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The Definition of Crimes Against Humanity: Resolving the Incoherence

BETH VAN SCHAACK*

This Article discusses the present contours of the prohibition of crimes against humanity with reference to proceedings before the International Criminal Tribunal for the Former Yugoslavia and deliberations at the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. Because the contemporary status of this offense under international law cannot be understood or appreciated without reference to its history, this Article traces the evolution of the concept of crimes against humanity with particular reference to the genesis and re-interpretation of the war nexus requirement. A recurrent theme in this narrative is the search for an element of the offense sufficient to distinguish crimes against humanity from "ordinary" municipal crimes (e.g., murder, assault or false imprisonment) and to justify the exercise of international jurisdiction over inhumane acts that would otherwise be the subject of domestic adjudication. The war nexus originally served this purpose for the Nuremberg architects, although the time-honored doctrine of humanitarian intervention could have provided adequate precedent for the international prosecution of crimes against humanity. Recently, the International Criminal Tribunal for the Former Yugoslavia devised an ingenuous solution to the problem of delimiting international jurisdiction and distinguishing crimes against humanity from "ordinary" crimes. The Trial Chamber did not require proof of a substantial link between the defendant's inhumane act and a state of war. Rather, the Chamber defined crimes against humanity in terms of the mens rea of the defendant and the existence of a widespread or systematic attack against a civilian population. However, at the same time, the Tribunal added additional elements to the definition of crimes against humanity that further complicate the definition and the

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Prosecution's burden of proof. Most recently, members of the international community drafting the Statute for the permanent International Criminal Court drew upon the ICTY Statute and the work of the Tribunal in drafting a consensus definition of crimes against humanity that will govern prosecutions before the new court. Fortunately, these drafters stopped where the Trial Chamber should have. They defined crimes against humanity with reference only to the existence of a widespread or systematic attack against a civilian population and the mental state of the individual defendant. In so doing, they recognized that once the abuse of civilians surpasses a particular threshold, the prescriptions of international law are activated and individual perpetrators can be held internationally liable for their acts of murder, assault or unlawful detention. The evolving definition of crimes against humanity since the Nuremberg era reveals the way in which the principles guiding the contemporary codification of international criminal law are dramatically shifting. Such norms were previously drafted with an eye toward fortifying, or at least defending, state sovereignty. Over time, however, these guiding principles have become more concerned with condemning injurious conduct and guaranteeing the accountability of individuals who subject others, including their compatriots, to inhumane acts.

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I. INTRODUCTION

Although crimes against humanity are as old as humanity,¹ the concept of a cognizable offense first surfaced in condemnations of the massacres of the Armenians by what was then the Ottoman Empire² and other atrocities committed in World War I.³ After this brief but abortive appearance, the juridical history of this offense really begins at Nuremberg. The term “crimes against humanity” first appeared in positive international law in Article 6(c) of the Charter of the International Military Tribunal (IMT), which defined crimes against humanity as a constellation of prohibited acts committed against a civilian population.⁴ The category of crimes against humanity was added to the Charter because it was feared that under the traditional formulation of war crimes, many of the defining acts of the Nazis would go unpunished.⁵ The crimes against humanity count in the Nuremberg

1. See Jean Graven, *Les crimes contre l'humanité*, 76 RECUEIL DES COURS 472, 433 (1950).

2. See Vahakn N. Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications*, 14 YALE J. INT'L L. 221, 280 (1989).

3. See Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference (Mar. 29, 1919)*, 14 AM. J. INT'L L. 95 (1920) [hereinafter *Commission's Report*].

4. The Charter defined crimes against humanity as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.” Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, art. 6(c), 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter IMT Charter], reprinted in 1 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at xii (1951) [hereinafter CCL 10 TRIALS]. The London Agreement was signed by the four major Allies and was then acceded to by nineteen other states (Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela, and Yugoslavia). Article 5(c) of the Charter for the Tokyo Tribunal was substantially the same as Article 6(c) of the IMT Charter, although it omitted reference to persecutions on “religious grounds” and did not require the enumerated acts to be “committed against any civilian population.” See Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, Jan. 19, 1946, art. V(c), T.I.A.S. No. 1589, 4 Bevans 20, 21, as amended Apr. 26, 1946, 4 Bevans 20, 27 [hereinafter Tokyo Charter], reprinted in 1 BENJAMIN B. FERENCZ, *DEFINING INTERNATIONAL AGGRESSION* 522, 523 (1975). The Tokyo Tribunal was not a multipartite forum created by international agreement; rather, it was established pursuant to an Executive Decree of General Douglas MacArthur, the Supreme Commander for the Allied Powers in Japan acting under orders from the U.S. Joint Chiefs of Staff. Article 8 of the Tokyo Charter allowed any nation that had been “at war” with Japan to appoint counsel to assist the tribunal’s Chief of Counsel. Accordingly, eleven nations participated in the prosecution: Australia, Canada, New Zealand, Great Britain, India, the United States, the Philippines, China, the Soviet Union, France, and the Netherlands.

5. Bert V.A. Röling, *The Nuremberg and the Tokyo Trials in Retrospect*, in 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 590, 591 (M. Cherif Bassiouni & V. Nanda eds., 1973). The inclusion of Article 6(c) reflected the desire of the Allies not to be restricted “to bringing to justice those who had committed war crimes in the narrower sense . . . but that also such atrocities should be investigated, tried, and punished as have been committed on Axis territory against persons of other than Allied nationality.” Egon Schwelb, *Crimes Against Humanity*, 23

Indictment encompassed acts committed by Nazi perpetrators against German victims, who were thus of the same nationality as their oppressors, or against citizens of a state allied with Germany.⁶ While the crime of aggression—deemed “the greatest menace of our times”⁷—was the centerpiece of the Charter and the Nuremberg Trial (which was to be “the Trial to End All Wars”),⁸ the notion of crimes

BRIT. Y.B. OF INT'L L. 178, 183 (1946). The United States delegates to the IMT deliberations defended the controversial conspiracy provisions of the Charter on this ground as well by arguing that “there was ‘no acceptable substitution for the [conspiracy] article as a means of reaching any large numbers of persons’ as well as of prosecuting atrocities committed by the Nazis against German nationals.” Stanislaw Pomorski, *Conspiracy and Criminal Organization*, in THE NUREMBERG TRIAL AND INTERNATIONAL LAW 213, 219 (G. Ginsburgs & V.N. Kudriavstev eds., 1990).

6. Acts against these victims would not constitute war crimes, which are generally defined in terms of prohibited acts directed toward the citizens, soldiers or property of an adversary in an armed conflict. See *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgment, at 233, para. 619 (Int'l Crim. Trib. former Yugo., Trial Chamber II, May 7, 1997) (noting that the Allies conceptualized crimes against humanity to include those “other serious crimes that fall outside the ambit of traditional war crimes, such as where the victim is stateless, has the same nationality as the perpetrator, or that of a state allied with that of the perpetrator”), available at <<http://www.un.org/icty/100895.htm>>. See generally AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 344 (Peter Malanczuk ed., 1997) (noting that the Geneva Conventions are mainly concerned with the protection of individuals who find themselves in enemy territory or who inhabit territory occupied by the enemy); Perry Gulbrandsen, *A Commentary on the Geneva Conventions of August 12, 1949*, in 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 368 (M. Cherif Bassiouni & V. Nanda eds., 1973).

7. 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 99 (1947) [hereinafter IMT TRIALS]. At the time, the United States delegation in particular viewed “belligerent militarism [as] . . . the greatest threat and . . . the proximate cause of the Nazis' other crimes.” Simon Chesterman, *Never Again . . . and Again: Law, Order, and the Gender of War Crimes in Bosnia and Beyond*, 22 YALE J. INT'L L. 299, 318 (1997). Despite this apparent hierarchy of crimes, a formal definition of “aggression” eluded the international community until 1974. See *Definition of Aggression*, G.A. Res. 3314 (XXIX), 29 U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1974). This definition later proved unacceptable to delegates drafting the Rome Statute of the International Criminal Court. See Rome Statute of the International Criminal Court, art. 5(2), U.N. Doc. A/CONF.183/9 (July 17, 1998) (noting that the “Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 [amendments] and 123 [review of the Statute] defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.”) [hereinafter ICC Statute].

8. David Luban, *The Legacies of Nuremberg*, 54 SOC. RES. 779, 781 (1987). The Nuremberg Tribunal conceived of the crime of aggression as encompassing all other crimes: “to initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.” Judgment of October 1, 1946, International Military Tribunal Judgment and Sentence, 22 IMT TRIALS, *supra* note 7, at 498, reprinted in 41 AM. J. INT'L L. 172, 186 (1947) [hereinafter Nuremberg Judgment]. Indeed, a majority of the Nuremberg Tribunal's judgment consists of describing the aggressive acts of Germany and the treaties proscribing such aggression. See *id.* at 175-224. The notion of crimes against the peace was the most controversial element of the Charter at the time. See F.B. Schick, *The Nuremberg Trial and the International Law of the Future*, 41 AM. J. INT'L L. 770, 783 (1947) (“Most controversial among the broad legal aspect of the Nuremberg Trial is the basic concept that aggressive war is not only illegal in international law but that those ‘who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing.’”) (quoting Nuremberg Judgment); see also Quincy Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT'L L. 38, 62-67 (1947); George Finch, *The Nuremberg Trial and International Law*, 41 AM. J. INT'L L. 20, 25-37 (1947).

against humanity has proven to be the real legacy of Nuremberg, albeit with chronic definitional confusion.

The exercise of international jurisdiction over acts committed by Germans against other Germans “must be considered a legal innovation of first magnitude.”⁹ The crimes against humanity charge confirmed that citizens are under the protection of international law even when they are victimized by their compatriots.¹⁰ Furthermore, the criminality of such acts “whether or not in violation of the domestic law of the country where perpetrated”¹¹ established the supremacy of international law over municipal law.¹² In this way, the prohibition of crimes against humanity at Nuremberg had the potential to irretrievably pierce the trope of sovereignty—“a rule of international law which provides that no state shall intervene in the territorial and personal sphere of validity of another national legal order.”¹³

Despite this foundation for a new legal paradigm, the definition of crimes against humanity in the Charter of the International Military Tribunal contained a curious limiting principle: the Nuremberg Tribunal could assert jurisdiction only over those crimes against humanity committed “before or during the war” and “in execution of or in connection with any crime within the jurisdiction of the Tribunal,” *i.e.*, war crimes or crimes against the peace.¹⁴ This formulation became known as the “war nexus,” and it is apparent that the Charter’s drafters and the Nuremberg Tribunal itself considered the war nexus necessary to justify the extension of international jurisdiction into what would otherwise be acts within the domestic jurisdiction of a state. The war nexus allowed the drafters of the Charter to condemn specific inhumane acts of Nazi perpetrators committed within Germany without threatening the entire doctrine of state sovereignty. Thus, Germany’s initiation of an aggressive war marked by systematic war crimes

9. Schick, *supra* note 8, at 785.

10. See Schwelb, *supra* note 5, at 178 (citing ALBERT DE LA PRADELLE, 2 NOUVELLE REV. DROIT INT’L PRIVÉ (1946) (noting that crimes against humanity have been acclaimed as a “revolution in international law”).

11. IMT Charter art. 6(c), *supra* note 4, at xi.

12. See Elisabeth Zoller, *La Définition des Crimes Contre L’humanité*, 120 J. DROIT INT’L 549, 552 (1993) (“Pour la première fois se faisait jour l’idée qu’il y avait des actes à ce point attentatoires à la dignité humaine que le fait qu’ils aient été exécutés conformément au droit d’un Etat était un argument inopérant.”) (“For the first time, the idea emerged that there were certain acts so detrimental to human dignity that the argument that they had been executed in conformity with domestic law was ineffective.”) (translation by author).

13. Schick, *supra* note 8, at 785. At the Nuremberg proceedings, the British prosecutor, Sir Hartley Shawcross, acknowledged that “[n]ormally International Law concedes that it is for the State to decide how it shall treat its own nationals; it is a matter of domestic jurisdiction.” Concluding Speeches by the Prosecution, 19 THE TRIAL OF THE GERMAN MAJOR WAR CRIMINALS, PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY 433 (1946). See also THE CHARTER AND JUDGMENT OF THE NÜRNBERG TRIBUNAL: HISTORY AND ANALYSIS (Memorandum Submitted by the Secretary-General) 43-44, 69-70 (1949).

14. Given this formulation, the term “crimes against humanity” has been likened to “an accessory crime” or “a byproduct of war,” designed for the protection of inhabitants of countries in aggressive wars. Schwelb, *supra* note 5, at 206.

provided the justification for the violation of its sovereignty entailed by the inclusion of crimes against humanity within the subject matter jurisdiction of the IMT Charter.

Since this inception, the definition of crimes against humanity has been plagued by incoherence.¹⁵ Unlike the international law prohibitions against genocide¹⁶ and war crimes,¹⁷ the prohibition against crimes against humanity did not become the subject of a comprehensive multilateral convention until very recently.¹⁸ Without a consensus definition, international tribunals, international law drafters and commentators in the post-Nuremberg era were left to follow the Nuremberg precedent in their treatment of the prohibition against crimes against humanity. Accordingly, many of these subsequent interpretations of the scope of the offense treated the war nexus requirement as a substantive element of the offense that would have to exist before the term "crimes against humanity" would apply to inhumane acts that did not constitute war crimes,¹⁹ despite the fact that the war nexus requirement could have been dismissed as a jurisdictional element unique to the circumstances of the Nuremberg and Tokyo

15. See Diane F. Orentlicher, *Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2537, 2585 (1991) ("[T]he meaning of the term [crimes against humanity] is shrouded in ambiguity.").

16. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

17. The four Geneva Conventions and their two Optional Protocols collectively proscribe war crimes committed in international and internal armed conflicts. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, 116; Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Protocol Addition to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, Annexes I, II (1977), *reprinted in* 16 I.L.M. 1391 (1977); Protocol Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, Annexes I, II (1977), *reprinted in* 16 I.L.M. 1442 (1977).

18. See ICC Statute, *supra* note 7 (defining crimes against humanity). See also M. Cherif Bassiouni, "Crimes Against Humanity: The Need for a Specialized Convention," 31 COLUM. J. TRANSNAT'L L. 457 (1994).

19. See, e.g., *Polyukovich v. Regina* (Austr. 1992) 172 C.L.R. 501, paras. 45 (noting argument by the Commonwealth that crimes of persecution and other serious crimes "must be committed in the execution of or in connection with war or occupation to be a crime at international law"), 70 (holding that "conduct which amounted to persecution on the relevant grounds, or extermination of a civilian population, including a civilian population of the same nationality as the offender, constituted a crime in international law only if it was proved that the conduct was itself a war crime or was done in execution of or in connection with a war crime") (Toohey J.); AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW, *supra* note 6, at 354 ("Crimes against humanity are wider than war crimes; they can be committed before a war as well as during a war, and they can be directed against 'any civilian population,' including the wrongdoing state's own population.").

Tribunals.²⁰ At the same time, participants in subsequent trials and codification efforts attempted to eliminate the war nexus requirement on the grounds that it significantly limited the scope of the prohibition against crimes against humanity by excluding comparable inhumane acts committed in peacetime.²¹ These attempts met opposition from other parties intent on halting the further erosion of state sovereignty and fearful of elevating every peacetime crime to a crime against humanity in violation of international law. Opponents of the war nexus thus faced the challenge of devising another principle to distinguish crimes against humanity from ordinary crimes and to justify the application of international jurisdiction. The result was a hodgepodge of definitions that did little to satisfy the principle of legality.²²

20. See, e.g., Roger S. Clark, *Crimes Against Humanity at Nuremberg*, in *THE NUREMBERG TRIAL AND INTERNATIONAL LAW* 177, 195 (George Ginsburgs & V. N. Kudriavtsev eds., 1990) (arguing that “[w]hat [the Nuremberg Tribunal] was concerned with was both a much narrower question as to its own jurisdiction and a question as to what had been proved in respect of the relationship between pre-1939 offenses and aggressive war.”); Theodor Meron, Editorial Comment, *War Crimes in Yugoslavia and the Development of International Law*, 88 *AM. J. INT’L L.* 78, 85 (1994) (suggesting that the war nexus “may have been guided by jurisdictional considerations and not necessarily by a conceptually narrow definition of crimes against humanity”).

21. The war nexus requirement significantly limits the reach of the prohibition against crimes against humanity with respect to violent situations that do not rise to the level of an armed conflict, such as occurred in Latin America during the Cold War or in South Africa under apartheid.

22. See, e.g., Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia Since 1991, annexed to Report of the Secretary-General Pursuant to Paragraph 2 of U.N. Security Council Resolution 808, U.N. GAOR, May 19, 1993, U.N. Doc S/25704 (defining crimes against humanity as “the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.”) [hereinafter ICTY Statute]; International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, art. 3, U.N. Doc. S/Res/955 (1994), 33 *I.L.M.* 1598, 1603 (1994) (defining crimes against humanity as “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.”); *CAN. CRIM. CODE*, R.S.C., ch. C-46, § 7(3.76) (1985) (defining crimes against humanity as “murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at the time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognized by the community of nations.”); *Fédération Nationale Des Déportés Et Internes Résistants Et Patriotes v. Barbie*, 78 *I.L.R.* 124, 137 (1988) (Ct. de Cassation, Crim. Chamber) (defining crimes against humanity as “inhumane acts and persecution committed in a systematic manner in the name of a State practicing a policy of ideological supremacy, not only against persons by reason of their membership of a racial or religious community, but also against opponents of that policy, whatever the forms of their opposition”); *Touvier*, CA Paris, 1988, 100 *I.L.R.* 341, 350-51 (holding that crimes against humanity “must firstly form part of the execution of a common plan performed in the name of a State practicing in a systematic manner a policy of ideological supremacy” and “must have been committed against persons by reason of their belonging to a racial or religious group, or

Given this trend toward the uncoupling of the prohibition of crimes against humanity from a state of war, it was surprising that the United Nations Security Council reproduced a version of the war nexus when it drafted the Statute of the ad hoc International Criminal Tribunal for the Former Yugoslavia (ICTY).²³ The Appeals Chamber of the ICTY, in the first contested case to come before it, affirmed the *obiter dicta* of the Trial Chamber below and declared the war nexus to be a jurisdictional element peculiar to the Nuremberg Charter and now to the ICTY Statute as opposed to a substantive element of customary international law.²⁴ In its subsequent formulation of the prohibition against crimes against humanity during the merits phase, the Trial Chamber laid to rest some of the definitional confusion that had been plaguing the concept of crimes against humanity since its inception.²⁵ The Trial Chamber did not require proof of a substantial link between the defendant's inhumane act and a state of war. Rather, the Chamber defined crimes against humanity in terms of the *mens rea* of the defendant and the existence of a widespread or systematic attack against a civilian population. In so holding, the Trial Chamber significantly minimized the prosecutorial burden of proof with respect to the war nexus in the Statute. At the same time, it cleverly resolved the problem of the "hook" on which to hang international jurisdiction. However, the Trial Chamber reversed this progressive trend and attached additional elements to the prohibition against crimes against humanity. These elements are not found in the Tribunal's Statute or elsewhere in customary international law, and they significantly and unnecessarily increase the Prosecution's burden of proof.

Most recently, members of the international community drafting the Statute for the permanent International Criminal Court (ICC) drew upon the ICTY Statute and the work of the Tribunal in drafting the definition of crimes against humanity that will govern prosecutions before the new court.²⁶ Fortunately, these drafters stopped where the Trial Chamber should have. They defined crimes against humanity with

against opponents of that policy of ideological supremacy"); *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935*, U.N. SCOR, 49th Sess., Annex, at 27, U.N. Doc. S/1994/1405 (1994) (Rwanda Commission of Experts) (defining crimes against humanity as "gross violations of fundamental rules of humanitarian and human rights law committed by persons demonstrably linked to a party to the conflict, as part of an official policy based on discrimination against an identifiable group of persons, irrespective of war and the nationality of the victim, and includes acts such as the following: Murder; Extermination . . ."); M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 247 (1992) (including state action and discriminatory intent as elements of crimes against humanity).

23. ICTY Statute, *supra* note 22.

24. *See* Prosecution v. Tadić, Case No. IT-94-I-T, Decision on the Defence Motion, (Int'l Crim. Trib. former Yugo., Trial Chamber II, Aug. 10, 1995), at 30; Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal in Jurisdiction (Int'l Crim. Trib. former Yugo., App. Chamber, Oct. 2, 1995), at 73. *See also infra* Part V.

25. *See* Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment (Int'l Crim. Trib. former Yugo., Trial Chamber II, May 7, 1997); *see infra* Part V.

26. *See* ICC Statute, *supra* note 7, art. 7.

reference only to the existence of a widespread or systematic attack against a civilian population and the mental state of the individual defendant. In so doing, they recognized that once the abuse of civilians surpasses a particular threshold, the prescriptions of international law are activated.

This Article discusses the present contours of the prohibition of crimes against humanity with reference to proceedings before the International Criminal Tribunal for the Former Yugoslavia and deliberations at the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. Because the contemporary status of this offense under international law cannot be understood or appreciated without reference to its history, this Article traces the evolution of the concept of crimes against humanity with particular reference to the genesis and re-interpretation of the war nexus requirement. A recurrent theme in this narrative is the search for an element of the offense sufficient to meaningfully distinguish crimes against humanity from “ordinary” municipal crimes (*e.g.*, murder, assault, or false imprisonment) and to justify the extension of international jurisdiction to inhumane acts that would otherwise be the subject of domestic adjudication. The war nexus originally served this purpose for the Nuremberg architects, although the time-honored doctrine of humanitarian intervention could have provided adequate precedent for the international prosecution of crimes against humanity. The evolving definition of crimes against humanity since the Nuremberg era reveals the way in which the principles guiding the contemporary codification of international criminal law are dramatically shifting. Such norms were previously drafted with an eye toward fortifying, or at least defending, state sovereignty. Over time, however, these guiding principles have become more concerned with condemning injurious conduct and guaranteeing the accountability of individuals who subject others, including their compatriots, to inhumane acts.

II. THE ROOTS OF THE PROHIBITION AGAINST CRIMES AGAINST HUMANITY

A. *Precursors to the Nuremberg and Tokyo Charters*

The so-called Martens Clause,²⁷ which can be found in the 1907 Hague Convention Respecting the Laws and Customs of War on Land and subsequent humanitarian law conventions, first articulated the notion that international law encompassed transcendental humanitarian

27. The Martens Clause was named after the Russian delegate to the first Hague Conference to address the laws of war.

principles that existed beyond conventional law.²⁸ This clause provides that:

Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the laws of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.²⁹

The Allies invoked these “laws of humanity” after World War I in connection with the proposed trials of war criminals from Germany and its allies. In particular, the Turkish government’s massacre of the Armenian population prompted the Allied governments of France, Great Britain and Russia to issue in 1915 a joint Declaration to the Ottoman Empire denouncing these acts as “crimes against humanity and civilization for which all the members of the Turkish Government will be held responsible together with its agents implicated in the massacres.”³⁰

The Allied governments attending the Preliminary Peace Conference of Paris in January 1919 formed a Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties for Violations of the Law and Customs of War with representatives from the “Great Powers”—the United States, the United Kingdom, France, Italy, and Japan—and the lesser “Powers”—Belgium, Greece, Poland, Romania, and Serbia—to report on violations of international law committed in World War I and a procedure for trying such offenses.³¹ The majority of the Commission called for the establishment of a Tribunal that would try “[a]ll persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of State, who have been guilty of offences against the laws and customs of war or the laws of humanity”³²

28. See Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277. The 1907 Hague Convention has its roots in many respects in an International Military Commission staged on Crete in 1898 by the six Great Powers (Russia, France, Italy, Great Britain, Germany, and Austria). These trials exercised jurisdiction over acts, such as the massacre of Christian compatriots by Muslim Cretans, that would later be termed “crimes against humanity.” I am indebted to Dr. R. John Pritchard for this observation. See generally R. John Pritchard, *Gunboat Diplomacy, or The First Modern International Criminal Tribunal for Crimes against Humanity: Thoughts on the National and International Military Commissions on Crete 100 Years Ago* (1998) (unpublished manuscript, on file with the author).

29. *Id.* at 2279-80.

30. Schwelb, *supra* note 5, at 181 (quoting Armenian Memorandum Presented by the Greek Delegation to the Commission of Fifteen on Mar. 14, 1919).

31. See *Commission’s Report*, *supra* note 3, at 95.

32. *Id.* at 117.

The U.S. delegation (led by Robert Lansing and James Brown Scott) dissented from this recommendation, however, insofar as such a Tribunal would exercise jurisdiction over violations of the “laws of humanity.”³³ It noted that the duty of the Commission was to investigate violations or breaches of the laws and customs of war, not violations of the laws or principles of humanity.³⁴ The dissent distinguished between moral and legal responsibilities and argued that the former were not justiciable by an international tribunal regardless of how iniquitous the challenged acts were. This dissent further explained that:

The laws and customs of war are a standard certain, to be found in books of authority and in the practice of nations. The laws and principles of humanity vary with the individual, which, if for no other reason, should exclude them from consideration in a court of justice, especially one charged with the administration of criminal law.³⁵

The U.S. position ultimately prevailed and the 1919 Treaty of Versailles excluded reference to “crimes against humanity” in the relevant provisions (Articles 228-30).³⁶

The work of the Commission led to the insertion into the Peace Treaty of Sèvres of provisions calling for the trial by the Allied Powers of Turkish war criminals accused of violating the laws and customs of war and of engaging in the Armenian massacres on Turkish territory during—but not before—the war. Notably, the terms “crimes against humanity” and “laws of humanity” were not employed.³⁷ The Treaty

33. *Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities (Apr. 4, 1919), Annex 2, reprinted in id.* at 127.

34. *See id.* at 133-34 (“[T]he report of the Commission does not, as in the opinion of the American representative it should, confine itself to the ascertainment of the facts and to their violation of the laws and customs of war, but going beyond the terms of the mandate, declares that the facts found and acts committed were in violation of the laws and of the elementary principles of humanity.”).

35. *Id.* at 134.

36. *See Treaty of Versailles, June 28, 1919, reprinted in 13 AM. J. INT’L L. 151 (Supp. 1920), 16 AM. J. INT’L L. 207 (Supp. 1922).* *See generally* Clark, *supra* note 20, at 178. The proposed international tribunal to try German war criminals was never convened in part because Germany refused to surrender German nationals to the Allies in repudiation of Article 228 of the Versailles Treaty, and the Netherlands refused to surrender Kaiser Wilhelm II. Germany did conduct national trials, the so-called Leipzig Trials, but the majority of defendants were acquitted or their cases were dismissed. *See generally* Dadrian, *supra* note 2, at 315-17.

37. *See Peace Between the Allied Powers and Turkey (Treaty of Sèvres), Aug. 10, 1920 (unratified), reprinted at 15 AM. J. INT’L L. 179 (Supp. 1921).* The Treaty was entered into by the Allies (the United Kingdom, France, Italy, Japan but minus the United States), other interested states (Armenia, Belgium, Greece, the Hedjaz, Poland, Portugal, Romania, Yugoslavia, and Czechoslovakia), and Turkey. *See* Dadrian, *supra* note 2, at 281; David Matas, *Prosecuting Crimes Against Humanity: The Lessons of World War I*, 13 *FORDHAM INT’L L.J.* 86, 90 (1989-90).

went unratified and never came into force. Its successor, the Treaty of Lausanne,³⁸ was silent on the issue of criminal responsibility pursuant to an accompanying Declaration of Amnesty for all offenses under international law perpetrated between 1914-1922.³⁹ Although the Allies—largely at the insistence of the United States delegation—forsook the concept of crimes against humanity in the post-World War I proceedings, they revived it in response to the atrocities of World War II.

B. *The Prohibition Against Crimes Against Humanity Enters Positive Law*

The inclusion of the offense of crimes against humanity into the Charter of the IMT was relatively uncontroversial, as there is little in the drafting history to suggest opposition to its addition.⁴⁰ The United States delegation originally proposed that the subject matter jurisdiction of the Tribunal be limited to violations of the customs and rules of warfare, invasion by force, initiation of war, launching a war of aggression, and recourse to war as an instrument of national policy.⁴¹ In a reversal of the United States position on crimes against humanity following World War I, this draft was soon supplemented to criminalize in Article 12(b) acts committed before or during World War I that resembled those acts that were eventually termed “crimes against humanity”: “Atrocities and offenses, including atrocities and persecutions on racial or religious grounds, committed since 1 January 1933 in violation of any applicable provision of the domestic law of the country in which committed.”⁴²

The British delegates first proposed a precursor to the war nexus in Article 12: “Atrocities and persecutions and deportations on political, racial or religious grounds, in pursuance of the common plan or enterprise referred to in sub-paragraph (d) hereof whether or not in

38. Treaty of Lausanne, 28 L.N.T.S. 12, *reprinted in* 18 AM. J. INT’L L. 1 (Supp. 1924).

39. *Id.* (providing that a “[f]ull and complete amnesty shall be respectively granted to the Turkish Government and by the Greek Government for all crimes or offences committed during the same period which were evidently connected with the political events which have taken place during that period.”). See BASSIOUNI, *supra* note 22, at 175; see also Matas, *supra* note 37, at 92. In lieu of an international tribunal, the Turkish government undertook domestic trials in 1919-1921 under relevant provisions of its penal codes. See generally Dadrian, *supra* note 2, at 291-317.

40. This is in stark contrast to the hostile reception accorded the United States proposal to include jurisdiction over the crime of aggression and the common plan to wage war.

41. American Draft of Definitive Proposal, Presented to Foreign Ministers at San Francisco, April 1945, *reprinted in* REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIBUNALS 22, doc. IV (1945) [hereinafter JACKSON REPORT].

42. Revision of American Draft of Proposed Agreement, June 14, 1945, *reprinted in* JACKSON REPORT, *supra* note 41, at 55, 57, doc. IX, ¶ 12(b).

violation of the domestic law of the country where perpetrated.”⁴³ Subsequent French⁴⁴ and British⁴⁵ drafts did not include the language of the war nexus, whereas a Soviet draft removed reference to this category of crimes altogether.⁴⁶

Justice Robert H. Jackson of the United States delegation argued for language that linked the prosecution of civilian atrocities to the prosecution of the “common plan” on the grounds that such a connection was necessary to justify the activation of international jurisdiction:

It has been a general principle of foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business; that is to say, the way Germany treats its inhabitants . . . is not our affair any more than it is the affair of some other government to interpose itself in our problems. The reason that this program of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was a part of a plan for making an illegal war. Unless we have a war connection as a basis for reaching them, I would think we have no basis for dealing with atrocities. They were a part of the preparation for war or for the conduct of the war in so far as they occurred inside of Germany and that makes them our concern.⁴⁷

43. Amendments Proposed by the United Kingdom, June 28, 1945, reprinted in JACKSON REPORT, *supra* note 41, at 86, 87, doc. XIV, ¶ 3(e). In keeping with the United States proposal, sub-paragraph (d) criminalized: “Entering into a common plan or enterprise aimed at aggression against, or domination over, other nations, which plan or enterprise included or intended, or was reasonably calculated to involve or in its execution did involve, the use of unlawful means for its accomplishment, including any or all of the acts set out in subparagraphs (a) to (c) above [violations of the laws or customs of war, launching a war of aggression, invasion] or the use of a combination of such unlawful means with other means.” *Id.* ¶ 3(d).

44. See Draft Article on Definition of “Crimes,” Submitted by French Delegation, July 19, 1945, reprinted in JACKSON REPORT, *supra* note 41, at 293, doc. XXXV (providing jurisdiction over any person who directed the preparation and conduct of: “(i) the policy of aggression against, and of domination over, other nations, carried out by the European Axis Powers in breach of treaties and in violation of international law; (ii) the policy of atrocities and persecutions against civilian populations; (iii) the war, launched and waged contrary to the laws and customs of international law; and who is responsible for the violations of international law, the laws of humanity and the dictates of the public conscience, committed by the armed forces and civilian authorities in the service of those enemy Powers”).

45. See Proposed Revision of Definition of “Crimes” (Article 6), Submitted by British Delegation, July 20, 1945, reprinted in JACKSON REPORT, *supra* note 41, at 312, doc. XXXIX.

46. See Redraft of Definition of “Crimes,” Submitted by Soviet Delegation, July 23, 1945, reprinted in JACKSON REPORT, *supra* note 41, at 327, doc. XLIII.

47. Minutes of Conference Session of July 23, 1945, reprinted in JACKSON REPORT, *supra* note 41, at 328, 331, doc. XLIV. Justice Jackson further explained, “We think it is justifiable that we interfere or attempt to bring retribution to individuals or to states only because the concentration camps and the deportations were in pursuance of a common plan or enterprise of making an unjust or illegal war in which we became involved. We see no other basis on which we are justified in reaching the atrocities which were committed inside Germany, under German law, or even in violation of German law, by authorities of the German state. Without

Professor Gros of the French delegation objected to this requirement and noted that there have been many interventions for humanitarian reasons unrelated to acts of aggression.⁴⁸ He also noted the burden such a requirement would place on the Prosecution:

I think that it puts on us an obligation to prove that those persecutions were inflicted in pursuit of aggression and that is a difficult burden because, even in the Nazi plan against the Jews, there is no apparent aggression against other nations. Paragraph (a) speaks of aggression over other nations; so it would be easy for German counsel to submit to the court that the Nazis' plan against the Jews is a purely internal matter without any relation whatsoever to aggression as the text stands.⁴⁹

Sir David Maxwell Fyfe of the British delegation countered that it would not be difficult to associate the anti-Jewish measures with the general plan of aggression.⁵⁰ The French delegates apparently did not pursue their objections, and all subsequent drafts, including the French ones, included language that linked the prosecution of atrocities against civilian populations to either the launching of aggressive war or to the common plan provision.⁵¹ With respect to one such draft, Justice

substantially this definition, we would not think we had any part in the prosecution of those things which I agree with the Attorney-General are absolutely necessary in this case." *Id.* at 333.

48. See Minutes of Conference Session of July 24, 1945, reprinted in JACKSON REPORT, *supra* note 41, at 360, doc. XLVII.

49. *Id.* at 361.

50. See *id.* at 362. In his summation, the British Chief Prosecutor Sir Hartley Shawcross explained that "the crime against the Jews, insofar as it is a crime against humanity and not a war crime as well, is one which we indict because of its close association with the crime against the peace. That is, of course, a very important qualification on the Indictment of the Crimes against Humanity which is not always appreciated by those who have questioned the exercise of this jurisdiction. But subject to that qualification we have thought it right to deal with matters which the criminal law of all countries would normally stigmatize as crimes—murder, extermination These things done against belligerent nationals, or for that matter, done against German nationals in belligerent occupied territory would be ordinary war crimes the prosecution of which would form no novelty. Done against others they would be crimes against municipal law except insofar as German law, departing from all the canons of civilized procedure, may have authorized them to be done [T]he nations adhering to the Charter of this Tribunal have felt it proper and necessary in the interest of civilization to say that these things even if done in accordance with the laws of the German State . . . were, when committed with the intention of affecting the international community—that is in connection with the other crimes charged—not mere matters of domestic concern but crimes against the law of nations." Concluding Speeches by the Prosecution, 19 THE TRIAL OF THE GERMAN MAJOR WAR CRIMINALS, PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG 471 (1948).

51. See, e.g., Redraft of Definition of "Crimes," Submitted by Soviet Delegation, July 25, 1945, reprinted in JACKSON REPORT, *supra* note 41, at 373, doc. XLVIII; Redraft of Definition of "Crimes," Submitted by American Delegation, July 25, 1945, reprinted in JACKSON REPORT, *supra* note 41, at 374, doc. XLIX; Revised Definition of "Crimes," Prepared by British Delegation and Accepted by French Delegation, July 28, 1945, reprinted in JACKSON REPORT, *supra* note 41, at 390, doc. LII; Revised Definition of "Crimes," Prepared by British Delegation

Jackson noted that “we should insert words to make clear that we are reaching persecution, etc. of Jews and others in Germany as well as outside of it, and before as well as after commencement of the war.”⁵² In other words, he did not anticipate that crimes against humanity would be prosecuted only if they were committed following the formal commencement of war. After much contentious debate over the inclusion of the crimes of aggression and the common plan, the United States delegation proposed a revised Article 6 that was finally accepted by the other delegates.⁵³ This marks this first time that the term “crimes against humanity” was employed in the drafting process.

This precise formulation did not appear in the final version of the Charter; rather the Charter contained a slight discrepancy in punctuation.⁵⁴ The French- and English-language versions of the IMT Charter contained semicolons between the two broad categories of crimes against humanity—enumerated inhumane acts and persecutions on specified grounds. In other words, the English version read: “and other inhumane acts committed against any civilian population, before or during the war; or persecutions . . . in execution of or in connection with any crime within the jurisdiction of the Tribunal”⁵⁵ This formulation implied that the “war nexus” was relevant only for the second broad category of crime: persecution-related crimes. The Russian-language text, like the United States proposal,⁵⁶ contained a comma that applied the war nexus to both categories of crimes. By the Berlin Protocol of October 6, 1945,⁵⁷ the semicolons that had originally appeared in the equally authentic English and French versions of the text were replaced by the comma from the Russian version.⁵⁸ As such, the caveat, “in execution of or in connection with any crime within the jurisdiction of the Tribunal,” applied to both sets of acts—inhumane acts and persecutions—and gave rise to the war nexus as it is known today.⁵⁹

to Meet Views of Soviet Delegation, July 28, 1945, *reprinted in* JACKSON REPORT, *supra* note 41, at 392, doc. LIII.

52. Notes on Proposed Definition of “Crimes,” Submitted by American Delegation, July 31, 1945, *reprinted in* JACKSON REPORT, *supra* note 41, at 394, doc. LV, ¶ 4.

53. *See* Revision of Definition of “Crimes,” Submitted by American Delegation, July 31, 1945, *reprinted in* JACKSON REPORT, *supra* note 41, at 395, doc. LVI (granting the IMT jurisdiction over “Crimes Against Humanity, namely, murder[,] extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, religious grounds, in furtherance of or in connection with any crime within the jurisdiction of the International Tribunal, whether or not in violation of the domestic law of the country where perpetrated”).

54. *See* Charter of the International Military Tribunal, *reprinted in* JACKSON REPORT, *supra* note 41, at 422, doc. LX.

55. *Id.* at 423, art. 6(c).

56. *See supra* note 53.

57. Protocol to Agreement and Charter, October 6, 1945, *reprinted in* JACKSON REPORT, *supra* note 41, at 429, doc. LXI.

58. *See* Schwelb, *supra* note 5, at 194.

59. *See id.* at 192-95. As originally drafted, the Tokyo Charter contained the comma as opposed to the semi-colon. *See* Tokyo Charter, *supra* note 4.

While this substitution did not alter the English text considerably, it did require substantial amendment to the French text.⁶⁰ The original text had defined crimes against humanity as:

l'assassinat . . . et tout autre acte inhumain commis contre toutes populations civiles, avant ou pendant la guerre; ou bien les persécutions pour des motifs politiques, raciaux ou religieux, commises à la suite de tout crime rentrant dans la compétence du Tribunal international ou s'y rattachant, que ces persécutions aient constitué ou non une violation du droit interne du pays où elles ont été perpétrées.⁶¹

This definition clearly indicates that the war nexus applied only to acts of persecution and not to the first category of crimes against humanity—inhumane acts. After the Protocol, the text read:

l'assassinat . . . et tout autre acte inhumain commis contre toutes populations civiles, avant ou pendant la guerre, ou bien les persécutions pour des motifs politiques, raciaux ou religieux, lorsque ces actes ou persécutions, qu'ils aient constitué ou non une violation du droit interne du pays où ils ont été perpétrés, ont été commis à la suite de tout crime rentrant dans la compétence du Tribunal, ou en liaison avec ce crime.⁶²

The source of the semi-colon in the French and English texts apparently remains a mystery. An unsatisfyingly simple explanation is that there was a punctuation error in the text.⁶³ At the same time, it has been

60. See Zoller, *supra* note 12, at 555 (emphasizing the radical change in the French text wrought by the Berlin Protocol).

61. "Assassination . . . and all other inhumane acts committed against any civilian population, before or during the war; or acts of persecution for political, racial or religious motives, committed in connection with any other crime included within the competence of the International Tribunal, regardless of whether or not these acts of persecution constituted a violation of the internal law of the country in which they were committed." (translation by author).

62. "Assassination . . . and all other inhumane acts committed against any civilian population, before or during the war, or acts of persecution for political, racial or religious motives, when these inhumane acts or acts of persecution, regardless of whether they constituted a violation of the internal law of the country in which they were committed, are committed following any other crime contained within the competence of the International Tribunal, or in connection with such a crime." (translation by author). See THE CHARTER AND JUDGMENT OF THE NÜRNBERG TRIBUNAL: HISTORY AND ANALYSIS (Memorandum Submitted by the Secretary-General) 66 (1949).

63. See G.I.A.D. Draper, *The Modern Pattern of War Criminality*, 6 ISRAEL Y.B. HUM. RTS. 9, 19 (1976) ("Originally there had been a semi-colon at that point of the text, but this semi-colon, having been discovered by the USSR to be a textual error, was replaced by a comma."). See generally Clark, *supra* note 20, at 191-92 (suggesting that perhaps "an error was simply made").

acknowledged that “the nagging doubt remains that something more substantive was going on and that there had been a change of position.”⁶⁴ The pre-Protocol French text in particular suggested that the tribunal was to exert jurisdiction over inhumane acts regardless of their connection to war—the French position at the outset of the deliberations.⁶⁵

C. *The Nuremberg Tribunal’s Restrictive Treatment of Crimes Against Humanity*

The IMT Charter thus defined crimes against humanity in reference to the other two crimes to be prosecuted by the Nuremberg Tribunal: crimes against the peace⁶⁶ and war crimes.⁶⁷ While the Charter’s language is not ambiguous on this point,⁶⁸ the Tribunal generally, although not exclusively as shall be seen, limited the prosecution of crimes against humanity to those acts perpetrated after war had been officially declared.⁶⁹ In this way, the Tribunal virtually negated the phrase “before or during the war” and limited the application of the prohibition against crimes against humanity even more than the Charter’s drafters.⁷⁰ Despite the articulation of this

64. Clark, *supra* note 20, at 192.

65. See *supra* text accompanying notes 48-49.

66. Crimes against the peace were defined at Article 6(a) as: “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.” IMT Charter, *supra* note 4, art. 6(a), at xi.

67. Article 6(b) defined war crimes as:

violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of a civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

Id. art. 6(b), at xi.

68. Note that the text reads that crimes against humanity are those “inhumane acts committed against any civilian population, *before or during the war.*” See Schick, *supra* note 8, at 787 (emphasis added).

69. Note that this limited interpretation was apparently contrary to Justice Jackson’s interpretation of the text of the Charter. See *supra* text accompanying note 52.

70. The “Tribunal, regrettably perhaps, and in clear disregard of the Charter, decided to interpret crimes against humanity restrictively, limiting itself to those committed after 1939, and so assimilating them to the less controversial charge of war crimes.” JUDITH SHKLAR, LEGALISM 165 (1964). According to Donnedieu de Vabres, the French judge at Nuremberg, “the category of crimes against humanity which the Charter had let enter by a very small door evaporated by virtue of the Tribunal’s judgment.” HANNAH ARENDT, EICHMANN IN JERUSALEM 257 (1963), quoting M. DONNEDIEU DE VABRES, LE PROCÈS DE NUREMBERG (1947). “It is not clear from the reasoning of the Tribunal, in view of its previous holding that it was bound by the Charter as the law of the case, why it felt free to disregard the express terms of the Charter on this particular definition.” Finch, *supra* note 8, at 23. See also Wright, *supra* note 8, at 61-62 (“The Tribunal might have found that some of the acts before [November 1937, when the plans for waging aggressive war were laid] were war crimes or crimes against humanity in the sense of the Charter. Its refusal to do so seems to have manifested its prevailing disposition to give the defendants the benefit of any doubt.”).

apparently steep threshold, in practice the Tribunal did not require proof of a tight nexus between the acts charged and the war.

In evaluating the crimes against humanity count, the Nuremberg Tribunal held broadly that the majority of inhumane acts perpetrated prior to the formal declaration of war did not constitute crimes against humanity in that it had not been proven that they satisfied the requirements of the war nexus in the Charter.

To constitute Crimes against Humanity, the acts relied on before the outbreak of the war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were Crimes against Humanity within the meaning of the Charter, but from the beginning of the war in 1939, War Crimes were committed on a vast scale, which were also Crimes against Humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute War Crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted Crimes against Humanity.⁷¹

In other words, enumerated acts committed prior to September 1, 1939, the date Germany invaded Poland, "could not constitute crimes against humanity . . . no matter how 'revolting or horrible' they were" because it has not been satisfactorily proved that they were done in execution of, or in connection with any such crime.⁷²

71. Nuremberg Judgment, *supra* note 8, at 249. Indeed, the judgment aggregated the verdicts of the defendants with respect to the war crimes and crimes against humanity counts and it is often difficult to determine precisely which acts constitute war crimes and which constitute crimes against humanity. *See, e.g., id.* at 273-275 (reciting Hermann Göring's crimes), 279-80 (same for Joachim von Ribbentrop), 282-83 (Wilhelm Keitel); 284-85 (Ernst Kaltenbrunner), 287-88 (Alfred Rosenber), 289-90 (Hans Frank), etc.

72. Leila S. Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289, 308 (1994) (quoting IMT Judgment). Wexler observes that the time when a crime was committed is not alone decisive, the connexion [sic] with the war must be established in order to bring a certain set of facts under the notion of a crime against humanity within the meaning of Article 6(c). *See id.* The British Prosecutor, Sir Hartley Shawcross, explained in his closing arguments: "You have to be satisfied not only that what was done was a crime against humanity but also that it was not purely a domestic matter, but that directly or indirectly it was associated with crimes against other nations or other nationals, in that, for instance, it was undertaken in order to strengthen the Nazi Party in carrying out its policy of domination by aggression, or to remove elements such as political opponents, the aged, the Jews, the existence of whom would have hindered the carrying out of the total war policy." Concluding Speeches by the Prosecution, 19 THE TRIAL OF THE GERMAN MAJOR WAR CRIMINALS, PROCEEDINGS OF THE

Of the twenty-two indicted Nazi leaders, nineteen were convicted,⁷³ of which two were found guilty only of crimes against humanity (Julius Streicher and Baldur von Schirach).⁷⁴ Notwithstanding the Tribunal's affirmation—and even heightening—of the war nexus requirement, there were times when the connection between the acts of defendants convicted of crimes against humanity and other crimes against the peace or war crimes was “juridically fragile.”⁷⁵ In addition, the restrictive interpretation of the war nexus was relaxed with respect to non-German victims. Crimes against Austrian nationals committed before the war satisfied the requirement introduced by the war nexus because they were perpetrated while Austria was annexed by Germany, an act that constituted a crime against the peace under the Charter. For example, with respect to von Schirach, indicted under Counts One (conspiracy) and Four (crimes against humanity) but convicted under Count Four alone,⁷⁶ the Tribunal reasoned:

Austria was occupied pursuant to a common plan of aggression[, so i]ts occupation is, therefore ‘a crime within the jurisdiction of the Tribunal’ As a result, ‘murder, extermination, enslavement, deportation, and other inhumane acts’ and ‘persecutions on political, racial, or religious grounds’ in connection with this occupation constitute a Crime against Humanity.⁷⁷

Likewise, Constantin von Neurath was convicted of crimes against humanity on the basis of his activities in Czechoslovakia before September 1, 1939.⁷⁸

Similarly, Streicher was indicted on Counts One and Four, but acquitted on Count One. With respect to Count Four, he was accused of writing, speaking, and preaching hatred of the Jews and inciting

INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY 433 (1946).

73. Hjalmar Horace Greeley Schacht, Franz von Papen, and Hans Fritzsche were acquitted. Martin Bormann was tried and convicted *in absentia*. See Nuremberg Judgment, *supra* note 8, at 331-32. Twenty-eight Japanese leaders were indicted for all three crimes within the Tokyo Charter (the Charter did not criminalize organizations as the Nuremberg Charter had) and twenty-five of the defendants were convicted (the cases against three defendants were dismissed because two were declared “unfit” and one died). The Judgment focuses on the crimes against the peace charges and largely passes over the other counts that were not dismissed. See International Military Tribunal for the Far East, Judgment, pt. C, ch. IX, at 1143-44 (1948). See generally RICHARD H. MINEAR, VICTOR'S JUSTICE: THE TOKYO WAR CRIMES TRIAL (1971).

74. See Nuremberg Judgment, *supra* note 8, at 547-49 (Streicher); *id.* at 563-66 (von Schirach).

75. Zoller, *supra* note 12, at 554 (translation by author).

76. The tribunal acquitted von Schirach under Court 1 on the grounds that he was not sufficiently involved in the planning or preparation of the war of aggression. See Nuremberg Judgment, *supra* note 8, at 310.

77. *Id.*; see also *id.* at 318-21 (finding Arthur Seyss-Inquart similarly guilty under Count 4).

78. See Nuremberg Judgment, *supra* note 8, at 325-26 (finding von Neurath guilty under Count 4).

people to active persecution and extermination. The Tribunal concluded simply that "Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with War Crimes, as defined by the Charter, and constitutes a Crime against Humanity."⁷⁹ No other support for the presence of a war nexus was provided.

This review of the record reveals that the Tribunal was satisfied by evidence of a merely tenuous connection between the acts alleged to be crimes against humanity and the war. Furthermore, as observed by a later United Nations commentary, the Tribunal assumed that "although an inhumane act, to constitute a crime against humanity, must be connected with a crime against peace or with a war crime, the required connexion [sic] can exist even when the crime against peace or the war crime was committed by another person,"⁸⁰ as was the case with defendant Streicher. In fact, although the Nuremberg judges may have limited and even downplayed the crimes against humanity charge, all those sentenced to hang were found guilty of crimes against humanity. In contrast, the defendants found guilty of waging aggressive war were accorded life sentences,⁸¹ even though the Tribunal had indicated that "to initiate a war of aggression is the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole."⁸² Thus, the judges "revealed their true sentiment by meting out their most severe punishment, the death penalty, only to those who had been found guilty of those quite uncommon atrocities that actually constituted a 'crime against humanity.'"⁸³

79. Nuremberg Judgment, *supra* note 8, at 134.

80. THE CHARTER AND JUDGMENT OF THE NURNBERG TRIBUNAL HISTORY AND ANALYSIS (Memorandum submitted by the Secretary-General) 69 (1949).

81. See Wright, *supra* note 8, at 41.

82. Nuremberg Judgment, *supra* note 8, at 186.

83. ARENDT, *supra* note 70, at 257. An alternative explanation for this sentencing phenomenon turns on the nature and consequences of the crimes:

Though aggressive war may result in larger losses of life, property and social values than any other crime, yet the relationship of the acts constituting the crime to such losses is less close than in the case of crime [sic] against humanity. The latter implies acts indicating a direct responsibility for large-scale homicide, enslavement or deportation of innocent civilians. . . . The crime of aggressive war . . . may lead to large-scale hostilities and serious losses but they may, on the other hand, succeed or be suppressed without serious damage.

Wright, *supra* note 8, at 44. This presumed hierarchy of crimes appears in ICTY jurisprudence. See Prosecutor v. Erdemovic, Case No. IT-96-22-A, Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah (Int'l Crim. Trib. former Yugo., App. Chamber, Oct. 7, 1997), at 17, para. 21 ("It is in their very nature that crimes against humanity differ in principle from war crimes. Whilst rules proscribing war crimes address the criminal conduct of a perpetrator towards an immediate protected object, rules proscribing crimes against humanity address the perpetrator's conduct not only towards the immediate victim but also towards the whole of humankind."). *But see* Prosecutor v. Erdemovic, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Li (Int'l Crim. Trib. former Yugo., App. Chamber, Oct. 7, 1997), at 10-16, para. 19-27 (arguing that crimes against humanity are not more serious than war crimes); see

In this way, it is apparent that the Nuremberg Charter drafters considered the war nexus requirement to be essential to justify the international adjudication of acts that would otherwise be within the jurisdictional sphere of Germany.⁸⁴ The Nuremberg Tribunal further limited the reach of the crimes against humanity charge to those acts perpetrated after the formal commencement of war, despite the clear intent of the Charter's drafters. The strength of this precedent was to influence subsequent trials of lesser defendants in the occupied zones, even though the constitutive document is silent as to the war nexus requirement.

III. THE NUREMBERG PROGENY: SUBSEQUENT CRIMES AGAINST HUMANITY TRIALS

The next major codification of the prohibition of crimes against humanity appeared in Control Council Law No. 10 (CCL 10)⁸⁵ enacted by the Allied Control Council of Germany⁸⁶ almost immediately after the promulgation of the IMT Charter "[i]n order to give effect to the terms of the . . . London Agreement of 8 August 1945, and the Charter

also id. at 10, para. 19 ("The gravity of a criminal act and consequently the seriousness of its punishment, are determined by the intrinsic nature of the act itself and not by its classification under one category or another.").

84. Some commentators have argued that the war nexus requirement was more a response to the desire to remain faithful to the principle of legality—*nullum crimen sine lege, nulla poena sine lege*. According to this theory, the war nexus implied that the prohibition of crimes against humanity was a corollary of, or at most a mere incremental innovation to, the prohibition of war crimes, an already well-developed corpus of law. See BASSIOUNI, *supra* note 22, at 186 (opining that the war nexus requirement was devised in order "to strengthen its legality by connecting it to the more established notion of war crimes. Thus, by foregoing prosecution for crimes committed between 1933 and the advent of war in 1939, the framers of the Charter most likely believed that it would strengthen the prosecution's legal case for post-1939 criminalization."); SHKLAR, *supra* note 70, at 162 (noting that to the drafters of the IMT Charter, the charge of war crimes was familiar and based upon a tradition of written instruments). Yet this explanation does not fully account for the resilience of the war nexus beyond the Nuremberg era. Furthermore, it implies that the concept of crimes against humanity was about repackaging the same offenses under a different rubric. What was truly revolutionary about the concept of crimes against humanity was that while the prohibited acts ("murder, extermination, enslavement, deportation, and other inhumane acts") do not differ substantially from traditional war crimes, the class of victims who are protected by the two prohibitions does differ significantly.

85. Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against the Peace and Against Humanity, art. II(c), (1945) [hereinafter CCL 10], *reprinted in* 1 CCL 10 TRIALS, *supra* note 4, at xvi, xvii.

86. The Allied Control Council was composed of authorized representatives from the four Powers, *viz.*, the former U.S.S.R., the U.S., Great Britain, and France. Pursuant to the Potsdam Declaration, the governments of the four Powers assumed the responsibility of administering the German State. See Schick, *supra* note 8, at 780 ("The legal consequence of the Potsdam Declaration was that Germany as an independent state ceased to exist . . . [and] the whole legislative, judicial, and executive rights formerly possessed by the German Government are vested in the Control Council."). In other words, the German government "went out of existence" upon the unconditional surrender of Germany. As such, the sovereignty of Germany was being "held in trust by the condominium of the occupying powers." Finch, *supra* note 8, at 22.

issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders other than those dealt with in the International Military Tribunal.”⁸⁷ CCL 10 did not incorporate the war nexus⁸⁸ when it defined crimes against humanity as:

Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.⁸⁹

The legislative history of CCL 10 is sparse, so the intent of its drafters in excluding reference to the war nexus remains unclear. It may have been that its drafters in the Control Council considered the Law to be German domestic law, to be administered by local courts,⁹⁰ without

87. CCL 10, *supra* note 85, pmb1., reprinted in 1 CCL 10 TRIALS, *supra* note 4, at xvi.

88. The absence of the war nexus requirement prompted one commentator to posit at the time that crimes against humanity were no longer linked to a state of war. See Schwelb, *supra* note 5, at 218 (“The whole jurisprudence evolved in the Nuremberg proceedings with a view to restricting crimes against humanity to those closely connected with the war becomes irrelevant for the courts which are dealing or will be dealing with crimes against humanity under Law No. 10.”). This position finds support in contemporary commentaries notwithstanding contrary jurisprudence by the post-Nuremberg tribunals. See Meron, *supra* note 20, at 85 (concluding that CCL 10 “deleted the jurisdictional nexus between war crimes and crimes against the peace . . . [such] that crimes against humanity exist independently of war”).

89. CCL 10, *supra* note 85, art. II(c).

90. The Prosecution in the *Flick* case emphasized CCL 10’s character as an “occupational enactment” in its attempt to apply the crimes against humanity provision to acts occurring prior to the formal declaration of war. See *United States v. Flick*, Opening Statement for the Prosecution, 6 CCL 10 TRIALS, *supra* note 4, at 3, 84. Later, however, the Prosecution characterized the Military Tribunal before which it was arguing as “an international tribunal.” *Id.* at 90. The characterization of CCL 10 by another tribunal was ambiguous on this point. See *United States v. Altstoetter*, Opinion and Judgment, 3 CCL 10 TRIALS, *supra* note 4, at 954, 965-66 (noting that CCL 10 “is an exercise of supreme legislative power in and for Germany. It does not purport to establish by legislative act any new crimes of international applicability. . . . [Likewise,] C. C. Law 10 may be deemed to be a codification rather than original substantive legislation. Insofar as C. C. Law 10 may be thought to go beyond established principles of international law, its authority, of course, rests upon the exercise of the ‘sovereign legislative power’ of the countries to which the German Reich unconditionally surrendered.”); *but see id.* at 1213 (“The Nurenberg [sic] Tribunals [under CCL 10] are not German courts On the contrary, the jurisdiction of this Tribunal rests on international authority [It] enforces international law as superior in authority to any German statute or decree.”); *id.* at 964 (“The fact that C. C. Law 10 on its face is limited to the punishment of German criminals does not transform this Tribunal into a German court.”). Subsequent judicial pronouncements have treated CCL 10 as an international instrument. See *Prosecutor v. Erdemovic*, Case No. IT-96-22-A, Judgment, Separate and Dissenting Opinion of J. Cassese (Int’l Crim. Trib. former Yugo., App. Chamber, Oct. 7, 1997), para. 27 (“[A]s Control Council Law No. 10 can be regarded as an international instrument among the four Occupying Powers (subsequently transformed, to a large extent, into customary law), the action of the courts establishing or acting under that Law acquires an international relevance that cannot be attributed to national courts pronouncing solely on the strength of national law.”).

international legal ramifications⁹¹. Accordingly, concerns for respecting the doctrine of sovereignty were perhaps less pressing, because the Control Council as “trustee”⁹² of German sovereignty could “consent” to the violation of sovereignty entailed by the crimes against humanity provisions in CCL 10.⁹³

This law was to form the basis for prosecutions of non-major defendants⁹⁴ conducted by the Allies in their respective zones of occupation and in the vicinity of the alleged crimes. For example, under CCL 10, the United States prosecuted twelve cases involving Nazi military and civilian leaders, German industrialists, and other offenders.⁹⁵ Several of these proceedings addressed the war nexus requirement. Two tribunals interpreted the terms of the Law literally and announced that crimes against humanity could be perpetrated and prosecuted independent of a state of war.⁹⁶ However, the legal weight to be accorded these determinations is unclear given that they were arguably mere *obiter dicta*. The trials that directly addressed the issue adhered to the Nuremberg precedent and incorporated the war nexus requirement into the definition of crimes against humanity in CCL 10.⁹⁷ These tribunals and the occasional defense counsel justified this departure from the text of CCL 10 on the force of the Nuremberg precedent and the need to maintain a distinction between crimes against humanity and ordinary domestic crimes.

The tribunal in the so-called *Einsatzgruppen Case*, brought against commanders of the killing squads that were responsible for killing millions of Jews and other “undesirables,” reasoned that the “Allied Control Council, in its Law No. 10, removed this limitation [the war nexus] so that the present Tribunal has jurisdiction to try all crimes against humanity as long known and understood under the general

91. This characterization is shared by some commentators. See BASSIOUNI, *supra* note 22, at 35 (noting that CCL 10 “was not intended to be an international instrument but national legislation”).

92. See *supra* note 86.

93. In contrast, the IMT Charter served as the constitutive instrument of an international judicial organ administering international law—so that its jurisdiction in “administering international law, and therefore its jurisdiction in domestic matters of Germany [was] cautiously circumscribed.” Schwelb, *supra* note 5, at 218.

94. The Moscow Declaration of October 30, 1943 declared that the majority of German war criminals would be tried within the countries in which they perpetrated their crimes, but the major war criminals would be punished by joint action of the Allies. See Leo Gross, *The Punishment of War Criminals: The Nuremberg Trial*, in LEO GROSS, SELECTED ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION 133, 137 (1993). Accordingly, the Charter provided that the Tribunal was to try those major war criminals “whose offenses have no particular geographic location.” IMT Charter, *supra* note 4, at viii.

95. See generally Willard Cowles, *Trials of War Criminals (Non-Nuremberg)*, 42 AM. J. INT’L L. 299 (1948); TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS (1992).

96. See *United States v. Ohlendorf*, Opinion and Judgment, 4 CCL 10 TRIALS, *supra* note 4, at 411; *United States v. Altstoetter*, Judgment, 3 CCL 10 TRIALS, *supra* note 4, at 954.

97. See *United States v. Flick*, Judgment, 6 CCL 10 TRIALS, *supra* note 4, at 3; *United States v. von Weizsaecker*, 12 CCL 10 TRIALS, *supra* note 4, at 118.

principles of criminal law.”⁹⁸ As such, “this law [prohibiting crimes against humanity] is not restricted to events of war. It envisions the protection of humanity at all times.”⁹⁹ This holding must be regarded as *obiter dicta*, however, given that the indictment charged only actions committed between May 1941 and July 1943, well after the commencement of war.¹⁰⁰

The *Justice Case*¹⁰¹ involved various German jurists who were charged with the commission of war crimes, crimes against humanity,¹⁰² and with conspiring to commit such offenses¹⁰³ through the instrumentalities of the German Ministry of Justice and courts. Although the Tribunal observed that CCL 10 “differs materially from the Charter,” in that, in the former, the war nexus was “deliberately omitted from the definition” of crimes against humanity,¹⁰⁴ all of the acts alleged under Count Two (crimes against humanity) of the indictment were committed after September 1939, so the legal weight attributable to this observation is unclear. Count One (common plan) of the Indictment did, however, allege acts committed prior to this time. Upon dismissing this Count on the grounds of lack of jurisdiction to try any defendant upon a charge of conspiracy as a separate substantive offense,¹⁰⁵ the Tribunal observed that Count One may contain residual charges which could still be pursued:

98. *United States v. Ohlendorf*, Opinion and Judgment, 4 CCL 10 TRIALS, *supra* note 4, at 411, 499.

99. *Id.* at 497.

100. *See id.*, Indictment, at 15. Another tribunal found the accused guilty of crimes against humanity without addressing the war nexus requirement, because all the acts charged took place after the commencement of the war or in occupied territory. *See, e.g.*, *United States v. Greifelt*, Opinion and Judgment, 5 CCL 10 TRIALS, *supra* note 4, at 88, 152-54.

101. *United States v. Altstoetter*, Indictment, 3 CCL 10 TRIALS, *supra* note 4, at 15.

102. Count Two charged as follows: “Between September, 1939 and April, 1945, all of the defendants herein unlawfully, willfully, and knowingly committed war crimes, as defined by Control Council Law No. 10, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, and were connected with plans and enterprises involving the commission of atrocities and offenses against persons and property, including, but not limited to, murder, torture, and illegal imprisonment of, and brutalities, atrocities, and other inhumane acts against thousands of persons.” *Id.* at 19.

103. Count One accused the defendants of “acting pursuant to a common design, unlawfully, willfully, and knowingly did conspire and agree together and with each other . . . to commit war crimes and crimes against humanity, as defined in [CCL 10]. . . . [A]ll of the defendants herein, acting in concert with each other and with others, unlawfully, willfully and knowingly, were principals in, accessories to, ordered, abetted, took a consenting part in, and were connected with plans and enterprises involving, the commission of war crimes and crimes against humanity All of the defendants herein . . . accordingly are individually responsible for their own acts and for all the acts performed by any person or persons in execution of the said common design, conspiracy, plans, and enterprises.” *Id.*

104. 3 CCL 10 TRIALS, *supra* note 4, at 974.

105. *Id.* at 956 (“[N]either the Charter of the International Military Tribunal nor Control Council Law No. 10 has defined conspiracy to commit a war crime or a crime against humanity as a separate substantive crime; therefore, this Tribunal has no jurisdiction to try any defendant upon a charge of conspiracy considered as a separate substantive offense.”).

Count one of the indictment, in addition to the separate charge of conspiracy, also alleged unlawful participation in the formulation and execution of plans to commit war crimes and crimes against humanity which actually involved the commission of such crimes. We, therefore, cannot properly strike the whole of count one from the indictment, but, in so far as count one charges the commission of the alleged crime of conspiracy as a separate substantive offense, distinct from any war crime or crime against humanity, the Tribunal will disregard that charge.¹⁰⁶

However, because the remaining counts alleged acts committed after September 1939 and the Tribunal felt bound by the “limitations of time set forth” within the Indictment,¹⁰⁷ the judgment left unanswered the question of whether it would have allowed for the prosecution of offenses committed before 1939 had they been charged in Counts Two through Four.

In discussing crimes against humanity more generally, the Tribunal recognized that the war nexus operated to distinguish crimes against humanity from ordinary crimes. It suggested an alternative mechanism when it formulated its own definition of the offense. This definition emphasized that it must be proven that the defendant consciously participated in a systematic attack manifesting some government involvement against a population group:

[C]rimes against humanity as defined in [CCL 10] must be strictly construed to exclude isolated cases of atrocity or persecution whether committed by private individuals or by a governmental authority. As we construe it, that section provides for punishment of crimes committed against German nationals only where there is proof of conscious participation in systematic government organized or approved procedures amounting to atrocities and offenses of the kind specified in the act and committed against populations or amounting to persecutions on political, racial, or religious grounds.¹⁰⁸

The tribunal elaborated that the “overt acts of the several defendants must be seen and understood as deliberate contributions toward the

106. *Id.* The Tribunal also cautioned that “[t]his ruling must not be construed . . . as denying to either prosecution or defense the right to offer in evidence any facts or circumstances occurring either before or after September 1939, if such facts or circumstances tend to prove or to disprove the commission by any defendant of war crimes or crimes against humanity as defined in Control Council Law No. 10.” *Id.*

107. *Id.* at 985.

108. *Id.* at 982.

effectuation of the policy of the Party and State The material facts which must be proved in any case are: (1) the fact of the great pattern or plan of racial persecution and extermination, and (2) specific conduct of the individual defendant in furtherance of the plan.”¹⁰⁹

The war nexus was directly at issue in the *Flick Case* in which the tribunal expressly rejected an argument that the omission of the limiting language in CCL 10 manifested an intent to broaden the scope of crimes against humanity.¹¹⁰ In that case, the accused—officials of the Flick Concern—were charged with the deployment of slave labor, the spoliation and seizure of property, and accessory liability for actions of a criminal organization (the SS). Certain contested transactions charged as crimes against humanity were undoubtedly completed prior to the formal commencement of war.¹¹¹

The Prosecution argued that the plain language of the Law provided jurisdiction over crimes against humanity independent of their connection to war crimes or crimes against the peace.¹¹² Furthermore, it noted that the provisions in paragraph five of Article II nullifying pardons for crimes committed and statutes of limitation¹¹³ would be rendered meaningless if the tribunal had jurisdiction only over those crimes against humanity committed after the commencement of war because:

This provision has no application to war crimes, since the rules of war did not come into play, at the earliest, before the annexation of Austria in 1938 This provision is clearly intended to apply primarily to crimes against humanity, and explicitly recognizes the

109. *Id.* at 1114; *see also id.* at 984-85 (“Simple murder and isolated instances of atrocities do not constitute the gravamen of the charge. Defendants are charged with crimes of such immensity that mere specific instances of criminality appear insignificant by comparison. The charge, in brief, is that of conscious participation in a nation wide government-organized system of cruelty and injustice”). As will become apparent, this formulation was to influence the formulation adopted by the International Criminal Tribunal for the Former Yugoslavia. *See infra* Part V.

110. *See* United States v. Flick, Judgment, 6 CCL 10 TRIALS, *supra* note 4, at 1212 (“It is argued that the omission of this phrase [in execution of or in connection with . . .] from Control Council Law No. 10 evidences an intent to broaden the jurisdiction of this Tribunal to include such crimes [occurring before September 1, 1939].”).

111. *See* United States v. Flick, Opening Statements for the Prosecution, 6 CCL 10 TRIALS, *supra* note 4, at 77. *See generally* Matthew Lippman, *War Crimes Trials of German Industrialists: The “Other Schindlers,”* 9 TEMP. INT’L & COMP. L.J. 173, 185-206 (1995).

112. *See* United States v. Flick, Opening Statements for the Prosecution, 6 CCL 10 TRIALS, *supra* note 4, at 80, 85.

113. “In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect of the period from 30 January 1933 to 1 July 1945, nor shall any immunity, pardon, or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment.” CCL 10, *supra* note 85, art. II, para. 5.

possibility of their commission on and after 30 January 1933.¹¹⁴

Finally, the Prosecution advocated a teleological approach to statutory construction when it argued that any other interpretation would be contrary to the Law's object and purpose:

Acts properly falling within the definition in Law No. 10 are, we believe, punishable under that law when viewed as an occupational enactment, whether or not they were connected with crimes against peace or war crimes. No other conclusion can be drawn from the disappearance of the [war nexus] And no other conclusion is consonant with the avowed purposes of the occupation as expressed at the Potsdam Conference, cardinal among which are the abolition of the gross and murderous racial and religious discrimination of the Third Reich These purposes cannot possibly be fulfilled if those Germans who participated in these base persecutions of their fellow nationals during the Hitler regime go unpunished.¹¹⁵

The Prosecution concluded with the assertion that "crimes against humanity as defined in Law No. 10 'stand on their own feet' and are quite independent of crimes against peace or war crimes."¹¹⁶

The Tribunal rejected these arguments and held that to interpret the Law as such would contravene the express language of the Preamble incorporating the London Agreement of which the Charter was an integral part.¹¹⁷ Furthermore, the Tribunal reasoned that its very purpose was to try "war criminals" who committed crimes during the war or in connection with war: "[w]e look in vain for language evincing any other purpose. Crimes committed before the war and having no connection therewith were not in contemplation."¹¹⁸ Thus, the Tribunal dismissed the crimes against humanity charge in Count Three of the Indictment on the grounds that the defendant's acquisition of industrial property occurred prior to the outbreak of war and was thus outside of the

114. *United States v. Flick*, Opening Statements for the Prosecution, 6 CCL 10 TRIALS, *supra* note 4, at 82.

115. *Id.* at 83.

116. *Id.* at 84.

117. *See United States v. Flick*, Judgment, 6 CCL 10 TRIALS, *supra* note 4, at 1212-14.

118. *Id.* at 1213 ("To try war crimes is a task so large . . . that there is neither necessity nor excuse for expecting this Tribunal to try persons for offenses wholly unconnected with the war. So far as we are advised no one else has been prosecuted to date in any of these courts including IMT for crimes committed before and wholly unconnected with the war.").

Tribunal's jurisdiction.¹¹⁹ In so holding, the Tribunal rejected last minute arguments by the Prosecution that the very purpose of the defendant's acts was economic preparation for war.¹²⁰ Interestingly, the Tribunal seemed to rest its determination on the precise date of the alleged acts and focused less on the connection between the acts and crimes against the peace or war crimes.¹²¹

The *Flick* judgment proved insurmountable to the Prosecution in the *Ministries Case*, which involved charges against members of the German Foreign Office for their role in the deportation of Jews.¹²² There, the Defense moved to quash Count Four of the Indictment for lack of jurisdiction on the grounds that the acts alleged, which occurred between January 1933 and September 1939, fell outside of the purview of CCL 10 which was enacted "[i]n order to give effect to the terms of . . . the London Agreement of August 8, 1945 and the Charter issued pursuant thereto."¹²³ The Defense explained the war nexus as a prerequisite for the exercise of international penal jurisdiction:

The Charter formulated for the first time the criminal concept of crimes against humanity. The concept which in itself comprehends far-reaching facts had to be limited because of the international character of the

119. See *id.* at 1216. The Tribunal held that even if the contested transactions had occurred after September 1, 1939, it would still lack jurisdiction given the nature of the offenses charged: "The 'atrocities and offences' listed therein, 'murder, extermination,' etc., are all offences against the person. Property is not mentioned. Under the doctrine of *ejusdem generis* the catch-all words 'other persecutions' must be deemed to include only such as affect the life and liberty of the oppressed peoples. Compulsory taking of industrial property, however reprehensible, is not in that category." *Id.* at 1215.

120. See *United States v. Flick*, Closing Statement for the Prosecution, 6 CCL 10 TRIALS, *supra* note 4, at 1008 ("Accordingly, the acts charged in count three were clearly connected with the commission of crimes against peace, and would be punishable even under the restricted scope of the doctrine of 'crimes against humanity' adopted by the International Military Tribunal under the London Charter.").

121. As a United Nations commentary notes, "The Flick Tribunal appears to have been on sounder ground when it said that 'crimes committed before the war *and* having no connection therewith were not in contemplation' than when it declared that 'In the I.M.T. trial the Tribunal declined to take jurisdiction of crimes against humanity occurring before September 1, 1939.'" 9 LAW REPORTS OF THE TRIALS OF WAR CRIMINALS 47 (footnotes omitted, emphasis in original) (1949) [hereinafter LAW REPORTS]. This latter interpretation of the Nuremberg precedent is supported by one distinguished commentator. See Schwelb, *supra* note 5 at 204-05 ("The scope of the phrase 'before or during the war' is therefore considerably narrowed as a consequence of the view that, although the time when a crime was committed is not alone decisive, the connection with the war must be established in order to bring a set of facts under the notion of a crime against humanity within the meaning of Article 6(c). As will be seen later, this statement does not imply that no crime committed before 1 September 1939 can be a crime against humanity. The Nuremberg Tribunal considered some inhumane acts committed prior to 1 September 1939 to be crimes against humanity in cases where their connection with the crime against peace was established. Although in theory it remains irrelevant whether a crime against humanity was committed before or during the war, in practice it is difficult to establish a connection between what is alleged to be a crime against humanity and a crime within the jurisdiction of the Tribunal, if the act was committed before the war . . .").

122. See *United States v. von Weizsaecker*, 13 CCL 10 TRIALS, *supra* note 4, at 76.

123. *United States v. von Weizsaecker*, Defense Motion to Dismiss Count Four of the Indictment, 13 CCL 10 TRIALS (1952), *supra* note 4, at 76, 77 (quoting CCL 10 pmbl.).

prosecution supported thereby. In temporal respect it is rather comprehensive since it includes crimes against the civil population prior to and during the war; with regard to the substance, however, it is limited since only such crimes are subject to prosecution which have been committed in execution of or in connection with a crime within the jurisdiction of the Tribunal according to the Charter. This limitation provides the definition of the crime against humanity which is subject to criminal prosecution and therewith also the limitation of a tribunal's competency for trial.¹²⁴

The Defense emphasized that if CCL 10 was to extend the Charter's definition of crimes against humanity, it could have done so *expressi verbis*, especially considering the close connection between the two enactments. The Defense further argued that CCL 10 did not need to include the war nexus requirement because it existed already within the law's frame and delimitation.¹²⁵

The Prosecution in rebuttal attempted to diminish the prior rulings under CCL 10 on this point first by denying them precedential authority¹²⁶ and then by distinguishing them on their facts.¹²⁷ When forced to confront the *Flick* Tribunal's unequivocal application of the war nexus, the Prosecution argued that the Tribunal there "create[d] ambiguities where none in fact exist[ed]."¹²⁸ The remainder of the Prosecution's submission rested on arguments about the juridical background of the notion of crimes against humanity.

The acts which we have charged as criminal in this indictment were criminal under international penal law

124. *Id.* at 77.

125. *See id.* at 78.

126. *See id.* at 83, Oral Argument of the Prosecution on the Defense Motion to Dismiss Count Four ("[T]he conclusion reached, and the statements made, by these other Tribunals are certainly entitled to great weight, but are not binding on this Tribunal. Under [CCL 10] . . . certain determinations by the IMT are made binding, but decisions on general abstract questions of law are not."). The Prosecution here was referring to Article II(1)(d) of CCL 10 which criminalized "[m]embership in categories of a criminal group or organization declared criminal by the International Military Tribunal" on the authority of Article 10 of the IMT Charter which held that "[i]n 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 for 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." IMT Charter, *supra* note 4, art. 10.

127. *See* United States v. von Weizsaecker, Oral Argument of the Prosecution on the Defense Motion to Dismiss Count Four, 13 CCL 10 TRIALS, *supra* note 4, at 84 (arguing that the *Flick* decision turned on the nature of the acts alleged—property crimes—and cannot be read to suggest that the *Ministries* Tribunal has no jurisdiction to "hear and determine these charges of murder, enslavement, and other atrocious crimes because they occurred prior to September 1939").

128. *Id.* at 92.

long before the adoption of the [Charter and CCL 10] . . . Law No. 10, therefore, is not a source of international law in a strict legislative sense at all, although it is a prime example of the method by which international law, like the common law, develops.¹²⁹

In support of the argument that the international prohibition of crimes against humanity predated the Charter, the Prosecution referenced occasions throughout history when nations intervened in response to “certain types of atrocities and offenses shocking to the moral sense of all civilized nations,”¹³⁰ because “unilateral armed intervention . . . was the only method for [international penal law’s] . . . enforcement until recent years. Indeed, lacking some vehicle for true collective action, interventions were probably the only possible sanction of that time, but they are outmoded and cannot be resorted to in these times either safely or effectively.”¹³¹ Furthermore, the Prosecution argued that CCL 10 represents an “occupational enactment” for Germany with “objectives which the Charter did not comprehend”¹³² in that it was concerned primarily with punishing “crimes committed by Germans against Germans,”¹³³ many of which occurred prior to 1939, so that requiring a connection to the war would nullify the object and purpose of the Law. The Prosecution also borrowed from the unsuccessful plain language arguments of the Prosecution in the *Flick* trial.¹³⁴

The Prosecution recognized that without the war nexus element, the definition of crimes against humanity could expand the tribunal’s jurisdiction to encompass municipal law crimes. In response to the perceived need to distinguish crimes against humanity from such “ordinary” crimes, the Prosecution borrowed from the formulation of the Tribunal in the *Justice Case*:¹³⁵ “the prosecution must show that these acts form part of a general pattern or program, in which the defendants participated, amounting to a systematic program of the persecution of Jews or other groups of the civilian population of sufficient scale and violence.”¹³⁶ As a final argument, the Prosecution argued that, in any case, the indictment should be considered as a whole

129. *Id.* at 85.

130. *Id.* at 97-98 (citing instances of humanitarian intervention).

131. *Id.* at 98-99.

132. *Id.* at 107.

133. *Id.* at 86.

134. *See id.* at 94 (“[T]he laws of war cannot have come into play at the very earliest before the annexation of Austria in 1938, and it follows that the . . . paragraph [5 of Article II of CCL 10] has substantive effect between 1933 and 1938 only with respect to crimes against humanity, and it is a cardinal principle that statutes are to be construed so as to give effect to their provisions, not to nullify them.”).

135. *See id.* at 102-31; *see also supra* text accompanying note 110 (recounting reasoning in the *Justice Case*).

136. *Id.* at 103.

and all the acts alleged to be crimes against humanity were in fact connected with war crimes and crimes against the peace.¹³⁷

In a tersely worded memorandum,¹³⁸ the Tribunal invoked the *nullum crimen sine lege* principle¹³⁹ and refused to go further than the IMT Judgment that preceded it.¹⁴⁰ Accordingly, it rejected the Prosecution's construction of CCL 10 on the grounds that it "cannot justify an extension of the jurisdiction of this Tribunal beyond the sphere to which the International Military Tribunal properly limited itself."¹⁴¹ It noted that to "hold otherwise would be to disregard the well-established principle of justice that no act is to be declared a crime which was not a crime under law existing at the time when the act was committed."¹⁴² It concluded broadly that it had not been established that "crimes against humanity perpetrated by a government against its own nationals, are of themselves crimes against international law."¹⁴³

The war nexus requirement appeared in other Nuremberg-era legislation enacted by the victorious powers. The *Hadamar Trial*,¹⁴⁴ for example, was conducted under a United States directive issued by General Eisenhower regarding Military Commissions in the European theater of operations.¹⁴⁵ The directive empowered Military Commissions to try individuals accused of violations of the laws or customs of war, the law of nations, or the laws of occupied territory, including:

murder, torture or ill-treatment of prisoners of war or persons on the seas; killing or ill treatment of hostages; murder, torture or ill-treatment, or deportation to slave

137. *See id.* at 89.

138. *See id.* at 112, Order of the Tribunal Dismissing Count Four, and Tribunal Memorandum Attached Thereto.

139. The maxim *nullum crimen sine lege, nulla poena sine lege* announces the principle of legality—"no crime without law, no punishment without law."

140. *See id.* at 112-17.

141. *Id.* at 114.

142. *Id.* at 116.

143. *Id.* at 117. Similarly, in the *Medical Case*, the Tribunal found its jurisdiction limited to those offenses (in this case medical experimentation) committed after the commencement of the war. *See U.S. v. Brandt, Judgment, 2 CCL 10 TRIALS, supra* note 4, at 171, 181. However, it made no attempt to connect the abuse of German nationals with crimes against the peace or war crimes or distinguish between the former and crimes against humanity. *See, e.g., id.* at 227 (holding simply that "[t]o the extent that these experiments did not constitute war crimes, they constituted crimes against humanity").

144. Trial of Alfons Klein and Six Others, U.S. Military Commission Appointed by the Commanding General Western Military District, U.S.F.E.T., Wiesbaden, Germany (Oct. 8-15, 1945), *reprinted in 1 LAW REPORTS, supra* note 121, at 46.

145. United States Military Commissions are convened under the Constitutional power of Congress to "define and punish Piracies and Felonies committed on the high Seas and Offences against the Law of Nations . . ." U.S. CONST. art. I, § 8. Under this power, the Congress passed the Articles of War which recognized the Military Commission as an appropriate tribunal for the trial and punishment of offenses against the law of war, including offenses committed by enemy combatants.

labour or for any other illegal purpose, of civilians of, or in, occupied territory; plunder of public or private property; wanton destruction of cities, towns villages; . . . murder, extermination, enslavement, deportation or other inhumane acts committed against any civilian population, or persecution on political, racial, national or religious grounds, in execution of or in connection with any offence within the jurisdiction of the commission, whether or not in violation of the domestic law of the country where perpetrated; and all other offences against the laws or customs of war¹⁴⁶

The Prosecutor of the Military Commission in Wiesbaden charged certain personnel of a state sanitarium with the general crime of violating international law for “acting jointly and in pursuance of a common intent and acting for and on behalf of the then German Reich” in that they did “wilfully, deliberately and wrongfully, aid, abet, and participate in the killing of human beings of Polish and Russian nationality, their exact names and number being unknown but aggregating in excess of 400, and who were then and there confined by the then German Reich on an exercise of belligerent control.”¹⁴⁷ The Military Commission concluded that it did not have jurisdiction over crimes against humanity insofar as they were not simultaneously violations of the laws and usages of war.¹⁴⁸

Although the war nexus requirement was not an express element of the offense of crimes against humanity in CCL 10, this review of the post-Nuremberg jurisprudence reveals that those tribunals that addressed the question considered themselves bound by the Nuremberg Tribunal’s precedent and accordingly treated the war nexus requirement as an essential element of the offense to be proven by the prosecution. This staying power of the war nexus requirement reveals a profound ambivalence among international lawyers of that era about the propriety of international law reaching inhumane acts that occurred entirely within the boundaries of a sovereign state.

As written by the Charter’s drafters and as interpreted by the Nuremberg and subsequent postwar tribunals, the war nexus requirement had the potential to significantly limit the scope of the

146. Annex II, United States Law and Practice Concerning Trials of War Criminals by Military Commissions and Military Government Courts, 1 LAW REPORTS, *supra* note 121, at 111, 112. The December 5, 1945 United States Regulations Governing the Trials of Accused War Criminals, promulgated to try minor war criminals, similarly granted jurisdiction over crimes of “murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population before or during the war, or persecutions on political, racial or religious grounds in execution of, or in connection with, any crime defined herein” [war crimes and crimes against the peace]. See Annex II, United States Law and Practice Concerning Trials of War Criminals by Military Commissions and Military Government Courts, *supra*, at 114.

147. Hadamar Trial, *reprinted in* 1 LAW REPORTS, *supra* note 121, at 47.

148. See *id.* at 52.

international legal prohibition against crimes against humanity going forward. In particular, the IMT Charter's contrived nexus between crimes against humanity and either war crimes or crimes against the peace is frequently not borne out in practice. Certain inhumane acts that defined the Nazi era could never be "shoe-horned" into crimes against the peace or traditional notions of war crimes:

reports of unheard-of atrocities, the blotting out of whole peoples, the "clearance" of whole regions of their native population, that is, not only crimes that "no conception of military necessity could sustain" but crimes that were in fact independent of the war and that announced a policy of systemic murder to be continued in time of peace.¹⁴⁹

This fact was noted by the Tribunal in the *Einsatzgruppen Case*: "The annihilation of the Jews had nothing to do with the defense of Germany, the genocide program was in no way connected with the protection of the Vaterland; it was entirely foreign to the military issue [T]he argument that the Jews . . . constituted an aggressive menace to Germany, a menace which called for their liquidation in self-defense, is untenable as being opposed to all facts, all logic and all law."¹⁵⁰ The war nexus' patent constraints on the scope of international penal law were to influence future drafters. Accordingly, they experimented with alternative formulations of the prohibition against crimes against humanity that would reach peacetime offenses while still satisfactorily distinguishing crimes against humanity from ordinary crimes.

IV. THE POSTWAR CRIMES AGAINST HUMANITY LEGACY

Following the conclusion of the Nuremberg Trial, the United Nations began codifying aspects of the law applied and developed in the post-war period. The perceived need to distinguish crimes against humanity from ordinary crimes and the propriety of retaining the war nexus emerged repeatedly during these subsequent codification efforts.

149. ARENDT, *supra* note 70, at 257. Arendt decried the war nexus as preventing the Tribunal from doing full justice to the crime perpetrated against the Jewish people, given that this crime which "had so little to do with war and its commission actually conflicted with and hindered the war's conduct . . ." *Id.* at 258.

150. United States v. Ohlendorf, Opinion and Judgment, 4 CCL 10 TRIALS, *supra* note 4, at 411, 469-70. See also FINKELKRAUT, REMEMBERING IN VAIN, THE KLAUS BARBIE TRIAL AND CRIMES AGAINST HUMANITY 4 (1992) (noting that "the members of exterminating bureaucracy did not in fact make war," rather, the Nazi treatment of the "Jewish Question" was a "gratuitous crime totally detached from the necessities and horrors of the military enterprise") (emphasis in original); Zoller, *supra* note 12, at 553 (noting that the war nexus obliged the prosecutor to make an impossible proof: a connection between the Nazi plan of aggression and the Final Solution).

In these debates, some delegates supported the retention of the war nexus requirement, while other delegations sought to formulate an alternative solution to the question of delimiting international jurisdiction. The result is a veritable juggling of alternative elements—such as the requirements of state action, proof of a discriminatory motive on the part of the perpetrator, or acts that are either large-scale or the result of a policy—and a concomitantly protean definition of the offense.

In 1946, the United Nations endorsed the principles of international law within the IMT Charter.¹⁵¹ It directed the International Law Commission (ILC)¹⁵² to “[f]ormulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal.”¹⁵³ The ILC’s 1950 report on the “Principles of International Law Recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal” retained the war nexus and defined the offense of crimes against humanity as “[m]urder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion [sic] with any crime against peace or any war crime.”¹⁵⁴ The ILC clarified that:

In its definition of crimes against humanity the Commission has omitted the phrase ‘before or during the war’ contained in article 6(c) of the Charter of the Nürnberg Tribunal because the phrase referred to a particular war, the war of 1939. The omission of the phrase does not mean that the Commission considers that crimes against humanity can be committed only during a war. On the contrary, the Commission is of the opinion that such crimes may take place also before a war in connexion [sic] with crimes against peace.¹⁵⁵

At the same time, the ILC began to prepare a Draft Code of Offences Against the Peace and Security of Mankind. Originally, the ILC defined the offense of crimes against humanity in terms of the nature and scope of the acts themselves by requiring crimes against

151. See G.A. Res. 95(I), U.N. Doc. A/64/Add.1 (1946), at 188 (1946).

152. The U.N. created the ILC in order to promote “the progressive development of international law and its codification.” G.A. Res. 174, U.N. GAOR, U.N. Doc. A/519, at 105 (1945).

153. G.A. Res. 177, U.N. Doc. A/519, at 111-12 (1947).

154. *Report of the International Law Commission to the General Assembly*, U.N. GAOR, 5th Sess., Supp. No. 12, at 11, 14, U.N. Doc. A/1316 (1950), reprinted in 4 AM. J. INT’LL. 126, 132 (Supp. 1950); [1950] 2 Y.B. INT’LL. COMM’N 374.

155. *Id.*

humanity to be committed on a massive or systematic basis.¹⁵⁶ However, in the 1951 proceedings, delegates decided to delete the qualifier “mass” from the definition of crimes against humanity (primarily because the Charter had not employed it). This in turn provoked a revival of the war nexus by the Chairman, who “was of the opinion that the deletion of the word ‘mass’ made it necessary to retain those reservations [the war nexus], since otherwise a whole series of domestic crimes would be converted into crimes under international law.”¹⁵⁷ Another delegate agreed that without the war nexus requirement,

any isolated murder committed for specific political or other reasons now came under paragraph 9 [the crimes against humanity provision]. If the Commission now eliminated the connection between that crime and the others referred to in the draft code [war crimes and crimes against the peace], it would make, for example, the persecution of a single individual belonging to some political party or other a crime against humanity and, hence, an international crime. In his view, such a proposal was Utopian; it would be going too far.¹⁵⁸

Other proponents considered the nexus between a crime against humanity and an act of war or a war crime necessary to justify international judicial intervention: “At the London Conference . . . it had been generally agreed that, to justify action by the International Military Tribunal, the acts in question, for example the persecution of Jews, must be committed in time of war.”¹⁵⁹ Finally, other delegates justified the retention of the war nexus on the basis of their mandate: “[t]he Commission was not . . . entrusted with the preparation of a general international penal code. The acts covered by the draft code

156. This approach finds some support in Nuremberg-era commentary. See, e.g., HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 179 (1948) (“As a rule systematic mass action, particularly if it was authoritative, was necessary to transform common crime, punishable under municipal law, into a crime against humanity, which this became also a concern of international law. Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had been their victims.”).

157. *Summary Records of the 3d Session*, [1951] I Y.B. INT’LL. COMM’N, 90th mtg., at 70. Other delegates argued that the qualifier “mass” should have been retained precisely in order to maintain the distinction between international and domestic crimes. See *id.* at 69.

158. *Id.* 91st mtg., at 74 (statement of Kerno). See also *id.* 91st mtg., at 76 (statement of Amado) (“The crimes referred to in paragraph 9 were already regarded as crimes *per se* under the penal codes of all countries, but became crimes under international law through being connected with acts calculated to disturb the peace.”).

159. *Id.* 91st mtg., at 74 (testimony of Spiropoulos).

were 'offences against the peace and security of mankind,' that was to say, they belonged to a specific category."¹⁶⁰

Opponents of the retention of the war nexus interpreted it as a jurisdictional rather than substantive element of the definition of crimes against humanity in the IMT Charter. According to one delegate, the war nexus concerned "the required conditions to enable such a crime to be dealt with by a court [The Charter] provided that the jurisdiction of the Tribunal operated only where there was a connexion [sic]. But the crime could exist even without such a connexion."¹⁶¹

The issue was not resolved by the 1954 proceedings.¹⁶² One delegate proposed that the war nexus be removed as it was not necessary for the ILC to adhere to the Nuremberg Charter which "had dealt with a specific situation. The interests of mankind as a whole, not only in time of war, had to be considered."¹⁶³ This same delegate compared crimes against humanity to genocide and noted that the prohibition against the latter was equally applicable in times of peace and war. Although delegates initially deleted the war nexus,¹⁶⁴ in subsequent proceedings the issue was referred to a subsidiary panel for further discussion.¹⁶⁵ Those delegates eventually voted to replace the war nexus with the requirement that the defendant be "acting under the instigation or toleration of the authorities" and be motivated by "political, social, racial, religious, or cultural grounds."¹⁶⁶ Under this formulation, ordinary crimes may be prosecuted as crimes against humanity when the perpetrator is a quasi-state actor and was motivated by discriminatory animus.¹⁶⁷

160. *Id.* 90th mtg., at 71 (delegate Amado). *See also id.* 91st mtg., at 76 (delegate Alfaro) (arguing further that "[a]ll the crimes that it [the ILC] codified must therefore be connected with war, with preparation of war or with the consequences of war").

161. *Id.* 91st mtg., at 75 (delegate Sandström).

162. *Report of the International Law Commission to the General Assembly*, U.N. Doc. A/2693 (1954), reprinted in [1954] 2 Y.B. INT'L L. COMM'N 140, 151-52.

163. *Summary Records of the Third Session*, U.N. Doc. A/2693 (1954), reprinted in [1954] 1 Y.B. INT'L L. COMM'N 131-32, 267th mtg. (delegate Hsu).

164. *See id.* at 133.

165. *See id.* 268th mtg., at 135.

166. *Id.* 270th mtg., at 148. *See generally* D.H.N. Johnson, *The Draft Code of Offences Against the Peace and Security of Mankind*, 4 INT'L & COMP. L. Q. 445, 464-65 (1955) (critiquing the drafters for including the discriminatory motive and state action requirements). One commentator explained the extension of the requirement that the perpetrator act on discriminatory grounds to all crimes against humanity and not just to acts of persecution, as was the original IMT formulation, on the grounds that "this was considered necessary once the war-crime-connection clause was removed i.e. it was necessary to distinguish internationally illegitimate violations of human rights from legitimate state policy protected by the 'domestic jurisdiction' provision of Article 2(7) of the U.N. Charter." Sydney L. Goldenberg, *Crimes Against Humanity—1945-1970*, 10 W. ONT. L. REV. 1, 19 n.53 (1971).

167. The ICTY revived this latter element in its formulation of crimes against humanity. *See infra* Part V.

The Code remained virtually dormant¹⁶⁸ until the 1980s due to the inability of delegates to agree upon a definition of “aggression.”¹⁶⁹ In that period, the General Assembly drafted the 1968 Convention on the Non-Applicability of the Statutory Limitations to War Crimes and Crimes against Humanity, which concerns crimes against humanity “whether committed in time of war or in time of peace.”¹⁷⁰ Similarly, the International Convention in the Suppression and Punishment of the Crime of Apartheid established that apartheid is a crime against humanity whether committed in wartime or peacetime.¹⁷¹ Neither of these conventions is well-subscribed to.

The ILC returned to the Draft Code in the 1980s in response to a General Assembly request.¹⁷² At the commencement of proceedings in 1984, one delegate noted that while belligerency and criminality were closely linked in the World War II period, in the modern era, “the concept of an international crime has acquired a greater degree of autonomy and covers all offences which seriously disturb international public order.”¹⁷³ Delegates agreed that the “concept of crimes against humanity had now become effectively autonomous in law and was no longer indissolubly linked with war crimes or crimes against the peace.”¹⁷⁴ Accordingly, the draft adopted by the ILC in 1991¹⁷⁵ provided that enumerated inhumane acts may be prosecuted as crimes against humanity even when they occur in times of peace so long as they are perpetrated in a systematic manner or on a mass scale.¹⁷⁶ Delegates

168. See G.A. Res. 897 (IX) U.N. GAOR, 9th Sess., Supp. No. 21, at 50, U.N. Doc. A/2890 (1954) (postponing work on the Draft Code).

169. The G.A. completed a definition of aggression in 1974. See *Definition of Aggression*, G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, at 142-44, U.N. Doc. A/9631 (1974).

170. Adopted by G.A. Res. 2391, U.N. GAOR, 23rd Sess., Supp. No. 18, at 40-41, U.N. Doc. A/7218 (1968), reprinted in 754 U.N.T.S. 73 (adopting the convention on November 26, 1968). See generally Robert H. Miller, *The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 65 AM. J. INT'L L. 476 (1971).

171. The General Assembly adopted and opened the Convention for signature and ratification on November 30, 1973. See G.A. Res. 3068 (XXVIII), U.N. GAOR, 28th Sess., Supp. No. 30, at 75, U.N. Doc. A/9030 (1973) (entry into force July 18, 1976).

172. See G.A. Res. 106, U.N. GAOR, 36th Sess., Supp. No. 51, at 239, U.N. Doc. A/36/774 (1981).

173. Doudou Thiam, Special Rapporteur, *Second Report on the Draft Code of Offences against the Peace and Security of Mankind*, [1984] 2 Y.B. INT'L L. COMM'N, at 90, U.N. Doc. A/CN.4/SER.A/1984.

174. *Summary Records of the 1960th Meeting*, [1986] 1 Y.B. INT'L L. COMM'N 104, U.N. Doc. A/CN.4/SER.A/1986. The ILC's Special Rapporteur announced that the autonomy of crimes against humanity from war crimes “has now become absolute. Today, crimes against humanity can be committed not only within the context of an armed conflict, but also independently of any such conflict.” Doudou Thiam, Special Rapporteur, *Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind*, [1986] 2 Y.B. INT'L L. COMM'N 53, U.N. GAOR, Int'l Law Comm'n, 38th Sess., at 6, U.N. Doc. A/CN.4/398 (1986).

175. See *Report of the International Law Commission to the General Assembly*, 46 U.N. GAOR, 46th Sess., Supp. No. 10, at 6, U.N. Doc. A/46/10 (1991), reprinted in [1991] 2 Y.B. INT'L L. COMM'N 79, 94-98, U.N. Doc. A/CN.4/SER.A/1991.

176. In this draft, the ILC replaced the term “crimes against humanity” with “Systematic or Mass Violations of Human Rights.” According to Article 21, “An individual who commits or orders the commission by another individual of any of the following . . . violations of human

explained that the new chapeau¹⁷⁷ was meant to exclude isolated violations of human rights and ensure that jurisdiction would be allowed only where the acts listed were committed in a systematic manner or on a mass scale.¹⁷⁸ Delegates elaborated that “[t]he systematic element relates to a constant practice or to a methodical plan to carry out such violations. The mass-scale element relates to the number of people affected by such violations or the entity that has been affected.”¹⁷⁹ Furthermore, in this draft of the Code, proof that the perpetrator was a state actor was not a required element.¹⁸⁰

Despite this apparent solution to the problem of distinguishing crimes against humanity from ordinary crimes, disagreements continued to arise within the ILC over the requirement that inhumane acts be prosecuted as crimes against humanity only when they are perpetrated on a mass or systematic scale. As the Special Rapporteur noted, “even a crime perpetrated against a single victim could constitute a crime against humanity on the basis of its perpetrator’s motives and its cruelty.”¹⁸¹ Further, the inclusion in the Statute for the International

rights in a systematic manner or on a mass scale consisting of any of the following acts: (a) murder; (b) torture; (c) establishing or maintaining over persons a status of slavery, servitude or forced labor; (d) deportation or forcible transfer of population; (e) persecution on social, political, racial, religious or cultural grounds. . . .” Draft Code of Crimes Against the Peace and Security of Mankind, [1991] 2 Y.B. INT’L L. COMM’N 103, U.N. Doc. A/CN.4/SER.A/1991/Add.1; see also *Summary Records of the 2239th Meeting*, [1991] 1 Y.B. INT’L L. COMM’N 218, U.N. Doc. A/CN.4/SER.A/1991.

177. The “chapeau” of the treaty provision is the introductory language outlining the elements that govern all subsequently enumerated crimes against humanity.

178. See *Summary Records of the 2239th Meeting*, *supra* note 176, at 222 (statements of Pawlak, Chairman of the Drafting Committee, and Barsegov). One delegate argued that this threshold requirement was inappropriate for the crime of “deportation . . . of a population,” an inherently massive and systematic act. As a result, the text was changed to read: “An individual who commits or orders the commission of any of the following violations of human rights . . . in a systematic manner or on a mass scale; or deportation or forcible transfer of population shall, on conviction thereof, be sentenced” *Id.* (proposal of Graefrath). See also *Report of the International Law Commission to the General Assembly*, *supra* note 175, at 266 (“Isolated acts of murder or torture, and so on, which are not systematic or on a mass scale, no matter how reprehensible as violations of human rights, do not come under the draft Code.”).

179. *Report of the International Law Commission to the General Assembly*, *supra* note 175, at 103.

180. See *id.* at 267. See also *Report of the International Law Commission to the General Assembly*, [1994] 2 Y.B. INT’L L. COMM’N 40 (“It is the understanding of the Commission that the definition of crimes against humanity encompasses inhumane acts of a very serious character involving widespread or systematic violations aimed at the civilian population in whole or in part. The hallmarks of such crimes lie in their large-scale and systematic nature. The particular forms of unlawful act . . . are less crucial to the definition than the factors of scale and deliberate policy, as well as in their being targeted against the civilian population in whole or in part The term ‘directed against any civilian population’ should be taken to refer to acts committed as part of a widespread and systematic attack against a civilian population on national, political, ethnic, racial or religious grounds. The particular acts referred to in the definition are acts deliberately committed as part of such an attack.”).

181. *Summary Records of the 2379th Meeting*, [1995] 1 Y.B. INT’L L. COMM’N 3, U.N. Doc. A/CN.4/SER.A/1995. See also *Summary Records of the 2386th Meeting*, [1995] 1 Y.B. INT’L L. COMM’N 51, U.N. Doc. A/CN.4/SER.A/1995 (noting that research has shown that a violation of human rights need not be massive in order to be a crime against humanity and a “single atrocity committed against a sole individual could be so shocking as to constitute an offence against mankind as a whole”).

Criminal Tribunal for the Former Yugoslavia of a species of the war nexus requirement revived arguments for the nexus' inclusion in the Draft Code. One delegate suggested the Code adopt the definition of crimes against humanity in the ICTY Statute on the grounds that it

would answer many of the criticisms made by Governments, for it was understood that the definition of crimes against humanity contained in the Charter of the Nurnberg Tribunal and the Statute of the International Tribunal for the Former Yugoslavia applied only in time of war and not in time of peace, as would be the case with the text under consideration, and that, as far as peacetime was concerned, genocide supplied a sufficient correction for that apparent defect with regard to crimes which were crimes against the peace and security of mankind and not merely international crimes.¹⁸²

One delegate asked, "Did the category [of crimes against humanity] presuppose a link with other crimes in the Code, with war crimes in particular? . . . But how were such crimes to be distinguished from crimes under ordinary law?"¹⁸³ Delegates also experimented with adding a state action requirement, arguing that acts

committed by persons enjoying the protection or authorization of a State . . . warranted classification as crimes against the peace and security of mankind. . . . The seriousness of a crime which justified inclusion in the Code lay precisely in the fact that it was committed by someone enjoying the protection or the consent of the State to kill, enforced disappearances or torture.¹⁸⁴

Delegates returned repeatedly to the question that had plagued them: "The basic question was at what point a violation of a humanitarian principle or human rights violations, which were essentially matters

182. *Summary Records of the 2379th Meeting*, [1995] 1 Y.B. INT'L L. COMM'N 3, 6, U.N. Doc. A/CN.4/SER.A/1995 (statement of Pellet).

183. *Summary Records of the 2385th Meeting*, [1995] 1 Y.B. INT'L L. COMM'N 43, U.N. Doc. A/CN.4/SER.A/1995 (statement of Tomuschat).

184. *Summary Records of the 2384th Meeting*, [1995] 1 Y.B. INT'L L. COMM'N 33, U.N. Doc. A/CN.4/SER.A/1995 (statement of Carreno). The inclusion of a state action requirement has been supported by some commentators. *See, e.g.*, BASSIOUNI, *supra* note 40, at 470-71 ("The prerequisite legal element discussed above (state action or policy) is, therefore, indispensable to the legal nature of 'crimes against humanity,' and must be established before an international criminal charge can be brought against an alleged perpetrator. This becomes particularly important since Post-Charter Legal Developments have removed the connection between 'crimes against humanity' and 'crimes against the peace' or 'war crimes.' In the absence of such a link to internationally prohibited conduct, 'crimes against humanity' becomes less violable as an international crime unless another link joins it to the valid sphere of international criminalization.").

within the national jurisdiction, became an international problem that came within international jurisdiction."¹⁸⁵ In its final comprehensive formulation of the Draft Code of Offences Against the Peace and Security of Mankind, the ILC defined crimes against humanity in terms of two elements: scale and state action. Accordingly, the 1996 Draft Code defines crimes against humanity as "any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group: (a) murder (b) extermination"¹⁸⁶ In this way, the final ILC draft definitively eliminated the war nexus requirement. Instead, the Commission defined the offense with reference to the nature of the acts themselves—*i.e.*, their widespread or systematic nature—and state action. Despite the ILC's extensive deliberations, this definition has not yet been universally accepted and has in certain respects been mooted by subsequent codification efforts.

V. THE AD HOC INTERNATIONAL CRIMINAL TRIBUNAL'S SOLUTION TO THE CRIMES AGAINST HUMANITY DILEMMA

One of the most recent articulations of the prohibition against crimes against humanity reintroduced the war nexus despite its apparent abandonment by the ILC. Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia¹⁸⁷ confers jurisdiction over certain prohibited acts "when committed in armed conflict, whether international or internal in character, and directed against any civilian population."¹⁸⁸ The war nexus requirement was included in the ICTY Statute even though the Commission of Experts Established Pursuant

185. *Summary Records of the 2385th Meeting*, [1995] 1 Y.B. INT'L L. COMM'N 45, U.N. Doc. A/CN.4/SER.A/1995 (statement of Rao).

186. *Report of the International Law Commission to the General Assembly*, U.N. GAOR, 51st Sess., Supp. No. 10, A/51/10 (1996), at 93-94.

187. The ICTY was established by the U.N. Security Council acting under Chapter VII, which required a determination that events in the former Yugoslavia constituted a threat to international peace and security. *See* S.C. Res. 827, U.N. SCOR, U.N. Doc. S/Res/827 (1993).

188. ICTY Statute, *supra* note 22, art. 5. The Commission of Experts established to investigate violations of international law in the former Yugoslavia noted that the definition of crimes against humanity in the statute for the ICTY codified the principles of international law affirmed by the General Assembly in Resolution 95(I):

The Nuremberg application of 'crimes against humanity' was a response to the shortcoming in international law that many crimes committed during the Second World War could not technically be regarded as war crimes *stricto sensu* on account of one or several elements, which were of a different nature. It was, therefore, conceived to redress crimes of an equally serious character and on a vast scale, organized and systematic, and most ruthlessly carried out.

Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780, U.N. SCOR 49th Sess., Annex VI, at 21, U.N. Doc. S/1994/674 (1994).

to Security Council Resolution 780¹⁸⁹ and several states¹⁹⁰ indicated that it was not an inherent element of the prohibition against crimes against humanity. Nonetheless, comments by the Secretary-General, who emphasized that crimes against humanity are prohibited “regardless of whether they are committed in an armed conflict, international or internal in character,” suggested that this limitation in the Statute is jurisdictional rather than definitional.¹⁹¹

189. See *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*, U.N. SCOR 49th Sess., Annex VI, at 21, U.N. Doc. S/1994/674 (1994) (“Crimes against humanity are also no longer dependent on their linkage to crimes against the peace or war crimes.”).

190. See, e.g., *Letter of April 13, 1993 From the Permanent Representative of Canada to the United Nations*, U.N. Doc. S/25594 (Apr. 14, 1993), at 3 (proposing that the Tribunal’s subject matter jurisdiction include “Crimes against humanity under customary or conventional law including such acts as wilful killing and deliberate mutilation, extrajudicial and summary execution, sexual assault, slavery, torture, illegal detention, deportation, forced labour or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, and that constitutes a contravention of customary international law or conventional international law . . .”); *Letter of February 16, 1993 from the Permanent Representative of Italy to the United Nations*, U.N. Doc S/25300 (Feb. 17, 1993), at 3 (tendering submission prohibiting “crimes against humanity consisting of systemic or repeated violations of human rights, such as wilful murder and deliberate mutilation, rape, reducing or keeping persons in a state of slavery, servitude or forced labour, or persecuting or heavily discriminating against them on social, political, racial, religious or cultural grounds; or deporting or forcibly transferring populations”); *Letter of April 5, 1993 From the Permanent Representative of the United States of America*, U.N. Doc S/25575 (Apr. 12, 1993), at 6 (suggesting that the Tribunal be empowered to prosecute “[a]cts of murder, torture, extrajudicial and summary execution, illegal detention and rape that are part of a campaign or attack against any civilian population in the former Yugoslavia on national, racial, ethnic or religious grounds.”). But see *Letter of March 31, 1993 From the Representatives of Egypt, The Islamic Republic of Iran, Malaysia, Pakistan, Saudi Arabia, Senegal and Turkey to the United Nations*, UN Doc. No. A/47/920. S/25512 (Apr. 5, 1993) (proposing that the Tribunal have competence over crimes against humanity, “defined in articles 6(c) and 5(c) of the London and Tokyo Charters, respectively, and as further developed by customary international law, which includes: murder, torture, mutilation, rape, reducing or keeping a person in a state of slavery, servitude or forced labour, deporting or forcibly transferring populations, systemic pillage and looting, systemic destruction of public and private property, when committed as part of a policy of persecution on social, political, racial, religious or cultural grounds . . .”).

191. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, para 47, U.N. Doc. S/25704 (May 3, 1993), reprinted in 32 I.L.M. 1159, 1192 (1993). This interpretation is supported by some commentators. See VIRGINIA MORRIS & MICHAEL SCHARF, AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 239 (1995) (“This limitation is temporal rather than substantive in character, as indicated by the phrase ‘when committed in armed conflict.’ The phrase does not require any connection with a war crime or any substantive connection to an armed conflict.”). In contrast to the Yugoslav International Tribunal, the Statute of the Rwandan International Tribunal does not recite the war nexus and provides that the Tribunal “shall have the power to prosecute persons responsible for . . . crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.” *Establishing the International Tribunal for Rwanda*, U.N. SCOR Res. 955, art. 3, U.N. Doc. S/Res/955 (1994), reprinted in 33 I.L.M. 1598, 1603 (1994). See Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT’L L. 554, 557 (1995) (“By making no illusion to the international or noninternational character of the conflict, the broad language of Article 3 of the Rwanda Statute . . . both strengthens the precedent set by the commentary to the Yugoslavia Statute and enhances the possibility of arguing in the future that crimes against humanity (in addition to genocide) can be committed even in peacetime.”). This formulation includes the discriminatory intent element debated by the ILC, probably because it was included within the Rwanda Commission of Experts Report, which defined crimes against humanity as: “gross violations of fundamental rules of humanitarian and human rights law committed by persons demonstrably linked to a party to the conflict, as part of an official policy

In *Prosecutor v. Tadić*, the second case to go to judgment before the ad hoc tribunals, the ICTY confronted the rather sparse definition of crimes against humanity in its Statute. During the jurisdictional phase, the Appeals Chamber¹⁹² confirmed that conviction for crimes against humanity under customary international law no longer requires proof of a link to a state of war or to war crimes.¹⁹³ During the trial phase, Trial Chamber II elaborated on this interpretation and suggested a novel mechanism for distinguishing crimes against humanity from ordinary crimes that turns on the *mens rea* of the defendant and the existence of a widespread or systematic attack against a civilian population.¹⁹⁴ Although this aspect of the Opinion and Judgment sufficiently defined crimes against humanity in such a way that does not subject ordinary municipal crimes to international jurisdiction, the Trial Chamber proceeded to increase unnecessarily the prosecution's burden of proof by adding additional elements to the definition of the offense that do not appear in the Tribunal's Statute.¹⁹⁵ In identifying the elements of a crimes against humanity charge, the Trial Chamber was not expressly concerned with distinguishing crimes against humanity from ordinary crimes or with delimiting international jurisdiction. However, the elements it added were drawn from the ILC's debates on this topic which suggests that these concerns may in fact undergird its reasoning.

In a preliminary motion¹⁹⁶ in the *Tadić* case, the Defense challenged the jurisdiction of the Tribunal, including the jurisdiction *rationae materiae* under Article 5 by reviving the war nexus requirement and claiming that the prosecution had not satisfied this element.¹⁹⁷ It argued that, contrary to the formulation of Article 5, customary international law dating from the Nuremberg era conferred jurisdiction over only those crimes against humanity committed "in the execution of or in connection with" an international, as opposed to internal, armed conflict.¹⁹⁸ Accordingly, the Defense concluded that,

based on discrimination against an identifiable group of persons, irrespective of war and the nationality of the victim, and includes acts such as the following: Murder; Extermination . . ." *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935*, U.N. SCOR, 49th Sess., Annex, at 3, U.N. Doc. S/1994/1405 (1994).

192. The Yugoslavia Tribunal is composed of three Trial Chambers and a single Appeals Chamber.

193. See *infra* text accompanying note 211.

194. See *infra* text accompanying note 231-33. This mechanism has its roots in the formula proposed by the tribunal in the *Justice Case*, see *supra* text accompanying note 109, and Canadian crimes against humanity case law, see *infra* text accompanying note 236.

195. See *infra* text accompanying notes 219, 247.

196. According to what is now Rule 72(A) (then Rule 73(A)) of the Tribunals Rules of Procedure and Evidence, preliminary motions by the accused include (i) objections on the lack of jurisdiction; (ii) objections based on defects in the form of the indictment; (iii) applications for severance of crimes joined in one indictment; and (iv) objections based in the denial of request for assignment of counsel. See *Rules of Procedure and Evidence, Rule 72(A)*, U.N. Doc. No. IT/32/Rev. 13 (July 9-10, 1998), at 52.

197. See *Prosecutor v. Tadić*, Case No. IT-94-I-T, Defence Motion on Jurisdiction (Int'l Crim. Trib. former Yugo., Trial Chamber II, June 23, 1995).

198. *Id.* at 12-13.

given the Nuremberg formulation and the subsequent developments in customary law, Article 5 of the Statute impermissibly broadened the scope of the prohibition against crimes against humanity, violated the principle of *nullum crimen sine lege*,¹⁹⁹ and contravened the object and purpose of the Statute. According to the Defense, this requirement of the existence of an international armed conflict was not satisfied in the Republic of Bosnia and Herzegovina.²⁰⁰

In response, the Prosecution attempted to demonstrate that the war nexus requirement was no longer a substantive element of crimes against humanity. It claimed that Article 5 represents a more limited formulation of the prohibition against crimes against humanity than is found in customary international law.²⁰¹ Further, according to the Prosecution, the IMT Charter “was not intended as an inherent or general restriction on the scope of crimes against humanity under general international law since the ad hoc jurisdiction of the [Nuremberg] Tribunal was limited to the ‘just and prompt trial and punishment of the major war criminals of the European Axis.’”²⁰² The Prosecution observed that the Secretary General’s Report confirms that Article 5 of the Statute was not based exclusively on Article 6(c) of the IMT Charter: “Crimes against humanity were first recognized in the Charter and Judgment of the Nuremberg Tribunal, as well as in Law No. 10 of the Control Council of Germany.”²⁰³ Finally, the Prosecution tracked the definition of crimes against humanity found in other contemporary formulations—such as the work of the ILC, the Genocide Convention, and the Apartheid Convention²⁰⁴—to conclude that “the more stringent requirement under Article 5 of the ICTY Statute that

199. *See id.* According to the Report of the Secretary-General, “the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law.” *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, supra* note 191, at para. 34.

200. *See* Prosecutor v. Tadić, Case No. IT-94-I-T, Defence Motion on Jurisdiction (Int’l Crim. Trib. former Yugo., Trial Chamber II, June 23, 1995), at 4, 13 (“The conflict in Bosnia, therefore, has to be regarded as an internal conflict within the internationally recognized state of Bosnia-Herzegovina.”). The Defense successfully advanced this characterization to challenge charges against Tadić under Article 2, which concerns “grave breaches” of the Geneva Convention and which is applicable only to international armed conflicts. *See id.* at 11; Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment (Int’l Crim. Trib. former Yugo., Trial Chamber II, May 7, 1997), at 227-28, paras. 607-08 (dismissing Article 2 charges on the grounds that the victims of the acts alleged were not “protected persons” within the meaning of the Geneva Conventions because the conflict was not “international”). *But see* Prosecutor v. Tadić, Case No. IT-94-1-T, Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute (Int’l Crim. Trib. former Yugo., Trial Chamber II, May 7, 1997) (dissenting from the Trial Chamber’s holding on the “internationality” of the conflict).

201. *See* Prosecutor v. Tadić, Case No. IT-94-1-T, Response to the Motion of the Defense on the Jurisdiction of the Tribunal (Int’l Crim. Trib. former Yugo., Trial Chamber II, July 7, 1995), at 8.

202. *Id.* at 54.

203. *Id.* at 56 (quoting *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, supra* note 191, at 13, para. 47).

204. *See id.* at 56-58.

crimes against humanity be linked to “armed conflict, whether international or internal in character” cannot be considered as *ex post facto* application of criminal law.”²⁰⁵ In other words, if customary international law did not require proof of a nexus with armed conflict in order to secure a conviction for crimes against humanity, the Statute could not violate the legality principle if it increased the Prosecution’s burden by requiring proof of such a nexus.

The Trial Chamber largely ratified the Prosecution’s arguments when it concluded that the “nexus in the Nuremberg Charter between crimes against humanity and the other two categories, crimes against peace and war crimes, was peculiar to the context of the Nuremberg Tribunal established specifically ‘for the just and prompt trial and punishment of the major war criminals of the European Axis countries.’”²⁰⁶ The Trial Chamber elaborated that:

the definition of Article 5 is in fact more restrictive than the general definition of crimes against humanity recognised by customary international law. The inclusion of the nexus with armed conflict in the article imposes a limitation on the jurisdiction of the International Tribunal and certainly can in no way offend the *nullum crimen* principle so as to bar the International Tribunal from trying the crimes enumerated therein. Because the language of Article 5 is clear, the crimes against humanity tried in the International Tribunal must have a nexus with an armed conflict, be it international or internal.²⁰⁷

Because the Trial Chamber determined that it would have jurisdiction over the crimes alleged regardless of whether the conflict was deemed international or internal, it declined to rule on the nature of the conflict.²⁰⁸

205. *Id.* at 59. The Prosecution also argued that the conflict in the former Yugoslavia was international for the purposes of establishing Article 2 jurisdiction. *See id.* at 36-46.

206. *Prosecution v. Tadić*, (Case No. IT-94-I-T, Decision on the Defence Motion (Int’l Crim. Trib. former Yugo., Trial Chamber II, Aug. 10, 1995), at 30 (quoting IMT Charter art. 1).

207. *Id.* at 32.

208. *But see* *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Separate Opinion of Judge Li on the Defense Motion for Interlocutory Appeal on Jurisdiction (Int’l Crim. Trib. former Yugo., App. Chamber, Oct. 2, 1995), at 8, para. 20 (arguing that the tribunal should have ruled on the nature of the conflict in order to establish its jurisdiction with respect to Article 2).

On interlocutory appeal of the dismissal of the Defense motion,²⁰⁹ the Appeals Chamber confirmed this ruling.²¹⁰ The Chamber held that:

It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, . . . customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law.²¹¹

The war nexus requirement reappeared at the trial stage when the Trial Chamber had to determine the way in which the Statute's version of the war nexus requirement would operate, particularly with respect to the degree of nexus required by the Statute. In its pretrial brief, the Prosecution argued that in order to satisfy the war nexus element, it was sufficient to demonstrate that the crimes were committed:

“during a period of armed conflict” or “in time of armed conflict.” . . . Accordingly, to establish the nexus necessary for a violation of Article 5, it is sufficient to demonstrate that the crimes were committed at some point in the course or duration of an armed conflict, even if such crimes were not committed in direct relation to or as part of the conduct of hostilities, occupation, or other integral aspects of the armed conflict.²¹²

209. According to Rule 72(B)(ii), decisions on preliminary motions are without interlocutory appeal with the exception of motions challenging jurisdiction. *See Rules of Procedure and Evidence, supra* note 196, at 52.

210. *See* Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal in Jurisdiction (Int'l Crim. Trib. former Yugo., App. Chamber, Oct. 2, 1995).

211. *Id.* The Appeals Chamber determined that an “armed conflict” exists “whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” *Id.* at 37, para. 70. The Appeals Chamber emphasized that “the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities,” *id.* at 36, para. 67, and concluded that the alleged crimes did occur in the context of an armed conflict such that the Tribunal had jurisdiction over them under Article 5. *See id.* at 37, para. 70.

212. Prosecutor v. Tadić, Case No. IT-94-1-T, Prosecutor's Pre-Trial Brief (Int'l Crim. Trib. former Yugo., Trial Chamber II, Apr. 10, 1996), at 44, *citing Provisional Verbatim Record of 3217th Meeting*, U.N. S/PV.3217 (May 25, 1993) (compiling supportive interpretations of the Security Council of this phrase).

In contrast, the Defense argued that the acts must be perpetrated “in” an armed conflict.²¹³

The Trial Chamber interpreted the Statute’s definition of crimes against humanity as containing two conditions of applicability—the acts must be committed first, within the context of a war and second, against a civilian population. The Chamber further explained that each condition contained a bundle of substantive elements that must be proven beyond a reasonable doubt by the prosecution in order to secure conviction.²¹⁴ In discussing the first condition of applicability for Article 5, the Trial Chamber held that the formulation of the war nexus in the Statute “necessitates the existence of an armed conflict and a nexus between the act and that conflict.”²¹⁵ In other words, the act must have occurred “in the course or duration of an armed conflict” and must be linked geographically as well as temporally with the armed conflict.²¹⁶ It is not necessary, however, for the acts to occur “in the heat of battle” or that the commission of a crime against humanity be connected with that of a war crime.²¹⁷

The Trial Chamber went farther than this, however, and held that the war nexus requirement elevated the Prosecution’s burden of proof with respect to the defendant’s *mens rea*²¹⁸ by requiring proof that the defendant acted on the basis of non-personal motives. In this way, the Chamber transformed the war nexus, a jurisdictional limitation of

213. Prosecution v. Tadić, Case No. IT-94-1-T, Response of the Defense to the Prosecutor’s Pre-Trial Brief (Int’l Crim. Trib. former Yugo., Trial Chamber II, Apr. 23, 1996), at 17-18.

214. See Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment (Int’l Crim. Trib. former Yugo., Trial Chamber II, May 7, 1997), at 235, para. 625.

215. *Id.* at 236, para. 626. In so holding, the court noted that the precise text of the Nuremberg Charter’s war nexus was more limitative in that it required that the enumerated acts be committed “in execution of or in connection with” war crimes or crimes against the peace. *Id.* at 236, para. 627. See James C. O’Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT’LL. 639, 650 (1993) (noting that the ICTY Statute requires “only a connection between crimes against humanity and armed conflict, which is not itself a crime under the statute; it thus marks a modest advance over the Nuremberg Charter by expressly removing the requirement of connection to another crime under international law”).

216. Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment (Int’l Crim. Trib. former Yugo., Trial Chamber II, May 7, 1997), at 239, para. 633.

217. *Id.* at 238-39, para. 632. As support for this particular construction, the Trial Chamber noted that several permanent members of the Security Council interpreted this element to mean that the acts alleged were committed “during a period of armed conflict.” *Id.* at 238, para. 631 (citing *Provisional Verbatim Record of 3217th Meeting*, U.N. S/SPV.3217 (May 25, 1993) at 11 (statement of France to the effect that offenses must be committed “during a period of armed conflict on the territory of the former Yugoslavia”), 16 (statement of the United States), 19 (statement of the United Kingdom), 45 (statement of the Russian Federation)). In treating Security Council member statements as authoritative interpretations of provisions of the Statute, the Trial Chamber invoked the reasoning of the Appeals Chamber in the jurisdictional phase. See Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal in Jurisdiction (Int’l Crim. Trib. former Yugo., App. Chamber, Oct. 2, 1995), at 50, para. 88 (noting that an uncontested declaration by a Security Council member constitutes an “authoritative interpretation” of a statutory provision).

218. “*Mens rea*” refers to the subjective state of mind required by the definition of an offense. See generally Francis Bowes Sayre, *The Present Significance of Mens Rea in the Criminal Law*, in HARVARD LEGAL ESSAYS 399 (1934).

Article 5 according to its own reasoning, into a substantive *mens rea* element of crimes against humanity. According to the Chamber, this additional element requires that “the act and the conflict must be related or, to reverse this proposition, the act must not be unrelated to the armed conflict, must not be done for purely personal motives of the perpetrator.”²¹⁹ In other words, “while personal motives may be present they should not be the sole motivation for the act.”²²⁰

The Prosecution appealed this new element both as an error of law and on policy grounds. It observed that Article 5 does not contain a requirement that crimes against humanity cannot be committed for purely personal reasons.²²¹ For support of its position that crimes against humanity can be committed for personal motives, the Prosecution cited several domestic post-World War II cases involving convictions for crimes against humanity for what appeared to be purely personal motives. For example, in one case, the defendant’s sole motive for denouncing the victim was to “get rid of” her and her “hysterical behavior.”²²² In a second case, a court held that a perpetrator of a crime against humanity is:

anyone who contributes to the realization of the elements of the offence, without at the same time wishing to promote National Socialist rule, which is the source and beneficiary of the offence, but who acts perhaps out of fear, indifference, hatred for the victim or out of some other ulterior motive. For, in cases of acting out of such motivations, the offence is connected with the rule of violence.²²³

In other words, this case stands for the proposition that the defendant’s motives for committing a crime against humanity are irrelevant and thus need not be related to a prevailing armed conflict. Finally, the Prosecution argued that the object and purpose of the Statute would be defeated if perpetrators would escape liability for crimes against

219. Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment (Int’l Crim. Trib. former Yugo., Trial Chamber II, May 7, 1997), at 239, para. 634.

220. *Id.* at 254, para. 658.

221. See Prosecution v. Tadić, Case No. IT-94-1-A, Brief of Argument of the Prosecution (Cross-Appellant) (Int’l Crim. Trib. former Yugo., App. Chamber, Jan. 12, 1998), at 60.

222. OGHBZ, Criminal Chamber of the Supreme Court for the British Zone (Nov. 11, 1948), STS 78/48, reprinted in 2 JUSTIZ UND NS-VERBRECHEN 498 (1945-1966) (unofficial translation).

223. OGHBZ, Criminal Chamber of the Supreme Court for the British Zone (Mar. 5, 1949), STS 19/49, reprinted in 1 ENTSCHEIDUNGEN DES OBERSTEN GERICHTSHOFES FÜR DIE BRITISCHE ZONE, 321, 341 (1949) (unofficial translation).

humanity if they were able to demonstrate that they acted for purely personal motives.²²⁴

In discussing the second condition of applicability for Article 5, the Trial Chamber interpreted the term “population” in the phrase “directed against a civilian population” to require a showing that the crimes committed were of a collective nature. At first, the Trial Chamber appeared to borrow from the work of the ILC²²⁵ when it indicated that the collective nature of crimes against humanity “exclude[s] single or isolated acts which, although possibly constituting war crimes or crimes against national penal legislation, do not rise to the level of crimes against humanity.”²²⁶ The Opinion continued that the “acts must occur on a widespread or systematic basis”²²⁷ with the former term referring to the number of victims and the latter to a “pattern or methodical plan.”²²⁸ This reasoning implied that the particular acts to be prosecuted must involve multiple victims or a pattern of behavior.

Later in the Opinion and Judgment, however, the Trial Chamber appeared to contradict itself when it concluded that a single act can in fact constitute a crime against humanity: “Clearly, a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual need not commit numerous offenses to be held liable.”²²⁹ This holding is in keeping with a ruling of another Trial Chamber, which held that:

Crimes against humanity . . . must be widespread or demonstrate a systematic character. However, as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognised as guilty of a

224. See *Prosecution v. Tadić*, Case No. IT-94-1-T, Brief of Argument of the Prosecution (Cross-Appellant) (Int'l Crim. Trib. former Yugo, App. Chamber, Jan. 12, 1998), at 65-66. This appeal will be heard in early 1999.

225. See *supra* text accompanying notes 177-81, 186.

226. *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgment (Int'l Crim. Trib. former Yugo., Trial Chamber II, May 7, 1997), at 244, para. 644.

227. *Id.* at 244, para. 644; see also *id.* at 245-46, para. 645 (emphasizing that the required characteristic of “widespreadness” and systematicity are alternatives).

228. *Id.* at 246, para. 648. Separate and apart from the requirement that the acts be related to a systematic attack against a civilian population, the Trial Chamber also discussed whether the acts must be perpetrated in pursuance of a policy of a state or a non-state entity. *Id.* at 250, para. 653. Although the Trial Chamber entitled this section of the Opinion and Judgment “The Policy Element,” its subsequent reasoning suggests that proof of a policy is a mere corollary to the requirement that the acts be part of a widespread or systematic attack: “[n]otably, if the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not.” *Id.* at 250, para. 653.

229. *Id.* at 247-48, para. 649.

crime against humanity if his acts were part of the specific context identified above.²³⁰

The *Tadić* Trial Chamber resolved this apparent inconsistency in its own reasoning by applying the characteristics of “widespread” and “systematic” to the prevailing attack against a civilian population rather than to the individual acts themselves and by elaborating upon the *mens rea* of the perpetrator. The court reasoned that “it is the occurrence of the act within the context of a widespread or systematic attack on a civilian population that makes the act a crime against humanity as opposed to simply a war crime or a crime against national penal legislation.”²³¹ Accordingly, it held that so long as the perpetrator acts with knowledge that his or her act “fits in with” a widespread or systematic attack against a civilian population, a single enumerated act can constitute a crime against humanity if the other elements for conviction are satisfied.²³² Under this formulation, the definition of crimes against humanity contains two mental state requirements. First, the Prosecution must prove the mental state associated with the underlying enumerated offense (*i.e.*, murder, etc.). Second, the prosecutor must prove that the perpetrator knew of “the broader context in which his act occurs”²³³ (*i.e.*, the attendant circumstances in which he or she acted).²³⁴

This two-tiered approach was substantially borrowed from the reasoning of the Canadian courts in *Regina v. Finta*.²³⁵ In that case, the

230. Prosecutor v. Mksic, Case No. IT-95-13-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence (Int'l Crim. Trib. former Yugo., Trial Chamber I, Apr. 3, 1996), at 13, para. 30. Rule 61 (Procedure in Case of Failure to Execute a Warrant) is activated upon the failure of the accused to appear before the Tribunal and allows the Trial Chamber entertain witnesses and evidence in order to determine whether there are reasonable grounds for believing that the accused committed the offenses for which he is charged in the indictment.

231. Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment (Int'l Crim. Trib. former Yugo., Trial Chamber II, May 7, 1997), at 252, para. 656.

232. *Id.* at 254, para. 659; *see also id.* at 253, para. 657. Note, however, that the Trial Chamber is quite imprecise with its terminology. For example, in a different section of its Opinion and Judgment, the Chamber refers to “the widespread or systematic acts.” *Id.* at 248, para. 650.

233. *Id.* at 253, para. 656.

234. In this way, the Trial Chamber mirrored the approach taken by the American Law Institute's Model Penal Code, which provides that the objective elements of an offense—conduct, attendant circumstances, and result—are associated with culpability terms that may differ within a particular offense. *See generally* Paul H. Robinson et al., *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983) (praising this “elemental analysis” approach).

235. 69 O.R.2d 557 (H.C. 1989), 92 D.L.R.4th 1 (Ont. C.A. 1992), [1994] 1 S.C.R. 701. Imre Finta was the first suspected Nazi war criminal prosecuted under a Canadian statute that grants domestic jurisdiction over acts committed extraterritorially that constituted war crime or crimes against humanity and were unlawful under the laws of Canada at the time they were perpetrated. *See* CAN. CRIM. CODE, R.S.C., ch. C-46, § 7(3.76) (1985). Finta was charged with unlawful confinement, robbery, kidnapping and manslaughter as both crimes against humanity and war crimes (a total of eight counts). His jury acquittal was affirmed by the Ontario Court of Appeal, 73 C.C.C.3d 65 (Ont. C.A. 1992), and the Supreme Court of Canada, [1994] 1

Court of Appeals held that the requisite “international element” that distinguished crimes against humanity from ordinary crimes resided simultaneously in the *actus reus* and the *mens rea* of the crime. With regard to the former, the defendant’s act must take place within a particular set of circumstances. With respect to the latter, the Court noted that the relevant Canadian statute did not define the mental state that “must accompany the existence of the facts or circumstances which bring an act within those definitions [S]ince the international component of the charges is central to Finta’s culpability, it is necessary to read a fault requirement into those definitions.”²³⁶ Furthermore,

Knowledge of the existence of the facts or circumstances which bring the conduct within the definition of the prohibited conduct is commonly required where a definition of culpable conduct is silent as to the necessary fault requirement. We would, as the trial judge did, hold that knowledge of the circumstances or facts which bring an act within the definition of a war crime or crime against humanity constitutes the mental component which must coexist with the prohibited acts to establish culpability for those acts.²³⁷

In affirming this formulation, the majority²³⁸ of the Supreme Court emphasized that “[p]roof of this mental element is an integral part of determining whether the offences committed amount to a . . . crime against humanity.”²³⁹ Furthermore, “in order to constitute a crime against humanity or a war crime, there must be an element of subjective knowledge on the part of the accused of the factual conditions which render the actions a crime against humanity.”²⁴⁰ According to the Supreme Court, it sufficed that the accused was willfully blind to these circumstances.²⁴¹ Likewise, the Yugoslav Tribunal’s Trial Chamber

S.C.R. 701.

236. *Regina v. Finta*, 92 D.L.R.4th 1, 84 (Ont. C.A. 1992).

237. *Id.*

238. The dissent argued that “there is no need for the jury to be concerned with the mental element in relation to the war crimes and crimes against humanity beyond those comprised in the underlying domestic offence with which the accused is charged. . . . [T]he mental blameworthiness required for such crimes is already captured in the *mens rea* required for the underlying offence.” [1994] 1 S.C.R. 701, 754 (La Forest, J., dissenting). According to this line of reasoning, the offense is “internationalized” by virtue of the existence of the factual circumstances; the defendant need not know of these circumstances. *Id.* See generally Judith Hippler Bello & Irwin Cotler, *International Decisions*, 90 AM. J. INT’L L. 460 (1996) (criticizing the majority opinion as erecting too high a threshold for conviction). The approach advocated by the dissent would essentially impose strict liability as to the circumstantial element of the existence of a widespread and systematic attack.

239. [1994] 1 S.C.R. 701, 813.

240. *Id.*

241. *Id.* at 820. At the same time, the accused need not be aware that his acts constituted a crime against humanity or were illegal under international law.

held that knowledge “is examined on an objective level and can factually be implied from the circumstances.”²⁴²

The *Finta* approach adopted by the *Tadić* Trial Chamber significantly clarified the prosecution’s burden of proof with respect to the elements of the offense of crimes against humanity. Proof of the requisite attendant circumstances (an attack on a civilian population) operates as a threshold jurisdictional inquiry that clearly distinguishes what would otherwise be municipal crimes within the jurisdiction of national courts from crimes against humanity appropriate for international adjudication. This attack need not rise to the level of an armed conflict, although pursuant to the ICTY Statute’s formulation of the war nexus, the Prosecution must demonstrate some nexus between the crime against humanity and a state of war. The knowledge *mens rea* requirement ensures that the defendant was aware that his or her act would contribute to the requisite attendant circumstance.²⁴³ In contrast to a strict liability approach to attendant circumstances, this formulation better achieves the criminal law’s twin goals of condemnation and deterrence. Moreover, resting international adjudication upon the defendant’s mental state justifies the elevated moral stigma and punishment associated with the perpetration of international crimes.²⁴⁴ At the same time, it is not necessary for the defendant consciously to desire to effectuate this contribution, which would unnecessarily increase the prosecution’s burden of proof, suggest a defense that would be difficult to refute, and (particularly in a multinational jurisdiction) better ensure that the prosecutorial inquiry remains out of the realm of motive, which raises vexing issues of proof.²⁴⁵

In the opinion of the Chamber, however, this “knowing” formula does not exhaust the Prosecution’s burden of proof with respect to the mental state of the accused. In further elaborating upon the second condition of applicability for Article 5, the Trial Chamber held that the inclusion of the term “population” in the Statute required that the

242. Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment (Int’l Crim. Trib. former Yugo., Trial Chamber II, May 7, 1997), at 253, para. 657.

243. A *mens rea* requirement of knowledge suggests that the defendant was either directly conscious of the attendant circumstances, or was otherwise willfully blind to them. Knowledge can be inferred from the circumstances at hand. See Robinson, *supra* note 234, at 694-95; Model Penal Code § 2.02(7) (providing that when knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist); United States v. Jewell, 532 F.2d 697 (9th Cir. 1976) (“deliberate ignorance and positive knowledge are equally culpable”).

244. I am indebted to Margaret deGuzman for this observation.

245. It has been noted that “[a]n individual’s personality and psyche, therefore, largely determine his or her motives. The exact contours of motive, accordingly, will be within each individual’s knowledge alone. . . . [As such, a]bsent an explicit admission of racial motivation by the accused, prosecutors need to rely on circumstantial evidence of the accused’s reasons for perpetrating the alleged crimes. Inferences about motive which are drawn from circumstantial evidence, however, may be highly inaccurate given the inherent ambiguity of motive itself.” James Morsch, *The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation*, 82 J. CRIM. L. 659, 666-77 (1991).

Prosecution demonstrate that the enumerated acts were “taken on” discriminatory (*i.e.*, racial, religious, ethnic, or political) grounds.²⁴⁶ The Trial Chamber reached this conclusion notwithstanding that the majority of the sources it cites—the Nuremberg Charter, CCL 10, the ILC Draft Code—are to the contrary.²⁴⁷ As support, the Chamber referred once more to the Report of the Secretary-General, the declarations of certain permanent members of the Security Council,²⁴⁸ and the Rwanda Tribunal’s Statute.²⁴⁹

It is clear that this additional requirement that the Prosecution prove a discriminatory animus on the part of the defendant is mandated by neither customary international law nor the ICTY’s Statute.²⁵⁰ Accordingly, the Prosecution in its Appeals Brief argued that only Article 5(h), “persecutions on political, racial and religious grounds,”

246. The Trial Chamber labels this portion of the Opinion and Judgment “The necessity of discriminatory intent.” It is unclear, however, if the added element is conceived of as a species of intent or one of motive. Although the Chamber does not employ the term “motive,” the reasoning of the Chamber suggests that the added element actually addresses the motive of the defendant. Although the terminology in this area of criminal law is plagued by imprecision, motive generally refers to the idiosyncratic circumstances motivating the actor, in contrast to intent, which represents the volitional element of the crime or the desire to bring about some consequence. See Craig Peyton Gaumer, *Punishment For Prejudice: A Commentary on the Constitutionality and Utility of State Statutory Responses to the Problem of Hate Crimes*, 39 S.D. L. REV. 1, 13 (1994) (“[T]he term motive can perhaps be best described as simply the ‘why’ behind a defendant’s conduct, as opposed to the mental states of intent or purpose, which relate to ‘what’ the defendant meant to accomplish.”). In most common law jurisdictions, motive is not a material element of the offense, but it may be relevant at the time of sentencing. See, e.g., *Regina v. Finta*, [1994] 1 S.C.R. 701, 823 (Can. 1994) (noting that the perpetrator’s motive is irrelevant and need not be proven by the prosecution). The emerging law governing so-called “hate crimes” is a notable exception. See generally James B. Jacobs & Jessica S. Henry, *The Social Construction of a Hate Crime Epidemic*, 86 J. CRIM. L. & CRIMINOLOGY 366 (1996). The distinction between motive and intent in civil law definitions is less precise, and motive may be a material element of an offense in such jurisdictions. See, e.g., 11 COLLECTION OF YUGOSLAV LAWS: CRIMINAL CODE, art. 135 (1964) (defining murder as “whoever kills another out of greed, in order to commit or cover up another criminal offense, out of unscrupulous vengeance or from other base motives”).

247. As written, the IMT Charter and CCL 10 envision two classes of crimes: inhumane acts and persecutions on discriminatory grounds. This bifurcate interpretation of the Charter was supported by a United Nations analysis of the Nuremberg Charter and Judgment: “[i]t might perhaps be argued that the phrase ‘on political, racial or religious grounds’ refers not only to persecutions but also to the first type of crimes against humanity. . . . This interpretation, however, seems hardly to be warranted by the English wording and still less by the French text.” THE CHARTER AND JUDGMENT OF THE NÜRNBERG TRIBUNAL: HISTORY AND ANALYSIS (Memorandum Submitted by the Secretary-General), *supra* note 13, at 67.

248. See *Prosecutor v. Tadić*, (Case No. IT-94-1-T, Opinion and Judgment (Int’l Crim. Trib. former Yugo., Trial Chamber II, May 7, 1997), at 249-250, para. 652, citing *Provisional Verbatim Record of 3217th Meeting*, U.N. S/PV.3217 (May 25, 1993) 11 (statement of France), 16 (statement of the United States), 45 (statement of the Russian Federation).

249. See Statute of the International Tribunal for Rwanda, art. 3, U.N. Doc. S/Res/955 (1994), reprinted in 33 I.L.M. 1598, 1603 (1994). It has been suggested, however, that this formulation was “derived word-for-word” from the 1993 Secretary General’s Report and as such should not provide an independent source of support for the argument that all prosecutions of crimes against humanity require proof that the defendant was motivated by a discriminatory animus. See Yoram Dinstein, *Crimes Against Humanity*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY* 891, 896 (Jerzy Makarczyk ed., 1996).

250. This element did not appear in the post-World War II proceedings and was considered but eventually rejected by the ILC in its Draft Code of Offences Against the Peace and Security of Mankind. See *supra* text accompanying notes 167, 181, 187.

contains a discriminatory “grounds” requirement.²⁵¹ The Prosecution suggested a theory of statutory construction when it argued that provisions within the Statute should be interpreted to reflect prevailing customary international law unless the Statute expressly indicates an intention to deviate from customary law.²⁵² The Prosecution argued that the Tribunal should rely on statements of Security Council members as tools for interpretation only where there is an “obvious lacuna” in the text of the Statute.²⁵³ It noted that “[t]o accord weight to the views of one or a few Security Council Members, to resolve an ambiguity which does not exist, would lead to considerable uncertainty in the scope and content of the applicable law under the Statute.”²⁵⁴

The Prosecution also demonstrated that the Trial Chamber’s interpretation destabilized the structure of the Statute. First, this interpretation relegated the persecution clause to a residual provision that would apply to “a small class of cases not covered by other provisions of Article 5.”²⁵⁵ Second, it rendered Article 5(i)—the “other inhumane acts” clause—redundant.²⁵⁶ The Prosecution argued that the persecution clause should instead be read to provide a basis for additional criminal liability for all inhumane acts when they are committed on discriminatory grounds. In other words, if a defendant is charged with an intentional killing motivated by racial animus, she or he should be able to be convicted under Article 5(a)—murder—as well as under Article 5(h)—persecution.²⁵⁷ Finally, the Prosecution argued

251. Prosecutor v. Tadić, Case No. IT-94-1-A, Brief of Argument of the Prosecution (Cross-Appellant) (Int’l Crim. Trib. former Yugo., App. Chamber, Jan. 12, 1998), at 68.

252. See *id.* at 71-72.

253. *Id.* at 73. As an example, the Prosecution cited Article 3 of the Statute, which by its terms applies to unenumerated violations of the laws or customs of war: “The International Tribunal shall have the power to prosecute persons violating the laws of customs of war. Such violations shall include, but not be limited to: (a) employment of poisonous weapons. . . .” ICTY Statute, *supra* note 22, art. 3. The Appeals Chamber in the *Tadić* Jurisdictional Decision invoked such statements to interpret Article 3 in light of the intentions of the Security Council. See Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal in Jurisdiction (Int’l Crim. Trib. former Yugo., App. Chamber, Oct. 2, 1995), at 50, para. 88.

254. Prosecutor v. Tadić, Case No. IT-94-1-A, Brief of Argument of the Prosecution (Cross-Appellant) (Int’l Crim. Trib. former Yugo., App. Chamber, Jan. 12, 1998), at 74.

255. *Id.* See Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment (Int’l Crim. Trib. former Yugo., Trial Chamber II, May 7, 1997), at 276, para. 702 (“Given the fact . . . that the Nurnberg Charter clearly defined two types of crimes against humanity, of which only the persecution type requires discriminatory intent, there would seem to be no difficulty in attaching additional culpability to acts which fall within the ‘inhumane act’ category of crimes against humanity if motivated by discrimination. Nevertheless, because the Trial Chamber has incorporated the requirement . . . that discriminatory intent is required for all crimes against humanity, acts that are found to be crimes against humanity under other heads of Article 5 will not be included in the consideration of persecution as a separate offence under Article 5(h).”).

256. Prosecutor v. Tadić, Case No. IT-94-1-A, Brief of Argument of the Prosecution (Cross-Appellant) (Int’l Crim. Trib. former Yugo., App. Chamber, Jan. 12, 1998), at 75.

257. The Prosecution’s interpretation of the dual role played by the persecution clause in the definition of crimes against humanity is not the only interpretation possible. It is perhaps more likely that the persecution clause is meant to reach acts that do not involve significant invasions of life or liberty, but which become crimes against humanity when they are taken on discriminatory grounds. In other words, such acts are not considered “inhumane” without this

that the Trial Chamber's exhaustive enumeration of discriminatory grounds would fail to protect victim groups that could not be characterized by the grounds listed by the Trial Chamber but that have been the victims of crimes against humanity in the past.²⁵⁸ The appeal on the *Tadić* Opinion and Judgment will be heard in 1999.

In conclusion, in elaborating upon the definition of crimes against humanity in its Statute, Trial Chamber II attempted to clarify when inhumane acts and acts of persecution would constitute crimes against humanity for the purpose of adjudication before the ICTY. The solution adopted depends in part upon an internationalized version of familiar theoretical constructs of domestic criminal law—the *actus reus* and the *mens rea*. However, the Trial Chamber reversed this trend toward the rationalization of international crimes by adding two species of motive to the definition of crimes against humanity. The requirement that the defendant act on the basis of other than personal motives threatens to revive the war nexus requirement by repackaging it in terms of the motivational state of the defendant. The discriminatory motive requirement adds nothing to the international nature of the offense and threatens to exclude from the rubric of crimes against humanity inhumane acts involving non-enumerated motives. Although the *Tadić* Opinion and Judgment was to significantly influence the drafting of the final Statute for the permanent ICC, the drafters wisely excluded the Tribunal's extraneous motive requirements.

added element. This could include non-physical acts of economic, linguistic or cultural discrimination such as a prohibition on religious worship or the use of a national language, even in private; the systematic destruction of monuments or buildings representative of a particular social, religious, cultural, or other group; limitations on the professions open to members of certain groups; restrictions on family life; the plunder of property; the imposition of collective fines, etc.

258. *Id.* at 76, citing OGHBZ, Criminal Chamber of the Supreme Court for the British Zone (Mar. 5, 1949), STS 19/49, reprinted in 1 ENTSCHIEDUNGEN DES OBERSTEN GERICHTSHOFES FÜR DIE BRITISCHE ZONE, 321, 341 (1949) (finding accused guilty of crimes against humanity committed against mental patients); Judgment of Oct. 1, 1946, International Military Tribunal (Nuremberg) Judgment and Sentence, 22 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 498 (1948), reprinted in 41 AM. J. INT'L L. 172, 293 (1947) (finding defendant Wilhelm Frick guilty of crimes against humanity on the basis of his knowledge that "insane, sick, and aged people, 'useless eaters', were being systematically put to death" in war nursing homes, hospitals, and asylums). The Trial Chamber observed that the crimes in question clearly satisfied this element. See Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment (Int'l Crim. Trib. former Yugo., Trial Chamber II, May 7, 1997), at 250, para. 652 ("Factually, the inclusion of this additional requirement that the inhumane acts must be taken on discriminatory grounds is satisfied by the evidence discussed above that the attack on the civilian population was conducted against only the non-Serb portion of the population because they were non-Serbs."). This observation should not serve as an additional justification of this element's inclusion. The work of the ICTY will undoubtedly influence future codification efforts at the national, regional and international levels, and such a requirement threatens to significantly limit the scope of the prohibition against crimes against humanity as it applies to other scenarios.

VI. THE PERMANENT INTERNATIONAL CRIMINAL COURT'S CONSENSUS DEFINITION

Immediately after the formation of the United Nations, drafters of the Convention on the Prevention and Punishment of the Crime of Genocide contemplated the establishment of a permanent international criminal court.²⁵⁹ The ILC was commissioned to study “the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes”²⁶⁰ As was the case with the Draft Code of Offences Against the Peace and Security of Mankind, work on the permanent international criminal court stalled until the late 1980s when a collection of Latin American and Caribbean states re-invigorated the project. With prompting from the General Assembly, the ILC again turned its attention to drafting a statute. After much delay, the ILC completed a draft statute in 1994 that formed the basis for intensified consideration by an Ad Hoc Committee on the Establishment of an International Criminal Court²⁶¹ and then a Preparatory Committee on the Establishment of an International Criminal Court formed by the General Assembly.²⁶² A final Statute was finally achieved in July 1998 at the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.²⁶³

Members of the Preparatory Committee on the Establishment of an International Criminal Court (PrepCom) grappled with the precise elements to be included within the definition of crimes against humanity. Delegates noted the need to identify “general criteria for crimes against humanity to distinguish such crimes from ordinary crimes under national law and to avoid interference with national court jurisdiction with respect to the latter.”²⁶⁴ Delegates generally focused

259. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. VI, 78 U.N.T.S. 277 (entered into force Jan 12, 1951) (providing that individuals charged with committing genocide shall be tried “by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction”).

260. *Prevention and Punishment of the Crime of Genocide*, G.A. Res. 260(III)(B), U.N. Doc. A/810 (1948).

261. See G.A. Res. 49/53 Dec. 9, 1994 (establishing the Ad Hoc Committee).

262. See G.A. Res. 50/46 Dec. 11, 1995 (establishing the Preparatory Committee). After convening six separate sessions, the Preparatory Committee produced a revised draft Statute that served as the basis for negotiations at the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held from June 15 to July 17, 1998 in Rome, Italy.

263. See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998). The Diplomatic Conference was attended by delegations from almost two hundred states, over 30 observers and intergovernmental organizations, and hundreds of non-governmental organizations. The author attended on behalf of the Geneva-based International Service for Human Rights and the New Delhi-based South Asia Human Rights Documentation Centre.

264. *Summary of the Proceedings of the Preparatory Committee During the Period March 25-April 12, 1996*, U.N. Doc. A/AC.249/1 (May 7, 1996), at 16.

on the criteria contained in Article 3 of the Rwanda Statute.²⁶⁵ For example, some delegates argued that a conviction for crimes against humanity required proof that the defendant was motivated by a discriminatory animus. Others argued that “the inclusion of such a criterion would complicate the task of the prosecution by significantly increasing its burden of proof in requiring evidence of this subjective element.”²⁶⁶ These delegates further argued that crimes against humanity could be committed against other groups, including intellectuals, social, cultural or political groups, and that such an element was not required under customary international law, as evidenced by the Yugoslav Tribunal’s Statute.²⁶⁷ Most delegates supported reference to the widespread and/or systematic criteria, and, in most cases, these characteristics modified the acts committed.²⁶⁸

With respect to the war nexus, some delegates argued that existing law required some type of connection to an armed conflict and that in any case, the majority of such crimes were invariably committed in armed conflict.²⁶⁹ To this suggestion, other delegates argued—with reference to CCL 10, the Rwanda Statute and the *Tadić* Opinion and Judgment—that such a connection was no longer required and that such crimes can occur in times of peace and in ambiguous situations as well.²⁷⁰ The 1996 Report noted that:

The view was expressed that peacetime offences might require an additional international dimension or criterion to indicate the crimes that would be appropriate for adjudication by the Court, possibly by limiting the individuals who could commit such crimes. Some delegations question the need for an additional criterion assuming that sufficiently serious, grave or inhumane acts were committed on a widespread and systemic basis, with attention being drawn to proposals for clarifying this general criterion to indicate more clearly the offences that would be appropriate for international adjudication.²⁷¹

265. *See id.*

266. *Id.* at 17.

267. *See id.*

268. *See id.* (“Some delegations expressed the view that this criterion could be further clarified by referring to widespread and systematic acts of international concern to indicate acts that were appropriate for international adjudication; acts committed on a massive scale to indicate a multiplicity of victims in contrast to ordinary crimes under national law.”).

269. *See 1 Report of the Preparatory Committee on the Establishment of an International Criminal Court (Proceedings of the Preparatory Committee during March-April and August 1996)*, U.N. GAOR, 51st Sess., Supp. No. 22, U.N. Doc. A/51/22, at 23.

270. *See id.*

271. *Id.*

State proposals continued to place the war nexus and discriminatory motive requirements in brackets, indicating a lack of agreement as to the text. Such proposals defined crimes against humanity alternatively as:

the following [crimes] [acts], when committed as part of a widespread [and] [or] systematic attack [on a massive scale] against any civilian population: (a) [murder][willful killing]; (b) extermination . . . (h) persecutions on political, [national, ethnic,] racial and religious grounds [in connection with any [other] crime within the jurisdiction of the Court]

["Crimes against humanity" means the following: [crimes] [acts], when committed as part of a widespread [and] [or] systematic attack [on a massive scale] against any civilian population.]²⁷²

Other proposals, however, began to approach the formula adopted by the Trial Chamber in the *Tadić* Opinion and Judgment: "A person commits a crime against humanity when . . . [(c) he commits that act [knowing it is part of] [with the intent to further] a widespread and systematic attack against a civilian population]."²⁷³ Alternatively, "[The following acts when committed as part of a widespread and systematic attack against any civilian population shall be punishable . . .]."²⁷⁴

In the 1997 proceedings, the PrepCom's Working Group on the Definition of Crimes specifically considered the definition of crimes against humanity and retained both the war nexus and the discriminatory motive as optional elements of the offense:

For the purpose of the present Statute, any of the following acts constitutes a crime against humanity when committed

[as part of a widespread [and] [or] systematic commission of such acts against any population];

272. *Report of the Preparatory Committee on the Establishment of an International Criminal Court (Compilation of proposals)*, U.N. GAOR, 51st Sess., Supp. No. 22A, U.N. Doc. A/51/22 (1996), at 65. Brackets indicate text that had not yet been agreed upon in the deliberations.

273. *Id.* at 67. The brackets within this provision reveal that the drafters were undecided on the level of mental state associated with crimes against humanity. The two alternatives correspond to the mental states of knowledge and purpose as found in the American Law Institute's Model Penal Code § 2.02.

274. *2 Report of the Preparatory Committee on the Establishment of an International Criminal Court (Compilation of proposals)*, U.N. GAOR, 51st Sess., Supp. No. 22A, U.N. Doc. A/51/22 (1996), at 65.

[as part of a widespread [and] [or] systematic attack against any [civilian population] [committed on a massive scale] [in armed conflict] [on political, philosophical, racial, ethnic or religious grounds or any other arbitrarily defined grounds:] (a) murder]²⁷⁵

The definition of crimes against humanity was not considered at the next two sittings of the Preparatory Committee,²⁷⁶ and the above options appeared in the final consolidated text that served as a foundation for deliberations in July 1998 in Rome.²⁷⁷

In contrast to the crime of genocide, a consensus definition of crimes against humanity eluded drafters until the final days of the Diplomatic Conference. China, India, the Russian Federation and a number of states from the Middle East continued to support the retention of the war nexus requirement and the inclusion of a discriminatory motive element. In the end, though, the most controversial component of the definition turned on whether terms “widespread” and “systematic” would be conjunctive or disjunctive as applied to the attack against the civilian population. Several states (including India, the United Kingdom, France, Egypt, Turkey, the Russian Federation, Japan, and the United States) argued that the prosecution should be required to demonstrate that the attack manifested both characteristics. Other delegations argued that it would be sufficient if the attack was either widespread or systematic. The Canadian delegation suggested a compromise formula for the chapeau of the crimes against humanity provision to resolve what became an impasse in the negotiations.²⁷⁸ A slightly modified version of this formula was eventually adopted and Article 7 now reads: “For the purpose of this Statute, ‘crimes against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder . . .

275. *Decisions Taken by the Preparatory Committee at its Session Held from February 11 to 21, 1997*, U.N. Doc. A/AC.249.1997/L.5 (Mar. 12, 1997), Annex 1, at 4.

276. *See Decisions Taken by the Preparatory Committee at its Session Held from August 4 to 15, 1997*, U.N. Doc. A/AC.249/1997/L.8/Rev.1 (Aug. 14, 1997); *Decisions Taken by the Preparatory Committee at its Session Held from 1 to 12 December 1997*, U.N. Doc. A/AC.249/1997/L.9/Rev.1 (Dec. 18, 1997). Nor was this formulation significantly altered during the more informal intersessional meetings held in The Netherlands. *See Report of the Intersessional Meeting From January 19 to 30, 1998 in Zutphen, The Netherlands*, U.N. Doc. A/AC.249/1998/L. (Feb. 1998), pt. 2, art. 5[20], at 16-18. Participants there did note that if the discriminatory intent clause in the chapeau were retained, it would be necessary to consider the interrelationship between that clause and the persecution paragraph. *See id.* at 16.

277. *See Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. Doc. A/CONF.183/2/Add.1 (Apr. 14, 1998), at 25-26.

278. According to this proposal, the chapeau of the crimes against humanity provision would read: “For the purpose of the present Statute, a crime against humanity means any of the following acts when knowingly committed as part of a widespread or systematic attack directed against a civilian population.” Proposal on file with the author.

²⁷⁹ In this way, the ICC definition mirrors the core elements of the formula adopted by the Yugoslav Tribunal in the *Tadić* case with the notable exception of the dual burdensome motive elements.

In this way, the drafters of the ICC Statute, representing almost two hundred states, have confirmed that the existence of a widespread or systematic attack against a civilian population is sufficient to justify international judicial intervention. The existence of this attack entitles the international community to prosecute individuals who knowingly contribute to the attack regardless of their motives. It is not necessary for this attack to rise to the level of an armed conflict as defined by international law. Drafters specifically rejected alternative formulations of the offense that relied upon the war nexus requirement and motive requirements similar to those adopted by the Trial Chamber in the *Tadić* case.

The ICC Statute's formulation should be accorded great weight in future codification efforts and national prosecutions for crimes against humanity. In particular, the Appeals Chamber of the ICTY should articulate a definition of crimes against humanity based solely on the interplay between the two chapeau elements—the *mens rea* of the defendant and the existence of a widespread or systematic attack against a civilian population. As they incorporate international norms into their domestic penal codes, national legislatures should borrow from the chapeau of Article 7 of the ICC Statute to define crimes against humanity.²⁸⁰ Similarly, South Africa's Truth and Reconciliation Commission should utilize this definition as it considers whether the

279. Rome Statute of the International Criminal Court, art. 7, U.N. Doc. A/CONF.183/9 (July 17, 1998). The explanatory note at Article 7(2)(a) defines "attack directed against any civilian population" as "a course of conduct involving the multiple commission of acts referred to in paragraph 1 directed against any civilian population, pursuant to or knowingly in furtherance of a state or organizational policy to commit such acts." Many NGOs at the Diplomatic Conference objected to this provision on the grounds that it appeared to "smuggle" the controversial "and" back into the Statute. It was argued that in order to secure a conviction for crimes against humanity, the prosecutor would have to prove the requisite attendant circumstance—the existence a widespread or systematic attack against a civilian population involving: (1) multiple acts directed against a civilian population that were (2) pursuant to or knowingly in furtherance of a governmental or organizational policy to commit those acts. In other words, the attack must still be widespread and systematic despite the disjunctive formula in the chapeau. It is clear, however, that this sub-paragraph must be interpreted as compromise between proponents of the conjunctive and disjunctive formulas such that the burden of proof on the prosecution is lower than it would have been under the rejected "widespread and systematic" formulation. See SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTER, THE NORTH AMERICANS RE-WRITE CUSTOMARY INTERNATIONAL LAW: AN "AND" BY ANY OTHER NAME IS STILL AN "AND" (July 2, 1998) (on file with author).

280. This would avoid the confusion contained within Australia's War Crimes Amendment Act of 1988, which treats a "serious crime" as a "war crime" if it was committed "in the course of political, racial or religious persecution" or "with the intent to destroy in whole or in part a national, ethnic, racial or religious group" and was committed "in the territory of a country when the country was involved in war or when territory of the country was subject to an occupation." War Crimes Amendment Act 1988, § 7(3). Members of the Australian High Court treated this crime as a species of crimes against humanity. See *Polyukovich v. Regina* (Austr. 1992) 172 C.L.R. 501 (Toohey, J.).

practice of apartheid constitutes a crime against humanity.²⁸¹ And, if the ILC continues its work on the Draft Code of Offences Against the Peace and Security of Mankind, the ICC Statute's definition should be employed. Finally, national judiciaries adjudicating international law claims²⁸² could invoke the ICC Statute's definition of crimes against humanity given that it is the only multilateral instrument since the Nuremberg and Tokyo Charters to comprehensively define the offense.²⁸³

VII. AN HISTORICAL RECAPITULATION

This history of the definition of crimes against humanity reveals international law's evolving treatment of the concept of state sovereignty. On the one hand, the notion of state sovereignty has been a pillar of the international system since the 1648 Peace of Westphalia heralded the birth of the modern nation state.²⁸⁴ At the same time, an unconditional application of sovereignty has the potential to result in impunity for gross human rights violations committed within the boundaries of a state. Article 6 of the IMT Charter reflects this tension in international law between a reverence for state sovereignty and the emergence of the promotion of human rights as an overarching goal of the international system. On the one hand, Article 6(a) of the Charter reinforced the concept of sovereignty by criminalizing crimes against the peace—the violation of another state's sovereignty. On the other hand, Article 6(c) pierced the veil of sovereignty by holding national leaders legally accountable for treatment accorded to their own subjects, even when such treatment was putatively “legal” under the prevailing

281. The legislative mandate of the Truth and Reconciliation Commission (TRC) authorizes it to investigate crimes that rise to the level of crimes against humanity under international law. See Promotion of National Unity and Reconciliation Act of 1995, ch. 2 (1995). The Promotion of National Unity and Reconciliation Act empowers the TRC to inquire into: “gross violations of human rights, including violations which were part of a systematic pattern of abuse,” *id.* §4(a)(i), “the nature, causes and extent of gross violations of human rights,” *id.* §4(a)(ii), and “the question whether such violations were the result of deliberate planning.” *Id.* §4(a)(iv). The TRC is in the process of determining if the Promotion of National Unity and Reconciliation Act authorizes it to confirm international consensus that apartheid is a crime against humanity.

282. This includes civil cases brought under the Alien Tort Claims Act, which creates United States federal court jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350 (1988). See, e.g., *Mehinovic v. Vuckovic*, Case No. 98-V.2470 (N.D. Ga. filed Aug. 20, 1998) (suing for crimes against humanity allegedly committed in Bosanski Samac, Bosnia and Herzegovina).

283. It should be noted that the ICC Statute does not purport to codify or establish customary international law. See ICC Statute, art. 10 (“Nothing in this Part [Part 2, Jurisdiction, Admissibility and Applicable Law] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”).

284. See U.N. CHARTER art. 2(1) (“The Organization is based on the principle of the sovereign equality of all its Members.”).

national law. In other words, the drafters of the Charter simultaneously fortified and undermined the notion of sovereignty.²⁸⁵

The Charter's war nexus operated to reconcile the tension between these two provisions. It guaranteed that only when a state disturbed world order by engaging in aggressive acts would its sovereignty be challenged by the assignment of criminal liability to its leaders or other citizens who committed inhumane acts against their compatriots. In other words, the nexus provided a check on the erosion of sovereignty inherent in the notion of crimes against humanity.²⁸⁶ It sent the message to state leaders that only when they engage in acts of aggression, and especially if they lose,²⁸⁷ would crimes committed within state borders be subjected to international scrutiny and opprobrium.

The war nexus was not the only way to reconcile Articles 6(a) and 6(c). Instead, the drafters of the IMT Charter could have codified the classic international law doctrine of humanitarian intervention.²⁸⁸ Humanitarian intervention involves the intervention by one state into the territorial integrity of another state in order to protect individuals who are the victims of abuses by fellow citizens that the state is unwilling or

285. Luban, *supra* note 8, at 784 ("Article 6(c), the most enduring moral achievement of Nuremberg, is irreconcilable on its face with legal positivism, and thus with the classic doctrine of sovereignty."); *see also* FINKIELKRAUT, *supra* note 150, at 5 (noting that the notion of crimes against humanity "had never been able to descend from the heights of theory . . . for it had always collided with another founding principle of modern politics—the absolute sovereignty of the state"); José J. Alvarez, *Nuremberg Revisited: The Tadić Case*, 7 *EUROP. J. INT'L L.* 245, 260 (1996) (noting that the drafters of the Nuremberg Charter undermined their own legacy by tying crimes against humanity to the crime of aggression and failing to resolve the tension between statism and human rights). It has been noted that while the criminalization of aggression indirectly benefits individuals under international law, the primary benefits inures to the state system. *See* Louis Henkin, *Human Rights and State "Sovereignty"*, 25 *GA. J. INT'L & COMP. L.* 31, 33 (1995-1996).

286. This perspective explains the persistent opposition to the abandonment of the war nexus. *See* Guyora Binder, *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie*, 98 *YALE L.J.* 1321, 1333 (1989) ("Such efforts to detach crimes against humanity from the law of war have been criticized as entailing international interference in the internal affairs of sovereign states."). One commentator has speculated that efforts to codify the prohibition of crimes against humanity in a specialized convention have been rare because the notion of crimes against humanity challenges the primacy of sovereignty in the international order. *See* Zoller, *supra* note 12, at 558.

287. This application of the war nexus could lead to the conclusion that "[o]nly victor's justice is possible." Luban, *supra* note 8, at 808.

288. *See id.* at 787. *See also* MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 90, 101-08 (1977) (arguing that humanitarian intervention in response to massive human rights violations is valid exception to the general inviolability of state sovereignty).

unable to prevent.²⁸⁹ The doctrine has an ancient pedigree that predates the more modern state-oriented theories of international law.²⁹⁰

The British Prosecutor at Nuremberg, Sir Hartley Shawcross, likened the exercise of the IMT's jurisdiction over crimes against humanity to the historical right of humanitarian intervention:

Normally international law concedes that it is for the state to decide how it shall treat its own nationals; it is a matter of domestic jurisdiction Yet international law has in the past made some claim that there is a limit to the omnipotence of the State and that the individual human being, the ultimate unit of all law, is not disentitled to the protection of mankind when the state tramples upon his rights in a manner which outrages the conscience of mankind. . . . The same view was acted upon by the European powers which in time past intervened in order to protect the Christian subjects of Turkey against cruel persecution. The fact is that the right of humanitarian intervention by war is not a novelty in international law—can intervention by judicial process then be illegal?²⁹¹

This analogy between humanitarian intervention and the prosecution of crimes against humanity arose repeatedly in the post-World War II

289. See Yogesh K. Tyagim, *The Concept of Humanitarian Intervention*, 16 MICH. J. INT'L L. 883, 884 (1995) ("The basis for a humanitarian intervention lies in the absence of a minimum moral order in the whole or a part of a state, which is inconsistent with fundamental humanitarian norms and unacceptable to other states or non-state entities."); Malvina Halberstam, *The Legality of Humanitarian Intervention*, 3 CARDOZO J. INT'L & COMP. L. 1, 1 (1995) (defining humanitarian intervention as "the use of force by one state in the territory of another to protect persons who are in imminent danger of death or grave injury when the state in whose territory they are is unwilling or unable to protect them").

290. Grotius argued in 1625 that a "war for the subjects of another [is] just, for the purpose of defending them from injuries inflicted by their ruler . . . [if] a tyrant . . . practices atrocities toward his subjects which no just man can approve." Halberstam, *supra* note 290, at 3, quoting HUGO GROTIUS, *VINDICAE CONTRA TYRANNOS* (1625). See also *Lettre de M. Arutz, in Rolin Jacuemyns, Note Sur la Théorie de Droit d'Intervention*, 8 REV. DROIT INT'L LEGIS. COMPARÉE 675 (1876), quoted in Jean-Pierre Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Vitality Under the U.N. Charter*, 4 CAL. W. INT'LL.J. 203, 220 (1974) ("[H]owever worthy of respect the rights of sovereignty and independence of States may be, there is something even more worthy of respect, namely the law of humanity, or of human society, that must not be violated. In the same way as within the State freedom of the individual is and must be restricted by the law and the morals of the society, the individual freedom of the States must be limited by the law of human society.") (emphasis in original); LASSA OPPENHEIM, *INTERNATIONAL LAW* 347 (1st ed. 1905) ("[S]hould a State venture to treat its own subjects or a part thereof with such cruelty as would stagger humanity, public opinion of the rest of the world would call upon the Powers to exercise intervention for the purpose of compelling such State to establish a legal order of things within its boundaries sufficient to guarantee to its citizens an existence more adequate to the ideas of modern civilisation.")

291. Concluding Speeches by the Prosecution, 19 THE TRIAL OF GERMAN MAJOR WAR CRIMINALS, PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG, 433, 471-72 (1948).

proceedings. For example, in the *Justice* case, the tribunal observed that the concept of crimes against humanity has its roots in humanitarian intervention as it occurred in Turkey, Lebanon, Romania and Russia in response to religious persecution.²⁹² Similarly, in *U.S. v. Goering*, the tribunal noted that “[t]he rights of humanitarian intervention on behalf of the rights of man, trampled upon by a state in a manner shocking the sense of mankind, has long been considered to form part of the recognized law of nations. Here, too, the Charter merely develops a preexisting principle.”²⁹³ Finally, the Prosecution in the *Flick Case* argued in favor of the application of the crimes against humanity provision to events occurring prior to the formal commencement of war with reference to instances of humanitarian intervention throughout history:

This doctrine that inhumane atrocities against civilian populations are so contrary to the law of nations that a country is rightfully entitled to interfere and endeavor to put an end to them, by diplomatic protest or even by force, was repeatedly voiced and often acted upon during the nineteenth century.²⁹⁴

The Prosecution in that case concluded that while military intervention in defense of victims of crimes against humanity is no longer an appropriate sanction, “the fact that a particular method of enforcing law and punishing crime has become outmoded does not mean that what was previously a well-recognized crime at international law is such no longer.”²⁹⁵ The Prosecution emphasized that the world community had developed to such an extent that collective legal action along the lines of the International Military Tribunal had become possible.²⁹⁶

The doctrine of humanitarian intervention suggests that the existence of a widespread or systematic attack against a civilian population provides the hook on which international jurisdiction can hang. It is unfortunate that the drafters of the IMT Charter were not guided more by the protection of individuals at risk and less by the desire to safeguard the principle of sovereignty at the expense of the protection of basic human rights. The formulation chosen by the drafters of the Statute for the permanent international criminal court harkens back to this classic doctrine of humanitarian intervention and emphasizes the principles that should properly guide the drafting of international norms and the response to grave international crimes.

292. See *United States v. Altstoetter*, 3 CCL 10 TRIALS, *supra* note 4, at 981-82.

293. *United States v. Goering*, 3 CCL 10 TRIALS, *supra* note 4, at 92.

294. *United States v. Flick*, Opening Statement for the Prosecution, 6 CCL 10 TRIALS, *supra* note 4, at 3, 87-88. As support, the Prosecution cited interventions in Greece, Turkey, Lebanon, Russia, Romania, Syria and Cuba in defense of ethnic and religious minorities. See *id.* at 88-89.

295. *Id.* at 90.

296. See *id.*

VIII. CONCLUSION

The history of the prohibition against crimes against humanity has been characterized by a quest to identify an element of the offense that serves to distinguish crimes against humanity from ordinary municipal crimes. For the drafters of the Nuremberg Charter, which was the first positive law articulation of the offense, the war nexus requirement served this purpose. International lawyers soon realized, however, that this element undesirably and illogically limited the scope of the prohibition of crimes against humanity. Accordingly, they began the search for an alternative mechanism to justify international jurisdiction. The *Tadić* Trial Chamber, with reference to the *Justice and Finta* cases, significantly clarified the international law in this area with its *mens rea* formulation. However, it further muddied the waters with the addition of unnecessary motive elements that serve only to increase the prosecution's burden of proof. As it resolves the appeal brought by the Office of the Prosecutor in the *Tadić* case, the ICTY's Appeals Chamber should reverse the Trial Chamber's ruling insofar as it attaches motivational elements to the definition of crimes against humanity. It should instead articulate a definition of crimes against humanity that recognizes that the interplay between the two elements—the *mens rea* of the defendant and the existence of a widespread or systematic attack against a civilian population—is sufficient to distinguish crimes against humanity from ordinary crimes. The proceedings at the ICC Diplomatic Conference should provide guidance to the Appeals Chamber in this regard.

The achievement of a consensus definition of crimes against humanity at the ICC Diplomatic Conference represents a significant achievement for the international community and for the effort to protect basic human rights worldwide. The convoluted path leading to this point signifies the dramatic evolution that has occurred with respect to the principles that guide the codification of international criminal law. In particular, the ICC Statute's definition of crimes against humanity—a definition based on the existence of a widespread or systematic attack against a civilian population and the perpetrator's knowing contribution to that attack—marks the welcome culmination of a slow but steady process of erosion of the significance of state sovereignty in the process of international law formation.