MEDICAL NECESSITY AS A DEFENSE FOR CRIMES AGAINST HUMANITY: AN EXAMINATION OF THE MOLOKAI TRANSFERS

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I. INTRODUCTION

Germs, like ideas, do not recognize national borders. The current state of globalization has increased the permeability of such borders and thereby intensified the danger posed by distant viral outbreaks, as well as the intentional use of weaponized biological agents.

Confronted with the threat of a natural or man-made biological catastrophe, it is conceivable that a state might respond with extreme measures that might include quarantine and isolation; confiscation and destruction of property; interference with fundamental human rights of liberty, association, and propagation; and, in the worst case, lethal triage of the afflicted. Although such a scenario may seem more farfetched than it actually is, its examination nonetheless allows one to limn the respective boundaries of the rights of the state and of its citizens. In other words, the question of the permissible state response to a lethal outbreak of such virulence as to jeopardize the existence of the state creates a scenario in which the normally complementary regimes of international law and international humanitarian law are put into conflict.

The purpose of this article is to inquire whether and how it might be possible to determine the predominance of equally fundamental strictures of international humanitarian law governing individual rights or the older body of international law governing the rights and duties of the state. It will attempt to discover whether or not there exists a mechanism through which such a conflict can be resolved; more specifically, the existence of a defense of medical necessity, distinct from the doctrine of self-defense, for state actions that could constitute crimes against humanity where inaction might threaten the preservation of the state and its polity.

In its 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice (ICJ), evenly split, refrained from issuing a conclusive decision on whether, under international law, "the threat of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of the State would be at stake."[2] Its silence on such a question, given the horror of a nuclear attack, may be both prudent and comprehensible, but, in the same opinion, the ICJ also recognized the existence of "the fundamental right of every State to survival, and thus its right to self-defence."[3]

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1. The author would like to thank Donna Arzt and David Crane for their valuable advice and assistance.

2. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. (July 8), ¶105(E).

3. *Id.* ¶ 96.

This simultaneous acknowledgement of the state's fundamental right of survival and the refusal of the ICJ, even in a non-binding advisory opinion, to confirm or deny the legitimacy of a nuclear attack to protect that right of survival, constitutes a true state of aporia, an impasse in assessing the truth of a proposition due to contradictory evidence both to its credit and discredit.

If there is a fundamental state right of survival, then it follows logically (and according to the established law of self-defense) that a state may act with the necessary and proportionate force against another that imminently threatens that survival.[4] As such, an extreme threat should theoretically permit an extreme response. The nuclear option, however, is one of such indiscriminate destructiveness, in itself and in the further retaliation that it invites, that it arguably can never be exercised in a proportionate manner, and thus, the state's fundamental right of survival would appear to be circumscribed by the disproportionate measure of nuclear self-defense.

On the other hand, if one were to accept the proposition that the destruction of an antagonistic state or sub-state group that is capable, intent, and poised upon one's own annihilation warrants the most emphatic and effective measure of self-defense available, then the use of a nuclear defense may appear less disproportionate and less untenable. Indeed, a prohibition of such use, its lethal imprecision notwithstanding, might, in fact, be circumscribed by the fundamental right of a state to self-defense in the face of its otherwise assured destruction.

In response to a request to adjudicate such a bloody Hobson's choice, it is no wonder that the ICJ chose the refuge of silence, and it is a blessing that the circumstances that would require a conclusive adjudication have not arisen in the succeeding decade.

Rightly or wrongly, in recent years the threat of nuclear war has appeared to have receded in the popular imagination and has been replaced by fears of a looming biological catastrophe, be it a naturally occurring outbreak of a particularly lethal strain of influenza on the order of the Spanish flu epidemic of 1918 or the use by terrorists of a weaponized virus on an unknowing populace.[5] None of these fears is new, but rather, each is a resurgent awareness of a vulnerability as old as the human race.

The *Encyclopedia of Plague and Pestilence* lists over seventy major epidemics in North America from the early seventeenth through the mid-twentieth century, chief among them smallpox, measles, yellow fever, scarlet fever, influenza, diphtheria, dengue fever, cholera, typhus, typhoid fever, hepatitis, malaria, and polio.[6] Many of these diseases pose nowhere near as great a danger as they have in the past, but rather than indulge in complacency, it is worth noting that smallpox, the

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4. See discussion of the *Caroline* doctrine and note 17 below.

5. A 1999 Pew Research survey indicates that about two-thirds of the Americans polled expect a bio-terror attack within the next fifty years. MICHAEL OSTERHOLM AND JOHN SCHWARTZ, LIVING TERRORS: WHAT AMERICA NEEDS TO KNOW TO SURVIVE THE COMING BIOTERRORIST CATASTROPHE xvii (2000).

6. GEORGE C. KOHN, ENCYCLOPEDIA OF PLAGUE AND PESTILENCE 362-72 (1995).

most contagious of them, was thought to have been eradicated, only to reemerge in the 1980s. Moreover, the past fifty years have also seen the advent of numerous deadly emerging viruses such as Lassa, Rift Valley, Oropouche, Rocio, Q, Guanarito, Monkeypox, Chikungunya, Venezuelan Equine Encephelitis, Hanta, Machupo, Junin, Mokola, Duvenhage, LeDantec, Kyasanus, Brain Virus, Semliki, Crimean-Congo, Sindblis, O'nyongnyong, Nameless Sao Paolo, Marburg, Ebola Sudan, Ebola Zaire, and Ebola Reston,[7] not to mention the more prosaic but deadly re-emergent diseases such as tuberculosis, SARS, and pandemic influenza.[8] While many of these emerging viruses are not household names, none of them is ever any more than a short flight away from any other place on the planet.

Similarly, the intentional use of germs as weapons on American soil predates the creation of the United States and has recurred periodically throughout its history. From General Cornwallis' efforts to break the siege at Yorktown by sending freed slaves infected with smallpox into rebel camps[9] to the Kentucky doctor (and later governor of the state) Luke Blackburn's tainting of clothes with smallpox and yellow fever to sell to Union soldiers during the American Civil War[10] to the targeting of Allied troops in Europe by German agents who infected Allied livestock with anthrax in World War I,[11] germ warfare is nothing new in American history. More recent occurrences are the salmonella poisoning of an Oregon salad bar by the Bhagwan Rajneeshee cult in 1984[12] and the anonymous anthrax letters scare of 2001.[13]

Whether the heightened sense of vulnerability felt by many Americans following the events of September 11, 2001 has been exaggerated at times or not, it is clear that the threat of biological disaster exists as much today as it ever has.[14]

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7. RICHARD PRESTON, THE HOT ZONE 446 (1994). Preston points out that while the airborne Ebola Reston virus thus far has only been known to be lethal to monkeys, the slightest mutation could render it far more deadly to human beings than the other, non-airborne Ebola strains. For a detailed discussion of numerous emerging viruses, see LAURIE GARRETT, THE COMING PLAGUE: NEWLY EMERGING DISEASES IN A WORLD OUT OF BALANCE (1995).

8. Alfred DeMaria, Jr., *The Globalization of Infectious Diseases: Questions Posed by the Behavioral, Social, Economic and Environmental Context of Emerging Infections*, 11 NEW ENG. J. INT'L & COMP. L. 37, 39 (2005).

9. ELIZABETH A. FENN, POX AMERICANA: THE GREAT SMALLPOX EPIDEMIC OF 1775-82, 122-32 (Hill and Wang 2d ed. 2002) (2001).

10. Susanna Smith, Old Tactics, New Threat: What is Today's Risk of Smallpox, September 2002, http://www.ama-assn.org/ama/pub/category/print/8755.html.

11. G.W. Christopher, T.J. Cieslak, J.A. Pavlin, & E.M. Eitzen, Jr., *Biological Warfare: A Historical Perspective*, 278 JAMA 412, 412-17 (1997).

12. JUDITH MILLER, STEPHEN ENGELBERG, WILLIAM BROAD, GERMS: BIOLOGICAL WEAPONS AND AMERICA'S SECRET WAR 15-33 (2001).

13. For a comprehensive collection of news stories and analysis, see "Analyzing the Anthrax Attacks," http://www.anthraxinvestigation.com/reuters.html.

14. In the CDC journal *Emerging Infectious Diseases*, Jonathan B. Tucker of the Monterey Institute of International Studies' Chemical and Biological Weapons

Even if recognized as only one hypothetical contingency, it is one that merits guardedness and foresight. A relevant question, in part analogous to that raised by the ICJ's advisory opinion, is of the extent to which a government may permissibly respond under international law to a biological disaster of such catastrophic proportions as to put the survival of the state at risk.

According to the customary requirements of self-defense, first articulated by Daniel Webster in his 1841-42 negotiations with British envoys to resolve the *Caroline* incident, a state may use force against another if it is a necessary, proportionate response to an imminent threat.[15] The three *Caroline* requirements of necessity, proportionality, and imminence have been described as "the *locus classicus* of the law of self-defence."[16] They have also been cited at Nuremberg[17] and "are now regarded as pertinent to all categories of self-defence."[18]

Nonproliferation Project, states that there has been a marked increase in incidents involving biological agents between 1960 and 1999 (although many of the reported incidents were hoaxes), citing the Project's open-source database of publicly known cases of domestic and international criminals and terrorists having sought to acquire biological, chemical, radiological, or nuclear materials as evidence. Jonathan B. Tucker, *Historical Trends Related to Bioterrorism: An Emperical Analysis*, 5 EMERGING INFECTIOUS DISEASES 498, 503 (July – Aug. 1999). He concludes, however, that "the diffusion of dual-use technologies relevant to the production of biological and toxin agents, and the potential availability of scientists and engineers formerly employed in sophisticated biological warfare programs such as those of the Soviet Union and South Africa, suggest that the technical barriers to mass casualty terrorism are eroding." *Id.* Participating in the same symposium, *Medical and Public Health Response to Bioterrorism,* Jessica Stern, then the superterrorism Fellow at the Council on Foreign Relations,s concludes that "major attacks are becoming more likely." Jessica Stern, *The Prospect of Domestic Bioterrorism*, 5 EMERGING INFECTIOUS DISEASES 498, 517 (July – Aug. 1999).

15. The *Caroline* doctrine was the result of the 1837 destruction of the American steamboat *Caroline*, used by American sympathizers to aid the Canadian insurgents of the Mackenzie Rebellion against British rule. The insurgents had seized an island on the Canadian side of the Niagara River, and some of their American neighbors used the *Caroline* to transport men and material across the border in support of the rebellion. A British unit crossed the border at night, seized the *Caroline*, set it afire and then adrift to be wrecked on Niagara Falls. Numerous Americans were killed or injured in the British operation, and when accused by the American government of violating its sovereignty, the British claimed self-defense. YORUM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE, 218 (Cambridge Univ. Press 3d ed. 2001) (1994). In the ensuing correspondence with British envoys, U.S. Secretary of State Daniel Webster rejected the British invocation of self-defense and set forth what has become the "classic statement:" that the prerequisite of a valid plea of self-defense is "necessity of self-defense, instant, overwhelming, leaving no choice of means, no moment for deliberation." VI THE WORKS OF DANIEL WEBSTER 261 (1851).

16. R.Y. Jennings, "'*The* Caroline *and* McLeod *Cases*,'" 32 AM. J. INT'L L. 82, 92 (1938) (*cited in* DINSTEIN, *supra* note 15, at 219.)

17. DINSTEIN, *supra* note 15, at 219.

18. *Id.*

The *Caroline* requirements, however, are an inexact template for the scenario envisioned in this article; namely a widespread outbreak of an epidemic of extreme lethality, whether natural or planned, and involving an unfamiliar emerging virus.[19] The question of what constraints, if any, might bind a state in its efforts to eliminate or contain the danger posed by its own infected citizens is not easily illuminated by a doctrine of self-defense, which regulates a response to a threat by a foreign state or its actors.[20] Nor, for that matter, are Article 51 of the United Nations (UN) Charter's pronouncements on a state's right of self-defense particularly on point where the danger prompting a need for such self-defense arises not from beyond national boundaries, but from within.

Moreover, given the imperfect understanding of the cause, effects, potency, susceptibilities, and means of transmission of a newly mutated or emergent virus, it is doubtful that a precise determination of the imminence of the threat or the necessity and proportionality of response under the *Caroline* requirements is a viable reality except in hindsight. Such determinations are fraught with ambiguity in the best of circumstances; however, the stealth with which a silent, odorless virus may spread, the delay between insidious infection and detection days or weeks later, and the likelihood of second, third, and fourth-waves of infection, all militate against a slavish compliance with the *Caroline* requirements.[21] Such compliance could, in fact, do more to exacerbate than to quash a catastrophic biological outbreak.

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19. A common illustration of the *Caroline* doctrine is the 1916 U.S. military intervention in Mexico in pursuit of the bandit Pancho Villa. *Id.* at 218. The ineffectual Mexican government was unable to control its frontiers and borders, and raids into the U.S. by Villa prompted President Wilson to justify his dispatch of forces into Mexico as the necessary and sole remedy available to protect Americans from the bandit's crossborder depredations. *Id.*

Ironically, the provocation for Wilson's intervention, the Villa gang's 1916 raid on Columbus, New Mexico, may itself have been prompted by a particularly inept public health policy on the U.S. side of the Rio Grande. An outbreak of typhus in El Paso, Texas was widely blamed on louse-ridden Mexican day laborers, and in the winter of 1916, the El Paso Health Department instituted a policy of mandatory gasoline baths for such laborers as were held in the city's hospitals and jails. HOWARD MARKEL, WHEN GERMS TRAVEL 126-28 (2004). On March 5, the sheriff rousted twenty-six Mexicans and forced them under gunpoint into the jail's holding cell to bathe in a tub filled with gasoline, kerosene, and vinegar to kill any typhus-carrying lice. *Id.* at 128. During the delousing process, an American arrested for drug-trafficking was brought into the holding cell and struck a match to light a cigarette. *Id.* The gasoline fumes ignited; the twenty-six Mexicans and two Americans burned to death. *Id.* at 128-29. Thirty other prisoners were severely burned, and the incident was widely known in the Mexican community on both sides of the border as "El Holocausto." *Id.*

Villa's raid on Columbus occurred a few days later, and was thought by many to have been a reprisal for "El Holocausto." *Id.* Of the raid, he is rumored to have said, "Now I'll show them how to set people aflame." MARKEL, WHEN GERMS TRAVEL, at 130.

20. In the scenario of a bio-terror attack, a foreign power might be involved, but, when the house is ablaze, the first priority is to put out the fire, and the second is to determine if it was arson.

21. OSTERHOLM & SCHWARTZ, *supra* note 5, at xx, 10.

In contrast, dispensing with any kind of standard, particularly in a climate of panic, outrage, and political opportunism, is apt to result in the roughshod trampling of the human rights of those already afflicted and whose only offense is illness. In an extreme scenario, it is conceivable that the survival of the State could be invoked as providing an exception to the customary prohibition of such measures (usually characterized as crimes against humanity) as forced transfer, imprisonment, interference with family or productive rights, and, at the extreme, the killing of the afflicted. The possible response to such an extreme crisis raises the question of whether or not one can infer a template more commensurate with the extreme threat of a biological catastrophe than that provided by the *Caroline* doctrine.

The question is whether or not there exists in international law (and as an alternative to the self-defense doctrine) an affirmative defense of medical necessity to crimes against humanity.

To date, no such defense has been raised or articulated at any tribunal,[22] and scholarly writings on necessity in international law, notably the International Law Commission's (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts,[23] are adamant that no such defense exists in the face of *jus cogens*[24] violations such as crimes against humanity. However, even a cursory survey of state practice, past and present, suggests that the ILC's categorical prohibition is more aspirational than descriptive. It also suggests that the silence surrounding the possibility of such a defense for breaches of peremptory norms may arise from a

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22. In U.S. v. Karl Brandt, et al., *in* I Trials of War Criminals Before the Nuremberg Military Tribunal Under Control Council Law No. 10, at 8-17 (U.S. Gov't Printing Office 1946), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-I.pdf.), twenty-three Nazi doctors were tried at Nuremberg for committing atrocities under the guise of medical experimentation. They pled not guilty on the grounds that they had violated no then-existing law and that they had carried out superior orders necessitated by a national emergency, but they did not invoke medical necessity. *See generally* HORST H. FREYHOFER, THE NUREMBERG MEDICAL TRIAL: THE HOLOCAUST AND THE ORIGIN OF THE NUREMBERG MEDICAL CODE 50-58 (2004).

23. The International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, ¶ 77, U.N. Doc A/56/10 (Sept. 6, 2001).

24. Ian Brownlie defines *jus cogens* as the category of "certain overriding principles in international law" and states that:

> [Th]e major distinguishing feature of such rules is their relative indelibility. They are the rules of customary international law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect. The least controversial examples of the class are the prohibitions of the use of force, the law of genocide, the principal of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy.

IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 488-489 (Oxford Univ. Press 6th ed. 2003) (1966). This category is also known as "the peremptory norms of general international law." *Id.*

reluctance to articulate an exception to such norms even in the most dire of scenarios—the widespread outbreak of a contagion of extreme lethality—for fear that such an exception, once posited, may lead to its abuse by states that do not, in fact, face a real choice between the betrayal of the human rights of a portion of its population and the possible destruction of its population in its entirety.

In an effort to square the discrepancy between international law, as exemplified by the ILC's Draft Articles, and the requirements of the competing regime of international humanitarian/criminal law,[25] this article will focus primarily on a case study of the widespread and systematic program of forced transfers of those afflicted with leprosy,[26] or those suspected of being so afflicted, in Hawaii from 1866 until 1969. Justified by the state's mistaken perception of those transferred as posing a medical threat to the population at large, over eight thousand people were forcibly exiled to a concentration camp on the remote Kalaupapa peninsula on the island of Molokai for over a century; the first transfer occurring just after the American Civil War and the last in the year that man first set foot on the moon.

Today, leprosy does not pose a serious medical threat.[27] A cure was found in the 1940s and a simple multi-drug therapy has been available since 1982.[28] In 2005, Canadian scientists discovered the genetic trigger for the disease and determined that ninety-five percent of the human race is immune to leprosy and that, of the remaining five percent, two-thirds of those who contract the disease do so in its non-communicable form.[29] In short, despite millennia of misperception, it is now

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25. Although the category of crimes against humanity historically falls within the purview of international criminal law, which is concerned with the punishment of individual acts, and the ILC's Draft Articles on State Responsibility are concerned with State acts, the Draft Articles acknowledge and reassert the *jus cogens* prohibition of crimes against humanity. This suggests that at such time as the Draft Articles were adopted by the United Nations, violations by States would theoretically fall within the purview of international criminal law. For the foreseeable future, however, one need not expect any meaningful deviation from Geoffrey Robertson's observation that "dog does not eat dog at the UN." GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE 56 (The New Press 2000) (1999). It should be noted, however, that, according to the ICJ, even though embedded in a mere draft, the Draft Articles' definition of necessity and its inapplicability to violations of peremptory norms, do reflect customary international law. See Part V(b) below.

26. The preferred contemporary name for the disease is Hansen's Disease, named for the Norwegian doctor who identified the causative bacillus in 1868 and isolated it in 1874. It is thought by many sufferers of the disease to be less laden with pejorative connotations than "leprosy," the widely used historical appellation. JOHN TAYMAN, THE COLONY: THE HARROWING TRUE STORY OF THE EXILES OF MOLOKAI 4 (2006).

27. Interview by Ian Punnett with John Tayman, author, on Coast to Coast AM with George Noory (Feb. 4, 2006), *available at* http://www.coasttocoastam.com/gen/page1298.html [hereinafter Tayman interview].

28. *Leprosy*, BBC NEWS, Sept. 7, 1998, http://news.bbc.co.uk/1/hi/health/medical_notes/166163.stm [hereinafter *Leprosy* BBC].

29. Tayman interview, *supra* note 27.

known to be one of the least communicable of diseases.[30] It, therefore, may seem an odd choice for an examination of the medical necessity defense, but four factors speak to its utility for such an examination.

First, the very fact that the perceived threat of the disease of leprosy has abated allows one to examine the events from start to finish and over the course of an evolving awareness of the causes and treatments of the disease. It also forces an acknowledgement of the fact that perfect medical knowledge is as much a chimera as perfectly sanitary conditions in an operating room, but that in either case, those charged with protecting the health of the individual or society must make do with the knowledge and circumstances available to them at the time. Focusing on a more contemporary contagion such as SARS, avian flu, or some little known variant of viral hemorrhagic fever might be more timely but would deprive one of the opportunity to examine the evolution of medical understanding regarding that contagion. The abatement of the threat of leprosy permits a 360-degree view of the state's response to that threat.

Second, the policy of forced transfer to the Kalaupapa colony was truly widespread and systematic. It took place over the course of a century, and while the policies of this program did generally improve over time, it was also the case that as the authorities (or as often as not, unofficial ministers to the sick such as the Belgian priest Father Damien or Sister Marianne Cope of Syracuse, New York) remedied some of the most heinous conditions, the health authorities implemented new and equally egregious programs such as forced experimentation and sterilization. The influence of the Kalaupapa colony and its approach of "total institution"[31] also extended beyond its five square miles. The colony would become an informal model for similar colonies in Norway (1885), New South Wales (1890), the South African Cape Colony (1892), Japan (1900), Ceylon (1901), Canada (1906), and British India (1898), as well as Carville, Louisiana (1894) and Cuilon in the US-administered Philippines (1901).[32] As such, its ramifications were more widespread and systematic than they might appear at first glance.

Third, leprosy is not only the world's oldest known disease,[33] it is also one of the most iconic and has become universally emblematic of the pariah. Throughout nearly all cultures and eras, it was taken for granted that the afflicted were, at the very least, to be shunned and, at worst, killed outright. Its great potency as a symbol of "the other" has resulted in its metaphorical use from such diverse corners, from the proponents of the vile Nazi race theories[34] to the innocent carrier

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30. *Id.*

31. TED GUGELYK & MILTON BLOOMBAUM, THE SEPARATING SICKNESS: MA'I HO'OKA'AWALE 8 (The Separating Sickness Foundation 3d ed. 1996) (1979).

32. *See id.*

33. Mike Wooldridge, "India Targets Leprosy," BBC NEWS ONLINE, Wed. Jan. 9, 2000, http://news.bbc.co.uk/1/low/health/610402.stm.

34. For examples of such tripe, see ROBERT LEY, PESTHAUCH DER WELT (Franz Müller Verlag 1944), *translated in* "Pestilential Miasma of the World," Calvin College German Propaganda Archive, http://www.calvin.edu/academic/cas/gpa/pesthauch.htm.

"Typhoid Mary" Mallon, who bitterly characterized her twenty-six years of civil confinement by the New York Board of Health as a banishment fit only for a leper.[35] Because of this potency as an emblem of the inherently dangerous pariah, an examination of the state response to the perceived danger of leprosy may subsume other state responses to similar threats to the populace at large, whether or not such threats are grounded in legitimate medical understanding.

Lastly, while many may be vaguely aware of the ministrations of Father Damien of Molokai, most are not familiar with the extent and duration of the hardships needlessly suffered by the exiles at Kalaupapa. It is worthwhile simply to commemorate the endurance they displayed in the face of literally atrocious treatment perpetrated upon them in the name of public health. It is also useful to note that this inquiry is motivated by what James Joyce termed "the ineluctable modality of the visible,"[36] the premise that what we can imagine of the future is informed, if not controlled, by what we have seen in the past. It is, therefore, wise to reiterate, for those who imagine that prior encroachments by government on the human rights of its citizens were nothing but overwrought, short-lived peccadilloes arising from crisis conditions, that the "total institution" policy implemented at Kalaupapa persisted for over a century.

Part I of this article will discuss briefly the nature and history of the disease of leprosy, followed in Part II by an examination of the history of the Kalaupapa colony. In Part III, a discussion of Kalaupapa colony's incidents of forced transfer, imprisonment, torture, enforced sterilization, and persecution, in order to determine if these events would meet the threshold of crimes against humanity according to contemporary instruments such as the Rome Statute,[37] the Convention Against Torture,[38] and the Nuremberg Code.[39] Part IV will turn to a discussion of the defense of necessity in international law from Grotius to its most recent iteration in the ILC Draft Articles.[40] Part V will discuss the possibility that the right of a state to self-

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35. JUDITH WALZER LEAVITT, TYPHOID MARY: CAPTIVE TO THE PUBLIC'S HEALTH 138 (1996).

36. JAMES JOYCE, ULYSSES 51 (David Campbell Publisher 1992) (1922).

37. Rome Statute of the International Criminal Court, July 17, 1988, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. The U.S. is not a party to the Rome Statute, but the Statute's Article 7 articulates the "authoritative definition" of crimes against humanity and "crystallizes the concept." Robertson, *supra* note 25, at 357, 361. Also, the "definition of crimes against humanity under the ICC Statute is not an innovation; it reflects developments of international humanitarian law since Nuremberg." KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 90 (2001)

38. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 114 [hereinafter Convention Against Torture].

39. Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10, 2 (U.S. Gov't Printing Office 1949), *available at* http://ohsr.od.nih.gov/guidelines/nuremberg.html [hereinafter Nuremberg Code].

40. Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) *available at* http://www.un.org/law/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [hereinafter ILC Draft Articles].

preservation constitutes a peremptory norm of equal weight to other peremptory norms and will attempt to determine whether the prohibition and state practice can be reconciled.

The discussion that follows is based on a hypothetical scenario, but one that consists of historical fact. It entails a certain amount of chronological dissonance in that it focuses on events that occurred, in the main, well before the emergence of the modern doctrines of international criminal law that began with Nuremberg. As such, the ban on the retroactive application of law embodied in the precept of *nullum crimen sine lege* applies, but so too does the old adage that history never repeats itself, but it always rhymes. The aim of this article is to provide a partial illumination of possible state responses to events which, at their worst, have not yet come to pass and, at their best, may never do so and remain "wicked dreams [that] abuse the curtained sleep."[41]

II. THE DISEASE

Leprosy is the oldest disease known to man, and its earliest known incidence has been variously dated at 600 B.C.[42] to 200 B.C.[43] Although its precise origins are unknown,[44] some have speculated that the bacillus transferred to human beings from the armadillo or the water buffalo.[45] Today, it is understood that the disease can be caught simply by inhaling the bacillus communicated by someone who has an untreated case of the communicable or lepromatous form of the disease.[46] For centuries, however, it was widely thought to have been a form of venereal disease,[47] which was in keeping with the moral stigma that many societies attributed to the afflicted. Of the two main forms of leprosy, lepromatous is the progressive and contagious form (in those who are susceptible), and it causes lesions in the skin, thus facilitating the transmission of the bacteria to others.[48] If unattended, it will eventually invade the internal organs and respiratory tract and cause extreme

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41. WILLIAM SHAKESPEARE, MACBETH act 2, sc.1.

42. *Leprosy Genetic Link Found,* BBC NEWS ONLINE, Mar. 30, 2001, http://news.bbc.co.uk/2/hi/science/ nature/1250011.stm.

43. JARED DIAMOND, GUNS, GERMS, AND STEEL: THE FATE OF HUMAN SOCIETIES 205 (W.W. Norton & Company 1999) (1997).

44. ANDREW NIKIFORUK, FOURTH HORSEMAN: A SHORT HISTORY OF EPIDEMICS, PLAGUES, FAMINE, AND OTHER SCOURGES 30 (1991).

45. *See* DIAMOND, *supra* note 43, at 159, 204-05.

46. Tayman interview, *supra* note 27.

47. GAVAN DAWS, SHOAL OF TIME: A HISTORY OF THE HAWAIIAN ISLANDS 309 (1989).

48. GUGELYK & BLOOMBAUM, *supra* note 31, at 6.

physical disfigurement.[49] It is more likely to attack children than adults, and can have an incubation period of three to fifteen years.[50] The other form, tuberculoid, is contained within the skin and nerves and thus is generally not transmissible to others.[51] It often spontaneously heals, albeit with some residual nerve damage.[52]

In its lepromatous form, the bacteria, if untreated, will multiply in the cooler parts of the body, such as the fingers and toes, ears, and forehead.[53] As the disease progresses, it will manifest itself as ulcers, bumps, and blotches, although the severity of the disfigurement depends on the strength of the individual's immune system.[54] Mild pain in the joints and pale skin is the typical manifestation in one with a strong immune system.[55] Symptoms in those individuals with a weak immune system include eroded noses, swollen tongue and lips, hair loss, a thickening of the brow, a loss of eyebrows, an inability to blink, a wasting away of the vocal cords, and an increasing numbness in the extremities.[56]

The common image of body parts falling off is a myth, but the loss of sensitivity in extremities (described by some as the loss of "the gift of pain") frequently led to an increased incidence of accidental physical trauma. The disease was not fatal in itself, but the infections that usually resulted from such repeated trauma often eventually spread to the internal organs, and this was usually the ultimate cause of death.[57]

None of this, however, was understood for two thousand years. It was only in 1868 that the Norwegian scientist Gerhard Armauer Hansen identified the *bacillus leprae* as the causative agent of the disease[58] and it was another seventy-eight years, in 1946, until a prophylactic treatment of sulfone drugs in combination with penicillin and mycin were discovered.[59] In 1982, the World Health Organization endorsed a multi-drug treatment consisting of a cocktail of antibiotics that could completely cure the tuberculoid form of the disease within six months and the more severe lepratomous form within two years.[60] In 2005, scientists identified the genetic trigger for the disease and found that it often followed racial and family lines, with people of Scandinavian, French, and Hawaiian ancestry more at risk of contracting the disease than other groups.[61] There are currently approximately seven thousand

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49. *Id.* at 6-7.
50. *Id.* at 7.
51. *Id.* at 6-7.
52. *Id.* at 7.
53. TAYMAN, *supra* note 26, at 71.
54. NIKIFORUK, *supra* note 44, at 31.
55. *Id.*
56. *Id.*
57. Tayman interview, *supra* note 27.
58. DAWS, *supra* note 47, at 209.
59. GUGELYK & BLOOMBAUM, *supra* note 31, at 11.
60. *Leprosy BBC*, *supra* note 28.
61. Tayman interview, *supra* note 27.

cases of leprosy in the U.S., making it more common than the measles,[62] and while it has been eradicated in ninety-eight countries and eight million have been completely cured,[63] there are still an estimated 800,000 cases around the world.[64]

Throughout most of history, however, the general understanding of leprosy was that it was a living death and a sign of God's condemnation. In medieval Europe, a person with leprosy was required by custom to take part in a separation ceremony that consisted of writing a letter to proclaim his departure from the world of the living, followed by a funeral mass during which the afflicted stood in a freshly dug grave while the priest emptied three spadefuls of earth on him.[65] Thereafter, he was expected to live apart from society in a leper house or "lazeretto."[66] The ancient Egyptians referred to the disease as "the death before death" and banished those who contracted it to a place called the "city of mud."[67] In ancient China people with leprosy were burned to death, their disease characterized as "an open indication of spirit displeasure;" in ancient India, lepers were killed outright and their disease characterized as a clear cause for avoiding "an enemy of God."[68] In traditional Korean culture, the afflicted were considered the equivalent of a dead dog and a curse from heaven.[69]

In western culture, the stigma of leprosy was most influentially articulated in the sanitary laws of Leviticus 13:44-46: "whosoever shall be defiled with the leprosy, and is separated by the judgment of the priest, shall . . . cry that he is defiled and unclean. All the time that he is a leper and unclean, he shall dwell without the camp." Millennia of leprophobia was thus initiated in the West by this divine pronouncement communicated to Moses by the Deity.[70] It was of no matter that the disease discussed in this passage was not actually leprosy, but was equated with such only by virtue of a mistranslation from Hebrew to Latin.[71] The same moral condemnation of the afflicted evidenced in other cultures was firmly affixed in the minds of the faithful[72] and would flourish in Hawaii following the introduction of the

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62. *Id.*

63. *Leprosy BBC*, *supra* note 28.

64. *Id.* Countries where the disease is still active include India, Brazil, Indonesia, Myanmar, Mozambique, Ethiopia, and Madagascar. *Id.*

65. NIKIFORUK, *supra* note 44, at 28.

66. *Id.* at 29. The medieval hostels were named after one or the other Lazarus in the New Testament, although it is not certain whether it is the unfortunate scabies-afflicted pauper who received riches in heaven or the man who died but was brought back to the world of the living. Either would provide an apt model for those consigned to the lazaretto. *Id.*

67. *Id.*

68. *Id.* at 41.

69. *Id.*

70. TAYMAN, *supra* note 26, at 96.

71. *Id.* at 97-98.

72. *See* NIKIFORUK, *supra* note 44, at 32-33.

disease there following Captain James Cook's initial contact with the Hawaiian people in 1778.[73]

III. THE COLONY

Of all the habitable places on earth, the Hawaiian islands are the most geographically isolated.[74] Located in the northern Pacific, they lie almost halfway between San Francisco and Australia.[75] The islands were gradually populated by various Polynesian peoples beginning approximately 1,700 years ago.[76] This isolation continued for nearly fifteen centuries until it was shattered by the first contact with the Western world with the arrival of Captain Cook and his crew off the coast of Kauai on January 18, 1778.[77] The results were catastrophic, as was so often the case when isolated populations encountered Westerners with immune systems made robust by centuries of crowded urban living and interaction with migrating populations. In fact, "[t]heir few weeks of contact with natives, ranging from handshakes to sexual intercourse, produced the near-extinction of the Hawaiian race."[78] Scholars have variously estimated the population of the Hawaiian islands in 1776 as anywhere from 242,000 to 800,000,[79] but by 1853, the native population of the islands had been reduced to a mere 73,138, due to such recently introduced sicknesses (from East and West) as venereal disease, measles, whooping cough, influenza, smallpox, typhus, and leprosy.[80] In his 1864 book, *The Hawaiian Islands: Their Progress and Condition Under Missionary Labors*, the Reverend Rufus Anderson wrote of this precipitous winnowing of the native population as if it was a natural phenomenon, "rather like the amputation of the diseased members of the body."[81]

A. Leprosy in Hawaii

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73. STEPHEN KINZER, OVERTHROW: AMERICA'S CENTURY OF REGIME CHANGE FROM HAWAII TO IRAQ 11 (2006).

74. *See id.* at 10.

75. S. J. WATTS, EPIDEMICS AND HISTORY: DISEASE, POWER, AND IMPERIALISM 64 (1997).

76. *Id.*

77. KINZER, *supra* note 73, at 11.

78. *Id.*

79. WATTS, *supra* note 75, at 65.

80. *Id. See also* KINZER, *supra* note 73, at 11 (if a defense of medical necessity were ever warranted, one wonders if it might not have been in the face of the extreme winnowing of the Hawaiian population by the inadvertent introduction of unfamiliar diseases by merchant and missionary visitors in the eighteenth century).

81. WATTS, *supra* note 75, at 65.

It is unclear when leprosy made its first appearance in Hawaii, but approximately one percent of the indigenous population succumbed to it in the years following the first Western contact.[82] Public awareness of the presence of the disease was widespread by the early part of the nineteenth century.[83] In his notes written around 1823, the Reverend C.S. Stewart of the American Board of Missionaries noted that the disease was "the frequent and hideous mark of a scourge, which more clearly than any other proclaims the curse of a God of purity . . . which . . . annually consigns hundreds of this people to the tomb."[84] Many Western observers of the native Hawaiian culture and its comparatively lax sexual mores concluded that the affliction was both a venereal disease and a divine condemnation of Hawaiian licentiousness.[85]

Among the Hawaiians, the disease was referred to as the Ma[']i Pake, the Chinese disease, because it was common in that country[86] and one of the lesser members of the royal family had famously contracted the disease some years after visiting there.[87] Accurately or not, many Hawaiians suspected that the disease was spread by the Chinese galley cooks,[88] who were often employed on the ships of the Anglo-American merchant fleet,[89] notwithstanding the equally plausible theory that it was spread by immigrants and sailors from Norway, another population that had a higher susceptibility to the disease.[90] For their part, members of the resident Western (or *haole*) mercantile elite were also content to attribute the spread of the disease to the Chinese laborers.[91] By the middle of the nineteenth century, the authorities and the populace at large recognized that leprosy was endemic among the native

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82. Tayman interview, *supra* note 27.

83. DAWS, *supra* note 47, at 209.

84. WATTS, *supra* note 75, at 65.

85. DAWS, *supra* note 47, at 209-210.

86. RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 1854-1874: TWENTY CRITICAL YEARS 73 (1953).

87. O.E. BUSHNELL, THE GIFTS OF CIVILIZATION: GERMS AND GENOCIDE IN HAWAII 202 (1993).

88. It is interesting to note the symmetry in attitudes of blame on opposite ends of the globe. In New York City, the lower class Irish immigrant cook Mary Mallon was vilified as the lethal typhoid carrier even though the Board of Health was aware of thousands of other carriers at liberty in the city. On the other hand, many diseases do find greater purchase among the impoverished, and many recent immigrants often fall into that category. Nevertheless, one suspects a tendency to scapegoat the poor and the outsider during periods of social upheaval such as the sudden opening of the Hawaiian kingdom to foreign influences and the unprecedented influx of immigrants of modest means in the U.S. at the end of the nineteenth century. *See generally*, JUDITH WALZER LEAVITT, TYPHOID MARY: CAPTIVE TO THE PUBLIC'S HEALTH (1996); HOWARD MARKEL, QUARANTINE, EAST EUROPEAN IMMIGRANTS AND THE NEW YORK CITY EPIDEMICS OF 1892 (1999) [hereinafter MARKEL, QUARANTINE].

89. BUSHNELL, *supra* note 86, at 202.

90. *Id.*

91. *Id.*

population.[92] Despite this recognition, the stigma and shame attached to the disease at the time are clear from the absence of any mention of it in a promotional pamphlet distributed to the public upon the 1850 creation of Hawaii's Board of Health. The pamphlet acknowledged the presence in the islands of cholera, a highly communicable "filth disease" that kills through terminal diarrhea,[93] but, for fear of injuring the image of the islands and of the mercantile interests of the *haole* fruit growers and merchants, the Board of Health thought it prudent to say nothing about the even more hateful disease of leprosy.[94]

B. The Law

While the Hawaiian kingdom was an independent constitutional monarchy throughout most of the nineteenth century, many have argued that this independence was nominal and, at the very least, compromised by the disproportionate influence of the *haole* missionary and mercantile community.[95] Whether or not one agrees that King Kamehameha IV and his brother and successor Prince Lot, later Kamehameha V, were puppets of western influences in the mid-nineteenth century,[96] there is a general consensus that the representatives of Western, and increasingly American, interests "slowly and imperceptibly wormed their way, year by year, into the King's favor until they were the power behind the throne. Controlling the business and wealth of the islands, they became the dominant minority amongst the people who only a few years before had welcomed them as visitors."[97]

On the 1863 recommendations of one such influential westerner, Dr. Wilhelm Hillebrand (the German-born director of the Queen's Hospital in Honolulu), the Hawaiian Board of Health, and the King's cabinet (the latter two rather liberally staffed by Westerners) determined that the spread of leprosy in the islands required decisive government action; specifically, a policy of enforced isolation.[98] Six thousand people out of a population of about 150,000 had been treated for the disease in that year alone,[99] and, at the urging of Kamehameha V, the legislature passed "An Act to Prevent the Spread of Leprosy" on January 3, 1864, which was signed into law by the King exactly one year later.[100]

Section 3 of the Act contained the substance of the law and stated that "the Board of Health or its agents are authorized and empowered to cause to be confined, in some place or places for that purpose provided, all leprous patients who shall be

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92. *Id.*
93 MARKEL, supra note 88, at 199-200.
94. WATTS, *supra* note 75, at 66.
95. *Id.*
96. *See id.*
97. WILLIAM ADAM RUSS, THE HAWAIIAN REVOLUTION 1893-94 15 (1st ed. 1959).
98. KUYKENDALL, *supra* note 86, at 73.
99. TAYMAN, *supra* note 26, at 26.
100. KUYKENDALL, *supra* note 86, at 73.

deemed capable of spreading the disease of leprosy."[101] It further stated that every policeman and government agent must "cause to be arrested and delivered to the Board of Health or its agents, any person alleged to be a leper."[102]

Rather than draft an entirely new statute to deal with the disease, however, the legislators relied on an old quarantine law written in response to an earlier outbreak of smallpox, but they omitted a provision from this template that stated that if a person were removed to a quarantine area, the Board of Health would "provide him with nurses and other necessaries."[103] The new law referred to medical care, but only for those patients "in the incipient stages" of the disease;[104] there was no mention of medical care for persons that the Board decided already had leprosy and "who shall be considered incurable."[105] Since the legislators and the Board of Health shared the common apprehension of the era that leprosy was incurable, their expectation was that the patients, once exiled to this place of isolation, would never return[106] and that the disease, along with its subjects, would die out in due time.[107]

For all intents and purposes, this Act criminalized the disease and effectively authorized the local sheriffs, police, and bounty hunters to comb the islands for suspected threats to the public health; this individuals would then be captured, loaded into cattle stalls, and shipped to a place of isolation and essentially marooned for life.[108] Over the course of a century, through the years of the monarchy, republic, and U.S. territory and statehood, many would be motivated, not only by the dictates of legal duty and the lure of reward, but also by petty spite and rivalry, to turn in over eight thousand suspected public health threats.[109] The subsequent processing of these unfortunates did entail an examination by Board of Health doctors, generally at the Kalihi receiving station near Honolulu,[110] but numerous other conditions can mimic the symptoms of leprosy, such as syphilis, tuberculosis, yaws, yeast infection, melanoma, lice infestation, or certain hormonal dysfunctions,[111] and, in practice, psoriasis, eczema, or even a bad sunburn could suffice to dispatch one to lifelong exile.[112]

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101. *Id. quoting* Laws 1864-65.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. WATTS, *supra* note 75, at 66.
107. Tayman interview, *supra* note 27.
108. *Id.*
109. *Id.* Well into the twentieth century, it was commonplace for teachers to receive a reward of ten dollars from the Board of Health for reporting students whom they suspected of having leprosy. *See* GUGELYK & BLOOMBAUM, *supra* note 31, at 26.
110. KUYKENDALL, *supra* note 86, at 74-75.
111. BUSHNELL, *supra* note 86, at 44.
112 .Tayman interview, *supra* note 27.

C. "There is no law here."

As the site of this exile, the Board of Health selected the small and remote Kalaupapa peninsula on the northern coast of Molokai,[113] later described by Robert Louis Stevenson as "a prison fortified by nature"[114] and as "the pit of hell" by Jack London.[115] The blunted triangular peninsula sits beneath a three thousand-foot vertical wall, the highest sea cliffs in the world, and the other three sides are bounded by shark-infested waters,[116] making it virtually escape-proof.

The first group of forced exiles, nine men, three women, and a stowaway child, were transported by ship from the Kalihi processing station early in 1866.[117] Ten of them would be dead within two years.[118] The Board's expectation was that the inmates would be self-sufficient and provided each with a shovel and a blanket, as well as starter provisions of cattle, pigs, goats, poultry, and seed crops to cultivate sweet potatoes and taro.[119] Water was also available from adjacent valleys.[120] However, the agricultural self-sufficiency envisaged by the Board was beyond the capabilities of the original inmates as many of them were too ill to work and many of the rest were lawyers and businessmen who were inept at agrarian pursuits.[121] Despite the fact that there was quickly a shortage of food and no shelter, another dozen inmates were delivered to Kalaupapa two weeks later, and the population of the community, if it could be called that, had risen to 140 by the end of the year.[122] The Board had not provided for any physicians, medical facilities or treatment,[123] but it did hire two rather ineffectual resident supervisors, one who lived at the top of the cliffs and the other who resided in the camp itself.[124] In time, the Board did permit the exiles to be accompanied by a helper, known as a *kokua*, who was usually a spouse or a parent.[125] These helpers, however, were under the same legal constraints as the patients and subject to perpetual exile.[126]

For the first seven years, the conditions of life, such as it was, were execrable. Starvation and death were near daily occurrences, and "power went to those brutal enough to wield it."[127] Many of the exiled turned to banditry,

113. KUYKENDALL, *supra* note 86, at 73-74.
114. Quoted in TAYMAN, *supra* note 26, at 2.
115. *Id.*
116. Tayman interview, *supra* note 27.
117. *Id.*
118. TAYMAN, *supra* note 26, at 4.
119. *See* KUYKENDALL, *supra* note 86, at 75.
120. *Id.* at 74.
121. Tayman interview, *supra* note 27.
122. *Id.*
123. KUYKENDALL, *supra* note 86, at 75.
124. *See id.* at 74.
125. TAYMAN, *supra* note 26, at 41.
126. *Id.*
127. Tayman interview, *supra* note 27.

moonshining, and preying on the weaker of their number.[128] The most disfigured inmates would wait at the shoreline with torches for the nighttime disembarkation of the newest exiles, jeering, "there is no law here," and snatch women and children among the new arrivals to be auctioned off as sexual slaves.[129] One historian likened the disembarkation of new exiles to "dropping women into a prison yard."[130] It was as if civilization, having discarded the exiles, the exiles would in turn chose to discard civilization. Murders and suicides were commonplace,[131] and the overall death rate in the first five years was forty-six per cent.[132]

In a sense, however, those who perished at Kalaupapa had already been rendered civilly dead by their leprosy diagnosis by the Board of Health prior to exile. With this verdict, the subject's spouse was granted a summary divorce, the subject's will was executed as if he or she were already dead,[133] and, in many cases, the Board of Health seized the subject's property and savings to help defray the cost of the exile.[134]

D. Sporadic Improvement

Conditions at the colony improved somewhat beginning in 1873, a year that saw 487 new exiles, roughly doubling the population.[135] The most significant arrival in that year may have been the Belgian priest Father Damien, whose chosen vocation to minister to the exiles of Molokai included both moral suasion and practical physical labor.[136] As a result of his efforts and example, as well as the ever-increasing number of exiles, a society began to coalesce around the more civilized and moral of the inmates.[137]

During these same years, the government began to provide more food and medicine to the colony and established a meagerly stocked store.[138] It also created a hospital that accommodated eighty patients, provided for periodic visits by a doctor hired by the Board of Health,[139] and eventually granted the inmates an allowance of

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128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. TAYMAN, *supra* note 26, at 2.

133. *Id.*

134. *Id.* at 8.

135. *Id.* at 84.

136. *Id.* at 105. Damien eventually succumbed to leprosy, thereby fulfilling his vocation. After his death in 1889, his well-publicized good works were continued by Sister Marianne Cope of Syracuse and Brother Joseph Dutton of Madison, Wisconsin.

137. Tayman interview, *supra* note 27.

138. TAYMAN, *supra* note 26, at 92.

139. *Id.* at 110. The first permanent doctor, Nathaniel Bright Emerson, was assigned to Kalaupapa in 1879. He chose not to stay long, but he later became one of the triumvirate of Board of Health doctors charged with the task of protecting Honolulu from a 1900 outbreak of bubonic plague. This entailed the judicious razing of infected buildings in Chinatown, but the

$5.75 a year.[140] The government installed a pipe water system, but there was still a great disparity in the quality of shelters for the inmates.[141] The quality of the resident supervisors remained erratic; they were increasingly chosen from among the inmates themselves, and some evidenced competence while their health permitted, and others showed nothing more than a penchant for corruption and venality.[142] Drunkenness and disease were still rampant, and the average death rate was one per day.[143]

Despite such incremental improvements at Kalaupapa, the segregation laws and policy of forced exile remained very unpopular with Hawaiian society at large, although, in general, it acquiesced to their dictates.[144]

E. Reform

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fires burned out of control for seventeen days, resulting in the destruction of four thousand homes over thirty-eight acres and the nearly total destruction of Chinatown. *See generally*, JAMES C. MOHR, PLAGUE AND FIRE: BATTLING BLACK DEATH AND THE 1900 BURNING OF HONOLULU'S CHINATOWN (2005).

140. TAYMAN, *supra* note 26, at 108. The allowance, however, did not cover the cost of a pair of trousers and shoes.

141. *Id.* at 92.

142. *Id.* at 116. One of the worst was Clayton Straun, an American inmate and former slave-trader. He was also a pimp, a moonshiner, and sold inmates' rations to outsiders. His chief innovation as resident supervisor was the introduction of zinc ID tags, ostensibly to facilitate the adminstration of rations. For the most part, however, he used the tags to keep track of and harass his enemies within the camp. For a detailed examination of a more thorough use of oppressive data management, see EDWIN BLACK, IBM AND THE HOLOCAUST (2001).

143. *Id.* at 92.

144. *See* KUYKENDALL, *supra* note 86, at 72-73, 75. A notorious act of defiance to the segregation and exile policies was the 1887 murder on the island of Kauai of Dr. Jared K. Smith by a young man named Kapea, whose mother and sister Smith had diagnosed with leprosy, resulting in their exile to Kalaupapa. Kapea shot Smith through the heart when Smith answered his door, and Kapea was later alleged to have said of his revenge that "my gun has feasted on a man and now is satisfied." *See*, LAWRENCE M. JUDD, LAWRENCE M. JUDD AND HAWAII: AN AUTOBIOGRAPHY 271 (1971).

A more celebrated exception to the general acquiescence was the resistance to the exile law by a fugitive community (led by a Hawaiian judge named Kapahei Kauai but referred to by the authorities as "the Archleper") that established itself in the remote and nearly inaccessible Kalalau valley on the island of Kauai in the 1890s. The failure of successive efforts by local authorities to roust the criminally ill from their refuge in 1892 and 1893 (and the casualties sustained by the local law enforcement) led to an escalation of the government efforts to flush the fugitives from their self-imposed exile. Among the new Republican government's tactics were implementation of martial law on the western half of the island and the dispatch of a special militia equipped with howitzers to encourage the recalcitrant fugitives to accede to the dictates of public health. Most of the fugitives proved amenable to such suasion, but the local press cheered the successful evasion of the authorities by a thirty-year old cowboy named Koolau and his wife and infant son. *See* TAYMAN, *supra* note 26, at 8-19.

In 1893, the Hawaiian monarchy was toppled by a cabal of American business magnates with the tacit support of the U.S. government and replaced with a short-lived republic that was an intermediate stage to eventual annexation by the United States in 1898.[145] This succession of governments did little to alter the half-century of continuous ascendancy of the western merchant elite in the islands.[146] After annexation by the United States, however, a flurry of lawsuits on behalf of Kalaupapa exiles forced the Hawaiian legislature to formulate new procedures for the designation of the afflicted as a threat to the public health in a manner that did not violate their substantive due process rights.[147]

Among the most egregious infractions in the diagnosis and sentencing procedure were the brief and often perfunctory nature of the examination (often by a single Board of Health doctor), the lack of a formal mechanism for challenging the diagnosis, and the frequent lack of say in the diagnosis by the patient's own physician.[148] In response to these legal challenges and political pressures, the legislature drafted new and stricter procedures for the diagnosis of the suspects. These alterations required that (A) the suspect be examined by government physicians in his or her own district; (B) the suspect be given the additional option of examination by his or her personal physician; (C) the suspect be provided with a certificate acknowledging a judgment of health where merited; (D) the suspect be examined further by a bacteriologist at Kalihi if the initial examination indicated the presence of the disease; (E) the Board compile an extensive case file; and (F) the Board exile only after the suspect and file had been examined and the suspect judged diseased by four members of a panel of three physicians and two bacteriologists.[149]

These provisions were an improvement over an Hawaiian Supreme Court habeas ruling from a decade before that held that leprosy was a disease, not a crime, but that nevertheless, due to the "law of overriding necessity," one infected with the disease must be treated as if a criminal.[150] Many of the Kalaupapa exiles demanded a reexamination following the promulgation of the new procedures; ten of the first eleven to be reexamined were found to be free of leprosy.[151] In the early years of the twentieth century, the Board of Health also began a program of parole for non-infectious exiles and shifted its emphasis to treatment over simple segregation.[152]

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145. KINZER, *supra* note 73, at 13-14, 24-30.

146. *See id.* at 13-14.

147. TAYMAN, *supra* note 26, at 205-206.

148. *Id.* at 206.

149. *Id.* (citing Haw. Rev. Stat. § 1122A (1908)).

150. *Id.* at 205.

151. *Id.*

152. *Id.* at 207. In a 1908 article entitled "The Lepers of Molokai" for the *Women's Home Companion*, Jack London not only described the newly implemented procedures to protect the rights of the afflicted, but also provided a cheery depiction of a Kalaupapa July Fourth festival including horse races, a shooting contest at the rifle club, and serenades by glee clubs accompanied by ukeleles and banjos. Jack London, *The Lepers of Molokai*, WOMAN'S HOME

F. Experimentation

From the middle of the nineteenth century onwards, the various governments in Hawaii had sought effective treatments for leprosy, engaging the efforts of practitioners of Indian, Chinese, and Japanese medicine, as well as scientists in the western tradition, American concocters of patent medicine, and the kahuna Kainokalani, but with little success.[153]

Throughout the 1880s, Arthur Albert Mouritz, the British-born resident physician at Kalaupapa, experimented on hundreds of people with the hope of devising an inoculation for the disease, mainly on fifteen *kokua* assistants[154] who had accompanied their diseased spouses to the colony.[155] Mouritz later acknowledged the dubious ethics of trying to impart the disease of leprosy to uninfected subjects, but it was also the case that the fifteen subjects, ten men and five women, not only volunteered for the experiments, but also urged Mouritz to undertake them in the first place.[156] His later reservations notwithstanding, Mouritz admitted that the *kokuas* presented "a splendid field for experimental work."[157]

In one such effort, Mouritz inoculated a male *kokua* with leprous serum and saliva from his diseased wife, but to no effect. A second effort a year later was also unsuccessful, and when the man's wife died, he married another patient and lived with her in the colony until her death sixteen years later. When he finally left Kalaupapa, he was still uninfected.[158] Another subject of Mouritz's experiments was an inmate who had been erroneously sentenced to exile, released after ten months, and then once again mistakenly exiled to Kalaupapa.[159] Mouritz could find no trace of the disease in this subject, but he still tried to induce it by making long incisions

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COMPANION, Jan. 1908, *available at* http://carl-bell-2.baylor.edu/~bellc/JL/TheLepersOfMolokai.html.

153. DAWS, *supra* note 47, at 210.

154. Board of Health policy regarding the presence of uninfected spouses and parents at Kalaupapa was inconsistent. Sometimes it was permitted, sometimes it was not. Consequently, some *kokuas* tried to fake the disease to avoid being ejected from the colony. "One man who had lived with his diseased wife for six years without contracting the disease counterfeited it by burning his skin with hot tobacco ashes and then rubbing in salt and kerosene oil." JUDD, supra note 144, at 271.

155. TAYMAN, *supra* note 26, at 147.

156. JUDD, *supra* note 144, at 271.

157. TAYMAN, *supra* note 26, at 147.

158. JUDD, *supra* note 144, at 272. Another male *kokua* married three inmate women in succession, and he too never contracted the disease, although, after the death of his third wife, he was finally ejected from Kalaupapa for distilling liquor and gambling, suggesting a communal awareness that not all contagion is medical. *See also* Korematsu v. United States, 323 U.S. 214 (1944).

159. TAYMAN, *supra* note 26, at 147.

over the subject's lumbar region and inoculating the cuts with leprous serum.[160] This failed as well.[161]

Other efforts included feasting fleas, mosquitoes, bedbugs, and spiders on leprous patients for hours with a hope of harvesting the causative bacillus from the ingested blood.[162] His harvesting projects also included attempts to capture "leper breath" by fitting on the patient's head a contraption from which two rods protruded forward from the ears with a strip of antiseptic gauze to collect the patient's exhalations for further study.[163] These efforts also revealed nothing, nor did his experiments with "leper tears."[164]

The most infamous instance of morally questionable experimentation in the field of leprosy, however, was that performed by the German doctor Edward Arning on a convicted Hawaiian murderer named Keanu in 1884. After losing his appeal, Keanu was presented with an offer by the Board of Health: to be hanged as sentenced or to be inoculated with leprosy as an experimental subject and thereafter live out his days in prison or at Kalaupapa, depending on the progress of the disease.[165] Confronted with this "choice," Keanu opted for the reprieve and allowed Doctor Arning to graft a fist-sized lump of leprous flesh taken from an eleven-year old girl into the muscle tissue of his forearm.[166] Within two years, Keanu developed a full-blown case of leprosy and was accordingly transferred to Kalaupapa and kept there until his death eight years later.[167] At about the time of the subject's death, however, Arning learned that Keanu had lived with leprous relatives in his youth, and thus it was impossible to know if his disease was the result of that contact or of the deal that he made with the Board of Health.[168] The experiment proved nothing.[169]

By the turn of the twentieth century, the standard treatment for leprosy was injection with chaulmoogra oil, a byproduct of a tree commonly found in East India and thought at the time to have beneficial properties for leprosy patients.[170] "The oil was viscous, burned like fire, and when injected moved visibly beneath the skin, a phenomenon one doctor likened to a snake slithering under a sheet."[171] Although there was in some instances a coincidence between patients' improvement and these excruciating injections, their curative properties were never categorically demonstrated.[172] Doctors nevertheless prescribed them widely, sometimes as many

160. *Id.*
161. *Id.*
162. *Id.* at 147-148.
163. *Id.* at 148.
164. *Id.*
165. JUDD, *supra* note 144, at 28.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. TAYMAN, *supra* note 26, at 207.
171. *Id.*
172. *Id.*

as three hundred injections a week for a single patient, until the more reliable sulfone cure discovered in 1946 became readily available as a treatment.[173]

One other medical effort in the years preceding the discovery of the sulfone cure, the treatment of lagopthalamos, or loss of the blinking reflex, merits comment. The loss of the use of the eyelid muscle, a common occurrence in advanced cases of leprosy, coupled with a numbness in the fingers that rubbed away bits of debris from unblinking eyes, often resulted in damage to the cornea and subsequent partial or total blindness.[174] To reduce this risk, "surgeons rigged a thread of muscle from the jaw to the lid, which caused the person to blink as he chewed—doctors then handed them a pack of gum."[175] While this makeshift solution is both ridiculous and horrific, it raises the question of what else, given the state of the medical knowledge and technology of the time, the doctors could have done.[176]

G. Confiscation of Children and Sterilization

By the 1930s, Kalaupapa in many ways resembled other provincial villages, albeit a small and impoverished one. The population fluctuated between 450 and 500.[177] All ages were represented, and roughly half of the population would not be recognized as having leprosy by a casual observer.[178] The inference of domestic normalcy in these years, however, would be misplaced, mainly because of two policies adopted by the legislature: the mandatory separation of non-leprous children from their leprous parents and the creation of a eugenics board dedicated to the sterilization of the "unfit."

Throughout the fourth decade of the twentieth century, there was a constant pressure on Hawaiian politicians to outlaw births at the Kalaupapa colony,[179] and for those children who were born there, the legislature passed a law in 1931,[180] which provided that "all non-leprous children born to parents one or both of whom are

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173. *Id.* at 207, 252-255.

174. *Id.* at 274.

175. *Id.*

176. The same question could be asked of the treatment of many ailments throughout history. For example, the typical treatment for the blindness-inducing disease of trachoma at Ellis Island in the early decades of the twentieth century entailed a surgeon applying a liquid cocaine anesthetic, then making shallow incisions on the underside of the patient's eyelids, and applying copper sulfate on the incisions, sometimes followed by the "vigorous rubbing of the inner eyelids with a steel toothbrush-like instrument dipped in corrosive chemicals, such as bichloride of mercury. MARKEL, QUARANTINE, *supra* note 88, at 106. While such treatment may seem literally torturous by contemporary standards, and probably those of the day as well, there was no alternative to such treatment other than blindness.

177. TAYMAN, *supra* note 26, at 228.

178. Tayman interview, *supra* note 27.

179. TAYMAN, *supra* note 26, at 239.

180. In The Matter of the Petition of Violet Lincoln Kaelemakule For A Writ Of Habeas Corpus On Behalf Of John Kaelemakule, 32 Haw. 731, 1933 WL 2389, at *1 (Hawai'i Terr. 1933) (law passed was Act 214, L. 1931).

leprous are hereby declared wards of the Territory of Hawaii and placed in the care, custody, and control of the board of health during minority" and that "the board shall permit any child born to parents, only one of whom is leprous, to reside with its non-leprous parent, provided such parent is capable of caring for, educating and maintaining such a child."[181] Either way, the Act divided families, and it further allowed the Board of Health to place such children with any relative or non-relative that it saw fit.[182]

One former sixty-seven year inmate at Kalaupapa recollected the effects of this policy:

> The worst thing about being a leprosy patient is that they shove you around like cattle. They take you here to die, and still they push you around . . . .You know, the babies that were born inside here were not allowed to stay with their parents. After the babies were born, the law said they had to be taken away to the baby nursery at Kalaupapa. They were afraid of the contact—afraid the babies would catch the disease from their parents. But some of my children, I will tell you this, some of them I kept longer. Most times, the babies were born at night. We kept everyone quiet so the administrators and nurses would not hear the baby being born. . . . We would try to keep the babies as long as we could, but most times we kept them only until morning. Then we would carry them to the nursery. I didn't want any trouble with the Board of Health. So we gave them up. That was the law. They allowed the children to live one year inside the Kalaupapa nursery. There we could see them only through thick glass, but no can touch! Then after one year, they were removed. They were either *hanai*[183] by family members, or "issued" out for adoption by the Board of Health.[184]

In addition to the mandatory removal of children, the 1930s also saw growing support for the eugenics movement that had spread through the rest of the country in the preceding decade.[185] By 1933, twenty-seven states had passed laws

181. *Id.*

182. *Id.*

183. "Hanai" is a traditional Hawaiian custom of giving a child of one's own to relatives or close friends to strengthen ties between the families.

184. GUGELYK & BLOOMBAUM, *supra* note 31, at 35-37. As harsh as such a policy undoubtedly was on the parents, a much worse practice was in place in Japan where, from the 1930s to the 1950s, the babies of hundreds of leprosy patients held in sanatoriums were deliberately killed by the medical staff of the institutions for fear that the infants would pass on the disease. *See "Japan's leprosy policy denounced,"* BBC NEWS, Mar. 2, 2005, http://news.bbc.co.uk/2/hi/asia-pacific/4311679.stm.

185. TAYMAN, *supra* note 26, at 239.

requiring the sterilization of those who were deemed unfit, and under these laws, sixteen thousand people were subjected to sterilization.[186] The director of Queen's Hospital in Honolulu, Dr. Nils Larson, advocated the sterilization policy and asked: "Is it possible that this community will continue not to take legislative measures to correct the evil that indiscriminate breeding brings upon us?"[187]

In 1938, the legislature did vote to establish an eugenics board to implement such "corrective" social policy, but the territorial governor, Lawrence M. Judd, exerted his authority and deflected the enforced sterilization policy from the population of Kalaupapa.[188] Instead, the Board of Health instituted a policy of strongly encouraging the inmates to submit to voluntary sterilization. To weight their decision in favor of submission, it made the sterilization procedure a prerequisite for any parole for non-infectious inmates to visit family outside of Kalaupapa.[189] This precondition militates against a characterization of the sterilization policy as voluntary in anything more than a nominal sense, and it is impossible to know how many of the exiles would have subjected themselves to sterilization had the chance for a temporary reunion with loved ones not been contingent upon it.[190] There is also a bitter irony that the sterilization program, which

186. *Id.*

187. *Id.*

188. *Id.* at 240.

189. *See* GUGELYK & BLOOMBAUM, *supra* note 31, at 39 (an oral history of one inmate describes the procedure for non-infectious inmates desiring to visit family in the capital, Honolulu).

190. In an oral history of Kalaupapa, one former inmate described the choice proffered by the Board of Health policy:

> [I]n 1938 they tried to promote that sterilization policy on us. Any patient who wanted to go to Honolulu for a visit had to submit. Now you know, we missed Honolulu very much. Especially those patients who had children and family there.

Id. Another inmate described the program as such:

> I wanted to go to Honolulu to visit my son. I could go on one condition, to be made sterile. My son was only two and one-half years old. I had never seen him from the day he was born at Kalaupapa. They took him straight out. I wanted to see him because I loved him and missed him. You want to see your child, especially your son. He was *hanai*, raised by family, and I got word he was sick. So I asked the administrators if I could go out and visit him. They said you can see him, but only if you are made sterile. They cut off my balls. You had no choice. That's the only way you could go, so I *submitted* and I went; I *saw my only son*.

Id. at 40.

began in 1938 and continued until 1943, coincided almost exactly with the sulfone drug experiments that were taking place at the national leprosy research center in Carville, Louisiana[191] and which ultimately resulted in a cure for leprosy in 1946.[192]

H. The Final Years

In 1969, the state legislature, following the recommendations of a Citizens' Committee on Leprosy, ended the policy of forced exile in favor of voluntary hospitalization and discharge upon successful therapy.[193] The new law provided that those inmates (now residents) who wished to remain in Kalaupapa were free to do so, and it guaranteed them adequate health care and medical service for life.[194] In the years that followed, however, fears that real estate developers might find a way to oust those residents who chose to make Kalaupapa their home motivated the legislature additionally to pass a national parks law in 1981 that further protected the residents from being expelled from the community that they had forged out of a century of exile.[195] Had it been otherwise, it would have comprised one more outrage upon an already greatly put-upon population; it would have been tantamount to telling them that not only had the state made their history at Kalaupapa one of excruciating hardship, but also one devoid of meaning. The 1981 law safeguarded against this deprivation.

In 1987, at the height of the AIDS crisis, Surgeon General C. Everett Koop, upon the urgings of various scientists and concerned citizens, considered and rejected the proposition of re-instituting Kalaupapa as a national colony for AIDS.[196] He dismissed the suggestion based on his examination of its history and his conclusion that quarantine would achieve nothing but frighten patients in need of medical attention into hiding.[197]

III. THE CRIMES

The principle of *nullum crimen sine lege*, or "no crime without a law to prohibit it," is a fundamental tenet of criminal law and prohibits prosecution for acts or omissions that were not forbidden by any law at the time of their occurrence.[198] As such, the various policies and actions perpetrated upon those afflicted with leprosy in Hawaii from 1866 to 1969 are largely beyond the reach of the various international human rights laws that proliferated following the Second World War.

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191. TAYMAN, *supra* note 26, at 240, 252, 255.
192. *Id.* at 255.
193. *Id.* at 280-81.
194. *Id.* at 281.
195. *Id.* at 293-94.
196. *Id.* at 305-06.
197. TAYMAN, *supra* note 26, at 305-06
198. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 139-145 (2003).

The aim of this investigation, therefore, is not to argue for indictments, but to examine this century-long policy of forcible transfer and exile from a vantage informed by the instruments of international humanitarian law of the second half of the twentieth century with the hope that it may serve, in the event of a future medical emergency of catastrophic proportions, as an object lesson that identifies the stresses that exist at the fault line between two tectonic plates of state responsibility: the preservation of the state and the protection of its citizens' human rights.

In the case of the Molokai transfers, this tension manifested itself when three successive governments viewed the prevalence of leprosy in the islands posed a dire threat to the health of the community[199] and with their subsequent response to that perceived threat. Their resulting policies might be characterized as forcible transfer, imprisonment in violation of international law, torture, forced sterilization, and persecution, each of which is contained within the definition of crimes against humanity set forth in the Rome Statute of the International Criminal Court.[200]

A. Forcible Transfer

With regard to the Rome Statute's Article 7(1)(d) crime of forcible transfer of population, the entire 103-year program of "total institution" at Kalaupapa constituted the forcible transfer of over eight thousand people who were subjected to this exile solely on the basis of the Board of Health's suspicion that they had contracted leprosy. The fact that most of those transferred acquiesced to their exile—that only a few actually resisted it does not render it voluntary in any meaningful sense—and the government's use of police, bounty hunters, informants, and detachments of militia armed with howitzers belies any effort to characterize the program of transfers as non-coercive.

In addition to Article 7(1)(d), this program might be viewed as violative of Article 3 of the UN Declaration of Human Rights, which guarantees the life, liberty, and security of the individual;[201] Article 9, which prohibits arbitrary arrest, detention, and exile;[202] Article 13, which provides for freedom of movement both within and without the borders of one's state;[203] and Article 20, which guarantees freedom of

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199. That leprosy posed a grave public health threat was the conventional perception throughout most of history, but by the mid-nineteenth century, there were sufficient indications that the disease was not universally lethal, although the selectivity of the mechanism by which the disease was communicated was at best imperfectly understood. It may be the case that the dire threat that the disease posed was more to the interests of agricultural trade and, later, tourism. As the understanding of the disease improved, the nature of the threat that it actually posed would have to be recalibrated to reflect the diminution of its threat to the public health.

200. Rome Statute, *supra* note 31, art. 7(1)(d), (e), (f), (g), (h).

201. Universal Declaration of Human Rights, G.A. Res. 217A, art. 3, U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

202. *Id.* art. 9.

203. *Id.* art. 13.

peaceful assembly and association.[204] These guarantees fall short, however, when read in conjunction with the Declaration's Article 29(2), which makes exemptions for the protection of public order and the general welfare.[205]

Similarly, the Kalaupapa program might have violated provisions of the 1966 International Covenant on Civil and Political Rights (ICCPR),[206] particularly Articles 15, 17, and 22. These articles protect one from being held "guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law at the time it was committed,"[207] from arbitrary and unlawful interference with his privacy, family, or home, and from encroachments of one's freedom of association.[208] However, Article 22(2) also provides exceptions to this guarantee for the protection of national security, public safety, and public health,[209] thereby providing a dispensation for the state's encroachment upon the rights listed in the Covenant.

B. Imprisonment

Article 7(1)(e) of the Rome Statue prohibits imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law.[210] The simple facts of the Kalaupapa program show that thousands of people were imprisoned on a virtually escape-proof peninsula when neither guilty nor convicted of any crime, but merely set aside by the authorities to protect the majority of the population from the threat of disease. In retrospect, it is clear that many of these people did not have the disease in its communicable form and that a number of them probably did not have the disease at all. Nevertheless, based on the medical

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204. *Id.* art. 20.

205. *Id.* art. 29(2).

206. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), arts. 15, 17, 22, U.N. GAOR, UN Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR].

207. *Id.* art. 15. It is questionable whether the forced exile and imprisonment should be construed as "being held guilty of a criminal offense;" however, until 1884, contracting leprosy was essentially thought of as a crime, and thereafter the Hawaiian Supreme Court clarified that it was not a crime, but that the exiles would have to be treated as if it were, a semantic distinction for which one wonders if the drafters of the ICCPR would have any patience. TAYMAN, *supra* note 26, at 205.

208. ICCPR, *supra* note 206, arts. 17, 22.

209. Section 2 of ICCPR Article 22 states that:

> [N]o restriction may be placed on this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Id. art. 22(2).

210. Rome Statute, *supra* note 31, art. 7(1)(e).

understanding of the time, and on rather commonplace quarantine and isolation laws, these inmates were deprived of their liberty absent any criminal offense on their parts.

In his 1904 opinion in *Jacobson v. Massachusetts*, in which the Supreme Court upheld a law requiring mandatory smallpox vaccination, Justice Harlan wrote for the Court that:

> The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of the principle which recognizes the right of each individual person to use his own whether in respect to his person or his property, regardless of the injury that may be done to others.[211]

The Court invoked the principles of self-defense and "paramount necessity" in the face of the threat of epidemic disease to support the proposition that citizens may be compelled, by force if need be, to comply with lawful regulations in order to protect the public collectively from imminent danger.[212] The decision does not hold that a person can be forcibly vaccinated against his will, but that his refusal may rightfully result in his arrest, imprisonment, quarantine, or isolation.[213] The fact that the U.S. Constitution recognizes this police power to implement and enforce such "reasonable regulations"[214] to protect the public health, however, does not in itself render that power commensurate with the requirements of international law.[215] Rather, the reasonableness of such regulations must comport with customary international law as reflected in general state practice[216] and with standards of medical knowledge current at the time of the acts in question. In the case of the Kalaupapa program, the increasing understanding of leprosy and the awareness of its

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211. Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 26 (1904).

212. *Id.* at 29, 30.

213. LEAVITT, *supra* note 35, at 78.

214. *Jacobson*, 197 U.S. at 29.

215. *See* United States v. Josef Alstötter et al. (The Judges' Trial), *in* 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW NO. 10, at 3 (U.S. Gov't Printing Office 1951) (for the proposition that a nation's entire legal system may be in violation of international law), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-II.pdf.

216. *See* discussion *infra* Part IV.

relatively non-communicable nature directly diminishes the public health justification for the imprisonment of the afflicted inmates.

C. Torture

Article 7(2)(e) of the Rome Statute defines torture as the "intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising from, inherent to, lawful sanctions."[217] The various instances of medical experimentation that occurred at Kalaupapa, particularly those performed by Doctors Mouritz and Arning, may fall within this definition and thus constitute crimes against humanity and violations of a *jus cogens* norm. The experiments of Mouritz and Arning were not conducted for the primary purpose of inflicting pain and suffering on their subjects, but the goal of the experiments was the inducement of a disease upon subjects that inherently entails such pain and suffering.[218] While the ultimate aim of their work was the discovery of a cure for leprosy, Mouritz and Arning's use of uninfected inmates and *kokuas* as "human soil"[219] for the cultivation of the leprosy bacillus is repugnant to the modern notions of medical ethics and, by Mouritz's own admission, those of their own day as well.[220]

The Nuremberg Code, ten principles delimiting what is permissible in cases of human experimentation, was articulated in 1947 as part of the opinion of the Nuremberg Tribunal in *United States v. Brandt* (The Doctors' Trial).[221] The case concerned experiments conducted by Nazi doctors upon unwilling subjects from the concentration camps, which included studies to gauge the subjects' endurance to high altitudes, freezing temperatures, malaria, jaundice, mustard gas, and typhus, as well as experiments aimed at making sea water drinkable, euthanasia, and forced sterilization.[222] The first provision of the Nuremberg Code is applicable to the

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217. Rome Statute art. 7(2)(e).

218. JUDD, *supra* note 144, at 271.

219. TAYMAN, *supra* note 26, at 147.

220. *Id.*

221. United States v. Karl Brandt et al ("The Doctors' Trial"), *in* 1 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW NO. 10, at 8-17 (U.S. Gov't Printing Office 1946), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-I.pdf.

222. *Id.* In addition to pleading a defense of superior orders and arguing that they had violated no then existing law, the accused also attempted a *tu quoque* defense, alleging that the United States had also engaged in equivalent experimentation on domestic convicts, but the prosecution distinguished the coerced participation of the Nazi experiments from the incentive-driven participation of U.S. convicts. *See* FREYHOFER, *supra* note 22, at 86-102.

Throughout the first half of the twentieth century, some American convicts had in fact received incentives to serve as research subjects and be infected with yellow fever, beriberi, plague, cholera, pellagra, or malaria. *Id.* at 17. In some instances, they received reduced sentences and in others, their choice of cigarettes or cigars. *Id.*

experimentation at Kalaupapa and requires the subject's voluntary consent, whereby the subject is "so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion."[223] Although the participation of Mourtiz's *kokua* subjects was voluntary, it is questionable whether it could have been obtained without coercion or duress when the common impetus for participation was a desire of the *kokuas* to contract the disease and avoid the possibility of ejection from the colony and separation from their spouses and loved ones. The case of Arning's subject, Keanu, is more clear-cut: his choice was between participation and the gallows. It may be noted that by agreeing to be a subject, Keanu gained a ten-year extension on his life, albeit with a disease that may or may not have been the result of Arning's experiment, but his choice to participate cannot in any meaningful way be called voluntary in light of the alternative to his cooperation.

The Nuremberg Code also requires that the hoped-for results of the experiments be unprocurable by other means[224] and that they be "conducted as to avoid all unnecessary physical and mental suffering and injury."[225] It is an open question whether the desired results were, in fact, procurable by other means since Mourtiz' efforts were unsuccessful and Arning's were inconclusive due to poor preparation. As for avoiding unnecessary pain and suffering, however, both doctors aimed specifically at imparting a disease that entailed both great physical suffering and an attendant stigma from which, it is safe to infer, mental suffering would also ensue, regardless of the subjects' motivation for participation.

Article 5 may be the most incriminating when applied to the Kalaupapa experiments in that it states that "no experiment should be conducted where there is an *a priori* reason to believe that death or disabling injury will occur."[226] As leprosy was believed, wrongly in hindsight, to be an extremely communicable and deadly disease, it is natural, according to the standards of medical knowledge of the day, to see an *a priori* reason why injecting inmates with leprous serum or saliva or grafting a lump of leprous flesh into the muscle tissue of an uninfected subject would lead to disabling injury or death. In fact, the success of the experiments depended upon it.

Two of the accused doctors (Hans Romberg and Sigfried Ruff) also stated at the trial that in the summer and autumn of 1945 they had taken part in high altitude experiments of the same sort as conducted at Dachau, but in the latter instance under the auspices of the U.S. Air Force. *Id.* at 92 (citing Records of the United States Nu[rem]berg War Crimes Trials, United States v. Karl Brandt, et al. (Case 1, Medical Case), *microformed on* Publications M887, Proceedings at 6492, 7011 (Nat'l Archives Microfilm Publ'ns)). They also stated that six of the subjects died as a result of the latter experiments. *Id.* The tribunal eventually disallowed the defendants' *tu quoque* defense. *Id.* Seven of the doctors were hanged, nine received prison terms, and seven were acquitted. *Id.* at 105.

223. Nuremberg Code, Article 1, available at http://www.hhs.gov/references/nurcode.htm.

224. *Id.* at art. 2.

225. *Id.* at art. 4.

226. *Id.* at art. 5.

The experimentation at Kalaupapa may also contravene the prohibitions of the Convention Against Torture,[227] which came into force in 1987. Article 1 defines torture as "any act by which severe pain and suffering, whether physical or mental, is intentionally inflicted on a person for obtaining from him or a third person information or a confession."[228] This prohibition, which is absolute and not excepted by reason of public emergency,[229] is generally interpreted as applying to scenarios of verbal interrogation.[230] If, however, the prohibition can be read as also applying to situations where the interrogation is not of the mind but of the body of the subject, such as an effort to force a revelation of information that is so secret and unique to the subject that it is unknown even to his own mind,[231] then the Kalaupapa experiments could fall within the contours of the Convention Against Torture.

D. Enforced Sterilization

Article 7(1)(g) of the Rome Statute identifies enforced sterilization as a crime against humanity.[232] The policy of the Kalaupapa administrators, from 1938 to

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227. Convention Against Torture, *supra* note 38.

228. *Id.* at art. 1(1).

229. *Id.* at art. 2(2).

230. *See* Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) (1978) *available at*, http://www.worldlii.org/eu/cases/ECHR/1978/1.html.; HCJ 5100/94 *Public Committee Against Torture in Israel v. Israel* [1998] IsrSC 53 (4) 817, *available at*, http://elyon1.court.gov.il/Files_ENG/02/690/007 /a34/02007690.a34.pdf.

231. Just a few examples of such interrogation of unwitting and unconsenting subjects include:

- the Tuskegee experiments on the results of untreated syphilis from 1932 to 1972. JAMES H. JONES, BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENTS (REVISED EDITION) (Free Press 1993) (1981);
- the U.S. Army's spraying of biological agents over parts of Hawaii and Alaska; over the cities of San Francisco, Washington, DC, and Key West; and even in the New York City subway system and elsewhere in order to study the dispersion effects of the agents from 1949 to 1969. LEONARD A. COLE, CLOUDS OF SECRECY: THE ARMY'S GERM WARFARE TESTS OVER POPULATED AREAS 6 (1988).
- the U.S. Department of Defense's Project SHAD (Shipboard Hazard and Defense) chemical and biological warfare defense experiments in the 1960s. DOD Releases Five Project 112 SHAD Fact Sheets (Oct. 31, 2002) http://www.projectshad.org/news/new-factsheets.htm.
- the 2005 and 2006 efforts of the U.S. Navy to test Hemopure, a bovine blood substitute, on unconscious civilian trauma patients. Andrew Bridges, *Testing Blood Substitute On Hold*, SEATTLE TIMES, Dec. 15, 2006.

Each lends heft to David Rothman's assertion that for decades after Nuremberg, "the American research community considered the Nuremberg findings, and the Nuremberg Code, irrelevant to its own work." DAVID ROTHMAN, STRANGERS AT THE BEDSIDE: A HISTORY OF HOW LAW AND BIOETHICS TRANSFORMED MEDICAL DECISION MAKING 31 (1991).

232. Rome Statute, *supra* note 37, at art. 7(1)(g). It also identifies sexual slavery and any other form of sexual violence. *Id.* While the chief responsibility for the widespread practice of

1943, of strongly encouraging voluntary sterilization among the inmates was not technically mandatory nor foisted upon every inmate; however, the authorities' use of voluntary sterilization as the necessary *quid pro quo* to receive permission for a temporary parole to Honolulu to visit family is sufficiently coercive to discredit any characterization of the inmate's compliance as truly voluntary. This policy also contravenes Article 17 of the ICCPR, which protects against arbitrary and unlawful interference with one's family, privacy, and home,[233] as well as Article 16(1) of the UN Declaration of Human Rights, which guarantees the right to marry and found a family.[234]

E. Persecution

Article 7(1)(h) of the Rome Statute prohibits "persecution of any identifiable group on . . . grounds that are universally recognized as impermissible under international law."[235] Article 7(2)(g) defines "persecution" as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."[236] That the exile program at Kalaupapa meets the "severe deprivation of fundamental rights" prong of this prohibition seems clear: the exiled were deprived of their physical liberty, separated from family, rendered civilly dead, and often had their property and children confiscated. In the early years of the program, they were imprisoned in a violent and savage environment with little protection or provision of food, shelter, or medical attention. In later years, many were subjected to unethical experimentation and sterilization. In addition to the severe burdens of the disease and its stigma, the afflicted were also forced to contend with an atmosphere of betrayal by informants who might be a teacher, a neighbor, or a relative. The deprivation of these fundamental rights was the result of no other offense than contracting, or appearing to have contracted, the disease of leprosy.

The second prong of this prohibition, however, requires that such deprivation be contrary to international law by reason of the identity of the group so deprived. The question is therefore whether or not international law permits such

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auctioning off women and children as sexual slaves during the first seven years of the colony's existence rests with those inmate-perpetrators themselves, some responsibility must also be placed on the shoulders of the Board of Health personnel who permitted such practices to flourish. If the entire program of forced exile were found to be illegal, the foreseeable crimes committed in the colony could theoretically be imputed to the Board of Health personnel under the doctrine of joint criminal enterprise, particularly its second "system of repression" and third "extended liability" variants. *See* Prosecutor v. Tadic, Judgment, ICTY Appeals Chamber, Case No. IT-94-1-A, 15 July 1999; Prosecutor v. Krnojelac, Judgment, ICTY Appeals Chamber, Case No. IT-97-25-A, 17 September 2003.

233. ICCPR, *supra* note 206, at art. 17.

234. UDHR, *supra* note 201, at art. 16(1).

235. Rome Statute, *supra* note 37.

236. *See id.* at art. 7(1)(g).

deprivation where the affected group is defined, as here, as a group of ordinary citizens who by virtue of contracting a disease are perceived as posing a dire threat to the public health and safety.

In *Jacobson*, the Supreme Court held that individual rights and liberties may be curtailed in the face of a grave threat to the public welfare, a position in accord with much state practice around the globe.[237] Similarly, Article 29 of the UN Declaration of Human Rights adds a proviso to its protections that:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights of freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.[238]

To what degree the rights and liberties of the individual may be curtailed and in the face of how dire a threat remain open questions, especially in a scenario where the dictates of morality are at odds with the needs of public order and the general welfare, or where the rights of a minority can be protected only by imperiling the very existence of the state. Persecution does not cease to be persecution simply because it protects the welfare of the majority of the population or, perhaps semantically, it does. International law, as articulated in Article 29 of the UN Declaration of Human Rights seems to provide a loophole by which persecution may be excusable if the stakes are high enough.

While the evidence is sketchy at best, the presumption, if not the intention, of the creators of the Kalaupapa exile program that the transferees would eventually die out and the threat of their disease would die with them suggests that the authorities' neglectful treatment of the colony in its early years could conceivably constitute a violation of the Rome Statute's Article 7(1)(b) prohibition of extermination, defined as "the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population."[239] This is at best a speculative aside in an already counterfactual exercise, and the various policies embodied in the Kalaupapa exile program would not be permitted in most instances by the subsequent instruments of international law discussed above. Where they are implemented as measures of self-preservation and with the intention of destroying the disease and not the patient, however, they might be permissible, despite their severity and disproportion to the evolving understanding of the disease of leprosy and the attendant diminution of the threat that it posed to society.

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237. 197 U.S. 11 (1905).

238. UDHR, *supra* note 201, art. 29(2).

239. Rome Statute, *supra* note 37, art. 7(2)(b).

Regardless of whether the Kalaupapa policies would fulfill the criteria of crimes against humanity or whether they could be defended successfully on the grounds of medical necessity, there is a dark irony in the invocation of necessity by those who implemented the policies, particularly when one considers the destruction of Hawaiian society and its inhabitants' brush with extinction as a result of the unfamiliar diseases introduced at the first contact with visitors from the West. One wonders if the catastrophe of this contact might itself have been a crisis sufficient to justify a necessity defense had the Hawaiians responded with extreme measures to protect themselves from western disease carriers. Such a scenario in which an entire country is threatened with destruction by the presence of an unintentionally lethal minority underscores the troubling question of just how far a state may be excused for human rights violations in the face of dire necessity.

IV. THE NECESSITY DEFENSE IN INTERNATIONAL LAW

A. Grotian Necessity (The Right of Self-Preservation)

From the seventeenth century to today, international law has recognized the existence of an affirmative defense of necessity for legal violations by state actors, although the view of this defense has evolved over four centuries from that of a right or justification for a state's breaches of its international obligations to that of a mere excuse for such breaches. However, in the face of a medical threat of extreme lethality, a reversion from the conception of excuse back to that of justification is likely.

Grotius, the progenitor of modern international law, equated the necessity defense with a state's right to self-preservation, stating that "the Jewish law . . . no less than the Roman, acting upon the same principle of tenderness, forbids us to kill anyone who has taken our goods, unless for the preservation of our lives."[240] In his view, the defense was available only in instances of "extreme exigency."[241] The Grotian formulation of necessity required (1) a lack of *mens rea* on the part of the state invoking the defense (the necessity claimed cannot be a pretext for other objectives); (2) the presence of a real and imminent danger; (3) proportionality between the necessity and the action taken by the state; (4) consideration of the

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240. HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE, bk. 2, at 83 (M. DUNNE ed., A. CAMPBELL trans., photo reprint of 1979.)(1625).

241. *Id.* at 377. Grotius goes on to state that "no emergency can justify any one taking and applying to his own use what the owner stands in equal need of himself." *Id.* At first glance, this may suggest a rejection of the application of the necessity defense to a lethal or extreme response to a state-threatening medical crisis; however, in the passage above, he is speaking of the seizure of property of neutrals in a time of war. Clearly, the taking of life is an immeasurably more dire encroachment than the taking of property, but it is not clear that there is an apt parallel between the neutral party during war and the blameless citizen who nevertheless poses a grave threat to those around him and ultimately to the state itself.

equities of the situation; and (5) restitution to the injured state where possible.[242] Like most international jurists before Nuremberg, Grotius conceptualized the use of the defense in situations involving an encroachment by one state upon the sovereign rights of another state and not upon the human rights of a portion of the a state's own population.[243] Nevertheless, there is nothing in the Grotian formulation that could not be applied to a matter strictly confined within the borders of a single state.

The conception of necessity as the fundamental right of the state to self-preservation predominated for three and a half centuries and prompted numerous scholars to emphasize this preeminent right as the source for all other rights of the state. As expressed by the nineteenth century scholar Travis Twiss, "Of the Primary and Absolute rights of a nation, the most essential, and as it were the Cardinal Right, upon which all others hinge, is that of Self-Preservation. This Right necessarily involves, as subordinate Rights, all other Rights which are essential as means to secure this principal end."[244] Many scholars, however, recognized the ambiguity inherent in this conception of the necessity defense as arising from the right of self-preservation, particularly when the justification impinges upon the equally fundamental right of self-preservation by the state against which the defense is alleged. As expressed by Charles Fenwick, "[t]he conflict of international rights thus resulting is governed by a few general principles of law, which are, however, so vague as to leave it an open question . . . whether the right of one has justified a breach of the right of the other."[245] In response to this conundrum, modern doctrine has largely discarded the right-based conception of necessity as a justification for wrongdoing and replaced it with a formulation that views the defense as a mere excuse.[246]

The difference is this: necessity as a justification characterizes the action not as laudable in itself, but neither is it something to be condemned. Necessity as an excuse, on the other hand, characterizes the action as something to be condemned, but nevertheless permitted on the very narrow basis of the unique pattern of events

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242. Roman Boed, *State of Necessity As a Justification for Internationally Wrongful Conduct*, 3 YALE HUM. RTS. & DEV. L.J. 1, 5-6.

243. The advent of international humanitarian law following the atrocities of the Second World War probably would have been a revelation to Grotius and others who conventionally saw a state's treatment of its population as an attribute of the state's sovereignty and thus beyond the reach or concern of international law.

244. TRAVERS TWISS, THE LAW OF NATIONS CONSIDERED AS INDEPENDENT POLITICAL COMMUNITIES 179 (Clarendon Press, 2d ed. 1884) (1861). Also, "[t]he right of existence, or of self-preservation, is recognized by international law as the primary right of states, being the necessary postulate of the possession of all other rights." CHARLES G. FENWICK, INTERNATIONAL LAW 142 (1924); and "[i]n order to protect and preserve this right [of self-preservation], [a State] may in extreme cases of necessity commit what would ordinarily be an infraction of the Law of Nations and violate the territorial sovereignty or international right of another State." AMOS S. HERSHEY, THE ESSENTIALS OF INTERNATIONAL PUBLIC LAW AND ORGANIZATION 232 (1927), at 232, *quoted in* Boed, *supra* note 242, at 6.

245. FENWICK, *supra* note 244, at 142-43.

246. Boed, *supra* note 242, at 7.

that gave rise to the violation. According to George Fletcher, "excuses do not express policy goals. They respond to an imperative generated by the defendant's situation. Excuses are not levers for channeling behavior in the future, but an expression of compassion for one of our kind caught in a maelstrom of circumstance."[247]

B. Modern Doctrine (The Excuse of Essential Interest)

This shift from justification to excuse is largely the result of a comprehensive study by Professor Roberto Ago[248] on necessity in international law commissioned by the UN's ILC in the 1970s and, in large part, the basis of the ILC's articulation of the necessity defense in Articles 25 through 27 of the 2001 Draft Articles on State Responsibility.[249] The Ago Report marshals evidence from various international tribunals to dispense with the right/justification formulation of necessity. In reformulating it as an excuse to breach obligations when doing so is necessary for the protection of an essential state interest (and not only that of self-preservation), Ago simultaneously diluted the authority of the defense but also gave it a greater versatility of application.

One example of this broadened application is the ecological necessity defense illustrated by the 1967 *Torrey Canyon* incident discussed by Ago and in the ILC Draft Articles commentary.[250] The *Torrey Canyon*, a Liberian tanker carrying 117,000 tons of crude oil, ran aground off the coast of Cornwall outside of British territorial waters. The crew abandoned the tanker, which started to leak oil in the sea, thereby posing a threat to the ecology of the British waters and coastline. When the tanker started to break apart, intensifying the ecological threat, the British government tried various remedies and ultimately chose to bomb the tanker to burn off the remaining oil in its holds. There was no resultant protest from the Liberian government, and both the Ago Report and the commentary to the ILC Draft Articles suggest that even if the tanker had not been abandoned or if the owners of the *Torrey Canyon* had tried to prevent its destruction, the British action would have been permissible under international law because of the necessity of preventing ecological harm to the Cornish coastline. This necessity arose from an "essential interest" of

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247. GEORGE P. FLETCHER, THE INDIVIDUALIZATION OF EXCUSING CONDITIONS, IN JUSTIFICATION AND EXCUSE IN THE CRIMINAL LAW: A COLLECTION OF ESSAYS 56 (1994), *quoted in* Ian Johnstone, *The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism*, 43 COLUM. J. TRANSNAT'L L., 337, 351 (2004-05).

248. Ago later became a judge for the International Court of Justice.

249. Boed, *supra* note 242, at 7.

250. Int'l Law Comm'n, *Addendum – Eighth Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur – The Internationally Wrongful Act of the State, Source of International Responsibility (Part 1)*, ¶ 35, U.N. Doc. A/CN.4/318/Add.5-7 (June 19, 1980), *available at* http://untreaty.un.org/ilc/documentation/english/a_cn4_318_add5-7.pdf; *Draft Articles*, *supra* note 40, at ¶ 9.

the United Kingdom, but one that still fell far short of preservation of the state itself.[251]

Similarly, in the 1997 *Gabcikovo-Nagymaros* case,[252] the International Court of Justice reaffirmed the "essential interest" basis of the modern doctrine of necessity. Hungary and Czechoslovakia agreed under a 1977 treaty to jointly construct a system of dams and locks on the Danube for the purpose of generating electricity, improving navigation, and preventing floods. A dozen years into the venture, Hungary withdrew from the project and claimed that the project threatened its environment and the Budapest water supply. Hungary supported the breach of its treaty obligations by claiming necessity, and, although the ICJ found against Hungary, it did so because it had not demonstrated that a state of necessity actually existed. The ICJ found that Hungary's underlying motivation for withdrawal was primarily economic and that it was that factor that had contributed to the alleged state of necessity. The salient point, however, is that the ICJ assumed that, had an actual state of necessity existed, Hungary's breach of its obligations to (at that point) Czechoslovakia would have been legal.[253]

In both the *Torrey Canyon* and *Gabcikovo-Nagymaros* incidents, an essential ecological interest was purportedly at risk, although not to such an extent as to threaten the very existence of the state, public order, or the lives of a large segment of the population. The prospect of a grave medical disaster such as a widespread epidemic or the outbreak of a virus sufficiently lethal so as to pose a threat to the existence of the state would also constitute an ecological threat to essential interests, but of a much greater magnitude than those implicated in *Torrey Canyon* or *Gabcikovo-Nagymaros*. As such, the modern doctrine of necessity would be available in such a scenario of medical crisis, but while the requirements for invoking the defense may be more lax in a case where the threatened interest is actual self-preservation, the levels of proof and permissible response would also depend upon the severity of encroachment upon the people or state against whom the defense is wielded.

In such cases, therefore, the ambiguity that prompted the shift in the view of necessity from justification to excuse remains. The state actions to be excused in *Torrey Canyon* and *Gabcikovo-Nagymaros* were instances of international wrongdoing, but of a relatively low magnitude; destruction of abandoned property in the former and breach of contract in the latter. In contrast, the types of state response that one might expect in the event of a widespread lethal outbreak are far more severe in their consequences and more likely to impinge on the fundamental human rights of life and liberty of those who pose a threat by virtue of their affliction. In such cases, the calculation of the balance between the rights of the state and the rights of those who threaten it becomes a far more delicate matter.

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251. *Draft Articles*, *supra* note 40, at ¶ 9; Boed, *supra* note 242, at 10-11.
252. Gabčíkovo-Nagymaros Project, (Hung. v. Slovk.), 1997 I.C.J. 7 (Sept. 25).
253. *Id.* at 46.

The considerations required for such a calculation are set forth in Articles 25 and 26 of the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts.[254] According to Article 25:

> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
>
>   (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
>   (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
>
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
>
>   (a) The international obligation in question excludes the possibility of invoking necessity; or
>
>   (b) The State has contributed to the situation of necessity.[255]

Article 26 further states that the necessity defense can only be invoked with regards to actions that do not violate *jus cogens*: "Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law."[256]

Based on this articulation, the modern doctrine of necessity therefore requires: (1) the presence of a grave and imminent threat to an essential interest of the state; (2) the absence of any alternative remedy to that threat; (3) a balancing of the interests embodied in the state act and the interests of the state or international community affected by the breach; (4) the absence of a specific prohibition of the defense in a pertinent treaty, i.e., the obligation cannot be non-derogable; (5) no contribution to the state of necessity by the invoking state; and (6) the state action must comport with the peremptory norms of international law.[257]

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254. *Draft Articles*, *supra* note 40. The articles have not yet achieved treaty status at present and currently constitute soft law; however, in Gabcikovo-Nagymaros, the I.C.J. stated of the ILC Draft Article 33 (the forerunner of and essentially identical to Articles 25 and 26 as adopted by the ILC in 2001), that its definition of necessity reflected customary international law. 1997 I.C.J. at 41.

255. *Id.* at art. 25.

256. *Id.* at art. 26.

257. Paragraph 5 of the commentary to Article 26 lists as peremptory norms the prohibition of aggression, genocide, slavery, racial discrimination, crimes against humanity

Examining the incidence of forcible transfer, imprisonment, torture, and sterilization attendant upon the Kalaupapa program in light of the criteria of Articles 25 and 26 reveals the tension that exists in the modern doctrine of necessity when applied to a medical crisis of calamitous proportions.

C. Application of the Modern Doctrine

1. Essential Interest

According to the Article 25 Commentary, it is impossible to pre-judge what interests are "essential," and such a determination must depend on the particular circumstances at hand.[258] However, the defense has been invoked to protect such interests as "safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population."[259] The program of forcible exile arose as a response to the perception of leprosy as endemic in mid-nineteenth century Hawaii and thus a threat to the public health. Although this perception has since proven incorrect, the concerns of the legislators and Board of Health members were in accord with the universal and millennia-old view of the disease as highly communicable and extremely dangerous. As such, not only was an essential interest implicated, but also, according to the standards of the day, the threat was a grave one.

The imminence of the threat is arguable,[260] but, again according the medical understanding of the times and the long incubation period of the disease, it would have been reasonable to see the threat as imminent at the time of the program's creation. Over time, however, there were sufficient indications that the disease was not as communicable as was long supposed. Even though the reasons were not understood throughout most of the century, it was apparent that most of the *kokua* and uninfected resident supervisors did not contract the disease despite long-term interaction with the afflicted inmates. Consequently, assessment of the gravity and imminence of the threat should have diminished throughout the course of the century. It is, however, feasible that even such a lesser threat may still have constituted a threat to the essential interests of trade and, later, tourism, but it is unlikely that a threat to such lesser economic interests could accommodate the invocation of necessity in defense of state actions that encroach on such fundamental

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and torture, and the right to self-determination. *Id.* at ¶5 (*citing* East Timor (Port. v. Austl.) 1995 I.C.J. 90, 102 (June 30)).

258. *Id.* at ¶15.

259. *Id.*

260. Paragraph 15 of the Commentary to Article 25 notes that "imminent" should be understood as being "proximate." *Id.* However, it also quotes *Gabcikovo-Nagymaros*: "a 'peril' appearing in the long term might be held to be 'imminent' as soon as it is established, at the relevant point in time, that the realization of that peril, however, far off it might be, is not thereby any less certain and inevitable." *Id.* (*quoting* Gabčíkovo-Nagymaros Project, (Hung. v. Slovk.), 1997 I.C.J. 7, 42 (Sept. 25)).

rights as life and liberty. Moreover, the requirement that there be no alternative to the act of necessary wrongdoing would likely disqualify the severe measures taken at Kalaupapa in response to a threat to merely economic interests.

2. No Alternative

Given the perception of the dire threat of the disease, it is difficult to imagine what alternatives to quarantine and isolation the Board of Health might have exercised in 1866. As such, the forcible transfer and imprisonment of the afflicted may be viewed, according to the times, as a reasonable response to the danger of leprosy rampant throughout the islands. This is supported by the fact that quarantine and isolation measures are historically within the powers of the state to protect the public health, although the manner of implementation (insufficient food, shelter, medicine, and security) was grossly inadequate at best and arguably tantamount to an effort at extermination at worst. In either case, there were numerous alternatives to the horrendous conditions in which the inmates were forced to live, especially in the early years of the colony. It is also difficult to reconcile the long duration of imprisonment at Kalaupapa (for those who survived) as it became increasingly evident that for many of the afflicted, the disease reached a point of stasis and in some cases actually improved. The eventual introduction of a temporary parole system for the non-communicable inmates was a belated step in the right direction, but its limited use only emphasizes the existence of an unutilized alternative to lifelong imprisonment.

With reference to the "no alternative" requirement, the question of when experimentation on human subjects shades into torture presents some ambiguity since experimentation by its very nature requires an exploration of alternative methods under variable conditions. Despite later speculation about the disease's origins in water buffalo or armadillos, it is doubtful that experimentation on non-human subjects would have been efficacious in producing a treatment of cure for the disease. The crucial limitations on human experimentation are the informed and voluntary consent of the subject and the termination of the experiment at the subject's will or at the first suggestion that continuation endangers the subject's life. With these conditions in mind, the Mouritz and Arning experiments might disingenuously be termed voluntary, but the necessarily lethal aims of the experiments, whether realized or not, transform them into something much more like torture than responsible medical research.[261] Nevertheless, the uncomfortable suspicion remains that, given the limitations of knowledge, there may not have actually been an alternative to the sorts of experiments performed by Mouritz and Arning. However, the dire ramifications for the subjects of such experiments require an insistence upon an alternative to the quasi-coercive recruitment of "volunteers."

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261. This is in contrast to procedures that are extremely unpleasant but directed towards the repair of the individual. It is a distinction between the research subject and the patient.

The policy of sterilizing inmates (another quasi-coercive practice) occurred late enough in the history of the program that it is difficult to defend its utility as anything other than a means of saving taxpayers the expense of caring for those children who would otherwise become wards of the state. The actual practice of removing children from the care of leprous parents, while harsh, may not have admitted to any alternative, both from the standpoint of protecting the child from the disease as understood at the time and from an upbringing by parents rendered incapable by the severity of their affliction. However, using the absent child as a lure for volunteers for sterilization can only be characterized as a despicable stratagem to achieve an indefensible aim.

3. Balancing of Interests

While Article 25 frames the issue of balancing interests in terms of two or more states (or of the international community at large), the chief tension between fundamental rights implicated by a catastrophic medical crisis is between a state and a portion of its citizenry, but, as microbes do not recognize national borders, the rights of neighboring states would likely be implicated as well. In the case of the Kalaupapa exiles, the fundamental rights of life, liberty, propagation, and freedom from inhumane treatment and torture were sacrificed to the public health for over a century, and while post-Nuremberg advancements in human rights law strongly argue for the absolute inviolability for such fundamental rights, one can find exceptions to this rule both in the national law as represented in *Jacobson* and in international law under Article 29 of the U.N. Declaration of Human Rights, at least with regard to the right to liberty and self-determination.[262]

These exceptions suggest that in the event of a massive public health crisis, the rights of the state are apt to take precedence over certain basic human rights.[263] When the human rights at stake are so fundamental and irreversible as the right to life or the right of propagation, however, it is imperative that the threshold for the state's invocation of necessity be extraordinarily high and based on the most stringent evaluation of the threat as dire enough to threaten the existence of the state itself. As noted in the Commentary to Article 33 of the 1980 Draft Articles on State Responsibility (the predecessor to Articles 25 and 26 of the Articles adopted by the ILC in 2001), "the interest sacrificed on the altar of 'necessity' must obviously be less important than the interest it is thereby sought to save."[264] Accordingly, the threat to the state must be of the utmost severity before the state may consider an irrevocable encroachment on the most fundamental rights of its citizens.

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262. *See supra* Part III(e).
263. *See infra* Part V.
264. Boed, *supra* note 242, at 18 (quoting Roberto Ago, *Addendum to the Eighth Report on State Responsibility*, ¶ 35, U.N. Doc. A/CN.4/318/ADD.5-7).

According to Roman Boed, "a community interest in a given human rights norm can be outweighed...by an essential interest of a State."[265] A crisis of a man-made or natural outbreak of a lethal virus is bound to have consequences for neighboring countries such that a decisive response by either state could be in the essential interest of both. The spread of the third pandemic of the bubonic plague from China to Hong Kong to Honolulu and finally to San Francisco in 1900[266] illustrates the mobility of the threat posed by a deadly communicable disease; this mobility has only increased with the ease of modern global transit. Therefore, if such an outbreak were to threaten the essential interests of a multiplicity of states, pragmatism suggests that the balance of interests would tip in favor of the states' interests in self-preservation to the detriment of those citizens whose rights would be trammeled as part of the response to the outbreak by the state(s) at risk.

The Article 25 Commentary holds that the invoking state is not the sole judge of the existence of a state of necessity, but given the grave and imminent nature of the threat, it is likely that the state will be the sole judge at the time that it responds to the threat.[267] Such response would be based on less than perfect knowledge of the threat and might ultimately prove to be based on erroneous assumptions, as in Kalaupapa.

Daniel Dobos has argued for the application of the Precautionary Principle to cases of ecological necessity,[268] and it seems that the Hawaiian legislators were thinking in similar terms when responding to the crisis of leprosy. While the Precautionary Principle has been applied mainly to environmental and trade cases that lack the urgency of the lethal pandemic scenario, its focus on the "seriousness and irreversible damage" makes it an appropriate standard for considering the level of response to a lethal pandemic. That the state response may impinge on the lives and rights of the afflicted, however, necessitates a much higher threshold of knowledge than would be required in a mere cost analysis for responding to a lesser ecological threat. Rather, it would call for a determination as near to certainty as possible that the state is at risk of actual extinction. However, to require perfect certainty as a prerequisite to responding to a medical crisis not only asks the impossible, but also negates any invocation of the necessity defense in any scenario.

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265. *Id.* at 40.

266. MARILYN CHASE, THE BARBARY PLAGUE: THE BLACK DEATH IN VICTORIAN SAN FRANCISCO 14 (2003). Ironically, 1900 was the year of the rat according to the Chinese calendar.

267. *Draft Articles*, *supra* note 40, at ¶16 (quoting Gabčíkovo-Nagymaros Project, (Hung. v. Slovk.), 1997 I.C.J. 7, 40-41 (Sept. 25)).

268. Daniel Dobos, *The Necessity of Precaution: The Future of Ecological Necessity and Precaution*, 13 FORDHAM ENVTL. L.J. 375, 384-85 (2002). The Precautionary Principle emerged from West German law in the mid-1980s and was enshrined in Principle 15 of the 1992 Rio Declaration on the Environment and Development. It states: "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." 1992 Rio Declaration on the Environment and Development.

Nevertheless, the audacity of attempting to devise a formula by which the state might calculate the need for depriving its citizens of their lives or liberty is staggering in its obscenity. If the then prevailing "scientific principles" exercised at the Salem witch trials were unassailable at the time, the resultant executions could only be seen as the appropriate outcome.

4. Non-Derogability

Article 25 precludes the use of the necessity defense for state breaches of its international obligations where the relevant treaty or international instrument explicitly prohibits it.[269] One such example, noted above, is Article 2 of the Convention Against Torture, which categorically dismisses any exception to its ban on torture for any reason, including public emergency. While some conventions do permit exceptions to their guarantees of human rights, an explicit non-derogation clause is an uncompromising obstacle to invocation of necessity; one might expect a state to attempt to sidestep this obstacle by recharacterizing the action to be defended as something other than the act prohibited by the convention.[270] For example, the Mouritz and Arning experiments might be characterized as torture, but it is possible to argue that they may look like torture without actually rising to the level of torture as defined and prohibited in the pertinent convention. Similarly, quasi-coercive sterilization may be argued to be distinct from that which is enforced. In the aftermath of a medical catastrophe and correspondingly dire state response, it is easy to imagine the state actors engaging in such equivocation or ignoring the non-derogation issue altogether.

5. Non-Contribution to the State of Necessity

The creators and administrators of the Kalaupapa program cannot reasonably be said to have contributed to the threat of widespread leprosy in the mid-nineteenth century, although it is noteworthy that the disease was unknown in the islands prior to the arrival of the westerners who quickly came to dominate such institutions as the legislature and Board of Health. Nevertheless, the connection between the introduction of the disease and the policies implemented to battle it eighty years later is too tenuous to constitute state contribution to the state of necessity. Even if it were not, the gravity of the perceived threat was such as to raise

269. *Draft Articles*, *supra* note 40, at ¶19 (*citing* text of Article 25(2)(a)).

270. Parse, if possible, the casuistic distinction between "genocide" and "acts of genocide."

the question of whether or not it should really matter if the state had contributed to the necessity.[271]

Faced with the enormity of the threat posed by a lethal pandemic, the need for an effective response is unchanged regardless of the state's contribution to its creation. Such contribution to the state of necessity would no doubt require an accounting once the threat had abated, but, in practice, it strains credulity that a state might refrain from action were it aware that its very existence was at stake. If, however, the threat began as a fabrication or discriminatory pretext by the state to accomplish ends prohibited by international law (such as a viral equivalent of the Nazi Reichstag fire), the threat posed to neighboring states and the international community by such a fabrication would likely suffice to permit outside intervention by neighboring states, followed by a post-emergency reckoning of the culpability of the state that created the crisis. As noted above, the necessity defense is a fact-dependant doctrine that defies easy codification, and the rarity of its application serves to underscore its *ad hoc* nature. As such, the issue of state contribution should be assessed on a case-by-case basis rather than categorically rejected for a multiplicity of as yet undiscerned eventualities.

6. Compliance with Peremptory Norms

Although the state actions perpetrated upon the Kalaupapa exiles arguably withstand the strictures of Article 25 of the 2001 Draft Articles on State

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271. The manner in which a state may contribute to a state of necessity need not conjure up the image of malevolent lab technicians intent on releasing doomsday viruses, but one wonders if there is any reason to believe that Murphy's law is any less applicable in government research labs than anywhere else.

In 1942, Porton Down, the British biological weapons research agency, conducted anthrax experiments on sheep on the uninhabited Gruinard Island off the northwest coast of Scotland. COLE, *supra* note 231, at 23-25. Its anthrax bomb successfully killed its subjects, but the agency had underestimated the safe distance between the test site and the inhabited coast opposite the island, resulting in a number of human anthrax infections on the mainland. *Id.*

In 1955, careless drug trials by the government-licensed drug manufacturer and insufficient oversight by the government resulted in the public distribution of a Cutter Labs polio vaccine that contained the live polio virus. As a result of the use of the hot vaccines for inoculation in the western United States, 200,000 people were infected, 70,000 became ill, 200 were permanently paralyzed, and ten died. PAUL A. OFFIT, THE CUTTER INCIDENT: HOW AMERICA'S FIRST POLIO VACCINE LED TO THE GROWING VACCINE CRISIS 89-90 (2005).

In 1979, an accidental release of anthrax dust from Compound 19, the Soviet bio-weapons research facility near Sverdlovsk (now Yekatarinberg), resulted in nearly seventy civilian deaths, but exclusion of military personnel from this figure suggests that the actual number of casualties is higher. *See Red Lies: Biological Warfare and the Soviet Union*, CBC NEWS INDEPTH: BIOLOGICAL WEAPONS, Feb. 18, 2004, http://www.cbc.ca/news/background/bioweapons/redlies.html.

Responsibility,[272] Article 26 explicitly prohibits use of the necessity defense for violations of the peremptory norms of international law. If those aspects of the Kalaupapa exile program discussed in Part II meet the definition of crimes against humanity set forth in Article 7 of the Rome Statute, then those instances of forcible transfer, imprisonment, torture, forced sterilization, and persecution will not permit the invocation of the necessity defense, notwithstanding the existence of a grave and imminent medical threat to which they were a response. Therefore, the program of forced exile, if judged by such standards, would be indefensible on the grounds of necessity. The fact, however, that the program was the model for similar camps around the globe and persisted for over a century, the last quarter of which coincided with the first flourish of international humanitarian law, strongly indicates that the program was acceptable to the state and ended not because of any scruples about international law, but only because the perceived medical threat had abated.

That states will turn a blind eye to the dictates of international humanitarian law in the face of medical need, even one that poses a relatively low-intensity threat or none at all, is a well-attested proposition. Japan did not end its own program of "total institution" for its leprosy patients until 1996 and then only when forced to admit that not only were there were no scientific grounds for the program, but that its Ministry of Health had allowed it to continue only as a way to ensure that the Ministry would continue to receive ample funding from the Ministry of Finance.[273]

In the early 1990s, the Cuban government instituted mandatory HIV testing of virtually all adults.[274] Those who tested positive for the virus were indefinitely interned in a sanitarium to receive treatment and reveal the names of past sexual partners, who are then located, tested, and interned themselves.[275] The government alleges that it has all but halted the spread of the disease because of this program.[276]

In response to the spread of severe acute respiratory syndrome (SARS) from China's Guangdong Province in November of 2002, Singapore, Canada, and the Hong Kong special administrative region implemented protective health measures such as mandatory medical examinations, travel bans, quarantines and forced detentions (in some cases, with electronic tagging of the detainees), and destruction

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272. *Draft Articles*, *supra* note 40, at arts. 25-26. They do so either by meeting the requirements of Article 25 or by the application of exceptions recognized by national and international law or via the possible re-characterization of the acts as something less than the acts prohibited by customary and conventional international law.

273. BBC News Online, Mar. 2, 2005, http://bbc.co.uk/go/pr/fr/-/2/hi/asia-pacific/4311679.stm.

274. *See* Elinor Burkett, *Cuba AIDS 'Solution' Lock 'Em Up*, MIAMI HERALD, Nov. 10, 1991, *available at* http://www.aegis.com/news/mh/1991/MH911107.html.

275. *Id.*

276. *Id.* One might be wary of pronouncements emanating from Castro's Cuba, but there is an undeniable utility in an habitual disregard for civil liberties on the part of a government faced with a massive health crisis. For an in-depth examination of authoritarian versus liberal approaches to such a crisis, see RICHARD J. EVANS, DEATH IN HAMBURG: SOCIETY AND POLITICS IN THE CHOLERA YEARS (2005).

of SARS-infected property.[277] While such measures appear to have been fairly successful in containing the disease, there is no doubt that, peremptory norm violations or not, the measures exist uneasily at best with modern conceptions of human rights. Moreover, this tension between the conflicting requirements to protect both the state and the human rights of its citizens would only intensify in the event of a catastrophic lethal pandemic.

Of the six necessity requirements in the ILC's Draft Articles, only one, an essential interest at risk, is unproblematic when viewed from the vantage of the state's survival of a catastrophic lethal pandemic. The requirement of the state's non-contribution to the crisis, while relevant after the fact, is not a germane consideration while such a crisis persists. The requirement of no alternative is clearly desirable, but it appears of indeterminate applicability in a scenario in which the nature, potency, effect, reach, and duration of the threat is unknown. The remaining three requirements (non-derogability, compliance with peremptory norms, and the balancing of the interests of those acting and those acted upon) all beg the question of when, if ever, the fundamental rights of an innocent few could be sacrificed for the welfare of the majority and the preservation of the state.

V. SELF-PRESERVATION AS A PEREMPTORY NORM

Article 38(1) of the Statute for the International Criminal Court (Statute) lists the sources of international law as conventions, custom, and the general principles of law, and, as a subsidiary means of determining its rules, scholarly writings.[278] The Statute does not speak to a hierarchy among the first three sources, but some commentators suggest that, in practice, international tribunals will favor pertinent treaty provisions over examples of relevant customary practice, as long as the customary rule of international law does not have the status of *jus cogens* or peremptory norm.[279]

The ILC Draft Articles do not have the status of a treaty, but whether they comprise general principles of law or customary international law as the ICJ stated in *Gabcikovo-Nagymaros*,[280] the Draft Articles constitute a basis of international law. Customary international law is defined in Section 102(2) of the Restatement (Third) of International Law as "the general and consistent practice of states followed by them from a sense of legal obligation," also known as *opinio juris*, or a strong sense that the rule is obligatory.[281] The most fundamental and authoritative category of customary international law is *jus cogens*, or the peremptory norm, which is defined

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277. *See* Jason W. Sapsin, *SARS and International Legal Preparedness*, 77 TEMP. L. REV. 155, 159-62 (2004).

278. Rome Statute, *supra* note 37, art. 21.

279. THOMAS BUERGENTHAL & HAROLD G. MAIER, PUBLIC INTERNATIONAL LAW IN A NUTSHELL 21-22 (West Pub. Co., 2d ed. 1990) (1985).

280. Gabcikovo-Nagymaros, 1997 I.C.J. ¶ 52.

281. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 102(2) (1987).

by Article 53 of the Vienna Convention on the Law of Treaties as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[282]

If the prohibition of crimes against humanity constitutes a peremptory norm that will brook no exceptions, and if the use and abuses of "total institution" at Kalaupapa rise to the level of such crimes, then not only would the Kalaupapa program be indefensible under current international law, so too would any future action by a state forced to choose the most extreme responses (such as those discussed in Part III) to a medical catastrophe that put the state's very existence at risk. In the face of such a choice, the dictates of international law would seem to require the state, in effect, to commit suicide. This course of action is neither realistic nor borne out in any way by state practice. The opposite course, as acknowledged by the ICJ in *Nuclear Weapons*,[283] is far more in accord with the custom of nations: states will do what is necessary to survive. Grotius was right.

States may be destroyed or truncated or fail internally,[284] but the absence of any example of a state actually choosing self-destruction supports the contention that self-preservation is the general practice of states and is such a fundamental aspect of their existence that it is questionable whether it can even be said to be based on *opinio juris*. If anything, self-preservation is the most essential interest and the one by which a state is capable of recognizing any legal obligations at all. As such, it exists prior to *opinio juris* and is its condition precedent.[285] The fundamental and universal observation of this rule renders it an example of customary international law and a peremptory norm at that. As a peremptory norm, it does not negate the validity of other peremptory norms, but neither do they negate the *jus cogens* status of the state's right to preserve its existence from destruction.

If the prohibitions of crimes against humanity and voluntary self-destruction of the state are of equal weight and authority by virtue of their status as peremptory norms, neither one can be said to take *de jure* precedence over the other. They may coexist as foundational principles of international law as long as the exercise of one

282. Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S 331.

283. Legality of the Threat of Use of Nuclear Weapons, 1996 I.C.J. ¶ 96 (July 8).

284. The divestment of empires such as the British Empire or the Soviet Union does not constitute the self-destruction of a state. Both the United Kingdom and Russia continued to exist after the voluntary relinquishment of territorial control of their holdings. Nor does secession, such as the dissolution of Yugoslavia or the United Arab Republic into component states, constitute voluntary self-destruction in the intended sense of extinguishing the polity. Such a self-destroyed state presents the inverse image of the failed state in which the institutions of governance have disappeared but the populace remains. A suitable analogy for the voluntary self-destruction of a state in this sense would be the fate of Jonestown or the Heaven's Gate cult, and to claim the attribute of existence for such a state is the conceptual equivalent of the neutron bomb.

285. It is difficult to conceive of what the legal obligations of a non-existent state might be.

does not impinge on the authority of the other, but in the rare event where they do come into conflict, it is doubtful that there can be any pat formula to determine if and how either of these two equally non-derogable obligations can give way to the other.

In the unlikely event that a tribunal were to attempt to resolve this impasse,[286] the effort might prove less intractable by the application of an interest analysis methodology used in American conflicts law.[287] Brainerd Currie, perhaps the most influential proponent of interest analysis, has categorized the varieties of conflicts of law as false conflicts, true conflicts, unprovided-for conflicts, and apparent conflicts.[288] A false conflict is one in which only one of the involved states has a strong interest in applying its law,[289] but when dealing with peremptory norms of international law, the distinction between one state's interest and another's is not germane. The very nature of a *jus cogens* norm is that it is a fundamental obligation of all states, and consequently, the application of each norm is in the interest of the particular state in question and of all other states as well. In the same way, the unprovided for conflict, one in which no state's interest is implicated by the conflict,[290] is also a mischaracterization of a conflict of peremptory norms. Neither category is helpful here.

A true conflict is one in which more than one state has a genuine interest in the application of its law.[291] In this scenario, however, the conflict is not between the law of competing jurisdictions, but rather between two equally valid and applicable regimes of law: international law, which governs the rights and obligations of states; and international humanitarian/criminal law, which governs the rights of the populace and the punishment of those who encroach upon those rights, respectively. The fundamental contradiction of these regimes' *jus cogens* obligations would appear to present a true conflict.

The peremptory norms against crimes against humanity and the voluntary self-destruction of the state may coexist, but they cannot be reconciled when in conflict. The best one might hope for is a weighing of the comparative impairment to the interests that each norm embodies, namely, the commitment to the inviolable dignity of the human race (in theory, at least) or the destruction of the political, cultural, and social entity that is in place to maximize and protect (again, in theory, at least) that dignity. Resorting to a simple numerical tally to choose which norm to breach is an inherently inadequate solution to a literally existential conundrum. The

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286. ROBERTSON, *supra* note 25.

287. Gregory H. Fox, International Organizations: Conflicts of International Law, ASIL, Proceedings of the Annual Meeting, Dec. 31, 2001.

288. SYMEON C. SYMEONIDES, WENDY COLLINS PERDUE, & ARTHUR T. VON MEHREN, CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL CASES AND MATERIALS 126 (West 2d ed. 2003) (1998).

289. BRAINEARD CURRIE, *Married Women's Contracts: A Study in Conflicts of Law Method, in* SELECTED ESSAYS ON THE CONFLICT OF LAWS 77-127 (Duke University Press 1963).

290. CURRIE, *supra* note 289, at 152.

291. CURRIE, *supra* note 289, at 107, 181-85.

deprivation of a minority's most fundamental human rights might permit the continued existence of the state, but even in its survival, the state has failed in its equally fundamental purpose of safeguarding the rights and dignity of its citizens. In other words, the state may continue to exist, but the idea the state purportedly embodies will have sacrificed no less than the rights and lives of the weakest of the polity jettisoned by the state. Perhaps the best that one might say of the state after such a sacrifice is that the sacrifice will afford the state to do better next time.

The very irreconcilability of these norms requires the existence of a necessity defense by which individual instances of this conflict can be adjudicated, if not resolved, on an *ad hoc* basis. However, the existence of such a defense emphatically does not constitute a justification for the perpetration of crimes against humanity. Given the gravity of such crimes and the universal abhorrence that they elicit, one is reluctant to identify this defense as either "justification" or "excuse." The enormity of the breach of international law that must result from a conflict of these two norms, to say nothing of its moral implications,[292] militates against even the slightest hint of acceptability embodied in the word to "excuse." This may be a semantic quibble, but it italicizes the need for a new term of art apart from "justification" or "excuse;" one that combines the sense of needful entitlement in the former and the utter condemnation in the latter. Perhaps it is naïve to suggest that a word could be coined to allow one to speak of the unspeakable and the effort should be left to a master of Zen koans who has spent time in hell, but the very ineffability of definition required to reconcile these two contradictory norms speaks to the need for an *ad hoc*, and not a categorical, approach to analyzing situations in which they clash. Rather than view a scenario of lethal triage (or some other utilitarian ruination of a comparatively few lives to save many) through the lens of "justification" or "excuse," a more accurate term would be "endurance."

A French proverb holds that to understand all is to forgive all. That may be overstating the case. It would be presumptuous at best and a literally atrocious usurpation at worst to forgive offenses on behalf of the silenced victims of the offense, but a defense of medical necessity would not be forgiveness or absolution, but a mechanism to facilitate an understanding of "the maelstrom of circumstance"[293] in which the state and its people must choose between crime and obliteration.

The existence of the necessity defense for crimes against humanity does not imply that it would often or ever be successful. In fact, it is greatly hoped that there will never be an opportunity for its pleading, but the century-long history of abuse

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292. For a discussion of the moral implications of taking a life to save a life, see Charles I. Lugosi, *Playing God: Mary Must Die So Jodie May Live Longer*, 17 ISSUES L. & MED. 123 (2001). Lugosi's article criticizes a 2000 British decision to approve a surgery to separate two infant conjoined twins, without which both twins were likely to die but which would almost certainly result in the death of the weaker twin. Although the parents did not consent to the operation, it was performed. As predicted, the weaker twin died, and the stronger twin survived. The author criticizes the decision as an unjustified example of speculative utilitarianism and a rupture of law and morality.

293. FLETCHER, *supra* note 242, at 351.

suffered by the exiles of Molokai as a sacrifice to the public health is but one of many indications that the state will, when threatened, engage in measures to ensure its self-preservation.

An alternative to this impasse, however, is available through the application of Currie's fourth category of interest analysis, that of the apparent conflict. According to Currie, an apparent conflict is a true conflict in which "each state would be constitutionally justified in asserting its interest, but on reflection the conflict is avoided by a moderate definition of the policy or interest of one state or the other."[294] Continuing the substitution by analogy of competing regimes of international law for competing municipal jurisdictions, the apparent conflict approach permits a resolution between the contradictory peremptory norms if one of them can be recharacterized as something less than a *jus cogens* norm and thus denuded of its obligatory compulsion.

A closer examination of the definitions of crimes against humanity in Article 7(2) of the Rome Statute permits a reconciliation of the opposing norms by revealing that not all ostensible instances of forcible transfer, torture, or persecution are in fact worthy of those epithets and therefore are not crimes against humanity. For example, according to Article 7(2)(d), "forcible transfer of population" means the "forced displacement of the persons concerned by the expulsion or other coercive acts from the area in which they are lawfully present, *without grounds permitted by international law*."[295] Similarly, Article 7(2)(e) defines "torture" as the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture *shall not include pain or suffering arising from, inherent in or incidental to, lawful sanctions*."[296] "Persecution," according to Article 7(2)(g), is "the intentional and severe deprivation of fundamental rights *contrary to international law by reason of the identity of the group or collectivity*."[297] In short, not everything that looks and feels like a crime against humanity necessarily is one.

As noted in Part III, the main human rights conventions contain loopholes to their guarantees of (mostly) inviolable human rights. Article 29(2) of the Universal Declaration of Human Rights is in effect an exculpatory clause that rescinds its guarantees for encroachments "meeting the just requirements of morality, public order and the general welfare in a democratic society."[298] Article 22(2) of the ICCPR withdraws its guarantee of freedom of association when it is contrary to "the interests of national security, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others."[299] The ICCPR's Article 17(1) guarantees against interference with privacy, family, and the

294. Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 763 (1963).

295. Rome Statute, *supra* note 37, at 94 (emphasis added)

296. *Id.* (emphasis added).

297. *Id.* (emphasis added).

298. UDHR, *supra* note 201, at art. 29(2).

299. ICCPR, *supra* note 206, at art. 22(2).

home extends only to interference that is "arbitrary and unlawful."[300] In the cases of extermination and torture, the Rome Statute, in Articles 7(2)(b) and (e), respectively, require that the perpetrator intend the destruction of a part of the population or intend the infliction of severe pain or suffering.[301] Even in these extreme cases, it is unlikely that such intention could be demonstrated where the primary motivation of the acts are the containment or destruction of the disease, not of the patient.

The sum effect of such pragmatic loopholes is erasure of the conflict of peremptory norms. The self-preservation of the state maintains its fundamental status. So too does the prohibition of crimes against humanity, but the two norms will not come into conflict because for an act to rise to the level of a crime against humanity, it cannot be genuinely motivated by medical necessity when the preservation of the state is at stake. In this view, the "total institution" policies implemented at Kalaupapa, noxious as they were, do not constitute crimes against humanity. If only one peremptory norm is implicated, there is no conflict.

Application of the apparent conflict template may in some sense resolve the impasse presented by the question of the limits of governmental response to a catastrophic outbreak of extreme lethality; however, one cannot but sense that this resolution is no more than an example of reptilian formalism, glibly evading what remains a true moral conflict, if not a legal one. If the major human rights conventions exempt their guarantees on the grounds of public order, national security, and public health, there is no particular need for a defense of medical necessity, as international law already tacitly recognizes medical necessity as a valid pretext for extreme government measures that would be impermissible under other, less catastrophic circumstances. Moreover, to articulate or codify an explicit defense of medical necessity would likely prove disagreeably impolitic, as it might entail the possibility of an at least partial redemption of past political atrocities that could be couched in terms of battling contagion, medical or otherwise. A very short list of such abuses would contain Nazi experimentation on concentration camp prisoners, Soviet warehousing of political dissidents in state "mental institutions," participation of Argentine doctors as monitors of torture procedures to ensure that the victims not die too quickly, and internment of Japanese-Americans in concentration camps for fear that they might spread the contagion of anti-Americanism.

While such incidents could never truly be rehabilitated by the existence of an explicit defense of medical necessity, they would likely become baselines for determining when an action has gone too far in response to a purported medical necessity. These are lines of which no one would want to ask how close may we come without actually crossing them. Analogizing and distinguishing from such precedents could at best be only a source of repugnance and at worst result in the dulling of the moral sense without which law is nothing more than the interest of the strongest.

That international law tacitly accommodates, at least in silhouette, a defense

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300. *Id.* at art. 17(1).

301. Rome Statute, *supra* note 37, at 94.

of medical necessity is apparent from the public health and public order exemptions in instruments like the Universal Declaration of Human Rights and the ICCPR, as well as the Rome Statute's requirement that its prohibited acts show a specific intent or not be based on grounds otherwise recognized by international law. As such, the defense exists insofar as medical necessity can be invoked to justify acts which under other circumstances would constitute crimes against humanity; at the same time, the defense does not exist because the circumstances which would permit its invocation render the acts something less than crimes against humanity. There is little question, however, that the distinction between otherwise identical acts of forcible transfer, imprisonment, forced sterilization, or unconsenting subjection to excruciating procedures in search of useful information is of small consequence to those who must endure them.

VI. CONCLUSION

The threat of disease is as old as humanity. The threat of weaponized disease is scarcely any newer, and both often develop through sudden and unpredictable mutations. A minor mutation in a hemorrhagic fever virus such as Ebola Sudan or Ebola Zaire could render it airborne and thereby vastly increase the reach of its virulence. Similarly, a mutation might render the airborne Ebola Reston virus, currently only lethal to monkeys, an indiscriminately adept killer of human beings.

Such possibilities should suffice to create a healthy human wariness of the viral world, but throughout history, there have been constant efforts to harness disease for use as a weapon. Twenty-five centuries ago, early Assyrian practitioners of biological warfare attempted to kill their enemies by contaminating their wells with poisonous fungi.[302] The Black Death may have been introduced into Europe by returning Genoan merchants who were infected at the 1347 siege of Caffa in the Crimea where the besieging Tartars flung their own plague dead over the walls of the city.[303] In the twentieth century, many countries explored the possibilities of weaponized plague, anthrax, and smallpox, even after ratification of the 1972 Biological Weapons Convention by 140 countries.[304] Recently, organizations such as

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302. Susanna Smith, American Medical Association, Old Tactics, New Threat: What is Today's Risk of Smallpox? (Sept. 2002), http://www.ama-assn.org/ama/pub/category/print/8755.html.

303. JOHN KELLY, THE GREAT MORTALITY: AN INTIMATE HISTORY OF THE BLACK DEATH, THE MOST DEVASTATING PLAGUE OF ALL TIME 8-10 (2006). Many historians dispute this, believing it was instead the infected rat population that spread the disease. *Id.* The issue is still debated today. *Id.* (citing Mark Wheelis, *Biological Warfare at the 1346 Siege of Caffa*, 8 EMERGING INFECTIOUS DISEASES 971 (2002)).

304. Jozef Goldblat, *The Biological Weapons Convention- An Overview*, INTERNATIONAL REVIEW OF THE RED CROSS, No. 318, 251-265 (June 30, 1997), *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/html/57JNPA.

UNESCO, the U.S. Chemical and Biological Arms Control Institute, and the International Committee of the Red Cross have expressed concern about the increasing feasibility of the development (perhaps within a decade) of weaponized bio-organisms that could target specific ethnic or racial groups according to the targets' shared DNA signature.[305] Even if this last horror does not become a reality, its possibility italicizes the real and ongoing risk of biological catastrophe.

As such, the question of governmental response to such a catastrophe is as relevant in today's world of globalization and terror as it ever has been in the past. In response to the 2001 anthrax outbreaks, Georgetown and Johns Hopkins' Center for the Law and the Public's Health, at the behest of the Center For Disease Control, drafted the Model State Emergency Health Powers Act (MSEHPA) for U.S. states to implement in the event of "the occurrence of imminent threat of an illness or health condition caused by bioterrorism or a novel or previously controlled or eradicated infectious agent or biological toxin. The health threat must pose a high probability of a large number of deaths or serious disabilities in the population."[306] At present, nineteen states and the District of Columbia have adopted the CDC-sponsored MSEHPA outright or in amended form,[307] and arguably the version granting the broadest powers for the protection of the public health has been adopted by Florida, which, in its most pertinent passage, bestows the following powers upon the State Health Officer:

> Ordering an individual to be examined, tested, vaccinated, treated, or quarantined for communicable diseases that have a significant morbidity or mortality and present a severe danger to public health. Individuals who are unable or unwilling to be examined, tested, vaccinated, or treated by reasons of health, religion, or conscience may be subjected to quarantine.
>
> Examination, testing, vaccination, or treatment may be performed by any qualified person authorized by the State Health Officer.
>
> If the individual poses a danger to the public health, the State Public Health Officer may subject the individual to quarantine. *If there is no practical method to quarantine the individual, the State Health Officer may use any means necessary to treat the individual.*

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305. ICRC, Risks of Potential Misuse of the Life Sciences for Hostile Purposes, http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5VDJAF (last visited Oct. 24, 2007); *see also*, Ethirajan Anbarasan, Genetic Weapons: A 21st Century Nightmare?, http://www.unesco.org/courier/1999_03/uk/ethique/txt1.htm.

306. Lawrence O. Gostin, *Public Health Law in the Age of Terrorism: Rethinking Individual Rights and Common Goods*, 21 HEALTH AFF. 6, 83 (Nov.- Dec. 2002), *available at* http://content.healthaffairs.org/content/vol21/issue6/.

307. *Id.* at 81.

> *Any order of the State Health Officer given to effectuate this paragraph shall be immediately enforceable by a law enforcement officer.*[308]

The utility of the broad discretion granted in the Florida statute to protect the public health is obvious, and it does not inevitably require rampant encroachment on fundamental human rights. As written, however, it does not preclude it either. In the event of a massive outbreak of the sort envisioned by the statute and the MSEHPA, it is conceivable that those wielding the powers granted therein could be faced with such a grave threat that they might feel obligated to exercise them to their fullest extent, regardless of the impact on the afflicted minority. Such a scenario is speculative and clearly undesirable, but while disease has been a constant threat through all stages of human history, it may be that the risk of attack by biological weapons has never been higher than it is today,[309] and it is conceivable that such an attack could result in countermeasures at least as harsh as those implemented to battle the naturally occurring spread of leprosy in Hawaii.

The Finnish jurist Martii Koskenniemi said of international law that "one's faith is never to present law, but always to how it will be in a desired future."[310] The millenarian prospect is an attractive one and probably conducive to incremental global improvement. However, when confronted with the tumult and fragility of the world as it exists today, one cannot rely on the unfolding of an idyllic system of global concord. Just as the laws of physics warp when approaching the speed of light, one might also expect the law of nations to do so when approaching the speed of darkness, an apt description for a scenario in which a state's survival depends on its sacrifice of the human rights of its citizens. Whether or not a defense of medical necessity exists in international law, whether or not such policies of "total institution" as implemented at Kalaupapa qualify as crimes against humanity, the fundamental conflict discussed in this article, if realized, would constitute a crisis of unprecedented magnitude and specificity that it is questionable whether any legal apparatus could be pertinent except in retrospect. Were such a reckoning possible, it must necessarily be in conformance to the unique circumstance of catastrophe that brought it into being. For it to be otherwise would be to sacrifice understanding in favor of a false certainty and to risk losing the gift of pain that is also the source of compassion.

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308. FLA. STAT. ANN. § 381.00315(1)(b) (2006) (emphasis added), *discussed in* George J. Annas, *The Statute of Security: Human Rights and Post-9-11 Epidemics*, 38 J. HEALTH L. 319, 342-43 (2005).

309. *See* Stern, *supra* note 14.

310. Martii Koskenniemi, *Book Review*, 4 GERMAN L.J. 1087 (2003), *available at* http://www.germanlawjournal.com/pdf/Vol04No10/PDF_Vol_04_No_10_1087-1094_Legal_Culture_Koskenniemi.pdf (reviewing PHILOSOPHY IN A TIME OF TERROR. DIALOGUES WITH JÜRGEN HABERMAS AND JACQUES DERRIDA (Giovanna Borradori, ed., 2003)).