

從「戰爭法」到「人道法」：

以違反人道罪適用範圍之變遷看國際人道法之發展

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摘要

18、19 世紀，歐洲民族國家興起，為了領土之統一與擴張，開始了一連串的戰爭，這些戰爭導致數以萬計之人員傷亡，為了減緩或避免這些慘絕人寰之情況發生，紅十字國際委員會因之成立，開啟了戰爭法的發展，研擬、制訂各項條約，包括從戰爭行為人角度出發，所規定之武器使用的 1907 年海牙公約體系，與從戰爭受害者角度出發，所規範之武裝衝突中平民待遇的 1949 年日內瓦公約。

1990 年代，因國家內部種族仇恨，前南斯拉夫與盧安達發生了震驚國際的大屠殺事件，為了因應、制裁造成數十萬人死傷之種族屠殺，遂成立前南斯拉夫與盧安達國際特別刑事法庭；隨後，針對其他地區類似情形，亦紛紛成立國際特別刑事法庭。在此基礎上，為統一規範與制裁此種嚴重侵害平民基本權利之罪行，成立常設之國際刑事法院，於 2003 年開始運作迄今。

從 18、19 世紀的戰爭法，到 21 世紀初國際刑事法院的設立，這背後反映出什麼樣的規範變遷？過去的戰爭法又是如何變為今日我們所認知的國際人道法？本文試圖從針對平民之廣泛或系統的攻擊，例如盧安達胡圖族對圖西族之殺害、迫害，所構成的違反人道罪適用範圍之變遷，來探究從戰爭法到國際人道法之轉變歷程。違反人道罪從僅限於戰時，擴張到可適用於和平時期，不僅保障了戰爭中平民的基本權利，更使平民於國內武裝衝突甚至未達武裝衝突之情況，都能受到全面保護，反映國際人道法從「戰爭法」轉向「人道法」之改變。

關鍵字：國際人道法、戰爭法、違反人道罪、武裝衝突

From “Law of War” to “Humanitarian Law”: Analyzing the Development of International Humanitarian Law by studying the Change of the Scope in the Application of Crimes Against Humanity

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Abstract

The wars between nation-states in the 18th and 19th centuries caused great human loss and serious calamity. In response, International Committee of the Red Cross was established and the law of war began to develop. A series of treaties and conventions were drafted and adopted including “the law of Hague” that seeks to regulate the conduct of hostilities and “the law of Geneva” that strives to protect war victims such as civilians and prisoners of war.

In the 1990s, massacres in the Former Yugoslavia and Rwanda as a result of racial hatred caused hundreds of thousands of lives and the cruelty of the deeds shocked the international society. The International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda were created to prosecute persons responsible for these massacres. Similar tragedies also occurred in other states, and a number of *ad hoc* international criminal tribunals were set up to punish these wrongdoers. All these led to the establishment of the International Criminal Court that has since 2003 been in operation.

From the law of war in the 18th and 19th centuries to the establishment of the International Criminal Court in the early 21st century, a profound change seems to have occurred in the development of the aforementioned international law of war. What has been changed? To what extent is this a change in the nature of the law of war becoming international humanitarian law? This article attempts to analyze the development of international humanitarian law by studying the change of the scope in the application of crimes against humanity. Crimes against humanity were limited to the times of war but are now applicable also to the times of peace. Fundamental rights of civilians are protected in all times. This change clearly reflects the development of international humanitarian law that has been changed from law of war.

Key words: international humanitarian law, law of war, crimes against humanity, armed conflict

壹、前言

18、19 世紀，歐洲有許多民族國家興起，為了領土之統一與擴張，各國向外征戰，導致數以萬計之人員傷亡，為回應戰爭帶來之慘狀，紅十字國際委員會於 1863 年成立，戰爭法開始蓬勃發展。因戰爭往往導致許多生命財產難以彌補之損失，國際成員為減輕戰爭之後果，遂開始研擬、制定相關規範。不僅從戰爭行為者之角度，針對戰爭中的各項武器使用通過一系列 1907 年海牙公約與其他禁止、限制大規模毀滅性武器使用之公約，形成海牙公約體系；亦從戰爭受害者之角度，針對戰爭中的平民待遇通過一系列 1949 年日內瓦公約與議定書，形成日內瓦公約體系。此二公約體系成為戰爭行為之兩大重要規範。¹

1990 年代，前南斯拉夫社會主義聯邦共和國因內部聯邦尋求獨立、解體，導致一連串肇因於「種族淨化」政策之軍事衝突，盧安達則發生胡圖人大規模屠殺圖西人的事件，此二國皆因種族仇恨而起之大屠殺造成數十萬人傷亡，震驚國際社會，挑戰了傳統的戰爭法規範，為制裁以二國之種族屠殺事件，分別成立前南斯拉夫國際刑事法庭²與盧安達國際刑事法庭³；其後，針對其他國家之類似事件，亦成立國際特別刑事法庭。為了統一規範、制裁此種侵害平民基本權利與人性尊嚴之情況，國際社會開始研擬常設國際刑事法院之成立，於 2002 年通過《國際刑事法院羅馬規約》後，國際刑事法院開始運作迄今。⁴

從 18、19 世紀的戰爭法，到 21 世紀初國際刑事法院的設立，這背後反映出什麼樣的規範變遷？過去的戰爭法又是如何變為今日我們所認知的國際人道法？傳統戰爭法於 1990 年代受到國內武裝衝突之挑戰，屬於國際人道法重要罪責之一、針對平民之廣泛或系統的攻擊所構成的違反人道罪（Crimes against Humanity），例如前南斯拉夫塞爾維亞人對波士尼亞人與盧安達胡圖族對圖西族之殺害與迫害，該罪之適用範圍於該時期亦有所變化，因此，本文試圖藉由違反人道罪適用範圍之變遷，探究國際人道法之改變。

本文發現，違反人道罪之適用範圍從一開始從屬於戰爭罪、違反和平罪而僅限於戰爭時期，逐漸擴張到可適用於國內武裝衝突，最後與武裝衝突脫鉤而可適用於未達武裝衝突之情況，使平民受到全面性之保護。從此角度切入，看到國際人道法關懷視野之擴大，對人民基本權利與人性尊嚴之保障更為完整。

本文認為，經歷超過一世紀之發展，國際人道法在本質上有了改變，此種改變可分為兩個部分。其一乃從「戰爭法」轉變成「人道法」，此係國際社會意識到平民之基本權利不僅於戰爭時期會遭到剝奪，於和平時期亦可能受到與戰爭時期相似之壓迫。因此，不應僅於戰爭時期保護平民，而應從人道角度出發，於任

¹ HENRY J. STEINER, PHILIP ALSTON, & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS AND MORALS: TEXT AND MATERIALS, 69-71 (New York: Oxford University Press, 3rd ed., 2007).

² *Id.* at 1248-58.

³ *Id.* at 1273-90.

⁴ *Id.* at 1291-98.

何時期都使平民之基本權利受到保障，違反人道罪適用範圍之變遷便展現了此一觀念之改變。

國際人道法本質上的另一項改變乃從「人道法」到「刑事法化」，亦即不僅國家必須善盡其對平民基本人道之保障，個人亦應因其剝奪平民基本權利之行為，受到法律上的制裁。因此，違反國際人道法之個人，不僅是第一線執行任務者，上層之指揮官或當權者亦同，皆應於法院接受審判，並為其行為負法律責任。

雖然此二變遷於 1990 年代開始一起發展，但由於並非所有違反國際人道法之行為，皆對行為人個人以刑事規範相繩，因此，了解國際人道法從「戰爭法」轉變成「人道法」之過程，仍有其助益。本文首先將介紹國際人道法從「戰爭法」到「人道法」的歷史發展，再透過違反人道罪適用範圍之變遷，觀察國際人道法從「戰爭法」到「人道法」之重心改變。

貳、「戰爭法」到「人道法」

18、19 世紀，歐洲民族國家興起，各國為了領土之統一與擴張，開啟了一連串的戰爭，造成上萬人員之傷亡，面對此種慘狀，紅十字國際委員會因而成立，戰爭法開始蓬勃發展，為了減緩、杜絕戰爭帶來的嚴重後果，國際成員開始商討、制訂各項條約，形成了以戰爭行為者之角度出發、規範武器使用之 1907 年海牙公約體系，與以戰爭受害者之角度出發、規範戰時平民待遇之 1949 年日內瓦公約體系。

到了 1990 年代，前南斯拉夫與盧安達因內部種族衝突，發生了震驚國際社會的種族大屠殺事件，造成數十萬人傷亡，此種內國武裝衝突挑戰了傳統的戰爭法，為制裁此等駭人的事件，分別成立前南斯拉夫國際刑事法庭與盧安達國際刑事法庭，其後，針對其他地區之類似事件，亦紛紛成立國際特別刑事法庭。在此基礎上，統一規範侵害平民基本權利與人性尊嚴之常設國際刑事法院於 2003 年運作迄今。

以下將依時間演進，介紹國際人道法從戰爭法到人道法之歷史發展。

一、第一次世界大戰前

1859 年 6 月 24 日，在義大利尋求統一的戰爭中，發生了蘇法利諾戰役(Battle of Solferino)，短短一天內造成了約六千人死亡、四萬人受傷。日內瓦商人 Henry Dunant 目睹此慘烈的狀況，回國後，於 1862 年出版了《蘇法利諾的回憶》(A Memory of Solferino) 一書。為了使戰爭中的受傷士兵受到足夠的照顧，Dunant 與另外四人成立紅十字國際委員會 (International Committee of the Red Cross)，為紅十字會之起源，並促成 1864 年於日內瓦通過《改善戰地武裝部隊傷兵員境遇公約》(Convention for the Amelioration of the Condition of the Wounded in

Armies in the Field)。⁵

1868年，當時俄國正準備與英國爭奪中亞與印度洋，為避免其軍隊因爆炸性子彈而處於劣勢，因此召開會議，與當時主要強權通過《聖彼得堡宣言》

(Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight)，禁止使用造成不必要痛苦之武器、發射物與器材。1874年，俄國再次發起於布魯塞爾召開會議，通過有關戰爭法與慣例的《布魯塞爾宣言》(Project of an International Declaration concerning the Laws and Customs of War)。於1899年與1907年兩次海牙和平會議(Hague Peace Conference)中，將前述二宣言納入，通過一系列海牙公約以規範陸地與海上戰爭行為，⁶且被稱為《馬爾頓條款》(Martens Clause)⁷的1899年第二海牙公約序言對日後許多公約之擬訂與國際人道法之發展具有深遠影響。⁸

二、第一次世界大戰後

在第一次世界大戰結束後，德國於1919年6月與戰勝國簽署《凡爾賽條約》(Treaty of Versailles)，該條約第227條與228條規定，成立特別法院起訴違反國際道德與條約的前德皇威廉二世(Kaiser Wilhelm II)以及違反戰爭法與慣例的德國軍官與士兵；然因德國不願交出其國民，且協約國同意德國於其本國法院起訴其公民，因此最後並未成功成立該特別法院。⁹在戰間期，雖曾試圖建立國

⁵ THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 22 (Dieter Fleck ed., New York: Oxford University Press, 2nd ed., 2008); François Bugnion, *The International Committee of the Red Cross and the Development of International Humanitarian Law*, 5(1) CHI. J. INT'L L. 191, 191-93 (2004). 中華民國紅十字會總會網站。

<http://www.redcross.org.tw/RedCross/page/pagetypeA1.jsp?groupid=106&webno=&no=239> (最後瀏覽日：2012/11/20)。Treaties & Documents by Date, <http://www.icrc.org/ihl.nsf/INTRO?OpenView> (last visited Nov. 20, 2012). 紅十字國際委員會推動了日內瓦公約與其附加議定書之簽訂，該等公約與議定書賦予紅十字國際委員會在武裝衝突情況之任務，強化了該委員會在國際人道法之重要性與地位。History of ICRC,

<http://www.icrc.org/eng/who-we-are/history/overview-section-history-icrc.htm> (last visited Nov. 20, 2012).

⁶ Fleck, *id.* at 23-24; Bugnion, *id.* at 198-99; Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868, <http://www.icrc.org/ihl.nsf/INTRO/130?OpenDocument> (last visited Nov. 20, 2012); Treaties & Documents by Date, *id.*

⁷ Martens Clause:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience. Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899, <http://www.icrc.org/ihl.nsf/FULL/150?OpenDocument> (last visited Nov. 20, 2012).

⁸ Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94(1) AM. J. INT'L L. 78, 78-79 (2000).

⁹ YUSUF AKSAR, IMPLEMENTING INTERNATIONAL HUMANITARIAN LAW: FROM THE AD HOC TRIBUNALS TO A PERMANENT INTERNATIONAL CRIMINAL COURT 44, 72-73 (New York: Routledge, 2004); COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 16 (Otto Triffterer ed., Hart Publishing, 2nd ed., 2008).

際刑事法院且有許多相關討論，但最終仍未付諸實踐。¹⁰

除了嘗試成立國際刑事法院外，有鑑於第一次世界大戰中空戰與毒氣對平民造成的危害，分別於1923年與1925年草擬《空戰規則》(Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare)與通過《禁止在戰爭中使用窒息性、有毒或其他氣體和細菌作戰方法議定書》(Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare)。雖然前者為正式通過而具有法律拘束力，但因其與陸地與海上戰爭規範相互呼應，仍具有一定之重要性。¹¹

1929年日內瓦外交會議修正了1864年與1906年日內瓦公約，通過《改善戰地武裝部隊傷兵員境遇公約》(Convention for the Amelioration of the Condition of the Wounded in Armies in the Field)與《關於戰俘待遇公約》(Convention relative to the Treatment of Prisoners of War)。¹²

三、第二次世界大戰後

在第二次世界大戰後，戰勝的同盟國分別於紐倫堡與東京成立紐倫堡國際軍事法庭(International Military Tribunal at Nuremberg)與遠東國際軍事法庭(International Military Tribunal for the Far East)，以審判德國與日本戰犯。雖然因同盟國在戰爭中所為之暴行並未受到審判，而使該二國際軍事法庭無法被視為國際法上真正的國際刑事法院，但《國際軍事法庭憲章》(Charter of the International Military Tribunal)第6條關於「違反和平罪」(crimes against peace)、「戰爭罪」(war crimes)與「違反人道罪」(crimes against humanity)的定義，以及根據該憲章與法庭判決所得之《紐倫堡原則》(Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal)仍對國際人道法之發展有重大影響。¹³

1948年，聯合國通過《防止及懲治種族滅絕罪公約》(Convention on the Prevention and Punishment of the Crime of Genocide)，將種族滅絕視為國際犯罪，且國際刑事法庭對此有管轄權，並委任國際法委員會(International Law

¹⁰ AKSAR, *id.* at 44-45.

¹¹ Fleck, *supra* note 5, at 24-26; Bugnion, *supra* note 5, at 199; Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare. Drafted by a Commission of Jurists at the Hague, December 1922 - February 1923, <http://www.icrc.org/ihl.nsf/INTRO/275?OpenDocument> (last visited Nov. 20, 2012); Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Geneva, 17 June 1925, <http://www.icrc.org/ihl.nsf/INTRO/280?OpenDocument> (last visited Nov. 20, 2012).

¹² Fleck, *id.* at 26; Bugnion, *id.* at 194; Treaties & Documents by Date, *supra* note 5.

¹³ AKSAR, *supra* note 9, at 45-46; Triffterer, *supra* note 9, at 16-17; Charter of the International Military Tribunal - Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ("London Agreement"), <http://www.unhcr.org/refworld/docid/3ae6b39614.html> (last visited Nov. 20, 2012); Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf (last visited Nov. 20, 2012).

Commission) 研究成立國際刑事法院之可行性。¹⁴

隔年，瑞士政府召開外交會議，各國於該會議中修改與增訂之前的日內瓦公約，重新通過四項新公約，包含《改善戰地武裝部隊傷兵員境遇公約》(Convention for the Amelioration of the Condition of the Wounded in Armies in the Field)、《改善海上武裝部隊傷兵員及遇船難者境遇公約》(Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea)、《關於戰俘待遇公約》(Convention relative to the Treatment of Prisoners of War) 與《關於戰爭中平民保護公約》(Convention relative to the Protection of Civilian Persons in Time of War)，此四項公約簡稱 1949 年日內瓦公約，日後成為國際人道法的內容之一。¹⁵

聯合國於 1950 年組成國際刑事管轄問題委員會 (Committee on International Criminal Jurisdiction) 研究國際刑事法院之成立與規約，¹⁶該委員會於 1951 年與 1953 年提出《國際刑事法院規約草案》(Draft Statute for an International Criminal Court)，國際法委員會亦於 1951 年與 1954 年提出《危害人類和平與安全罪法草案》(Draft Code of Offences against the Peace and Security of Mankind)。然因對侵略之定義仍有歧見，因此聯合國大會決定暫緩建立國際刑事法院一事。¹⁷

1972 年，聯合國大會為補充 1925 年日內瓦議定書之內容，通過《禁止發展、生產與儲存細菌(生物)與毒素武器以及銷毀此類武器之公約》(Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction)。¹⁸1977 年於日內瓦舉行的外交會議，針對 1949 年日內瓦公約，通過《第一附加議定書：關於國際性武裝衝突中平民的保護》(Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)) 與《第二附加議定書：關於非國際性武裝衝突中平民的保護》(Protocol

¹⁴ G.A. Res. 260 (III), U.N. Doc. A/RES/260 (Dec. 9, 1948), <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/044/31/IMG/NR004431.pdf?OpenElement> (last visited Nov. 20, 2012); AKSAR, *id.* at 46; Triffterer, *id.* at 17; Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, <http://www.icrc.org/ihl.nsf/FULL/357?OpenDocument> (last visited Nov. 20, 2012).

¹⁵ AKSAR, *supra* note 9, at 46; Bugnion, *supra* note 5, at 196. 中華民國紅十字會總會網站。 <http://web.redcross.org.tw/about02.aspx> (最後瀏覽日：2012/11/20)。Treaties & Documents by Date, *supra* note 5.

¹⁶ G.A. Res. 489 (V), ¶ 1, U.N. Doc. A/RES/489 (Dec. 12, 1950), <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/060/87/IMG/NR006087.pdf?OpenElement> (last visited Nov. 20, 2012).

¹⁷ G.A. Res. 898 (IX), ¶ 1, U.N. Doc. A/RES/898 (Dec. 14, 1954), <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/096/33/IMG/NR009633.pdf?OpenElement> (last visited Nov. 20, 2012); G.A. Res. 1186 (XII), ¶ 1, U.N. Doc. A/RES/1186 (Dec. 11, 1957), <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/119/69/IMG/NR011969.pdf?OpenElement> (last visited Nov. 20, 2012); AKSAR, *supra* note 9, at 46-47; Triffterer, *supra* note 9, at 17.

¹⁸ Bugnion, *supra* note 5, at 199; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction. Opened for Signature at London, Moscow and Washington. 10 April 1972, <http://www.icrc.org/ihl.nsf/INTRO/450?OpenDocument> (last visited Nov. 20, 2012).

Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II))，前者更涉及一向由 1899 年與 1907 年海牙公約所規範之交戰行為。¹⁹

1980 年，聯合國通過《禁止或限制使用某些可被認為具有過份傷害力或濫傷作用的常規武器公約》(Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects) 與相關議定書。²⁰1989 年，千里達及托巴哥共和國 (Republic of Trinidad and Tobago) 提議建立國際刑事法院以打擊毒品販賣，使建立國際刑事法院之議題再度受到重視。²¹

四、1990 年以後：特別刑事法庭之成立

1990 年代，前南斯拉夫國際刑事法庭 (the International Criminal Tribunal for the Former Yugoslavia, 簡稱 ICTY) 與盧安達國際刑事法庭 (the International Criminal Tribunal for Rwanda, 簡稱 ICTR) 的建立加速了常設國際刑事法院之成立，使國際人道法有了重大進展。

南斯拉夫社會主義聯邦共和國 (the Socialist Federal Republic of Yugoslavia, 以下簡稱前南斯拉夫) 位於有歐洲火藥庫之稱的巴爾幹半島上，包含斯洛維尼亞 (Slovenia)、克羅埃西亞 (Croatia)、塞爾維亞 (Serbia)、波士尼亞與赫塞哥維納 (Bosnia-Herzegovina)、蒙特內哥羅 (Montenegro)、馬其頓 (Macedonia) 等六個共和邦，與科索沃 (Kosovo)、弗依弗丁納 (Vojvodina) 等兩個自治區。²²該國之種族與宗教組成非常複雜，包括斯洛維尼亞人、克羅埃西亞人、塞爾維亞人、匈牙利人、阿爾巴尼亞人、馬其頓人、蒙特內哥羅人與穆斯林。²³

1991 年 6 月 25 日，斯洛維尼亞與克羅埃西亞率先宣布獨立，前南斯拉夫開始解體，其解體導致一連串軍事衝突，衝突地點從斯洛維尼亞、克羅埃西亞延伸至波士尼亞與赫塞哥維納。²⁴針對前南斯拉夫之問題，聯合國安全理事會 (Security Council, 簡稱安理會) 通過第 764 號決議，要求各軍事衝突之當事方應遵守國際人道法之規範。²⁵

¹⁹ Bugnion, *supra* note 5, at 197-98, 200. 中華民國紅十字會總會網站。前揭註 15。Treaties & Documents by Date, *supra* note 5; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, <http://www.icrc.org/ihl.nsf/INTRO/470?OpenDocument> (last visited Nov. 20, 2012).

²⁰ Treaties & Documents by Date, *id.*; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. Geneva, 10 October 1980, <http://www.icrc.org/ihl.nsf/INTRO/470?OpenDocument> (last visited Nov. 20, 2012).

²¹ AKSAR, *supra* note 9, at 47-48.

²² 外交部網站。 <http://www.mofa.gov.tw/webapp/ct.asp?xItem=19625&ctnode=1131&mp=1> (最後瀏覽日：2012/11/20)。

²³ AKSAR, *supra* note 9, at 9.

²⁴ *Id.* at 9-10.

²⁵ S.C. Res. 764, ¶ 10, U.N. Doc. S/RES/764 (July 13, 1992), <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/011/23/IMG/NR001123.pdf?OpenElement>

然而，前南斯拉夫之軍事衝突卻日益惡化，造成許多人員傷亡，安理會通過第 771 號決議，強烈譴責違反國際人道法之行為，要求相關當事方停止該等違法行為，並呼籲各國與國際組織提供前南斯拉夫內違法國際人道法之相關資訊；²⁶ 隨後，並通過第 780 號決議，要求聯合國秘書長成立專家委員會，審查、分析根據第 771 號決議所提供之資訊，以及該委員會自行調查之資訊，秘書長應向安理會報告專家委員會之結論。²⁷

根據該專家委員會之報告，前南斯拉夫之軍事衝突大致可分成以下三階段。²⁸ 第一階段為斯洛維尼亞於 1991 年 6 月 25 日宣布獨立後，南斯拉夫人民軍（Yugoslav People's Army，簡稱 JNA）與斯洛維尼亞領土防衛隊（Slovenia Territorial Defence Forces）、當地斯洛維尼亞裔警方之間的衝突，此波衝突僅持續幾星期。²⁹

第二階段為克羅埃西亞於 1991 年 6 月 25 日宣布獨立後，南斯拉夫人民軍、塞爾維亞裔民兵、警察、武裝平民等與克羅埃西亞國家衛隊（Croatian National Guard）、當地民兵、克羅埃西亞裔警察、武裝平民等所發生之衝突。³⁰ 第三階段為波士尼亞與赫塞哥維納於 1992 年 3 月 6 日宣布獨立後，克羅埃西亞與波士尼亞政府部隊之間、波士尼亞政府與塞爾維亞部隊之間、克羅埃西亞與塞爾維亞部隊之間的衝突，此地之衝突最為嚴重³¹。³²

前南斯拉夫之軍事衝突主要肇因於「種族淨化」(ethnic cleansing) 之政策。種族淨化係指一種族或宗教團體以暴力方式移除特定區域內之另一種族或宗教團體，³³ 就前南斯拉夫之情況而言，種族淨化意指以武力或恐嚇之方式，將相關團體自該區域移除，使該區域之種族單一化。³⁴ 執行該政策之手段包含大規模謀殺、酷刑、任意逮捕與拘留、非法處決、強暴與其他方式之性暴力、將平民監禁於貧民區、強制平民搬遷與驅逐、破壞公共與文化資產、對平民之蓄意軍事攻擊或威脅、以平民作為掩護等。³⁵

(last visited Nov. 20, 2012).

²⁶ S.C. Res. 771, ¶¶ 2-5, U.N. Doc. S/RES/771 (Aug. 13, 1992), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N92/379/72/IMG/N9237972.pdf?OpenElement> (last visited Nov. 20, 2012).

²⁷ S.C. Res. 780, ¶¶ 2-4, U.N. Doc. S/RES/780 (Oct. 6, 1992), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N92/484/40/IMG/N9248440.pdf?OpenElement> (last visited Nov. 20, 2012).

²⁸ *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992)*, ¶¶ 110-13, U.N. Doc. S/1994/674 (May 27, 1994), http://www.un.org/ga/search/view_doc.asp?symbol=S/1994/674 (last visited Nov. 20, 2012).

²⁹ *Id.* at ¶ 111.

³⁰ *Id.* at ¶ 112.

³¹ AKSAR, *supra* note 9, at 10.

³² *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992)*, *supra* note 28, at ¶ 113.

³³ *Id.* at ¶ 130.

³⁴ *Interim Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992)*, ¶ 55, U.N. Doc. S/25274 (Feb. 10, 1993), http://www.un.org/ga/search/view_doc.asp?symbol=S/25274 (last visited Nov. 20, 2012); *id.* at ¶ 129,.

³⁵ *Id.* at ¶ 56; *Final Report of the Commission of Experts Established pursuant to Security Council*

發生在前南斯拉夫之殘暴行為造成龐大人民流離失所與傷亡，³⁶ 聯合國安理會認為前南斯拉夫之問題已對國際和平與安全構成威脅，應成立國際法庭，起訴自 1991 年於該境內嚴重違反國際人道法者；³⁷ 並通過第 827 號決議，依聯合國憲章第 7 章之規定，成立前南斯拉夫國際刑事法庭。³⁸

就在前南斯拉夫發生種族淨化問題時，位於非洲中部的盧安達共和國（Republic of Rwanda）亦面臨類似問題。盧安達曾為德國之殖民地，於 1962 年獨立建國，³⁹ 該國自 1959 年起四十餘年，歷經數次大屠殺，這幾次大規模且系統性違反人權之大屠殺主要係針對圖西（Tutsi）人。⁴⁰ 儘管已有不同種族之通婚，盧安達政府仍父親血統區分盧安達人民，並註記於身分證上；於 1994 年 4 月，盧安達的人口比例約為百分之八十四的胡圖（Hutu）人、百分之十四的圖西人與百分之二的其他種族。⁴¹

1994 年 4 月 6 日，盧安達總統 Juvénal Habyarimana 與蒲隆地（Burundi）總統 Cyprien Ntaryamira 所搭乘之飛機遭到攻擊因而喪生，此事件成了廣泛且系統性違反國際人道法之行為的導火線。⁴² 因情形嚴重，聯合國安理會認為已對該區域之和平與安全構成威脅，要求盧安達內相關當事方盡速停火，並要求聯合國秘書長盡快提交該國境內違反國際人道法之調查報告；⁴³ 隨後，通過第 935 號決議，要求聯合國秘書長成立專家委員會，審查、分析各國與國際人道組織所提供之資訊，以及該委員會自行調查之資訊，秘書長並應向安理會報告專家委員會之結論。⁴⁴

根據專家委員會之報告，胡圖人對圖西人自 1994 年 4 月 7 日開始之種族滅絕，乃經過系統性之計畫。⁴⁵ 1992 年，Habyarimana 政府之官員曾發表演說，呼

Resolution 780 (1992), *supra* note 28, at ¶¶ 129, 134.

³⁶ *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992)*, *id.* at ¶ 310.

³⁷ S.C. Res. 808, ¶ 1, U.N. Doc. S/RES/808 (Feb. 22, 1993), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N93/098/21/IMG/N9309821.pdf?OpenElement> (last visited Nov. 20, 2012).

³⁸ S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf?OpenElement> (last visited Nov. 20, 2012).

³⁹ 外交部網站。 <http://www.mofa.gov.tw/webapp/ct.asp?xItem=241&ctnode=1131&mp=1>（最後瀏覽日：2012/11/20）。

⁴⁰ *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 935 (1994)*, ¶ 55, U.N. Doc. S/1994/1405 (Dec. 9, 1994), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N94/478/78/PDF/N9447878.pdf?OpenElement> (last visited Nov. 20, 2012).

⁴¹ *Id.* at ¶¶ 59-61.

⁴² *Id.* at ¶ 56.

⁴³ S.C. Res. 918, ¶¶ 1, 19, U.N. Doc. S/RES/918 (May 17, 1994), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N94/218/36/PDF/N9421836.pdf?OpenElement> (last visited Nov. 20, 2012).

⁴⁴ S.C. Res. 935, ¶¶ 1-3, U.N. Doc. S/RES/935 (July 1, 1994), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N94/273/51/PDF/N9427351.pdf?OpenElement> (last visited Nov. 20, 2012).

⁴⁵ *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 935 (1994)*, *supra* note 40, at ¶¶ 58, 62.

籲胡圖人殺害圖西人並棄屍於盧安達的河流中；⁴⁶種族仇恨的宣傳在 1993 年透過廣播、海報大肆散佈，稱圖西人為敵人，應將敵人殲滅，並將圖西人貶低為蛇、蟑螂與動物；⁴⁷之後，並成立胡圖民兵之訓練營，宣傳針對圖西人之種族仇恨與大規模謀殺之方法，受訓者則組成民兵。⁴⁸

在 Habyarimana 總統飛機失事後三十至四十五分鐘內，許多道路遭到封鎖並設置路障，檢查身分證以判別種族，圖西人被挑出處決，首都吉佳利（Kigali）的街道上佈滿屍體；⁴⁹總統衛隊之成員進入溫和派胡圖人家中，殺害該等人與其家屬，總統衛隊與民兵並開始在首都與其他城鎮系統性屠殺圖西人，即便圖西人逃至飯店或教堂裡，亦遭到追殺。⁵⁰

自 1994 年 4 月 6 日至該年 7 月 15 日，估計約有五十萬人遭到殺害。⁵¹有鑑於此等嚴重違反國際人道法之情形已對國際之和平與安全構成威脅，聯合國安理會通過第 955 號決議，依聯合國憲章第 7 章之規定，成立盧安達國際刑事法庭，起訴自 1994 年 1 月 1 日至該年 12 月 31 日違反國際人道法者。⁵²

在國際刑事法院正式運作前，針對科索沃（Kosovo）、東帝汶（East Timor）、獅子山（Sierra Leone）與柬埔寨（Cambodia）等國違反國際人道法之問題，分別成立聯合國科索沃臨時行政任務團（United Nations Interim Administration Mission in Kosovo）與前南斯拉夫國際刑事法庭合作，⁵³東帝汶特別刑事法庭（Special Panels for Serious Crimes in East Timor）就 1999 年 1 月 1 日至該年 10 月 25 日間違反國際人道法之行為進行審判，⁵⁴柬埔寨特別刑事法庭（Extraordinary Chambers in the Courts of Cambodia）審判 1975 年 4 月 17 日至 1979 年 1 月 6 日間違反國際人道法之行為，⁵⁵以及獅子山特別法庭（Special Court for Sierra Leone）審判 1996 年 11 月 30 日以後違反國際人道法之行為。⁵⁶

除了前述各法庭之成立外，亦有多項條約於 1990 年後通過，包括 1993 年通過《禁止發展、生產、儲存與使用化學武器以及銷毀此類武器之公約》（Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction）、1997 年通過《禁止使用、儲存、生產與轉讓殺

⁴⁶ *Id.* at ¶ 63.

⁴⁷ *Id.* at ¶ 64.

⁴⁸ *Id.* at ¶ 65.

⁴⁹ *Id.* at ¶ 69.

⁵⁰ *Id.* at ¶¶ 68-72.

⁵¹ *Id.* at ¶ 92.

⁵² S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement> (last visited Nov. 20, 2012).

⁵³ S.C. Res. 1244, ¶¶ 10, 14, U.N. Doc. S/RES/1244 (June. 10, 1997), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement> (last visited Nov. 20, 2012); GEERT-JAN ALEXANDER KNOOPS, AN INTRODUCTION TO THE LAW OF INTERNATIONAL CRIMINAL TRIBUNALS: A COMPARATIVE STUDY 15-17 (New York: Transnational Publishers, 2003).

⁵⁴ GEERT-JAN ALEXANDER KNOOPS, *id.* at 14-15.

⁵⁵ *Id.* at 13-14.

⁵⁶ *Id.* at 11-13.

傷人員地雷以及銷毀此種地雷之公約》(Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction) 與 2005 年通過《第三附加議定書，關於採納一個新增特殊標誌的附加議定書》(Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III)) 等。⁵⁷

五、2000 年以後：國際刑事法院之成立

2000 年後，國際人道法之重大發展乃國際刑事法院 (International Criminal Court) 之成立，該法院成立之重要進展，可回溯至 1990 年代。

1994 年，國際法委員會參考紐倫堡與遠東國際軍事法庭規約以及前南斯拉夫與盧安達國際刑事法庭規約，向聯合國大會提出國際刑事法院規約草案，為審查該規約草案產生之實質與行政問題，遂成立建立國際刑事法院特設委員會 (Ad Hoc Committee on the Establishment of an International Criminal Court)。⁵⁸ 在該委員會於 1995 年進行兩次會議後，聯合國大會考量其提出之報告，成立建立國際刑事法院籌備委員會 (Preparatory Committee on the Establishment of an International Criminal Court)，以準備廣為接受之完整公約文本。⁵⁹

在 1996 年至 1998 年間，成立國際刑事法院籌備委員會進行了六次會議，處理國際刑事法院所涉及之各種問題，以研擬規約草案。1998 年 7 月於羅馬舉行的聯合國建立國際刑事法院全權代表外交會議 (United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court) 中，通過《國際刑事法院羅馬規約》(Rome Statute of the International Criminal Court)。該規約於 2002 年 7 月 1 日正式生效，隔年 3 月 11 日，該法院之法官正式就職。⁶⁰

此後，國際刑事法院針對違反國際人道法之情況進行調查，且起訴違反國際人道法者，⁶¹並於 2012 年 4 月宣布其第一個判決。⁶²

⁵⁷ Bugnion, *supra* note 5, at 200. 中華民國紅十字會總會網站。前揭註 15。Treaties & Documents by Date, *supra* note 5.

⁵⁸ G.A. Res. 49/53, ¶ 2, U.N. Doc. A/RES/49/53 (Dec. 9, 1994), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/767/77/PDF/N9576777.pdf?OpenElement> (last visited Nov. 20, 2012); AKSAR, *supra* note 9, at 48-49; Chronology of the International Criminal Court, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Chronology+of+the+ICC.htm> (last visited Nov. 20, 2012); History of the ICC, <http://www.iccnw.org/?mod=icchistory> (last visited Nov. 20, 2012).

⁵⁹ G.A. Res. 50/46, ¶¶ 1-2, U.N. Doc. A/RES/50/46 (Dec. 11, 1995), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/257/60/PDF/N9525760.pdf?OpenElement> (last visited Nov. 20, 2012); AKSAR, *id.* at 49; Chronology of the International Criminal Court, *id.*; History of the ICC, *id.*

⁶⁰ AKSAR, *id.* at 62, 67; GEERT-JAN ALEXANDER KNOOPS, *supra* note 53, at 7; Chronology of the International Criminal Court, *id.*; History of the ICC, *id.*; Rome Statute of the International Criminal Court, 17 July 1998, <http://www.icrc.org/ihl.nsf/INTRO/585?OpenDocument> (last visited Nov. 20, 2012).

⁶¹ Situations and Cases, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (last visited Nov. 20, 2012).

⁶² Democratic Republic of Congo, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/Related+Cas>

參、違反人道罪適用範圍之變遷：是否限於武裝衝突？

違反人道罪禁止針對平民之廣泛或系統的攻擊，為國際人道法的重要議題之一，此部分所要探討的是該罪之適用範圍，亦即該罪是否僅適用於武裝衝突之情況？為國際武裝衝突或非國際武裝衝突？以此為切入點，分析國際人道法之轉變。

一、僅限於國際武裝衝突

違反人道罪適用範圍之探討可回溯至第二次世界大戰後首次將違反人道罪成文化之《國際軍事法庭憲章》。該憲章第 6 條第 c 款規定：「違反人道罪係指為實行或涉及本法庭管轄之任何罪行，於戰爭前或戰爭期間，對任何平民之謀殺、滅絕、奴役、驅逐出境或其他非人道行為，或基於政治、種族或宗教理由之迫害，不論該等行為是否違反犯罪所在國之內國法律。」⁶³此規定將違反人道罪與國際武裝衝突相連結，即便該款規定法院可審理於戰爭前或戰爭期間所發生違反人道罪之行為，但僅限於與違反和平罪或戰爭罪有關之情況，限制了法庭的管轄權，使法院對於第二次世界大戰爆發前之罪行幾乎難以起訴。⁶⁴

國際軍事法庭判決裁示：「要構成違反人道罪，戰爭爆發前之行為必須為實行或涉及法庭管轄之任何罪行。法院認為，這些令人厭惡且可怕的行為並未被完

es/ICC+0104+0106/Democratic+Republic+of+the+Congo.htm (last visited Nov. 20, 2012).

⁶³ Article 6(c) of Charter of the International Military Tribunal - Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis:

Crimes against humanity.- 'namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

⁶⁴ AKSAR, *supra* note 9, at 243; GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS 148-49 (New York: Oxford University Press, 2005); L.J. VAN DEN HERIK, THE CONTRIBUTION OF THE RWANDA TRIBUNAL TO THE DEVELOPMENT OF INTERNATIONAL LAW 154-55 (Boston: Martinus Nijhoff Publishers, 2005); CAROLINE FOURNET, INTERNATIONAL CRIMES: THEORIES, PRACTICE AND EVOLUTION 39-40 (London: Cameron May, 2006); WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 186-87 (New York: Cambridge University Press, 2006); Triffterer, *supra* note 9, at 170-7; GIDEON BOAS, JAMES L. BISCHOFF & NATALIE L. REID, INTERNATIONAL CRIMINAL LAW PRACTITIONER LIBRARY VOLUME II: ELEMENTS OF CRIMES UNDER INTERNATIONAL LAW 24 (New York: Cambridge University Press, 2008); RONALD C. SLYE & BETH VAN SCHAACK, INTERNATIONAL CRIMINAL LAW: ESSENTIALS 229 (New York: Aspen Publishers, 2009); CHRISTINE BYRON, WAR CRIMES AND CRIMES AGAINST HUMANITY IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 190 (New York: Manchester University Press, 2009); Beth Van Schaack, *The Definition of Crimes against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT'L L. 787, 791, 803-04 (1999); Margaret McAuliffe deGuzman, *The Road from Rome: The Developing Law of Crimes against Humanity*, 22 HUM. RTS. Q. 335, 346-47 (2000); Simon Chesterman, *An Altogether Different Order: Defining the Elements of Crimes against Humanity*, 10 DUKE J. COMP. & INT'L L. 307, 310 (2000); Payam Akhavan, *Contributions of the International Criminal Tribunals for the Former Yugoslavia and Rwanda to Development of Definitions of Crimes against Humanity and Genocide*, 94 AM. SOC'Y INT'L L. PROC. 279,279 (2000); Guénaël Mettraux, *Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT'L L.J. 237, 264 (2002); Mohamed Elewa Badar, *From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes against Humanity*, 5 SAN DIEGO INT'L L.J. 73, 91 (2004); Payam Akhavan, *Reconciling Crimes Against Humanity with the Laws of War: Human Rights, Armed Conflict, and the Limits of Progressive Jurisprudence*, 6(1) J. INT'L CRIM. JUST. 21, 24 (2008).

滿證實係為實行或涉及任何該等罪行。因此法庭無法宣告 1939 年前之行為符合憲章之違反人道罪，但自 1939 年戰爭開始後，犯下了廣泛的戰爭罪，違反人道罪亦同；起訴書中所控訴且發生在戰爭開始後之非人道行為，雖未構成戰爭罪，但其皆係為實行或涉及侵略戰爭，因此構成違反人道罪。」⁶⁵在被起訴的 22 名德國官員中，只有 Julius Streicher 與 Baldur von Schirach 僅因違反人道罪而被判有罪。⁶⁶

Julius Streicher 長達 25 年發表仇視猶太人的言論、文章與宣揚，但法庭僅針對 1939 年戰爭爆發後，其煽動謀殺與滅絕德國占領之東部領域的猶太人，做出裁決。法庭認為，其於東部之猶太人在可怕的情況下遭到殺害時，煽動進行謀殺與滅絕，此等行為顯然構成基於政治與種族理由之迫害，且涉及戰爭罪，符合憲章規定，因此構成違反人道罪。⁶⁷Baldur von Schirach 參與將猶太人驅逐出維也納之行動，法院認為，德國以依照侵略計畫占領奧地利，此占領為法庭管轄之罪行，涉及此占領之謀殺、滅絕、奴役、驅逐出境或其他非人道行為，或基於政治、種族或宗教理由之迫害，構成憲章第 6 條第 c 款之違反人道罪，故 Baldur von Schirach 之行為構成違反人道罪。⁶⁸

雖然《國際軍事法庭憲章》第 6 條第 c 款規定須有國際武裝衝突之存在，但法庭對於國際武裝衝突與違反人道罪行為之連結僅需微薄之證明即可。⁶⁹然須為實行或涉及違反和平罪或戰爭罪，才可能構成違反人道罪，使違反人道罪成為附屬於戰爭罪或違反和平罪之概念。⁷⁰

同盟國為了在德國建立統一法律標準，處理國際軍事法庭以外之戰犯，遂制定《同盟國管制理事會法第 10 號》(Allied Control Council Law No. 10)。⁷¹該法第 2 條第 1 項第 c 款規定：「違反人道罪，包含但不限於對任何平民之謀殺、滅絕、奴役、驅逐出境、監禁、酷刑、強暴或其他非人道行為，或基於政治、種族或宗教理由之迫害等暴行與罪行，不論該等行為是否違反犯罪所在國之內國法律。」⁷²此規定刪除了《國際軍事法庭憲章》第 6 條第 c 款的「為實行或涉及本

⁶⁵ TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG, 14 NOVEMBER 1945-1 OCTOBER 1946, VOLUME I, 254-55 (1947), http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf (last visited Nov. 20, 2012).

⁶⁶ *Id.* at 301-04, 317-20; BOAS, BISCHOFF & REID, *supra* note 64, at 24; Van Schaack, *supra* note 64, at 805; Yoram Dinstein, *Case Analysis: Crimes Against Humanity After Tadic*, 13(2) LEIDEN J. INT'L L. 373, 374 (2000).

⁶⁷ TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG, 14 NOVEMBER 1945-1 OCTOBER 1946, VOLUME I, *id.*, at 301-04; Van Schaack, *id.* at 805-06; Mettraux, *supra* note 64, at 264-65.

⁶⁸ TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG, 14 NOVEMBER 1945-1 OCTOBER 1946, VOLUME I, *id.* at 317-20; SLYE & VAN SCHAACK, *supra* note 64, at 230; Van Schaack, *id.* at 805.

⁶⁹ VAN DEN HERIK, *supra* note 64, at 155; SLYE & VAN SCHAACK, *id.* at 230; Van Schaack, *id.* 805-06.

⁷⁰ AKSAR, *supra* note 9, at 243; BOAS, BISCHOFF & REID, *supra* note 64, at 24.

⁷¹ TRIAL OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10: NUREMBERG, OCTOBER 1946-APRIL 1949, VOLUME I, XVI (1949), http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-I.pdf (last visited Nov. 20, 2012).

⁷² Article II(1)(c) of Allied Control Council Law No. 10:

Crimes against Humanity. Atrocities and offenses, including but not limited to murder, extermination,

法庭管轄之任何罪行」與「於戰爭前或戰爭期間」，使違反人道罪獨立於違反和平罪與戰爭罪，亦即將違反人道罪之行為與戰爭脫鉤。⁷³

儘管有此規定，法庭對於違反人道罪是否需與國際武裝衝突相連結，仍有不同立場。⁷⁴在有些案件中，法院仍強調違反人道罪與戰爭之連結。在 *United States v. Flick et al.* 一案中，法庭反駁《同盟國管制理事會法第 10 號》第 2 條第 1 項第 c 款刪除了《國際軍事法庭憲章》第 6 條第 c 款「為實行或涉及本法庭管轄之任何罪行」係為擴張法庭對於戰爭前之違反人道罪行為之管轄的說法，認為根據《同盟國管制理事會法第 10 號》序言與第 1 條之規定，《國際軍事法庭憲章》為該法不可或缺之一部份，且法庭之唯一目的係為審判在戰爭期間犯罪或所犯之罪涉及戰爭的戰犯，因此，法庭認為其對被告在戰爭爆發前占領猶太人財產之行為無管轄權，駁回被告犯下違反人道罪之控訴。⁷⁵

在 *United States v. von Weizsaecker et al.* 一案中，法庭首先表示，綜觀《同盟國管制理事會法第 10 號》序言與第 1 條之規定，即便該法第 2 條第 1 項第 c 款刪除《國際軍事法庭憲章》第 6 條第 c 款中「為實行或涉及本法庭管轄之任何罪行」之字句，法庭仍不得超越國際軍事法庭之管轄權範圍，且該法與《國際軍事法庭憲章》之目的不在創造新的罪行，根據罪行法定主義，在當時，政府對其國民犯下違反人道罪之行為，並非違反國際法之罪行，因此，對於德國政府在戰爭爆發前對其國民之迫害，法庭認為其無管轄權，駁回此控訴。⁷⁶

與上述案件相反，有些判決則將違反人道罪與國際武裝衝突脫鉤。在 *United States v. Altstoetter et al.* 一案中，雖然法庭因《國際軍事法庭憲章》與《同盟國管制理事會法第 10 號》為將共謀犯戰爭罪或違反人道罪列為獨立之罪行，而駁回針對被告在戰爭爆發前後共謀犯戰爭罪與違反人道罪之控訴，又起訴書所列證據係針對戰爭爆發後違反人道罪之行為，法庭僅能就起訴書所列之行為進行審判，但

enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

⁷³ AKSAR, *supra* note 9, at 243; METTRAUX, *supra* note 64, at 149-50; VAN DEN HERIK, *supra* note 64, at 155; FOURNET, *supra* note 64, at 41; BOAS, BISCHOFF & REID, *supra* note 64, at 24-25; BYRON, *supra* note 64, at 190; Phyllis Hwang, *Defining Crimes against Humanity in the Rome Statute of the International Criminal Court*, 22 FORDHAM INT'L L.J. 457, 460-61 (1998); Van Schaack, *supra* note 64, at 808; Dinstein, *supra* note 66, at 375; McAuliffe deGuzman, *supra* note 64, at 348; Mettraux, *supra* note 64, at 265; Kai Ambos & Steffen Wirth, *The Current Law of Crimes Against Humanity: An analysis of UNTAET Regulation 15/2000*, 13 CRIM. L.F. 1, 5 (2002); Badar, *supra* note 64, at 82.

⁷⁴ METTRAUX, *id.* at 150; FOURNET, *id.* at 41-42; BOAS, BISCHOFF & REID, *id.* at 25; BYRON, *id.*; Hwang, *id.* at 461; Van Schaack, *id.* at 809-19; McAuliffe deGuzman, *id.* at 357; Mettraux, *id.*; Ambos & Wirth, *id.* at 6; Badar, *id.* at 92-93.

⁷⁵ TRIAL OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10: NUREMBERG, OCTOBER 1946-APRIL 1949, VOLUME VI, 1212-16 (1952), http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-VI.pdf (last visited Nov. 20, 2012).

⁷⁶ TRIAL OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10: NUREMBERG, OCTOBER 1946-APRIL 1949, VOLUME XIII, 112-17 (1952), http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XIII.pdf (last visited Nov. 20, 2012).

法庭表示，因《同盟國管制理事會法第10號》第2條第1項第c款刪除《國際軍事法庭憲章》第6條第c款之「為實行或涉及本法庭管轄之任何罪行」，故兩法就違反人道罪之定義實質上並不相同。⁷⁷

在*United States v. Ohlendorf et al.*一案中，法院表示「人道法」（law of humanity）並不限於戰爭情況，且係為在任何時刻保護人性，而違反人道罪之行為很早就發生了，只是到現在才被列為國際罪行，國際刑事法庭因《國際軍事法庭憲章》之限制，僅審判為實行或涉及戰爭罪或違反和平罪之違反人道罪行為，然《同盟國管制理事會法第10號》刪除了此限制，因此該法庭可審判一般刑法原則所認知之所有違反人道罪，且因此規定並不受限於戰爭期間之犯行，故亦不受限於被告或受害者之國籍或犯罪發生地。⁷⁸

二、在僅限於武裝衝突或可適用於和平時期之間擺盪

雖然第二次世界大戰後之《國際軍事法庭憲章》與各法庭將違反人道罪之適用範圍限制於戰爭時期，但亦有試圖擴張違反人道罪適用範圍之意見提出。

國際法委員會依據《國際軍事法庭憲章》與國際軍事法庭之判決，提出《紐倫堡原則》，⁷⁹該原則將違反人道罪定義為：「為實行或涉及任何違反和平罪或任何戰爭罪，對任何平民之謀殺、滅絕、奴役、驅逐出境或其他非人道行為，或基於政治、種族或宗教理由之迫害。」⁸⁰雖然此定義仍保留違反人道罪與違反和平罪及戰爭罪之連結，但該委員會之報告表示：「將《國際軍事法庭憲章》第6條第c款之『於戰爭前或戰爭期間』刪除係因該字句指涉特定戰爭—1939年戰爭，刪除該字句不代表委員會認為違反人道罪僅能發生在戰爭期間，相反地，委員會認為該罪亦可能發生於涉及違反和平罪之戰爭前。」⁸¹

根據國際法委員會於1951年草擬的《危害人類和平與安全罪法草案》第2條

⁷⁷ TRIAL OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10: NUREMBERG, OCTOBER 1946-APRIL 1949, VOLUME III, 954-85 (1951), http://www.loc.gov/tr/frd/Military_Law/pdf/NT_war-criminals_Vol-III.pdf (last visited Nov. 20, 2012).

⁷⁸ TRIAL OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10: NUREMBERG, OCTOBER 1946-APRIL 1949, VOLUME IV, 496-500 (1950), http://www.loc.gov/tr/frd/Military_Law/pdf/NT_war-criminals_Vol-IV.pdf (last visited Nov. 20, 2012).

⁷⁹ G.A. Res. 177 (II), U.N. Doc. A/RES/177 (Nov. 21, 1947), <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/038/84/IMG/NR003884.pdf?OpenElement> (last visited Nov. 20, 2012).

⁸⁰ Principle VI(c) of Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal:
Crimes against Humanity: Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.

Report of the International Law Commission to the General Assembly, U.N. GAOR, 5th Sess., Supp. (No. 12), U.N. Doc. A/1316 (1950), reprinted in [1950] 2 Y.B. Int'l L. Comm'n 377, U.N. Doc. A/CN.4/34, http://untreaty.un.org/ilc/documentation/english/a_cn4_34.pdf (last visited Nov. 20, 2012).

⁸¹ *Report of the International Law Commission to the General Assembly*, U.N. GAOR, 5th Sess., Supp. (No. 12), U.N. Doc. A/1316 (1950), *id.*

第10項之規定：「為實行或涉及本條定義之其他罪行，國家當局或私人對任何平民之非人道行為，例如謀殺、滅絕、奴役、驅逐出境，或基於政治、種族、宗教或文化理由之迫害。」⁸²此定義不再將違反人道罪與違反和平罪或戰爭罪相連結，而是連結該罪與同條之其他罪行。雖然同條規定之侵略罪或針對他國之恐怖活動使違反人道罪仍與武裝衝突有關，但同條規定之罪行包括種族滅絕，根據1948年通過的《防止及懲治種族滅絕罪公約》第1條之規定，種族滅絕可發生在和平時期，⁸³因此，違反人道罪亦可能發生在和平時期。⁸⁴

此後，1954年《危害人類和平與安全罪法草案》第2條第11項⁸⁵、1991年該法草案第21條⁸⁶與1996年該法草案第18條⁸⁷對違反人道罪之定義皆刪除該罪與戰

⁸² Article 2(10) of 1951 Draft Code of Offences against the Peace and Security of Mankind: Inhuman acts by the authorities of a State or by private individuals against any civilian population, such as murder, or extermination, or enslavement, or deportation, or persecutions on political, racial, religious or cultural grounds, when such acts are committed in execution of or in connexion with other offences defined in this article.

Report of the International Law Commission to the General Assembly, U.N. GAOR, 6th Sess., Supp. (No. 9), U.N. Doc. A/1858 (1951), reprinted in [1951] 2 Y.B. Int'l L. Comm'n 136, U.N. Doc. A/CN.4/48 and Corr.1 & 2, http://untreaty.un.org/ilc/documentation/english/a_cn4_48_corr1-2.pdf (last visited Nov. 20, 2012).

⁸³ Article 1 of Convention on the Prevention and Punishment of the Crime of Genocide:

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

⁸⁴ Hwang, *supra* note 73, at 461, 463-64; Ambos & Wirth, *supra* note 73, at 7.

⁸⁵ Article 2(11) of 1954 Draft Code of Offences against the Peace and Security of Mankind:

Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.

Report of the International Law Commission to the General Assembly, U.N. GAOR, 9th Sess., Supp. (No. 9), U.N. Doc. A/2693 (1954), reprinted in [1954] 2 Y.B. Int'l L. Comm'n 150, U.N. Doc. A/CN.4/88, http://untreaty.un.org/ilc/documentation/english/a_cn4_88.pdf (last visited Nov. 20, 2012).

⁸⁶ Article 21 of 1991 Draft Code of Crimes against the Peace and Security of Mankind:

An individual who commits or orders the commission of any of the following violations of human rights:

— murder

— torture

— establishing or maintaining over persons a status of slavery, servitude or forced labour

— 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

shall, on conviction thereof, be sentenced [to...].

Report of the International Law Commission on the work of its Forty-Third Session, U.N. GAOR, 46th Sess., Supp. (No. 10), U.N. Doc. A/46/10 (1991), reprinted in [1991] 2 Y.B. Int'l L. Comm'n 103, http://untreaty.un.org/ilc/documentation/english/A_46_10.pdf (last visited Nov. 20, 2012).

⁸⁷ Article 18 of 1996 Draft Code of Crimes against the Peace and Security of Mankind:

A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group:

(a) Murder;

(b) Extermination;

(c) Torture;

(d) Enslavement;

(e) Persecution on political, racial, religious or ethnic grounds;

(f) Institutionalized discrimination on racial, ethnic or religious grounds involving the violation of

爭罪、違反和平罪或其他任何罪行之連結，亦即將違反人道罪與武裝衝突脫鉤，該罪不僅可能發生在戰爭時期，亦可能發生在和平時期。⁸⁸且1968年通過的《戰爭罪及違反人道罪不適用法定時效公約》(Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity)第1條第b款亦規定違反人道罪可發生在戰爭或和平時期。⁸⁹從這些草案與具有拘束力的公約可看出，習慣國際法上已認為違反人道罪不一定要有武裝衝突之存在，即該罪可發生在戰爭或和平時期。⁹⁰

《前南斯拉夫國際刑事法庭規約》第5條規定：「國際法庭應有權起訴於國際或國內武裝衝突中，犯下下列針對任何平民之罪行而負有責任者：(a)謀殺；(b)滅絕；(c)奴役；(d)驅逐出境；(e)監禁；(f)酷刑；(g)強暴；(h)基於政治、種族與宗教理由之迫害；(i)其他非人道行為。」⁹¹此規定將違反人道罪從國際戰爭擴張至國內武裝衝突。⁹²依安理會決議成立的前南斯拉夫問題專家委員會之報告表

fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;

(g) Arbitrary deportation or forcible transfer of population;

(h) Arbitrary imprisonment;

(i) Forced disappearance of persons;

(j) Rape, enforced prostitution and other forms of sexual abuse;

(k) Other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.

Report of the International Law Commission on the work of its Forty-Eighth Session, U.N. GAOR, 51st Sess., Supp. (No. 10), U.N. Doc. A/51/10 (1996), reprinted in [1996] 2 Y.B. Int'l L. Comm'n 47, http://untreaty.un.org/ilc/documentation/english/A_51_10.pdf (last visited Nov. 20, 2012).

⁸⁸ METTRAUX, *supra* note 64, at 150; FOURNET, *supra* note 64, at 43; BYRON, *supra* note 64, at 190; Hwang, *supra* note 73, at 464-66; Van Schaack, *supra* note 64, at 826; Dinstein, *supra* note 66, at 376; Mettraux, *supra* note 64, at 266; Ambos & Wirth, *supra* note 73, at 7-10; Badar, *supra* note 64, at 87.

⁸⁹ Article 1(b) of Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity:

(b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed.

⁹⁰ BOAS, BISCHOFF & REID, *supra* note 64, at 27; deGuzman, *supra* note 64, at 350.

⁹¹ Article 5 of Statute of the International Criminal Tribunal for the Former Yugoslavia:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;

(b) extermination;

(c) enslavement;

(d) deportation;

(e) imprisonment;

(f) torture;

(g) rape;

(h) persecutions on political, racial and religious grounds;

(i) other inhumane acts.

⁹² Theodor Meron, *War Crimes Law Comes of Age*, 92(3) AM. J. INT'L L. 462, 464 (1998).

示，違反人道罪適用於所有情況，該罪不局限於國際武裝衝突，而亦適用於國內武裝衝突，且該罪不再依靠與違反和平罪或戰爭罪之連結。⁹³聯合國秘書長之報告亦表示，違反人道罪不論於國際或國內武裝衝突之情況，皆被禁止。⁹⁴

對於此規定將違反人道罪與武裝衝突相連結，前南斯拉夫國際刑事法庭提出以下見解。在*Prosecutor v. Dusko Tadic*案，審判分庭認為，《國際軍事法庭憲章》將違反人道罪與違反和平罪及戰爭罪相連結，乃因該軍事法庭之設立係為公正、迅速審判與懲罰歐洲軸心國之主要戰犯，而有此特殊規定；其後之案例法中清楚顯示習慣國際法已不再要求違反人道罪須與違反和平罪或戰爭罪相連結；《前南斯拉夫國際刑事法庭規約》第5條之定義實際上較習慣國際法對違反人道罪之定義更為狹隘，此包含與武裝衝突相連結之規定限制了本法庭之管轄權。⁹⁵

同案上訴分庭亦贊同審判分庭之看法，上訴分庭表示，違反人道罪不須與國際武裝衝突相連結已是確立之習慣國際法規則，且習慣國際法確實不要求該罪須與任何衝突相連結，而從要求該罪於國內或國際武裝衝突之情況發生可看出，安理會於《前南斯拉夫國際刑事法庭規約》第5條之規定較習慣國際法所要求的更為狹義。⁹⁶上訴分庭更進一步表示，在習慣國際法下，違反人道罪亦可發生於和平時期，第5條中武裝衝突之要求是管轄權要件，而非該罪之實質要件，此武裝衝突之要求僅須證明曾有武裝衝突即可，此等要求已超過習慣國際法之要求。⁹⁷

此外，在*Prosecutor v. Dragan Nikolic*案，審判分庭指出，自國際軍事法庭判決以來，習慣國際法已不再需要判定違反人道罪與違反和平罪或戰爭罪之連結。⁹⁸*Prosecutor v. Dario Kordic and Mario Cerkez*案之審判分庭則表達與*Prosecutor v. Dusko Tadic*案上訴分庭相同之見解。⁹⁹在*Prosecutor v. Milorad Krnojelac*案，審判分庭亦認為《前南斯拉夫國際刑事法庭規約》第5條規定違反人道罪須發生於武裝衝突情況乃管轄權之要求。¹⁰⁰

⁹³ *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992)*, *supra* note 28, at ¶ 75.

⁹⁴ The Secretary-General, *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶ 47, U.N. Doc. S/25704 (May 3, 1993), http://www.un.org/ga/search/view_doc.asp?symbol=S/25704 (last visited Nov. 20, 2012).

⁹⁵ *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, Decision on the Defence Motion on Jurisdiction, ¶¶ 78-83 (Aug. 10, 1995), <http://www.icty.org/x/cases/tadic/tdec/en/100895.htm> (last visited Nov. 20, 2012).

⁹⁶ *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 141 (Oct. 2, 1995), <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> (last visited Nov. 20, 2012).

⁹⁷ *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Judgement, ¶¶ 249, 251 (July 15, 1999), <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf> (last visited Nov. 20, 2012).

⁹⁸ *Prosecutor v. Dragan Nikolic*, Case No. IT-94-2-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶ 26 (Oct. 20, 1995), http://www.icty.org/x/cases/dragan_nikolic/tord/en/951020.pdf (last visited Nov. 20, 2012).

⁹⁹ *Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-T, Judgement, ¶ 33 (Feb. 26, 2001), http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf (last visited Nov. 20, 2012).

¹⁰⁰ *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgement, ¶ 53 (Mar. 15, 2002), <http://www.icty.org/x/cases/krnojelac/tjug/en/krn-tj020315e.pdf> (last visited Nov. 20, 2012).

三、與武裝衝突脫鉤而可適用於任何時期

因1990年代內國衝突不斷發生，造成嚴重傷亡，國際社會開始反思違反人道罪之適用範圍是否仍必須與武裝衝突相連結，前南斯拉夫國際刑事法庭雖然認為違反人道罪應與武裝衝突脫鉤，但從《前南斯拉夫國際刑事法庭規約》第5條在文字上仍將違反人道罪限於武裝衝突之情況。

與《前南斯拉夫國際刑事法庭規約》第5條不同，《盧安達國際刑事法庭規約》第3條規定：「盧安達國際刑事法庭應有權起訴基於國籍、政治、族裔、種族或宗教理由，於廣泛或系統的攻擊中，犯下下列針對任何平民之罪行而負有責任者：(a)謀殺；(b)滅絕；(c)奴役；(d)驅逐出境；(e)監禁；(f)酷刑；(g)強暴；(h)基於政治、種族與宗教理由之迫害；(i)其他非人道行為。」¹⁰¹此規定將違反人道罪擴張到和平時期，刪除了有關武裝衝突之規定，將該罪與武裝衝突脫鉤，此反映了習慣國際法不再要求該罪與武裝衝突相連結之立場。¹⁰²

《國際刑事法院羅馬規約》第7條第1項規定：「為本規約之目的，『違反人道罪』係指於針對任何平民之廣泛或系統攻擊中，明知此攻擊而實施之下列行為：(a)謀殺；(b)滅絕；(c)奴役；(d)驅逐出境或強迫遷移人口；(e)違反國際法基本規則之監禁或以其他方式嚴重剝奪人身自由；(f)酷刑；(g)強暴、性奴役、強迫賣淫、強迫懷孕、強迫絕育或其他嚴重程度相當之性暴力；(h)基於政治、種族、國籍、族裔、文化、宗教、第3項所界定之性別，或公認為國際法不容之其他理由，對任何可以識別的團體或集體進行迫害，且涉及本項所提及之任何行為或本法院管轄權之任何犯罪；(i)強制失蹤；(j)種族隔離罪；(k)故意造成重大痛苦，或對人體或身心健康造成嚴重傷害之其他性質相同的非人道行為。」¹⁰³此規

¹⁰¹ Article 3 of Statute of the International Criminal Tribunal for Rwanda:

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for 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:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.

¹⁰² AKSAR, *supra* note 9, at 245; Timothy LH McCormack, *Crimes Against Humanity*, in THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 179, 184 (Dominic McGoldrick et al. eds., Hart Publishing, 2004); VAN DEN HERIK, *supra* note 64, at 159; FOURNET, *supra* note 64, at 45; SCHABAS, *supra* note 64, at 187; Triffterer, *supra* note 9, at 173; ALEXANDER ZAHAR & GÖRAN SLUITER, INTERNATIONAL CRIMINAL LAW: A CRITICAL INTRODUCTION 205 (New York: Oxford University Press, 2008); BOAS, BISCHOFF & REID, *supra* note 64, at 31; SLYE & Van SCHAACK, *supra* note 64, at 230; Meron, *supra* note 92, at 464; Chesterman, *supra* note 64, at 310; Dinstein, *supra* note 66, at 378, 386; deGuzman, *supra* note 64, at 351, 358; Akhavan, *supra* note 64, at 279; Mettraux, *supra* note 64, at 266; Ambos & Wirth, *supra* note 73, at 12; Badar, *supra* note 64, at 87-89, 93; Patricia M. Wald, *Genocide and Crimes against Humanity*, 6 WASH. U. GLOBAL STUD. L. REV. 621, 623 (2007); Akhavan, *supra* note 64, at 25.

¹⁰³ Article 7(1) of Rome Statute of the International Criminal Court:

定與《盧安達國際刑事法庭規約》第3條及習慣國際法相同，亦摒除違反人道罪與武裝衝突之連結。¹⁰⁴

從上述各項規定與判決之分析可知，違反人道罪已不再與任何其他罪行或武裝衝突相連結，不僅是獨立之罪行，亦可發生在於有武裝衝突之情況或和平時期。

四、小結

根據上述分析，違反人道罪一開始於《國際軍事法庭憲章》成文化，乃從屬於違反和平罪與戰爭罪，其適用範圍僅限於戰爭時期，且非獨立之罪行，雖然其後之《同盟國管制理事會法第10號》、《危害人類和平與安全罪法草案》及其他公約試圖擴張違反人道罪之適用範圍，然因無國際法院之重大裁判，故無法明確知悉國際社會是否已對違反人道罪之適用範圍達成共識。

《前南斯拉夫國際刑事法庭規約》雖將違反人道罪之適用範圍從國際武裝衝突擴張到之國內武裝衝突，仍使該罪之適用限於武裝衝突之情況，但該法庭認為習慣國際法已將違反人道罪與武裝衝突脫鉤，而可適用於和平時期，該規定顯然過於狹隘。其後之《盧安達國際刑事法庭規約》與《國際刑事法院羅馬規約》不再違反人道罪與武裝衝突相連結，使該罪可適用於任何情況。

違反人道罪成為獨立之罪且可適用於未達武裝衝突之情形，使平民之基本權利即使非在戰爭時期亦能受到完整保障，而違反人道罪適用範圍乃隨著時間演進而變遷，於1990年代確立其適用範圍，與傳統戰爭法受到挑戰之時期相同，而其適用範圍之變遷係從人道角度出發，為全面性保障平民之權利，反映出國際人道

For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

¹⁰⁴ AKSAR, *supra* note 9, at 247; ILIAS BANTEKAS & SUSAN NASH, INTERNATIONAL CRIMINAL LAW 135 (New York: Routledge-Cavendish, 3rd ed., 2007); Triffterer, *supra* note 9, at 175; ZAHAR & SLUITER, *supra* note 102, at 205; BOAS, BISCHOFF & REID, *supra* note 64, at 105-06; BYRON, *supra* note 64, at 191; Hwang, *supra* note 73, at 501; Van Schaack, *supra* note 64, at 845; deGuzman, *supra* note 64, at 353, 359; Akhavan, *supra* note 64, at 280; Badar, *supra* note 64, at 142; Wald, *supra* note 102, at 623; Akhavan, *supra* note 64, at 26.

法關懷視野之擴大，並有了本質上之轉變，即從「戰爭法」轉變成「人道法」。

肆、結論

國際人道法經歷超過一世紀的發展，除了通過大量條約，形成規範戰爭行為之海牙公約體系與日內瓦公約體系外，亦延伸關於種族滅絕罪與違反人道罪之規範，透過各種國際特別刑事法庭與常設國際刑事法院，使各種公約與規範能更進一步獲得實踐，展現其拘束力。

從國際人道法之發展脈絡可看出其本質上之變化，從一開始因應戰爭而生的戰爭法，轉變成以人道角度出發的人道法，而違反人道罪適用範圍之變遷，最能展現此一變化。違反人道罪從一開始從屬於戰爭罪與違反和平罪，後成為與戰爭罪、種族滅絕罪等罪並列之獨立一罪，其適用範圍更是從僅適用於國際武裝衝突，擴大到非國際武裝衝突，最後於和平時期亦適用該罪。

從違反人道罪適用範圍之變遷可看出國際社會對於國際人道法觀念之改變，亦即從一開始以戰爭為出發點，規範戰爭行為以降低戰爭對於平民造成之傷害，然此等以戰爭為主之規範並不足以使平民受到全面性之保障，從許多事件皆可看出平民於和平時期亦可能受到如同戰爭來自當權者之生命威脅。為保障平民最基本之權利，乃應從人道角度出發，擴展國際人道法之規範，使平民於和平時期亦能受到應有之保護，違反人道罪適用於和平時期正是使平民能夠受到完整保障、擁有基本人道待遇之最佳證明。

國際人道法除了本文所探討的從戰爭法演變成人道法以外，亦有其他面向之轉變，例如從人道法朝著刑事法化轉變。除了國家必須善盡其對平民之保護義務外，違反國際人道法之個人亦不再受到國家之掩護，而必須受到法律制裁。此等對個人責任之追究，不僅針對實際執行任務、侵害平民權益之人，更進一步追溯到上位者，亦即指揮官或其他上級之責任，使所有參與違反國際人道法之事件者均應負法律責任。國際特別刑事法庭與常設國際刑事法院之成立可看出國際社會對於個人責任之重視，法院對於國際人道法之運用更能使該法之規範更為明確，使仍有歧異之處達成共識。所有違反國際人道法之行為是否當然刑事法化？有哪些行為目前仍未刑事法化？值得進一步之研究與討論。

國際人道法之發展與其本質上的變化亦與國際法之演變方向相符，國際法之主體不再以國家為主，個人亦可作為國際法上之主體，負有權利義務。國際人道法從條約規範戰爭行為到其他罪行之發展、常設國際刑事法院之成立，從戰爭法演變為人道法、刑事法化，展現個人在國際法上亦扮演重要角色，個人不僅擁有基本權利，國家對其負有保護義務外，個人亦有責任遵守國際人道法之規範，違反者應受到法院審判而受法律制裁。

國際人道法不僅涉及戰爭法、人道法與刑事法外，亦與國際法與國際人權法相連結，而國際人道法以「人」、「人道」之角度出發，將其關懷視野擴大至和平時期，使人民能夠受到全面性保障，國家或當權者不僅於戰爭時期必須遵守戰爭法之規範，於和平時期亦應遵守違反人道罪之規範，以保護人民之人道尊嚴。

參考文獻

一、專書與期刊文章

- Akhavan, Payam. 2000. "Contributions of the International Criminal Tribunals for the Former Yugoslavia and Rwanda to Development of Definitions of Crimes against Humanity and Genocide." *American Society of International Law Proceedings* 94: 279-284.
- Akhavan, Payam. 2008. "Reconciling Crimes Against Humanity with the Laws of War: Human Rights, Armed Conflict, and the Limits of Progressive Jurisprudence." *Journal of International Criminal Justice* 6, 1: 21-37.
- Aksar, Yusuf. 2004. *Implementing International Humanitarian Law: From the Ad Hoc Tribunals to a Permanent International Criminal Court*. New York: Routledge.
- Ambos, Kai & Wirth, Steffen. 2002. "The Current Law of Crimes Against Humanity: An analysis of UNTAET Regulation 15/2000." *Criminal Law Forum* 13: 1-90.
- Badar, Mohamed Elewa. 2004. "From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes against Humanity." *San Diego International Law Journal* 5: 73-144.
- Bantekas, Ilias & Nash, Susan. 2007. *International Criminal Law*. New York: Routledge-Cavendish, 3rd Edition.
- Boas, Gideon, Bischoff, James L. & Reid, Natalie L. 2008. *International Criminal Law Practitioner Library Volume II: Elements of Crimes under International Law*. New York: Cambridge University Press.
- Bugnion, François. 2004. "The International Committee of the Red Cross and the Development of International Humanitarian Law." *Chicago Journal of International Law* 5, 1: 191-215.
- Byron, Christine. 2009. *War Crimes and Crimes against Humanity in the Rome Statute of the International Criminal Court*. New York: Manchester University Press.
- Chesterman, Simon. 2000. "An Altogether Different Order: Defining the Elements of Crimes against Humanity." *Duke Journal of Comparative & International Law* 10: 307-343.
- Dinstein, Yoram, 2000. "Case Analysis: Crimes Against Humanity After Tadic." *Leiden Journal of International Law* 13, 2: 373-393.
- Fleck, Dieter ed. 2008. *The Handbook of International Humanitarian Law*. New York: Oxford University Press, 2nd Edition.
- Fournet, Caroline. 2006. *International Crimes: Theories, Practice and Evolution*. London: Cameron May.
- Hwang, Phyllis. 1998. "Defining Crimes against Humanity in the Rome Statute of the International Criminal Court." *Fordham International Law Journal* 22: 457-504.
- Knoops, Geert-Jan Alexander. 2003. *An Introduction to the Law of International*

- Criminal Tribunals: A Comparative Study*. New York: Transnational Publishers.
- McAuliffe deGuzman, Margaret. 2000. "The Road from Rome: The Developing Law of Crimes against Humanity." *Human Rights Quarterly* 22: 335-403.
- McCormack, Timothy LH. 2004. "Crimes Against Humanity," in *The Permanent International Criminal Court: Legal and Policy Issues* 179-202. McGoldrick, Dominic, Rowe, Peter & Donnelly, Eric eds. Hart Publishing.
- Meron, Theodor. 1998. "War Crimes Law Comes of Age." *The American Journal of International Law* 92, 3: 462-468.
- Meron, Theodor. 2000. "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience." *The American Journal of International Law* 94, 1: 78-89.
- Mettraux, Guénaél. 2002. "Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda." *Harvard International Law Journal* 43: 237-316.
- Mettraux, Guénaél. 2005. *International Crimes and the Ad Hoc Tribunals*. New York: Oxford University Press.
- Schabas, William A. 2006. *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*. New York; Cambridge University Press.
- Slye, Ronald C. & Van Schaack, Beth. 2009. *International Criminal Law: The Essentials*. New York: Aspen Publishers.
- Steiner, Henry J., Alston, Philip & Goodman, Ryan. 2007. *International Human Rights in Context: Law, Politics and Morals: Text and Materials*. New York: Oxford University Press, 3rd Edition.
- Triffterer, Otto ed. 2008. *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*. Hart Publishing, 2nd Edition.
- van den Herik, L.J. 2005. *The Contribution of the Rwanda Tribunal to the Development of International Law*. Boston: Martinus Nijhoff Publishers.
- Van Schaack, Beth. 1999. "The Definition of Crimes against Humanity: Resolving the Incoherence." *Columbia Journal of Transnational Law* 37: 787-850.
- Wald, Patricia M. 2007. "Genocide and Crimes against Humanity." *Washington University Global Studies Law Review* 6: 621-633.
- Zahar, Alexander & Sluiter, Göran. 2008. *International Criminal Law: A Critical Introduction*. New York: Oxford University Press.

二、聯合國文件

- Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992)*, U.N. Doc. S/1994/674 (May 27, 1994).
- Final Report of the Commission of Experts Established pursuant to Security Council Resolution 935 (1994)*, U.N. Doc. S/1994/1405 (Dec. 9, 1994).

General Assembly Resolution 177 (II), U.N. Doc. A/RES/177 (Nov. 21, 1947).
General Assembly Resolution 260 (III), U.N. Doc. A/RES/260 (Dec. 9, 1948).
General Assembly Resolution 489 (V), U.N. Doc. A/RES/489 (Dec. 12, 1950).
General Assembly Resolution 898 (IX), U.N. Doc. A/RES/898 (Dec. 14, 1954).
General Assembly Resolution 1186 (XII), U.N. Doc. A/RES/1186 (Dec. 11, 1957).
General Assembly Resolution 49/53, U.N. Doc. A/RES/49/53 (Dec. 9, 1994).
General Assembly Resolution 50/46, U.N. Doc. A/RES/50/46 (Dec. 11, 1995).
Interim Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992), U.N. Doc. S/25274 (Feb. 10, 1993).
Security Council Resolution 764, U.N. Doc. S/RES/764 (July 13, 1992).
Security Council Resolution 771, U.N. Doc. S/RES/771 (Aug. 13, 1992).
Security Council Resolution 780, U.N. Doc. S/RES/780 (Oct. 6, 1992).
Security Council Resolution 808, U.N. Doc. S/RES/808 (Feb. 22, 1993).
Security Council Resolution 827, U.N. Doc. S/RES/827 (May 25, 1993).
Security Council Resolution 918, U.N. Doc. S/RES/918 (May 17, 1994).
Security Council Resolution 935, U.N. Doc. S/RES/935 (July 1, 1994).
Security Council Resolution 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).
Security Council Resolution 1244, U.N. Doc. S/RES/1244 (June. 10, 1997).
Report of the International Law Commission to the General Assembly, U.N. GAOR, 5th Sess., Supp. (No. 12), U.N. Doc. A/1316 (1950).
Report of the International Law Commission to the General Assembly, U.N. GAOR, 6th Sess., Supp. (No. 9), U.N. Doc. A/1858 (1951).
Report of the International Law Commission to the General Assembly, U.N. GAOR, 9th Sess., Supp. (No. 9), U.N. Doc. A/2693 (1954).
Report of the International Law Commission on the work of its Forty-Third Session, U.N. GAOR, 46th Sess., Supp. (No. 10), U.N. Doc. A/46/10 (1991).
Report of the International Law Commission on the work of its Forty-Eighth Session, U.N. GAOR, 51st Sess., Supp. (No. 10), U.N. Doc. A/51/10 (1996).
Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), ¶ 47, U.N. Doc. S/25704 (May 3, 1993).

三、案件

Prosecutor v. Dario Kordic and Mario Cerkez, Case No. IT-95-14/2-T, Judgement (Feb. 26, 2001).
Prosecutor v. Dragan Nikolic, Case No. IT-94-2-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence (Oct. 20, 1995).
Prosecutor v. Dusko Tadic, Case No. IT-94-1-T, Decision on the Defence Motion on Jurisdiction (Aug. 10, 1995).
Prosecutor v. Dusko Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion

for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995).
Prosecutor v. Dusko Tadic, Case No. IT-94-1-A, Judgement (July 15, 1999).
Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-T, Judgement (Mar. 15, 2002).
TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY
TRIBUNAL: NUREMBERG, 14 NOVEMBER 1945-1 OCTOBER 1946, VOLUME I,
(1947).
TRIAL OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER
CONTROL COUNCIL LAW No. 10: NUREMBERG, OCTOBER 1946-APRIL 1949,
VOLUME I (1949).
TRIAL OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER
CONTROL COUNCIL LAW No. 10: NUREMBERG, OCTOBER 1946-APRIL 1949,
VOLUME III (1951).
TRIAL OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER
CONTROL COUNCIL LAW No. 10: NUREMBERG, OCTOBER 1946-APRIL 1949,
VOLUME IV (1950).
TRIAL OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER
CONTROL COUNCIL LAW No. 10: NUREMBERG, OCTOBER 1946-APRIL 1949,
VOLUME VI (1952).
TRIAL OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER
CONTROL COUNCIL LAW No. 10: NUREMBERG, OCTOBER 1946-APRIL 1949,
VOLUME XIII (1952).

四、網路資源

Coalition for the International Criminal Court網站。

<http://www.iccnw.org/?mod=icchistory>。

ICC網站。

<http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Chronology+of+the+ICC.htm>。

ICC網站。<http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/>。

ICC網站。

<http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/Related+Cases/ICC+0104+0106/Democratic+Republic+of+the+Cong+o.htm>。

ICRC網站。<http://www.icrc.org/ihl.nsf/INTRO?OpenView>。

ICRC網站。

<http://www.icrc.org/eng/who-we-are/history/overview-section-history-icrc.htm>。

ICRC網站。<http://www.icrc.org/ihl.nsf/INTRO/130?OpenDocument>。

ICRC網站。<http://www.icrc.org/ihl.nsf/FULL/150?OpenDocument>。

ICRC網站。<http://www.icrc.org/ihl.nsf/INTRO/275?OpenDocument>。

ICRC網站。 <http://www.icrc.org/ihl.nsf/INTRO/280?OpenDocument>。

ICRC網站。 <http://www.unhcr.org/refworld/docid/3ae6b39614.html>。

ICRC網站。

http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf。

ICRC網站。 <http://www.icrc.org/ihl.nsf/FULL/357?OpenDocument>。

ICRC網站。 <http://www.icrc.org/ihl.nsf/INTRO/450?OpenDocument>。

ICRC網站。 <http://www.icrc.org/ihl.nsf/INTRO/470?OpenDocument>。

ICRC網站。 <http://www.icrc.org/ihl.nsf/INTRO/470?OpenDocument>。

ICRC網站。 <http://www.icrc.org/ihl.nsf/INTRO/585?OpenDocument>。

中華民國紅十字會總會網站。 <http://web.redcross.org.tw/about02.aspx>。

中華民國紅十字會總會網站。

<http://www.redcross.org.tw/RedCross/page/pagetypeA1.jsp?groupid=106&webno=&no=239>。

外交部網站。

<http://www.mofa.gov.tw/webapp/ct.asp?xItem=19625&ctnode=1131&mp=1>。

外交部網站。

<http://www.mofa.gov.tw/webapp/ct.asp?xItem=241&ctnode=1131&mp=1>。