Michigan Law Review

Volume 62 | Issue 6

1964

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MICHIGAN LAW REVIEW

Vol. 62 APRIL 1964 No. 6

CRIMES AGAINST HUMANITY AND THE PRINCIPLE OF NONEXTRADITION OF POLITICAL OFFENDERS

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THE unprecedented crimes against humanity committed by the Nazi leaders before and during World War II raised a vital question concerning the surrender of these men by the States in which they had later taken refuge. Although the civilized world was rightfully shocked and indignant at the cold, calculated brutality with which these crimes were committed, serious legal problems arose as to whether the persons who committed these offenses were subject to surrender under the existing extradition law and practice.[1] The most critical problem thus presented was whether crimes against humanity could properly be regarded as "political offenses" for which extradition is not generally granted.[2] Although the leaders of the United Nations alliance at that time stated that those participating in "atrocities, massacres and executions" would be sent back to the countries in which "their abominable deeds were done in order that they may be judged and punished,"[3] the matter still had to be decided by each individual country of refuge on the basis of its own extradition law. It is true, of course, that most of the persons guilty of crimes against humanity were adequately tried and punished by tribunals set up after World War II. However, it is also true that many other persons liable to prosecution on this charge are still at large in the territory of foreign States. Moreover, crimes against humanity are not infrequent in countries with dictatorial and tyrannical regimes. Therefore, the question of surrendering fugitives accused of these offenses remains a basic and contemporary problem of interna-

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1 For problems in this area, see 12 DEP'T STATE BULL. 190 (1945).

2 See generally GARCÍA-MORA, INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT 73-102 (1956).

3 See the joint declaration of Nov. 1, 1943, issued by President Roosevelt, Prime Minister Churchill and Premier Stalin (Moscow Declaration). For text, see 9 DEP'T STATE BULL. 310-11 (1943).

tional extradition law.[4] It is thus the purpose of this article to discuss the nature of crimes against humanity in an effort to determine whether they can be classified as political offenses. It is hoped that from the uncertainty and confusion which appear to underlie the practice of the State, some useful legal principles may be extracted.

I. THE NATURE OF CRIMES AGAINST HUMANITY

A. *Jurisdiction of War Crimes Tribunals Regarding Crimes Against Humanity*

The technical conception of crimes against humanity perhaps can be approached best from the standpoint of the Nürnberg Charter and Judgment. Under the Charter of the International Military Tribunal that sat at Nürnberg,[5] crimes against humanity consist in "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."[6] A similiar provision was included in the Charter of the International Military Tribunal for the Far East,[7] under which the Japanese leaders were tried and punished.[8] Although at first glance it appears that crimes against humanity include any of the inhumane acts enumerated in the Charter, which were committed either before or during the war, the jurisdiction of the Tribunal was substantially restricted in that these crimes were made punishable only in so far as they were committed "in execution of or in connection with any crime within the jurisdiction of the Tribunal."[9]

4 Thus, most recently the Supreme Court of Chile refused the extradition to West Germany of a former Nazi secret service officer accused of the murder of some 90,000 Jews in the Soviet Union. N.Y. Times, April 28, 1963, p. 13, col. 4. This problem of extraditing persons accused of war crimes and crimes against humanity was adverted to in Neumann, *Neutral States and the Extradition of War Criminals*, 45 AM. J. INT'L L. 495, 503-05 (1951).

5 Text in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 11 (1947).

6 Charter of the International Military Tribunal at Nürnberg art. 6, para. (c).

7 Charter of the International Military Tribunal for the Far East art. 5, para. (c).

8 For a discussion of the trial under this Charter, see KEENAN & BROWN, CRIMES AGAINST INTERNATIONAL LAW chs. 1, 3-4 (1950).

9 This restriction to the Nürnberg Charter as regards the crimes enumerated therein apparently did not exist in the original Four-Power Agreement of Aug. 8, 1945, signed at London providing for the establishment of the International Military Tribunal for

It is therefore clear that in order for these inhumane acts to constitute crimes against humanity within the jurisdiction of the Tribunal, it was essential that they be connected with crimes against peace[10] or with war crimes[11] as described in the Nürnberg Charter. The limited scope of the jurisdiction thus established can be most instructively illustrated by the Nürnberg Judgment itself, for in describing crimes against humanity it sharply said:

> "With regard to Crimes against Humanity there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic. . . . To constitute Crimes against Humanity, the acts relied on before the outbreak of 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."[12]

The net effect of the above holding is far-reaching on two grounds. First, within the limits laid down by the Tribunal, it is quite possible—indeed, it was so under the Nürnberg Judgment—that acts committed before a war, no matter how horrible and atrocious, unless connected with crimes against peace or with war

the prosecution and punishment of the major war criminals of the European Axis. The Amendment to the Charter was made under the Berlin Protocol of Oct. 6, 1945. For the story of how the amendment was made, see Lauterpacht, *The Subjects of the Law of Nations*, 64 L.Q. REV. 97, 103 (1948).

10 Charter of the International Military Tribunal at Nürnberg art. 6, para. (a).

11 *Id.* para. (b).

12 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 254-55 (1947). (Emphasis added.) For reference to pre-war persecutions, see *id.* at 282.

crimes proper, would technically fall outside of the concept of crimes against humanity and, thus, not be punishable at all under international law.[13] Second, within the terms of the Nürnberg Judgment, the characterization of crimes against humanity can properly be denied to acts done before a war, even if committed in connection with or in execution of any crime within the jurisdiction of the Tribunal.[14] In view of the fact that the Tribunal was expressly directed to consider crimes against humanity committed "before or during the war," this second restriction acquires a special significance since it limited the jurisdiction of the Tribunal, apparently in violation of the terms of the Charter.[15] Purely as a matter of future law, these two limitations upon the Tribunal's jurisdiction rule out the possibility that crimes against humanity embrace violations of the standards of decency and humanity to which all human beings are entitled under conditions of both peace and war.[16] This result runs contrary to the prescriptions of a modern law of nations deeply concerned with the welfare of the individual.[17] It scarcely needs reminding that totalitarian States and tyrannical regimes are amazingly callous in their lack of respect for human dignity and their estimate of the value of human life. It is, therefore, a sad commentary upon international law that unless connected with war crimes or crimes against peace,

13 This point may be emphasized by quoting from the opinion of the Tribunal: "The Tribunal is of course bound by the Charter, in the definition which it gives both of War Crimes and Crimes against Humanity. With respect to War Crimes, however, as has already been pointed out, the crimes defined by Article 6, Section (b), of the Charter were already recognized as War Crimes under international law." *Id.* at 253. The inference of this statement that crimes against humanity were not, in the view of the Tribunal, crimes against international law cannot be avoided. This conviction seems to have permeated the drafting of the Nürnberg Charter, for in a memorandum of Jan. 22, 1945, sent by the Legal Adviser of the Department of State to the President, the former expressed misgivings about the legality of punishing the Nazi leaders for atrocities committed in time of peace. The Legal Adviser felt that "These pre-war atrocities are neither 'war crimes' in the technical sense, nor offenses against international law; and the extent to which they may have been in violation of German Law, as changed by the Nazis, is doubtful. Nevertheless, the declared policy of the United Nations is that these crimes, too, shall be punished and the interests of postwar security and of necessary rehabilitation of the German peoples, as well as the demands of justice, require that this be done." See [1945] FOREIGN REL. U.S. 403-05 (1955).

14 See 2 SIBERT, TRAITÉ DE DROIT INTERNATIONAL PUBLIC 592 (1951).

15 See LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 86 (1950). See also Schwarzenberger, *The Judgment of Nuremberg*, 21 TUL. L. REV. 329, 353 (1947).

16 1 SCHWARZENBERGER, INTERNATIONAL LAW 321 (2d ed. 1949).

17 Thus, in its Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, the United Nations International Law Commission said that crimes against humanity "may take place also before a war in connexion with crimes against peace." International Law Comm'n, *Report*, U.N. GEN. ASS. OFF. REC., 5th Sess., Supp. No. 12, at 14 (A/1316) (1950).

atrocities committed by dictatorial regimes in peacetime and against their own people are likely to remain unpunished.[18]

It is, of course, quite possible to argue that the restrictive scope of crimes against humanity here described was merely intended to limit the jurisdiction of the Nürnberg Tribunal, and not to limit the substantive nature of crimes against humanity under international law.[19] It is thus of some interest to observe that in the celebrated *Eichmann* case, an Israeli court proceeded on this assumption in convicting Eichmann under the terms of an indictment which included crimes against humanity, although the court explicitly stated that most of Eichmann's crimes were committed during the war.[20] But long before this case, the more acceptable view of regarding crimes against humanity as including offenses committed before or during a war received some support from the enactment of the Allied Control Council Law No. 10,[21] which provided for the prosecution and punishment of the so-called minor war criminals by military tribunals to be set up by various nations.[22] The pertinent provision of this law says:

> "Each of the following acts is recognized as a crime:
> "*Crimes Against Humanity*: 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."[23]

Clearly, then, in principle the military tribunals established un-

18 *Cf.* MCDOUGAL & ASSOCIATES, STUDIES IN WORLD PUBLIC ORDER 366-67 (1960).

19 LAUTERPACHT, *op. cit. supra* note 15, at 36. This was also the opinion of some delegates to the Sixth Committee of the General Assembly in discussing the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal formulated by the International Law Commission. See SOHN, CASES ON UNITED NATIONS LAW 980 (1956).

20 For the opinion of the court, see 56 AM. J. INT'L L. 805, 828 (1962). For discussion of the legal issues involved, see Baade, *The Eichmann Trial: Some Legal Aspects*, 1961 DUKE L.J. 400.

21 For the text of this law, see Taylor, Final Report to the Secretary of the Army on the Nürnberg War Crimes Trials Under Control Council Law No. 10, at 250 (1949).

22 For the laws of the various countries providing for the establishment of tribunals for the trial of war criminals, see [1947] Ann. Dig. 292-95. For discussion on the work of these tribunals, see MCDOUGAL & FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 706-12 (1961); STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICTS 374 (1954).

23 Control Council Law No. 10 art. II, sec. 1, para. (c).

der Control Council Law No. 10 were given a broader scope of jurisdiction to consider crimes against humanity committed by the Nazi officials from the beginning of the Nazi regime right down to the end of World War II. The four Powers who agreed to this provision undoubtedly intended that no limitation would exist upon the jurisdiction of these tribunals.[24] Yet if that provision were to be given the wide meaning thus intended, it would surely have produced an inevitable conflict with the precedent established by the Nürnberg Judgment. Indeed, the moral and legal confusion on this issue was reflected in the contradictions of the United States military tribunals established at Nürnberg under Control Council Law No. 10. Thus, in the *Flick* case[25] involving the trial of a leading German industrialist and five others closely associated with him in his industrial enterprises, on the charge, *inter alia,* of crimes against humanity, the Tribunal decisively rejected the contention that these crimes included atrocities committed before 1939:

> "In the IMT trial the Tribunal declined to take jurisdiction of crimes against humanity occurring before 1 September 1939, basing its ruling on the modifying phrase, 'in execution of or in connection with any crime within the jurisdiction of the Tribunal,' found in Article 6 (a) [*sic*] of the Charter attached to the London Agreement of 8 August 1945. It is argued that the omission of this phrase from Control Council Law No. 10 evidences an intent to broaden the jurisdiction of this Tribunal to include such crimes. We find no support for the argument in express language of Law No. 10. . . . Crimes committed before the war and having no connection therewith were not in contemplation . . . . 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. We can see no purpose nor mandate in the chartering legislation of this Tribunal requiring it to take jurisdiction of such cases."[26]

A substantially similar result was reached in the *Ministries* case[27] involving the prosecution of eighteen ministers or high

24 Brand, *Crimes Against Humanity and the Nürnberg Trials,* 28 ORE. L. REV. 93, 116 (1949).

25 United States v. Flick, 6 TRIALS OF WAR CRIMINALS BEFORE THE NÜRNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 3 (1952) [hereinafter cited as WAR CRIMES REPORTS].

26 *Id.* at 1212-13.

27 United States v. Weizsaecker, 12 WAR CRIMES REPORTS 1 (1951).

officials in the Foreign Office and other state departments of the German Reich. While the counts of the indictment included crimes against humanity, the tribunal limited its jurisdiction to crimes committed during the war and in connection with war crimes or crimes against peace.[28] In contrast, in the *Justice* case,[29] dealing with the prosecution of fourteen judges, public prosecutors or high officials of the Reich Ministry of Justice, in referring to the provisions of the Nürnberg Charter and of the Control Council Law No. 10 which provide for the prosecution of crimes against humanity, the tribunal succinctly said:

> "Obviously, these sections are not surplusage. They supplement the preceding sections on war crimes and include within their prohibition not only war crimes, but also acts not included within the preceding definitions of war crimes. . . . As we construe it, that section [of Control Council Law No. 10] provides for the punishment of crimes committed against German nationals only where there is proof of conscious participation in systematic government organized or approved procedures . . . . *Thus the statute is limited by construction to the type of criminal activity which prior to 1939 was and still is a matter of international concern.*"[30]

Perhaps even more explicit is the opinion of the Tribunal in the *Einsatzgruppen* case,[31] which clearly held that Control Council Law No. 10 did not limit the jurisdiction of the war crimes tribunals to wartime offenses, but included "all crimes against humanity as long known and understood under the general principles of criminal law."[32] Although moral sentiment undoubtedly supports the latter view, the opinions in the *Flick* and *Ministries* cases probably represent the existing law. The latter proposition, however, is still subject to considerable controversy and doubt,[33] for in the revised version of the Draft Code of Offenses

28 14 WAR CRIMES REPORTS 467 (1952).

29 United States v. Altstoetter, 3 WAR CRIMES REPORTS 3 (1951).

30 *Id.* at 972, 982. (Emphasis added.) See also the case decided by the Spruchgericht at Stade, Germany, in 1947, in which the accused was convicted of membership in the criminal organization of the S.S., knowing that the organization was guilty of crimes against humanity. [1947] Ann. Dig. 100 (No. 38). In interpreting Control Council Law No. 10, the court said: "Law No. 10 provides that all criminal acts enumerated therein are crimes against humanity. As it does not require any connection with war, criminal acts committed before September 1, 1939, must also be regarded as such." *Id.* at 101.

31 United States v. Ohlendorf, 4 WAR CRIMES REPORTS 3 (1950).

32 *Id.* at 499.

33 Paoli, *Contribution a l'Étude des Crimes de Guerre et des Crimes Contre l'Humanité*

Against the Peace and Security of Mankind, adopted by the United Nations International Law Commission at its sixth session in 1954,[34] crimes against humanity are specifically included as crimes under international law and need not be connected with war crimes or crimes against peace. The pertinent provision of the Draft Code regards as crimes under international law,

> "inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, racial, religious or cultural grounds by the authorities of a state or by private individuals acting at the instigation or with the toleration of such authorities."[35]

It can be readily seen, therefore, that under the Draft Code the possibility of successful prosecution on charges of crimes against humanity both in peace and in war has been greatly enlarged. Moreover, that these offenses may be committed by the authorities of the State as well as by private individuals[36] constitutes another radical departure from the Nürnberg Charter and Control Council Law No. 10, for under these two instruments the acts of private persons were totally excluded.[37] It should be noted, however, that the Draft Code is innovatory rather than declaratory of existing law, but if it should gain acceptance by the States, most of the loopholes regarding crimes against humanity which exist in the Nürnberg precedents will effectively be closed.[38]

With this background in mind, it is now pertinent to explore in some detail just what a crime against humanity is, so that this conception may be more accurately viewed from the standpoint of political offenses.

en Droit Pénal International, 39 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 129 (1945).

34 Text in International Law Comm'n, *Report*, U.N. GEN. ASS. OFF. REC., 9th Sess., Supp. No. 9, at 10-11 (A/2693) (1954).

35 1954 Draft Code art. II, para. 11. This was previously para. 10.

36 For a full discussion of the Draft Code from the standpoint of the responsibility of private persons, see GARCÍA-MORA, INTERNATIONAL RESPONSIBILITY FOR HOSTILE ACTS OF PRIVATE PERSONS AGAINST FOREIGN STATES 36-46 (1962).

37 2 SIBERT, *op. cit. supra* note 14, at 591. As to the interpretation of Control Council Law No. 10, see United States v. Flick, 6 WAR CRIMES REPORTS 1216 (1952), where the tribunal said that "crimes against humanity as defined in Control Council Law No. 10 must be strictly construed to exclude isolated cases of atrocity or persecution whether committed by private individuals or governmental authority." An exactly identical holding is found in United States v. Altstoetter, 3 WAR CRIMES REPORTS 3, 982 (1951).

38 See Carjeu, *Quelques Aspects du Nouveau Projet de Statut des Nations Unies pour une Juridiction Criminelle Internationale*, 60 REVUE GÉNÉRAL DE DROIT INTERNATIONAL PUBLIC 401 (1956).

B. *Crimes Against Humanity Proper*

More comprehensively considered, two categories of crimes against humanity were distinguished in the Nürnberg Charter[39] and in Control Council Law No. 10.[40] The first category included "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population . . . ." In an effort to clarify these concepts, a United States military tribunal at Nürnberg most inclusively regarded as crimes against humanity murder, torture, enslavement, "acts committed in the course of wholesale and systematic violation of life and liberty" and infringements on "freedom of opinion . . . the moral or physical integrity of the family . . . or the dignity of the human being, by reason of his opinion, his race, caste, family or profession. . . ."[41] A careful examination of the decisions of the war crimes tribunals at once reveals that the crime against humanity count was generally assessed in the light of principles of common humanity that all civilized men are presumed to know.[42] From this perspective, the extermination of persons under an alleged "euthanasia program,"[43] the deportation of inhabitants of occupied countries to slave labor camps,[44] the use of concentration camp labor in the course of which individuals were ill-treated, tortured, and killed,[45] the mass extermination, torture, and mutilation of the civil popu-

39 Charter of the International Military Tribunal at Nürnberg art. 6, para. (c).

40 Control Council Law No. 10 art. II, sec. 1, para. (c).

41 United States v. Ohlendorf (The Einsatzgruppen case), 4 WAR CRIMES REPORTS 1, 498 (1950). Part of this definition was actually taken from one given by the Counselor of the Vatican at the 8th Conference for the Unification of Penal Law held on July 11, 1947. *Ibid.* Also a German court in 1947 said that deprivation of liberty is a crime against humanity. The court stressed that "amongst 'inhuman acts' deprivation of liberty must be included, particularly as the human personality is more severely affected thereby than by deportation." [1947] Ann. Dig. 100, 101 (No. 38).

42 See MCDOUGAL & FELICIANO, *op. cit. supra* note 22, at 691-92.

43 United States v. Greifelt, 5 WAR CRIMES REPORTS 89 (1950). It should be added, however, that the defendant was acquitted on the crime against humanity charge because the crime was directed against the nationals of his own State, that is, German nationals. Nevertheless, the tribunal intimated that it would be a crime against humanity if committed against inhabitants under belligerent occupation. Yet in United States v. Altstoetter (Justice case), 3 WAR CRIMES REPORTS 3 (1951), the tribunal held that inhuman acts committed by Germans against German nationals constituted punishable crimes against humanity. *Id.* at 982. In this respect apparently there is a difference of opinion among the war crimes tribunals. See generally GOULD, INTRODUCTION TO INTERNATIONAL LAW 657 (1957).

44 United States v. Milch, 2 WAR CRIMES REPORTS 353 (1947). The tribunal pointed out that Milch had participated in the terrorization, enslavement, and murder of Jews in Germany long before the outbreak of the War. See also United States v. List (Hostages case), 11 WAR CRIMES REPORTS 759 (1950).

45 United States v. Krauch (I. G. Farben case), 7 WAR CRIMES REPORTS 1 (1953).

lation in occupied countries,[46] and many other similar atrocities,[47] are all held to be crimes against humanity. It may also be noted that under the Nürnberg Charter and Control Council Law No. 10, "other inhumane acts against any civilian population" were similarly regarded as crimes against humanity. Thus, illustrations of acts so characterized by the war crimes tribunals include acts of terrorism against the civilian population,[48] the exposure of the population of occupied countries to bad weather conditions,[49] dispossessing persons of all means of subsistence,[50] compelling prisoners of war and civilians to submit to medical experiments resulting in brutalities, torture, disabling injury, and death,[51] separating newly born children from their parents and subjecting them to insanitary conditions and medical neglect, thus causing the death of a large number of these children,[52] and the murdering of foreign workers deported from their countries.[53] In respect to offenses against property, a United States military tribunal carefully drew a distinction between "industrial property" on the one hand, and "the dwellings, household furnishings, and food supplies of a persecuted people," on the other, reaching the conclusion that offenses against industrial property did not constitute crimes against humanity.[54] As to offenses against "the dwellings, household furnishings, and food supplies of persecuted people," unfortunately it is not very clear whether they are crimes against humanity, for the tribunal left the matter unsettled and subject to much speculation and doubt. What may be stressed, however,

46 United States v. Ohlendorf (The Einsatzgruppen case), 4 WAR CRIMES REPORTS 3 (1950).

47 See Schwelb, *Crimes Against Humanity*, 23 BRIT. YB. INT'L L. 178 (1946). See also Graven, *Les Crimes Contre l'Humanité*, 76 RECUEIL DES COURS, ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE 433 (1950) [hereinafter cited as HAGUE RECUEIL].

48 *In re* Gerbsch, Special Court, Amsterdam, First Chamber, Holland, April 28, 1948, [1948] Ann. Dig. 491, 498 (No. 155). See also *In re* Bellmer, Special Criminal Court, Second Chamber, Leeuwarden, Holland, June 20, 1949, [1950] Ann. Dig. 392 (No. 124).

49 See 2 DROST, THE CRIME OF STATE: GENOCIDE 185 (1959).

50 *Ibid.*

51 United States v. Pohl, 5 WAR CRIMES REPORTS 195 (1950). See also United States v. Brandt (Medical case), 1 WAR CRIMES REPORTS 3 (1949). It is interesting to note that in this case the tribunal said: "Manifestly human experiments under such conditions are contrary to 'the principles of the laws of nations as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of public conscience." 2 WAR CRIMES REPORTS 183 (1949).

52 *In re* Gerike, 7 WAR CRIMES REPORTS 76 (1948), [1947] Ann. Dig. 304.

53 *In re* Wagner, 13 WAR CRIMES REPORTS 118 (1949), [1947] Ann. Dig. 305.

54 United States v. Flick, 6 WAR CRIMES REPORTS 1214 (1952). This decision was followed in the subsequent case, United States v. Krauch (I.G. Farben case), 8 WAR CRIMES REPORTS 1130 (1952).

is that the extent to which offenses against personal property can be regarded as crimes against humanity would depend entirely upon the degree to which the actors deprive the persecuted people of certain human necessities, such as shelter, food supply and employment.[55]

In an attempt to compile the above offenses in a comprehensive code designed for future application, it has already been seen that the United Nations International Law Commission described inhuman acts in its Draft Code of Offenses Against the Peace and Security of Mankind,[56] as including "murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities."[57] While the Draft Code evidently seeks to project much the same policy that the Nürnberg Charter sought to apply in respect to crimes against humanity, it has, however, enlarged the scope of such crimes by freeing them from any necessary relationship with war crimes or crimes against peace.[58] It is therefore clear that under the Draft Code crimes against humanity have become a separate and independent category of international crimes.

Wholly apart from the provisions of the Draft Code, which are really presented *de lege ferenda*, the Geneva Convention No. IV of August 12, 1949, Relative to the Protection of Civilian Persons in Time of War, [59] marks an important step in the protection of the civilian population in an international war. After providing generally that "protected persons"[60] are to be treated humanely under all circumstances without any distinction based on race,

55 See Brand, *The War Crimes Trials and the Laws of War*, 26 BRIT. YB. INT'L L. 414, 423 (1949).

56 For the text of the 1951 Draft Code, see International Law Comm'n, *Report*, U.N. GEN. ASS. OFF. REC., 6th Sess., Supp. No. 9, at 10-14 (A/1858) (1951). For the text of the revised Draft of 1954, see note 34 *supra*.

57 1954 Draft Code, art. II, para. 11.

58 Johnson, *The Draft Code of Offences Against the Peace and Security of Mankind*, 4 INT'L & COMP. L.Q. 445, 450 (1955). See also Graven, *Principes Fondamentaux d'un Code Repressif des Crimes Contre la Paix et la Sécurité de l'Humanité*, 28 REVUE DE DROIT INTERNATIONAL 173, 191-204 (1950).

59 This Convention entered into force on Oct. 21, 1950. For text, see [1955] 3 U.S.T. & O.I.A. 3516, T.I.A.S. No. 3365 (effective Feb. 2, 1956).

60 Under Article 4 of the Convention "protected persons" include civilians who "at a given moment and in any manner whatsoever, find themselves in the hands of a power with whom their country is at war or under belligerent occupation. See Yingling & Ginnane, *The Geneva Conventions of 1949*, 46 AM. J. INT'L L. 393, 411 (1952).

religion, sex, or political opinion, the Convention goes on to say more particularly that the signatory States

> ". . . specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents."[61]

This provision strongly reflects the influence of the Nürnberg Charter and the accumulated experience of the war crimes trials, and represents a determined effort to prevent unnecessary physical suffering of the civilian population during war and belligerent occupation.[62] Unfortunately, however, this prohibition operates only in time of war and belligerent occupation, so that the enslavement and extermination of people, as done by the Nazi regime before the outbreak of World War II, are clearly not prohibited.

The second category of crimes against humanity described in the Nürnberg Charter and Control Council Law No. 10 included "persecutions on political, racial or religious grounds." In their historical perspective, the crimes included in this category were obviously inspired by the ruthless Nazi persecutions of the Jews and other European minorities.[63] The specific types of persecutions included such old-fashioned practices of tyrannical regimes as the murder and internment in concentration camps of political opponents, the repression of political opinion, the deportation and execution of those likely to be hostile to the government, and the persecution and murder of the members of minorities. The Nürnberg Tribunal made reference to these practices in the following terms:

> "With regard to Crimes against Humanity, there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a

61 Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 32.

62 See Gutteridge, *The Geneva Conventions of 1949*, 26 BRIT. YB. INT'L L. 294, 322 (1949).

63 See 2 DROST, *op. cit. supra* note 49, at 185.

> vast scale, and in many cases was organized and systematic. The policy of persecution, repression, and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt."[64]

More specific examples of the general policy of persecution pursued by the Nazi regime may be drawn from practically every case decided by the war crimes tribunals. More familiar, perhaps, are the persecutions against the Christian churches initiated early by the Nazi regime,[65] the internment and murder of Catholic priests and nuns in concentration camps,[66] the systematic program of genocide aimed at the destruction of foreign nations and ethnic groups by the elimination and suppression of national characteristics,[67] the use of extraordinary courts for the prosecution of political opponents,[68] the subjection of Jews and of nationals of Eastern countries to discriminatory and special penal laws and trials,[69] and the sterilization and castration of members of certain specified ethnic groups.[70] It may be added that there was an impressive consensus among the war crimes tribunals that all these acts of persecution were carried out pursuant to a declared policy of the Nazi government, so that, consistent with the Nürnberg Judgment, there was technically a direct connection between specific acts of persecution and the execution of a governmental policy.[71]

The foregoing crimes have been incorporated in a more enduring form in the Convention on the Prevention and Punishment of the Crime of Genocide,[72] adopted by the United Nations General Assembly on December 9, 1948, and ratified by a substantial number of States. The Convention provides that genocide is a crime under international law, whether committed in peace

64 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 254 (1947).

65 United States v. Weizsaecker (Ministries case), 14 WAR CRIMES REPORTS 467 (1952).

66 *Ibid.*

67 United States v. Greifelt, 5 WAR CRIMES REPORTS 89 (1950); United States v. Ohlendorf (Einsatzgruppen case), 4 WAR CRIMES REPORTS 3, 506 (1950).

68 United States v. Altstoetter (Justice case), 3 WAR CRIMES REPORTS 3, 993, (1951).

69 *Ibid.*

70 United States v. Pohl, 5 WAR CRIMES REPORTS 195, 971 (1950).

71 See note 37 *supra.*

72 U.N. GEN. ASS. OFF. REC., 3d Sess., 1st pt., Res. No. 260 at 174 (A/81-) (1948) (effective Jan. 12, 1951). For the origin and meaning of the word "genocide," see LEMKIN, AXIS RULE IN OCCUPIED EUROPE 79-95 (1944).

or in war,[73] and more specifically, declares genocide to include the killing of members of a group on racial or religious grounds, the causing of bodily or mental harm, the inflicting of conditions of life calculated to bring about the extermination of the group, the prevention of births, and the forcible transfer of children from one group to another.[74] The Convention applies not only to rulers and public officials, but to private individuals as well.[75] Any person may be indicted for the crime of genocide and for conspiracy, attempt, complicity, and incitement to commit the crime.[76] The enforcement of the Convention involves the incorporation of genocide into domestic law by the signatory States,[77] the trial of violators by competent domestic tribunals,[78] or, ultimately, by an international criminal court to be established, providing the contracting parties recognize the jurisdiction of this court.[79] Disputes concerning interpretation of the Convention are to be submitted to the International Court of Justice,[80] and any competent organ of the United Nations may be called upon to take whatever action may be necessary for the prevention and suppression of

73 Genocide Convention art. I.

74 *Id.* art. II.

75 *Id.* art. IV.

76 *Id.* art. III.

77 *Id.* art. V. For constitutional problems presented in the United States with respect to the enforcement of the Convention, see Carlston, *The Genocide Convention: A Problem for the American Lawyer*, 36 A.B.A.J. 206 (1950); McDougal & Arens, *The Genocide Convention and the Constitution*, 3 VAND. L. REV. 683 (1950); Phillips, *The Genocide Convention: Its Effect on our Legal System*, 35 A.B.A.J. 623 (1949).

78 Genocide Convention art. VI.

79 *Id.* art. VI. In 1951, a Committee on International Criminal Jurisdiction, appointed by the United Nations General Assembly, adopted a Draft Statute for an International Criminal Court to try "persons accused of crimes under international law." For the text of the Draft Statute, see Committee on International Criminal Jurisdiction, *Report*, U.N. GEN. ASS. OFF. REC. 7th Sess., Supp. No. 11, at 21-25 (A/2136) (1952). Obviously, genocide would fall within the jurisdiction of this court as a crime under international law. For this proposition, see Lemkin, *Genocide as a Crime under International Law*, 41 AM. J. INT'L L. 145 (1947). According to article 2, paragraph 9, of the 1954 Draft Code of Offenses Against the Peace and Security of Mankind, genocide becomes a crime under international law for which the responsible individuals are criminally liable. For text of the Draft Code, see note 34 *supra*. The Draft Statute for an International Criminal Court adopted in 1951 was subsequently revised in 1953 by the Committee on International Criminal Jurisdiction. For a comprehensive discussion of the Draft Statute, see GARCÍA-MORA, *op. cit. supra* note 36, at 178-94.

80 Genocide Convention art. IX. On Nov. 16, 1950, the General Assembly adopted a resolution asking the International Court of Justice for an advisory opinion on several questions dealing with the Genocide Convention. In particular, the advisory opinion dealt with the position of a State ratifying the Convention with reservations in relation to other States that ratify the Convention without reservations. See Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, [1951] I.C.J. REP. 15.

genocide.[81] Finally, genocide and the other acts punishable under the Convention are not to be considered as political offenses for the purpose of extradition, and the contracting parties are required to surrender persons accused of such crimes in accordance with their laws and treaties in force.[82]

The comprehensive scope of applicability manifested in all of the above provisions reflects the demand of the world community that the behavior of peoples and governments be made to conform to standards of human rights as a framework of State policy.[83] The manifestation of the principle of humanity in this context may further be seen in the Convention's twin recognition that genocide may be committed both in peace and in war, and that it need not be connected with war crimes or with crimes against peace. In the former postulate, the Genocide Convention has clearly followed the precedents laid down in the *Justice* and *Einsatzgruppen* cases,[84] while in the latter it has substantially departed from the restrictive conception of the Nürnberg Charter and Judgment. Thus, by broadening the possibility of preventing and punishing the crime of genocide, the parties to the Convention have sought to eradicate perhaps the most insidious and destructive of all the crimes against humanity,[85] and additionally have made genocide and the acts described in the Convention *delicta juris gentium* much in the manner of piracy, slave trade, counterfeiting of foreign currency, and the like.[86]

The foregoing exposition makes it now possible to focus more sharply on the question of whether crimes against humanity can technically be considered as political offenses. While this problem has come before domestic courts,[87] no uniform pattern is clearly discernible and it has therefore remained a most fundamental problem of extradition law.[88]

81 Genocide Convention art. VIII.

82 *Id.* art. VII. This provision is subsequently discussed in this article.

83 See McDOUGAL & FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 542 (1961).

84 See notes 29, 31 *supra.*

85 McDOUGAL & ASSOCIATES, STUDIES IN WORLD PUBLIC ORDER 346 (1960).

86 See Kunz, *The United Nations Convention on Genocide,* 43 AM. J. INT'L L. 738, 745 (1949).

87 See note 4 *supra.*

88 KIRCHHEIMER, POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS 380 (1961).

II. CRIMES AGAINST HUMANITY AND POLITICAL OFFENSES

It is a well established principle of extradition law that persons accused of political offenses are generally exempted from surrender. A network of extradition treaties, legislative enactments, and constitutional provisions almost universally guarantee this protection.[89] Yet, there is no uniform criterion to determine which acts fall within this exempted category, so that it is necessary for the courts to decide in each specific case whether the offense involved is a political act or a common crime. As a guiding principle, the courts usually begin with the generally accepted view that, broadly speaking, a political offense is an act directed against the State.[90] Thus, such offenses as treason, sedition, and espionage are generally regarded as political—for which extradition is denied. In terms of the traditional law, these offenses are "purely political offenses" or objective offenses, since they have no element whatever of an ordinary crime.[91] From this perspective, there can be no question that crimes against humanity fall outside of this description, and it would be highly misleading and inaccurate to treat them as such. The position has been taken, however, that crimes against humanity may more appropriately be classified in the category of "relative political offenses"; in this type of offense a common crime is so inextricably linked with a political act that the entire offense is regarded as political and, hence, nonextraditable.[92] The body of evidence thus far reviewed would seem to make it fairly clear that crimes against humanity are more common and, therefore, in order for an act to be considered as political, it must be shown that it was politically motivated or was directed against the interests of the State.[93] It may accordingly be argued that since crimes against humanity are largely committed by rulers and public officials in the execution of a State policy, the acts in question become "political" acts for which extradition should not be

89 For a discussion of these provisions, see García-Mora, *The Present Status of Political Offenses in the Law of Extradition and Asylum*, 14 U. PITT. L. REV. 371, 373-74 (1953).

90 For the intricacies and complexities in determining the nature of a political offense, see García-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226 (1962).

91 *In re* Fabijan, [1933-1934] Ann. Dig. 360, 363 (No. 156).

92 For a discussion of relative political offenses, see BEAUCHET, TRAITÉ DE L'EXTRADITION 208 (1899); BILLOT, TRAITÉ DE L'EXTRADITION 102 (1874).

93 See Evans, *Reflections Upon the Political Offense in International Practice*, 57 AM. J. INT'L L. 1 (1963).

granted.[94] Unmistakably implicit in this assertion is a facile analogy drawn from another area of international law—the "act of State" doctrine—which allegedly confers upon the officials of a State an immunity from prosecution in the courts of another State.[95] Wholly apart from the fact that the "act of State" doctrine was rejected as a defense by the Nürnberg Judgment[96] and in decisions of the war crimes tribunals,[97] the applicability of this doctrine in a world situation where public officials can potentially, and actually do commit all kinds of aggressions upon their people is highly questionable, to say the least. It may well be that analogies from conventional rules or other principles of international law are inadequate to support the emergence of a more effective international legal order in which individuals would be criminally liable for international crimes.[98] Reliance upon inherited principles in order to characterize crimes against humanity as political, merely because they are committed by agents of the State, amounts to asserting an extravagant claim for which there is no support[99] in

94 This was in fact one of the arguments put forth successfully in the case Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957), *vacated and remanded*, 355 U.S. 393 (1958), *surrender denied on remand sub nom.* United States v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959).

95 This argument is dealt with by the Nürnberg Tribunal in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 223-24 (1947).

96 The Nürnberg Judgment said in this connection: "The principle of international law, which, under certain circumstances, protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.'" *Id.* at 223 (1947). The "act of State" doctrine was treated in the same way at the Tokyo trial. See KEENAN & BROWN, CRIMES AGAINST INTERNATIONAL LAW 129-32 (1950). It should be noted also that article 4 of the Draft Code of Offenses Against the Peace and Security of Mankind rules out the "act of State" doctrine in article 4 as follows: "The fact that a person charged with an offence defined in this Code acted pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order." For text, see note 34 *supra*. The "act of State" doctrine was also rejected by a court of appeals of the United States in respect to the extradition of a head of state in the celebrated case, Jiménez v. Aristeguieta, 311 F.2d 547, 556-58 (5th Cir. 1962).

97 In United States v. Altstoetter (Justice case), 3 WAR CRIMES REPORT 1, 1062 (1951), the tribunal said as to the "act of State" doctrine: "Each defendant has pleaded in effect as a defense the act of State as well as superior orders in justification or mitigation of any crime he may have committed . . . . 'It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible . . . . In the opinion of the Tribunal, both these submissions must be rejected.'"

98 *Cf.* McDOUGAL & FELICIANO, *op. cit. supra* note 83, at 667.

99 In United States v. Krauch (I.G. Farben case), 8 WAR CRIMES REPORTS 1137-38 (1953), the tribunal said: "It is beyond the authority of any nation to authorize its citizens to commit acts in contravention of international penal law."

law or in fact, and certainly affords no comfort to those who have been the victims of aggression upon all law and humanity.

In deciding whether a crime is a "relative political offense," the courts must first determine whether there is any connection between the common crime involved and some political act. This seems to be a generally accepted practice, which apparently has been found to satisfy the demands of justice. Then, with respect to crimes against humanity, the crucial task would be to ascertain the degree of connection existing between these acts and a possible political offense. It may be pertinent to recall that the common theme which runs through the successive line of cases decided by the war crimes tribunals indicates that the unbelievable atrocities committed by the Nazi leaders were not isolated and casual, but rather were the result of a deliberate and systematic plan to destroy human lives and inflict suffering upon ethnic groups having no relation whatever with the prosecution of the war.[100] Granting that the act of initiating a war is a purely political offense for which extradition may not be granted,[101] still the means by which hostilities are conducted must be legitimately connected with the war to be characterized as political. It can scarcely be denied that the commission of atrocities during the conduct of hostilities or during belligerent occupation has no connection with furthering the legitimate policy of the State. Certainly, the deportation and enslavement of the civilian population and the elimination of racial and religious groups, to mention only two crimes against humanity, yield no special military significance and, in addition, cause *unnecessary* suffering and a *useless* destruction of human lives. It is therefore submitted that where the means incidental to the execution of State policy result in cruelty and unnecessary suffering upon individuals, the acts committed to implement such a policy cannot be regarded as political. However, it has been argued that if the acts in question are proportionate to the political end sought, the entire act may be characterized as political.[102] This argument essentially injects the element of proportionality into the determination of a political offense. While this test may

100 See KEENAN & BROWN, *op. cit. supra* note 96, at 117.

101 For elaboration, see García-Mora, *The Present Status of Political Offenses in the Law of Extradition and Asylum*, 14 U. PITT. L. REV. 371, 394-95 (1953).

102 See the authorities cited in STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICTS 361, n.68 (1954).

be helpful in determining the political criminality of other acts, such as war crimes which are likely to be committed by both sides during a war,[103] and which may not in every case give rise to criminal liability,[104] it must be rejected altogether with respect to crimes against humanity. It is exceedingly difficult, if not impossible, to justify the massacre and enslavement of a whole population for the sake of an illegitimate State policy. It is, therefore, the cruelty and atrocity, and the *needless* use of such means, that are decisive in determining whether crimes against humanity are to be considered political. The problem posed is not merely a pragmatic one of ascertaining the proportion existing between the political advantages gained and the use of specific means of oppression and destruction. Rather the problem is one of determining the ethical use of such means, as this ought rationally to be equated with legality. This is nothing more than the application of the principle of humanity, which is a postulate of international law, to the pursuit of political ends.

The foregoing observations clearly reveal an utter lack of connection between crimes against humanity and any political objective. Moreover, this view is adequately supported by the domestic extradition practice of the States. Thus, while under American extradition law the requisite connection between a common crime and a political act has been traditionally cast in language so abstractly broad as almost, if applied literally, to deny the surrender of a fugitive for the most feeble link existing between the two,[105] apparently a more realistic appraisal of the problem has recently compelled the United States to limit this broad test by requiring that the act involved be *primarily* a political infraction. This departure from the traditional policy of the United States is found in the recent extradition treaty with Brazil[106] which, in providing for the nonextradition of political offenders, expressly requires that "the allegation by the person sought of political purpose or motive for the request for his extradition will not preclude that person's surrender if the crime or offense for

103 For the application of the principle of proportionality to war crimes *stricto sensu*, see García-Mora, *War Crimes and the Principle of Nonextradition of Political Offenders*, 9 WAYNE L. REV. 269 (1963).

104 See GREENSPAN, THE MODERN LAW OF LAND WARFARE 464 (1959).

105 For a discussion of the American law, see García-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226, 1244-49 (1962).

106 Extradition Treaty With Brazil, Jan. 13, 1961, 44 DEP'T STATE BULL. 164, 166 (1961).

which his extradition is requested is primarily an infraction of the ordinary penal law."[107] Connection alone, therefore, is not enough to convert a common crime into a political act; the requirement has been added that the act in question be predominantly political. Similarly, under Swiss law, although an act may be regarded as political if the person sought alleges a political motive or end, this apparently broad test was early limited by the so-called theory of predominance incorporated into the Federal Law on Extradition enacted on January 22, 1892.[108] The theory of predominance basically means that in a "relative political offense," the political element must dominate the common crime. On such a basis, it has been consistently held by Swiss courts that acts of atrocity out of proportion to the political end sought will be considered as common crimes and, thus, extraditable.[109] In like vein, the French Extradition Law of March 10, 1927,[110] emphatically says that acts committed in the course of an insurrection or a civil war will not be regarded as political if "they constitute acts of odious barbarism and vandalism prohibited by the laws of war . . . ."[111] There is scarcely any doubt that this French attitude toward acts of barbarism and vandalism committed in the course of an insurrection or a civil war applies with equal force to situations involving acts against humanity in international law.[112] Finally, the same attitude has been reflected in recent extradition treaties. Thus, the Convention of January 21, 1949, between Poland and Czechoslovakia[113] provides that extradition will not be granted "if the offence is political or is connected with a political offence, unless the characteristic of an offence under ordinary law predominates . . . ."[114] The extradition treaties of other States afford ample endorsement of the same principle.[115]

107 Art. V, para. 6(a).

108 Article 10 of this law says: "Extradition is not granted for political offenses. It is granted, however, even when the guilty person alleges a political motive or end, if the act for which it has been requested constitutes primarily a common offense . . . ." Unofficial translation, see *Harvard Research in International Law, Part I, Extradition*, 29 AM. J. INT'L L. SUPP. 423 (1935) [hereinafter cited as *Harvard Research*].

109 See the Wassilief case, [1909] FOREIGN REL. U.S. 519 (1914). For a more recent case, see *In re* Kavic, [1952] Int'l L. Rep. 371 (No. 80) (dictum). Brazil also adheres to the same view as illustrated in *In re* De Bernonville, [1955] Int'l L. Rep. 527 (1958).

110 Text in *Harvard Research* 380-81.

111 Art. 5, para. 2.

112 Green, *Political Offences, War Crimes and Extradition*, 11 INT'L & COMP. L.Q. 329, 339 (1962).

113 For text, see 31 U.N.T.S. 262 (1949).

114 Art. 60, sec. b.

115 See Extradition Treaty Between Brazil and Bolivia, Feb. 25, 1938, art. III,

The relevance of the above brief exposition of extradition law and practice to crimes against humanity would seem to be clear and unmistakable; the same considerations which rationally bear upon the determination of whether a crime is a political offense under the domestic law of the states should also be relevant in deciding claims of political criminality in respect to crimes against humanity. Viewed from that perspective, and having in mind the conceptual framework established by the Nürnberg Judgment and the decisions of the war crimes tribunals, it becomes evident that crimes against humanity are primarily infractions of the ordinary penal law and, therefore, should give rise to the extradition of the offenders. It is indeed common learning that such offenses as murder, extermination, slavery, deportation, torture, mayhem and other assaults upon the dignity and worth of the individual are universally condemned by ethical judgment and are made punishable by the criminal laws of all civilized States.[116] It hardly needs reminding that the barbarity and atrocity which have been seen to accompany the commission of crimes against humanity weigh so heavily upon the common crime element that any political motivation completely disappears in the process; the surrender of the offender is the only rational course of action.[117]

Perhaps the most powerful legal argument offered to support the notion that crimes against humanity are political offenses is the doctrine of *mens rea* as a necessary condition of penal responsibility.[118] It is thus forcibly suggested that because of the absence of a precise definition of crimes against humanity, the persons accused of such offenses do not in fact know of the unlawful character of their acts.[119] Since it is a basic condition of political criminality that the offender act without *mala intentio*, the assertion that this element of a political offense is present where individuals do not

sec. 1, 54 U.N.T.S. 348 (1950); Convention between Finland and Sweden, Nov. 29, 1923, art. 2, para. 1, 33 L.N.T.S. 57 (1924); Convention between Latvia and Lithuania, July 12, 1921, art. 2, 25 L.N.T.S. 313 (1924); Additional Protocol to the Extradition Treaty Between Argentina and Italy, June 9, 1904, art. IV, [1905] FOREIGN REL. U.S. 33 (1906).

116 See KEENAN & BROWN, *op. cit. supra* note 96, at 114.

117 García-Mora, *The Present Status of Political Offenses in the Law of Extradition and Asylum*, 14 U. PITT. L. REV. 371, 395-96 (1953).

118 For a comprehensive discussion of the application of the principle of *mens rea* by the war crimes tribunals, see McDOUGAL & FELICIANO, *op. cit. supra* note 83, at 691-92.

119 This was brought out by a United States military tribunal in United States v. Flick, 6 WAR CRIMES REPORTS 1, 1214 (1952), quoting Professor Donnedieu de Vabres. See also Donnedieu de Vabres, *Le Procès de Nuremberg devant les Principes Modernes du Droit Pénal International*, 70 HAGUE RECUEIL 477, 496 (1947).

know of the unlawfulness of their acts appears compelling.[120] The international jurists who subscribe to this position have substantially concluded that crimes against humanity lack the essential elements of an ordinary crime and, therefore, must be regarded as political.[121] Although this argument seems persuasive at first sight, its validity is fatally impaired by other legal considerations of great weight. Turning again to the Nürnberg Charter and Control Council Law No. 10, it should be clear by now that the definition of crimes against humanity therein contained was not the result of nebulous legal thinking on the part of the victorious belligerents, but represented a codification on the international plane of acts that have long been recognized as criminal by the domestic criminal law of the States. It appears obvious, therefore, that the Nürnberg Charter and Control Council Law No. 10 were merely declaratory of existing law.[122] Thus, the suggestion that the justice of the doctrine of *mens rea* was substantially violated in prosecutions for crimes against humanity is a wholly unjustifiable assertion which can be attacked on three grounds. First, the crimes defined in the Nürnberg Charter and Control Council Law No. 10 were universally condemned by domestic legal systems. It made no difference whether they were in accord with German law or not. It should be recalled that both the Nürnberg Charter and Control Council Law No. 10 made those crimes punishable "whether or not in violation of the domestic law of the country where perpetrated."[123] The cases decided by the war crimes tribunals uniformly interpreted this provision as barring compliance

120 Thus, in United States v. List (Hostages case), 11 WAR CRIMES REPORTS 757 (1950), the tribunal made reference to the principle of *mens rea* in the context of superior orders as follows: "We are of the view, however, that if the illegality of the order was not known to the inferior, and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists and the inferior will be protected." *Id.* at 1236.

121 This argument apparently was offered by the defense in the Eichmann trial in Israel. For discussion of this point by the court, see 56 AM. J. INT'L L. 805, 843 (1962). It has been argued recently by a distinguished commentator that crimes against humanity are not precisely defined and that this point casts doubts upon the legality of the charge in the Eichmann trial. ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963). This position obviously ignores the Nürnberg precedent and the line of cases decided by the war crimes tribunals.

122 In this context, the Nürnberg Tribunal said: "The Charter is not an arbitrary exercise of power on the part of the victorious Nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation, and to that extent is itself a contribution to international law." 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 218 (1947).

123 Charter of the International Military Tribunal at Nürnberg art. 6, para. (c); Control Council Law No. 10 art. II, sec. I, para. (c).

with domestic law as a defense.[124] Second, even if not punishable by German law, no reasonable man could be expected to believe that the Nazi leaders were not aware of the unlawfulness of the acts they committed and of their responsibility to the world community under international law. Finally, the precedents both of the International Military Tribunal and of the war crimes tribunals clearly reveal that the plea of *mens rea* was considered in mitigation of war crimes *stricto sensu*, largely because of the lack of knowledge by individuals acting under superior orders of the technical laws and customs of war.[125] In the case of crimes against humanity, however, the same claim could not legitimately be asserted, for, placing a heavy emphasis upon sentiments of humanity that all men have in common, the war crimes tribunals applied the less complex test that the acts characterized as crimes against humanity outrage "fundamental concepts of justice."[126] As no one will seriously question that assaults upon the dignity and worth of the individual outrage the conscience of all civilized men, the existence of *mens rea* in crimes against humanity is more easily found than in prosecutions for war crimes proper, for in the latter some knowledge of the unlawfulness of the acts prohibited by the laws and customs of war was, in some cases, explicitly required.[127] This requirement implies some learning in the laws of war, which an ordinary soldier could not reasonably be expected to have.[128]

124 The Nürnberg Tribunal said: ". . . the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law." 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 223 (1947). See also for the same proposition, United States v. Altstoetter (Justice case), 3 WAR CRIMES REPORTS 983-84 (1951).

125 See MCDOUGAL & FELICIANO, *op. cit. supra* note 83, at 691. See also GREENSPAN, *op. cit. supra* note 104, at 486.

126 See United States v. List (Hostages case), 11 WAR CRIMES REPORTS 757, 1236 (1948), where the tribunal said "But the general rule is that members of the armed forces are bound to obey only the lawful orders of their commanding officers and they cannot escape criminal liability by obeying a command which violates international law and outrages fundamental concepts of justice."

127 *In re* Wintgen, Special Criminal Court, Amsterdam, Holland, July 6, 1949, [1949] Ann. Dig. 484 (No. 178).

128 However, in such cases criminal responsibility is attached to the commanding officer involved. See in this connection, *In re* Yamashita, 327 U.S. 1 (1946). It should also be mentioned that article 1 of the Hague Convention No. IV of 1907 Concerning the Laws and Customs of War says that "The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land, annexed to the present Convention." For text, see 36 Stat. 2277, 2290 (1910).

Applying the foregoing analysis to specific crimes against humanity, it would seem axiomatic that the unjustifiable taking of human life, whether it be in gas chambers, before firing squads, or in laboratories dedicated to vicious medical experiments, is murder, and it really does not make any difference whether it be regarded as a crime under domestic law or under international law.[129] The same consideration would apply to the deportation and enslavement of the civilian population as well as to prosecutions of ethnic and religious minorities. These acts do not constitute the normal exercise of governmental function, nor the civilized behavior of peoples and governments.[130] Thus, the broader point may be made that crimes against humanity are common crimes, and it would result in highly unjust decisions to treat them as political. In a somewhat different but cognate context, the Supreme Court of Palestine put the matter succinctly but bluntly when it said: "We know of nothing in the criminal law of this country or of England that creates a special offence called political murder."[131] This opinion not only serves to underscore the fact that crimes against humanity are specific types of offenses familiar to the domestic criminal law of every civilized country, but also that they do not become political because of their international dimensions.

Apart from these observations, it may still be suggested that the acts that constitute crimes against humanity are executed during the prosecution of a war and that they are incidental to and form a part of this overriding political objective.[132] The fallacy contained in this suggestion is reasonably obvious, for it overlooks the fundamental legal postulate that even during war, governments must conform to standards of decency and humanity in their dealings with both their own citizens and the so-called enemy population. Moreover, it proceeds from the illusion that

129 KEENAN & BROWN, *op. cit. supra* note 96, at 118.

130 Thus, in United States v. Ohlendorf (Einsatzgruppen case), 4 WAR CRIMES REPORTS 1, 411 (1950), the tribunal observed that the massacre of human beings was "so beyond the experience of normal man and the range of man-made phenomena that only the most complete judicial inquiry, and the most exhaustive trial, could verify and confirm them."

131 Yousef Said Abu Dourrah v. The Attorney-General, Supreme Court of Palestine, Jan. 20, 1941, [1941-1942] Ann. Dig. 331, 332 (No. 101). See also Evans, *supra* note 93, at 12.

132 In United States v. Pohl, 5 WAR CRIMES REPORTS 193, 967 (1947), the tribunal said: "We have been told many times, 'Germany was engaged in total war. Our national life was endangered. Everyone had to work.' This cannot mean that everyone must work for Germany in her waging of criminal aggressive war. It certainly cannot mean that Russian and Polish, and Dutch, and Norwegian noncombatants, including women and children, could be forced to work as slaves in the manufacture of war material to be used against their own countrymen and to destroy their own homelands."

a political motive or objective converts an otherwise ordinary crime into a political offense.[133] What apparently requires special emphasis is that mass killings, deportations, and the systematic elimination of helpless ethnic groups outrage the moral judgment of mankind and, certainly, no reasonable man can regard the commission of these acts as innocent.[134] Thus, if any merit remains to the argument relating to *mens rea*, it might be applied to war crimes *stricto sensu*, for these involve acts that violate the laws and customs of war, the unlawfulness of which may or may not be known. In fact, the prosecutions on the charge of war crimes proper afford enough evidence to conclude that if a case was made that the accused did not know the unlawful nature of the act in question, he was not held responsible.[135] These observations lend support to the proposition that in the case of crimes against humanity there is sufficient *mens rea* to regard the offenders as ordinary criminals, thus ruling out the possibility that their crimes be considered as political.

The third factor militating against the proposition that crimes against humanity are political offenses relates to the motivation of the offender. As indicative of the kind of consideration that underlies the commission of political offenses, the Supreme Court of Chile recently said that political offenses are committed for motives of public concern and are characterized "by altruistic or patriotic sentiments, while criminal offences arise from egoistical motives" such as revenge, hate, profit and the like.[136] The most conspicuous fact about the crimes for which the Nazi leaders were prosecuted is that these offenses were not inspired by any altruistic or patriotic motive, but by the strictly personal considerations of revenge against a given enemy population or hatred against a specific ethnic or religious group.[137] The deportation and enslavement of civilian inhabitants of countries under German belligerent occupation are illustrations of the former, while the ruthless persecution and murder of the Jewish people in Europe is an

133 *Cf.* García-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226, 1251 (1962).

134 STONE, *op. cit. supra* note 102, at 361.

135 See notes 120, 127 *supra*.

136 *Re* Cámpora, Chile Supreme Court, Sept. 24, 1957, [1957] Int'l L. Rep. 518, 521 (1961).

137 United States v. Milch, 2 WAR CRIMES REPORTS 359 (1947). The tribunal made mention of the fact that the defendant acquiesced in a plan of extermination of the Jews to the end that "when this war ends, there will be no more Jews in Europe." *Id.* at 789.

example of the latter. The obvious point of emphasis is that revenge and hate are usually the motivations of an ordinary crime and not the expression of any political conviction.[138] Offenses motivated by political conviction are acts directed against the State, which, although conceded to be unlawful, constitute nonextraditable offenses precisely because they may be the result of an honest desire of the individual to change what he regards as an unjust situation. Moreover, they do not violate any rights of private persons.[139] But when, in the course of a revolution or a war, the requirements of humanity are disregarded and needless suffering is inflicted upon persons having no connection with the State or even with the conduct of hostilities, there cannot be the slightest doubt that these offenses are directed against private persons and that the public rights of the State are not in any way affected.[140] The existence of a political motivation thus is lacking in situations of this kind. Moreover, the extradition of the offenders by other States would seem to constitute the only sanction of international law which might guarantee the observance of standards of decency and humanity in the course of political upheavals. It may be suggested, however, that if the doctrine of nonextradition of political offenders is to signify something more than just a means of assuring refuge to those who rebel against the prevailing political order, it should be adapted and related, not so exclusively to the nature of the offense involved, but rather primarily to the effect that these offenses have upon the observance of human rights. It should, therefore, be a common principle of all States that the legitimate purpose of the exemption in favor of political offenders is not to protect automatically every political rebel, but rather to protect those whose rights are the object of aggression by govern-

138 In the Swiss case *In re* Vogt, Switzerland, Federal Court, Jan. 26, 1924, the court found that the act of taking hostages in the course of a riot was an act of personal revenge, which was "another factor showing that there was no political element in the act." For text, see [1923-1924] Ann. Dig. 285-86 (No. 165).

139 In this connection, a Court of Appeal of France said: ". . . what distinguishes the political crime from the common crime is the fact that the former only affects the political organisation of the state, the proper rights of the state, while the latter exclusively affects rights other than those of the state." See *In re* Giovanni Gatti, Court of Appeal of Grenoble, France (*Chambre des Mises en Accusation*) Jan. 13, 1947, [1947] Ann. Dig. 145 (No. 70).

140 The Swiss Federal Tribunal said in this regard: "To seize as hostages private persons who have no part in the quarrel between the authorities and the rioters cannot according to Swiss conceptions be regarded as a means justified by its political end." *In re* Vogt, Switzerland, Federal Court, Jan. 26, 1924, [1923-1924] Ann. Dig., at 285.

mental authorities.[141] From such a perspective, it would seem inexorably to follow that since crimes against humanity involve the commission of cruelties and barbarities upon innocent and helpless people, the perpetrators of these offenses should not be allowed to hide behind the nonextradition principle, for this doctrine was initially designed for the *protection* of human rights, not to shelter those who trample upon human beings with impunity.

III. THE EXTRADITION OF OFFENDERS UNDER INTERNATIONAL CONVENTIONS

Faithfully reflecting mankind's sentiments that the commission of atrocities by the Nazi officials be punished after World War II, President Roosevelt, Prime Minister Churchill and Premier Stalin issued a joint declaration on November 1, 1943, firmly stating their conviction that "at the time of the granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in . . . atrocities, massacres and executions, *will be sent back to countries in which their abominable deeds were done* in order that they may be judged and punished. . . ."[142] However, when in pursuance of this policy the neutral nations were requested to extradite the persons accused of such offenses, they strongly expressed their unwillingness to grant extradition.[143] Their refusal to surrender these individuals was largely based upon the alleged political character of the acts with which the individuals were charged.[144] The resolution of February 13, 1946,[145] of the United Nations General Assembly offers still a further acknowledgment of the attitude of the world community regarding persons accused of crimes against humanity. The resolution recommended the members of the United Nations to extradite the offenders "to the countries in which their abominable deeds were done, in order that they may be judged and pun-

141 It is interesting to note that the Supreme Court of the Federal Republic of Germany has recently interpreted the right of asylum as extending to persons fearing persecution because of their political views and not merely applicable to those accused of political offenses *stricto sensu*. See Extradition (Ecuadorian National) case, German Federal Republic, Federal Supreme Court, Jan. 21, 1953, [1953] Int'l L. Rep. 370, 371 (1957).

142 For text see 9 DEP'T STATE BULL. 307, 311 (1943). (Emphasis added.) See also [1945] FOREIGN REL. U.S. 403 (1955).

143 For communications to this effect, see 12 DEP'T STATE BULL. 190 (1945).

144 See Neumann, *Neutral States and the Extradition of War Criminals*, 45 AM. J. INT'L L. 495, 500 (1951).

145 For the text of this resolution, see [1946-1947] U.N. YB. 66.

ished according to the laws of those countries. . . ." It also called upon nonmembers of the United Nations "to take all necessary measures for the apprehension of such criminals in their respective territories with a view to their immediate removal to the countries in which the crimes were committed for the purpose of trial and punishment according to the laws of those countries."[146] Substantially the same policy objectives were subsequently incorporated into the resolutions of December 15, 1946,[147] and of October 31, 1947.[148] While the principle laid down in these resolutions is compelling, the expectation that the States would formulate their extradition policy on such a basis was doomed to failure for two reasons. First, the functions and powers of the General Assembly are limited to discussion and the making of recommendations,[149] and do not include the competence to make legally binding decisions upon the members of the United Nations. It should, therefore, be clear that the resolutions here discussed lacked the necessary legal force to modify long-standing principles of extradition law, which are embodied in domestic enactments, treaties and judicial decisions.[150] If these resolutions have any merit, it is the recognition by the bulk of the community of States that persons accused of crimes against humanity should not find refuge from the legitimate prosecution of the aggrieved nations. Second, while a resolution of the General Assembly determining a given course of conduct does have some consequence for the formulation of State policy,[151] the implementation of such a policy is to be made by individual governments in accordance with their own laws and practices. Therefore, it is not surprising to recount that the reasons of policy embodied in the Assembly's resolutions have found little or no acceptance by governments, as evidenced by the number of cases of refusal to surrender persons accused of crimes against humanity.[152]

146 *Ibid.*

147 *Id.* at 170.

148 *Id.* at 222.

149 U.N. Charter arts. 10-11. See, however, the "Uniting for Peace Resolution," adopted by the General Assembly on Nov. 3, 1950, in which the General Assembly is vested with specific peace enforcement functions. For text, see U.N. GEN. ASS., OFF. REC., 5th Sess. Supp. No. 20, at 10 (A/1775) (1950).

150 Karadzole v. Artukovic, 247 F.2d 198, 205 (9th Cir. 1957).

151 See McDOUGAL & FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 429 (1961).

152 For cases illustrating this point, see Green, *supra* note 112, at 346-49. Most recently, in June 1961, the United States refused the extradition to the Soviet Union of a Lithuanian national accused of wartime mass murders on the ground that "a person accused of wartime mass murders might not get a trial in the Soviet Union that would

The undertaking to surrender offenders charged with crimes against humanity was reiterated in somewhat more effective terms in the peace treaties with certain States terminating World War II. Thus, according to the peace treaty with Italy signed on February 10, 1947,[153] Italy agreed to "take all the necessary steps to ensure the apprehension and surrender for trial of . . . persons accused of having committed, ordered or abetted war crimes and crimes against peace or humanity."[154] Substantially similar provisions are found in the peace treaties with Rumania,[155] Bulgaria,[156] Finland,[157] and Hungary.[158] Although it is quite true that the impact of these prescriptions is greatly limited in that the obligation to extradite offenders charged with crimes against humanity is applicable only to the signatory parties, the submission would nevertheless seem relevant to the extent that the peace treaties go beyond the traditional norms of extradition law. In this respect, the principle of protecting human rights in time of war is clearly evidenced.[159]

A more ambitious and far-reaching obligation to extradite persons accused of crimes against humanity has been incorporated into the Geneva Conventions No. IV of August 12, 1949, Relative to the Protection of Civilian Persons in Time of War,[160] and the Convention on the Prevention and Punishment of the Crime of Genocide,[161] both of which were previously mentioned. In the Geneva Convention, the pertinent provision says:

be considered fair according to United States standards." See N.Y. Times, Sept. 17, 1962, p. 12, col. 6. Also in 1961 the Italian Court of Final Appeal ruled that racial persecution is a political offense, thus denying the extradition of a German national to Germany. See N.Y. Times, April 7, 1961, p. 3, col. 8.

153 For text, see 49 U.N.T.S. 143 (1950); 42 AM. J. INT'L L. SUPP. 47 (1948).

154 Peace Treaty with Italy art. 45, para. (a).

155 Art. 6 (a). For text, see 42 U.N.T.S. 34 (1949); 42 AM. J. INT'L L. SUPP. 252 (1948).

156 Art. 5, para. (a). For text, see 41 U.N.T.S. 50 (1949); 42 AM. J. INT'L L. SUPP. 179 (1948).

157 Art. 9, para. (a). For text, see 48 U.N.T.S. 228 (1950); 42 AM. J. INT'L L. SUPP. 203 (1948).

158 Art. 6, para. (a). For text, see 41 U.N.T.S. 168 (1949); 42 AM. J. INT'L L. SUPP. 225 (1948).

159 It should be mentioned in the same connection that the Convention Relating to the Status of Refugees Adopted in Geneva on July 28, 1951, by a United Nations Conference of Plenipotentiaries provides in article 1, paragraph F that "The provisions of this Convention shall not apply to any persons with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes. . . ." For text, see *U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Final Act and Convention Relating to the Status of Refugees* (A/conf.) (2/108) at 16-17 (1951).

160 For text, see [1955] 3 U.S.T. & O.I.A. 3516, T.I.A.S. No. 3365 (effective Feb. 2, 1956).

161 For text, see U.N. GEN. ASS. OFF. REC. 3d Sess., 1st pt., Res. No. 260 at 174 (A/81-) (1948).

> "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. *It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons for trial to another High Contracting Party concerned,* provided such High Contracting Party has made out a *prima facie* case."[162]

The "grave breaches" to which the preceding article refers are carefully enumerated in another provision of the Convention. Since this stipulation is reminiscent of the description of crimes against humanity given in the Nürnberg Charter, it may be of some benefit to include it here in full.

> "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the right of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."[163]

Coupling this provision with the previous one providing for the extradition of persons accused of grave breaches of the Convention, it is apparent that the signatory States are now legally bound to surrender persons accused of crimes against humanity

162 Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, [1955] 3 U.S.T. & O.I.A. 3516, 3616, T.I.A.S. No. 3365. (Emphasis added.) The same provision is found in the other three Geneva Conventions as follows: Convention for the Amelioration of the Condition of the Wounded and Sick of Armed Forces in the Field art. 49, [1955] 3 U.S.T. & O.I.A. 3114, 3146, T.I.A.S. No. 3362; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea art. 50, [1955] 3 U.S.T. & O.I.A. 3217, 3250, T.I.A.S. No. 3363; Convention Relative to the Treatment of Prisoners of War art. 126, [1955] 3 U.S.T. & O.I.A. 3316, 3418, T.I.A.S. No. 3364.

163 Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 147. The other Conventions also contain provisions enumerating the grave breaches which are punishable. *E.g.*, Wounded and Sick in the Field art. 50; Wounded, Sick and Shipwrecked at Sea art. 51; and Prisoners of War art. 130.

committed in time of war. Indeed, it has been submitted that these articles will adequately cover the extradition of offenders against humanity in the future.[164] While the cogency of this suggestion is unquestioned, it is believed, however, that the Geneva Convention No. IV does not impose an absolute obligation to surrender. The observation may be made that article 146 imposes upon the signatory States two kinds of obligations. The first obligation binds the contracting parties "to search for persons alleged to have committed, or to have ordered to be committed" grave breaches of the Convention and to prosecute them before their own courts. The language in which this obligation is expressed leaves no room for doubt that it is mandatory in character and, thus, imports the duty of the contracting parties to amend their laws if necessary in order to ensure the prosecution of offenders. The second commitment under article 146, to "hand such persons for trial to another High Contracting Party," is greatly impaired by its permissive character, for the parties not only have a choice to grant or to deny extradition, but the determination of this whole question is entirely dependent upon each country's extradition law and practice. The liberty granted to the States by this provision is rather extensive, for widely accepted doctrines of extradition law, such as the prohibition to extradite apart from treaty, the doctrine of double criminality, the nonextradition of nationals and others may become relevant in order to defeat the surrender of an offender.[165] It should therefore be clear that the Geneva Convention in question still affords no foundation for the assertion that under its terms persons accused of crimes against humanity will be extradited to another contracting State.[166] What the Convention has obviously done is merely to suggest that a government may, "if it prefers," hand over an offender to a country requesting his extradition, but at the same time it leaves to the requested government sufficient discretion to determine the matter in the light of its own legislation. It is, thus, quite possible for a government to regard some of the breaches of the Convention as political offenses for which extradition will be

164 See Yingling & Ginnane, *The Geneva Conventions of 1949*, 46 AM. J. INT'L L. 393, 426 (1952).

165 For a comprehensive discussion of these doctrines in the context of asylum, see GARCÍA-MORA, INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT 53-72 (1956).

166 See Gutteridge, *The Geneva Conventions of 1949*, 26 BRIT. YB. INT'L L. 294, 306 (1949).

denied.[167] Without in any way belittling the good faith and humanitarian concern of its draftsmen, it may be concluded that with respect to the extradition of offenders, the weakness of the Geneva Convention No. IV is glaringly obvious and, on such bases, it can hardly be expected to achieve satisfactory results.

The Convention on the Prevention and Punishment of the Crime of Genocide offers more promising expectations in so far as the extradition of offenders is concerned. After reciting that "Genocide and the other acts enumerated in Article III shall not be considered as political crimes for the purpose of extradition," it goes on to say that "The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force."[168] Two implications would seem to follow from this provision. The first is that under no circumstances can the parties to the Convention regard genocide as a political offense.[169] The overriding purpose of the Convention is to punish genocide as an ordinary crime and the States cannot invoke their laws and practices to reach a different result. To this extent, one category of crimes against humanity has become an ordinary crime by the consensus of mankind.[170] The second implication indicates that the contracting parties have assumed the explicit obligation to extradite persons accused of genocide to any government requesting their surrender. This is clearly a mandatory provision and no exception can be engrafted into its terms. The Convention itself,

167 *Ibid.*

168 Genocide Convention art. VII.

169 Article VII of the Genocide Convention should be compared with article 3 of the Convention for the Suppression of Counterfeiting Currency, adopted on April 20, 1929. This article provides that counterfeiting "should be punishable as an ordinary crime." For text, see 4 HUDSON, INTERNATIONAL LEGISLATION 2692-705 (1931). Certainly, this is not a mandatory provision so that the States still have considerable liberty to regard counterfeiting as a political offense.

170 It may be worth mentioning that the New Yugoslav Criminal Code, enacted on March 2, 1951, provides for the punishment of genocide in article 124 as follows: "Whoever, with intent to exterminate completely or partially a national, ethnical, racial or religious group commits homicides or inflicts grievous bodily injuries, or gravely ruins physical or mental health of members of such group, or forcefully displaces the population, or places such group under the conditions of life leading to complete or partial extermination of the group, or applies measures calculated to prevent propagation of members of such a group, or forcefully sends children to another group, shall be punished by imprisonment for not less than five years or by death." For text, see 46 AM. J. INT'L L. SUPP. 36, 40 (1952). This provision is reminiscent of the crimes against humanity tried and punished in the war crimes trials. See to the same effect section 5 of the Crime of Genocide Act, enacted by the Israeli Parliament on March 29, 1950, [1950] U.N. YB. ON HUMAN RIGHTS 162 (1952).

with its clear statement of humanitarian purpose and positive undertakings, must be construed, not as giving the signatory States a choice between either enacting internal legislation for the extradition of offenders or merely refusing to do so, but rather, as committing them to a domestic course of action consistent with its aims. It is largely in this respect that the Genocide Convention differs radically from the Geneva Convention. Therefore, in order that the Genocide Convention may attain the purpose for which it was concluded, the contracting parties should amend their extradition law and practice if necessary so that those accused of genocide will be extradited as ordinary criminals. This last commitment is of capital importance, for it will reduce to sheer irrelevancy the defense characteristically invoked in extradition proceedings that crimes against humanity are political offenses.[171]

It remains to observe that the stipulation of the Convention to the effect that extradition is to be granted by the parties "in accordance with their laws and treaties in force," is not to be construed as a limitation upon the obligation to surrender. In view of the other provisions of the Convention, it is not at all unreasonable to assert that this stipulation merely allows the States the liberty to apply their own laws and treaties in so far as the procedure to surrender is concerned. To put the matter in different terms, the obligation to extradite offenders is clear and unmistakable, but the manner in which extradition will be carried out may be made by each country in accordance with already established procedures as found in extradition laws and treaties. This is a most reasonable provision, for it is common knowledge that extradition procedures vary substantially from country to country,[172] and, therefore, to compel States to abandon them really would amount to imposing an obligation of a highly questionable value.

171 A striking illustration of the use of this plea as a defense is found in Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957). Also in 1961 the Italian Court of Final Appeal held that racial persecution is a political crime, thereby denying the extradition of a German national under sentence in Munich. The defendant was Professor Ludwig Zind, who was sentenced to one year's imprisonment for having publicly expressed approval of the Nazi leaders who had executed millions of Jews during World War II. He offered as a defense that he was wanted in Germany for a political crime. For report of this case, see N.Y. Times, April 7, 1961, p. 3, col. 7.

172 Thus, in some countries extradition is an executive determination, while in others, including the United States and Great Britain, the requested individual has an opportunity for a judicial hearing. For the procedure in the United States, see 18 U.S.C § 3184 (1958). For discussion, see BISHOP, INTERNATIONAL LAW: CASES AND MATERIALS 473 (2d ed. 1962).

IV. CONCLUSION

From the examination of crimes against humanity presented in these pages, a conclusion may be formulated in terms of principles designed to serve as guidelines for future extradition law and practice. The focus is upon the nonpolitical aspect of these crimes and the need to achieve agreement regarding the extradition of the offenders. While, of course, it is true that a substantial measure of agreement has been attained for the extradition of those who violate the Geneva Convention Relative to the Protection of Civilian Persons in Time of War and the Convention on the Prevention and Punishment of the Crime of Genocide, there are still other crimes against humanity on which agreement has not been reached and which are susceptible of being regarded as political offenses. For present purposes the principle that should underlie this whole area of extradition law is the necessity for excluding from the category of political offenses crimes that cause unnecessary suffering and useless destruction of human lives. By ensuring the extradition and punishment of these offenders both in peace and in war, international law will offer some basis for the hope that, perhaps for the first time in history, a measure of control may be achieved over the means used to conduct hostilities or to change an internal political situation. The sad record of inhumanity disclosed at Nürnberg and at the other war crimes trials affords foundation for the assertion that man is quite capable of causing the destruction of his fellow man in the pursuit of purely personal objectives. It is submitted that this is precisely the motivation underlying the commission of crimes against humanity. The absence of any political motivation is strikingly clear. On such a basis, the surrender of the offenders appears as the only just course of action. It is hoped that the States will amend their extradition law and practice so as to include crimes against humanity in the category of extraditable offenses. This step would contribute substantially to the formulation of an international law deeply rooted in the protection of human rights and values.