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The Church Abuse Scandal: Were Crimes Against Humanity Committed?

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The Church Abuse Scandal: Were Crimes Against Humanity Committed?
Dermot Groome*

Abstract

Increasingly shocking revelations about sexual abuse by members of Catholic religious congregations and diocesan priests have recently raised the question of whether such widespread abuses constitute crimes against humanity. This paper considers that question in the context of a report issued by the Ryan Commission, an independent quasi-judicial commission that spent ten years conducting detailed investigations into childcare institutions operated by Catholic religious congregations in Ireland. The Ryan Commission’s findings with respect to both widespread physical and sexual abuse provide a factual basis upon which to consider whether crimes against humanity were in fact committed. Contrasting the intentionality behind excessive physical violence with the recklessness of allowing known pedophiles access to children highlights an important definitional requirement of crimes against humanity: that such not only be widespread and systematic—which both clearly are—but that such be in the context of an attack directed against a civilian population. While the systematic use of excessive corporal punishment to control children committed to industrial schools constitutes an “attack” upon them, the systematic cover-up of sexual abuse to prevent public scandal thereby causing widespread sexual abuse raises the question of whether an “attack” on a civilian population can be the result of criminal recklessness.

The atypical characteristics of the perpetrator, victim, and non-conflict context of these crimes also contribute to the debate on two unresolved issues in international law: first, the role of a “state policy” underlying an attack and whether the existence of one is a definitional

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requirement or simply an evidential consideration; second, whether a culpable omission forming the basis of international criminal responsibility can be based on non-criminal legal duties.

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“Justice for crimes against humanity must have no limitations.”

I. INTRODUCTION

Recent calls for the prosecution of Catholic Church officials reflect a deep sense of outrage at what reasonably appears to be widespread sexual abuse by clergy. While these crimes are undoubtedly violations of national law, whether they are violations of international criminal law is a question poignantly raised by these allegations. Some commentators have emphatically asserted that crimes against humanity have been committed and that high church officials should...
answer for them. Garnering less media attention are crimes of physical abuse perpetrated in childcare institutions operated by religious congregations. This article considers the question of whether international crimes were committed by applying the definitional requirements of crimes against humanity to the factual findings of a quasi-judicial commission established by the Irish government that for over ten years investigated allegations of systematic physical and sexual abuse in Ireland's childcare institutions. The report of the Ryan Commission was chosen for this exercise because of the thoroughness of its work, the similarity of its methods to the judicial adjudication of disputed facts, and its detailed analysis of the evidence it heard. Although the work of the Ryan Commission focuses on a limited set of allegations and not the overall problem of clerical sexual abuse facing the universal Catholic Church, it does provide the reliable findings upon which to consider questions related to international law.

While the following analysis is limited to the findings of the Ryan Commission with respect to the Christian Brothers' childcare institutions, it is relevant to the broader debate of widespread sexual and physical abuse by Catholic clergy.

John Brander served as a Christian Brother for almost twenty years. His sexual and physical abuse of children was commonly known to superiors of the Christian Brothers congregation. He was removed from the Christian Brothers with a grant of dispensation from his vows—a process that concealed his criminal acts. His dispensation was finalized on a Friday and on the following

3 "But the Holy See can no longer ignore international law, which now counts the widespread or systematic sexual abuse of children as a crime against humanity." Geoffrey Robertson, Put the Pope in the Dock, Guardian (April 2, 2010), online at http://www.guardian.co.uk/commentisfree/libertycentral/2010/apr/02/pope-legal-immunity-international-law (visited Sept 18, 2010). See also, Geoffrey Robertson, The Case of the Pope: Vatican Accountability for Human Rights Abuse (London Penguin 2010).

4 This article considers the question whether facts as determined by the Ryan Commission establish that crimes against humanity have been committed. The focus of this article is confined to the Ryan Commission's findings with respect to the Christian Brothers religious congregation, managers of the largest number of child care institutions during the period examined by the Commission. Throughout this article, "Congregation" refers to the Christian Brothers congregation. The Ryan Commission did not investigate allegations made against diocesan parish priests or clergy working outside of childcare institutions or the Holy See itself and accordingly such are outside the scope of this article.

5 Much of what is currently known about the church abuse scandal is the result of media reports related to lawsuits brought by the victims of this abuse. See, for example, Michael Rezendes, Church Allowed Abuse by Priest for Years, The Boston Globe (January 6, 2002), online at http://www.boston.com/globe/spotlight/abuse/stories/010602_geoghan.htm (visited Sept 18, 2010). Many of these cases were resolved in settlements that avoid a full judicial exploration of the underlying facts.

6 The Ryan Commission assigned each alleged perpetrator a pseudonym, even when that person had been convicted of the offense reported. The Commission also used pseudonyms for all victims and some witnesses. These pseudonyms are indicated with italics in this article.
Monday he assumed the position of principal in a national school, one of several educational posts held over multiple decades and punctuated by repeated crimes of physical and sexual abuse. His acts were brought to the attention of the Christian Brothers, subsequent employers, colleagues, two separate communities of nuns, a bishop, the Department of Education, and the police, but on each occasion he was able to continue his career—a career which irreparably damaged countless children.

In the late 1990s, reports of abusive treatment of children in the care of Irish religious congregations became increasingly prevalent and raised questions about whether such abuse was endemic to Irish childcare institutions. On May 11, 1999, Bertie Ahern, the Irish Taoiseach (Ireland’s highest elected official) publicly apologized to victims of child abuse and acknowledged “our collective failure to intervene.” He announced a plan to establish a national commission of inquiry. On May 23, 2000, the Commission to Inquire into Child Abuse was established as an independent statutory body by an act of The House of Oireachtas (Ireland’s national parliament). This Commission became popularly known as the Ryan Commission after Mr. Justice Seán Ryan of The High Court of Ireland who became chairperson in 2003. The Ryan Commission published its final report on May 20, 2009—a report that included over 2,600 pages describing in detail the evidence it considered and its findings supported by that evidence.


9 Justice Mary Laffoy, the original chairperson resigned on September 2, 2003. See Mary Laffoy, Ms Justice Mary Laffoy’s Letter of Resignation (Sept 8, 2003), online at http://www.irishtimes.com/newspaper/special/2003/laffoy/ (visited Dec 17, 2010).

II. THE COMMISSION TO INQUIRE INTO CHILD ABUSE, “THE RYAN COMMISSION”

The Ryan Commission’s mandate was three-fold. First, it was to provide a forum for those people abused in childcare institutions to recount their experiences and make submissions. Second, it was to: (a) inquire into allegations of abuse and the circumstances under which children were placed and maintained in institutions, (b) determine the nature, extent, and causes of any abuse, and (c) determine the extent to which the institutions themselves and government oversight of them contributed to the abuse. And third, it was to publish reports containing detailed findings and recommendations.\(^{11}\)

The Commission’s work was divided between two subordinate committees: the Confidential Committee and the Investigation Committee.\(^{12}\) The Confidential Committee provided a non-public forum for witnesses to make private submissions.\(^{13}\) The Investigation Committee conducted both private and public proceedings and had powers similar to a prosecutor or criminal court judge, including the authority to: (a) compel attendance,\(^ {14}\) (b) issue interrogatories,\(^{15}\) (c) compel the production of evidence,\(^{16}\) (d) take judicial notice

\(^{11}\) Principal Act, § 4 (cited in note 8).

\(^{12}\) Section 10 of the Principal Act sets out the structure of the Commission’s two committees. Section 10(6) prohibits a person from serving on both committees. Principal Act, §§ 10, 10(6) (cited in note 8).

\(^{13}\) Principal Act, § 15 (cited in note 8). The Confidential Committee was also empowered to prepare and furnish reports that maintained the confidential nature of the evidence it heard and did not make findings of specific allegations. See id § 16. Section 10 of the 2005 Act expanded the Confidential Committee report-making function to include making proposals “of a general nature” to the Commission. See 2005 Act, § 10 (cited in note 8).

\(^{14}\) Principal Act, § 14(1)(a) (cited in note 8).

\(^{15}\) Section 14(9) of the Principal Act as amended by § 9 of the 2005 Act. Principal Act §14(9) (cited in note 8).

\(^{16}\) Principal Act, §§ 14(1)(a)–(d) (cited in note 8). The Committee also had the power to compel disclosure of documents. See § 14(8) of the Principal Act as amended by § 9 of the 2005 Act (cited in note 8). Id §14(9). Section 14(1)(d) states that “the rules of court relating to the discovery of documents in proceedings in the High Court shall apply in relation to the discovery of documents pursuant to this paragraph with any necessary modifications.” Id §14(1)(d).
of prior convictions for abuse,\textsuperscript{17} and (e) issue other orders that were reasonable, just, and necessary to its work.\textsuperscript{18}

In the event of an unjustified and willful failure to comply with its directives, the Chairperson of the Investigation Committee could initiate summary contempt proceedings, enter a conviction, and impose penalties.\textsuperscript{19} It could also convict of perjury those it determined had testified falsely.\textsuperscript{20}

Although enabling legislation (the Principal Act) established the \textit{ratione temporis} between 1940 and 1999, it empowered the Commission to expand the \textit{ratione temporis} to other periods, a power it exercised in 2002 to examine allegations dating back to 1936.\textsuperscript{21} “Abuse” was defined broadly to encompass the following: physical injury (caused by willful, reckless, and negligent conduct or the failure to prevent such conduct); sexual abuse; or any act or omission which could seriously impair the physical and mental health of a child or cause serious adverse effects to a child’s behavior or welfare.\textsuperscript{22}

The Commission’s original authority to identify by name those it found committed acts of abuse was narrowed to limit the identification of only those convicted of crimes related to abuse.\textsuperscript{23} The Committee engaged a number of experts to assist.\textsuperscript{24}

\textsuperscript{17} Section 14(14) of the Principal Act, as amended by § 9 of the 2005 Act (cited in note 8), which states:

Evidence of a conviction of a person of an offence whose ingredients consist of or include abuse of a child in an institution during the relevant period in relation to the Committee shall be received by the Committee as evidence of abuse of the child in the institution during the relevant period aforesaid.

\textsuperscript{18} Principal Act, § 14(1)(e) (cited in note 8).

\textsuperscript{19} Section 14 of the Principal Act, as amended by § 9 of the 2005 Act.

\textsuperscript{20} Section 14(7) of the Principal Act provides:

If a person gives false evidence before the Committee or to a person examining him or her pursuant to subsection (5) in such circumstances that, if the person had given the evidence before a court, the person would be guilty of perjury, the person shall be guilty of an offence and shall be liable on conviction on indictment thereof to the penalties applying to perjury.

\textsuperscript{21} The Commission expanded the period the Investigation Committee would examine by its decision of November 26, 2002. It similarly expanded the period for the Confidential Committee to between 1914 and 2000 encompassing the breadth of the allegations brought before it by victims. See Ryan Report, vol 1 § 1.19 (cited in note 10).

\textsuperscript{22} Section 1 of the Principal Act as amended by § 3 of the 2005 Act (cited in note 8).

\textsuperscript{23} Section 13(2)(a) of the Principal Act had no such limitation and permitted the identification of the abuser: the report may “if the Committee is satisfied that abuse of children, or abuse of children during a particular period, occurred in a particular institution, contain findings to that effect and may identify the institution and the person who committed the abuse.” In an effort to meet
The Investigation Committee utilized a three-phase process. The first phase was primarily public and gave religious congregations an opportunity to present their account of how their institutions were managed. They could make concessions or admissions regarding well-known complaints against them.\textsuperscript{25} Questioning was led by attorneys representing the Committee and each congregation had counsel who could examine witnesses. Although victims and complainants were present (in some cases, with attorneys) they could not question witnesses during this phase.\textsuperscript{26}

Phase II consisted of private hearings in which specific allegations of abuse were explored. Public Phase III provided institutions the opportunity to respond to these allegations. During these Phase III proceedings, attorneys representing victims were allowed to examine witnesses often assuming an \textit{amicus curiae} role to the Investigation Committee.\textsuperscript{27}

A. Several Issues Unavoidably Affected the Reliability of the Ryan Commission’s Work

The Commission recognized a number of factors affecting the reliability of its work.\textsuperscript{28} One factor was the inherent difficulty in gathering evidence of
previously unreported claims of sexual abuse. Many crimes occurred with no one present other than the perpetrator and victim—most decades earlier.29 Many witnesses had lived lives fraught with physical and psychological illnesses as well as addictions that impaired their recollection.30 Widespread media accounts and a proliferation of victims groups created an environment with the potential to influence fragile and aging memories.31

The Commission also expressed concern that one of the government’s well-intentioned efforts to assist victims also created problems. Early in the process of developing its response, the government considered establishing a compensation program.32 This decision was motivated by a belief that: (a) it was unjust to require victims to engage in protracted litigation and face possibly insurmountable problems of proof, (b) such litigation risked overwhelming the courts, and (c) compensation was consonant with the government’s earlier apology.33 This government administered scheme was funded, in part, from voluntary contributions by the religious communities who ran the institutions. To implement the compensation scheme, the statute of limitations was amended in 2000 to loosen time limits for sexual abuse claims.34 Permitting claims for sexual abuse while retaining the time bar for physical abuse, however, created an incentive for some victims to mischaracterize their mistreatment. This problem was remedied with the enactment of the Residential Institutions Redress Act of 2002 which permitted stale claims of sexual, physical and other abuse under

Allegations of sexual abuse are difficult to verify. Length of time and the inherent secrecy of the act make it hard for complainants to prove their case, even on the “balance of probabilities”. To prove such a case beyond reasonable doubt, as is required by the criminal law, is even more difficult. In the same way as it is difficult to prove abuse, so it is also difficult to prove that abuse did not occur.

29 Id § 5.30. See also id § 5.38:

People giving evidence about events that occurred many years ago in their childhoods might not be precise on detail. Many of them were young children in large institutions, in which the adults dressed the same and were known as “Sister,” “Brother,” “Father,” or by surnames, religious names or nicknames. In addition, staff came and went, and sometimes stayed only for very short periods of time.

30 Ryan Report, vol 1 § 5.31 (cited in note 10).
31 Id §§ 5.32–5.33.
32 Mr. Tom Boland, Head of Legal Affairs at the Department of Education and Science testified that, “a compensation scheme was very much in policy minds from a very early time.” Id §§ 1.48, 1.65.
33 Id § 1.66.
certain conditions.\textsuperscript{35} The Commission was satisfied that in a few cases allegations of sexual abuse were deliberately fabricated in a cynical attempt to obtain compensation.\textsuperscript{36}

The Commission also found distorted accounts by those who worked in the institutions. While some were remarkably candid in their recollections and admissions, others were unable to recall anything unpleasant having occurred. The Commission opined that in some cases, unreliable accounts were not an attempt to mislead, but rather the witness’s “incapacity to accommodate the fact that people whose mission was spiritual and religious could have behaved cruelly, basely and self-indulgently, and that colleagues might have stood by or covered up such wrongdoing.”\textsuperscript{37}

III. SUMMARY OF THE RYAN COMMISSION’S FINDINGS REGARDING INSTITUTIONS OPERATED BY THE CHRISTIAN BROTHERS

The Irish Christian Brothers is the religious congregation attracting the greatest number of allegations of abuse as well as some of the most serious.\textsuperscript{38}

A. History of the Irish Christian Brothers Congregation

This religious congregation was established by Edmund Rice (1762–1844) who, in 1800, abandoned his career as a trader and devoted his life to ameliorating the suffering of children in his native Waterford by establishing a tuition-free school.\textsuperscript{39} He opened Congregation’s doors in 1802 and a year later founded a monastery inviting other men who shared his vision to join.\textsuperscript{40} He developed an educational model that assigned students to classes based on ability instead of age and generally opposed the use of corporal punishment.\textsuperscript{41} His model proved successful and other congregations of Christian Brothers

\textsuperscript{36} Ryan Report, vol 1 § 6.247 (cited in note 10).
\textsuperscript{37} Id § 5.39.
\textsuperscript{38} The Ryan Commission received over 700 complaints of abuse from people who attended institutions operated by the Christian Brothers. Id § 6.14.
\textsuperscript{39} This first school was a non-residential school. Id.
\textsuperscript{40} Ryan Report, vol 1 §§ 6.02–6.03 (cited in note 10).
\textsuperscript{41} Rice wrote in 1820: “Unless for some faults which rarely occur, corporal punishment is never inflicted.” Ryan Report, vol 1 § 6.04 (cited in note 10).
were established around Ireland. In 1820, the Congregation was granted a charter by the Holy See, administratively placing it under the direct supervision of the Vatican, thus eliminating direct oversight by local bishoprics.

The most significant expansion of the order occurred after the establishment of the industrial schools system in 1858. The government’s efforts to meet the needs of poor children complemented the charism of the order and the government’s commitment to providing funds for each child in the order’s care provided a reliable source of funding. The Congregation’s first industrial school in the Artane section of Dublin was purpose-built for the residential care and education of children. When it opened in 1870, it was considered by many to reflect the highest standards of childcare. By 1894, the order had established six industrial schools across Ireland certified to house over 1,700 boys. In addition to industrial schools, the Congregation operated a system of over 100 primary and secondary schools as well as several homes for orphans and deaf children. The greater portion of the Congregation’s educational mission was devoted to non-residential education. For an extended period, a majority of Irish Catholic boys received a substantial part of their education from Christian Brothers. The Christian Brothers have been credited with educating a “young Irish nation” after independence in 1916, and a great deal of their work is still held in high regard.

The order grew steadily and established congregations in Great Britain, India, Italy, New Zealand, Africa, and North America. Today this multi-national organization has a presence in twenty-six countries on every populated continent. The Investigation Committee only conducted comprehensive

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42 By 1820, the Christian Brothers had schools in Waterford, Carrick-on-Sur and Dungarvan and houses in Dublin, Cork and Limerick. Id § 6.05.
43 Id § 6.05. The Vatican Secretariat of State of Religious was responsible for overseeing the activities of this and other avowed religious congregations around the world. Id.
44 Section 44 of the Children Act of 1908 defines industrial schools: “The expression ‘industrial school’ means a school for the industrial training of children, in which children are lodged, clothed and fed, as well as taught.” Id § 2.12.
45 Ryan Report, vol 1 § 6.06 (cited in note 10).
46 Id § 6.07.
47 Id § 6.08. The schools, years of operation, and the number of children they were certified to care for were the following: Artane Industrial School for Senior Boys (1870–1969, 825); St. Joseph’s Industrial School for Senior Boys, Tralee (1870–1970, 145); St. Joseph’s Industrial School for Senior Boys, Salthill (1871–1995, 200); St. Joseph’s Industrial School for Senior Boys, Glin (1872–1966, 190); St. Joseph’s Industrial School for Senior Boys, Letterfrack (1887–1974, 165); and Carriglea Park Industrial School for Senior Boys, Dun Laoghaire (1896–1954, 250). See id § 6.11.
49 Id § 6.13.
50 Id § 6.07.
investigative hearings related to four of the Christian Brother’s industrial schools in Ireland.\textsuperscript{51}

B. Summary of the Findings of the Ryan Commission Related to Physical and Sexual Abuse\textsuperscript{52}

The Ryan Commission made detailed findings regarding institutions operated by Christian Brothers. These findings were supported by evidence tendered during the proceedings. With respect to physical abuse, the Commission found that the Christian Brothers “used frequent and severe corporal punishment to impose and enforce a regime of militaristic discipline.”\textsuperscript{53} It was the primary means of control.\textsuperscript{54} It “became physical abuse because of the excessive violence used and its general application and acceptance.”\textsuperscript{55}

Corporal punishment was “systemic and pervasive” and employed a number of methods and weapons designed to increase suffering—in some instances the Commission found cruel and sadistic behaviour.\textsuperscript{56} “Management did nothing to prevent excessive and inappropriate punishment and boys and Brothers learnt to accept a high level of physical punishment as the norm.”\textsuperscript{57} This arbitrary and excessive punishment created a climate of fear in which even children who obeyed all of the rules were still subjected to beatings.\textsuperscript{58} The public

\textsuperscript{51} The schools were in Artane, Letterfrack, Tralee and Carriglea Park. See id \S 6.15.

\textsuperscript{52} The Commission also made significant findings with respect to the education and general care and general management of institutions operated by the Christian Brothers. See, Ryan Report, vol 1 \S 7.845 \textsuperscript{6-11} (cited in note 10). Despite Artane’s being provided with sufficient income to care for the children, the facilities, education, and general care was poor. See also id \S 8.740 \textsuperscript{7-11}; \S 9.462 \textsuperscript{9-10}; \S 10.200 \textsuperscript{4-7} (noting some positive aspects of the educational program); \S 11.186 \textsuperscript{3-5} (“Glin Industrial School failed in its fundamental requirement to provide care, education and training for the boys.”); \S 12.223, \textsuperscript{1-6} \S 13.147 \textsuperscript{1, 2, 5}.

\textsuperscript{53} Id \S 7.311 (with respect to Artane). See also \S 9.462 \textsuperscript{2, 5} (St. Joseph’s Industrial School, Tralee); \S 11.186 \textsuperscript{1} (St. Joseph’s Industrial School, Glin); \S 12.223 \textsuperscript{8} (St. Joseph’s Industrial School, Salthill); \S 13.147 \textsuperscript{2} (St. Joseph’s School for Deaf Boys, Cabra).

\textsuperscript{54} Id \S 8.264 \textsuperscript{2}. With respect to the Letterfrack Industrial School the Commission observed that physical punishment, “was used to express power and status and practically became a means of communication between Brothers and boys, and among the boys themselves.” Id. See also Ryan Report, vol 1 \S\S 9.259, 9.462 (cited in note 10) (“St. Joseph’s Industrial School, Tralee”). In Carriglea Park Industrial School, the congregation sanctioned the appointment of men with a reputation for physical abuse to instill fear in the children. “The Congregation saw this as a legitimate means of controlling the large number of children in Carriglea.” Id \S 10.90.

\textsuperscript{55} Id \S 9.462.

\textsuperscript{56} Id \S 7.311 \textsuperscript{2}. See also \S\S 8.264, 13.147.

\textsuperscript{57} Ryan Report, vol 1 \S 7.311 (cited in note 10).

\textsuperscript{58} Id \S\S 7.311 \textsuperscript{5, 8.264 \textsuperscript{3}.}
nature of some beatings left a deep impression on other children who witnessed them.59

The management of the Congregation did not investigate cases of severe physical abuse, failed to sanction Brothers who were guilty of brutal assaults, and largely ignored the Congregation’s and the Education Department’s rules as well as the applicable law governing corporal punishment.60 The complete lack of oversight as to its use created an environment of impunity in which individual Brothers felt immune from any repercussions and were able to devise unusual and sadistic punishments.61 Concern expressed by the Congregation’s Superior General in the late 1930s indicated his “unease” about the pervasive and excessive nature of the physical abuse.62 Documents recorded senior leadership’s view that some Brothers were unsafe around children.63 These concerns were unheeded and no measures were taken to bring corporal punishment within legal guidelines.64 The only time physical abuse garnered a robust response was when it jeopardized the Congregation’s reputation or exposed it or its members to legal action.65 In some cases, “uncaring and reckless management by the Congregation” had serious consequences for the children.66 In those isolated cases in which Brothers were dismissed for misconduct, it was done in a way as to conceal their crimes, enabling them to secure employment in education and resume their crimes against other children.67

The Commission found that sexual abuse of boys was a chronic problem in some of the institutions operated by the Christian Brothers.68 With respect to Artane Industrial School, there was at least one person actively abusing boys sexually for more than half of a thirty-three year period.69 In another institution,

59 Id § 8.264 ¶ 4.
60 Id § 8.264.
61 Ryan Report, vol 1 § 8.264 ¶¶ 5–7. See, for example, §§ 9.137 (boy struck with a shovel), 9.150 (stitched leather baton allegedly with a lead insert), 9.153 (cat-o’-nine-tails—a whip with several strands of leather), 9.156 (forced running in ill-fitting clothes and boots), 9.167 (boys lined up and made to strike each other), and 13.147 ¶ 2 (cited in note 10).
62 Id § 9.259 ¶ 2.
63 Id § 12.223 ¶ 8.
64 Id § 9.259 ¶ 2.
66 Id.
67 See, for example, the case of John Brander described in Chapter 14 of the Ryan Report. Id § 14.157.
68 Id §§ 7.845 ¶ 2, 8.740 ¶ 4.
69 Ryan Report, vol 1 § 7.845 (cited in note 10). The Commission noted, “Much more abuse occurred than is recorded in documents because of inadequate recording and reporting procedures and other causes of under-reporting.” The Commission determined that intermittent abuse occurred in Artane for more than fifteen years in a thirty-three year period. Id.
the Commission concluded that during two thirds of a forty-two year period boys were being sexually abused—although “it is clear that more abuse happened than is recorded.”

In some cases, senior leadership acknowledged before the commission that such abuse constituted “criminal or indecent assault.”

The Congregation’s response to sexual abuse was primarily to protect the Congregation and its members from the consequences of public awareness. Brothers known to be serial abusers and considered a continuing danger were still permitted uninterrupted, unrestricted, and unsupervised access to children. There was a policy of covering up abuse and not reporting clearly criminal conduct to civil authorities. This policy often resulted in offenders continuing their criminal conduct unabated.

IV. WERE CRIMES AGAINST HUMANITY COMMITTED?

While much of the conduct described in the Ryan Report unquestionably constitutes national crimes, the question of whether it also constitutes crimes against humanity depends largely upon whether this conduct occurred in the context of a “widespread or systematic attack against a civilian population.”

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70 Id § 8.740 ¶ 4. The Commission determined that intermittent abuse occurred for more than twenty-eight years over a forty-two year period in Letterfrack.

71 Id § 10.98.

72 Id § 7.845 ¶ 3. The Commission found that “the moral failure of the Brother and danger of scandal . . . were regarded as the most significant repercussions of sexual abuse.” Id § 10.98. This policy was also reflected in the absence of any formal mechanism to report such abuse despite knowledge that it was pervasive problem. See Ryan Report, vol 1 § 13.119 (cited in note 10).


74 Id § 7.845 ¶ 3. “The manner in which Brothers who sexually abused were dealt with is indicative of a policy of protecting them . . . The needs of the victims were not considered.” Id § 8.740 ¶ 6. See also Ryan Report, vol 1 §§ 9.462, 13.119, and 13.119 (cited in note 10) (reporting crimes of sexual violence did not occur until the 1990s).

75 See id §§ 7.845 ¶ 3, 11.186 ¶ 2, 12.223 ¶ 9, 13.119 ¶ 7, 14.157. Inadequate supervision also created an environment in which there was significant sexual activity between boys including significant predatory attacks on young boys by older ones. Id §§ 7.845 ¶ 2, 10.200 ¶ 9.

76 Article 3 of the ICTR Statute states:

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape; (h) Persecutions on political, racial and religious grounds; (i) Other inhumane acts.

The additional definitional requirements expressed by this phrase are commonly referred to as the “chapeau elements” of crimes against humanity.\footnote{77}{The definition is commonly referred to as being comprised of five sub-elements: (a) an attack, (b) a nexus between the perpetrator’s conduct and the attack, (c) an attack that is directed against any civilian population, (d) an attack that is either systematic or widespread, and (e) the perpetrator has the requisite subjective state of mind with respect to these elements. See Guénaël Mettraux, International Crimes and the Ad Hoc Tribunals 155 (Oxford 2005).}

A. Does the Pattern of Physical and Sexual Abuse of Children in Childcare Institutions Meet the Chapeau Requirements for Crimes Against Humanity?

A consideration of whether the Christian Brothers conduct as described by the Ryan Report meets the chapeau definitional requirements of crimes against humanity necessitates examination of a number of related issues. Was this conduct such as to constitute an “attack” for the purpose of the chapeau elements? Were the children held in childcare in the Brothers’ institutions a “civilian population” for this purpose? Need a State policy underpin such an attack or can the perpetrators of the attack belong to a non-state organization? Must such an attack be purposeful or intentional, or can it be the result of criminal or reckless negligence? Were the perpetrators of the crimes aware of the existence of the attack and their contribution to it? Was the attack “widespread or systematic?” These issues will be discussed in turn.

B. Was the Conduct Described in the Ryan Report Such As to Constitute an “Attack” for the Purpose of the Chapeau Elements?

“Attack,” for the purpose of establishing a crime against humanity, describes a pattern of conduct involving acts of violence.\footnote{78}{See Prosecutor v Kunarac, Case No IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 415 (Feb 22, 2001) (“Kunarac Trial Judgment”); Kunarac Appeal Judgment, ¶ 89 (cited in note 76) (affirming that the concept of “an attack” was correctly defined in the Trial Chamber’s Judgment); Prosecutor v Naletilić, Case No IT-98-34-T, Judgment, ¶ 233 (Mar 31, 2003) (“Naletilić Trial Judgment”).} These violent acts can vary in character and gravity and may be different from the specific criminal acts constituting crimes against humanity. While conceptually awkward, the violent acts demonstrating the existence of an “attack” need not include any of...
the specific underlying crimes themselves. An attack can encompass “any mistreatment of the civilian population.”

The crimes described by the Ryan Commission undoubtedly establish there was a pattern of physical and sexual violence against children. This pattern of violence is unlike other historical examples of crimes against humanity that most often have been related to an armed conflict or the actions of an oppressive state. These crimes were committed in the context of a mission to provide care and education to children. The concept of “attack” in relation to crimes against humanity is a legal concept that is distinct from an “armed conflict” in relation to war crimes despite the fact that crimes against humanity and war crimes most often occur contemporaneously. Customary international law imposes no requirement that a nexus exist between an attack on a civilian population and an armed conflict.

C. Were the Children Held in Childcare in the Congregation’s Institutions a “Civilian Population” for the Purpose of the Chapeau Elements?

While there is no express minimum requirement, the population under attack must be of a sufficient size to establish that crimes were committed against a collective and not simply “a limited and randomly selected number of individuals.” A sizable group with some cohesive trait to establish that selection of its members was not random is sufficient to identify the population targeted in the attack.

79 Prosecutor v Kayishema, Case No ICTR-95-1-T, Judgment, ¶¶ 122, 135 (May 21, 1999) (“Kayishema Trial Judgment”). But note that “[w]hile the underlying crimes do not have to include the three elements of the attack ... they do have to form part of the attack[.]” Id.

80 Kunarac Appeal Judgment, ¶ 86 (cited in note 76).


82 Prosecutor v Tadic, Case No IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 141 (Oct 2, 1995) (“Tadic Jurisdictional Decision”).

83 Kunarac Appeal Judgment, ¶ 90 (cited in note 76). In the Tadic case the “targeted population” was deemed to be the Muslim population in a relatively small geographical area, this requirement is “intended to imply crimes of a collective nature and thus excludes single or isolated acts.” Prosecutor v Tadic, Case No IT-94-1-T, Judgment, ¶ 644 (May 7, 1997) (“Tadic Trial Judgment”).

84 See Nalelitic Trial Judgment, ¶ 235 (cited in note 78):

The term “population” in the meaning of Article 5 of the Statute [crimes against humanity] does not imply that the entire population of a geographical entity in which an attack is taking place must be subject to the attack. The element is fulfilled if it can be shown that a sufficient number of individuals were targeted in the course of an attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian population, and not only against a limited number of individuals who were randomly selected.
Crimes against humanity are in essence prohibitions against crimes directed at a collective and not at individuals no matter how numerous such crimes may be. A wave of similar crimes that are simply temporally and geographically connected will not constitute a crime against humanity.\textsuperscript{85} The findings of the Ryan Commission establish that over the course of sixty years, thousands of children were placed in Christian Brothers’ institutions and became victims of widespread physical and sexual abuse. While an examination of other elements will clarify the collective nature of the attack, the sheer number of children and the broad time period of the crimes suggest at least the potential that children committed by courts to the care of religious congregations constitute a civilian population that meets the threshold established by international law.\textsuperscript{86}

The target of this attack was atypical. The targeted population was not a different racial, ethnic, or religious group from the perpetrator, but children sharing all of the same characteristics of the perpetrators except for age and social class. Clear characteristic differences between perpetrators and victims help expose the animating animosities of the attack and identify its target. The aberrational nature of these crimes—their occurrence in the context of a quasi-parental relationship—makes it difficult to conceptualize children as the target of a widespread or systematic attack. The fact that the perpetrators were obliged to protect those being attacked is not a definitional bar. Under international law, the target of the attack can be any civilian population, including a state’s own population—a population the state may have important constitutional obligations to protect.\textsuperscript{87} The Ryan Report makes clear that, with respect to childcare institutions operated by the Christian Brothers, excessive corporal punishment was directed at all children in their care, regardless of behavior.\textsuperscript{88}

\textsuperscript{85} While the crimes of a particular perpetrator may be directed at a small number of individuals, the attack to which it forms part must be directed at a civilian population. \textit{Tadic Appeal Judgment}, ¶ 252 (cited in note 76).

\textsuperscript{86} The Ryan Commission examined institutions operated by seven other religious congregations (namely the Rosminian Order, the Presentation Brothers, the Brothers of Charity, the Sisters of Mercy, the Sisters of Charity, the Dominican sisters, and the Daughters of the Cross of Liège). \textit{Ryan Report}, vol 2 ¶¶ 1–16 (cited in note 10). Each of these congregations was under the direct supervision of the Vatican. While it is beyond the scope of this paper, if there is evidence establishing coordination and cooperation in the violence promulgated in these other institutions, they may be considered part of the same attack for the purposes of this element.

\textsuperscript{87} Mettraux, \textit{International Crimes} at 157 (cited in note 77). Consider, for example, the case of apartheid—an attack that was directed a civilian population the South African government was obliged to protect.

\textsuperscript{88} \textit{Ryan Report}, vol 1 ¶ 7.311 ¶ 5 (cited in note 10). The targeted civilian population must also be the primary object of the attack and not simply an incidental aspect of it. See \textit{Kunarac Appeal Judgment}, ¶ 91 (cited in note 76); \textit{Prosecutor v Bemba}, Case No ICC-01/05-01/08, Decision on confirmation of the Charges, ¶ 76 (June 15, 2009) ("Bemba Confirmation Decision").
D. Need a State Policy Underpin an Attack Against a Civilian Population or Can the Perpetrators of the Attack Belong to a Non-state Organization?

The perpetrator of this attack is equally atypical. In the nascent history of international criminal law, crimes against humanity have most often been perpetrated by individuals acting under a guise of state authority and perpetrated in locations under that state's control. The question of whether the legal definition of crimes against humanity limits its application to state actors is a matter of continuing debate—a debate framed by differing interpretations of Article 7(2)(a) of the ICC Statute: ""Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."  

The interpretative quandary presented by this Article is whether the reference to "state or organizational policy" limits the prohibition to states as defined by their policies or whether a plain reading of the text extends its application to other non-state organizations or actors capable of perpetrating widespread and systematic attacks. The codified elements of ICC crimes do not resolve the matter. The chair of the drafting committee of the ICC Statute has clearly stated his view that crimes against humanity under the ICC do not extend to non-state actors. Others have advanced an interpretation that would include "state-like" actors yet remain vigilant to the possibility that too broad a definition could inappropriately internationalize crimes committed by domestic actors.  


90 The Elements of Crimes of the ICC expounds on the text: "‘Attack directed against a civilian population in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1 of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.’" International Criminal Court (ICC), Report of the Preparatory Commission for the International Criminal Court, Addendum, Part II, Finalized draft text of the Elements of Crimes 5, Art 7 ¶ 3, (Nov 2, 2000) (hereinafter "Elements of Crimes"). A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Elements of Crimes at 5 n 6. See also Prosecutor v Katanga, Case No ICC-01/04-01/07, Decision on the Confirmation of the Charges, ¶ 396 (Sept 30, 2008) ("Katanga Confirmation Decision"). Geoffrey Roberts holds the view that the ICC's definition of crimes against humanity "might well exculpate the Vatican." Robertson, The Case of the Pope, at 135 (cited in note 3).

91 "Contrary to what some advocates advance, Article 7 does not bring a new development to crimes against humanity, namely, its applicability to non-state actors...The text clearly refers to state policy, and the words 'organizational policy'...do not refer to the policy of an organization, but the policy of a state." M. Cherif Bassiouni, The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text, vol 1 151–52 (Martinus Nijhoff 2005).
criminal gangs.92 This author suggests that "[t]he reference to 'State or organizational plan or policy' in article 7(2) should probably be construed broadly enough to encompass entities that act like States, even if they are not formally recognized as such."93

The Appeals Chamber of the ICTY examined what role, if any, state policy played in defining crimes against humanity and took the view that there was no requirement of a State policy.94

[N]either the attack nor the acts of the accused needs to be supported by any form of "policy" or "plan". There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes ... [P]roof that the attack was directed against a civilian population and that it was widespread or systematic, are legal elements of the crime. But to prove these elements, it is not necessary to show that they were the result of the existence of a policy or plan. It may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic (especially the latter) to show that there was in fact a policy or plan, but it may be possible to prove these things by reference to other matters. Thus, the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime.95

The ICC Statute, while codifying many principles of customary law, is not, as a treaty instrument, bound by them and can properly impose limits on what may have been perceived as an overbroad principle.96 In any event, it is clear that

92 See William A. Schabas, State Policy as an Element of International Crimes, 98 J Crim L & Criminology 953, 972 (2008). Schabas believes that the drafters intended to limit Article 7(2) to state actors "given that all previous case law concerning crimes against humanity, and all evidence of national prosecutions for crimes against humanity, had concerned State-supported atrocities." Id.


94 See Kunarac Appeal Judgment, ¶ 98 n 114 (cited in note 76). See also Prosecutor v Nahimana, Case No ICTR-99-52-A, Judgment, ¶ 922 (Nov 28, 2007) ("Nahimana Appeal Judgment"). It is well established that, while it may be helpful to prove the existence of a policy or plan, "it is not a separate legal element of a crime against humanity[]."


95 Kunarac Appeal Judgment ¶ 99 (cited in note 76). The Special Court for Sierra Leone has taken a similar course. See, for example, Prosecutor v Fofana, Case No SCSL-04-14-T, Judgment, ¶ 113 (Aug 2, 2007) ("Fofana Trial Judgment"); Prosecutor v Sesay, Case No SCSL-04-15-T, Judgment, ¶ 79 (Mar 2, 2009) ("Sesay Trial Judgment").

96 See Mugesera v Canada, 2 SCR 100, ¶ 158 (2005) ("[T]here is currently no requirement in customary international law that a policy underlie the attack, though we do not discount the possibility that customary international law may evolve over time so as to incorporate a policy requirement.").
customary international law has no such requirement despite any language in the ICC Statute that is understood to narrow the scope of to whom the prohibitions of crimes against humanity apply.\(^\text{97}\)

In the Katanga case, Germain Katanga is charged with murder and sexual slavery as crimes against humanity arising out of the conflict in Ituri between 2002 and 2003. Katanga was the commander of the Patriotic Resistance Force in Ituri (FRPI).\(^\text{98}\) The ICC Prosecutor alleges that Katanga along with Mathieu Ngudjolo Chui led a group of combatants of Lendu and Ngiti ethnicity in an armed attack against the Hema civilian population of Bogoro village in February 2003, an attack that resulted in the death of approximately 200 people. Pre-Trial Chamber I, in its Decision on the Confirmation of Charges, offers an interpretation that leaves open the possibility that crimes against humanity may be perpetrated by “any organization with the capability to commit a widespread or systematic attack against a civilian population.”\(^\text{99}\)

Following the Katanga case, Pre-Trial Chamber II confirmed charges against Jean-Pierre Bemba Gombo, alleging that members of the Movement for...
the Liberation of the Congo (MLC)\textsuperscript{100} had perpetrated crimes against the civilian population of the Central African Republic. The Chamber, in addressing the requirement of a “state or organizational policy” found that,

The requirement of “a State or organizational policy” implies that the attack follows a regular pattern. Such policy may be made by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be formalised. Indeed, an attack which is planned, directed or organized—as opposed to spontaneous or isolated acts of violence—will satisfy this criterion.\textsuperscript{101}

While it is clear that the drafters did not have large religious congregations in mind when they crafted the language of Article 7(2)(a), that by itself should not be a bar to enforcing a fair reading of the text’s prohibition to protect those vulnerable to such crimes.\textsuperscript{102} More dispositive than the perpetrator groups contemplated by the drafters is the original impetus behind defining such crimes. A former judge of the ICTY reminds us that “crimes against humanity were originally conceptualized as acts of so odious a nature that their commission was not just an assault on the victims involved, as with war crimes, but an offense against all humanity.”\textsuperscript{103}

For the last two years, the Crimes Against Humanity Initiative\textsuperscript{104} has been drafting a proposed \textit{International Convention on the Prevention and Punishment of Crimes

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\item Mouvement de Libération du Congo.
\item Bemba Confirmation Decision, ¶ 81 (cited in note 88) (emphasis added).
\item Schabas reminds us that “[generally the concept of ‘civilian population’ should be construed liberally, in order to promote the principles underlying the prohibition of crimes against humanity, which are to safeguard human values and protect human dignity.” William A. Schabas, \textit{The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone} 191 (Cambridge 2006). See Elements of Crimes, Art 7, ¶ 1 (cited in note 90):

\begin{quote}
[T]aking into account that crimes against humanity as defined in Article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.
\end{quote}

\item Patricia Wald, \textit{Genocide and Crimes Against Humanity}, 6 Wash U Global Stud L Rev 621, 624 (2007). Larry May also suggests crimes against humanity warrant international prosecution because their essential quality of being directed at a group—at humanity:

Only when there is serious harm to the international community, should international prosecutions against individual perpetrators be conducted, where normally this will require a showing of harm to the victims that is based on non-individualized characteristics of the individual, such as the individual’s group membership, or is perpetrated by, or involves, a State or other collective entity.


\item See Crimes Against Humanity Initiative, Wash U in St Louis School of Law, online at http://law.wustl.edu/crimesagainsthumanity/ (visited Nov 20, 2010).
\end{enumerate}
\end{footnotesize}
Against Humanity. Article 3 of the draft incorporates the text of Article 7 of the ICC Statute. The drafters include a commentary and with respect to this issue state: “Notwithstanding the legislative history of the Rome Statute, reasonable judicial interpretation of the term ‘organizational policy’ as used in paragraph 2(a) of the present provision might include non-State as well as State actors.”

The Christian Brothers is a large multi-national religious congregation that operated the majority of industrial schools in Ireland and educated most Irish boys in its system of non-residential schools. Thousands of needy boys were sent by committal orders to its industrial schools with no alternative to accepting the treatment they received there. The Christian Brothers was found to be an “organization with the capability to commit a widespread or systematic attack against a civilian population.”

Jurisprudence of the ad hoc tribunals establishes that while a “policy” is not a definitional requirement, the existence of one can be probative evidence of an attack. Evidence heard by the Ryan Commission revealed an organized policy of physical violence directed against children. The Commission engaged an expert to interview Brothers formerly assigned to Artane Industrial School. Dunleavy discovered that many of the Brothers that were assigned there were young and inexperienced. Artane was often their first assignment. Absent formal training, these young men relied on senior Brothers for guidance. Dunleavy observed:

Nearly all of the Brothers that I interviewed told me that it had been explained to them by senior Brothers at Artane Industrial School that the boys would not respect a Brother who did not discipline them extremely severely, and that a Brother who would not deal out such punishment would soon become known to the boys as a “Silly Brother”... One Brother related an incident where his fellow Brothers had burst into applause when he entered a room where they were, as it had been learned that he had punished one of his pupils by punching him in the face—previously he had not dealt out such harsh punishment.

There were two necessary corrections in subparagraph 1(h). The document includes the language “gender as defined in the present Convention,” and “or in connection with genocide or war crimes.”


Katanga Confirmation Decision, ¶ 396 (cited in note 90).

Kunarac Appeal Judgment, ¶ 98 (cited in note 76).

Most of the Christian Brothers who gave evidence testified that they joined the order in their early teens—some when they were fourteen years old. These boys were sent to the congregation’s private boarding schools and although they characterize their lives as regimented they were not subjected to abusive physical treatment there. Ryan Report, vol 1 §§ 6.64–6.65 (cited in note 10).

Id § 7.232.
Dunleavy goes on to say:

It is my conclusion that unofficially at least, a system existed in Artane Industrial School of inflicting unusually brutal punishment on pupils, that such a system was tacitly sanctioned by the more senior Brothers at the School, and that this unofficial code of discipline made it inevitable that the physical abuse of pupils at Artane Industrial School would occur.\textsuperscript{111}

Past residents who testified also believed there was a policy of physically abusive treatment.\textsuperscript{112} One former resident described the environment as one “of constant fear and that fear overrode everything else for me.”\textsuperscript{113} In some cases, requests were made to have more severe disciplinarians reassigned to institutions struggling with behavior problems.\textsuperscript{114} This policy of violence toward the children was tempered only when individual incidents risked attracting public criticism.\textsuperscript{115}

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\item\textsuperscript{111} Id § 7.232. The chaplain at Artane (not a member of the Congregation) observed in a report that he filed with the Archbishop of Dublin, “There seems to be no proportion between punishment and the offence... Some time ago, a hurley stick [similar to a field hockey stick] was used to inflict punishment on a small boy. The offence was negligible.” Id § 6.233. See also id §§ 7.233–7.234, 7.288, 7.300. The Report cites other examples in which Brothers appeared to have at ready access other implements they used to administer beatings including a fan belt, shovel, dowel, or a tire from a baby carriage. In addition some Brothers would kick students with a shod foot or lift students by the hair on their temples. See, for example, Ryan Report, vol 1 § 7.260 (cited in note 10). In some cases different Brothers employed particular techniques to make the punishment more painful such as run cold water over the child’s hands or require that the hand be held over a hard object so that it also caused pain when the blow from the strap was administered. See id §§ 7.296–7.301. Punishment was often delayed and administered unpredictably increasing the anxiety felt by the victim. A visitation report in the late 1930s remarked that only one brother succeeded in his work without resorting to corporal punishment, “[t]he only member of the staff who has succeeded in getting along with the boys without having recourse to corporal punishment is Br Dennet. His personal influence is very great, and his single-mindedness and truly Christ-like attitude in his dealing with his boys is having a marked effect for good on them.” Id § 7.83.

\item\textsuperscript{112} A witness from the mid-1940s to the mid-1950s testified:

\begin{quote}
[T]he place was built on terror, regular beatings were just accepted. What you’re hearing about is the bad ones, but we accepted as normal run of the mill from the minute you got up, that some time in that day you would get beaten. ... The last two down to the piss pots got beaten. Everything was timed and everyone that was last got beaten. We accepted that. We didn’t even regard that as cruelty. That was the way the regime was run.
\end{quote}


\item\textsuperscript{113} Id § 9.239. Professor Thomas Dunne, a former Christian Brother characterized Artane as “a secret, enclosed world, run on fear; the boys were wholly at the mercy of the staff, who seemed to have entirely negative views of them.” Id § 9.236.

\item\textsuperscript{114} In response to one such request, the particularly brutal Brother Ansel was assigned and exacted a reign of terror on the children. Id §§ 9.163, 10.90.

\item\textsuperscript{115} Ryan Report, vol 1 § 9.259 ¶ 3.
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E. Must an Attack Be Purposeful or Intentional, or Can It Be the Result of Criminal Negligence or Criminal Recklessness?

As discussed above, the Ryan Commission concluded that physical abuse was the result of a Congregation policy. Individual acts of physical abuse were clearly connected to the attack because they advanced the overall policy. The Commission did not, however, make similar findings with respect to sexual abuse. The sexual abuse perpetrated against children in Christian Brothers' schools was not clearly the result of a policy. While a policy to protect the institutions and individual Brothers from public disgrace and prosecution did exist, it is difficult to conclude that sexual abuse itself was a matter of policy in the way that physical abuse was. Despite the egregiousness of this conduct and the significant contribution congregational complicity made to the frequency and magnitude of sexual crimes, the attack on the civilian population was conceived and intended as one of physical and not sexual violence.

This then raises the question of whether a pattern of violent acts which is not in itself “purposeful” can constitute an attack and fulfill the contextual requirement of a crime against humanity. There is certainly no express requirement in the relevant jurisprudence requiring the prosecution to establish that the attack was an intentional or purposeful one, and a plain application of the elements as developed to date would not necessarily evaluate an attack to determine whether it was a purposeful one. All of the cases involving a crime against humanity, in the relatively short life of the crime, involve attacks against civilian populations that were obviously both intentional and purposeful. The widely known facts of these attacks never called into question conventional thinking about whether an attack must be the product of a purpose, although implicitly it appears to be there. The ICC Statute makes illegal enumerated crimes “when committed as part of a widespread or systematic attack directed against any civilian population.” The phrase “directed against” denotes something purposeful—not accidental. The absence of any detailed discussion


117 Article 7, ¶ 3 of Elements of Crimes (cited in note 90) states: “It is understood that ‘policy to commit such attack’ requires that the State or organization actively promote or encourage such an attack against a civilian population.” This requirement of “active promotion” suggests purposefulness. Further, n 6 states that “Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.” Antonio Cassese considers this requirement more stringent than that
about whether customary law imposes a requirement of purposefulness of the attack may largely be due to the very obvious purposefulness of the attacks examined to date. Where the phrase has been interpreted, courts have found that it requires that “the civilian population is the primary object of the attack” and not simply the collateral effect of a legitimate attack on a military object. This requirement that the civilian population be the primary object of the attack again implies a purpose behind the attack, that is, the violent acts suffered by the civilian population must be the result of a purposeful attack against them and not the byproduct of a purposeful and lawful attack on opposing forces.

While the widespread sexual abuse described in the Ryan Report is clearly a purposeful practice of covering up criminal acts to protect religious congregations and their permanent members, it is not so clearly a purposeful attack directed at children. That such egregious conduct could have such grave consequences for a civilian population raises the question of whether an attack against a civilian population that is the result of negligent or reckless conduct could satisfy the contextual requirements of a crime against humanity.

Consider a state that, in a well-intentioned campaign to protect its people from an expected flu epidemic, seeks to inoculate its population with a newly developed flu vaccine. All due care is taken in the development and testing of the vaccine before inoculating its population. Several months after the vaccination is widely given, it becomes apparent that the vaccine has an unexpected interaction with a gene found only in members of a particular ethnic group that causes them to become seriously ill and sometimes die. It seems difficult to imagine that this situation, as unfortunate as it might be, would constitute an attack for the purposes of a crime against humanity.

The result would be the same if the harm to the ethnic group was the product of the state’s failure to exercise due care in testing the vaccine. The discriminatory harm was unexpected and unintended even though it could have been prevented if appropriate due care had been exercised. Absent any knowledge that the vaccine would result in a discriminatory injury to a particular ethnic group, it is difficult to conceive of it as being “directed against” them.

A variation of this scenario, in which the state knows of the vaccine’s discriminatory impact on a particular group and nevertheless distributes it as a


119 Under these circumstances even if an individual misperceived this unforeseen event as a widespread attack against an ethnic group he bore animosity towards, his crimes against them in the hopes of furthering the attack would not properly be considered international crimes.
part of a purposeful attack directed against them could constitute a crime against humanity given the purposeful use of the defective vaccine.

In the final variation of the scenario, the state, in its well-intentioned campaign, becomes aware that there is a high probability that the newly developed vaccine will cause serious injury to a significant number of members of one ethnic group. Seized of this knowledge, the state recklessly and wantonly disregards this likelihood and distributes the vaccine, covering up the probable harm that will result. While such action may fall short of “purposeful”, it meets a standard of criminal negligence or recklessness and could be said to constitute an attack directed against a civilian population. The response of senior managers of the Christian Brothers to widespread and systematic sexual abuse falls within this last version of the scenario.

F. Were the Perpetrators of the Crimes Aware of the Existence of the Attack and Their Contribution to It?

For the crimes of a particular perpetrator to be considered crimes against humanity, they must be materially connected to the attack. This nexus will be deemed to exist if the individual’s crimes advance the attack and if the perpetrator is aware of the attack and that his conduct contributes to it. The magnitude of an individual’s contribution to the overall attack is irrelevant and a single prohibited crime is enough to invoke criminal responsibility.

The subjective element of this nexus requires that the perpetrator, in addition to intending the underlying crime, is aware of the overall attack and conceives of his conduct as part of that overall attack. For the abusive acts of an individual Brother to constitute an international crime, he must appreciate the connection his beating of a child has to the overall pattern of violent acts directed at the children. A perpetrator’s personal motivation for committing a particular offense is not relevant.

With respect to physical abuse, given universal issuance of leather straps by the congregation and the tacit approval of their use and the use of other means of violence against children, it is reasonable to conclude that those committing

120 Tadic Appeal Judgment, ¶¶ 248, 251, 271 (cited in note 76).
121 Kunarac Trial Judgment, ¶ 434 (cited in note 78).
122 Blaskic Appeal Judgment, ¶¶ 124–27 (cited in note 94). See also Kunarac Appeal Judgment, ¶ 102 (cited in note 76). The perpetrator must at least engage in the underlying crime accepting a perceived risk that his acts are part of the attack.
123 Kunarac Appeal Judgment, ¶ 103 (cited in note 76). It would be irrelevant if a particular beating was precipitated by a child mocking the perpetrator motivating him to harm the child. This would be a crime against humanity if the perpetrator appreciated the act’s contribution to the overall attack.
violent acts against children were aware of the use of physical abuse to control the children and that their individual acts contributed to this overall attack.

Assuming the attack is conceptualized as being restricted to only the physical abuse of children, it is still possible that crimes of sexual violence may nonetheless be crimes against humanity. Despite the attack being defined by control of children through physical violence, to the extent that an individual perpetrator conceived of and incorporated sexual violence as part of his contribution to the overall attack, he would be guilty of a crime against humanity. There is no requirement that the underlying crime of the perpetrator be the same as the violent acts comprising the attack—it simply must be connected to them.

G. Was the Attack “widespread or systematic”?

An “attack” must also be either widespread or systematic. This requirement serves to set a threshold regarding the magnitude of an attack. While these are two distinct requirements expressed in the disjunctive, they are often interrelated and the widespread nature of an attack can lead to the inescapable inference that it was also systematic. While widespread refers to the scale of the attack—either by numerous related acts or one significant act with widespread consequences—systematic describes the level of organization underlying the attack. Precise application of these two concepts depends upon how the targeted civilian population is conceived. Certainly the “widespread” nature of an attack will be defined in relation to the geographic and temporal parameters defining the attack. As the Akayesu Chamber explained, “[t]he concept of widespread’ [sic] may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.”

The Christian Brothers operated industrial homes for over 120 years. A policy of control by excessive corporal punishment was uniform in these institutions although implemented with particular severity in particular schools. The excessively structured regime imposed in these institutions

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124 This requirement would address to some extent Schabas’s concern that the absence of a “policy” requirement would internationalize domestic crimes committed by gangs.

125 Kunarac Appeal Judgment ¶ 95 (cited in note 76).

126 It is important to note that it is only the overall attack and not the individual crimes committed by an individual perpetrator that must be widespread or systematic. See Blaskic Appeal Judgment, ¶ 101 (cited in note 94).


128 The Commission found some uncommon but commendable exceptions. See, for example Ryan Report, vol 1 § 9.22 (cited in note 10) (“In the late 1950s, a Resident Manager was appointed who
impacted every hour of the time children spent there—excessive corporal punishment permeated every aspect of the children’s lives and was systematically applied.

1. Individual crimes. Once the chapeau elements are established, specific enumerated crimes perpetrated by individuals in connection with the attack may constitute crimes against humanity. Common to these enumerated crimes are their gravity, inherent violence, and significant impact on their victims. Specifically, enumerated crimes include: murder, extermination, torture, rape, forcible transfer, deportation, enslavement, imprisonment, and persecutions.

2. Murder as a crime against humanity. The report recounts the death of a boy in the late 1950s. There had been some allegations that his death was caused by a severe beating by a Brother when the boy failed to eat his dinner. The investigation revealed that prior to the beating, the boy had been reported ill and had vomited blood in his bed. An amended death certificate recorded the cause of death as “Bilateral Pleural Effusion. Septicemia.” The Commission found that the failure to conduct an independent and full inquiry at the time made it impossible to determine whether or not the boy’s death was a homicide.

3. Crimes of Sexual Violence. The crime of rape as defined in international law is committed when a perpetrator commits a non-consensual sexual penetration of a victim, however slight.

was noted for his kindness to the boys and the Brothers. A Visitation Report remarked that he was regarded as a ‘kind father and guide’ by the boys and the Brothers[]”.


130 The underlying elements of torture as a crime against humanity are the same as torture as a war crime. See Kunarac Appeal Judgment, ¶¶ 142–44 (cited in note 76).

131 See, for example, Kunarac Trial Judgment, ¶¶ 519–20 (cited in note 78).

132 See, for example, Prosecutor v Kordic, Case No IT-95-14/2-T, ¶ 302 (Feb 26, 2001) (“Kordic Trial Judgment”).

133 See, for example, Prosecutor v Kupreskic, Case No IT-95-16-T, Judgment, ¶ 621 (Jan 14, 2000) (“Kupreskic Trial Judgment”).


135 It has been defined as: [The actus reus of the crime of rape in international law is constituted by the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The mens rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.]

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There is no requirement that actual physical force be used; the penetration simply must have taken place without the consent of the victim, considering the circumstances under which the act took place.\textsuperscript{136} Significant for the \textit{Kunarac} chamber was the fact that the victims were detained by some of their attackers. When rapes occur in detention facilities or other places where the victim is not free to leave, such confinement is an important factor militating in favor of a lack of consent.\textsuperscript{137} Increasingly, domestic legislation recognizes the inherent coercive nature of detention when considering whether a victim "consented" to sexual activity with a guard or person in a position of authority.\textsuperscript{138} In the \textit{Kunarac} case, the Appeals Chamber found that "[s]uch detentions amount to circumstances that were so coercive as to negate any possibility of consent."\textsuperscript{139} While the Ryan Report makes a number of findings with respect to perpetrators raping children in violent physical attacks, most perpetrators raped children by abusing the inherently coercive setting in which the children were contained. Such sexual acts were non-consensual in every respect. Apart from the age of the victim, making them legally incapable of consent, the children were committed to industrial schools, unable to leave. Children who did abscond returned to severe physical punishments. A great deal of the conduct described in the Ryan Report would properly be considered rape as that term has been defined in international law.

\textit{Kunarac} Trial Judgment, ¶ 460 (cited in note 78).

\textsuperscript{136} \textit{Kunarac} Appeal Judgment, ¶ 129 (cited in note 76). "A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force." Id.

\textsuperscript{137} Id ¶ 131 (noting domestic laws recognizing the inherent coerciveness of a prison environment). For example, German substantive law in the chapter, "Crimes Against Sexual Self-Determination" § 174b prohibits sexual acts with persons in the custody of public authorities—the absence of consent is presumed and not an element of the crime.

\textsuperscript{138} It is a federal crime in the US for a guard to have sex with an inmate. See, for example, 18 USC § 2243 ("Sexual Abuse of a Minor or Ward"): (b) Of a ward. Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who is: (1) in official detention; and (2) under the custodial, supervisory, or disciplinary authority of the person so engaging; or attempts to do so, shall be fined under this title, imprisoned not more than 15 years or both.


\textsuperscript{139} \textit{Kunarac} Appeal Judgment, ¶ 132 (cited in note 76).
4. Inhumane treatment. In addition to those crimes specifically enumerated as crimes against humanity, a residual category incorporates other similarly serious criminal acts and contemplates the possibility that some may perpetrate grave acts yet to be imagined. “Other inhumane acts” is a prohibition of criminal acts similar in gravity to the other crimes that cause serious mental or physical suffering. Article 7(1)(k) of the ICC Statute defines “other inhumane acts” as those acts “of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” For the ad hoc tribunals, whether an act constitutes inhumane treatment is determined on a case-by-case basis given the circumstances of individual cases. The Kupreskic Trial Chamber applied the principle of ejusdem generis and conducted an examination of several international human rights instruments to discern whether charged conduct constituted inhumane treatment. Taking a similar approach in the context of the Ryan Report’s findings would invite an examination of the Convention on the Rights of the Child. Among the provisions related to the care of children,

140 The specifically enumerated crimes are murder, extermination, enslavement, deportation, imprisonment, torture, rape, and persecutions on political, racial and religious grounds. See Mettraux, International Crimes at 175 (cited in note 77).

141 The ICRC discussed the need for such a broad category in its commentary on the definition of “inhumane treatment” in the Geneva Conventions. “However great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts....” ICRC, Commentary on the IVth Geneva Convention Relative to the Protection of Civilian Persons in Time of War 39 (1958). The phrase “other inhumane acts” was first used in Article 6(c) of the London Agreement and Article II(1)(c) of Control Council Law No. 10. See Kupreskic Trial Judgment, ¶ 562 (cited in note 133).

142 See Kupreskic Trial Judgment, ¶ 563 (cited in note 133).

143 Rome Statute of the ICC, Art 7(1)(k) (cited in note 89).

144 Kayishema Trial Judgment, ¶ 151 (cited in note 79).

145 “Once the legal parameters for determining the content of the category of ‘inhumane acts’ are identified, resort to the ejusdem generis rule for the purpose of comparing and assessing the gravity of the prohibited act may be warranted.” Kupreskic Trial Judgment, ¶ 566 (cited in note 133). Ejusdem generis is a principle of statutory interpretation employed when a statute includes an enumerated list of similar items followed by residual inclusory language. The principle requires that this residual clause be interpreted to include other items of a similar nature to those enumerated. See Black’s Law Dictionary 594 (West 9th ed 2009). The Kupreskic Trial Chamber looked to the following international instruments for guidance on what might be considered inhumane treatment: Universal Declaration on Human Rights of 1948; the United Nations Covenant on Civil and Political Rights (Article 7); the European Convention on Human Rights, of 1950 (Article 3); the Inter-American Convention on Human Rights of 9 June 1949 (Article 5); the 1984 Convention against Torture (Article 1); IVth Geneva Convention (Article 49) and Additional Protocol II of 1977; General Assembly Resolution 47/133 (on enforced disappearance). Kupreskic Trial Judgment, ¶ 566 (cited in note 133).

146 Ireland ratified the Convention on the Rights of the Child on September 21, 1992. Under the Kupreskic approach, the Convention can be used as a benchmark to assist the court in identifying “a set of basic rights appertaining to human beings, the infringement of which may amount,
the convention imposes a duty on states “to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse . . . including sexual abuse.” Ireland had laws protecting children from abuse and corporal punishment was regulated. To the extent that the physical abuse of children in institutions significantly exceeded the boundaries of applicable law, it may properly be characterized as “inhumane treatment.”

The horsewhipping of students, the public beating of students, forcing students to eat excrement, and forcing children to hit each other were all in violation of Irish law and as such constitute “other inhumane treatment.” Sexual abuse that does not constitute rape because of the lack of penetration would also properly be considered inhumane treatment.

V. INDIVIDUAL RESPONSIBILITY FOR INTERNATIONAL CRIMES

Most domestic prosecutions as a practical matter focus on persons who directly perpetrate crimes. The scale of international crimes requires an examination of the acts of many persons connected to the crimes, some directly perpetrating the crimes and others participating indirectly. The fact that such crimes occur as the result of the collective efforts of many does not diminish the importance of establishing the individual criminal responsibility of the relatively few who may be called to account. The work of international prosecutors most often focuses on “senior leaders” such as senior-level perpetrators whose contribution may be remote both in time and location from a crime’s objective depending upon the accompanying circumstances, to a crime against humanity.”

147 The Convention on the Rights of the Child, GA Res 44/25, 1 UN GAOR Supp (No 49), UN Doc A/44/49 (1989), Art 19 § 1. Article 28, § 2 provides, “States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the present Convention.” See also id at Art 37(a) (“No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment”). Article 34 imposes a positive duty to protect a child from sexual exploitation and abuse. Id at Art 34.

148 Article 3, § 3 of the Convention on the Rights of the Child imposes upon States Parties the duty to “ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities....” Convention on the Rights of the Child, Art 3, § 3 (cited in note 147).


elements (actus reus). There is no requirement that a perpetrator be physically present. All persons, from commoners to heads of state, have the capacity to be held responsible for crimes.

The different ways in which someone can intentionally contribute to a crime are reflected in the different avenues or modes of participation incurring criminal responsibility. The first of these modes, "commission," in the traditional sense, characterizes the conduct of a direct perpetrator who knowingly and intentionally perpetrates a crime. Other modes include: planning, ordering, and instigating crimes.

A person can also incur liability as a co-perpetrator by aiding and abetting in the commission, planning, ordering, or instigation of a crime. Another form of co-perpetration, which adopts a broad interpretation of "committing," is participation in a joint criminal enterprise. Finally, a person who has neither the subjective element of a crime (mens rea), nor participates in the objective element (actus reus), but is a superior of a perpetrator may be criminally responsible if he knew his subordinate was about to commit a crime and failed to take necessary and reasonable measures to prevent it or, having reason to know that a crime was committed, failed to investigate or punish his subordinate.

Although adjudicating the criminal responsibility of organizations was a feature of Nuremberg, international criminal law has evolved to limit criminal responsibility to natural persons. Individuals are judged on their acts and not

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151 Several forms of criminal liability, such as superior responsibility, require the prosecution to establish the underlying culpability of the direct perpetrators. See Guénaël Mettraux, The Law of Command Responsibility 131 (Oxford 2009).

152 Prosecutor v Bosko, Case No IT-04-82-A, Judgment, ¶ 125 (May 19, 2010) ("Boskoski Appeal Judgment").

153 See Prosecutor v Kayishema, Case No ICTR-95-1-A, Judgment, ¶170 (June 1, 2001) ("Kayishema Appeal Judgment") ("Genocide is not a crime that can only be committed by certain categories of persons. As evidenced by history, it is a crime which has been committed by the low-level executioner and the high-level planner or instigator alike."). See also Akayesu Appeal Judgment, ¶¶ 436, 443-44 (cited in note 76). Principles I and III of the Nuremberg Principles affirm that "any person" who commits a crime under international law is responsible and liable for it.

154 See, for example, Statute of the ICTR, Art 6; Statute of the ICTY, Art 7.

155 Article 10 of the Nuremberg Charter states:

In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned. . . .

the acts of the paramilitary organization, political party, or state to which they belong.\textsuperscript{156}

VI. INDIVIDUAL CRIMINAL RESPONSIBILITY OF PRINCIPALS

A. Principal Perpetration: Commission Through Positive Acts

A person commits a crime in the traditional sense when he knowingly and voluntarily engages in the prohibited conduct \textit{(actus reus)} by a positive act or culpable omission while having the proscribed subjective state of mind \textit{(mens rea)}. In its purest form, commission involves a single perpetrator who is physically present and intentionally performs all the acts prohibited by the particular criminal statute.\textsuperscript{157}

The Ryan Commission devoted an entire section of its report to \textit{John Brander}, a Brother who engaged in a forty year career of physical and sexual abuse of many children. The Report details many of the allegations made against \textit{Brander} and documents his admission, at least in part, of the physical and sexual abuse of children.\textsuperscript{158} To the extent that \textit{Brander}'s acts constituted crimes against humanity he would be responsible for having "committed" them as a direct perpetrator.

B. Principal Perpetration: Commission Through "Culpable Omissions"

An intentional failure to discharge a legal duty may incur criminal liability under certain circumstances. For example, a police officer's intentional failure to answer a victim's cry for help with the intention that such failure will result in injury to that victim would be a culpable omission exposing the police officer to the same criminal liability as the attackers. International law recognizes that a crime may be committed by omission when a perpetrator fails to act with the intent to commit a particular crime.\textsuperscript{159}

\textsuperscript{156} See, for example, \textit{Prosecutor v Ojdanic}, Case No IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction-Joint Criminal Enterprise, ¶ 24-26, (May 21, 2003). Victims can and have filed civil suits against the religious organizations involved. Id.

\textsuperscript{157} For a discussion of this in international law, see \textit{Tadić Appeal Judgment}, ¶ 188 (cited in note 76); \textit{Nahimana Appeal Judgment}, ¶ 478 (cited in note 94).

\textsuperscript{158} See, for example, Ryan Report, vol 1 ¶ 14.05 (cited in note 10).

The failure of senior managers of the Christian Brothers to comply with applicable law imposing legal duties with respect to the children in their care may form the basis of criminal liability. An analysis of this issue requires an examination of: (a) the nature of the culpable omissions documented in the Ryan Report, (b) the origin of the Christian Brothers’ legal duty to the children in their care, (c) the failure by Christian Brothers’ management to discharge that legal duty, (d) whether this failure could form the basis of international criminal responsibility, (e) whether the perpetrators acted with the requisite mens rea in relation to their failure to protect children from physical abuse, and (f) whether the perpetrators acted with the requisite mens rea in relation to their failure to protect children from sexual abuse.

C. Nature of the Culpable Omissions Documented in the Ryan Report

One example of the culpable omissions documented by the Ryan Report is the case of Letterfrack. Letterfrack is a small town in the Connemara region of western Ireland. In 1849, a Quaker couple bought a tract of land in this remote landscape and built a large residence and school. The Christian Brothers took over the facility in 1887 and operated the Letterfrack Industrial School.6

On April 8, 1940, Brother Vernay, a Brother assigned to Letterfrack, was so troubled by an event that he wrote to the Provincial, bypassing his direct superior. This letter stated that “[t]he instruments used and the punishments inflicted are now obsolete even in criminal establishments.” He justified his direct appeal by citing the frequent excessive and offensive nature of punishments that were now widely known outside the school. At issue was the Superior/Resident Manager’s directive to two Brothers to punish several boys “using a horsewhip rather freely.”161

The Provincial informed the Superior General who replied that such treatment violated the Congregation’s laws and noted a Christian Brothers school in England where the headmaster was imprisoned and the school closed by the government because of similar abuse. He continued,

[A] secular body who would continue an official in office after allowing a law to be set aside to permit an offence which the common law punishes does not merit public confidence. I wish you to discuss in Council what is

of the crime, has to be distinguished from aiding and abetting a crime by encouragement, tacit approval or omission, amounting to a substantial contribution to the crime.” Ntagerura Appeal Judgment, ¶ 338.


161 Id §§ 8.54–8.57 (noting the incident involved several boys believed to have engaged in “immorality” lined up along a wall and “horsewhipped”).

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to be done in this case with the Superior of Letterfrack. I think the offence should not be passed over.162

The Resident Manager remained in charge of Letterfrack for the remainder of his tenure—there is no record that any action was taken against him. The Superior General did nothing other than acknowledge the unlawfulness of such acts.

D. Origin of the Christian Brothers’ Legal Duty to the Children in Their Care

The management of the Christian Brothers was subject to longstanding legal duties with respect to the children in their care. Legislation governing the treatment of children in Britain and Ireland can be found as early as 1598.163 A 1771 law gave parish overseers the authority to arrange rudimentary care for needy children. Rapid population growth eventually overwhelmed this parish-based welfare system and vagrant children wandered Britain and Ireland.164 By 1853, seventy-seven thousand children under fifteen were living in Irish workhouses.165 In 1858, reformatories were established for children engaged in criminal activity.166 A decade later, industrial schools were established to provide care, protection, and training for other needy children.167

Childcare in Ireland was regulated by the Children and Young Person’s Act of 1908 (Act of 1908), which set out the mandate of industrial schools and reformatories in general terms. Although regulations promulgated in 1933 (1933 Rules) gave more detailed guidance, the Act of 1908 remained the primary source of law protecting vulnerable children until 1996.168 The Act of 1908 reflected then-existing common law permitting parents to punish their children

162 Id §§ 8.59–8.60.
163 The Act for the Relief of the Poor of 1598 had provisions specific to children which gave the parish “overseers of the poor” the authority of “setting to work the children of all such whose parents shall not be thought able to keep and maintain their children.” Id § 2.01.
164 Ryan Report, vol 1 § 2.01 (cited in note 10). Between 1845 and 1850 a series of blight devastated successive potato crops resulting in widespread starvation. Approximately one million people died during the “Great Irish Famine” and 1.2 million emigrated. Id.
165 These were established by the Poor Relief (Ireland) Act of 1838. See id § 2.02.
166 This system of reformatories was established by the Reformatory Schools (Ireland) Act of 1858. Id § 2.07.
167 The Industrial Schools (Ireland) Act of 1868 established the legal basis for the establishment of industrial schools. Industrial schools were defined in the Children Act of 1908 as “a school for the industrial training of children, in which children are lodged, clothed and fed, as well as taught.” Ryan Report, vol 1 § 2.12 (cited in note 10).
168 The Children Act of 1908 was amended by the Child Care Act of 1991 which was not fully implemented until 1996. The 1991 Act was replaced in 2001 by the Children Act of 2001. Id § 2.10.
As applied to government facilities, the common law restricted punishment to children who could appreciate its corrective purpose and required that it be reasonable, taking into account the age, sex, and condition of the child.170

Under the 1933 Rules, managers of childcare facilities were authorized to punish errant children. Punishments included forfeiture of privileges as well as "moderate childish punishment with the hand," and "chastisement" with a cane, strap, or birch for more serious offenses. Corporal punishment was to be administered by the manager or a delegate in the manager’s presence. Caning children on the hands was expressly prohibited as was corporal punishment of girls over fifteen. Rules required all serious punishments to be recorded in a log book available to government inspectors.171

Sections 7 and 8 of the 1933 Rules required industrial schools to provide education for the children.172 Thus, the 1946 Rules and Regulations for National Schools also applied to the educational component of childcare. Under these rules, corporal punishment was reserved for grave transgressions and was to be administered only by the principal or a delegate.173 A directive from the

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169 Id § 4.04.

170 Id § 4.05.

171 Rules and Regulations for the Certified Industrial Schools in Saorstá Éireann, 1933, under the 54th Section of the Children and Young Persons Act of 1908, 8 Edw VII, Ch 67 §§ 12–13. These regulations remained effectively unchanged over the course of the life of these schools. Section 12 of the Rules admonished managers regarding the use of corporal punishment, "The Manager must, however, remember that the more closely the School is modeled on a principle of judicious family government the more salutary will be its discipline, and the fewer occasions will arise for resort to punishment." Id § 12. The Ryan Commission found almost universal disregard for this requirement and was only able to obtain two log books reflecting a relatively brief period of time and found that the failure to keep these required records impeded its investigation. See Ryan Report, vol 1 § 4.27 (cited in note 10).

172 Rules and Regulations for the Certified Industrial Schools in Saorstá Éireann, 1933, under the 54th Section of the Children and Young Persons Act of 1908, 8 Edw VII, Ch 67, §§ 7–8.

173 Section 96 of the 1946 Rules and Regulations for National Schools provides that:

(1) Corporal Punishment should be administered only for grave transgression. In no circumstances should corporal punishment be administered for mere failure at lesions.

(2) Only the principal teacher, or such other member of the staff as may be duly authorized by the manager for the purpose, should inflict corporal punishment.

(3) Only a light cane or rod may be used for the purpose of corporal punishment which should be inflicted on the open hand. The boxing of children’s ears, the pulling of their hair or similar ill-treatment is absolutely forbidden and will be visited with severe penalties.

(4) No teacher should carry about a cane or other instrument of punishment.

(5) Frequent recourse to corporal punishment will be considered by the Minister as indicating bad tone and ineffective discipline.
Department of Education made clear that corporal punishment was a punishment of last resort and could only be administered in strict conformity with applicable regulations.\(^{174}\) Irish educators would eventually abandon their reliance on corporal punishment in 1982\(^ {175}\) and in 1997 it was criminalized.\(^ {176}\) While corporal punishment was not \textit{per se} illegal during the period examined by the Commission, applicable laws and rules imposed important restrictions on its use. The legal duties imposed on the administrators of childcare facilities were reflected in the documents and internal regulations of the Congregation. Documents from between 1881 and 1906 are explicit in their cautions regarding corporal punishment.\(^ {177}\)

E. Failure by Christian Brothers' Management to Discharge Their Legal Duty Toward the Children in Their Care

The Christian Brothers' management manifestly failed to discharge its legal duty toward the children in their care. A letter by the Superior General in 1906 makes clear that he and the leadership team were fully aware of the pervasive use of abusive corrections, characterizing them as "very improper, very censurable and [that which] could not have the blessing of God."\(^ {178}\) Internal guidelines from 1920 and 1930 make clear that the problem of abusive and excessive corporal punishment was considered a persistent problem.\(^ {179}\) The abusive use of corporal

\(^{174}\) All of these specifications regarding corporal punishment prohibited its use for a failure to learn and prohibited punishments designed to humiliate children (in other words, special haircuts or clothes). Ryan Report, vol 1 § 4.15 (cited in note 10). Prior to 1956, use of a leather strap was never officially sanctioned, although no express prohibition existed either. A circular distributed by the Department of Education in 1956 amended Rule 96 to include and thereby officially sanction the use of a leather strap. Id § 4.20.

\(^{175}\) Department of Education Circular 9/82, which regarded any teacher employing such punishment, "guilty of conduct unbefitting a teacher" and justifying disciplinary action. Id § 4.23.

\(^{176}\) Section 24 of the Non-Fatal Offences Against the Person Act of 1997 abolished the immunity teachers previously possessed with respect to the physical chastisement of children. This immunity having been abolished exposed teachers employing corporal punishment to conviction for assault under section 2(1) of the 1997 act punishable by 12 months imprisonment and a fine of £1,500. Non-Fatal Offences Against the Person Act, 1997, § 24 (Act No 13/1997).

\(^{177}\) Ryan Report, vol 1 § 6.207 (cited in note 10). In 1900 the Superior General wrote in a letter to the Congregation: "[T]here are few matters I wish to urge with greater insistence upon the attention of the Brothers and especially of the young Brothers, than the evil done by the evil done by the use of injudicious punishment when correcting faults of their pupils. Corporal punishment is always degrading. . . . Sometimes it does incalculable injury." The letter continues with a description of the negative psychological effects of corporal punishment demonstrating a clear and astute understanding of its generally detrimental impact on children. See id §§ 6.208, 6.209.


\(^{179}\) Brother Noonan, the Superior General observed in 1930, "[T]hat abuses have arisen, and they will recur, I fear, as long as our regulations give any authority for the infliction of corporal
punishment would continue unabated by Christian Brothers until being formally prohibited by governmental regulations adopted in 1982.180

The Ryan Commission found that the blatant disregard of applicable law governing punishment was a common feature in institutions operated by the Christian Brothers. In summarizing its findings with respect to Artane it stated:

The policy of the School was rigid control by means of severe corporal punishment and fear of punishment. Such punishment was excessive and pervasive. The result of arbitrary and uncontrolled punishment was a climate of fear. All Brothers became implicated because they did not intervene or report excesses.181

To the extent that “corporal punishment” exceeded that permitted by the applicable law, senior managers of the Christian Brothers failed to discharge their legal duty to ensure compliance. Some of the punishments described by the Commission were marked by their inexplicable brutality and sadistic nature. One former resident reported a fellow student having his head beaten on a desk;182 another described a beating which took place over several days;183 another reported being struck in the testicles;184 and there was also evidence of a boy being struck in the head with a shovel.185

Even when the severity of punishments fell within applicable bounds, they were consistently administered in a manner that disregarded required procedures designed to prevent overuse. The requirement that corporal punishment be inflicted by the Resident Manager or a delegate in his presence was systematically ignored. Had this provision been followed, there would have been a more ordered regime and fewer cases of capricious violence.186 The decision to not maintain punishment books was a direct violation of a mechanism designed to protect children and make governmental review possible.187

180 On February 1, 1982 the Department of Education issued Circular 9/82 stating that teachers employing corporal punishment would be “regarded as guilty of conduct unbefitting a teacher” and the subject of “severe disciplinary action.” Ryan Report, vol 1 § 4.22 (cited in note 10).

181 Id § 7.845.

182 Id § 7.278.

183 Id § 7.279.

184 Id § 7.280.


186 Id § 7.250.

187 Id § 7.311 ¶ 8. Maintenance of a punishment book was a required by the law as well as congregations rules. Id § 9.145. There was no record of a punishment book ever being kept at Tralee. Ryan Report, vol 1 § 9.143 (cited in note 10).
The findings of the Ryan Commission support the conclusion that there was a universal failure by Resident Managers and their superiors to discharge their legal duty toward the children in their care.

F. Could the Christian Brothers’ Failure to Discharge Their Duty to the Children in Their Care Form the Basis of International Criminal Responsibility?

While the failure to discharge a legal duty having criminal consequences under domestic law can, under some circumstances, form the basis of international criminal responsibility, the effect of legal duties imposed by non-criminal statutes remains an unresolved question in international law.

During the 1994 Rwandan genocide, Emmanuel Bagambiki was préfet of Cyangugu prefecture. As the most senior governmental official, he had a statutory duty to protect the residents of Cyangugu. Tens of thousands of mostly Tutsis were massacred in his prefecture. A trial chamber of the International Criminal Tribunal for Rwanda (ICTR) found that Bagambiki’s legal duty to protect residents of Cyangugu “was not mandated by a rule of criminal law,” and therefore could not be the basis of individual responsibility.\(^{188}\) It also concluded that, although Bagambiki could have requested that the military protect Tutsis, he could not order them to intervene and there was insufficient evidence that he possessed other practical means of discharging this legal duty.\(^{189}\)

The Appeals Chamber, in its review of the case, noted that the question of whether an omission arising from a non-criminal statute could incur criminal responsibility remained open.\(^{190}\) It declined to address this issue, citing the Trial Chamber’s finding that Bagambiki did not have the means to protect Tutsis even if he had made every effort to do so and therefore it was largely immaterial whether omission liability could be based on civil obligations.\(^{191}\)

None of the laws imposing duties on the Christian Brothers was criminal in nature. The Christian Brothers’ failure to discharge their legal duties toward the

\(^{188}\) Prosecutor v Ntagerura, Case No ICTR-99-46-T, Judgment and Sentence, ¶ 660 (Feb 25, 2004) ("Ntagerura Trial Judgment").

\(^{189}\) Id.

\(^{190}\) Ntagerura Appeal Judgment, ¶¶ 334–35 (cited in note 159). The Appeals Chamber determined that it was not necessary to resolve the issue in the Ntagerura case. "The Prosecution has not indicated which possibilities were open to Bagambiki to fulfill his duties under the Rwandan domestic law. Thus, even if the failure to fulfill the duty of a Rwandan prefect to protect the population of his prefecture could entail responsibility under international criminal law, the Prosecution has not shown that the alleged error of the Trial Chamber invalidated its decision." Id ¶ 335.

\(^{191}\) Id ¶¶ 334–35. See also Ntagerura Trial Judgment, ¶ 17 (cited in note 188) (Separate Opinion of Judge Ostrovsky).
children presents a compelling case for defining which legal duties give rise to criminal responsibility in a more thoughtful way. A determination based simply on whether the duty has been characterized by national legislatures as criminal or civil unnecessarily creates arbitrary lapses in international protection for victims. To the extent that a law imposes a legal duty to protect persons from the criminal acts of others or of fundamental human rights, it forms an adequate basis for incurring criminal liability.

G. Did the Perpetrators Act with the Requisite Mens Rea in Relation to Their Failure to Protect Children from Physical Abuse?

The ICTY Appeals Chamber has recently reminded us of the importance of the general subjective requirement that, for conduct to be criminal, it must be possible for a perpetrator to determine in advance the criminal nature of the contemplated conduct. While the specific subjective element or mens rea will vary depending upon the particular crime, common to all subjective elements is the perpetrator’s ability to know in advance the criminal nature of the conduct before engaging in it.192 Senior managers, aware of their duty to protect the children from the crimes of others, would have fair notice that their intentional failure to do so could result in criminal consequences.

For the perpetrator of a culpable commission to incur responsibility, it must be established that the actor intentionally failed to discharge this duty while having the requisite subjective element (mens rea). With respect to physical abuse, the Ryan Commission found that “[m]anagement did nothing to prevent excessive and inappropriate punishment and boys and Brothers learnt to accept a high level of physical punishment as the norm.”193

Brother Anatole194 told the Committee that prior to coming to Letterfrack he was told about the need to maintain strict discipline; breaches were to be dealt with swiftly and harshly.195 He described an incident in which Brother Iven beat a boy placed over a chair on the school stage after having the boy’s pants removed. Iven savagely beat the boy with a leather strap on the bare buttocks while other children sat in the audience and watched.196

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192 See Boskoski Appeal Judgment, ¶ 66 (cited in note 152).
194 Brother Anatole was convicted in 2003 of sexually abusing boys in Letterfrack. Id § 8.156.
195 Id § 8.157.
196 Id § 8.165. A former resident who was in the audience that day recounted the event:

[He] was called up for his punishment on the stage, and he was battered and beaten by Br Iven in front of—we all had to sit in these chairs as if you were watching a play on the stage and Br Iven battered him, beat him, lashed him,
One Brother expressed in a letter to the Provincial his immediate superior’s policy with respect to physical punishment of the boys:

I know I have vexed the Superior a good many times because I did not punish the boys severely enough for his taste. He told me hundreds of times never to spare them. I will give you his own words in brackets. What are they but “illegitimates and pure dirt.”

This policy of controlling children through a regime of fear and terror evidences the intentionality behind the failure to observe legal obligations governing physical punishment. The Ryan Commission concluded that when senior management responded to allegations of abuse, it was not out of a sense of duty under the law but out of a fear of impending public scandal.

H. Did the Perpetrators Act with the Requisite Mens Rea in Relation to Their Failure to Protect Children from Sexual Abuse?

Implicit in the Children Act of 1908 was the duty to protect children from sexual abuse. Section 58(1) of the act established the grounds upon which a child could be committed to an industrial school. Grounds included cases where a father sexually abused his daughter and where a child lived in a place used for prostitution. While these particular grounds focused on the dangers faced by

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punched him and kicked him and because he wasn’t getting any satisfaction, he couldn’t make him cry, he started to take off his collar and take his habit down or whatever you call them, and he started to lash him, you know, with his fists and stuff. It seemed like it went on for a long, long time and we had to sit there and watch this.

Id § 8.209. Another former resident said, “you nearly preferred to get it yourself because listening to somebody getting bashed, in a sense it is worse than getting it yourself.” Ryan Report, vol 1 § 8.123 (cited in note 10).

Id § 8.65.

The Commission found it “inexplicable . . . that Brothers who were in serious breach of the Congregation’s own rules were tolerated and protected by the Congregation.” Id § 6.222. Dunleavy, an expert engaged by the Commission, reviewed eleven cases of serious physical abuse and found a number of common attributes including the fact that no one was ever dismissed or disciplined and no remedial measures were implemented to prevent reoccurrence. Id § 7.308.

Section 58(1) of the Children Act of 1908 sets out the conditions under which a child could be committed to an industrial school: (a) the child was found begging; (b) the child had no visible home or means of subsistence; (c) the child was found destitute or being the illegitimate child of an imprisoned woman; (d) the parents were unfit because they were a reputed criminal or alcoholic; (e) the child was a girl and her father had been convicted of offenses related to sexually abusing his daughters; (f) the child frequented the company of known thieves or prostitutes (other than the child’s mother); or (g) the child resided in a house used for prostitution. Children Act of 1908, §58(1). Section 4 of the Rules and Regulations promulgated in 1933 required that children be supplied with separate beds. Ryan Report, vol 1 § 4.02 (cited in note 10).
girls, they established that industrial schools were to be places that protected children from sexual abuse. 200

Senior management of the Christian Brothers was always aware of the need to protect children from predatory sexual behaviour. In 1887, the Superior General cautioned the Congregation to be vigilant against sexual activity among their charges and reminded Brothers of their “serious responsibility” to prevent students from coming “to learn evil they knew not before.” 201 As early as 1923, the Christian Brothers appreciated that their work had the potential to activate the pedophilic inclinations in some and urged vigilance.

Whilst the Brothers should cherish an affection for all their pupils especially the poor, they are forbidden to manifest a particular friendship for any of them. They must not fondle their pupils; and unless duty and necessity should require it, a Brother must never be alone with a pupil. 202

This implicit duty of senior managers to protect children from sexual abuse can only be the basis of criminal responsibility if their failure to discharge it was the result of an intention that children be sexually abused. While it is clear that senior managers of the Congregation consistently failed in their obligation to protect children from sexual crimes, the findings of the Ryan Commission do not support a conclusion that, like physical abuse, such was the product of an intentional attempt to control the children or serve some other purpose. Management’s response to the persistent and widespread sexual abuse of the children is marked by its incompetence and callous disregard for the children—not by some intentional policy to sexually abuse them. A comparison of the different ways in which two cases of sexual abuse were handled in Letterfrack illustrates this point.

200 Institutions were required to provide each child with a separate bed and under Section 53d of the Children Act of 1908 any decision to send the child to live or “board out” with a private family needed prior approval from the Minister of Education, through the Inspector of Industrial Schools. See Ryan Report, vol 1 § 4.02 (cited in note 10).

201 See id § 6.95.

202 Ryan Report vol 1 § 6.90. The dictates of this article were reinforced in a letter to the congregation by the Superior General in 1926:

The child's spiritual endowments and the end to which he is destined naturally cause the thoughtful religious to “love him in God”, while his natural charms tend to excite that “weak and sensual affection” that may easily prove to be ruinous to the child and teacher. Here is a DANGER SIGNAL that should never be lowered and should ever be heeded. The teacher who allows himself any softness in his intercourse with his pupil, who does not repress the tendency to “pets”, who fondles the young or indulges in other weaknesses, is not heeding the danger signal and may easily fall. Disastrous results for teacher and pupil have sometimes resulted from such heedlessness and effeminacy. Chapter VIII, Part I, of our Constitutions in its different articles, sets forth salutary precautions in this connection.

Ryan Report vol 1 § 6.92.
The first indication in the late 1950s that something was amiss with Brother Adrien was the Resident Manager's reaction to the Provincial's decision to cancel his transfer as earlier agreed. Implicit in the Resident Manager's letter was his belief that Adrien was sexually abusing boys. The Provincial recognized the Resident Manager's concern and transferred Adrien to a school for deaf boys. Adrien's career brought him in contact with many children in other institutions operated by the Christian Brothers. He was urgently transferred from Artane after being accused of sexual abuse there. He would eventually be returned to Letterfrack. The case of Adrien demonstrates the reprehensible and reckless practice of moving permanently professed Brothers who were pedophiles to different institutions to protect them and the Congregation from public scandal and legal action.

In the 1960s and during the same period that a Brother Dax was serially sexually abusing boys in Letterfrack, Mr. Albaric, a lay member of staff, was reported to have sexually abused several boys. Some older boys reported their concern to the Resident Manager who subsequently and without delay dismissed Albaric.

While excessive corporal punishments by lay staff attracted no response, the Congregation's response to sexual abuse by lay staff members and temporarily professed Brothers was significantly different. The quick and effective response when non-members of the Congregation committed crimes of sexual violence contrasted with the repeated transfer and cover-up of sex offenders who were professed clergy evidences a policy of protecting permanent members of the Congregation and the Congregation itself rather than an intentional policy to subject children to sexual abuse.

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203 Ryan Report, vol 1 § 8.329 (cited in note 10) ("In my opinion he is not suitable at all to handle young boys and it is positively dangerous, especially in these times, to have him looking after them."). The tacit approval in Letterfrack of extreme and excessive physical discipline leads to the conclusion that the Resident Manager is referring to sexual abuse.

204 Id § 8.330.

205 There is evidence that when sexual abuse was perpetrated by temporarily professed Brothers, such were not permitted to take permanent vows. Id § 7.315.

206 The case of Brother Dax is discussed in the section on Superior Responsibility. See Section VII.

207 The Commission queried why the Brother who first received the report left it to the boys to report the matter to the Resident Manager and considered that had the boys declined to do this Albaric would likely have abused more children. Ryan Report, vol 1 §§ 8.395–8.398 (cited in note 10).
I. Principal Perpetration: Commission Through Membership in a Joint Criminal Enterprise

The jurisprudence of the ad hoc Tribunals includes joint criminal enterprise as a mode of responsibility. The theory articulates principles of co-perpetration and has featured prominently and sometimes controversially in some judgments. Joint criminal enterprise was first described by the Tadic Appeal Chamber (although referred to as “common purpose doctrine”) and identified three categories of joint criminal enterprise in customary international law:

(i) the first or basic form includes cases in which co-perpetrators, acting according to a common purpose and sharing the same criminal intent, participate in the commission of an offense;
(ii) the second category or “systemic” cases is characterized by the existence of an “organized system of ill-treatment”;208
(iii) the third or extended form (and the most controversial) relates to cases in which co-perpetrators share a common criminal intention to commit particular criminal acts but one perpetrator commits additional acts that, although not specifically intended by other co-perpetrators, were a natural and foreseeable consequence of the joint criminal enterprise.209

Each of the above variations of joint criminal enterprise requires the existence of a plurality of persons who have agreed to commit an international crime and the material participation of members of the plurality.210 One of the difficulties and persistent criticisms of joint criminal enterprise as a theory of criminal liability is the difficulty in defining with precision the scope of culpable plurality. In the case of physical and sexual abuse at institutions operated by the Christian Brothers, it would be possible to define the small group of Brothers at a single institution as the plurality and examine whether there was an agreement between them to commit the criminal acts in that institution. It would also be possible to cast the plurality net to encompass senior leadership as well.

Certainly the long-standing, widespread, and collective perpetration of the criminal acts is similar to that sometimes found in joint criminal enterprise cases. The fact that children were legally and physically confined in the industrial schools denotes the essential characteristic of the second form of liability. The palpable foreseeability that a Brother known to have raped children would reoffend when transferred to another facility—his aberrations disguised—calls

209 Tadic Appeal Judgment, ¶ 204 et seq (cited in note 76). For example, participants in a criminal plan to forcibly displace people through ethnic cleansing may be liable if a participant in that plan commits a murder that was not originally envisaged because homicides are a natural and foreseeable consequence of a plan to engage in ethnic cleansing.
210 Tadic Appeal Judgment, ¶ 227 (cited in note 76).
to mind joint criminal enterprise’s third form. But the Ryan Report’s investigations, while comprehensive and careful, were not conducted with joint criminal enterprise in mind. To search for it among evidence sifted for another purpose would do both the theory and the Ryan Commission’s work a disservice. There is no evidence indicating the existence of an agreement to perpetrate crimes of sexual violence. In fact, with respect to sexual abuse, the evidence described in the Ryan Report suggests that it was the product of a willful disregard for the safety of vulnerable children and motivated by self-interest and self-preservation of the Congregation and its permanent members.

While it may be attractive to engage in analysis that seeks to establish by inference that such agreements must have existed, and certainly the long entrenched pattern of criminal conduct does beg the question, absent a more detailed examination of the “Rome files” or discovery of other documents indicating discussions between senior members, such analysis would largely be conjecture. Seeking to identify a joint criminal enterprise for the period described in the Ryan Report would also require an “intergenerational joint criminal enterprise”, straining the boundaries of a theory some scholars already believe to be vague and overbroad as well as the boundaries of judicious analysis.

J. Principal Perpetration: Ordering

In its simplest form, a person of authority who directs another to commit an offense is criminally responsible as a principal for that offense.\(^2\) An order does not need to be explicit\(^2\)\(^1\) and may be proved with circumstantial evidence.\(^2\)\(^1\)\(^2\)\(^1\) It does require a positive act.\(^2\)\(^1\)\(^3\) There is no requirement that there

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\(^2\) Boskoski Appeal Judgment, ¶ 160 (cited in note 151).

\(^1\) Prosecutor v Dragomir Milosevic, Case No IT-98-29/1-A, Judgment, ¶ 267 (Nov 12, 2009) (“Dragomir Milosevic Appeal Judgment”). As the Blaskic Appeal Chamber stated, “[A] person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order has the requisite mens rea for establishing liability.” Blaskic Appeal Judgment, ¶ 42 (cited in note 94). See also Galic Appeal Judgment, ¶¶ 152–57 (cited in note 159); Prosecutor v Kordic, Case No IT-95-14/2-A, Judgment, ¶ 30 (Dec 17, 2004) (“Kordic Appeal Judgment”); Ntag derwa Appeal Judgment, ¶ 482 (cited in note 158).


\(^3\) The Dragomir Milosevic Appeals Chamber stated, “That the actus reus of ordering cannot be established in the absence of a prior positive act because the very notion of ‘instructing’, pivotal to the understanding of the question of ‘ordering’, requires ‘a positive action by the person in a position of authority.” Dragomir Milosevic Appeal Judgment, ¶ 267 (cited in note 212), quoting Galic Appeal Judgment, ¶ 176 (cited in note 158). See also Nahimana Appeal Judgment, ¶ 481 (cited in note 94); Gacumbitsi Appeal Judgment, ¶ 182 (cited in note 94); Kamuhanda Appeal

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be a formal *de jure* superior/subordinate relationship to the direct perpetrator of the crime.\(^{215}\) All that is required is that the person giving the order has sufficient authority (*de jure* or *de facto*) to compel another to perpetrate a crime.\(^{216}\)

The Ryan Commission found that the Congregation had a policy of allowing Brothers to punish at their own discretion (consistent with the overall policy of exerting control through the use of excessive force). Evidence that a direct perpetrator of physical abuse acted upon the directives of a superior is infrequent. However, in 1940, Brother *Leveret* in a letter to the Provincial justified a particularly severe beating he administered saying:

> Since I came to this house I have never punished a single boy severely except on the one occasion when I was ordered to do so by my Superior. . . I explained the matter to [the Visitor] and he said that I did right in obeying my Superior.\(^{217}\)

In this particular instance, the Brother explained that he was ordered to administer an excessive punishment by his immediate superior and a senior member of the Provincial team affirmed that he was correct in obeying that order. To the extent that this order was a direction to inflict an excessive punishment constituting a crime, the Resident Manager would bear individual criminal responsibility for his acts.

**K. Principal Perpetration: Planning**

The objective element of planning requires that one or more persons designs the criminal conduct that is eventually perpetrated and that such planning substantially contributes to the commission of the crime.\(^{218}\) The subjective element requires at least "the awareness of the substantial likelihood that a crime will be committed in the execution of the acts or omissions planned."\(^{219}\)

\(^{215}\) Ryan Report, vol 1 § 8.65 (cited in note 10). Brother *Leveret* was referring to an incident in which he and another Brother horsewhipped several boys suspected of engaging in consensual sex. Id.

\(^{216}\) *Boshoski* Appeal Judgment, ¶ 164 (cited in note 151). See also *Nahimana* Appeal Judgment, ¶ 268 (cited in note 212). See also *Nahimana* Appeal Judgment, ¶ 479 (cited in note 94); *Kordic* Appeal Judgment, ¶ 26 (cited in note 211); *Boshoski* Appeal Judgment, ¶ 154 (cited in note 151).


\(^{218}\) *Semanza* Appeal Judgment, ¶ 361 (cited in note 94); *Nahimana* Appeal Judgment, ¶ 481 (cited in note 94).

\(^{219}\) *Boshoski* Appeal Judgment, ¶ 361 (cited in note 94); *Nahimana* Appeal Judgment, ¶ 29, 31 (cited in note 211). See also *Boshoski* Appeal Judgment, ¶ 66 (cited in note 151).
L. Principal Perpetration: Instigation

The Nahimana Appeal Chamber set out the definition of instigating:

The actus reus of "instigating" implies prompting another person to commit an offence. It is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused; it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime. The mens rea for this mode of responsibility is the intent to instigate another person to commit a crime or at a minimum the awareness of the substantial likelihood that a crime will be committed in the execution of the act or omission instigated.220

With regard to the requisite mens rea, as previously noted, the ICTY Appeals Chamber recently highlighted that for conduct to entail criminal liability, it must be possible for an individual to determine ex ante, based on the facts available to him, that the conduct is criminal.221

One former resident recalled being beaten for having a piece of bread and jam given to him by the wife of a staff member. In the beating that ensued he said that every Brother present punched him: "The old men were teaching the young men which was worse still when I think about it now."222

VII. INDIVIDUAL CRIMINAL RESPONSIBILITY OF AIDERS AND ABETTORS

A. Aiding and Abetting a Crime Through Positive Acts

Criminal responsibility for aiding and abetting is incurred when a person engages in acts or omissions "aimed specifically at assisting, furthering or lending moral support to the perpetration of a specific crime, and which substantially contributed to the perpetration of the crime."223 The acts which aid and abet the crime may occur before, during, or after the underlying crime.224 The aider and abettor must act in the knowledge that his acts assist in the commission of the crime by the principal. Although it is not necessary to know the precise criminal conduct the principal engaged in, the aider must be aware of

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220 Nahimana Appeal Judgment, ¶ 480 (cited in note 94) (footnotes omitted). The chamber went on to note that while the instigation must substantially contribute to the commission of a crime it need not be a sine qua non condition. Id.

221 Boskoski Appeal Judgment, ¶ 66 (cited in note 151).

222 Ryan Report, vol 1 § 7.264 (cited in note 10). The Report records how this man, so many years later became visibly upset by the unjust and excessive nature of this event.

223 Nahimana Appeal Judgment, ¶ 482 (cited in note 94).

224 Id.
its essential elements. 225 Given the ubiquity of physical abuse, it is perhaps not very useful to analyze the findings of the Ryan Commission for evidence of Brothers assisting other Brothers in perpetrating physical abuse against the children. There are, however, some notable cases such as one Brother holding a boy so another can beat him. 226

Providing Brothers with straps on an institutional basis also aided crimes of physical abuse. Brother Oliver was described by many former residents as one of the most brutal teachers in Artane. He made frequent use of the strap and had a reputation for punching boys in the jaw without warning. 227 On one occasion he scalded the hand of a boy who tried to excuse himself from sports because of a blister. On another occasion, he told a twelve year old boy who had soiled himself and inadvertently gotten excrement on Oliver’s shoes to lick them clean. 228 One witness told the Committee, “life with Br Oliver was one long beating.” 229

Brother Oliver appeared before the Committee and candidly acknowledged that many of the allegations were true—he was unable to recall some specific events but accepted that they occurred. 230 Oliver commented with respect to the universal issuance of leather straps:

The danger with that is this; that it could be used excessively... depending on the type of person you were. You could be somebody with a short fuse like myself, I have to admit I had the short fuse, and there would be times perhaps when... you would be inclined to use it [the leather strap]. 231

The Commission found that the fact that every brother in Artane was armed with a leather strap instead of limiting its use to a designated disciplinarian, as required, created conditions for excessive physical punishment. 232

With respect to sexual abuse, the Report’s findings raise concern that Brothers may have assisted direct perpetrators by providing them access to children under their supervision or acting as lookouts. Any criminal investigation

225 Id.
227 Id § 7.91.
228 Id §§ 7.105–7.109. The Ryan Commission was troubled by the contrast between Oliver’s unqualified apology to the person, who as a child, he made lick excrement off his shoes and the Congregation’s “exculpatory position” which sought to characterize the deplorable event in a manner designed to minimize embarrassment for the Christian Brothers.
229 Id § 7.92.
230 “I cannot remember any specific case... but I am not denying that such a thing could have happened.” Testimony of Brother Oliver in Ryan Report, vol 1 § 7.91 (cited in note 10).
231 Id § 7.89.
232 Id § 7.79.
would necessarily include an examination of such conduct which may have substantially contributed to crimes. Understandably, the Ryan Commission focused on the direct perpetrators and the Commission’s findings with respect to aiders and abettors are insufficiently detailed to draw any comprehensive conclusions.

B. Aiding and Abetting a Crime Through Culpable Omissions

Even absent a positive act, a person may be convicted for aiding and abetting a crime when, given his position, his inaction constituted tacit approval and encouragement which substantially contributed to the crime. In the Hadzibasanoovic case, the Appeal Chamber stressed “that a superior’s failure to punish a crime of which he has actual knowledge is likely to be understood by his subordinates at least as acceptance, if not encouragement, of such conduct with the effect of increasing the risk of new crimes being committed.” Unlike the omissions of a direct perpetrator, whose failure to fulfill a legal duty incurs liability as a direct perpetrator, there is no requirement that the aider and abettor fail some legal obligation. Other forms of inaction, such as failure to admonish subordinates or enforce internal rules can also encourage direct perpetrators and form the basis of liability. With respect to Brother Oliver above, there is no record of any disciplinary action being taken against him during his long career of physical abuse. He testified that he could not recall any applicable law and rules governing corporal punishment being brought to his attention and had never seen the legally required punishment book.

The failure of senior managers to curb abusive physical punishments constitutes aiding and abetting only if such failure was intended to encourage or

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233 See Brdjanin Appeal Judgment, ¶ 273 (cited in note 159); Prosecutor v Aleksovski, Case No IT-95-14/1-T, Judgment, ¶ 87 (June 25, 1999) (“Aleksovski Trial Judgment”); Akayesu Trial Judgment, ¶ 706 (cited in note 127). As the Kayishema case points out “individual responsibility . . . is based, in this instance, not on a duty to act, but from the encouragement and support that might be afforded to the principals of the crime from such an omission.” Kayishema Trial Judgment, ¶ 202 (cited in note 79), upheld, Kayishema Appeal Judgment, ¶¶ 201–02 (cited in note 153). This principle is reflected in Article 25(3)(b) of the ICC Statute.


235 The Appeals Chamber in Brdjanin distinguished between: (a) aiding and abetting by tacit approval and encouragement and (b) aiding and abetting by omission proper. With respect to tacit approval there is no requirement or legal duty to act. The Appeal Chamber stated that this form of liability is not, strictly speaking, criminal responsibility for omission, but for encouragement and support afforded the principals by the aider and abettor’s non-intervention. Brdjanin Appeal Judgment, ¶ 273 (cited in note 158).
provide moral support to principals of the underlying crimes.\textsuperscript{236} Under ICTR and ICTY jurisprudence, the aider and abettor must know that his omission is providing material assistance to the principal and must be aware of that crime.\textsuperscript{237} The Ryan Commission’s findings make clear that the environment of unaccountability established by the Congregation’s leadership was intended to allow individual Brothers to punish indiscriminately, excessively, and in contravention of applicable law and regulations. This environment, permeated with unaccountability, encouraged rather than discouraged the crimes against children.

The encouraging effect of the Congregation’s failure to reign in excesses is demonstrated by the testimony of a Brother who said he felt he could punish more severely in an industrial school than in a national school with active parental involvement.\textsuperscript{238} The opportunity was greater precisely because of the failure of senior managers to monitor and question the use of excessive corporal punishment as a parent might.

The absence of a requirement that injuries be investigated and reported to parents and the Department of Education suggests a policy of concealing such information.\textsuperscript{239} The policy of not enforcing applicable rules to maintain the punishment book and concealing violations empowered chronic abusers whose only self-restraint may have been a fear of repercussions.\textsuperscript{240}

\begin{footnotesize}
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\item See, for example, \textit{Prosecutor v Seromba}, Case No ICTR-2001-66-A, Judgment, ¶ 56,(Mar 12, 2008) (“Seromba Appeal Judgment”); \textit{Nahimana Appeal Judgment}, ¶ 482 (cited in note 94); \textit{Prosecutor v Blagjevec}, Case No IT-02-60-A, Judgment, ¶ 127 (May 9, 2007) (“Blagjevec Appeal Judgment”). See also Simić Appeal Judgment, ¶ 86 (cited in note 235); \textit{Prosecutor v Aleksovski}, Case No IT-95-14/1-A, Judgment, ¶ 87 (Mar 24, 2000) (“Aleksovski Trial Judgment”). Note that it is not necessary that the aider intended the underlying the crime—it is sufficient that he simply intended to assist the direct perpetrator.
\item Ryan Report, vol 1 § 8.178 (cited in note 10)(referring to the testimony of Brother Anatol).
\item Id § 7.137. See also id § 7.218. Twenty-six Brothers who had served in Artane gave evidence regarding their perception of why there was excessive physical punishment. Their testimony included in part: (a) the fact that they were all issued leather straps; (b) they were given authority to administer punishment for minor offenses without ever being told in clear terms how to differentiate between minor and major offenses; and (c) the immaturity, overwork and lack of proper supervision. Id.
\item Ryan Report, vol 1 § 7.232 (cited in note 10) (“The reluctance of the school to properly investigate and deal with any allegations of physical abuse, or even report the injury of pupils to parents or the Dept. of Education, ensured that such a system would persist”).
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Unlike the disparity between the Congregation’s response to sex abuse by permanently professed Brothers and lay employees, there was no difference in response to physical abuse, and physical abuse by lay staff was tolerated. A record from a manager’s diary recorded the case of a boy who was injured seriously enough to require hospital treatment. There is no record of any disciplinary action against that employee. It is reasonable to infer that the lack of oversight had the same encouraging effect on lay staff members as it had on Brothers.

The case of Brother Platt was the earliest recorded case of sexual abuse in the Christian Brothers’ records. Platt was in charge of the infirmary in Artane and admitted sexually abusing children to his Superior. The Superior referred the case to the Provincial Council, which in turn informed the General Council. Platt was given one day to apply for a dispensation; when he refused, the Council considered whether to expel him—the Council voted unanimously to retain him in the Congregation. Platt was transferred to another industrial school where he served for seven more years.

In the case of Brother Herve, his sexual abuse of children was known beyond the walls of Artane. One boy’s mother demanded an investigation into Herve’s conduct. When Herve was questioned by a Brother assigned to investigate, he “admitted that the charges were substantially true. He did kiss and fondle boys, but always (a) openly, (b) when others were present, and never in a gross manner.” There is no record of any disciplinary action taken against him. Herve’s perception that he could openly engage in such conduct with a child demonstrates the encouraging impact of his superiors’ inaction.

While sexual abuse was not the subject of a policy in the way physical abuse was, the failure of management to deal appropriately with known cases of rape and sexual misconduct likely encouraged the perpetrators, emboldening them with confidence that they could reoffend with impunity. Moving known serial offenders to other institutions where they would have access to children while intentionally covering up their known criminal propensities disarmed the staff and children in those institutions of their only available defense and facilitated further crimes. Similarly, those contemplating their first offense would have been encouraged by the lack of any response to crimes by their colleagues.

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242 Id § 7.328. The Ryan Commission stated that “[t]his case shows that the Congregation knew, as early as 1932, of the recidivist nature of these offenders. His [Superior General’s] description as a ‘danger’ and a ‘risk’ to the Congregation illustrates a clear understanding of this man’s propensity to re-offend.”
243 Id § 7.327.
244 Id § 7.335.
VIII. INDIVIDUAL CRIMINAL RESPONSIBILITY OF SUPERIORS

“Superior responsibility” as a mode of criminal liability holds a superior liable for the superior’s culpable failure to take reasonable steps to prevent or punish international crimes of those under his control. This liability is rooted in customary international law and arises from a superior’s grant of authority. A superior may incur criminal responsibility for the criminal acts of a subordinate if the following elements are established:

(i) the existence of a superior-subordinate relationship between the two;
(ii) the superior knew or had reason to know his subordinate committed a crime or was about to do so; and
(iii) the superior failed to take necessary and reasonable measures to prevent or punish the subordinate’s crime.

A superior can incur criminal liability for the crimes of a subordinate no matter what mode of participation forms the basis of the subordinate’s liability. This liability includes aiding and abetting. Although such superior liability is often considered in the context of a military command structure, its principles are equally applicable to civilians. “What determines the boundaries of applicability of the doctrine of superior responsibility is not the nature of the role or function (for example, military, civilian or other) played by an individual, but the degree of authority that he is capable of exercising over others.”

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245 For a detailed discussion of this mode of liability, see Mettraux, Command Responsibility at 38 (cited in note 151):

[The most recent and most persuasive jurisprudential pronouncements have characterized this doctrine as a sui generis form of liability for culpable omission. According to this view, a superior may be held criminally responsible, not for his part in the commission of crimes by his subordinates, but because of a personal and culpable failure on his part to adopt necessary and reasonable measures to prevent or punish those crimes.]


249 Nahimana Appeal Judgment, ¶ 605 (cited in note 94).

250 Mettraux, Command Responsibility at 102 (cited in note 151). Mettraux goes on to suggest that the doctrine may also apply “in the context of the activities of private military/security firms.” Id at 103.
A. Did a Superior/Subordinate Relationship Exist Between the Christian Brothers’ Management and the Brothers?

Under the Congregation’s management structure, each industrial school was run by a local community of Brothers headed by a “Superior.” This Superior was appointed by a Provincial who sat on a Provincial Council who in turn was appointed by the Congregation’s General Council. This hierarchical structure included a number of functionaries who could be properly characterized as “superiors” of a Brother interacting directly with the children. If the organizational structure of the Congregation placed a particular brother under the authority of more than one superior, the doctrine of superior responsibility would apply to each of them.

Each of the industrial schools managed by the Congregation was run on a day-to-day basis by the local religious community. The local superior’s dual role as leader of a religious community and the manager of its childcare facility created fundamental problems in the oversight of the institution’s work. His important responsibilities for the welfare of both the children and Brothers in the institution inevitably came into conflict whenever a Brother engaged in misconduct. Canon law required oversight of local superiors through yearly “visitations” by members of the Provincial Council. These regular visits assessed whether the local community was in conformity with the Congregation’s rules. The Visitor also inspected the finances and physical premises and, although the primary task was to assess, the Visitor was required to take action upon encountering “anything of a serious nature . . . opposed to the religious spirit.”

Discovery of problems precipitated a series of reports and

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252 “If a superior is proven to have possessed the effective control to prevent or punish relevant crimes, his or her own individual criminal responsibility is not excluded by the concurrent responsibility of other superiors.” Prosecutor v Oric, Case No IT-03-68-T, Judgment, ¶ 313 (June 30, 2006) (“Oric Trial Judgment”). It is also important to note that there is no requirement that there be a direct supervisory relationship between the perpetrator and the superior. It is possible for a superior to bear responsibility for the criminal acts of a subordinate even if such supervisory authority passes through other levels authority down to the direct perpetrator. See, for example, Prosecutor v Delalic, Case No IT-96-21-A, Judgment, ¶ 303 (Feb 20, 2001) (“Delalic Appeal Judgment” also referred to as “Celebici case”); Nabimana Appeal Judgment, ¶ 785 (cited in note 93); Limaj Trial Judgment, ¶ 522 (cited in note 213).
254 Id § 6.53.
255 Id. Brothers in the community were permitted to address problems directly with the Visitor thereby circumventing the regular reporting mechanism through the local superior.

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letters designed to bring problems to the attention of the Congregation’s most
senior leaders.256

Communities were given two months to remedy “serious irregularities”
and follow-up reports were sent to the Provincial or Superior General informing
him about the continued existence of serious problems—these were in turn
shared with members of the Provincial and General Councils.257 The Ryan
Commission commented on the frank and sometimes severe criticism contained
in these reports.258 A number of cases of alleged sexual abuse were reported to
senior members of the Congregation in these reports.259

The Investigation Committee found that the problems clearly identified in
the visitation reports of institutions were most often not addressed
by the Provincial. The Committee noted the conspicuous absence of any mention of
serious problems in letters sent by the Superior Provincial to Resident
Managers:260

[T]he Provincial authorities remained inactive in cases where they and the
Visitor were united in their criticisms of a particular staff member. The
records of the Congregation do not disclose any instance when a Superior/
Resident Manager was removed from his post for failing in his duties.261

The Appeals Chamber in the Čelebiči case emphasized that ‘effective
control’ is the determinative standard for cases involving both de jure and de facto
superiors of the direct perpetrator.262 It is possible that despite having de jure

256 The Visitor sent a written report to the Provincial Counsel with a copy sent to the Superior
General of the congregation. Id § 6.52.
258 Id § 6.58. The Investigation Committee considered these visitation reports to be “the single most
valuable source of documentary evidence” regarding conditions within institutions operated by
the Christian Brothers. The Committee found that these reports were in fact more critical than
the Department of Education’s own annual evaluation of the schools, reports that were
specifically focused on the conditions of the school and the care of the children. The Committee
found significant inconsistency in the rigor of the Christian Brother reporting mechanism noting
that reports written only months apart sometimes painted dramatically different pictures of the
conditions of an institution. See id §§ 6.59–6.61.
259 Id § 6.57.
261 Id § 6.63.
262 Delalic (Čelebiči) Appeal Judgment, ¶ 196 (cited in note 252); See also id ¶ 256 (“The concept of
effective control over a subordinate—in the sense of a material ability to prevent or punish criminal
conduct, however that control is exercised—is the threshold to be reached in establishing a
superior-subordinate relationship.”). See also Hailovic Appeal Judgment, ¶ 59 (cited in note 246).
There is no requirement that any de jure superior relationship exist. Nahimana Appeal Judgment, ¶
625 (cited in note 94).
authority over a direct perpetrator, a “superior” may lack effective control.\(^{263}\) Effective control established the minimum threshold of actual authority a superior must have to be held criminally responsible for the crimes of a subordinate. “Concretely, ‘effective control’ is the power to effect, not any result in relation to any matter, but the power and ability to take effective steps to prevent and punish crimes which others have committed or are about to commit.”\(^{264}\)

The vow of obedience for all religious congregations is an important part of the hierarchical structure. The effective control of a religious superior is rooted in the vow of obedience each novice takes. While this vow can be likened to military obedience, it had a degree of sanctity in that religious superiors were considered “representatives of Jesus Christ.”\(^{265}\) Each Brother was expected to follow the orders of their superiors without equivocation.\(^{266}\) Disobedient Brothers were subjected to humiliating punishments and disciplinary procedures under Canon law. The importance of this vow was reinforced by issuing seemingly pointless instructions.\(^{267}\) Evidently important to any finding that the Provincial and General Councils had effective control are examples of their ability to impose their will on subordinates in matters unrelated to the crimes. The removal and transfer of staff to meet administrative needs, the ability to set a budget and direct its implementation, the ability to accept or reject new members as well as dismiss current members of the Congregation would all be indicia of the effective control possessed by the management team of the Congregation.\(^{268}\)

\(^{263}\) For example, in the Blagojevic case, the Trial Chamber found that Vidoje Blagojevic had command and control over all units of the Bratunac Brigade, some of which participated in the Srebrenica massacre. Despite this, the chamber found that based on evidence of actual events, Blagojevic lacked effective control over Momir Nikolic. *Prosecutor v Blagojevic*, Case No IT-02-60-T, Trial Judgment, ¶ 795 (Jan 17, 2005). The Appeal Chamber did not find this conclusion to be irreconcilable. See *Blagojevic Appeal Judgment*, ¶ 302 (cited in note 247). Similarly in the Halilovic case, the Appeals Chamber found that “de jure power is not synonymous with effective control” and that the existence of de jure authority is not dispositive of the issue of whether a defendant had effective control. *Halilovic Appeal Judgment*, ¶ 85 (cited in note 246).


\(^{265}\) Ryan Report, vol 1 § 6.97 (cited in note 10) (citing Const 97 of the 1923 Constitution). A former Brother described this principle as “an internal resignation of your will to the will of your Superior. The most important thing about obedience was not what you did but how you thought.” See Ryan Report, vol 1 § 6.99 (cited in note 10).

\(^{266}\) One Brother recounted spending a week moving heavy stones across the yard only to be instructed to move them back the following week. Id § 6.100.

\(^{267}\) Id §§ 6.100–6.101.

\(^{268}\) For an enumerated list of indicia found relevant by courts, see Mettraux, *Command Responsibility* at 164–70 (cited in note 151).
In the case of a temporarily professed Brother (Brothers could not become permanent members until twenty-five) such a Brother could be dismissed by denying him the opportunity to take final vows—this was done in a number of cases. Once a Christian Brother took permanent (perpetual) vows, his service could be terminated only by his application for a dispensation from his vows or a decree of dismissal.

There were two methods of dismissal depending upon the offense. “Immediate” dismissal could be employed in a case of “grave external scandal.” Superiors had de jure authority to immediately dismiss a Brother for serious offenses. In cases of “grave external scandal” or of imminent and serious injury to the community, the Provincial, with the consent of the Provincial Council, could issue a decree of dismissal with immediate effect. The case was then referred to the Holy See for final determination.

In other cases involving an “external grave delict,” a more protracted procedure was employed. In such cases, a three-stage process was followed. Prior to dismissal, two formal warnings were administered. These formal admonitions, known as “canonical warnings,” were administered by the offender’s major superior. The first was a call to cease prohibited activity. The second was administered upon repetition of the offense and involved notice of possible dismissal. Under Canon Law, superiors were required to take remedial measures to remove the offender “from the occasion of relapse even by transfer if it is necessary to another house where vigilance is easier and the occasion of delinquency is more remote.”

Upon a third occurrence, the case was forwarded to the Superior General and General Council for a determination on whether dismissal was warranted. The accused was given an opportunity to defend himself before the General Council voted. A vote to dismiss was followed by a formal decree sent to the Holy See which the offender could appeal. If the Vatican confirmed the dismissal, the accused was required to apply for a dispensation from his vows.

This procedure was implemented in the case of Brother Marceau, but it still did not result in his dismissal. Many questioned his intelligence, judgment, and mental ability. His extreme acts of physical violence did not diminish after

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270 Id § 6.81. In cases in which this procedure would cause a harmful delay a local superior could issue the decree of dismissal with the consent of the Council and the local bishop. Id.
271 The case of Brother Plott appears to have followed this procedure although he was not ultimately dismissed. See id § 7.328.
272 Id § 6.79.
274 Id §§ 6.79–6.81.
repeated admonitions. The mother and physician of an eight year old complained of a beating he administered to the boy. The General Council issued Marceau a formal canonical warning. After this Canonical warning, he continued to re-offend. On one occasion he pulled a patch of hair out of a young boy’s head and broke another’s jaw with a punch. Despite these events and the continued concern of his colleagues and immediate superior, the Council failed to implement the final step and dismiss him.275

B. Did the Christian Brothers’ Management Know or Have Reason to Know of the Criminal Conduct of Their Subordinates?

For a superior to incur criminal responsibility it must be shown that he knew or should have known about the criminal conduct of subordinates. Knowledge of prior misconduct of a subordinate may, in some cases, serve to place a superior on notice that the subordate requires closer monitoring or additional inquiry.276 A court will assess, in light of the circumstances of each case, whether a superior had information that was sufficiently alarming to invoke responsibility as a superior.277 The Nahimana Appeal Chamber stated that:

The “reason to know” standard is met when the accused had “some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates”; such information need not provide specific details of the unlawful acts committed or about to be committed by his subordinates.278

The Commission found that rigorous observance of the vow of obedience in many cases inhibited Brothers from reporting criminal conduct to anyone other than their immediate superior. If the superior was involved or was considered hostile to such reports, it is likely that this resulted in the underreporting of sexual misconduct.279 Despite this, visitation reports proved to contain a large number of references to sexual abuse. Other documentary evidence discovered in Rome also established senior management’s awareness of numerous cases of sexual abuse.

275 Id §§ 9.46–9.105. Marceau appeared before the Investigation Committee and professed being humane in his treatment of the children although admitting to using the lamb laidir (strong hand).

276 Hadžibazanović Appeal Judgment, ¶ 30 (cited in note 233) (“Such failure is indeed relevant to the determination of whether, in the circumstances of a case, a superior possessed information that was sufficiently alarming to put him on notice of the risk that similar crimes might subsequently be carried out by subordinates and justify further inquiry[.]”).

277 Id ¶ 31. See also id ¶¶ 267–68.


279 Ryan Report, vol 1 § 6.98 (cited in note 10). See also id § 6.123.
In the early 1960s, the headquarters of the Christian Brothers was moved from Dublin to Rome. In 2003, the Congregation engaged an archivist to examine documents in its possession for references to abuse; this examination included files moved from Dublin in the 1960s. In Rome, the archivist discovered books containing the minutes of the Provincial and General Council. These included numerous references to sexual abuse occurring after 1930. Brother Gibson, who gave evidence before the Investigation Committee, acknowledged that these records demonstrated "there had been information [of sexual abuse] given to the Leadership Team at the time when they occurred." In some cases, the "Rome Files" recounted investigations that included written statements by victims. Brother Gibson acknowledged that the leadership team was aware of eleven cases of sexual abuse in Artane shortly after they occurred. The Investigation Committee reviewed these files and found references to disciplinary hearings and dispensations with respect to more than 130 brothers. In at least forty instances, there were specific references to "improper conduct with boys."

C. Did the Christian Brothers Take Reasonable Measures to Prevent or Punish the Crimes Committed by Their Subordinates?

Once a superior is aware that a crime has occurred or is being planned, he has a duty to take reasonable measures to punish or prevent its commission. The assessment of whether a superior discharged his legal obligation to take "necessary and reasonable" measures to prevent or punish criminal conduct of subordinates depends on the circumstances of the individual case. A superior may discharge this duty "by reporting the matter to the competent authorities." Here, the Appeal Chamber makes clear that such discharges the legal duty of the superior, "provided that this report is likely to trigger an investigation or initiate disciplinary or criminal proceedings." Whether or not a particular report is sufficient to discharge the superior's duty depends upon the circumstances of each case. A Resident Manager, for

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280 Id § 6.162.
281 Id.
282 See Ryan Report, vol 1 § 6.165 (cited in note 10). The Commission noted that in the majority of cases the references to actual crime investigated were obtuse referring to abusive conduct as "evidenced unsuitable moral character"; "grave misconduct" or "caused scandal."
284 Id ¶ 154 (cited in note 233); Besharki Appeal Judgment, ¶¶ 230–31 (cited in note 151). Here, the Appeal Chamber makes clear that such discharges the legal duty of the superior, "provided that this report is likely to trigger an investigation or initiate disciplinary or criminal proceedings." Id ¶ 231. Whether or not a particular report is sufficient to discharge the superior's duty depends upon the circumstances of each case. Id ¶ 234 (cited in note 151).
285 Hadzibasanovic Appeal Judgment, ¶ 142 (cited in note 233). There was evidence that senior leadership of the congregation understood the criminal nature of both sexual abuse and physical
example, may discharge his legal obligation as a superior by immediately suspending the offender, thereby denying him access to potential victims (measures to prevent) and informing senior management of completed acts of misconduct (measures to punish). Reasonable measures would also include reporting completed criminal acts to the civil authorities. The failure to prevent and the failure to punish are legally and factually distinct, and a superior may be obliged to make efforts in both regards given the circumstances of a particular case.286

Brother Dax currently stands convicted of sexually abusing twenty-five former pupils over fourteen years.287 Some victims gave evidence before the Investigation Committee; he also testified.288 Dax worked in childcare institutions operated by the Christian Brothers from the late 1950s to the mid 1970, including two periods in Letterfrack. Dax accepted that throughout his career he had serially sexually abused boys.289

By his own admission, Dax began sexually abusing boys six months after arriving at Letterfrack. In his own words, it started “with immodest touching and eventually leading to buggery.”290 He abused the same children regularly and sexually abused several children at the same time—often not stopping until a boy left school. He acknowledged raping some boys once or twice a week over a

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286 As the Hadžibasanovic Appeal Chamber stated:

The failure to prevent and the failure to punish are not only legally distinct, but are factually distinct in terms of the type of knowledge that is involved for each basis of superior responsibility. The duty to prevent arises for a superior from the moment he knows or has reason to know that a crime is about to be committed, while the duty to punish only arises after the commission of the crime. Thus, knowledge which is relevant to a superior's duty to punish may or may not be relevant to his duty to prevent depending on when the superior acquired actual knowledge or had reason to know about it.

Hadžibasanovic Appeal Judgment, ¶ 260 (cited in note 233) (footnotes omitted). See also Limaj Trial Judgment, ¶ 527 (cited in note 212) (“The duty to prevent arises from the time a superior acquires knowledge, or has reasons to know that a crime is being or is about to be committed, while the duty to punish arises after the superior acquires knowledge of the commission of the crime.”)


288 Id §§ 8.334–8.335.

289 Id § 8.337 (reporting Dax claimed that he refrained during a two year period during which his priest confessor was able to persuade him of the sinfulness of his acts—he resumed when that priest was transferred).

290 Id § 8.338. He admitted to the Committee that he raped and fondled boys. He asked to reserve his position with respect to masturbation and oral sex. Id § 8.340.

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prolonged period. He threatened them to secure their silence and detained boys who were upset and cried after being raped. Some of former residents Dax admitted raping gave evidence, “[M]y introduction to sex was in the back kitchen of Letterfrack, jammed up against a boiler, getting my leg burnt and getting raped by Brother Dax.” This witness recalled that after the first time he was raped he sobbed uncontrollably in front of the Resident Manager of the school. After years of reflection, this witness could not accept that this Brother did not know what Dax was doing given his emotional state that night and the public preferential treatment he received from Dax thereafter. Several other victims also testified; while Dax accepted that their accounts were probably true, he could not recall the specific incidents or boys. Dax maintained that no one ever spoke to him about his conduct.

For Congregation superiors to be criminally responsible for the acts of Dax it would have to be established that any failure on the part of superiors to be aware of his conduct was not the product of simple negligence but was the direct result of reckless or criminal negligence. The My Lai Massacre case established a standard similar to that used by the ad hoc tribunals. The failure of a commander to discharge his duty of due care that a reasonably prudent commander would have under similar circumstances is simple negligence and

291 Ryan Report, vol 1 § 8.341 (cited in note 10). When asked how he selected boys for abuse he was unable to say there was any other reason other than convenience— he simply abused the boys he had regular contact with working in the kitchen. Id § 8.342.

292 Id § 8.344.

293 Id § 8.354.

294 Id § 8.355. The witness recognized the preferential treatment that several other boys received as a clear indication that Dax was abusing them as well. When challenged by the Congregation’s lawyer on cross examination the witness said:

To say that they didn’t know would be to say that the sun doesn’t shine tomorrow because in a school like that, there is 120 boys, they all know what is going on. Everyone knew what was going on, there were very few that didn’t know, the only thing was we didn’t speak about it because we were ashamed of it . . . Brother Guillame [the superior and Resident Manager] didn’t know? I sat down and sobbed my heart out, that man knew and he never answered . . . Some of them were doing it, some of them were covering it . . . The ones that were covering are twice as guilty as the ones that didn’t because they could have stopped it.


295 Id §§ 8.359–8.370.

296 Id § 8.346.

297 Id § 8.390.

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insufficient to incur criminal responsibility. Recklessness or criminal negligence requires that such failure by the commander occur with the knowledge of, and conscious disregard for, the foreseeable consequences of that failure.\textsuperscript{299} For Dax's superiors to bear responsibility for his crimes, it would have to be established not only that his superiors failed to take action where a prudent superior would have, but also that such failure was the result of a wanton disregard for the foreseeable possibility that he would reoffend.\textsuperscript{300}

One of the most striking findings the Commission made was the different course of action the Congregation took depending upon whether the allegation of sexual abuse was made against a member of the Congregation or a lay person associated with the school. While sexual abuse by Brothers was considered a spiritual failing requiring guidance, lay staff or associates of the school who were similarly alleged to have acted improperly were reported by the Christian Brothers to the police.\textsuperscript{301}

A former Artane student provided an account that, while on an outing to a sports stadium, he was sexually assaulted by a man who was a former resident. When the man appeared at the school the following Sunday and requested to take the boy out for a visit, the boy broke down and told a Brother what had happened—"Before I was finished the conversation, the police were outside and

\textsuperscript{299} Id.

\textsuperscript{300} In Dax’s case many of his crimes occurred after he left the congregation and during a period when Christian Brother managers no longer had effective control over him. Ryan Report, vol 1 § 8.266 (cited in note 10).

\textsuperscript{301} Id § 7.320. This disparate treatment belies the Congregation’s explanation that its failure to view sexual abuse as a criminal matter to be reported to the police reflected a general societal disposition toward not reporting such matter. Some prominent leaders of the Catholic Church have begun to recognize the pervasive and consistent practice of covering up such crimes were at least in part the result of a clerical culture which sought to protect the church and individual priests. See, for example, Archbishop Mark Coleridge, \textit{Seeing the Faces, Hearing the Voices: A Pentecost Letter on Sexual Abuse of the Young in the Catholic Church} (May 23, 2010), online at http://www.cg.catholic.org.au/about/default.cfm?loadref=86 (visited Sept 18, 2010). Archbishop Coleridge considers the widespread nature of concealing this abuse and sets out a number of factors which, “may have combined to make the problem cultural rather than merely personal.” Id. These factors include: (a) a poor understanding of and poor communication about sexuality, (b) celibacy may have attracted men with pedophile tendencies, (c) seminary formation was not coupled with principles of life-long formation and latent tendencies may have only manifested later in life, (d) clericalism as a hierarchy of power instead of one of service, (e) institutional pride, (f) culture of forgiveness which failed to recognize the independent requirements of crime and punishment, (g) culture of discretion—the principle of confidentiality of the confessional permeates other aspects of church life in the form of discretion, and (h) underestimating the lack of control pedophiles may have had over their own conduct and intervening to prevent it, something he describes as a “supra-personal power” of evil. Id. See also Tom Roberts, \textit{Some Bishops Questioning Clerical Culture}, Natl Catholic Rptr 1 (Aug 20, 2010).
took the man away.”302 In another case, a boy alleged that a man who volunteered to assist with driving the boys on outings had molested him. The matter was immediately reported to the police (the boy also received “an awful hiding”).303

In light of the Congregation’s inability to explain the disparity in how these situations were dealt with, the Commission concluded:

These cases undermine the position adopted by the Congregation in relation to sexual abuse, namely that it was seen as a moral failing rather than criminal behaviour on the part of the Brother and was dealt with as such. No ambiguity existed in the case of lay offenders…. The Congregation was aware of the criminal nature of this conduct and took swift and effective action, which makes its failure to do so in the case of its own brethren all the more difficult to excuse.304

Some individual Brothers did take steps to address the problem of sexual abuse of children. In a Visitation Report from 1944, the Visitor referred to the dismissal of several Brothers and took the view: “In our institutions it should be considered a very grave offence for a Br. to take a boy to his room on any pretext, or to be seen alone with a boy on any occasion.”305 This Visitor went on to say that boys should have ready access to the Superior in order to report such abuse.306 Unfortunately, these interventions were infrequent and rarely resulted in decisive corrective action.

In cases where the Congregation felt compelled to act, it was done in a way that protected the abuser from prosecution and facilitated future crimes. The Report recounts the case of Brother Ricard whose “sordid and immoral” letter to a secondary student prompted an investigation that revealed a history of sexual abuse. He admitted the abuse when called before the General Council. Both the Provincial and General Councils considered his conduct to be the most egregious they had encountered and voted unanimously to dismiss him (he was

303 Id §§ 7.483–7.486.
304 Id § 7.492.
305 Id § 7.364. Later in the report the Visitor emphatically writes:

No Brother—young or old—is to allow a boy to enter his bedroom, nor is any Brother allowed to take a boy from the school, shops or parade. No Brother is to be alone with a boy anywhere. Any Br. who sees this Rule violated is to report it immediately to the Br. Superior.

Id § 7.367. This Visitor went on to recommend the installation of glass panels in locked doors near the kitchen and store-rooms—a recommendation which was never implemented. See Ryan Report, vol 1, § 7.368 (cited in note 10). Unfortunately, the prohibition about being alone with a boy was never rigidly enforced. Id § 7.518.

306 Id § 7.366. The Visitor went on to say that had the boys been able to report the sexual abuse, “the disturbing conduct experienced lately would have been avoided.” Id.
ultimately assisted in requesting a dispensation which would not refer to his
offenses). The day after the vote to dismiss Ricard, the Brother Procurator
General wrote a letter, which among other things stated:

We fear that the evil ways into which he had fallen may be of some years duration.
He leaves immediately for England (on leave of absence). Were he to remain in
Ireland and were the parents of the boys to get to know of his behaviour at [the
Christian Brothers' College] there would be a great danger of public prosecution.\(^{307}\)

Although Ricard's request for a letter of reference was denied, he was able
to return to Ireland less than a year later and secured a series of positions in
education until his retirement in the late 1980s.\(^{308}\) The example of Ricard
illustrates how transferring a known perpetrator is a criminal act not only for
failure to punish a completed criminal act but also as an act of complicity with
future crimes by encouraging the perpetrator by assuring unaccountability.

In those instances where the Congregation's management did take action,
Brothers were expelled from the Congregation in several ways. Brothers who
had yet to take final vows were refused permission to do so.\(^{309}\) Those under
perpetual vows were given an opportunity to seek a dispensation in advance of a
determination to seek their expulsion formally.

In summarizing its findings, the Ryan Commission found that for more
than half of the thirty-three years examined, there was at least one known
pedophile active in Artane and during some periods several. The Commission
found that during a year-long period in the 1940s, there were seven Brothers
perpetrating sexual abuse against the boys in the school.\(^{310}\) The Commission
found that the predominant consideration in dealing with sexual abuse was to
protect the institution from the perceived harm that would result if the
allegations became public. In an effort to prevent public disclosure of such
abuse the Congregation failed to investigate credible allegations and failed to
report them to the Department of Education or the police. The Commission

\(^{307}\) Id § 7.390 (emphasis added).
\(^{309}\) See, for example, id § 7.363.
\(^{310}\) The Commission noted that these were conservative estimates recognizing that a number of
factors resulted in significant underreporting including the following: (a) a lack of communication
between the boys and Artane's management; (b) boys were sometimes punished for reporting
such abuse; (c) a policy was established that reports were to be made to the Resident Manager
directly eliminating the chaplain, a person trusted by the boys, as a source of information; and (d)
in cases of admitted or documented abuse, there was often a notable lack of victims before the
Commission leading it to conclude that despite its announcements to victims, many had decided
not to provide information about abuse they suffered. Id §§ 7.548, 7.549.
found that this “policy facilitated further abuse when offenders were transferred within the Congregation or permitted to leave in good standing.”

With respect to the abusive physical practices, the few recorded accounts of action appear motivated by concern for the school’s reputation and not the welfare of the children.

**IX. CONCLUSION**

The epidemic of shocking crimes committed by clergy and professed religious officials in recent years shocks the conscience and invites us to reconsider the conventional interpretations of the definition of crimes against humanity. The context of the crimes, the perpetrator types, as well as the mens rea underlying the crimes all challenge current conceptions about what constitutes a crime against humanity. The Ryan Commission, in its careful detailed work investigating the abuse of children in Irish childcare facilities, provides a reliable factual basis for considering the applicability of crimes against humanity to such acts.

While many of the acts described in the Ryan Report are undoubtedly criminal, their status as crimes against humanity calls for a re-examination of what constitutes an attack directed at a civilian population. Can a non-state organization commit such crimes? Can such an organization commit such a crime through unintentional but reckless conduct?

This paper focused on the Ryan Commission’s investigation into the Christian Brothers, a religious congregation that operated many of Ireland’s industrial schools for children and the subject of the most complaints of physical and sexual abuse. The Ryan Commission found that the excessive corporal punishment, in violation of applicable Irish law, was used to maintain control in the industrial schools operated by the Christian Brothers. To the extent that physical violence was used as part of a widespread or systematic attack directed at children placed in the care of Christian Brothers, such acts of violence constitute crimes against humanity. With respect to sexual crimes, the answer is less clear, as unlike physical violence, the Ryan Commission did not find that sexual crimes were the product of a policy or were tolerated in all cases. Instead, the Ryan Commission found that such crimes were systematically covered up and perpetrators who were also permanently professed members of the Congregation were recklessly allowed continued access to children in order to

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311 Id § 7.845 ¶ 3.
312 See, for example, Ryan Report, vol 1 § 9.37 (cited in note 10). Brother Beaufort was issued a warning against extreme abusive practices because of the “possible evil consequences to the reputation of the school” quoting a contemporaneous note of a superior. Id.
protect the Congregation from scandal and those permanent members from
criminal prosecution. While such conduct does not establish the intent of senior
managers to perpetrate crimes of sexual violence against children, it does
manifest criminally reckless and wanton disregard for the crimes committed
against the children and as such should form the basis of a crime against
humanity. Although the Christian Brothers Congregation, a large multi-national
organization, is not a state, it had a similar capacity to perpetrate widespread and
systematic crimes against a civilian population, and as such its senior members
should be accountable for any crimes against humanity they may have
committed. “Justice for crimes against humanity must have no limitations.”

313 Wiesenthal, Vienna Documentation Center (cited in note 1).