trial for Torturing Prisoners" *UPI* (13 October 1993).
[228] Decision of 21 December 1993, Const. Ct. Czech Rep. (on file with Center for the Study of Constitutionalism in Eastern Europe, Univ. of Chicago).

This new understanding of the rule of law is usually established in post-communist transitions by newly founded Constitutional courts, that seek to enforce the new states' constitutions.[229] According to Teitel, Constitutional courts assist in the transformation to rule-of-law systems in a number of ways, first, defining by their very establishment a break from past political arrangements; second, enabling a form of participation in the fledgling democracy through litigation; and third, having become guardians of the new constitutional order through engaging in judicial review.[230]

Neil J. Kritz singles out two possible ways of coping with the legacy of the past: criminal sanctions against the leaders of the ousted regime or their henchmen for the abuses they inflicted upon the nation, and non-criminal sanctions which most frequently constitute purging from the public sector those who served the repressive regime.[231] Criminal prosecution of the perpetrators was the typical policy toward collaborators in West European countries which were occupied by the Nazis during World War II. As different from this strategy, in post-communist Central and East European states lustration or disqualification of the former elites, of the agents of the secret police and their informers, or of civil servants was used as a second way to address the questions of acknowledgment and

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[229] See H. Schwartz, "The New East European Constitutional Courts" (1992) 13 Mich. J.Int'l L. 741; R. Teitel, "Post-Communist Constitutionalism: A Transitional Perspective" (1994) 26 Colum. Hum. Rts. L. Rev. 167.

[230] *Supra* note 75 at 2032.

[231] N.J. Kritz, "The Dilemmas of Transitional Justice", in N.J. Kritz, ed., *Transitional Justice*, vol. 2 (Washington, D.C.: United States Institute of Peace Press, 1995), at xxxi, xxxiv.

accountability.[232] Both ways constitute individual responsibility and are not unanimously accepted.

Arguments in favour of prosecution and those against prosecution are often antipodal. Thus, the argument that prosecutions of former regime crimes strengthen fragile democracies which need legitimacy as they foster respect for democratic institutions and deepen democratic tradition in a society is countervailed by the agument that prosecutions can have highly destabilizing effects on an immature democracy as they can jeopardize the democratic transition and considerably weaken the legitimacy of the new regime. On the one hand, there is an argument that impunity precludes the coming of reconciliation, while, on the other hand, there are suggestions that criminal prosecutions may also preclude the reconciliation. Columnist Charles Krauthammer argues that truth telling always promotes reconciliation while trials are vindictive.[233] According to Mendez, in the position exemplified by Krauthammer, truth is actually proposed as an alternative to justice though, in fact, the best exercises in truth telling so far have not been predicated on the prospect of immunity from prosecutions.[234] Both the Sabato commission in Argentina and the Rettig commission in Chile withheld names of accused perpetrators in their final reports, but submitted them with the relevant

[232] *Supra* note 131 at 52.
[233] Ch. Krauthammer, "Truth, Not Trials: A way for the newly liberated to deal with the crimes of the past" *Wash. Post* (9 September 1994) A27.
[234] *Supra* note 143 at 268.

evidence to the courts as a way of contributing to justice[235] as opposed to the South African Truth Commission, based on promises of amnesties.

Some scholars and politicians claim that for the sake of a nation's reconciliation, it is necessary to leave the past behind and just to forgive the sins of a prior regime. However, punishing grave human rights violations of a prior regime is necessary to prevent their recurrence in the future and to repair the damage they caused. As fairly stated by the German writer Jurgen Fuchs, "[i]f we do not solve this problem in a definite way, it will haunt us as Nazism did. We did not denazify ourselves, and this weighed on us for years."[236] Impunity, moreover, allows "people to move into leadership positions whose involvement in the former regime makes them liable to blackmail through the threat of exposure."[237] Finally, there can hardly be any counter argument to the one that the successor government is bound to ensure that justice be done, first of all, as a moral obligation to the victims of the repressive system.

Country studies give examples of different ways of coping with the legacy of past regimes. They can be divided into those where the international community participated in adjudicating processes and those where transitional justice was performed or there were attempts to perform it domestically.

Among the former, the major historical precedent was the establishment of the International Military Tribunal at Nuremberg to prosecute Nazi leaders for war

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[235] *Comision Nacional sobre la Desaparicion de Personas, Nunca mas: The Report of the Argentine National Commission on the Disappeared*, 1st Am. ed. (1996); *Informe de la Comision Nacional de Verdad y Reconciliacion*, Tomo I (1991).
[236] "Justice or Revenge?" (1993) 4 J. Democracy 20 at 25.
[237] *Supra* note 133 at 195.

crimes, crimes against humanity and crimes against peace which was followed by numerous trials conducted by the occupying powers in their zones. Subsequently, the prosecution of Nazi criminals was left to the Germans.

Another problem concerning transitional justice was "how to replace Nazis and Nazi collaborators with knowledgeable democrats or at least with non-Nazis in all the major fields of government, politics, administration, judiciary, education, and cultural life."[238] To implement the purge program, *the Law for Liberation from National Socialism and Militarism* was enacted by the Laenderrat for the three Laender of the U.S. zone on March 5, 1946 which provided for the screening and categorizing of the entire adult population. As a result, in the U.S. zone "of three and a half million people processed by local boards, almost two and a half million were granted amnesty without trial; of the remainder, about 37 percent were exonerated; 51 percent were classified followers, 10.7 percent were classified lesser offenders, 2.1 offenders, and 0.1 major offenders; however by May 1948, appeal boards had downgraded all but 30 percent of those classified lesser offenders, offenders and major offenders by the local boards, so that most of them had escaped, or could expect to escape, the higher categorization. Of those convicted, the vast majority was merely fined; of those sentenced to labor camps, most had previous internment counted against such sentence; and of those held ineligible to hold public office or subject to other employment restrictions, such proscriptions were limited to short probation periods."[239] The results in the British

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[238] J.H. Herz, "Denazification and Related Policies" in Kritz, ed., *supra* note 231, at 19.
[239] *Ibid.* at 26.

and the French zones were even less comprehensive. Yet, both criminal and non-criminal, international and domestic sanctions against Nazis and Nazi collaborators had been very important for preventing the recurrence of Nazi system in the future. Though measures of individual responsibility turned out to have little effect, of great significance, however, was banning both the National Socialist German Workers' Party as a criminal organization and the propagation of Nazi ideology in Germany.

The only other examples of the international community's participation in prosecuting persons responsible for genocide and crimes against humanity are the ICTY and the ICTR [240] Notwithstanding the bureaucratic lag and other difficulties faced by the Prosecutor's office of the ICTY, as of 15 September 1996, seventy-five persons have been indicted, one was being prosecuted, one pleaded guilty, and seven were being held in custody.[241] The large number of accused is currently awaiting trial of the ICTY. As Bassiouni states, unlike the Yugoslav Tribunal which was fully operational but could not apprehend those who were indicted, the Rwanda Tribunal was not able to prosecute those held in custody.[242] As of now, two persons were convicted by the decision of the ICTR. One of them is Jean Kambanda, Rwanda's Prime Minister during the genocide who has pleaded guilty. This first-ever sentence for genocide was pronounced by the ICTR on 4 September, 1998.[243]

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[240] See F.P. King & A.-M. La Rosa, "The Jurisprudence of the Yugoslavia Tribunal: 1994-1996" (1997) 8 EJIL 123; D. Shraga & R. Zacklin, *supra* note 52.
[241] *Supra* note 20 at 44-45.
[242] *Ibid.* at 48.
[243] Press Release AFR/93L/2894 31 August 1998.

Some scholars argue that these international tribunals will have little or no effect on human rights violations of such enormous barbarity as they are disarticulated, if not entirely irrelevant, to the political, reconstructionist, and "peace" and "normalization" processes underway in Rwanda and the republics of the former Yugoslavia.[244] To their view, the main focus for the punishment of war criminals must remain at the national level as "the uglineness of war, the political reality of various hatreds - racial, religious, and gender - cannot be isolated into an international courtroom for resolution. Such a court would only make sense if it was part of a comprehensive domestic and international process of punishment, reconstruction, and reconciliation."[245] It is difficult to theoretically disagree with this argument, however, in transitional periods of political flux it is often impossible to gain such a comprehensive domestic process without the international community's participation. Dealing with past abuses at the national level quite often leads to impunity, pardons and amnesties.

Latin America's rich practice in this respect can be offered as proof. In Argentina, efforts of President Alfonsin to investigate human rights violations and to bring to trial both military chiefs who gave the orders and the officers who committed them were rather successful at the beginning, but received opposition from the army. In 1987, *the Due Obedience Law* was passed which had the effect of an amnesty by precluding a criminal penalty for torture and other human rights violations committed before 1983 under the previous military regime. As a result,

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[244] M. Mutua, "Never Again: Questioning the Yugoslav and Rwanda Tribunals" (1997) 11 Temple Int'l & Comp. L.J. 167 at 168.
[245] *Ibid.* at 170.

President Menem granted presidential pardons to all those convicted or under trial for state and subversive acts of terrorism, for misconduct in the war, or for rebelling against democratic institutions.[246]

In 1986, Uruguay passed *the Law Nullifying the State's Claim to Punish Certain Crimes* which declared an expiration of the state's punitive authority over crimes committed prior to March 1, 1985, by military and police personnel for political motives, in the performance of their functions or on orders from commanding officers who served during the de facto period.[247] Subsequently, in October 1987, El Salvador adopted *the Law on General Amnesty for the Consolidation of Peace* which covered crimes committed before October 1987.[248]

The practice of impunity is also a present issue in Colombia, Peru, Chile and Bolivia. According to Ambos, [t]he military justice system and "impunity laws" are the main *normative dimensions* of impunity. However, certain country specific peculiarities must be taken into account. The *military justice* system, particularly in Colombia and Peru, generates impunity, while in Chile and Argentina "*impunity laws*" in the form of amnesties and pardons have almost rendered superfluous the impunity generated by military justice. The Peruvian amnesty law of 1995 has a similar effect, while in Colombia the policy of remission and reduction of penalty has favoured insurgents, paramilitary groups and drug traffickers rather than the state security forces."[249]

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[246] *See* generally C.S. Nino, *supra* note 146; J. Kokott, *supra* note 141.
[247] *Supra* note 198.
[248] *Supra* note 197.
[249] *Supra* note at 145.

The international community did interfere. The Inter-American Commission on Human Rights has found that amnesties violate the American Convention. In the cases of Uruguay, El Salvador, and Argentina, the Inter-American Commission found that the American Convention's provisions gave rise to a duty of international law to prosecute that could not be extinguished or overruled by a domestic amnesty.[250] Moreover, as mentioned above, a legal duty to investigate and punish human rights violations was confirmed in *Velasquez case.*[251]

The practice of post-communist states in coming to terms with their past demonstrates application of international law provisions. Thus, governments, parties, judges, and legal scholars in Czechoslovakia, Hungary, and Poland have regularly invoked international conventions on human rights when preparing or reviewing criminal or lustration laws. In Poland, for example, a local Helsinki Committee has been set up and its proposals for procedural guidelines have received great attention in the debate on screening. The Hungarian President has asked the Constitutional Court to review two articles of the February 1993 *Act on Procedures Concerning Certain Crimes Committed during the 1956 Revolution* for their conformity with article 7.1 of the European Convention and with article 15.1 of the International Covenant[252] and the Constitutional Court upheld the Act

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[250] Inter-American Commission on Human Rights, Report No. 26/92 (El Salvador), 82nd Sess., OEA/ser. L/V/II.82 (24 September 1992); Report No. 29/92 (Uruguay), 82nd Sess., OEA/ser. L/V/II.82, Doc. 25 (2 October 1992); Report No. 24/92 (Argentina), 82nd Sess., OEA/ser.L/V/II.82, Doc. 24 (2 October 1992).
[251] *Supra* note 164.
[252] *Supra* note 131 at 74.

basing its decision upon international legal norms concerning offences constituting "war crimes" and "crimes against humanity" under international law.[253]

According to Teitel, "[i]n periods of political flux, international law offers a useful mediating concept. ... Grounded in positive law, but incorporating values of justice associated with natural law, international law mediates the rule-of-law dilemma."[254] On the other hand, there exists a clear tendency to emphasize domestic enforcement of international obligations. "This scheme - a preference for domestic enforcement with allowance for 'fallback' international jurisdiction - is embodied in several recent and draft conventions, which place primary responsibility for punishing proscribed conduct on the state where the crime occured, but establish universal jurisdiction to ensure prosecution in the event that the government most responsible for suppressing violations fails to bring offenders to account."[255] Thus, the best results in solving the problems of transitional justice can be achieved through joint efforts of domestic and international instruments.

2. POST-COMMUNIST TRANSITIONAL CASES

Post-communist states of Central and Eastern Europe, though having experienced similar legacies of the past, undertook different approaches to the issue of coping with past human rights abuses. In his study "The Third Wave", Samuel Huntington argues that the process of democratization can be seen in terms of the interplay between governing and opposition groups along a continuum

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[253] *Infra* note 278.
[254] *Supra* note 75 at 2029.
[255] *Supra* note 4 at 2562.

that produces three types of transition : transformation, when the elites took the initiative to bring about democracy; replacement, when the initiative rested with the opposition; and transplacement, when democratization came about through joint action on the part of both government and opposition.[256] Following Rustow's review of Huntington's book,[257] Huyse prefers the plain words *overthrow, reform,* and *compromise* as alternatives to Huntington's terminology.[258] According to Huntington, Hungary and Bulgaria were transformations, Poland and Czechoslovakia transplacements, and East Germany a case of replacement.[259] Consequently, the issue of coming to terms with the past was approached in different ways in Central and East European states.

In 1991, Czech and Slovak Federal Republic adopted the *Screening ("Lustration") Law*[260] which banned members of the National Security Corps, residents, agents, collaborators of the State Security, party officials (Article 2) from exercising functions in the State administration, in the Czechoslovak Army and other functions, specified in Article 1 of the Law for a period of five years until January 30, 1996. Later, Parliament extended the law to the year 2000, overiding a veto by President Vaclav Havel.[261] This law might affect 300,000 people.[262] However, on the complaint of the Trade Union Association of Bohemia, Moravia

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[256] See M. Kraus, "Settling Accounts: Postcommunist Czechoslovakia" in Kritz, ed., *supra* note 231, at 542.
[257] D. Rustow, "The Surging Tide of Democracy" (1993) 3 J. Democracy 119 at 119.
[258] *Supra* note 131 at 75.
[259] *Ibid.*
[260] Czech and Slovak Federal Republic: Screening ("Lustration") Law. Act No. 451/1991 (October 4, 1991) in N. J. Kritz, ed., *supra* note 8 at 312.
[261] See M.E. Ellis, "Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc" (1996) 59 L.& Contemp. Probs. 181 at 182.
[262] V. Benda, "Interview" (1992) 5 East Eur. Rev. 42.

and Slovakia, and the Czech and Slovak Confederation of Trade Unions, the International Labour Organization invited the Government of the CSFR, taking into account the conclusions made in the report of the Committee, to refer the matter to the Constitutional Court of the CSFR for a ruling on Act No. 451/1991 ("Lustration Law"), with due regards to the provisions of *Convention No.111 as Regards Protection against Discrimination on the Basis of Political Opinion* and to take the necessary measures to repeal or modify Act No. 451/1991.[263] Subsequently, in November, 1992 Constitutional Court of CSFR found the provisions of several articles of the Screening Law not conforming with *the Bill of Basic Rights and Freedoms*.[264] Thus, the Constitutional Court declared illegal that the law targeted "potential candidates for collaboration".

After the splitting of Czechoslovakia into two countries, the Czech Republic continued lustration proceedings under the same law that existed in Czechoslovakia. By August 1993, 210,000 people had been screened[265] with the consequence on some of them of having been banned from the exercise of the functions in the State administration, in the Czech Army, in the Office of the President of the Czech Republic and some other offices. However, as Huyse states, it is extremely difficult to judge the real impact of the Czechoslovakian Screening Act. In its original form it lasted only for one year.[266]

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[263] Czech and Slovak Federal Republic: International Labour Organization Decision on the Screening Law. GB.252/16/19 (February 28, 1992) 252nd Session in Kritz, ed., *supra* note 8 at 334.

[264] Czech and Slovak Federal Republic: Constitutional Court Decision on the Screening Law (November 26, 1992) in Kritz, ed., *supra* note 8 at 346.

[265] "Editor's Introduction" in N.J.Kritz, *supra* note 231 at 534.

[266] *Supra* note 131 at 68.

In 1993, the *Act on the Illegality of the Communist Regime and Resistance to it* was adopted in the Czech Republic, which declared the regime based on the communist ideology deciding on the government of the State and the fate of the citizens of Czechoslovakia from 25 February 1948 to 17 November 1989 to be criminal, illegal, and contemptible (Article 2).[267] The Communist Party of Czechoslovakia was considered to be a criminal and contemptible organization.[268] In response to the petition of a group of deputies of the Parliament of the Czech Republic to the Constitutional Court requesting nullification of that Act, the Constitutional Court confirmed the illegitimate nature of the political regime from 1948 to 1989.[269] According to Jan Obrman, the law on the illegitimacy of the Communist Party could serve as a legal basis for its liquidation in the future similar to the legislation outlawing both the National Socialist German Workers' Party and the propagation of Nazi ideology in Germany which have been used repeatedly as a justification for banning them.[270] This consequence of the aforementioned law as well as providing moral satisfaction for the victims seems to be the main outcome of it. The importance of that law was stressed by President Havel: "[T]hrough this law, the freely elected parliament is telling all victims of communism that society values them and that they deserve respect."[271]

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[267] Czech Republic: Act on the Illegality of the Communist Regime and Resistance to It. Act No. 198/1993 (July 9, 1993), in Kritz, ed., *supra* note 8, at 367.
[268] *Ibid.*
[269] Czech Republic: Constitutional Court Decision on the Act on the Illegality of the Communist Regime (December 21, 1993), *supra* note 8 at 369-374.
[270] Jan Obrman, "Czech Parliament Declares Former Communist Regime Illegal", in Kritz, ed., *supra* note 231 at 590.
[271] See *ibid.* at 592.

In Slovakia, the new government opposed the Lustration Law and, in January 1994, petitioned the Constitutional Court to overturn it. Though the Court rejected the petition, the law was never invoked until it expired at the end of 1996.[272] In February 1996, the Slovak National Council adopted a new law declaring the former Communist regime "immoral" and "illegal"[273] which has yet to be reviewed by the Constitutional Court.

Hungary was the first among former communist countries to adopt the law that would result in criminal proceedings against former communist officials. It was the November 4, 1991 *Law Concerning the Prosecutability of Offenses Committed Between December 21, 1944 and May 2, 1990* introduced by two deputies of the Hungarian-Democratic Forum, Peter Takacs and Zsolt Zetenyi. The bill called for the suspension of the statute of limitations for cases of treason, premeditated murder, and aggravated assault leading to death that had been committed between 21 December 1944 and 2 May 1990 where, for political reasons, prosecutions had not previously been possible.[274]

Arguments in favor of the law concerned the fact that the victims of Communists' crimes were still living alongside torturers and murderers and that distorted the concept of right and wrong.[275] The trials were not going to be against the average citizens who might have become communist party members in order to get or to keep their job, but against the people involved in torturing or

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[272] *Supra* note 261 at 183.
[273] "Constitutional Watch" (1996) 5 E. Eur. Const. Rev. 2 at 26.
[274] J. Pataki, "Dealing with Hungarian Communists' Crimes" in Kritz, ed., *supra* note 231 at 648.
[275] *Ibid.* at 650.

killing innocent individuals. Yet, a unanimous Constitutional Court overturned the law as lifting the statute of limitations and including treason among the crimes, and the definition of treason has changed several times during the past decade. The Court justified its decision by adherence to the principles of the rule of law: "Legal certainty based on objective and formal principles takes precedence over justice which is partial and subjective at all times."[276] The decision of the Court has received different reactions and responses. Teitel gives such an important justification for the jurisdictional tampering as referring homicide acts that are the subject of the challenged legislation to a category of grave criminal offenses, crimes against humanity. "Protection of the rule of law also implies adherence to fundamental international law norms such as the principle of the imprescriptibility of crimes against humanity. The failure to refer to any national or international precedents on this question is a glaring omission in the Hungarian constitutional court's opinion".[277]

Still, this was not the end of the story. In March 1993, the Hungarian Parliament adopted a Law on *"Procedures Concerning Certain Crimes Committed During the 1956 Revolution"* based on such international instruments as *the* Geneva *Conventions Relative to the Treatment of Civilians in the Time of War* and *Relative to the Treatment of Prisoners of War* of 1949 and the New York *Convention on the Non-Applicability of Statutory Limitations to War Crimes and*

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[276] Hungary: Constitutional Court Decision on the Statute of Limitations. No. 2086/A/1991/ 14 (March 5, 1992) in Kritz, ed., *supra* note 8 at 629-640.

[277] S.J. Schulhofer, M. Rosenfeld, R. Teitel, and R. Errera, "Dilemmas of Justice" in Kritz, ed., *supra* note 231 at 659.

Crimes Against Humanity of 1968. In its pre-promulgation review, the Constitutional Court upheld the main part of the law on the basis of the interpretation of Article 7 of the constitution: "The legal system of Hungary shall respect the universally accepted rules of international law, and shall ensure, furthermore, the accord between the obligations assumed under international and domestic law." The Act was interpreted as ensuring the enforcement of "universally accepted rules of international law."[278]

As in other Central European states, a screening law was also adopted in Hungary. The *Law on the Background Checks to be Conducted on Individuals Holding Certain Important Positions*. Law No. 23 (March 8, 1994)[279] had even more positions liable for verification. According to Edith Oltay, the purging of former agents from high ranking state positions was necessary not only because of moral considerations but also because those occupying such positions were susceptible to blackmail. Thus, it was likely to contribute to Hungary's coming to terms with its past.[280] The Law subjected approximately 12,000 officials to a screening process by at least two committees consisting of three professional judges each, which were to complete their work between July 1, 1994 and June 30, 2000. Information about public officials will be accessible to the public thirty years after the panel's ruling, i.e. in 2030.[281] After the Constitutional Court struck down

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[278] See K. Morvai, "Retroactive Justice Based on International Law: A Recent Decision by the Hungarian Constitutional Court" in Kritz, ed., *supra* note 231 at 662.
[279] Hungary: Law on the Background Checks to be Conducted on Individuals Holding Certain Important Positions. Law No. 23 (March 8, 1994) in Kritz, ed., *supra* note 8 at 418-425.
[280] E. Oltay, "Hungary's Screening Law", in Kritz, ed., *supra* note 231 at 667.
[281] *Ibid.* at 664.

several provisions of the 1994 law, Parliament enacted a new law in July 1996, which stipulates that all persons born before February 14, 1972 must be screened before taking an oath before the Parliament or the President.[282] After two screening committees examined the records of approximately 600 officials, in April 1977, several deputies came under scrutiny for being suspected as having worked as secret agents.[283]

Decommunization of East Germany, as different from other Central European States which dealt with their former regime crimes domestically, had been committed to a great extent by West German laws and courts. According to the decision of the Commission on Security and Cooperation in Europe on "Human Rights and Democratization in Unified Germany", some east Germans found the process unsatisfying, all the more so as the system had largely failed to prosecute the leaders of the corrupt and immoral East German regime."[284]

One of the primary goals of the decommunization process in East Germany was the historical, political, and juridical reappraisal of the activities of the State Security Service (Stasi). On November 15, 1991, the united German parliament adopted a law permitting citizens to see their files and a month later, on December 20, *the Act Concerning the Records of the State Security Service of the Former German Democratic Republic* ("Stasi Records Act")[285] was approved. On January

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[282] *Supra* note 261 at 184.
[283] *Ibid.*
[284] Commission on Security and Cooperation in Europe, "Human Rights and Democratization in Unified Germany" (September 1993) in Kritz, ed., *supra* note 231 at 595.
[285] Germany: Act Concerning the Records of the State Security Service of the Former German Democratic Republic ("Stasi Records Act") (December 20, 1991), in Kritz, ed., *supra* note 8 at 261-285.

2, 1992, the files were opened and anyone could obtain the contents of his Stasi file. "These checks have resulted in the dismissal of thousands of judges, police officers, schoolteachers and other public employees in eastern Germany who once informed for the Stasi."[286] However, according to Thomas R. Ronchon, it was hard to find a legal basis for prosecuting Stasi activities. Unlike the genocidal policies of the Nazi regime, the claim could not be made that telling the secret police about the activities of a friend, neighbor, or colleague was a violation of international law. West German law made it punishable for East German agents to spy on West or East German citizens, but the five year West German statute of limitations rendered prosecution under those terms near impossible. As a consequence, the government was obliged to prosecute officials of the former regime for transgressions of East German law, rather than questioning the morality of those laws in the first place.[287]

The moral consequences of the opening of the Stasi files were quite unpredictable. As it is pointed out in the report of the Commission on Security and Cooperation in Europe "Human Rights and Democratization in Unified Germany," "[f]rom well-respected dissident Vera Wollenberger, who learned with horror that her own husband had betrayed her, to Gerhard Riege, a member of the Bonn parliament who hanged himself after it was reported that he had been a Stasi informer, countless lives have been profoundly affected."[288] Yet, who knows how

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[286] "Germans Anguish Over Police Files" *The New York Times* (20 February 1992).
[287] T.R. Ronchon, "The Wall Within: Germans Cope with Unification" in G. Post, ed., *German Unification, Problems and Prospects* (Claremont, CA: The Keck Center for International and Strategic Studies, 1992) at 32-35.
[288] *Supra* note 284 at 597.

many lives have been affected as a result of the activity of Stasi informers. Moreover, as Joachim Gauck points out, "[j]ust imagine what would have happened if the files had been kept secret: not only would it have been impossible to create a climate of trust, but the files could have been used to threaten and blackmail people."[289]

There were efforts in Germany to prosecute the former President Erich Honecker and five other high-ranking Communist Party officials. The charges were based on three grounds: 1) that Mr. Honecker had exceeded his power under East German law; 2) that he broke international laws, including *the International Covenant on Civil and Political Rights*; and 3) that he violated basic human rights. By January 1993, however, a terminally ill Honecker was relieved from the trial and the Berlin Constitutional Court lifted the arrest order.[290]

In Albania, the 1992 *Law on Political Parties* prohibited the creation of "any party or organization with an antinational, chauvinistic, racist, totalitarian, Fascist, Stalinist, 'Enverist' or Communist, or Marxist-Leninist character, or any political party with an ethnic or religious basis."[291] Between 1992 and 1994, the government brought charges against more than seventy former Communist officials.[292] In December 1993, ten senior officials were each fined the equivalent of $60,000 and sentenced to prison.[293] A very important *Law on Genocide and*

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[289] "The Clean Up Bureau" in N.J. Kritz, ed., *supra* note 231 at 609
[290] *Supra* note 284 at 599-600.
[291] *U.S. Department of State, Albania Country Report on Human Rights Practices for 1996*, 30 January 1997 at 822.
[292] *Ibid.*
[293] Commission on Security and Cooperation in Europe, "Human Rights and Democratization in Europe" in N.J. Kritz, ed., *supra* note 231 at 729-34.

Crimes against Humanity Committed during the Communist Regime for Political, Ideological, and Religious Motives ("Genocide Law") was adopted in 1995 which prohibits persons with ties to the regime prior to March 1991 from holding selected positions in the government, parliament, judiciary, or mass media until the year 2002.[294] In January 1996, Albania's Constitutional Court upheld most provisions of the Genocide Law as well as of the 1995 *Law on the Verification of the Moral Character of Officials and Other Persons Connected with the Defense of the Democratic State* ("Lustration Law").[295] As a result of the screening process, 139 candidates were banned from participating in the 1996 parliamentary elections. However, democracy turned out to be very weak in Albania and, regardless of the results of screening, the Socialist Party was returned to power in the June 1997 elections.[296]

Bulgaria went a different way, and the Union of Democratic Forces regained power in 1997 elections. The Law which makes mandatory the opening of all files of members of high government officials and gives them one month to admit their past activities was adopted in July 1997. It was upheld by the Bulgarian Constitutional Court. However, the Court did support the claim of the opposition party deputies that the law could jeopardize the ability of the president, vice president, and members of the Constitutional Court to function, and ruled that the files of individuals in those positions should not be opened.[297]

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[294] *Supra* note 261 at 185-186.
[295] *Ibid.*
[296] *Ibid.* at 187.
[297] *Ibid.* at 189.

With the exception of the Baltic states, where transition started as replacement and changed into transplacement, all the rest of the former Soviet Union republics combined elements of two or more transitions. Launched by the leader of the Communist Party of the former Soviet Union policy of perestroika (economic reconstruction) and glasnost (openness), it was continued by the democratic forces of the opposition in almost all of the former Soviet Union republics after the failed coup organized by a group of Communist Party, military, and KGB officials. On August 25, 1991, President Yeltsin issued decrees suspending the activity of the Communist Party of the Russian Federation and confiscating its assets, and in November, 6, 1991 Decree suspensions were converted into a ban of the Communist Party. On the petition of a group of people's deputies, the Constitutional Court of Russian Federation examined the constitutionality of the aforementioned decrees. After detective like court hearings which took more than a year, the Court announced its solomonic decision which, according to Robert Sharlet, was a compromise giving each side something and served as a mirror reflecting the disorderly, conflict-ridden politics of the transition period in Russia.[298] The lawfulness of banning the central executive organs of the CPSU/RCP was confirmed, yet the Party had the right to reestablish the local branches of the RCP.

Efforts to screen and purge former Communist Party officials and to adopt a lustration law failed in Russia. Moreover, some laws on state security were

[298] R. Sharlet, "The Russian Constitutional Court: The First Term" in N.J. Kritz, ed., *supra* note 231 at 749, 750.

passed that complicated implementation of lustration. One, the *Law on Operative and Detective Activity,* bans the exposure of witting agents of the KGB (Article 16).[299] Similarly, the *Law on Federal Security Organs of the Russian Federation* protects the covert status of persons cooperating with "state security organs" (Art. 17).[300] Such practice, quite contrary to lustration, is unprecedented in other Central and East European States.

In Lithuania, the government issued *a Decree Banning KGB Employees and Informers from Government Positions,*[301] and *a Law on the Verification of Mandates of Those Deputies Accused of Consciously Collaborating with Special Services of Other States* was adopted.[302] Though these acts were implemented and the Temporary Commission of the Supreme Council investigated collaboration with the KGB and other secret services in Lithuania, absolute justice has not been reached. Much of Lithuanian KGB files had been removed to Russia and not all of them were returned. Soon, replacement gave way to transplacement and the Lithuanian Democratic Labour Party, which was a successor to the banned Communist Party, won the parliamentary election of October 1992. To the merit of the ex-president of Lithuania and LDLP leader, Algirdas Brazauskas, he did not run for presidential post in 1997 on the basis that Lithuania deserved to have a President who had not been a Communist leader in the past. Such good will of

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[299] V. Yasmann, "Legislation on Screening and State Security in Russia" in N.J. Kritz, ed., *supra* note 231 at 760.
[300] *Ibid.*
[301] Lithuania: Decree Banning KGB Employees and Informers from Government Positions. Decree No. 418 (October 12, 1991) in Kritz, ed., *supra* note 8 at 427.
[302] Lithuania: Law on the Verification of Mandates of Those Deputies Accused of Consciously Collaborating with Special Services of Other States. Law No. 1-2115 (December 17, 1991) in Kritz, ed., *supra* note 8 at 428-431.

former Communists to exercise transitional justice and to come to terms with the past would be the best solution of dealing with the legacy of the past.

In 1998, a new lustration law had been passed. However, at talks on the evening of 22 July 1998, Lithuanian Prime Minister Gediminas Vagnorius said he supports President Valdas Adamkus's opinion that the recently passed lustration law is "dubious from the point of view of the constitution and international law."[303]

Therefore, the practice of Central and East European states, though different in approaches to dealing with past human rights abuses, has much in common. Their practice confirms an international obligation to punish human rights abuses of a prior regime and is often based on such a duty. For example, in the Czech Republic *Act on the Illegality of the Communist Regime and Resistance to It*, Parliament declared the Communist Party of Czechoslovakia to be responsible for the system of government in this country in the years 1948-1989, being "[a]ware of the obligation of the freely elected parliament to come to terms with the Communist regime."[304] Most states have outlawed their Communist Parties and passed laws which provide for the screening and purging of people seeking public office. This can be explained by the fact that communist regimes, which were extremely repressive before 1970, have during the past two decades used mostly psychological violence through the network of their secret services' agents and collaborators. Hence, the desire to purify at least high official positions

[303] E-mail from list@infoukes.com to politics@infoukes.com, "Lithuanian President, Premier Discuss Controversial Bills" (received July 1998)
[304] *Supra* note 267 at 366.

of these groups. The compatibility of lustration laws with international human rights standards can certainly be questioned. However, the obligation of coming to terms with the past requires states to punish those guilty of human rights abuses. Because of the activity of communist parties officials, agents and collaborators of secret services, a great number of innocent people became victims of communist regimes. Moreover, lustration laws can be justified as being necessary in a democratic society in the interests of national security and economic well-being of the country. Former communist officials and secret services agents could not be trusted to carry out democratic reforms.

Unlimited privileges for the bureaucracy and a broad array of controls over society exercised through legal measures, a lack of human rights and due process, the absence of individual remedies, censorship, issuance of passports, a selective system of benefits to promote loyalty to the system[305] and creating an atmosphere of a permanent feeling of fear - those were the main crimes of the communists during the past two decades. In that environment, homicide acts, disappearances, torture, though occurred, were not mass-scale. Political killings were usually masked as suicides. Can such crimes be qualified as crimes against humanity? Persecutions on political, national, ethnic, cultural, or religious grounds committed as part of a widespread or systematic attack by communist regimes during the last two decades undoubtedly were crimes against humanity.

[305] W. Osiatynski, "Revolutions in Eastern Europe" (1991) 58 U. Chi. L. Rev. 823 at 849.

Most Central and East European states condemned communist ideology which is as evil as fascism.[306] A collection of respected analysts and historians, "Le livre noir du communisme"[307] counts between 85 million and 100 million victims of communist regimes in the Soviet Union, Eastern Europe, China and Cambodia, and these deaths, as Stephane Courtois argues in the introduction to the book, deserve the appellation "crimes against humanity" - the term most closely associated with Nazi genocide. Yet, "while it is impossible to imagine any political party with the word 'Nazi' in its name operating successfully anywhere in Europe, communist and former communist parties continue to exist and thrive."[308] Have we not learned from history!

3. UKRAINE'S CASE

Unfortunately, impunity for grave human rights violations of a prior regime still exists in Ukraine. Ukrainian Parliament and the President have not been as consistent as, for example, Czech, Hungarian, and Lithuanian authorities. Ukraine has not yet closed an important chapter of her tragic "red" history. However, there were attempts of de-communization in Ukraine. After the failure of August 24, 1991 military coup d'etat in the former Soviet Union, the Communist Party of Ukraine was accused of participation in the coup. The Presidium of the Verkhovna Rada (Parliament) of Ukraine issued *a Decree (Ukaz) on the Temporary Suspension of the Activity of the Communist Party of Ukraine* (August

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[306] A. Applebaum, "Teflon Totalitarianism" *The Wall Street Journal* (16 January 1998).
[307] *Supra* note 2.
[308] *Ibid.*

26, 1991).[309] Financial assets of the Communist Party and its property were frozen and were taken into the balance of the Verkhovna Rada of Ukraine pending a judicial investigation into their participation in the coup. Another Decree concerned the property of the Communist Party of Ukraine and the Communist Party of the Soviet Union in the territory of Ukraine (August 26, 1991).[310] On the petition of a group of people's deputies, the Constitutional Court of Ukraine has yet to examine the constitutionality of the aforementioned decrees.

The issue of justice for crimes committed under the ruling of the Communist Party of Ukraine has not been completed. However, in case of Ukraine there exist especially valid arguments for coping with the legacy of the past. Some crimes committed by the Communist Party of Ukraine - the Soviet Union constituted genocide and crimes against humanity taking into account their consequences.

One of them was the great famine of 1932-33, which was a crime of genocide committed against Ukrainians. It was organized by the Communist Party of Ukraine - the Soviet Union with intent to eradicate ukrainians as a national group. Of course, the Soviet authorities denied the existence of famine. According to Robert Conquest, the first line of defense was the plea that no famine had occurred. This was the official line of the Soviet Government. Abroad it was propagated by Soviet diplomats and Western journalists and others who had been

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[309] Указ Президії Верховної Ради України "Про тимчасове припинення діяльності Компартії України" (26 серпня, 1991) Літературна Україна, 29 серпня 1991 р.
[310] Постанова Президії Верховної Ради України "Про власність Компартії України та КПРС на території України" (26 серпня 1991) Літературна Україна, 29 серпня 1991 р.

deceived or corrupted by the Soviet authorities. Internally, the Soviet press simply ignored the famine, but occasionally printed a refutation or rejection of some insolent foreign slander.[311] However, the famine could not be hidden, and the Western public had information about it available to them. Some acted: on 28 May 1934 a resolution was submitted to the US House of Representatives (73rd Congress, 2nd Session, House Resolution 39a) by Congressman Hamilton Fish Jr., registering the facts of the famine, recalling the American tradition of "taking cognizance" of such invasions of human rights, expressing sympathy and the hope that the USSR would change its policies and in the meantime admit American relief. It was referred to the Committee on Foreign Affairs and ordered to be printed. [312]

In response to the man-made famine of 1932-33 in Ukraine, Ukrainians in Galicia and neighboring territories held wide actions of protest, which found expression in letters of the Government of the Ukrainian National (People's) Republic in exile and various organizations and parties, to the League of Nations, namely, to the head of the Council of the League of Nations, Mr. Mowinkel and the head of the Assembly of the League of Nations, Mr. Voter.[313] The League was asked to raise the painful question of the famine in Ukraine as "the very existence of a great nation is being theatened."[314]

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[311] Robert Conquest, *The Harvest of Sorrow* (N.Y.: Oxford Univ. Press) at 322-323.
[312] *Ibid.* at 310.
[313] J.E. Mace, "The Voices of Suffering" (1993) 3-12 Ukrainian World 34; J.E. Mace, "Ukrainian Reaction to the Famine in Ukraine", *ibid.* 36.
[314] *Ibid.* at 36.

The Ukrainian emigre organizations in the West fought in the most active manner to bring the facts to the attention of Governments and the public. In Washington, for example, the files of the State Department were full of appeals to the US administration to intervene in some way. They were always answered with a statement that the absence of any American state interest made this impractical.[315] As the United States at this time had no diplomatic relations with the Soviet Union, (not until November 1933), and the State Department was under instruction to work to establish such relations, the reports of the terror-famine were regarded by the Administration as unhelpful. The foreign diplomatic corps, located in Moscow, was not deceived. The British Embassy, for example, reported to London that conditions in the Kuban and the Ukraine were "appalling"/British Embassy dispatch 5 March 1933/."[316] Yet, the West kept silent, pretending not to notice. As George Orwell complained (of England), 'Huge events like the Ukraine famine of 1933, involving the deaths of millions of people, have actually escaped the attention of the majority of English russophiles'. But it was not only a matter of pure russophiles, but also of a large and influencial body of Western thought.[317] According to R. Conquest, the scandal was not that they justified the Soviet actions, but that they refused to hear about them, that they were not prepared to face the evidence."[318]

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[315] *Supra* note 311 at 311.
[316] *Ibid.*
[317] *Ibid.* at 321.
[318] *Ibid.*

However, in 1988, the ninety-ninth Congress of the USA created the Commission on the Ukraine Famine, headed by Dr. James E. Mace, to conduct a study of the 1932-33 famine in order to: (1) expand the world's knowledge of the famine and (2) provide the American public with a better understanding of the Soviet system by revealing the Soviet role in the Ukraine famine.[319] In its executive summary, the Commision formulated nineteen findings, one of which was: "Joseph Stalin and those around him committed genocide against Ukrainians in 1932-33".

There were attempts to organize "Nuremberg 2" tribunal for the crimes of the Communist Party of the Soviet Union. Among the first steps for preparing such a trial, it is worth while mentioning, the creation of an International Commission of Inquiry into the 1932-33 Famine in Ukraine.[320] The existence of the Commission was due to the initiative of the World Congress of Free Ukrainians, members of which approached a number of jurists and legal scholars all over the world, asking them to participate in an inquiry into the famine that was said to have taken place in Ukraine during 1932-1933. The Commission was constituted on February 14, 1988, with the following seven prominent international jurists as member-commissioners: Prof. Colonel G.I.A.D. Draper, formerly British prosecutor at the Nuremberg Trials; Prof. John P. Humphrey, Canada, formerly Director of the United Nations Division of Human Rights; Prof.

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[319] *Investigation of the Ukraine Famine 1932-33: First Interim Reports of Meetings and Hearings of and before the Commission on the Ukraine Famine. Held in 1986.* (Washington: United States Government Printing Office, 1987) at v.

[320] *International Commission of Inquiry into the 1932-33 Famine in Ukraine: Final Report* (1990).

G. Levasseur, France, formerly a member of the Commission for the Revision of the French Penal Code; Prof. R. Levene (h), Argentina, formerly president of the Court of Appeals; Prof. C.T. Oliver, USA., former Assistant Secretary of State and Ambassador; Prof. J. Sundberg, Sweden, appointed President of the Commission of Inquiry; and Prof. J. Verhoeven, Belgium, appointed vice-president.

The Commission of Inquiry had been established as an entirely independent, non-governmental, self-generated body. Under the Terms of Reference, adopted on February 14, 1988, the Commission was to inquire and report upon:

(1) the existence and extent of famine, (2) the cause or causes of such famine, (3) the effect it had on Ukraine and its people, and (4) the recommendations as to responsibility for the famine.[321]

As a result, five facts have been established to the satisfaction of the Commission:

(I) It is beyond doubt that the Ukraine was severely affected by famine in 1932-33 and that the Ukrainian and Soviet authorities were aware of the dire food shortages of the population.

(II) It is also indisputable that, although they were aware of the dramatic conditions in Ukraine, the Soviet authorities refrained from sending any relief until summer 1933.

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[321] *Ibid.* at 1

(III) The Soviet authorities adopted various legal measures which amplified the disastrous effects of the famine by preventing the victims from finding any food at all or from leaving the region... .

(V) It is true that the Soviet authorities at the time denied the existence of any famine in Ukraine and that, against all evidence to the contrary, persisted in their denials for more than fifty years, with the exception of Khruschev's private avowal." [322]

Though the International Commission of Inquiry into the 1932-33 Famine in Ukraine was not a court, still less a criminal court, nonetheless, the Commission, by its Terms of Reference, formulated recommendations "as to responsibility for the famine... During the debates, and particularly in the closing submission of the Counsel for Petitioner, W. Liber, Esq., an accusation of genocide was made".[323]

Undoubtedly, the conclusions, the Commission arrived at, testify to a preconceived carefully prepared plan to starve Ukraine and the required elements of genocide, such as intent to destroy, in whole or in part, a national, ethnical group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, are present in this case. Subsequently, under international law it is an affirmative duty of the state to punish human rights violators and non-retroactivity of penal law can not apply here. A number of questions arise, concerning who should carry responsibility for the

[322] *Ibid.* at 45-48.
[323] *Ibid.* at 51.

famine and whether local just as much as central authorities should shoulder the brunt of the responsibility for the famine in Ukraine.

In 1983, the Government of the Sovereign Ukraine (1917-20) (then in exile) presented the Accusation Act Against the Government of the U.S.S.R. Re Great Famine of 1932/33 to the International Court of Justice in Hague.[324] The answer was that only states can bring petitions to the Court. Ukraine didn't exist then as an independent state. She does exist now and the case of terror-famine is waiting to be pleaded.

Among other crimes of the Communist Party of Ukraine - the Soviet Union there were numerous systematic and mass-scale acts of torturing people during interrogation in 1930's - 1960's and hundreds of thousands deaths as a result of their beating in NKVD, later KGB prisons. According to the statistics of the Ch.K. (extraodinary committee), in 1918-19 they killed without trial more than 1,000 people every month. During the years of the highest point of Stalin's terror, more than 40,000 people were killed per month.[325] Many more people disappeared after having been kept by those security organs.

As fairly asked by N. M. Switucha, "why is it that Nazi concentration camps are regarded as a crime against humanity (which is right!), but Soviet concentration camps, that were scattered over the Siberian permafrost and tundras much longer than the Nazi camps, have not been universally condemned as a crime

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[324] "Accusation Act Against the Government of the U.S.S.R. Re Great Famine of 1932/33 Presented to the International Court of Justice by Government of the Sovereign Ukraine" (1982) Ukrainian Q.

[325] Борець Ю. Шляхами лицарів ідеї і чину. - 1995, с. 222.

against humanity?"[326] Millions of people were placed in a status of forced labour in labour camps and maintained in that status for many years.

Systematic and mass-scale persecution on political, national, language and religious ground was another crime committed by the Communist Party of Ukraine. While the Constitution of the Ukrainian SSR formally provided for all internationally recognized human rights, there was little tolerance for actions and practices incompatible with the Communist Party's ideology.[327] Consequently, human rights were not observed. One example of the blatant disregard of human rights by the Soviet authorities is the fate of a Ukrainian Helsinki Group, created in 1976 to promote the implementation of the Helsinki Accords in Ukraine. Out of its 37 members, 25 were imprisoned, 2 were exiled, 6 were banished, and 1 was incarcerated in a psychiatric institution.[328]

Persecution took many forms. One of them was, for example, the prohibition of practising the Ukrainian Autocephalous Orthodox worship. Whole parishes were repressed, bishops and priests were arrested, churches were destroyed. In 1930, as a result of a political process in the Ukrainian city of Kharkiv, 32 bishops and nearly 10,000 priests were exterminated.[329] Similar was the fate of the Ukrainian Greek-Catholic Church. Greek-Catholic priests were

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[326] E-mail from jjaworsk@watarts.uwaterloo.ca (John Jaworsky) topolitics@infoukes.com, "Dealing with the legacy of the past..." (received 19 March 1998).

[327] M. Antonovych, "Legal Aspects of Human Rights in Ukraine" (1996) 52 Ukrainian Q. 109 at 110.

[328] L. Verba & B. Yasen, eds., *The Human Rights Movement in Ukraine: Documents of the Ukrainian Helsinki Group 1976-1980* (Baltimor, Washington, Toronto: Smoloskyp Publishers, 1980) at 10.

[329] *See* Лизанчук В. Навічно кайдани кували: факти, документи, коментарі про русифікацію в Україні. - Львів: Інститут народознавства НАН України, 1995, с. 204.

either killed or incarcerated, and the rest were made to take the decision about liquidation of Brest Church Union in March 1946 which was absolutely anticanonical. However, both Ukrainian Autocephalous Orthodox and Greek-Catholic Churches remained catacomb churches during the Soviet period and were legalized after the collapse of the Soviet Union and the gaining of independence by Ukraine. During the period 1917-39, 8,000 churches were destroyed by Soviet authorities.[330]

Another form of persecution concerned the use of a national language. There was a short period of "ukrainization" in the 1920's, when 68 % of youth studied in Ukrainian schools. Since the 1930's, this process was stopped by the telegram from Stalin in 1933 regarding the halting of "ukrainization". A number of Communist Party's instructions and resolutions concerned the obligatory study of Russian in national republics schools (1938); free choice of the language of instruction (1958); thesis presentation only in Russian (1970); higher learning and teaching in Russian (1978, 1983); up till granting Russian the status of the official language (1990).[331] As cultural ground is included in the list of possible grounds for persecution against any identifiable group or collectivity, which is identified as one of the crimes against humanity in the Rome Statute and other international instruments, persecution concerning the use of the Ukrainian language can be treated as a crime against humanity.

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[330] *Ibid.*

[331] Ігнатенко П.Р., Поплужний В.Л., Косарєва Н.І., Крицька Л.В. Виховання громадянина: Психолого-педагогічний і народознавчий аспекти: Навчально-методичний посібник. - К.: Інститут змісту і методів навчання, 1997, с.204-205.

Of great tragic consequences for the people of Ukraine was the forcible transfer of hundreds of thousands Ukrainians to Siberia or the Far East. It followed the June 1944 secret order No. 0078/42 of the People's Commissariat of Internal Affairs of the USSR and of the People's Commissariat of Defense of the USSR signed by Beria and Zhukov.[332] Under this order, all the Ukrainians who lived under German occupation were to be deported to detached regions. As stated by the first secretatary of the CPSU Central Committee, Khruschev, in his report about "cult of personality" at the 1956 CPSU congress, Stalin's idea was to deport the whole Ukrainian people, and they managed to escape this lot only because they were too many, and there was no place where to exile them.[333]

Another crime, the Communist Party of Ukraine - the Soviet Union can be accused of, was 1986 Chornobyl nuclear disaster, which Phil Reeves called "gambling with the planet".[334] The Communist Party should carry the burden of responsibility for the fact that on 27 April 1986 - a full day after the top blew off Reactor Unit 4 - children were still playing in the streets of Prypyat, a town created for the workers of Chornobyl nuclear power station, and on May 1, 1986, millions of adults and children went on a May Day demonstration to greet Communist Party authorities who, meanwhile, were the first to evacuate their children and grandchildren to safe zones immediately after the catastrophe.

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[332] *Supra* note 329 at 234-235.
[333] A. Avtorkhanov, *The Empire of the Kremlin. The Soviet Type of Colonialism* (Germany:Prometheus-Verlag, 1988) at 80-81.
[334] E-mail from asydorenko@toltec.astate.edu (Alexander Sydorenko) to announce @infoukes.com, "Lethal legacy" (received 7 April 1998).

It is worth while mentioning that in Bulgaria, Grigor Stoitchkov, who was deputy Prime Minister from 1978 until 1989, and Lubomir Shindarov, who was Deputy Minister of Public Health from 1981 until 1989, were indicted in 1991 for failures to undertake the necessary measures against the effects of nuclear radiation, which had permeated into Bulgaria following the Chernobyl accident in 1986. They were convicted and their conviction was upheld in appeal.[335] Nothing of the kind happened in Ukraine, though the reasons for such trials were much more weighty.

Therefore, the question arises why the crimes of the Communist Party of Ukraine have not been universally condemned as crimes against humanity? As one of the reasons for this situation John Jaworsky gives as follows: "After World War II it was (relatively) easy to identify the "winners" and the "losers"; after all, the political system responsible for establishing the Nazi concentration camp system was defeated.... However, the Soviet system was never decisively "defeated" in a way which allowed for a decisive "coming to terms" with what happened during the Stalinist years... When the Soviet system finally collapsed, under the weight of the growing inefficiencies and internal contradictions which plagued the ailing Soviet state, you did not have clear-cut victors, with (relatively) clean hands, who wanted to prepare a full accounting of the abuses of the past. For a variety of reasons the new leaders of the post-Soviet states, and much of the post-Soviet public as well, did not want Nuremberg-style trials which would have provided

[335] A. M. Gross, "Reinforcing the New Democracies: The European Convention on Human Rights and the Former Communist Countries - A Study of the Case Law" (1996) 7 EJIL at 97.

such an accounting."[336] On the one hand, this can be regarded as a relevant and contrary state practice to the existence of a duty to prosecute under international law. On the other hand, new leaders of the post-Soviet Ukraine most likely understand that without exercising this duty, the state will not successfully go ahead as has been proven by the previous seven years of Ukraine's independence.

As Ukraine has ratified *the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*[337], and the crimes mentioned above do refer to crimes against humanity as they violated elementary principles of humanity, the argument of existing penal provisions defining the applicable statute of limitations as the one in effect at the time that crimes were committed does not work in case of Ukraine.

In general, Ukrainian successor government to the previous Ukrainian Soviet government has not actually denied responsibility to redress past violations. The Verkhovna Rada adopted the 1991 *Law on the Rehabilitation of Victims of Political Repressions in Ukraine."*[338] Imperfect as it may be, the very fact of its enactment is important. Noteworthy, in 1997, the Supreme Court of Ukraine has issued a book of normative legal acts on repressions and rehabilitation of condemned people.[339] This is the first time these normative acts, departmental instructions and clarifications which were the legal base of repressions in the

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[336] *Supra* note 326.
[337] *Supra* note 71.
[338] Про реабілітацію жертв політичних репресій на Україні: Закон України від 17 квітня 1991 р. /із змінами та доповненнями, внесеними Законами України від 15 травня та 19 листопада 1992 р./ Відомості Верховної Ради України. - 1991 р. - № 22, Ст. 262; 1992. - № 32, Ст. 456; № 49, Ст. 9.
[339] Реабілітація репресованих: Законодавство та судова практика / За ред. В.Т. Маляренка. - К.: Юрінком, 1997.

Soviet state were totally presented. Many books revealing the truth about the great famine of 1932-33 and other crimes of communism have appeared lately.[340] Monuments to the victims of the terror famine have been erected, while the statues of the Lenins and other leaders of the Communist Party have been demolished; streets named after Communist Party leaders have been renamed.

Yet, the Ukrainian government has not created a State commission of investigating former human rights abuses, has not banned the activity of the Communist Party responsible for those crimes against humanity. Thus far, only the non-governmental Association of Independent Researchers of the Famine-Genocide of 1932-33 in Ukraine chaired by Lidia Kovalenko-Manyak has been created.[341] As in Russia, efforts to use secret police files in order to screen and purge those who were affiliated with the former secret service have failed in Ukraine.

All this testifies to the fact that the Ukrainian government does not decisively follow an affirmative international law obligation on states to investigate and to punish grave human rights violations of a prior regime. Yet, as Jose Zalaquett warns, "leaders should never forget the lack of political pressure to put these issues on the agenda does not mean that they are not boiling underground,

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[340] 33-й: голод: Народна Книга-Меморіал / Упоряд.: Л.Б. Коваленко, В.А. Маняк. - К.: Рад. письменник, 1991; Колективізація і голод на Україні, 1929-1933 / АН України. Інститут історії України та ін.: Упоряд.: Г.М. Михайличенко, Є.П. Шаталіна; Відп. ред. С.В. Кульчицький. - К.: Наук. думка, 1992; Голод 1932-1933 років на Україні: очима істориків, мовою документів / Кер. кол. упоряд. Р.Я. Пиріг. - К.: Політвидав України, 1990; Сергійчук В. Як нас морили голодом. - К.: Бібліотека українця, 1996; та ін.

[341] "Famine-33" (1993) 3-12 Ukrainian World 37 at 37.

waiting to erupt."[342] Indeed, by June 26, 1996, the Ukrainian national democratic forces had collected more than 2 million signatures for a petition to ban the Communist Party.[343]

However, the Ukrainian nation has been weakened to a great extent. As Wictor Osiatynsky writes about Polish workers, and we can very well apply it to Ukrainians, "they will reenter capitalism, however with already ineffective industry, with a polluted environment, with a ruined social/political atmosphere, and with a devastated moral. Such will be the final price of utopia."[344] Ukrainians will have to re-enter it, though international community assistance is extremely important and needed. Intervention by international organizations into Ukraine for the sake of raising shame for former deeds (which most likely will not work in case of Ukrainian communists) and actualizing the problem of coming to terms with the past would be very important. It is urgent to establish the United Nations Commission of Investigating Communist Crimes. The aim of this commission should be condemning and banning the Communist Party of Ukraine, which is a successor of the Communist Party of Ukrainian SSR. It is not only required by international customary law, but can also be justified by the practice of Central and East European states most of which banned their former Communist Parties.

The hearing of the case of the Ukrainian famine by the ICC is unlikely. As Frank Chalk states, "[t]he International Criminal Court will not hear the evidence

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[342] A. Boraine, J. Levy, & R. Scheffer, eds., *Dealing with the Past: Truth and Reconciliation in South Africa* (Cape Town: IDASA, 1994) at 14-15.
[343] *Supra* note 262 at 195.
[344] *Supra* note 305 at 858.

of crimes against humanity and genocide suffered by Armenians and Ukrainians. The youngest of the perpetrators of 1915 would be in his 90s today and the last of Stalin's henchmen are rapidly fading into history."[345] The counter argument to this is that "[i]f there are survivors in their late 80s, why wouldn't there be perpetrators, even if they are in the fading stage?"[346]

Yet, as Teitel fairly states, "in the transitional context, the ordinary principle of individual responsibility for past wrongdoing is inapplicable, leading to the emergence of new criminal legal forms that may contribute to the construction of a liberal politics."[347] Prosecutions of violators do not evidence a customary international law obligation because, according to Roht-Ariaza, they may be responses to domestic political concerns.[348] As practices of post-communist Central and East European states have proven, in most cases this is what has really happened. Criminal prosecutions may preclude the reconciliation needed for democracies to function. Another argument, of those who stand against individual prosecutions, is that post-transition justice tends to be emergency justice without due time for sorting out of all the gradations in responsibility for the abuses of the past. Problems with the definition of responsibility inevitably arise. This issue has been emphasized by Vaclav Havel when speaking of the Czechoslovakian situation: "We have all become used to the totalitarian system and accepted it as an immutable fact, thus helping to perpetuate it. ... None of us is just its victim; we

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[345] F. Chalk, "Genocide with Impunity" *The [Montreal] Gazette* (26 April 1998) C4.
[346] E-mail from ponomarf@vaniercollege.qc.ca (Fran Ponomarenko) to politics@infoukes.com, "International Criminal Court" (received 29 April 1998).
[347] *Supra* note 75 at 2015.
[348] N. Roht-Ariaza, *supra* note 141 at 493.

are all responsible for it."[349] At the same time, criminal parties responsible for grave human rights abuses should be banned.

The state practice of the former communist Central and East European countries proves that the best way to observe justice during the transitional period and not to become involved in domestic political combat in the legal arena can be achieved by introducing international law standards. This imposes upon the international community the obligation to find appropriate means to support the efforts of transitional societies to achieve accountability.

[349] V. Havel, *cited in* S. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991) at 214.

CONCLUSION

The practice of most Central and East European States confirms the existence of the duty to investigate and to punish grave human rights violations of a prior regime. This state practice demonstrates that such type of accountability as criminal prosecution of the perpetrators, which has been the main official policy toward collaborators in West European countries after World War II, has received very little support in post-communist European States. Instead, post-communist transitional states use such measures of dealing with the past as lustration or disqualification of the former party elites, of the agents of the secret police and their informers, as well as outlawing their former Communist Parties.

The process of lustration is highly criticised by the international community and by many domestic forces as a political rather than a judicial measure. However, lustration laws could be justified as being necessary in a democratic society in the interests of national security and economic well-being of the country, as former Communist Party officials and agents of secret services could not be trusted to carry out democratic reforms. Only time will tell whether the process of lustration "will enhance or diminish the growth of democratic institutions of these transitional states."[350]

Some states such as Ukraine, where there exist specially valid grounds for coping with the legacy of the past, as crimes committed by the Communist Party of Ukraine constitute genocide and crimes against humanity, are too slow in dealing

[350] *Supra* note 260 at 196.

with the past. On the one hand, this can turn out to be an advantage, because when it comes to punishment, Ukraine will probably become a state with the rule of law. But on the other hand, people may lose any hope for justice to be done, and the case of recidivism can become possible.

In summary, the insertion of an international duty to investigate and to punish grave human rights abuses of a prior regime is very important for young democracies striving to establish a fair system of justice. In a transitional period of political flux, it is often impossible to gain a comprehensive domestic process without the international community's participation.

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