

Boston College Third World Law Journal

Volume 17

Issue 2 *International Law and Human Rights Edition*

Article 1

5-1-1997

Crimes Against Humanity

Matthew Lippman

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/twlj>

 Part of the [International Law Commons](#), and the [Military, War and Peace Commons](#)

Recommended Citation

Matthew Lippman, *Crimes Against Humanity*, 17 B.C. Third World L.J. 171 (1997),
<http://lawdigitalcommons.bc.edu/twlj/vol17/iss2/1>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Third World Law Journal by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

CRIMES AGAINST HUMANITY

MATTHEW LIPPMAN*

Crimes against humanity—inhumane acts or persecutions based on racial, religious or political grounds—constituted a revolutionary step in the evolution of international jurisprudence. This principle established that individuals and groups possess international legal personality and protection and that those who have drastically denigrated human dignity will be considered criminally culpable. The rights of individuals were thus determined to transcend culture and country borders, and public officials could no longer claim immunity for the mistreatment of those within their own or other States.

Crimes against humanity provides a potentially potent principle in combating the current escalation of national conflict and strife. Practice, however, often fails to match potential. The turn towards the next century provides an opportunity to diagram the drafting, development, and the next required step in the evolution of crimes against humanity.¹

* Professor of Law, University of Illinois at Chicago; J.D. American University; LL.M Harvard University; Ph.D. Northwestern University. This is devotedly and lovingly dedicated to Joanne Witzkowski Kalec, a healer of the heart, pathfinder of the spirit and pioneer of love, life and passion.

¹ See generally Matthew Lippman, *Conundrums Of Armed Conflict: Criminal Defenses To Violations Of The Humanitarian Law Of War*, 15 DICK. J. INT'L L. 1; Matthew Lippman, *The Good Motive Defense: Ernst Von Weizsaecker And The Nazi Ministries Case*, (on file with TOURO INT'L L. REV.); Matthew Lippman, *War Crimes Prosecutions Of Nazi Health Professionals And The Protection Of Human Rights*, 21 T. MARSHALL L. REV. 11; Matthew Lippman, *Fifty Years After Auschwitz: Prosecutions Of Nazi Death Camp Defendants*, 11 CONN. J. INT'L L. 199 (1995); Matthew Lippman, *War Crimes: The Trial Of Nazi Military Leaders*, 6 TOURO INT'L L. REV. 261 (1995); Matthew Lippman, *War Crimes Trials Of German Industrialists: The 'Other Schindlers'*, 9 TEMP. INT'L. & COMP. L.J. 173 (1995); Matthew Lippman, *The Nazi Doctors Trial And The International Prohibition On Medical Involvement In Torture*, 15 LOY. L.A. INT'L & COMP. L.J. 395 (1993); Matthew Lippman, *They Shoot Lawyers Don't They?: Law In The Third Reich And The Global Threat To The Independence Of The Judiciary*, 23 CAL. W. INT'L L.J. 257 (1993); Matthew Lippman, *The Other Nuremberg: American Prosecutions Of Nazi War Criminals In Occupied Germany*, 3 IND. INT'L & COMP. L. REV. 1 (1992); Matthew Lippman, *Nuremberg: Forty Five Years Later*, 7 CONN. J. INT'L L. 1 (1991); Matthew Lippman, *Nuremberg*, 6 LAW IN CONTEXT 28 (1988); Matthew Lippman, *The Denaturalization Of Nazi War Criminals In The United States: Is Justice Being Served?* 7 HOUS. J. INT'L L. 169 (1985); Matthew Lippman, *The Trial Of Adolf Eichmann And The Protection Of Universal Human Rights Under International Law*, 5 HOUS. J. INT'L L. 1 (1982); Matthew Lippman, *Towards An International Criminal Court*, 3 SAN DIEGO J. JUST. 1 (1995); Matthew Lippman, *Vietnam: A Twenty Year Retrospective*, 11 DICK. J. INT'L L. 325 (1993); Matthew Lippman, *War Crimes: The My Lai Massacre And The Vietnam War*, 1 SAN DIEGO J. JUST. 295 (1993).

The first section of this article will outline the evolution of crimes against humanity, which is rooted in transcendent humanitarian principles. The notion that there are transcendent humanitarian principles of international law was suggested in the Hague Convention and discussed in the debate over whether to punish defeated German military and political leaders following World War I. This established the foundation for the United States' proposal that the Nuremberg Charter incorporate a prohibition on crimes against humanity.

The second section notes that a compromise resulted in the Charter provision penalizing certain inhumane acts against civilians as well as persecutions based upon sectarian animus undertaken in connection with an aggressive war. The Nuremberg Tribunal, however, failed to fully differentiate crimes against humanity from war crimes. The Tribunal viewed crimes against humanity as an extension of the humanitarian law of war rather than as an autonomous source of rights. Several American occupation courts departed from this precedent and ruled that crimes against humanity encompassed the systematic commission of inhumane acts and acts of sectarian persecution, whether committed in periods of war or peace.

The third section of the paper observes that the third phase in the development of crimes against humanity affirms that the international interest in punishing crimes against humanity takes precedence over considerations of state sovereignty. The debate over the Genocide Convention, as well as various authoritative textual interpretations, support the view that genocide constitutes a crimes against humanity, whether committed in times of peace or war. The early versions of the Draft Code on The Peace and Security of Mankind affirmed that other crimes against humanity also were not required to be connected to crimes against peace. The United Nations subsequently proclaimed that the international interest in punishing crimes against humanity prohibits the application of domestic statutes of limitations. International documents and domestic courts also noted that the catastrophic character of crimes against humanity permits the exercise of universal jurisdiction and excludes such offenses from being considered non-extraditable political offenses.

The fourth section notes that recent domestic court decisions have affirmed these general principles. France, however, narrowly construed crimes against humanity so as to immunize World War II collaborators from prosecution.

The fifth section surveys the contemporary jurisprudence of crimes against humanity. The development of crimes against humanity culmi-

nated in the 1989 draft of the International Criminal Code which conceptualizes crimes against humanity as a mechanism for protecting universal human rights rather than as a part of the humanitarian law of war. The draft also limits crimes against humanity to large-scale, systematic acts. The autonomous status of crimes against humanity was confirmed by the Yugoslavian war crimes court.

The conclusion notes that crimes against humanity remain a customary rather than a conventional crime. An international code on the prohibition of crimes against humanity (code of conflict) provides the best safeguard against the dilution of this delict. This would also contribute to the clarification of uncertainties and ambiguities in the definition and scope of crimes against humanity.

I. THE MARTENS CLAUSE

The history of crimes against humanity begins with the Martens Clause. Fedor Fedorovitch Martens was a principal expert on international law and representative to the Hague conferences on the law of war. He drafted the so-called Martens Clause which was incorporated into the eighth paragraph of the Hague Convention of 1907. The Clause states that, in cases not covered by the Convention, the "belligerents remain under the protection of the rule of the principles of the laws of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience."² The latter language clearly connotes that the principles of humanity extend the compass of the code of conflict to cover "the interests of humanity and the ever progressive needs of civilization."³ The Martens Clause thus recognizes that States possess an obligation to adhere to both the spirit and substance of the humanitarian law of war. The Clause, however, remained an insignificant insertion into the code of conflict until discovered by the diplomats who drafted the Nuremberg Charter's prohibition on crimes against humanity.⁴

² Convention (No. IV) Respecting the Laws and Customs of War on Land, With Annex of Regulations, Oct. 18, 1907, Preamble, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631 [hereinafter Hague Convention].

³ *Id.*

⁴ See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, art. 6(c), 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter].

(c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious

European States had long claimed the prerogative to intervene on behalf of national and non-Muslim minorities within the Ottoman Empire.⁵ This claim increasingly came to be justified on the basis of the principles of humanity. The Allies issued a joint declaration in May of 1915 which warned that in view of the Turkish regime's support for "crimes . . . against humanity and civilization [in relation to Armenians] . . . that they will hold personally responsible . . . all members of the Ottoman government and those of their agents who are implicated in such massacres."⁶

II. WORLD WAR I

The Paris Peace Conference appointed a fifteen member commission to inquire into the legal liability of those responsible for World War I.⁷ The commission invoked the concept of crimes against humanity, concluding that the German Empire and her Allies were responsible for "outrages of every description committed on land, at sea, and in the air, against the laws and customs of war and . . . the laws of humanity."⁸ The Tribunal later reiterated that "[i]n spite of the explicit regulations, of established customs, and of the clear dictates of humanity, Germany and her allies have piled outrage upon outrage."⁹

The commission appeared to limit "laws of humanity" and "dictates of humanity" to aggravated violations of the laws and customs of war which were directed against civilians and prisoners of war. This encompassed the intentional commission of the "most cruel practices which primitive barbarism, aided by all the resources of modern science, could devise for the execution of a system of terrorism carefully planned and carried out"¹⁰

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.

Id.

⁵ Vahkn N. Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications*, 14 YALE J. INT'L L. 221, 233-40 (1989).

⁶ *Id.* at 262.

⁷ See Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 14 AM. J. INT'L L. 95, 96 (1920) [hereinafter Commission on Responsibility]. The Commission consisted of two representatives from each of the five Allied Powers and one from Belgium, Greece and Poland, Rumania and Serbia. *Id.* at 96-97.

⁸ *Id.* at 113.

⁹ *Id.*

¹⁰ *Id.* The Tribunal concluded that the "war was carried on by the Central Empires together with . . . Turkey and Bulgaria, by barbarious or illegitimate methods in violation of the established

The commission recommended the unprecedented extension of criminal liability to heads of State. Immunity for the Kaiser, as well as other officials, "would involve laying down the principle that the greatest outrages against the laws and customs of war and the laws of humanity, if approved against him, could in no circumstances be punished. Such a conclusion would shock the conscience of civilized mankind."¹¹ Other German officials also were to be prosecuted before an international tribunal. The court was to apply "the principles of the laws of nations as they result from the usages established among civi-

laws and customs of war and the elementary laws of humanity." *Id.* at 115 (emphasis omitted). "Not even prisoners, or wounded, or women, or children have been respected by belligerents who deliberately sought to strike terror into every heart for the purpose of repressing all resistance." *Id.* at 113.

Murders and massacres, tortures, shields formed of living human beings, collective penalties, the arrest and execution of hostages, the requisitioning of services for military purposes, the arbitrary destruction of public and private property, the aerial bombardment of open towns without there being any regular siege, the destruction of merchant ships without previous visit and without any precautions for the safety of passengers and crew, the massacre of prisoners, attacks on hospital ships, the poisoning of springs and of wells, outrages and profanations without regard for religion or the honor of individuals, the issue of counterfeit money . . . the methodical and deliberate destruction of industries with no other object than to promote German economic supremacy after the war, constitute the most striking list of crimes that has ever been drawn up to the eternal shame of those who committed them.

Id. at 113-14. Professor Egon Schwelb analyzed the allegations of atrocities lodged by the Allied Powers against Germany, Austria, Turkey and Bulgaria. Most constituted conventional war crimes. But, the charges also included crimes committed by Turkish and German authorities against Armenians and Greek-speaking citizens of Turkey. The annex to the Commission's report also lists the pillage by Austrian troops of Gorizia, which, at the time, was an Austrian town. The claim that Austrian and Turkish officials should suffer international liability for acts against their own State was unprecedented. *See* Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT'L L. 178, 181 (1946). "[A]lready on 28 May 1915 the Governments of France, Great Britain, and Russia made a declaration regarding the massacres of the Armenian population in Turkey, denouncing them as 'crimes against humanity and civilization for which all members of the Turkish Government will be held responsible together with its agents implicated in the massacres.'" *Id.* (emphasis omitted). *See also supra* note 7 and accompanying text.

¹¹ *See* Commission on Responsibility, *supra* note 7, at 116. Individuals, regardless of their position, "who have been guilty of offenses against the laws and customs of war or in the laws of humanity, are liable to criminal prosecution." *Id.* at 117. The vindication of the "principles of the laws and customs of war and the laws of humanity" would be incomplete if the Kaiser along with other officials were not prosecuted and punished. *See id.* The panel argued for recognition of negative criminality—the imposition of liability on individuals who failed to intervene to prevent penal delicts. "A word from them [the defendants] would have brought about a different method in the action of their subordinates on land, at sea and in the air." *Id.* The Commission did not endorse the superior orders defense, but "[i]t will be for the court to decide whether a plea of superior orders is sufficient to acquit the person charged from responsibility." *Id.*

lized peoples, from the laws of humanity and from the dictates of public conscience.”¹²

The American representatives, Robert Lansing and James Brown Scott, dissented from the proposal to punish both war crimes and violations of the principles of humanity. They contended that the laws and customs of war provide a “standard certain, to be found in books of authority and in the practice of nations.”¹³ The laws and principles of humanity, in contrast, “vary with the individual” and should be excluded from legal consideration.¹⁴ A judicial tribunal addresses “existing law, leaving to another forum infractions of the moral law and actions contrary to the laws and principles of humanity.”¹⁵

The Treaty of Versailles, as well as other post-World War I peace pacts, adhered to the predictable parameters of the code of conflict. The surrendering States recognized the right of the Allied Powers to prosecute those accused of acts in violation of the laws and customs of war.¹⁶

The exception was the Treaty of Se’vres, which obligated Turkey to hand over for trial those responsible for massacres. The Allied Powers reserved the right to designate a tribunal to try these offenders.¹⁷ This provision was directed at those who committed crimes against Armenian and Greek citizens of Turkey—acts which would constitute crimes against humanity under the Nuremberg Charter of 1945.¹⁸ The

¹² *Id.* at 122. Those to be prosecuted before an international, rather than domestic tribunal, were individuals committing outrages against civilians and soldiers affiliated with more than a single country, those whose orders were executed in more than one country, civilians and military authorities who ordered or failed to intervene to prevent criminal acts, and individuals it is advisable to prosecute before an international tribunal. *Id.* at 121–22.

¹³ *Id.* at 127, 134 (referring to *Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities*).

¹⁴ *Id.*; see also *id.* at 144. The American representatives also objected to the extension of liability to Heads of State. These authorities were politically accountable to the citizens of their country—subjecting them to an international tribunal is violative of State sovereignty. *Id.* at 135–36. They also questioned the imposition of negative criminality absent knowledge, power and authority. See *id.* at 143.

¹⁵ *Id.* at 144. The laws and principles of humanity “are not certain, varying with time, place, and circumstance, and . . . to the conscience of the individual judge. There is no fixed and universal standard of humanity. The law of humanity, or the principle of humanity, is much like equity” *Id.* at 144. See *id.* at 151 (discussing reservations by the Japanese delegation).

¹⁶ See Treaty of Peace with Germany (Versailles Treaty), June 28, 1919, arts. 228–30, 13 AM. J. INT’L L. 151 (Supp. 1919). Article 227 arraigned the German Emperor “for a supreme offence against international morality and the sanctity of treaties” and is a significant step in the punishment of crimes against peace. See *id.* at art. 227. For other World War I treaties incorporating the same language, see Schwelb, *supra* note 10, at 182.

¹⁷ See Treaty of Peace Between the Allied Powers and Turkey (Treaty of Se’vres), Aug. 10, 1920, art. 230, 15 AM. J. INT’L L. 179 (Supp. 1921).

¹⁸ See Schwelb, *supra* note 10, at 182.

Treaty was never ratified and was replaced by the Treaty of Lausanne. The Greek and Turkish governments, under the terms of this agreement, announced an amnesty “for all crimes and offenses.”¹⁹ In the end, an international tribunal was not convened—only a handful of German combatants were prosecuted for war crimes before the Leipzig Supreme Court.²⁰ Most were acquitted and those who were convicted soon gained release from custody. One commentator rationalized that “[w]hile . . . it shocks our sense of justice that the monstrous war crimes of Germany should go unpunished, it is perhaps best, in view of the interest of all the world and future generations that this should be so rather than that further seeds of hatred between nations should be sown.”²¹ The notion of laws of humanity which transcended the parameters of positive international law provided a foundation for the Nuremberg Charter’s prohibition of crimes against humanity. Both the drafting conference and Nuremberg Tribunal struggled with the connection between the waging of a war of aggression, war crimes and crimes against humanity.

III. NUREMBERG

A. *The Drafting Of The Nuremberg Charter*

The concept of crimes against humanity reemerged during the war crimes debate following World War II. President Franklin Delano Roosevelt, in a March 1944 statement, castigated Adolf Hitler for “committing . . . crimes against humanity in the name of the German people.”²² The President condemned the savagery visited upon civilians in Europe and denounced the “wholesale systematic murder of the Jews.”²³

A drafting conference was convened in London in 1945 to organize the prosecution of alleged German war criminals. A memorandum penned by Secretary of War Henry L. Stimson, Secretary of State Edward R. Stettinius, Jr., and Attorney General Francis Biddle, proposed that liability should be imposed on Nazi officials for acts com-

¹⁹ Treaty with Turkey and Other Instruments Signed at Lausanne (Treaty of Lausanne), Ch. VIII, 18 AM. J. INT’L L. 1, 92–93 (Declaration Of Amnesty) (Supp. 1924).

²⁰ See generally *German War Trials* 16 AM. J. INT’L L. 674–724 (1922) (judicial decisions involving questions of international law).

²¹ George C. Battle, *The Trials Before the Leipzig Supreme Court of Germans Accused of War Crimes*, 8 VA. L. REV. 17 (1921).

²² Statement by the President, Mar. 24, 1944 in Report of Robert H. Jackson United States Representative to the International Conference on Military Trials 12, 13 (1945) [hereinafter Jackson Report].

²³ *Id.*

mitted throughout Hitler's regime, beginning with the Führer's ascendancy to power on January 30, 1933.²⁴ The three conceded that pre-war atrocities were:

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 a necessary rehabilitation of German peoples, as well as the demands of justice, require that this be done.²⁵

The eventual American proposal advocated a more conventional scheme and concentration on the initiation and waging of a war of aggression, with limited attention directed to war crimes.²⁶ The United States also envisioned Nuremberg as the foundation for the further prosecution of Germans active in organizations declared criminal by the Nuremberg Court.²⁷

Justice Robert H. Jackson refined the American proposal in June 1945 and catalogued various crimes with which the defendants could be charged. He stressed that the termination of World War II and the accompanying decision to punish international penal delicts provided a singular opportunity to fix the future of international criminal law.²⁸ Jackson supported the Secretaries' scheme and advocated an article punishing "[t]hose acts which offended the conscience of our people [and] were criminal by standards generally accepted in all civilized countries"²⁹ This would center on the Nazi's persecution of civil-

²⁴ Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, January 22, 1945, in Jackson Report, *supra* note 22, at 2, 4-5 (Document I).

This [criminal] conduct goes back at least as far as 1933, when Hitler was first appointed Chancellor of the Reich. It has been marked by mass murders, imprisonments, expulsions and deportations of populations; the starvation, torture and inhuman treatment of civilians; the wholesale looting of public and private property on a scale unparalleled in history; and, after initiation of "total" war, its prosecution with utter and ruthless disregard for the laws and customs of war.

Id. at 4.

²⁵ *Id.* at 5-6.

²⁶ American Draft of Definitive Proposal, Presented to Foreign Ministers at San Francisco, April 30, 1945, in Jackson Report, *supra* note 22, at art. 6, 22, 24 (Document IV).

²⁷ American Memorandum Presented at San Francisco, April 30, 1945, in Jackson Report, *supra* note 22, at 28, 29-30 (Document V).

²⁸ Report to the President by Mr. Justice Jackson, June 6, 1945, in Jackson Report, *supra* note 22, at 42, 52.

²⁹ *Id.* at 42, 48.

ians—the confiscation of property, murder, torture and persecution on political, racial, and religious grounds. These practices, according to Jackson, were contrary to the sovereign prerogative of the Reich and were preparatory to international aggression: “Our people felt that these were the deepest offenses against that International Law described in the Fourth Hague Convention of 1907 as including the ‘laws of humanity and the dictates of the public conscience.’”³⁰

Jackson proposed to supplement the punishment of those who contravened the laws, rules, and customs of land and naval warfare with a separate provision prohibiting “[a]trocities and offenses, including atrocities and persecutions on racial or religious grounds, committed since 1933. This is only to recognize the principles of criminal law as they are generally observed in civilized states.”³¹ Jackson explained that this was based on the Martens Clause of the Fourth Hague Convention which provided that “inhabitants and belligerents shall remain under the protection and rule of ‘the principles of the law of nations, as they result from the usage established among civilized peoples from the laws of humanity and the dictates of public conscience.’”³² Liability was imposed on those who incited, ordered, procured, or counselled the commission of such atrocities and offenses.³³

³⁰ *Id.* at 49.

Early in the Nazi regime, people of this country came to look upon the Nazi Government as not constituting a legitimate state pursuing the legitimate objectives of a member of the international community. They came to view the Nazis as a band of brigands, set on subverting within Germany every vestige of a rule of law which would entitle an aggregation of people to be looked upon collectively as a member of the family of nations. Our people were outraged by the oppressions, the cruelest forms of torture, the large scale murder, and the wholesale confiscation of property which initiated the Nazi regime within Germany. They witnessed persecution of the greatest enormity on religious, political and racial grounds, the breakdown of trade unions, and the liquidation of all religious and moral influences

Id.

³¹ *Id.* at 50. Jackson noted that the principles of criminal law generally observed in civilized States had been assimilated into International Law at least since 1907. *Id.*

³² *Id.* at 51.

[T]he feeling of outrage grew in this country, and it became more and more felt that these were crimes committed against us and against the whole society of civilized nations by a band of brigands who had seized the instrumentality of a state.

I believe that those instincts of our people were right and that they should guide us as the fundamental tests of criminality. We propose to punish acts which have been regarded as criminal since the time of Cain and have been so written in every civilized code.

Id. at 50.

³³ *Id.* at 51.

The American proposal of June 14, 1945 provided, *inter alia*, for the punishment of atrocities and offenses against persons or property constituting violations of international law, including the laws, rules, and customs of land and naval warfare.³⁴ A separate provision prohibited "atrocities and offenses, including atrocities and persecutions on racial or religious grounds, committed since 1 January 1933 in violation of any applicable provision of the domestic law of the country in which committed."³⁵ This, in part, was intended to condemn the persecution of Jews, minorities and political dissidents within Germany. Jurisdiction was extended to acts committed subsequent to Hitler's ascent to power, some six years prior to the initiation of World War II. Jurisdiction was also limited to acts which were violative of the domestic law of the country in which they were committed. The latter avoided the complications involved in claiming international cognizance over acts prior to the initiation of armed aggression, but placed most of the Nazi's racial repression within the Reich outside of the Tribunal's procedural parameters.³⁶

A second American draft limited this provision to atrocities, persecutions, and deportations undertaken on political, racial, or religious grounds, in pursuance of a common plan or enterprise to dominate other nations. The scope of this provision was restricted by the requirement that these acts were preparatory to, or part of, Germany's war of aggression. The draft also specified that such acts were punishable "whether or not in violation of the domestic law of the country where perpetrated."³⁷

A Soviet proposal expressly condemned atrocities and violence "in regard to civilian populations" and specifically listed as intolerable "deportations of civilians to slave labour, murder and ill-treatment of prisoners of war, destruction of towns and villages, plunder and other violations of the laws and customs of war."³⁸ The Soviet provision omitted

³⁴ Revision of American Draft Proposed Agreement, June 14, 1945, in Jackson Report, *supra* note 22, at 55, 57 (Document IX).

³⁵ *Id.* at 12(b).

³⁶ *Id.* The Tribunal "shall be bound by this declaration of the parties to this Agreement that the following acts are criminal." *Id.* art. 12. International law under the American proposal "shall be taken to include treaties between nations and the principles of the laws of nations as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience." *Id.*

³⁷ Revised Draft of Agreement and Memorandum Submitted by American Delegation, June 30, 1945, in Jackson Report, *supra* note 22, at 119, 121 (Document XVIII).

³⁸ Draft Showing Soviet and American Proposals in Parallel Columns, in Jackson Report, *supra* note 22, at 165, 169 (Document XXIII).

reference to racial or religious persecution and was limited to violations of the laws and customs of war.³⁹ Premising this provision on the laws and customs of war seemingly deprived the Tribunal of jurisdiction over events prior to the Nazi's 1939 invasion of Poland.⁴⁰

A sub-committee incorporated both the American and Russian proposals into the draft protocol. The Soviet provision was accepted without modification. Bracketed language in the American version indicated that the sub-committee was unable to agree whether to require that atrocities and persecutions motivated by political, racial or religious animus, undertaken in pursuance of a common plan or enterprise to dominate other nations, be punishable. The sub-committee also did not know whether or not these acts were in violation of the domestic law of the country where perpetrated.⁴¹ A British draft also adhered to the American version.⁴²

The French retreated from the requirement that atrocities and persecutions against civilian populations were required to be motivated by a political, racial or religious animus. The draft also omitted reference to deportations and other specified acts. A separate provision, consistent with the Russian version, sanctioned the waging of war "contrary to the laws and customs of international law."⁴³ The French also specified that the Tribunal was charged with punishing acts which

³⁹ *Id.*

⁴⁰ See also Redraft of Definition of "Crimes," Submitted by Soviet Delegation, July 23, 1945, in Jackson Report, *supra* note 22, at 327 (Document XLIII).

⁴¹ Draft of Agreement and Charter, Reported by Drafting Subcommittee, July 11, 1945, in Jackson Report, *supra* note 22, at 195, 197 (Document XXV).

The following acts shall be considered criminal violations of International Law and shall come within the jurisdiction of the Tribunal:

(a) Violations of the laws, rules or customs of war. Such violations shall include murder and ill-treatment of prisoners of war; atrocities against and violence towards civil populations; the deportation of such populations for the purpose of slave labour; the wanton destruction of towns and villages; and plunder; as well as other violations of the laws, rules and the customs of war.

....

(e) Atrocities and persecutions and deportations on political, racial or religious grounds [in pursuance of a common plan or enterprise referred to in sub-paragraph (d) hereof, whether or not in violation of the domestic law of the country where perpetrated].

Id. 6(a)(e), at 197.

⁴² Draft Agreement and Charter, Proposed by British Delegation, July 11, 1945, in Jackson Report, *supra* note 22, at 202, 205 (Document XXVI). See also Redraft of Charter, Submitted by British Delegation, July 23, 1945, in Jackson Report, *supra* note 22, at 348, 352 (Document XLV).

⁴³ See Draft Article on Definition of "Crimes," Submitted by French Delegation, July 19, 1945, in Jackson Report, *supra* note 22, at 293 (Document XXXV). Article 6(ii) punishes "the policy of atrocities and persecutions against civilian populations." *Id.* at art. 6(ii).

were violative of "international law, the laws of humanity and the dictates of the public conscience."⁴⁴ A second British draft confined the Tribunal's jurisdiction to "[s]ystematic atrocities against or systematic terrorism or ill-treatment or murder of civilians."⁴⁵ This explicitly limited the Tribunal's jurisdiction to barbaric conduct which was part of a sustained government policy.

The debate revolved around several considerations. First, there was a question of including a separate provision directed at crimes against civilians or encompassing these delicts under the canopy of a prohibition on crimes against the humanitarian law of war. Second, drafters debated whether to incorporate a motive requirement and whether to enumerate specific acts which were illustrative of the type of delicts to be punished. The latter might have been interpreted to qualify or limit the acts encompassed within parameters of crimes against humanity. A third consideration was the restriction of the Tribunal's jurisdiction. Drafters compared limiting jurisdiction to the period subsequent to the launching of Germany's war of aggression or to include preparatory or unrelated acts which risked extending the Tribunal's jurisdiction into Germany's domestic sphere. A fourth question was whether the Tribunal's jurisdiction should encompass acts which were in contravention of international law, regardless of whether they were violative of domestic law. There also was a question of whether international law should be broadly interpreted to include the laws of humanity and the dictates of public conscience. A final issue revolved around whether to limit crimes against humanity to systematic atrocities.⁴⁶

The proposal eventually drafted was discussed by the drafting conference. The somewhat ambiguous text condemned atrocities against the civilian population, including murder and ill-treatment, deportation to slave labor and other violations of the laws and customs of war. The latter clause would limit crimes against humanity to acts committed during the conduct of warfare.⁴⁷ The British representative, Sir David Maxwell Fyfe, objected to the phrase, "[a]nd other violations of the laws and customs of warfare" as limiting the scope of the draft.⁴⁸

⁴⁴ *Id.*

⁴⁵ Proposed Revision of Definition of "Crimes" (Article 6), Submitted by British Delegation, July 20, 1945, in Jackson Report, *supra* note 22, at 312 (Document XXXIX).

⁴⁶ See *supra* notes 24-45.

⁴⁷ Redraft of Definition of "Crimes," Submitted by Soviet Delegation, July 23, 1945, in Jackson Report, *supra* note 22, at 327 (Document XLIII).

⁴⁸ Minutes of Conference Session of July 23, 1945, in Jackson Report, *supra* note 22, at 328, 329 (Document XLIV) [hereinafter Session of July 23, 1945].

The phrase was redundant—such acts were already encompassed within the provision punishing violations of the laws and customs of war.⁴⁹

Justice Jackson objected to the Soviet's failure to require that atrocities against civilians were part of a plan to wage a war of aggression. Jackson noted that "[i]t has been a general principle of foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business [It] is not our affair any more than it is the affair of some other government to interpose itself in our problems."⁵⁰ Absent "a war connection as a basis for reaching them, I would think we have no basis for dealing with atrocities."⁵¹

Jackson explained that the requirement that atrocities, persecutions and deportations were to be based on political, racial or religious grounds stemmed from the fact that such acts were connected with the Nazi's consolidation of power and the propulsion of Germany into war.

We think it is justifiable that we interfere or attempt to bring retribution to individuals or to states only because the concentration camps and the deportations were in pursuance of a common plan or enterprise of making an unjust or illegal war in which we became involved. We see no other basis on which we are justified in reaching the atrocities which were committed inside Germany, under German law, or even in violation of German law, by authorities of the German state. Without substantially this definition, we would not think we had any part in the prosecution of those things⁵²

The Russian representative, Professor A.N. Trainin, disputed the limitation of crimes against civilians to acts motivated by a sectarian

⁴⁹ *Id.* at 329. The prefatory phrase in the Soviet draft article six, *inter alia*, punished the preparation or conduct of criminal acts. Sir David Maxwell Fyfe argued that the terrorization of the German Jewish population was in preparation for war. *See id.* Justice Jackson insisted that the Allied Powers agree to the definition of the relevant crimes so as to avoid this being litigated before the Tribunal. *See id.*

⁵⁰ *Id.* at 331. Justice Jackson argued that there was no need to convene an international tribunal to prosecute violations of the laws and customs of land warfare. The only rationale for an international prosecution was "when we couple these individual acts with the German plan to make warfare by that lawless and terroristic method." *Id.*

⁵¹ *Id.* "They [the atrocities] were a part of the preparation for war or for the conduct of the war in so far as they occurred inside of Germany and that makes them our concern." *Id.* Jackson's remarks appear to lack coherence. The Soviet draft specifically punished atrocities against the civilian population which were contrary to the "laws and customs of war"—suggesting such acts must occur during armed conflict. *See supra* note 38 and accompanying text.

⁵² Session of July 23, 1945, in Jackson Report, *supra* note 22, at 333. Jackson may have feared that a contravention of Germany's domestic jurisdiction would lead to scrutiny of racial segrega-

animus. He sought to incorporate Justice Jackson's sentiments, noting that "[t]here can be no doubt that . . . violations of the customs of war, whether in regard to prisoners of war or civilians, is in fact an international crime. An action becomes an international crime even though it may be carried out in accordance with definitions of international law if it is done as part of preparation of aggression or domination over other nations."⁵³ Professor Andre Gros of France favored the French draft. He argued against enumerating acts constituting crimes against civilians, pointing out that "[b]y the fact of saying those acts are deemed criminal violations we admit some of them were not, and the . . . construction which I attempted . . . was to get the same result . . . without incurring the risk of any criticism against construction."⁵⁴

Professor Gros questioned whether humanitarian concerns only achieved an international dimension when connected with a war of aggression. He also pointed to the evidentiary burden of establishing that the persecution of Jews and others was part of a plan to wage war.⁵⁵ Professor Gros noted that "the American[s] want to win the trial on the ground that the Nazi war was illegal, and the French people and other people of the occupied countries just want to show that the Nazis were bandits."⁵⁶ Sir David Maxwell Fyfe nevertheless pointed out that there was a distinction under international law between a "Nazi chastising a Jew before the war and the systematic persecution of the Jews in order to carry out the Nazi plan"⁵⁷

tion in the United States. He noted that "[w]e have some regrettable circumstances at times in our own country in which minorities are unfairly treated." *Id.* Justice Jackson also noted that the Nuremberg Charter should not be limited to acts committed by the European Axis Powers. "If it is a good rule of law, it should bind us all, and if not, we should not invoke it at this trial. It sounds very partial to me, and I think we would get great criticism from it." *Id.* at 336. The Russian representative General I.T. Nikitchenko, on the other hand, stressed that the jurisdiction of the Tribunal should be limited to the crimes of Axis Powers—"it is not our task to try to draft a code which could be applied at all times and under all circumstances." Minutes of Conference Session of July 25, 1945, in Jackson Report, *supra* note 22, at 376, 382 (Document LI).

⁵³ Session of July 23, 1945, *supra* note 48, at 333.

⁵⁴ *Id.* at 334. Professor Gros also argued that the Tribunal might declare various acts criminal, but that this should be declared to be in violation of international law. *See id.* This, in his opinion, was the retroactive creation of law. *See id.* The document being developed "is a creation by four people who are just four individuals—defined by those four people as criminal violations of international law." *Id.* at 334. Those acts have known for years before and have not been declared criminal violations of international law. *See id.* It is *ex post facto* legislation. *Id.* at 335.

⁵⁵ Minutes of Conference Session of July 24, 1945, in Jackson Report, *supra* note 22, at 360–61 (Document XLVII).

⁵⁶ Minutes of Conference Session of July 25, 1945, in Jackson Report, *supra* note 22, at 376, 381–82 (Document LI).

⁵⁷ Session of July 25, 1945, in Jackson Report, *supra* note 22, at 361.

The Soviet Union offered a compromise proposal which seemingly captured these contending views. The Soviet draft punished war crimes and crimes against civilians in separate articles. Atrocities against civilians, including murder and ill-treatment of civilians and deportations to slave labor, were punished. The second clause of this provision punished persecutions on racial or religious grounds which were inflicted in pursuance of aggression or domination over other nations. The Soviets omitted mention of the destruction of towns and villages and plunder, presumably fearing that this would implicate the Allied Powers.⁵⁸ Justice Jackson approvingly noted that "I have seen the villages and towns of Germany. I think that you will have great difficulty distinguishing between the military necessity for that kind of destruction as distinguished from some done by the Germans . . . [i]t seems to me those subjects invite recriminations that would not be useful in the trial."⁵⁹ The American delegation continued to insist that crimes against civilians should also be confined to exterminations or deportations on political, racial or religious grounds—whether or not in violation of the domestic law of the country where perpetrated. Furthermore, such crimes, according to Justice Jackson, should be required to be undertaken in pursuit of a common plan, enterprise or policy to prepare or wage a war of aggression.⁶⁰ Justice Jackson, in abandoning the initial American position, later proclaimed that the "[Russian] provision as to atrocities against civilians is much the same as the draft we submitted except that we expressly provided for disregard of domestic law because otherwise there would be difficulty reaching some of the German activities toward their own population."⁶¹

⁵⁸ See Redraft of Definition of "Crimes," Submitted by Soviet Delegation, July 25, 1945, in Jackson Report, *supra* note 22, at 373 (Document XLVIII). See also Redraft of Soviet Definition of "Crimes" (Article 6), Submitted by British Delegation, July 23, 1945, in Jackson Report, *supra* note 22, at 359 (Document XLVI). Great Britain again offered a compromise proposal, prohibiting atrocities and persecutions and deportations on political, racial or religious grounds with bracketed language specifying that such acts are undertaken in pursuance of a common plan or enterprise. See *id.* A separate article condemned violations of the laws, rules or customs of war and enumerated various examples drawn from the Russian draft. See Redraft of Charter, Submitted by British Delegation, July 23, 1945, in Jackson Report, *supra* note 22, at 348, 352 (Document XLV). The acts enumerated under the war crimes provision were murder and ill-treatment of prisoners of war; atrocities and violence towards civil populations; the deportation of such populations for slave labor; the wanton destruction of towns and villages; plunder; and other violations of the laws, rules and customs of war. *Id.* at 351.

⁵⁹ Minutes of Conference Session of July 24, 1945, in Jackson Report, *supra* note 22, at 376, 380 (Document LI).

⁶⁰ Redraft of Definition of "Crimes," Submitted by American Delegation, July 25, 1945, in Jackson Report, *supra* note 22, at 374 (Document XLIX).

⁶¹ Minutes of Conference Session of July 25, 1945, in Jackson Report, *supra* note 22, at 376, 380.

A joint British and French draft adopted the essential features of the Russian proposal and amalgamated both atrocities against civilians and persecution on political, racial or religious grounds into a single provision. The draft included, but was "not limited to murder and ill-treatment of civilians and deportations of civilians to slave labour."⁶² A second clause prohibited "persecution on political, racial or religious grounds committed in pursuance of the common plan or conspiracy [aimed at domination over other nations]."⁶³ A separate article punished violations of the laws, rules and customs of war, including "atrocities against civilian populations of occupied countries and the deportation of such populations to slave labour, wanton destruction of towns and villages and plunder."⁶⁴ There was no pretension of propounding universal principles, since the Anglo-French proposal envisioned the charter as a constitutive document which merely defined the jurisdiction of the Allied Tribunal.⁶⁵

An additional American draft added that the Tribunal's jurisdiction extended to atrocities and persecutions "committed in any country, at any time, in pursuance of the common plan or conspiracy [to dominate other nations]."⁶⁶ This was intended to clarify that "we are reaching persecution . . . of Jews and others in Germany as well as outside of it, and before as well as after commencement of war."⁶⁷ Justice Jackson also noted that "[d]estruction, as well as plunder, should be specified or we fail to reach such conduct as opening dykes to flood lands with salt water"⁶⁸ But, he stressed that the enumeration of some acts should not be interpreted to preclude prosecution for others.⁶⁹ The Anglo-French draft stated that the offenses enumerated "shall be deemed to be crimes coming within the jurisdiction of the Tribunal."⁷⁰ The American draft was even more restrictive, providing that the Tribunal "shall have power and jurisdiction to hear, try and

⁶² Revised Definition of "Crimes," Prepared by British Delegation and Accepted by French Delegation, July 28, 1945, in Jackson Report, *supra* note 22, at 390 (Document LII).

⁶³ *Id.*

⁶⁴ *Id.* at art. 6(a).

⁶⁵ *Id.* at art. 6.

⁶⁶ Revised Definition of "Crimes," Submitted by American Delegation, July 30, 1945, in Jackson Report, *supra* note 22, at 393 (Document LIV).

⁶⁷ Notes on Proposed Definition of "Crimes," Submitted by American Delegation, July 31, 1945, in Jackson Report, *supra* note 22, at 394 (Document LV).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See Revised Definition of "Crimes," Prepared by British Delegation and Accepted by French Delegation, July 28, 1945, in Jackson Report, *supra* text accompanying note 22.

determine charges of crimes against only those who acted in aid of the European Axis Powers.”⁷¹

The American draft submitted on July 31, 1945 denominated delicts directed at civilians as “Crimes Against Humanity.”⁷² This paralleled the provision which was subsequently incorporated into the Nuremberg Charter:

CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.⁷³

The Tribunal accepted the Russian text, which replaced the semicolon between the words “war” and “or” with a comma. This replacement clarified the Tribunal’s jurisdiction, focusing the Nuremberg trials on the initiation and waging of aggressive war rather than the violation of human rights.⁷⁴

The drafting conference thus adopted a separate article directed at crimes against civilians. This provision extended and supplemented the prohibition on war crimes. Inhumane acts as well as political, racial

⁷¹ See Revised Definition of “Crimes,” Submitted by American Delegation, July 30, 1945, in Jackson Report, *supra* note 22, at 393. Justice Jackson noted that the jurisdiction of the Tribunal was limited to the trial of individuals affiliated with the European Axis Powers. See *id.* Justice Jackson observed, however, that these same acts would be crimes if committed by United States officials. See Notes on Proposed Definition of “Crimes,” Submitted by American Delegation, July 31, 1945, in Jackson Report, *supra* note 22, at 394, (Document LV).

⁷² Revision of Definition of “Crimes,” Submitted by American Delegation, July 31, 1946, in Jackson Report, *supra* note 22, at 395 (Document LVI).

⁷³ Nuremberg Charter, *supra* note 4, at art. 6(c). The other core crimes within the jurisdiction of the Tribunal were:

CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing. . . .

Id. at art. 6(a).

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

Id. at art. 6(b).

⁷⁴ See *supra* text accompanying note 26.

or religious persecution, were subject to prosecution so long as connected to a crime against peace or a war crime. It was uncertain whether the enumeration of grave and serious offenses was intended to limit the character of punishable crimes. This did not appear to be an exhaustive list. Justice Jackson, for instance, stressed the need to punish destruction and plunder of property—neither of which were specifically prohibited. There was no geographic limitation on the acts encompassed within this article, indicating that the Tribunal's authority extended to acts against "any civilian populations," including those within the territorial boundaries of the Reich.⁷⁵ The language that a crime against humanity was punishable regardless of the law of the country where the act was committed was intended to assert the primacy of international legal standards. But, the relevant sources of international law were not enumerated.⁷⁶

There clearly is a significant overlap between the types of acts envisioned as constituting crimes against humanity and war crimes. Murder is enumerated as both a war crime and a crime against humanity. The war crime of extermination is also included under crimes against humanity, suggesting that drafters intended to punish the large-scale loss of civilian life. The crimes against humanity of enslavement and deportation appear analogous to the war crime of deportation and slave labor; and inhumane acts appears similar to the war crime of ill-treatment.⁷⁷

The conceptualization of crimes against humanity was a major step towards the primacy of international law. Civilians were no longer captive to domestic doctrine. However, the application of international law was limited to acts which were connected to the planning, preparation, initiation, or waging of an aggressive war. The drafters thus defaulted on the opportunity to provide protection for human rights in times of peace as well as war.⁷⁸

⁷⁵ See *supra* text accompanying note 73.

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ See *supra* text accompanying notes 22–74. An early reference to the "elementary dictates of humanity" was contained in a 1937 treaty protecting merchant ships against submarine attacks during the Spanish civil war. See Nyon Arrangement, Sept. 14, 1937, L.N.T.S. 4184. The peace treaty with Italy was unique in requiring the Italians to surrender those accused of war crimes and crimes against peace or humanity. See Italian Peace Treaty, Feb. 10, 1947, reprinted in IV Major Peace Treaties of Modern History 1648–1967 art. 45(1)(a), at 2421 (1967).

B. *The Nuremberg Indictment*

Twenty-two high-ranking Nazi officials were variously convicted of crimes against peace, war crimes and crimes against humanity at Nuremberg. Count One charged the defendants with a common plan or conspiracy to commit a crime against peace. The indictment alleged that the defendants carried out this common plan or conspiracy in a "ruthless" fashion in "complete disregard and violation of the laws of humanity."⁷⁹ These "methods and crimes" constituted "violations of international conventions, of internal penal laws, of the general principles of criminal law as derived from the criminal law of all civilized nations and were involved in and part of a systematic course of conduct."⁸⁰ The content of these crimes against humanity was detailed in Count Four, which incorporated by reference the war crimes set forth in Count Three.⁸¹ Count Four charged that the defendants committed crimes against humanity during the period preceding May 8, 1945, in Germany, and in all those countries and territories occupied by the German armed forces since September 1, 1939, including Austria, Czechoslovakia, Italy, and on the High Seas.⁸²

Two crimes against humanity were enumerated which were not incorporated into the war crimes count. German civilians believed to oppose the Nazi Government were imprisoned without trial, murdered and tortured.⁸³ The Nazi regime also singled out various groups for political, racial and religious persecution. This persecution constituted "deliberate and systematic genocide, the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others."⁸⁴ For instance, the Nazi regime orchestrated vio-

⁷⁹ *United States v. Hermann Goering et. al.* (indictment), reprinted in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 27, 41 (1948) [hereinafter *Nuremberg Judgment*].

⁸⁰ *Id.* at 65 (Count Four).

⁸¹ *Id.*; see also 42-52 (Count Three). Acts listed under war crimes include: murder and ill-treatment of civilian populations; deportation for slave labor; murder and ill-treatment of prisoners of war and other members of the armed forces; killing of hostages; plunder of public and private property; wanton destruction of cities, towns and villages not justified on the basis of military necessity; conscription of civilian labor; forcing civilians in occupied territories to swear allegiance to a hostile power; and Germanization of occupied territories. See *id.*

⁸² *Id.* at 65.

⁸³ *Id.* at 66-67.

⁸⁴ *Nuremberg Judgement*, *supra* note 79, at 43-44 (Count Two).

lent anti-Jewish demonstrations throughout Germany in November 1938. Jewish property was confiscated and destroyed and 30,000 Jews were arrested and sent to concentration camps. The acts against civilians in the occupied territories were war crimes as well as crimes against humanity. German troops fleeing Russia, "exterminated Jews rather than allow[ing] them to be liberated. . . . [C]oncentration camps and ghettos were set up in which Jews were incarcerated and tortured, starved, subjected to merciless atrocities, and finally exterminated."⁸⁵

This "systematic course of conduct" against suspect individuals and groups⁸⁶ contravened international conventions, and internal penal laws. This conduct also violated the general principles of criminal law as derived from the criminal law of all civilized nations and violated the Nuremberg Charter.⁸⁷

C. *The Nuremberg Judgment*

The Nuremberg Tribunal confronted the challenges of clarifying the requisite connection between crimes against humanity and a war of aggression and of differentiating between war crimes and crimes against humanity. The Nuremberg Tribunal noted that the Charter was the expression of sovereign legislative power by the countries to which Germany had unconditionally surrendered. The exercise of this prerogative had been endorsed by the civilized members of the community of nations. The Court emphasized that the legal principles applied by the tribunal were not an arbitrary exercise of power, but an "expression of international law existing at the time of [the Court's] creation; and to that extent is itself a contribution to international law."⁸⁸ Even a retroactive application of the law, however, would not prohibit these prosecutions: "the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but it is in general a principle of justice."⁸⁹

The fact that crimes against humanity had not been previously codified was not controlling. International law is not limited to conventions. It also is revealed in the customs and practices of States which "gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts."⁹⁰

⁸⁵ *Id.* at 67 (Count Four).

⁸⁶ *Id.* at 65.

⁸⁷ *Id.*

⁸⁸ *Nuremberg Judgment*, *supra* note 79, at 411, 461.

⁸⁹ *Id.* at 462.

⁹⁰ *Id.* at 464.

These precepts are to be interpreted in a dynamic fashion: "The law is not static, but by continual adaptation follows the needs of a changing world."⁹¹ The Court ruled that international law imposes culpability upon individuals as well as States. Limiting liability to States lends license to individuals to transgress the contours of the international code of war. This responsibility attaches regardless of individuals' prestige, rank or official status.

[T]he 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.⁹²

Those who transgress the boundaries of the law of war may not rely on the superior orders defense. Such a command may be recognized in mitigation of punishment, but the test "is not the existence of the order, but whether moral choice was in fact possible."⁹³

Count One charged conspiracies to commit a war of aggression as well as war crimes and crimes against humanity. The Tribunal ruled that a conspiracy charge was not negated by the existence of a dictatorship—Hitler "had to have the co-operation of statesmen, military leaders, diplomats and businessmen. When they, with knowledge of his aims, gave him their co-operation, they made themselves parties to the plan he had initiated That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts."⁹⁴ The Tribunal, however, ruled that the text of the Charter only prohibited a conspiracy to prepare, initiate, and wage an aggressive war and dismissed the other conspiracy charges.⁹⁵

The Tribunal next turned its attention to the substantive charges and observed that war crimes were committed on a "vast scale never

⁹¹ *Id.*

⁹² *Nuremberg Judgment, supra* note 81, at 466.

⁹³ *Id.*

⁹⁴ *Id.* at 468–69.

⁹⁵ *Id.* at 469. This conclusion is not fully supported by the text of the Charter. *See id.* The Tribunal arguably desired to focus on the aggressive war charge. *See id.* This was intellectually persuasive since the Court concluded that aggressive war "is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole." *Id.* at 427. The conspiracy component of Article 6 read as follows: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any

before seen in the history of war . . . and were attended by every conceivable circumstance of cruelty and horror."⁹⁶ These were not capricious; rather, they were the consequence of "cold and criminal calculation."⁹⁷ This pernicious pattern was the predictable product of the Nazi philosophy of "total war" which denied restraints on warfare.⁹⁸ The Tribunal suggested that German war crimes against civilians also constituted crimes against humanity. These acts "not only [were] in defiance of well-established rules of international law, but [were] in complete disregard of the elementary dictates of humanity."⁹⁹

The Tribunal then shifted its attention to crimes against humanity. A vast number of Jews and political opponents were murdered in Germany prior to the war while others were systematically interned and persecuted under cruel conditions. In order to constitute a crime against humanity such acts "must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal."¹⁰⁰ The Court concluded that as "revolting and horrible as many of these

persons in execution of such plan." Nuremberg Charter, *supra* note 4, at art. 6. The Tribunal rather ambiguously stated that the "words do not add a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in a common plan. The Tribunal will therefore disregard the charges . . . that the defendants conspired to commit War Crimes and Crimes against Humanity . . ." *Nuremberg Judgment, supra* note 79, at 469 (discussing the contours of the law of conspiracy).

⁹⁶ *Id.* at 469.

⁹⁷ *Id.* at 470.

⁹⁸ *Id.* at 469.

⁹⁹ *Id.* at 470.

Prisoners of war were ill-treated and tortured and murdered, not only in defiance of the well-established rules of international law, but in complete disregard of the elementary dictates of humanity. Civilian populations in the occupied territories suffered the same fate. Whole populations were deported to Germany for the purposes of slave labor upon defense works, armament production and similar tasks connected with the war effort. Hostages were taken in very large numbers from the civilian populations in all the occupied countries and were shot as suited the German purposes. Public and private property was systematically plundered and pillaged in order to enlarge the resources of Germany at the expense of the rest of Europe. Cities and towns and villages were wantonly destroyed without military justification or necessity.

Id. The Tribunal was "bound by the Charter, in the definition . . . of War Crimes and Crimes against Humanity." *Id.* at 497. But, the former already were prohibited under the Hague Convention of 1907 which civilized nations had come to regard by 1939 as declaratory of the laws and customs of war. Hague Convention, *supra* note 2, at arts. 46, 50, 56. The claim that the humanitarian law of war was inapplicable due to the Reich's subjugation and incorporation of the occupied territories was ruled inapplicable so long as the German presence was being militarily contested. *See* Nuremberg Judgment, *supra* note 79, at 497. "As to war crimes committed in Bohemia and Moravia, it is a sufficient answer that these territories were never added to the Reich, but a mere protectorate was established over them." *Id.* at 497-98.

¹⁰⁰ Hague Convention, *supra* note 2, at 498.

crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime.”¹⁰¹ The Tribunal, therefore, refrained from a “general declaration” that acts prior to 1939 were crimes against humanity within the meaning of the Charter.¹⁰² However, following the invasion of Poland,

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.¹⁰³

The Tribunal thus ruled that a crime against humanity was only cognizable when undertaken in connection with a crime against peace or a war crime. The Court refused to rule that international law controls the conduct of countries in periods of peace as well as war. The Tribunal, however, interpreted the “execution . . . or . . . connection” standard broadly in relation to the persecution of Jews, determining that the seizure of Jewish assets within Germany was intended to finance the war effort.¹⁰⁴ The Nazi regime’s eradication of German Jews, according to the Court, were also part of the German plan to create a culturally and politically pure Greater Germany.¹⁰⁵

Nonetheless, the differentiation between war crimes and crimes against humanity remained imprecise. Most of the crimes against humanity catalogued in the judgment—the murder and mistreatment of civilians, the pillage of public and private property, slave labor and persecution of Jews in the occupied territories—also constituted war crimes.¹⁰⁶

D. *Crimes Against Humanity: Streicher and von Schirach*

Julius Streicher and Baldur von Schirach were the only defendants indicted for crimes against humanity who were not also indicted for war crimes.¹⁰⁷ Streicher was acquitted of waging a war of aggression and convicted of crimes against humanity. He was labelled “Jew-Baiter

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Hague Convention, *supra* note 2, at 492.

¹⁰⁵ *Id.* at 492–93.

¹⁰⁶ *Id.* at 471–96.

¹⁰⁷ *See id.* at 547, 563.

Number One” based on the writings which he published in *Der Sturmer*, an anti-Semitic weekly whose circulation reached over half a million in 1935. Streicher was an ardent advocate of the boycott of Jewish businesses and the racially exclusionary Nuremberg Decrees. The Tribunal also determined that he was “responsible” for the demolition on August 10, 1938 of the synagogue in Nuremberg and publicly supported the Jewish pogroms of November 1938.¹⁰⁸

Streicher began to call for the annihilation of the Jewish race as early as 1938. The fervor of his call increased as German troops crossed into adjoining countries. A May 1939 article proclaimed that “[t]he Jews in Russia must be killed. They must be exterminated root and branch.”¹⁰⁹ Streicher continued to advocate the annihilation of Jews while fully aware that they were being slaughtered in the occupied territories.¹¹⁰

The tribunal did not determine the scope of Streicher’s liability. The Tribunal merely ruled that, “Streicher’s incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with War Crimes . . . and constitutes a Crime against Humanity.”¹¹¹

The issue of intent was central to incitement to war crimes and crimes against humanity—an offense which was not specifically set forth in the Nuremberg Charter. Hans Fritzsche held various propaganda positions, eventually rising in 1942 to Head of the Radio Division in the Propaganda Ministry and Plenipotentiary for the Political Organization of the Greater Reich. He was acquitted based on the finding that his anti-Semitic speeches were not “intended to incite the German people to commit atrocities on conquered peoples . . . [h]is aim was rather to arouse popular sentiment in support of Hitler and the German war effort.”¹¹²

Von Schirach served as Gauleiter of Vienna as well as Reich Governor for Vienna and Reich Defense Commissioner for the Gauleiter of Vienna, providing him with plenary power over the Austrian capi-

¹⁰⁸ Hague Convention, *supra* note 2, at 547, 563.

¹⁰⁹ *Id.* at 548.

¹¹⁰ *Id.* at 548–49.

¹¹¹ Hague Convention, *supra* note 2, at 549.

¹¹² *Id.* at 584–85. The Tribunal ruled that Fritzsche was not aware that the war of information was false. *See id.* It also noted that there was no evidence that he was aware of the extermination of Jews in the East. *See id.* The Court also observed that “[h]is position and official duties were not sufficiently important . . . to infer that he took part in originating or formulating propaganda campaigns.” *Id.* at 584.

tal.¹¹³ He defended his deportation of sixty thousand Viennese Jews as “contributing to European culture.”¹¹⁴ Von Schirach regularly received reports of events in the East and was well-aware that these Jews faced “special action.”¹¹⁵ He was convicted of crimes against humanity: “while he did not originate the policy of deporting Jews . . . [h]e knew that the best the Jews could hope for was a miserable existence in the ghettos of the East. Bulletins describing the Jewish extermination were in his office.”¹¹⁶ The Streicher and von Schirach judgments indicate that the Tribunal relied on crimes against humanity to extend its jurisdiction over acts prior to Hitler’s invasion of Poland in 1939. The only limitation was that such delicts were required to have been undertaken in connection with a war of aggression. Acts initiated against civilians during armed conflict or in the occupied territories were considered crimes against humanity as well as war crimes. The latter affirmed the special status accorded to these protected persons and highlighted that such atrocities were not an accepted aspect of armed conflict. Although the International Military Tribunal did not distinguish between war crimes and crimes against humanity in convicting the other defendants, the judgments provide some sense of the scope of crimes against humanity.¹¹⁷

E. *Crimes Against Humanity: Other Defendants*

Several defendants were convicted of atrocities against civilians in the occupied territories. Ernst Kaltenbrunner was appointed head of

¹¹³Hague Convention, *supra* note 2, at 563. The Tribunal characterized Hitler’s “invasion of Austria” as a “premeditated aggressive step in furthering the plan to wage aggressive wars against other countries.” *Id.* at 433. This was a “common plan of aggression” rather than a war of aggression. *Id.* It nevertheless constituted a “‘crime within the jurisdiction of Tribunal’ as that term is used in Article 6(c) of the Charter.” *Id.* at 565. Murder, extermination, enslavement, deportation and other inhumane acts and persecutions on political, racial or religious grounds in association with the occupation thus constituted crimes against humanity. *Id.*

¹¹⁴Hague Convention, *supra* note 2, at 565.

¹¹⁵*Id.*

¹¹⁶*Id.* at 565–66. Von Schirach, while Gauleiter of Vienna, continued to function as Reichsleiter for Youth Education (Hitler Jugend) and was informed of the organization’s participation in the deportation of Soviet young people and the Soviet’s apprenticeship in German industry and auxiliary units of the German armed forces. *See id.* Von Schirach urged the bombing of an English town in retaliation for the assassination of Heydrich in 1942. *See id.* Both of the latter arguably constituted war crimes. *Id.* at 566.

¹¹⁷*See supra* text accompanying notes 107–16. Several defendants were only indicted and convicted of war crimes. *See* Nuremberg Judgment, *supra* note 79, at 557, 562–63. Various organizations which engaged in crimes under the Charter were declared criminal. *See id.* A defendant’s voluntary, knowing membership in a criminal organization or a conscript’s involvement in criminal conduct resulted in the imposition of criminal liability. *See id.* at 500; *see also* Nuremberg Charter, *supra* note 4, at art. 9, 10.

the Reich Main Security Office (RSHA) in 1943. He was convicted of ordering the murder, ill-treatment and torture of civilians.¹¹⁸ Others were sentenced for ordering summary punishment. General Field Marshal Wilhelm Keitel served as Chief of Staff of the High Command of the Armed Forces. He was convicted of ordering the execution of 50-100 Communists for each German killed, and noted that human life was worth little in the East. He authorized the use of firing squads to punish the relatives of suspected saboteurs in Norway. Keitel also signed the infamous "*Nacht und Nebel*" decree that provided for the secret deportation, detention and summary sentencing of those accused of resisting Germany occupation in the occupied territories. He also ordered French, Dutch and Belgian citizens to work on the Atlantic Wall.¹¹⁹

Arthur Seyss-Inquart served as Reich Commissioner of the German-occupied Netherlands from 1940-1945. He was "ruthless in applying terrorism to suppress all opposition . . . a program which he described as 'annihilating' his opponents . . . [H]e was involved in the shooting of hostages for offenses against the occupation authorities and sending to concentration camps all suspected opponents . . . including priests and educators."¹²⁰

Wilhelm Frick served as Reich Minister of the Interior until August 1943 when he was appointed Reich Protector of Bohemia and Moravia. He was aware that euthanasia was being practiced during the war against the aged, mentally challenged, sick and socially undesirable, yet, "he did nothing to stop them." A report of the Czechoslovak War Commission estimated that 275,000 mentally deficient and aged . . . for whose welfare he was responsible, fell victim to it.¹²¹

Hermann Goring was Commander-in-Chief of the Luftwaffe, Plenipotentiary for the Four Year plan and a close confidant of the Führer. He significantly contributed to the process of singling-out Jews for persecution. He imposed a billion dollar fine on the Jewish Community following the Crystal Week riots. Goring also signed decrees extending anti-semitic legislation to the newly occupied territories and, in July 1941, ordered a "complete solution of the Jewish question in the German sphere of influence in Europe."¹²²

¹¹⁸ *Nuremberg Judgment*, *supra* note 79, at 537.

¹¹⁹ *Id.* at 535-36.

¹²⁰ *Id.* at 575. Dutch police were forced to participate through threat of reprisal against their families. *See id.*

¹²¹ *Id.* at 546-47.

¹²² *Id.* at 527.

Frick, while Reich Minister of the Interior, drafted, signed and administered various decrees excluding Jews from the social and economic sectors of German society. He also signed a final decree in 1943 which granted plenary power over the Jews to the Gestapo, paving the path for their annihilation. During Frick's tenure as Reich Protector of Bohemia and Moravia, thousands of Jews were transferred to Auschwitz where they were killed.¹²³ Defendant Seyss-Inquart, while Reich Commissioner of the Netherlands, signed a series of decrees economically enervating Jews. He followed this with decrees dictating registration, ghettoization, affixation of the Star of David, and finally the deportation of roughly ninety percent of Holland's 140,000 person Jewish community to community.¹²⁴

Defendant Fritz Saukel was appointed Plenipotentiary General for the Utilization of Labor in 1942. He was charged with securing workers to staff the Reich's industries. Saukel conceded that only 200,000 of the five million foreign workers deported to the Reich departed voluntarily. He was aware that "ruthless methods [were] being taken to obtain laborers and vigorously supported them on the ground[s] that they were necessary to fill the quotas."¹²⁵

Those defendants responsible for economic discrimination against Jews, as well as the pillage and plunder of the occupied territories, were also convicted of crimes against humanity. In August 1942, Goring ordered the occupation chiefs to exploit the newly-acquired territories and admonished that "[i]t makes no difference to me . . . if you say that your people will starve."¹²⁶

Defendant Seyss-Inquart denounced the legal limitations on pillage and plunder as "obsolete."¹²⁷ He issued regulations authorizing the "widespread pillage of public and private property" in the Netherlands.¹²⁸ Hans Frank was Governor General of the occupied Polish territory. The Tribunal noted that the:

¹²³ *Nuremberg Judgment*, *supra* note 79, at 545–46. Joachim von Ribbentrop served as Reich Minister for Foreign Affairs. *Id.* He also ordered diplomatic representatives to expedite the deportation of Jews to the East. *Id.* He participated in a conference in which the Hungarians were informed that the Jews either must be exterminated or deported to concentration camps. *Id.* at 532. Ernst Kaltenbrunner was appointed head of RSHA with authority over the security police and service. *Id.* He signed a series of decrees deporting Jews to concentration camps and headed an organization responsible for the death of six million Jews. *Id.* at 538.

¹²⁴ *Id.* at 576.

¹²⁵ *Nuremberg Judgment*, *supra* note 79, at 567.

¹²⁶ *Id.* at 552. Goring imposed a billion dollar fine on German Jews following the Crystal Week riots. *See supra* text accompanying note 122.

¹²⁷ *Nuremberg Judgment*, *supra* note 79, at 567.

¹²⁸ *Id.*

[E]conomic demands made on the Government General were far in excess of the needs of the army of occupation and were out of all proportion to the resources of the country. The food raised in Poland was shipped to Germany on such a wide scale that the rations of the population of the occupied territories were reduced to the starvation level, and epidemics were widespread.¹²⁹

Walter Funk, while serving as President of the Reichsbank in 1942, entered into an agreement to receive currency, gold and jewels from the Security Police and instructed his subordinates to disregard doubts and questions. The Reichsbank retained gold and notes in reserve and sent the valuables to Berlin municipal pawn shops. The Tribunal concluded that "he either knew what was being received or was deliberately closing his eyes to what was being done."¹³⁰

Defendant Alfred Rosenberg was Reich Minister for the Occupied Territories. He was convicted of conducting the systematic plunder of both private and public property throughout German-occupied Europe. He organized and directed "Einsatzstab Rosenberg" which plundered museums and libraries, confiscated art treasures and pillaged private homes. "Aktion-M" was instituted in December 1941. Over 69,000 Jewish homes in the Western Europe were plundered, 38,000 in Paris alone. Roughly 27,000 railroad cars were required to transport these goods to Germany. In addition, approximately 22,000 art objects had been seized by the Einsatzstab as of July 14, 1944.¹³¹

The Tribunal required both knowledge of and active involvement in crimes against humanity. The Tribunal failed to find "that the evidence sufficiently connects [Rudolf] Hess" to crimes against humanity and war crimes.¹³² Absent more compelling evidence, the Tribunal was unable to sustain a guilty verdict. This finding appeared to have been based on the fact that although Hess possessed knowledge of crimes committed against Jews in Eastern Europe, but neither participated nor ordered such delicts. His role in other atrocities was adjudged *de minimis*.¹³³ On the other hand, Hans Frank, Governor Gen-

¹²⁹ *Id.* at 542. Goring participated in planning the spoliation of Russian agriculture and industry and diverted food to Germany. *Id.* at 526.

¹³⁰ *Id.* at 551.

¹³¹ *Nuremberg Judgment, supra* note 79, at 540.

¹³² *Id.* at 529. Hess was Minister without Portfolio and was Hitler's closest confidant. He inexplicably fled to England in 1941. *See id.*

¹³³ *Id.*

eral of Poland, was determined to have been a “willing and knowing participant in the use of terrorism . . . in . . . economic exploitation . . . which led to the death by starvation of a large number . . . in the deportation . . . as slave laborers of over a million . . . and in . . . the murder of at least 3 million Jews.”¹³⁴

The Nuremberg Court also imposed vicarious liability on defendants with power and authority to intervene to prevent illicit activity. Constantin Freiherr von Neurath was appointed Reich Protector of Bohemia and Moravia in March 1939. He contended that the anti-semitic and repressive policies put into place were conceived and carried out by the Reich security apparatus. The Tribunal, however, convicted von Neurath, ruling that “he served as the chief German official in the Protectorate . . . knowing that war crimes and crimes against humanity were being committed under his authority.”¹³⁵

Von Neurath was succeeded in 1943 by Frick who “knew full well what the Nazi policies of occupation were in Europe, particularly with respect to Jews . . . and by accepting the office of Reich Protector . . . assumed responsibility . . .”¹³⁶ Sauckel, the Plenipotentiary General for the Utilization of Labor, claimed that he was not responsible for the abuses associated with the detention and transportation of workers to Germany. The Tribunal, however, noted that “Sauckel had over-all responsibility for the slave labor program. . . . He was aware of the ruthless methods being taken to obtain laborers and vigorously supported them on the ground that they were necessary to fill the quotas.”¹³⁷

An official’s protest and prevention of some atrocities, and lack of involvement in others, does not absolve him of complicity in the commission of criminal conduct. Defendant Seyss-Inquart, while Reich Commissioner for the Netherlands:

[I]n certain cases . . . opposed . . . extreme measures . . . as when he was largely successful in preventing the Army from carrying out a scorched earth policy, and urged the Higher SS and Police Leaders to reduce the number of hostages to be shot. But . . . Seyss-Inquart was a knowing and voluntary participant in War Crimes and Crimes against Humanity . . .¹³⁸

¹³⁴ *Id.* at 544.

¹³⁵ *Id.* at 582.

¹³⁶ *Nuremberg Judgement*, *supra* note 79, at 546.

¹³⁷ *Id.* at 541, 567 (discussing defendant Alfred Rosenberg).

¹³⁸ *Id.* at 576.

Defendant Ernst Kaltenbrunner served as Head of the Reich Security Service and claimed that the:

[C]riminal program had been started before his assumption of office; that he seldom knew what was going on; and that when he was informed he did what he could to stop them. . . . But he exercised control over the activities of the RSHA, was aware of the crimes it was committing, and was an active participant in many of them.¹³⁹

Mitigating circumstances were recognized in sentencing defendants. The Tribunal noted that Walther Funk, Minister of Economics and President of the Reichsbank, "was never a dominant figure in the various programs in which he participated. This is a mitigating fact of which the Tribunal takes notice."¹⁴⁰ Rudolf Hess was Reich Minister for Armaments and War Production and a member of the Central Planning Board for the Four Year Plan. He was central in the slave labor program. The Tribunal emphasized that Rudolf Hess had established industries in the occupied territories in order to avoid deporting workers to Germany. In addition, "[h]e carried out his opposition to Hitler's scorched earth program in some of the Western countries and in Germany by deliberately sabotaging it at considerable personal risk."¹⁴¹ The Tribunal also recognized that Von Neurath intervened to gain the release of detained Czechs. He was reprimanded by Hitler, but persisted in cautioning restraint. Von Neurath went on leave in September 1941, refused to resume his duties and his resignation was formally accepted in August 1943.¹⁴²

On the other hand, the Tribunal noted in the case of Hermann Goring that "[t]here is nothing to be said in mitigation . . . Goring was often . . . the moving force . . . [h]e was the leading war aggressor . . . director of the slave labor program and the creator of the oppressive program against the Jews and other races, at home and abroad."¹⁴³ Superior orders were not recognized in mitigation for those instances in which a defendant voluntarily and willingly engaged in grossly criminal conduct.¹⁴⁴ Wilhelm Keitel was Chief of the High Command of the

¹³⁹ *Id.* at 538.

¹⁴⁰ *Id.* at 552.

¹⁴¹ *Id.* at 579.

¹⁴² *Nuremberg Judgment*, *supra* note 79, at 582. Hess and Funk were sentenced to life imprisonment; von Neurath to fifteen years imprisonment. *See id.* at 588-89.

¹⁴³ *Id.* at 527.

¹⁴⁴ *Id.* at 533. "There is abundant evidence . . . that Ribbentrop was in complete sympathy

Armed Forces. The Tribunal ruled that superior orders could neither be recognized in defense or in mitigation in the case of “crimes so shocking and extensive . . . committed consciously, ruthlessly, and without military excuse or justification.”¹⁴⁵

F. *The Nuremberg Judgement And Crimes Against Humanity: Summary*

In sum, the Nuremberg Tribunal failed to provide a principled distinction between war crimes and crimes against humanity. Crimes against humanity were limited to inhumane acts against civilians undertaken in execution of, or in connection with, a crime against peace or war crime. These atrocities, of course, also constituted war crimes when carried out in contested or occupied territory. Repressive acts within Germany which were considered to be connected with a crime against peace also were within the jurisdiction of the Tribunal.¹⁴⁶

Murder, mass extermination, deportation and enslavement of civilians were enumerated as crimes against humanity under the terms of the Nuremberg Charter. The phrase “other inhumane acts” was interpreted to encompass economic discrimination against Jews as well as the confiscation of Jewish property and the pillage and plunder of property in the occupied territories.¹⁴⁷ The Tribunal made no distinction between personal, commercial and state-owned property.¹⁴⁸

Crimes against humanity thus were viewed as extending the scope of the humanitarian law of war rather than as an autonomous source of rights which accrued to individuals in periods of peace as well in war. The impact of the Tribunal’s interpretation of crimes against humanity would ultimately prove to be limited by the Nuremberg Charter’s exclusive concern with the European Axis Powers.¹⁴⁹ The Tokyo Trial—the other major war post-World War II war crimes trial—added little to the jurisprudence on crimes against humanity.

with all the main tenets of the National Socialist creed, and that his collaboration with Hitler and with other defendants . . . was whole-hearted. It was because Hitler’s policy and plans coincided with his own ideas that Ribbentrop served him so willingly to the end.” *Id.* at 533.

¹⁴⁵ *Nuremberg Judgement*, *supra* note 79, at 536. Alfred Jodl was Chief of the Operations Staff of the High Command. *Id.* The Tribunal noted that the superior orders defense was prohibited by Article Eight of the Nuremberg Charter. *See id.* In addition, superior orders were not recognized in mitigation: “There is nothing in mitigation. Participation in such crimes . . . has never been required of any soldier and he cannot . . . shield himself behind a mythical requirement of soldierly obedience at all costs as his excuse for commission of these crimes.” *Id.* at 571.

¹⁴⁶ *See supra* text accompanying notes 88–145.

¹⁴⁷ Nuremberg Charter, *supra* note 4, at art. 6(c).

¹⁴⁸ *See* Hague Convention, *supra* note 2, at arts. 52–56.

¹⁴⁹ *See supra* text accompanying notes 10–145.

G. Tokyo Tribunal

The Tokyo Charter was the foundation document which defined the jurisdiction and powers of the International Military Tribunal in Tokyo.¹⁵⁰ The Charter was an executive decree of General Douglas MacArthur, Supreme Commander for the Allied Powers in Japan, who only cursorily consulted the other Allied Powers in developing the document.¹⁵¹

The Tokyo Tribunal was charged with the “just and prompt trial and punishment of the major war criminals in the Far East.”¹⁵² The Tokyo Charter’s definition of crimes against humanity differed from that at Nuremberg in omitting the requirement that such acts were “committed against any civilian population.”¹⁵³

The Tokyo Tribunal focused almost exclusively on crimes against peace, striking all but one war crimes count on the grounds of lack of jurisdiction, redundancy and vagueness. There was no explicit charge of crimes against humanity. The remaining war crimes count charged various defendants with “recklessly disregarding their legal duty to take adequate steps to rescue the observance and prevent breaches of the laws and customs of war.”¹⁵⁴ The evidentiary presentation under this count went towards war crimes against civilians. Although the charge was not explicit, it presumably also constituted crimes against humanity.¹⁵⁵

Koki Hirota intermittently served as Japanese Foreign Minister between 1936–38. Hirota was convicted of failing to take steps to insure the observance and to prevent breaches of the laws and customs of

¹⁵⁰ Charter Of The International Military Tribunal For The Far East, Apr. 26, 1946 *reprinted in* RICHARD H. MINEAR, VICTORS’ JUSTICE THE TOKYO WAR CRIMES TRIAL 185 (1971) [hereinafter TOKYO CHARTER].

¹⁵¹ The Tokyo War Crimes Trial, *reprinted in* II THE LAW OF WAR A DOCUMENTARY HISTORY 1029, 1031 (Leon Friedman ed., 1972) [hereinafter TOKYO JUDGMENT].

¹⁵² Tokyo Charter, *supra* note 150, at art. 1.

¹⁵³ See Nuremberg Charter, *supra* note 4, at art. 6(c). Unlike the Nuremberg Charter, so-called conventional war crimes were not enumerated:

(b) Conventional War Crimes: Namely violationns of the laws or customs of war;

(c) Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial 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.

Tokyo Charter, *supra* note 150, at art. 6(b)(c).

¹⁵⁴ Tokyo Judgment, *supra* note 151, at 1033.

¹⁵⁵ *Id.*

war. He received reports of atrocities in Nanking between December 1937 and February 1938, and accepted assurances from the War Ministry that the atrocities would be curbed. Reports of such acts nevertheless continued for at least another month. The Tribunal concluded that Hirota was “derelict in his duty in not insisting before the Cabinet that immediate action be taken . . . [h]e was content to rely on assurances which he knew were not being implemented while hundreds of murders, violations of women, and other atrocities were being committed daily. His inaction amounted to criminal negligence.”¹⁵⁶

Several other defendants with knowledge and authority also were held liable for a breach of their duty to intervene to halt war crimes.¹⁵⁷ General Iwane Matsui was Commander-in-Chief of the Central China Area Army which occupied Nanking. Under General Matsui’s direction, there:

[f]ollowed a long succession of most horrible atrocities committed by the Japanese Army upon the helpless citizens. Wholesale massacres, individual murders, rape, looting and arson were committed by Japanese soldiers. . . . In . . . six or seven weeks thousands of women were raped, upwards of 100,000 people were killed and untold property was stolen and burned.¹⁵⁸

The Tribunal held that Matsui was cognizant of these atrocities and was criminally culpable in failing to fulfill his duty to control his troops and to protect the citizens of Nanking.¹⁵⁹

The Tokyo Tribunal, in contrast to Nuremberg, did not define or discuss crimes against humanity. The decision did affirm that civilian and military officials with power and authority were liable for a failure to intervene to halt war crimes and crimes against humanity. The duty was triggered in the case of serious and widespread official delicts of which a decision-maker was aware or should have been aware.¹⁶⁰

¹⁵⁶ *Id.* at 1134. The duty of army commanders and relevant governmental officials is “to take such steps and issue such orders as will prevent . . . the commission of war crimes and satisfy himself that such orders are being carried out.” *Id.* at 1151-162.

¹⁵⁷ *Id.* at 1146. Kenryo Sato was Chief of the Military Affairs Bureau. *See id.* He was responsible for responding to protests, but lacked authority to initiate preventive action. *See id.* at 1147.

¹⁵⁸ Tokyo Judgement, *supra* note 151, at 1142.

¹⁵⁹ *Id.* In the absence of direct knowledge, “[t]hat crimes are notorious, numerous and widespread as to time and place are matters to be considered in imputing knowledge.” *Id.* at 1039.

¹⁶⁰ *See id.*

The impact of the Nuremberg and Tokyo judgments was limited by the fact that only the vanquished were subject to prosecution. These trials nevertheless ushered in a paradigm shift. Severe violations of the laws and customs of war were now the concern of the civilized world community as well as the victim State. This was clearly conveyed in the concept of crimes against humanity which symbolized the common interest of all people in protecting civilians from the scourge of war. Some, such as Justice R.B. Paul, remained skeptical. Paul queried, in his dissent at Tokyo, whether the prosecutions were “essentially political though cloaked by a juridical appearance.”¹⁶¹

The innovation introduced by the concept of crimes against humanity cannot be under-estimated. British Chief Prosecutor at Nuremberg, Sir Hartley Shawcross, in his closing speech, observed that inherent in the notion of crimes against humanity was the notion that there is a limit to the power of the State and that the individual, who is the ultimate unit of all law, is not disentitled to the protection of mankind when the State infringes upon his rights in a manner which outrages the conscience of mankind.¹⁶²

The fact is that the right of humanitarian intervention by war is not a novelty in International Law—can intervention by judicial process then be illegal? . . . The Charter . . . gives warning for the future, to dictators and tyrants masquerading as a State that if, in order to strengthen or further their crimes against the community of nations they debase the sanctity of man in their own countries, they act at their peril, for they affront the International Law of mankind.¹⁶³

American tribunals convened under Control Council Law No. 10 in occupied Germany and were divided in their interpretation of crimes against humanity. Most courts adhered to the Nuremberg precedent, but two influential decisions determined that crimes against humanity were not required to be connected to the waging of a war of aggression. These judgments also clarified that crimes against humanity required the systematic commission of severe State-sponsored delicts.

¹⁶¹ Tokyo Judgment, *supra* note 153, at 1159, 1182 (dissenting judgment of justice R.B. Pal).

¹⁶² XIX Trial of German Major War Criminals Before the International Military Tribunal 472 (1947).

¹⁶³ *Id.*

H. *Control Council Law Law No. 10: The Flick Case*

Following the war, the Allied Powers agreed to prosecute alleged German war criminals found within their zones of occupation. Control Council Law No. 10 defined crimes against humanity as “[a]trocities and offenses which included, but were not limited to, the various enumerated offenses.”¹⁶⁴ In addition to murder, extermination, enslavement and deportation, the enumerated “inhumane acts” were expanded to include imprisonment, torture and rape.¹⁶⁵ A third modification was omitting the requirement that crimes against humanity must be undertaken in connection with any crime within the jurisdiction of the Tribunal.¹⁶⁶ An American court considered the scope of crimes against humanity in the *Flick* case. Count three charged Friedrich Flick, along with two other executives in the Flick firm, Otto Steinbrinck and Konrad Kaletsch, with crimes against humanity. The three allegedly exerted economic and political pressure on the Jewish owners of certain German industries which were subsequently acquired by the Flick firm. These events occurred prior to the Nazi invasion of Poland.¹⁶⁷

The *Flick* Tribunal noted that the Nuremberg Tribunal had declined to assume jurisdiction over crimes against humanity occurring prior to September 1, 1939. The court rejected the argument that its jurisdiction was broadened by the omission of the requirement that a crime against humanity should be in execution of, or in connection with, any crime within the jurisdiction of the Tribunal from Control Council Law No. 10. The judges ruled that the Court had been established to prosecute major Nazi war criminals and that nothing in

¹⁶⁴Control Council Law No. 10, *reprinted in* VI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 art. 6(c), XVIII, XIX (1952).

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.

Id. at art. 6(c).

¹⁶⁵*Id.*

¹⁶⁶*Id.*

¹⁶⁷*United States v. Friedrich Flick*, *reprinted in* VI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 1187, 1212 (1942) [hereinafter *Flick Judgment*].

the record indicated that crimes committed "before and wholly unconnected with the war" should have been punished.¹⁶⁸

The Tribunal next addressed the issues of whether property offenses were encompassed within crimes against humanity? The taking of property by a sovereign without just compensation is prohibited under the law of many states, but is usually not considered a crime. A sale through pressure or duress may be challenged in equity, but the use of coercion, even when motivated by race or religion, does not constitute a crime against humanity. The court observed a distinction between industrial property and the dwellings, household furnishings, and food supplies of a persecuted people. The court explained, "in this case . . . we are . . . concerned with industrial property, a large portion of which (ore and coal mines) constitutes natural resources in which the state has a peculiar interest."¹⁶⁹

The Tribunal noted that the International Military Tribunal at Nuremberg had cited the involvement of various defendants in anti-semitic economic discrimination. However, it does not appear that "[The] IMT considered, much less decided, that a person becomes guilty of a crime against humanity merely by exerting anti-Semitic pressure to procure by purchase or through state expropriation industrial property owned by Jews."¹⁷⁰

¹⁶⁸ *Id.* at 1213. Control Council Law No. 10 was expressly made subject in the Preamble to the requirements of the Nuremberg Charter. Control Council Law No. 10, *supra* note 164.

¹⁶⁹ *Id.* at 1214.

To try war crimes is a task so large . . . that there is neither necessity nor excuse for expecting this Tribunal to try persons for offenses wholly unconnected with the war. . . . [N]o 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.

Id. at 1213. Defendants were convicted for the confiscation of personal property. *See United States v. Oswald Pohl*, reprinted in V TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 958, 978 (1950) [hereinafter *WVHA Judgment*].

¹⁷⁰ *Flick Judgment*, *supra* note 167, at 1215. The Tribunal noted that economic discrimination against Jews had been cited in the cases of Funk and Seyss-Inquart. *See id.* The Leadership Corps was declared a criminal organization based upon various acts, including economic discrimination against Jews. *See id.* The Court observed that crimes against humanity is an awkward and ambiguous concept which through self-interested interpretation may be used to justify intervention into the affairs a third-party State. *See id.* Despite the elastic nature of this concept, earlier discussions all concur that crimes against humanity are directed against physical threats and injuries and do not encompass property offenses. *See id.* The latter, of course, may be incidental to the persecution of peoples. *See id.*

Control Council Law No. 10 punished "atrocities and offenses," including "murder, extermination" and other crimes against the person.¹⁷¹ Property is not mentioned. The doctrine *eiusdem generis*, according to the Tribunal, dictates that the scope of "other persecutions" include "only such as affect the life and liberty of the oppressed peoples. Compulsory taking of industrial property, however reprehensible, is not in that category."¹⁷² Thus, "[w]hether we hold that we have no jurisdiction or whether we assume jurisdiction and hold that no crime against humanity has been proved, the result . . . is the same. . . . [T]he evidence . . . relates to subject matter not within [our] jurisdiction."¹⁷³

I. Control Council Law No. 10: The Medical Case

The *Medical Judgment* was the second decision issued by an American war crimes court under Control Council Law No. 10. The defendants were charged with war crimes and crimes against humanity. The counts were identical other than that war crimes were alleged to have been directed against "civilians and members of the armed forces then at war with the German Reich . . . in the exercise of belligerent control."¹⁷⁴ The same acts in Count Four were alleged to have been directed against "German civilians and nationals of other countries."¹⁷⁵ These charges were based on involuntary experiments involving simulated high-altitudes, freezing water, mustard and poison gas survivability, the effect of spotted fever, poison and incendiary devices, bone, muscle and nerve regeneration, and the potability of sea water.¹⁷⁶ The protocols allegedly resulted in brutalities, tortures, disabling injury, and death.¹⁷⁷ In addition, they contravened international conventions, the laws and customs of war, the general principles of criminal law,

¹⁷¹ *Id.* at 1215. (discussing Control Council Law No. 10, at art. 6(c). Article 6(b)), which punishes war crimes, specifically lists "offenses against persons or property." See Control Council Law No.10, *supra* note 164, art. 6(b).

¹⁷² *Flick Judgment*, *supra* note 167, at 1215.

¹⁷³ *Id.* at 1216.

¹⁷⁴ *United States v. Karl Brandt*, reprinted in II TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 171, 174 (1950) [hereinafter *Medical Judgment*]. Counts two and three alleged in substance that between September 1939 and April 1945 that the defendants were involved in medical experiments without the subjects' consent. See *id.* These resulted in "murders, brutalities, cruelties, tortures, atrocities, and other inhuman acts." *Id.* at 175.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 175-78.

¹⁷⁷ *Id.* at 183.

Control Council Law No. 10 as well as "usages established among civilized peoples, from the laws of humanity, and from the dictates of public conscience."¹⁷⁸

The Tribunal concluded that "[j]udged by any standard" the record revealed the commission of war crimes and crimes against humanity during World War II.¹⁷⁹ These were "not the isolated and casual acts of individual doctors and scientists . . . but were the product of coordinated policy-making and planning at high governmental, military and Nazi Party levels, conducted as an integral part of the total war effort."¹⁸⁰

Karl Brandt was Reich Commissioner for Medical and Health Services with plenary power over health affairs. He was convicted of involvement in various experiments and also was determined to have organized and administered the euthanasia program, involving the gassing of so-called incurables. This was subsequently extended to Jews and concentration camp inmates who were considered unfit for work. Brandt alleged that he was involved in the euthanasia of incurables, but then turned his attention to other affairs and was uninvolved in the extermination of Jews and other concentration camp inmates. The Tribunal ruled that he had breached his duty to supervise the program: "A discharge of that duty would have . . . revealed . . . that . . . its [euthanasia] purposes were prostituted by men for whom Brandt was responsible, and great numbers of non-German nationals were exterminated" ¹⁸¹

Brandt argued that euthanasia was justified to alleviate the pain and expense of the incurably ill. The Tribunal did not address the prerogative of a State to subject its citizens to euthanasia. But, "[a]ssuming that it may do so, the Family of Nations is not obligated to give recognition to such legislation when it manifestly gives legality to plain murder and torture of defenseless and powerless human beings of

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 181.

¹⁸⁰ *Medical Judgement*, *supra* note 174, at 181. Coincidental with the initiation of World War II, "criminal medical experiments on non-German nationals, both prisoners of war and civilians, including Jews and 'asocial' persons, were carried out on a large scale in Germany and the occupied countries." *Id.* These acts were "ordered, sanctioned, permitted, or approved by persons in positions of authority who under all principles of law were under the duty to know about these things and to take steps to terminate or prevent them." *Id.*

¹⁸¹ *Id.* at 197. The evidence, in any event, is "conclusive that almost at the outset of the program, non-German nationals were selected for euthanasia and exterminated." *Id.*

other nations.”¹⁸² The Court concluded that “[t]o the extent that these criminal acts did not constitute war crimes they constituted crimes against humanity.”¹⁸³

Karl Gebhardt was a consulting surgeon in the *Waffen Schutzstaffel* (commonly known as the SS) and chief clinical officer of the Reich Physician SS and Police. He participated in sulfanilamide protocols upon non-consenting human subjects, during which several died. Various female subjects also were subjected to bone, muscle and nerve regeneration and bone transplantation experiments. Gebhardt, as chief clinical officer, also approved sea-water and sterilization protocols.¹⁸⁴ He contended that in the interest of advancing medical knowledge, a State may subject prisoners condemned to death to painful experimental protocols. The Tribunal concluded that:

[w]hatever may be the right of a state with reference to its own citizens, it is certain that such legislation may not be extended so as to permit the practice upon nationals of other countries who, held in the most abject servitude, are subjected to experiments without their consent and under the most brutal and senseless conditions.¹⁸⁵

Gebhardt was convicted of aiding, abetting and taking a consenting part in medical experiments upon non-German nationals without their consent. This resulted in maiming and other inhuman treatment: “To the extent that these experiments did not constitute war crimes, they constituted crimes against humanity.”¹⁸⁶

The *Medical* Tribunal ruled that crimes against humanity are not ameliorated by a good motive. Defendant Wolfram Sievers was Reich Business Manager of the *Ahnenerbe* Society which was devoted to racial research. Sievers obtained funds, materials, equipment and concentration camp inmates for experimental research. He claimed that he served as business manager in order to monitor Himmler’s activities and to obtain information of utility to the resistance. The Tribunal

¹⁸² *Id.* at 198. The evidence indicates that Brandt’s dereliction of duty contributed to the extermination of non-German nationals. *See id.*

¹⁸³ *Medical Judgement, supra* note 174, at 198.

¹⁸⁴ *Id.* at 224–26.

¹⁸⁵ *Id.* at 227. The law of war, under some circumstances, permits the execution of spies and illegal combatants. *See id.* The law of war, however, “does not under any circumstances countenance the infliction of death or other punishment by maiming or torture.” *Id.* at 224.

¹⁸⁶ *Id.* at 227.

ruled that “murders were committed with cooperation of the Ahnenerbe upon countless thousands of wretched concentration camp inmates who had not the slightest means of resistance. . . . It certainly is not the law that a resistance worker can commit no crime, and least of all, against the very people he is supposed to be protecting.”¹⁸⁷

The *Medical Judgment* thus held that State-sponsored euthanasia and involuntary medical experiments against non-German nationals during wartime constituted crimes against humanity. Whatever the legality of euthanasia or involuntary medical experimentation against a State’s own citizens, such practices are contrary to international law when directed against non-nationals. The Tribunal made no attempt to connect the abuse of German nationals with crimes against peace and was content to limit its judgment to non-nationals. There also was no effort to distinctly differentiate crimes against humanity from war crimes—the only demonstrable distinction was that the latter was intended to safeguard civilians.¹⁸⁸

J. *Control Council Law No. 10: The Justice Case*

The *Justice* case clarified and extended the concept of crimes against humanity. The defendants were leading legal officials, judges and lawyers in the Third Reich. They were charged with participation in a “government-organized system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice, and through the instrumentality of the courts.”¹⁸⁹ The accomplishment of aggressive war, the elimination of political opposition and the extermination of European

¹⁸⁷ *Medical Judgment*, *supra* note 174, at 263, 292–94 (discussing Adolf Pokorny). On the other hand, defendant Kurt Blome, who was Plenipotentiary for Cancer Research, was acquitted based on the defense that he advocated criminal conduct which resulted in less harm than that which would have resulted from the plan contemplated by his superiors. *See id.* Blome persuaded Heinrich Himmler to intern rather than exterminate tubercular Poles. *See id.* There was no evidence that any Poles were deprived of their life or property. *See id.* The Tribunal determined that a moral or humanitarian appeal would have had a minimal impact upon Himmler or Hitler. *See id.* at 231–34. “[I]t cannot be held that the latter was not well-worded when considered as an attempt to put an end to the plan originally adopted, and to bring the substitution of another plan not so drastic. Whatever may have been its purpose, the record shows that . . . the letter did in fact divert Himmler from his original program and that as a result . . . the extermination plan was abandoned.” *Id.* at 234.

¹⁸⁸ *See supra* text accompanying notes 174–87.

¹⁸⁹ *United States v. Josef Altstoetter*, reprinted in III TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 954, 985 (1951)

Jewry required the Nazis “to harness the Ministry of Justice and the entire court system for the enforcement of the penal laws in accordance with National Socialist ideology.”¹⁹⁰

The Tribunal noted that the prohibition on crimes against humanity are “not surplusage,” but are intended to supplement the preceding sections on war crimes by including acts absent from the preceding definitions.¹⁹¹ War Crimes encompass atrocities committed against civilians in, or from, occupied territories, whereas crimes against humanity prohibit atrocities “against any civilian population.”¹⁹² The crimes against humanity provision also prohibits persecutions on racial, religious, or political grounds, regardless of whether such acts are sanctioned under domestic law. This language clearly indicates that “acts by Germans against German nationals may constitute crimes against humanity within the jurisdiction of the Tribunal to punish.”¹⁹³

The Tribunal noted that the prosecution of persons charged with crimes against humanity is limited “both by definition and illustration, as appears from C.C. Law 10.”¹⁹⁴ Control Council Law No. 10 employs the words “against any civilian population” rather than “against any civilian individual.”¹⁹⁵ This precludes the isolated crime—the provision is “directed against offenses and inhumane acts and persecutions on

[hereinafter *Justice Judgment*]. The Tribunal asserted that its jurisdiction was based on the Reich’s unconditional surrender and the resulting Allied occupation of Germany. *See id.* at 960. The parameters of the Court’s power was defined by Control Council Law No. 10 which was a joint legislative act by the occupying powers. *Id.* at 965. The Court also contended that Control Council Law No. 10 was an expression of existing international law. *See id.* at 966.

¹⁹⁰ *Id.* at 999.

¹⁹¹ *Id.* at 972. The judgment suggested that not all of the acts enumerated as crimes against humanity were violative of preexisting international law. *See id.* The punishment of these acts rested upon the exercise of the Allied Powers’ condominium jurisdiction over Germany.

All of the war crimes and many, if not all, of the crimes against humanity . . . were . . . violative of preexisting principles of international law. . . . C.C. Law 10 may be deemed to be a codification rather than original substantive legislation. Insofar as C.C. Law 10 may be thought to go beyond established principles of international law, its authority, of course, rests upon the exercise of the “sovereign legislative power” of the countries to which which the German Reich unconditionally surrendered.

Id. at 966.

¹⁹² *Justice Judgment, supra* note 189, at 972.

¹⁹³ *Id.* at 973. The Allied Tribunals were authorized to act as a German court and to adjudicate crimes committed by “persons of German citizenship or nationality against other persons of German citizenship or nationality, or stateless persons.” *See* Control Council Law No. 10, *supra* note 166.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

political, racial, or religious grounds systematically organized and conducted by or with the approval of government."¹⁹⁶

The Tribunal, in the *Justice* case, stressed that the evidence indicates that the defendants' inhumane acts were committed in execution of, and in connection with aggressive war, and therefore satisfied the requirements of crimes against humanity established in the Nuremberg Charter. The Tribunal stressed, however, that there was no requirement that this connection be established. Control Council Law No. 10 "differs materially from the Charter" and "defines crimes against humanity as inhumane acts, etc., committed, 'in execution of, or in connection with, any crime within the jurisdiction of the tribunal,' whereas in C.C. 10 the words last quoted are deliberately omitted from the definition."¹⁹⁷

The Tribunal rejected the contention that this was retroactive punishment. The defendants' acts constituting war crimes or crimes against humanity were in direct violation of German criminal law. The prohibition of ex post facto punishment, "as a rule of justice and fair play, should be no defense if the act . . . in violation of C.C. Law 10 was also known . . . to be a punishable crime under . . . domestic law."¹⁹⁸

The *Justice* Tribunal thus affirmed that crimes against humanity were limited to the systematic commission of severe, State-sponsored delicts. The Court extended crimes against humanity to encompass crimes committed by Germans against German nationals prior to, and independent of, the initiation of aggressive war. The Tribunal noted

¹⁹⁶ *Id.* "It is not the isolated crime by a private German individual which is condemned, nor is it the isolated crime perpetrated by the German Reich through its officers against a private individual." *Id.*

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

Id. at 982.

¹⁹⁷ *Id.* at 974.

¹⁹⁸ See Control Council Law No.10, *supra* note 164, at 977. The Tribunal argued that many of the laws of the Weimar era which protect human rights were never repealed. See *id.* The defendants conduct thus was in violation of domestic law. See *id.* International law, according to the judgment, "requires proof before conviction that the accused knew or should have known that in matters of international concern he was guilty of participation in a nationally organized system of injustice and persecution shocking to the moral sense of mankind, and that he knew

that violations of the laws and customs of war will no longer be the only offenses recognized by common international law.¹⁹⁹

The Tribunal commented that this interpretation reflected a shrinking of the scope of States' domestic jurisdiction which was immune from international regulation.²⁰⁰

The Court noted that Nuremberg was the culmination of a growing international concern with the welfare of the individual. There was a realization that the abuse of individuals may attain international significance due to a direct and adverse impact upon the rights and interests of other States.²⁰¹ It would not be inaccurate to declare that:

[T]yrannical conduct, or massacres, or religious persecutions are wholly unrelated to the foreign relations of the territorial sovereign. . . . [T]he society of nations . . . may not unreasonably maintain that a state yielding to such excesses renders itself unfit to perform its international obligations, especially . . . as they pertain to the protection of foreign life and property within its domain.²⁰²

The Tribunal bolstered this contention by pointing to the fact that as far back as 1827, in an effort to safeguard the interests of humanity, American and European States had both intervened, and threatened to intervene in other States.²⁰³ Control Council Law No. 10, according to the Court, thus was "limited . . . to the type of criminal activity which

or should have known that he would be subject to punishment if caught." *Id.* at 977-78. The defendants possessed the requisite intent and cannot complain that the subsequent codification of such a crime constitutes retroactive punishment—the Allied Powers repeatedly warned of their intent to punish the perpetrators of the acts sanctioned in Control Council Law No. 10. *See id.* Control Council Law No 10 also does not recognize a superior orders defense—individuals are subject to punishment regardless of whether their acts were consistent with the domestic law of their country. *See id.* at 983. Governmental participation is a material element of a crime against humanity. *See id.* Such involvement, thus, may not be asserted as a defense. *See id.* at 984.

The very essence of the prosecution case is that the laws, the Hitlerian decrees and the Draconic, corrupt, and perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity and that participation in the enactment and enforcement of them amounts to complicity in crime.

Id.

¹⁹⁹ *Id.* at 979. Control Council Law No. 10 "is not limited to the punishment of persons guilty of violating the laws and customs of war in the narrow sense; furthermore, it can no longer be said that violations of the laws and customs of war are the only offenses recognized by common international law." *Id.*

²⁰⁰ *Id.*

²⁰¹ *See* Control Council Law No.10, *supra* note 164, at 980.

²⁰² *Id.*

²⁰³ *Id.* at 981-82.

prior to 1939 was and still is a matter of international concern.” Such atrocities “were acts of such scope and malevolence . . . [that] they so clearly imperiled the peace of the world that they must be deemed to have become violations of international law.”²⁰⁴ Regardless of whether the concept of crimes against humanity is the “product of statute or of common international law, or as we believe, of both, we find no injustice to persons tried for such crimes. They are chargeable with knowledge that such acts were wrong and were punishable when committed.”²⁰⁵

The *Justice* Tribunal convicted Oswald Rothaug, director of the district court in Nuremberg, of crimes committed within Germany against German nationals. In one instance in 1942, Rothaug sentenced a sixty-eight year-old Jew to death for racial pollution. The evidence indicated that the defendant greeted a young family friend with a kiss and permitted her to momentarily sit on his lap.²⁰⁶ The *Justice* Tribunal concluded that Rothaug:

[i]n spite of the legal sophistries which he employed, was merely an instrument in the program of the leaders of the Nazi State of persecution and extermination. . . . His acts were . . . terrible in that those who might have hoped for a last refuge in the institutions of justice found these institutions turned against them and a part of the program of terror and oppression.²⁰⁷

The Court ruled that crimes against humanity may not be justified by an alleged effort to prevent more atrocious acts.

Franz Schlegelberger served as Secretary of State in the Reich Ministry of Justice. He was instrumental in creating a criminal justice and judicial system which was calibrated to the Nazi legal cosmology. This centralized system subsequently was extended to the occupied territories. Schlegelberger also assisted in arranging the so-called “Night and Fog” procedure, which involved the secret detention and deportation of suspected political dissidents in the occupied territories.²⁰⁸

²⁰⁴ *Id.* at 982. The Tribunal noted that Hitler based his intervention into Czechoslovakia on the grounds of that country’s purported persecution of racial Germans which he alleged was violative of international law. *See id.* The Court cited the crime of genocide as the exemplar of crimes against humanity. *See id.* at 983.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 1151–54.

²⁰⁷ *Id.* at 1155–56. Rothaug thus was involved in a national program of racial persecution and “participated in the crime of genocide.” *Id.* at 1156.

²⁰⁸ *Id.* at 1081–85.

The Tribunal noted that Schlegelberger's weakening of the rule of law had set the stage for the triumph of terror. This introduced an "element of evil to the State which is not found in . . . atrocities which do not sully judicial robes."²⁰⁹

The Tribunal also commented on the meaning of "political persecution" within the definition of crimes against humanity in Control Council Law No. 10.²¹⁰ Defendant Rudolf Oeschey served on the Special Court at Nuremberg. He sentenced Count Montgelas to death for privately insulting Hitler and approving of the assassination attempt on Hitler's life. The Count was placed in solitary confinement, denied counsel and secretly indicted, prosecuted and executed within a two day period.²¹¹

The Tribunal ruled that prosecutions for remarks hostile to the Nazi regime do not constitute a violation of Control Council Law No. 10. The tribunal did note however:

the circumstances under which the defendant was brought to trial and the manner in which he was tried convince us that Montgelas was not convicted for undermining the already collapsed defensive strength of the defeated nation, but on the contrary, that the law was deliberately invoked . . . as a last vengeful act of political persecution. If the provisions of C.C. Law 10 do not cover this case, we do not know what kind of political persecution it would cover.²¹²

The prohibition on political and racial persecution thus pertains to the motive and factual basis for the prosecution. The Tribunal depended heavily upon circumstantial evidence to establish a political motive in the Montgelas case.²¹³

²⁰⁹ *Id.* at 1086. Hitler presented Schlegelberger with 100,000 Reichmarks as a gift upon Schlegelberger's retirement. *See id.* The Tribunal recognized that Schlegelberger was not an ardent Nazi. *See id.* Nevertheless, "he sold [his] intellect and . . . scholarship to Hitler for a mess of political pottage and for the vain hope of personal security." *Id.* at 1087.

²¹⁰ *See* Control Council Law No. 10, *supra* note 164, at 1164.

²¹¹ *Id.* at 1163-65.

²¹² *Id.* at 1164. The Tribunal ruled that laws against habitual criminals, looters, hoarders or those guilty of undermining the defense strength of the nation were a valid exercise of State power. But, "these laws were in many instances applied in an arbitrary and brutal manner shocking to the conscience of mankind and punishable here." *Id.* at 1165.

²¹³ *See supra* text accompanying notes 211-12.

K. Control Council Law No. 10: The *Einsatzgruppen* Case

Crimes against humanity also were discussed in the *Einsatzgruppen* case, which involved the prosecution of the commanders of the killing squads which shadowed the German troops advancing into Poland and Russia. These units liquidated two million Jews, Gypsies, the mentally and physically challenged, communists, and political dissidents.²¹⁴

The *Einsatzgruppen* Court saw the codification of crimes against humanity as the culmination of a trend towards the international protection of the integrity and rights of individuals. The desire to punish these acts previously “existed only in the hearts of mankind” and “has now been written into the books of men as the law of humanity.”²¹⁵ The Court grounded crimes against humanity within the principles of justice common to all civilized States. “[M]urder becomes no less murder because directed against a whole race instead of a single person.”²¹⁶

Absent a legal mechanism to bring the perpetrators of atrocity to justice, only the ineffective and impractical mechanisms of diplomatic protest and armed intervention previously were available.²¹⁷ As a result of the Nuremberg Charter, however, the “inalienable and fundamental rights of common man need not lack for a court . . . [h]umanity can assert itself by law. It has taken on the role of authority.”²¹⁸

²¹⁴ *United States v. Otto Ohlendorf*, reprinted in IV TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 411, 412, 415–16 (1950) [hereinafter *Einsatzgruppen Judgment*].

²¹⁵ *Id.* at 497. The Tribunal noted that it derived its existence from Control Council Law No. 20, but that its subject matter jurisdiction resulted from international law “valid long prior to World War II.” *Id.* at 454. The defendants were charged with murder which certainly did not involve retrospective punishment. *See id.* at 459. International law may be derived from written enactments—codes, treaties and conventions. *See id.* But, it also may develop through custom and usage and through the application of the common law. *See id.* at 458. The Court stressed that although crimes against humanity were adjudicated at Nuremberg as an international offense for the “first time” that “this does not . . . mean that a new offense has been added to the list [of] transgressions of man.” *Id.* at 499.

²¹⁶ *Id.* at 497. “A Fuehrer Order, announcing the death of classifications of human beings can have no more weight in the scales of international justice than the order of a highwayman or pirate.” *Id.*

²¹⁷ *Id.* at 497–98.

²¹⁸ *Einsatzgruppen Judgment*, *supra* note 214, at 498. The Tribunal was reluctant to concede that crimes against humanity were a novel offense.

Although the Nuernberg trials represent the first time that international tribunals have adjudicated crimes against humanity as an international offense, this does not . . . mean that a new offense has been added to the list of transgressions of man. Nuernberg has only demonstrated how humanity can be defended in court, and it

Crimes against humanity under Control Council Law No. 10 are not restricted to times of war, but protection to humanity at all times.²¹⁹ The Tribunal thus possesses wide jurisdiction to try crimes against humanity, regardless of the nationality of the victim.²²⁰ None of the indictment's charged defendants with crimes against any specified country, but against humanity as a whole.²²¹ Humanity was the sovereignty which had been offended and the Tribunal was convoked to determine why.²²²

The Tribunal noted that those indicted for crimes against humanity were being prosecuted before an American Tribunal. However, the defendants were not solely accountable to the Allied Powers. They also were responsible to "humanity itself, humanity which has no political boundaries and no geographical limitations."²²³ The prohibition on the killing of non-combatants had been incorporated into international treaties on the humanitarian law of war for some time. The prosecution of such acts as crimes against humanity, as well as war crimes under Control Council Law No. 10, was intended to vindicate the interests of people as well as victim States.²²⁴

The prosecution of crimes against humanity filled a vacuum in law enforcement. International jurisdiction provided protection when the domestic criminal system failed to respond. The Tribunal noted that crimes against humanity only fall within international jurisdiction when the state involved, because of indifference, impotency or complicity, has not taken measures to prevent the crimes and punish the criminals.²²⁵ The *Einsatzgruppen* Tribunal thus viewed crimes against human-

is inconceivable that with this precedent extant, the law of humanity should ever lack for a tribunal.

Id. at 499.

²¹⁹ *Id.* at 497. "These acts have unfortunately been occurring since the world began, but not until now were they listed as international offenses." *Id.*

²²⁰ *Id.* at 499. The killing squads victims in the Soviet Union included German nationals. *See id.*

²²¹ *Einsatzgruppen Judgment, supra* note 214, at 499.

²²² *Id.* at 497. "This is not a new concept in the realm of morals, but it is an innovation in the empire of the law." *Id.*

²²³ *Id.* at 498. "Humanity is man itself. Humanity is the race which will go on in spite of all the fuhrers and dictators . . ." *Id.* at 498.

²²⁴ *See generally* *Einsatzgruppen Judgment, supra* note 214, at 459.

²²⁵ *Id.* at 498.

Where law exists a court will rise. Thus, the court of humanity . . . will never adjourn. . . . It would be an admission of incapacity . . . that mankind . . . should be unable to maintain a tribunal holding inviolable the law of humanity, and, by doing so, preserve the human race itself.

Id. at 499.

ity as an embodiment and fulfillment of a universal sentiment for justice. This was the ultimate vindication of the rule of law.²²⁶

The defendants attempted to claim that their civilian victims supported Bolshevism and therefore posed a threat to Germany. In contrast, the Tribunal ruled that “the genocide program was in no way connected with the protection of the Vaterland . . . the argument that the Jews . . . constituted an aggressive menace to Germany. . . which called for their liquidation in self-defense, is untenable as being opposed to all facts, all logic and all law.”²²⁷

The defendants claimed that they sacrificed their victims in order to save their own lives. The Tribunal noted that the defendants were not required to place themselves in peril by protesting or resisting these killings. It determined, however, that there was no indication that the defendants had been compelled or coerced—they approved of the order to kill. Any expression of doubt or disability would have led to their being released from their lethal responsibilities.²²⁸ Neither could a defendant claim in justification that protest was futile since others would have carried out the Nazi’s policies. Individuals are responsible only for their own conduct, and cannot accurately calibrate the impact of their acts on others. In fact, protest may have emboldened others to act.²²⁹

The indictments in the other American prosecutions were limited to acts committed during armed conflict and the judges did not address the scope of crimes against humanity.²³⁰ Defendants, for the most part, were convicted of both crimes against humanity and war crimes based upon the same underlying facts.²³¹ The Tribunal in the *RuSHA* case did note that the acts charged as:

²²⁶ *Id.* at 462–63.

²²⁷ *Id.* at 469–70. The Tribunal distinguished between the incidental killing of civilians during an air attack and the killing squad’s mass and indiscriminate killing of Jews. *See id.* at 467.

²²⁸ *Einsatzgruppen Judgment*, *supra* note 214, at 480–81. Some defendants contended that resistance was futile. *See id.* But, “[n]o one can shrug off so appalling a moral responsibility with the statement that there was no point in trying.” *Id.* at 482. A soldier could not be accused of cowardice who sought to avoid involvement in assassination of civilians. *See id.* at 485.

²²⁹ *Id.* at 485.

²³⁰ *See United States v. Alfred Krupp*, reprinted in IX TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 1327, 1374 (1950). “All of the acts relied upon as constituting crimes against humanity occurred during and in connection with the war.” *Id.* Defendants were held liable under Control Council Law No. 10 for taking a consenting part in crimes against humanity. *See id.* Liability was imposed on defendants who were “part of an organization actively engaged in crimes against humanity, [who were] aware of those crimes and who yet voluntarily remained a part of that organization lending [their] own professional efforts to the continuance and furtherance of those crimes” *Id.*

²³¹ *See WVHA Judgment*, *supra* note 169, at 962.

[c]rimes against humanity as defined in Control Council Law No. 10 . . . are violative of international conventions, and particularly . . . the Hague Regulations (1907), and are violative of the general principles of criminal law as derived from the criminal laws of all civilized nations and of the internal penal laws of the countries in which such crimes were committed.²³²

This suggested that the *RuSHA* recognized that crimes against humanity could be punished in times of peace as well as war.

L. *Control Council Law No. 10 And Crimes Against Humanity: Summary*

The American courts convened under Control Council Law No. 10 agreed that their power and authority was a product of the Allied Powers' co-dominion jurisdiction over Germany. The judges acknowledged that they were constrained by the statutory architecture of the article defining the scope of crimes against humanity. Some courts, however, noted that crimes against humanity were also rooted in customary international law.²³³

The *Flick* Tribunal was alone in interpreting the crimes against humanity provision of Control Council Law No. 10 in accordance with the narrow Nuremberg precedent.²³⁴ The *Justice* and *Einsatzgruppen* Tribunals noted that the text did not dictate that crimes against humanity were to be undertaken in connection with a war of aggression or war crime. This meant that courts were free to take cognizance of the treatment accorded to German nationals prior to the initiation of the Reich's wars of aggression without linking such acts to the initiation of aggressive war.²³⁵ Crimes against humanity thus were envisioned as extending the scope of the Tribunal's jurisdiction.²³⁶ The panels concurred that crimes against humanity were limited to severe and systematic State violations of international law.²³⁷ Mass atrocities and exterminations were prohibited under the law of all civilized legal systems and

²³² *United States v. Ulrich Greifelt*, reprinted in V TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 88, 153 (1950) [hereinafter *RuSHA Judgment*].

²³³ See *supra* text accompanying notes 194–96.

²³⁴ See *supra* text accompanying notes 170–71.

²³⁵ See *supra* text accompanying notes 168, 191–93. The *Medical* Judgment avoided addressing this issue—limiting itself to the treatment of non-German nationals. See generally *Medical Judgment*, *supra* note 174.

²³⁶ See *supra* text accompanying note 191.

²³⁷ See *supra* text accompanying note 199.

had been continuously condemned, posing no issue of retroactive punishment.²³⁸

A significant number of judges thus extended crimes against humanity into areas traditionally viewed as within States' domestic jurisdiction. This reflected a realization that catastrophic criminal conduct threatened global peace and stability and that, as a result, the safeguarding of individuals had evolved into a matter of international concern. A regime which engaged in such conduct also was an unfit and unworthy member of the community of nations. The international punishment of these penal offenses was intended to provide effective prosecution in those instances in which domestic institutions were stymied by the self-interest of the States.²³⁹

The Control Council No. 10 judgments severed the connection between armed conflict and crimes against humanity. The Eighth Conference for the Unification of Penal Law, in July 1947, extended the concept of crimes against humanity to encompass the protection of the fundamental human rights of individuals based upon their national, political, racial, or religious groups.²⁴⁰

The extension of international jurisdiction into areas formerly considered to be within States' domestic jurisdiction, of course, was not universally endorsed.²⁴¹ Crimes against humanity, however, were established as a core concept in international jurisprudence and were referenced and incorporated into various domestic military codes. The Belgium Decree of December 13, 1944 established a commission to investigate violations of international law and the laws of customs of

²³⁸ See *supra* text accompanying notes 215–18.

²³⁹ See *supra* text accompanying notes 201–05, 225.

²⁴⁰ Sydney L. Goldenberg, *Crimes Against Humanity—1945–1970* 10 U.W.O. L. REV. 1, 12 (1971) (quoting the Eighth Conference for the Unification of Penal Law, July, 1947).

Whoever, abusing the sovereign power of the State, of which he is the soldier, agent or protege, deprives without right, by reason of their nationality, their race, their religion or their opinion, an individual, or group of individuals or a collectivity, of one of the elementary rights attaching to the human being, that is to say:

- right to life
- right to corporeal integrity and health
- right to individual liberty
- right to found a family
- 'droit de cite'
- right to free work, sufficently remunerated to secure the subsistence of the individual and of his family
- right to improve oneself, to learn, to profess a religion or a philosophical opinion, commits a crime against humanity.

Id.

²⁴¹ See *supra* text accompanying note 168.

war. The Preamble recalled that “numerous violations of the rules of International Law and of the obligations of humanity have been committed by the invaders.”²⁴² Similarly, the Luxemburg Grand Ducal Decree of July 3, 1945, which established a National Office for the Investigation of War Crimes, referred in its Preamble “to the numerous violations of international law and of the obligations of humanity which have been committed by the invader”²⁴³ The Austrian Constitutional Law of July 26, 1945 provided for the punishment of those contravening the accepted rules of international law, the laws of war, as well as “the natural principles of humanity.”²⁴⁴ The Danish Act for the prosecution of war crimes of July 13, 1946 incorporated the text of the Nuremberg Charter.²⁴⁵ The United Nations War Crimes Commission also affirmed that crimes against humanity were not required to be connected with the waging of a war of aggression.

M. *United Nations War Crimes Commission*

The Allied Powers charged the United Nations War Crimes Commission with responsibility for investigating and compiling evidence of war crimes. The Commission also issued legal opinions relating to war crimes and the penal liability of purported perpetrators.²⁴⁶ The United States representatives to the Legal Committee drew attention to the atrocities which were committed against German Jews and Catholics as well other offenses perpetrated on religious or racial grounds. The representatives proposed that the Commission should consider “crimes committed against stateless persons or against any persons because of their race or religion as ‘crimes against humanity.’”²⁴⁷ The representatives explained that these acts threatened the foundation of civilization, regardless of time, geography or contravention of the laws and customs of war.²⁴⁸

The Czechoslovakian representative stressed that such criminal conduct could no longer be regarded as within the domestic jurisdiction of the Axis Powers. The admonitions issued by Allied leaders

²⁴² Schwelb, *supra* note 10, at 223.

²⁴³ *Id.*

²⁴⁴ *Id.* The law later refers to “the natural principles of humanity.” *Id.*

²⁴⁵ *Id.* at 224.

²⁴⁶ UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION 120, 169 (1948) [hereinafter WAR CRIMES COMMISSION].

²⁴⁷ *Id.* at 175.

²⁴⁸ *Id.* The Belgian representative to the Committee on Facts and Evidence had made a similar, but unsuccessful proposal in April 1944. *See id.* at 173.

during World War II were a recognition that such acts were a matter of international concern which had been instrumental in precipitating armed conflict.²⁴⁹ The Legal Committee urged the War Crimes Commission to transcend the strict standard for war crimes and to expand its jurisdiction to crimes against humanity. Such crimes, in accordance with the spirit of the Nuremberg Charter, encompassed "crimes committed against any person without regard to nationality, stateless persons included, because of race, nationality, religious or political belief, irrespective of where they have been committed."²⁵⁰ The War Crimes Commission, following an extended debate, somewhat ambiguously determined in 1945 that "crimes against humanity . . . were war crimes within the jurisdiction of the Commission."²⁵¹

The Committee on Facts and Evidence implemented this proposal and implicated a commander of an Austrian unit for crimes against humanity committed prior to the invasion of Czechoslovakia. Two additional charges against Czechoslovakians and ten allegations against Italians and Yugoslavs resulted in findings of crimes against humanity.²⁵² A report by the Legal Committee, adopted by the War Crimes Commission in 1947, limited crimes against humanity to acts which by their "number, magnitude and savagery . . . contributed to a systematic pattern of abuse."²⁵³ Such systematic offenses were required to have been carried out pursuant to an official governmental policy.²⁵⁴

In the next phase in the development of crimes against humanity, the United Nations affirmed that crimes against humanity were not required to be connected to an aggressive war and could be committed in periods of peace. The United Nations also proclaimed that domestic statutes of limitations were inapplicable to crimes against humanity. These developments reflected that the international interest in pun-

²⁴⁹ *Id.* at 175.

²⁵⁰ *Id.* at 176. Delicts which transcended war crimes were described as a "violation of the criminal laws of the countries invaded or otherwise affected, or of the laws and customs of war, of the general principles of criminal law as recognised by civilised nations, or of the laws of humanity and dictates of the public conscience as provided in the Hague Preamble." *Id.*

²⁵¹ WAR CRIMES COMMISSION, *supra* note 246, at 177.

²⁵² *Id.* at 177-78.

²⁵³ *Id.* at 179.

²⁵⁴ *Id.* The report detailed that there were two types of crimes against humanity—the "murder type" and the "persecution type." *Id.* at 178. These delicts were designed to protect civilians and may be committed prior to, or during, the war. *See id.* The nationality of the victim and whether the act was contrary to domestic law was irrelevant. *See id.* The perpetrators, as well as those who planned and ordered crimes against humanity, all were criminally liable. *See id.* at 178-79.

ishing war crimes was considered to take precedence over municipal law and politics.

III. POST-NUREMBERG U.N. DEVELOPMENTS

A. *The Genocide Convention*

Polish scholar and attorney Raphael Lemkin is credited with coining the neologism “genocide”²⁵⁵ to denote the destruction of a nation or ethnic group. Lemkin explained that genocide is derived “from the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing), thus corresponding in its formation to such words as tyrannicide, homicide, infanticide, etc.”²⁵⁶ He noted that the extreme form of this crime entails the extermination of an entire group. However, the more typical pattern involves a systematic assault on a group’s economic, political, religious and social life. Those who are victimized are singled out for persecution based upon their group membership rather than their individual characteristics.²⁵⁷

The leading post-war European precedents concerning genocide are a triad of prosecutions before the Supreme National Tribunal of Poland. These cases resulted in the conviction and execution of three major Nazi officials, but contributed little to clarifying the definition or scope of the crime of genocide. Amon Leopold Goeth served as commandant of the forced labor camp at Plaszow (Cracow) between February 11, 1943 and September 13, 1944. He ordered or indirectly caused the deaths of roughly 8,000 inmates. He also liquidated the Cracow and Tarnow Jewish ghettos as well as the forced labor camp at Szebnie and appropriated currency and valuable metals.²⁵⁸ In convicting Goeth, the Tribunal noted that “[t]he wholesale extermination of Jews and . . . of Poles had all the characteristics of genocide in the biological meaning of this term and embraced, in addition, the de-

²⁵⁵ See RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REFORM* 79 (1944).

²⁵⁶ *Id.*

²⁵⁷ *Id.* Lemkin described two phases of genocide: the destruction of the customary culture of the victims; and its replacement by that of the oppressor. *Id.* He proposed two new international crimes: barbarity, oppressive and destructive actions directed against members of a national, religious or racial group; and vandalism, the malicious destruction of works and art and culture thought to represent the artistic destruction of an oppressed group. *Id.* at 91.

²⁵⁸ Trial of Hauptsturmführer Amon Leopold Goeth, 7 I.L.R. 1 (1948) (discussing the Supreme National Tribunal Policy of 1946).

struction of the cultural life of these nations.”²⁵⁹ Rudolf Franz Ferdinand Hoess was commandant of Auschwitz from May 1, 1940 until the end of October 1943 and served as commander of the security police garrison at Auschwitz between June and August 1944. The Tribunal paid particular attention to the medical experiments engineered by Hoess which were designed to “lower or destroy the reproductive power of the Jews, Poles, Czechs and other non-German nations which were considered by the Nazis as standing in the way of the fulfillment of German plans of world domination. . . . [T]hey were preparatory to the carrying out of the crime of genocide.”²⁶⁰

Artur Greiser was Deputy Gauleiter of the Nazi Party for the Danzig District and President of the Senate of occupied Danzig. Greiser’s involvement in the deportation and extermination of Jews and Poles and in the Germanization of Polish children was characterized as “physical and spiritual genocide.”²⁶¹ He was convicted of having ordered, approved and facilitated “the general totalitarian genocidal attack on the rights of the small and medium nations to exist, and to have an identity and culture of their own.”²⁶²

The United Nations adopted the Convention on the Prevention and Punishment of the Crime of Genocide in 1948. Article One states that “[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”²⁶³ Article Four provides that individuals committing genocide “shall be punished

²⁵⁹ *Id.* at 9.

The criminal activities of the accused Amon Goeth in the Cracow district were but a fragment of a wide action which aimed at the extermination of the Jewish population in Europe. . . . [T]he . . . freedom of the Jews was . . . restricted; they were . . . deprived of personal freedom and confined in . . . ghettos. From there they were . . . transferred to concentration camps and eventually murdered in a wholesale manner by shooting and in gas-chambers. Large numbers . . . perished in each stage . . . through inhuman treatment and torture or were individually murdered by German and Ukrainian henchmen.

Id. at 2.

²⁶⁰ Trial of Obersturmbannführer Rudolf Franz Ferdinand Hoess, 7 I.L.R. 11, 25 (1948) (discussing the Supreme National Tribunal Policy of 1947) (Notes On The Case).

²⁶¹ Trial of Gauleiter Artur Greiser, XIII I.L.R. 70, 114 (1949) (discussing the Supreme National Tribunal).

²⁶² *Id.*

²⁶³ Convention On The Prevention And Punishment Of The Crime Of Genocide, Jan 12, 1951, art. I, 78 U.N.T.S. 277 (1948) [hereinafter Genocide Convention].

whether they are constitutionally responsible rulers, public officials or private individuals."²⁶⁴

The phrase "in time of war and in time of peace" in Article One was inserted by the Ad Hoc Committee in order to clarify that, unlike the Nuremberg Charter, the Genocide Convention is not limited to acts committed during armed conflict.²⁶⁵ This was supported in the Sixth Committee,²⁶⁶ but some argued for a broader phrase which would clearly encompass situations of civil unrest or armed occupation.²⁶⁷

Extensive debate took place over the description of genocide as a crime against international law in Article One. The preamble to the Secretariat's draft refers to genocide as a "crime against the Law of Nations."²⁶⁸ Article One of the Ad Hoc Committee's version characterizes genocide as a "crime under international law."²⁶⁹ A number of delegates urged that genocide should be referred to as a "crime against humanity" in order to identify the Convention with the proceedings at Nuremberg.²⁷⁰ Mr. Ordonneau of France, during the Committee debates, argued that the "foundation-stone of the structure which was to defend the world from crimes committed against humanity had been laid at Nuremberg. . . . The Ad Hoc Committee on Genocide, which now had to lay the second stone . . . should base its work . . . within the general framework of crimes against humanity."²⁷¹ He later pro-

²⁶⁴ *Id.* at art. IV. The interpretation of the Genocide Convention is based on three documents: *Draft Convention on the Crime of Genocide, Commentary*, U.N. Secretary-General, U.N. Doc. E/447 (1947) [hereinafter Secretary-General's Comment]; *Report of the Ad Hoc Committee on Genocide to the Economic and Social Council on the Meetings of the Committee Held at Lake Success, New York, from April 5 to May 10, 1948*, 7 U.N. ESCOR, Supp. (No. 6), U.N. Doc. E/794 (1948) [hereinafter Ad Hoc Committee Report]; *Draft Convention and Report of the Economic and Social Council, Report of the Sixth Committee*, U.N. GAOR, 3d Sess., U.N. Doc. A/760 (1948) [hereinafter Sixth Committee Report]. See Proceedings of the Ad Hoc Committee, U.N. ESCOR Ad Hoc Comm. on Genocide, 6th Sess, 1st-28th mtgs., U.N. Doc. E/AC.25/SR.1-E/AC.25/SR.28 (1948); Proceedings of the Sixth Committee, U.N. GAOR, 6th Comm. 3d Sess., 63d-135th Mtgs. (1948).

²⁶⁵ U.N. ESCOR Ad Hoc. Comm. on Genocide, 6th Sess., 21st mtg., at 2, U.N. Doc. E/AC.25/SR.21 (1948) (Referring to statements of Mr. Rudzinski). Mr. Rudzinski objected that mention of war implied that armed conflict was inevitable and suggested that the Genocide Convention should be made applicable at all times. *Id.*

²⁶⁶ U.N. GAOR 6th Comm., 3d Sess., 68th mtg. at 53 (1948).

²⁶⁷ *Id.* at 52 (Mr. Tarazi, Syria).

²⁶⁸ Secretary-General's Comment, *supra* note 264, at 5 (referring to the Preamble).

²⁶⁹ Ad Hoc Committee Report, *supra* note 264, art. 1, at 4.

²⁷⁰ U.N. ESCOR Ad Hoc Comm. on Genocide, 6th Sess., 20th mtg. at 6-7, U.N. Doc. E/AC/25/SR.20 (1948) (referring to statements by Mr. Morozov of the former U.S.S.R.). See also *id.* at 7 (referring to Mr. Ordonneau Fr. and genocide defined as a crime against humanity).

²⁷¹ *Id.* 7th mtg., at 7-8 (referring to U.N. Doc. E/AC.25/SR.7).

claimed that “in his Government’s opinion, genocide was the most characteristic of crimes against humanity.”²⁷² Despite general recognition that genocide was a crime against humanity, a French proposal to define genocide as a crime against humanity was rejected.²⁷³ Mr. Rudzinski of Poland argued that although genocide was a crime against humanity, the inclusion of such a characterization would breach the parameters placed on the Committee by the United Nations General Assembly.²⁷⁴ Mr. Maktos of the United States, at the close of the Committee’s consideration of the Convention, noted that the instrument “for the first time in history, would outlaw the most heinous crime against humanity—the crime of genocide”²⁷⁵

During the Sixth Committee debates, Mr. Chaumont of France again unsuccessfully argued that genocide should be referred to as a crime against humanity rather than as a crime under international law. This characterization would provide continuity with the prosecutions of Nazi officials following World War II and indicate the determination of the world community to enforce the norm against genocide.²⁷⁶ Mr. Morozov of the Soviet Union recognized that genocide was an “atrocious crime against humanity,”²⁷⁷ but noted that this characterization would require the Committee to consider the relationship between genocide and other crimes against humanity.²⁷⁸ Mr. Maktos of the United States warned that reference to genocide as a crime against humanity would create needless confusion. This concept was identified with the International Military Tribunal at Nuremberg whose jurisdiction was limited to offenses committed during armed conflict.²⁷⁹

Despite the text of the treaty, genocide has been explicitly and widely recognized as a crime against humanity. The Special Rapporteur on Genocide, in his 1978 report, argued that genocide, whether committed in time of peace or war, should be considered an aggravated crime against humanity.²⁸⁰ He noted that genocide is distinguished from other crimes against humanity, such as mass murder or racial or

²⁷² *Id.* 27th mtg., at 11 (referring to U.N. Doc. E/AC.25/SR.27).

²⁷³ *Id.*

²⁷⁴ *Id.*, 20th mtg., at 7 (referring to U.N. Doc. E/AC.25/SR.20).

²⁷⁵ *Id.* 24th mtg., at 16 (referring to U.N. Doc. E/AC.25/SR.24).

²⁷⁶ See Sixth Committee Report, *supra* note 264, at 38 (Mr. Chaumont, France).

²⁷⁷ *Id.* at 39.

²⁷⁸ *Id.* 74th mtg., at 104.

²⁷⁹ *Id.* 67th mtg., at 43.

²⁸⁰ Nicodeme Ruhashyankiko, Special Rapporteur, *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, U.N. ESCOR, 31st Sess, 107, U.N. Doc E/CN.4/Sub.2/416

religious persecution, by the fact that it requires a specific intent to exterminate a group. The Special Rapporteur concluded that:

[g]enocide . . . is by its nature simply a crime against humanity, and indeed an aggravated crime against humanity. Accordingly, it would seem more correct from the standpoint both of logic and of method to regard genocide as simply an *aggravated* case of crimes against humanity. The aggravation lies simply in the additional intent which is characteristic of genocide.²⁸¹

Genocide committed against civilians in connection with an armed conflict, consistent with the Nuremberg Charter, clearly constitutes a crime against humanity and also may constitute a war crime.²⁸² The Secretary-General, in the commentary to the Secretariat's draft Genocide Convention, notes that war may be accompanied by the crime of

(1978) (*quoting* STEFAN GLASER, DROIT INTERNATIONAL PENAL CONVENTIONNEL 109 (1970)) [hereinafter Study of Prevention and Punishment of Genocide]. The Special Rapporteur noted "it was clearly not permissible to qualify genocide as a crime against humanity when committed in connexion with a war, while refusing to do so when its commission was not connected with a war." *Id.* at 107.

²⁸¹ *Id.* Glaser notes the difference between crimes against humanity and genocide:

[It] is not so much objective as subjective, in that it relates to the motives of the perpetrator. The same act—for example, murder—may be, or rather may be described as, either a crime against humanity or an act of genocide, depending on the motives of the person committing it; if his aim is to eliminate the victim because of the latter's race, religion or political beliefs, with no other intent, his act constitutes a crime against humanity, whereas if committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, it will be qualified as genocide.

Id.

The United Nations Secretariat, in a note submitted to the Ad Hoc Committee on Genocide in 1948, observes that the General Assembly, in adopting the Genocide Convention, "[w]ithout going into the general question of crimes against humanity . . . wished to give special treatment to the crime of genocide because of the particular gravity of the crime, which aims at the systematic extermination of human groups." *Relations Between the Convention on Genocide on the One Hand and the Formulation of the Nurnberg Principles and the Preparation of a Draft Code of Offences Against Peace and Security on the Other*; U.N. Secretariat, at 1, 6, U.N. Doc. E/AC.25/3 (1948) [hereinafter *Relations Between the Convention on Genocide*].

²⁸² *Id.* at 5.

[G]enocide is mass murder. It constitutes an act of extermination. It is therefore covered by . . . Article 6, paragraph (c) of the Charter of the international military Tribunal. If the crime of genocide is understood in the widest sense to include the destruction by brutal means of the specific characteristics of a human group, it is still covered by the terms of Article 6, paragraph (c) of the Charter of the International Military Tribunal which is concerned with "persecutions on political or racial or religious grounds.

Id.

genocide. This occurs "when one of the belligerents aims at exterminating the population of enemy territory and systematically destroys what are not genuine military objectives. Examples of this . . . [include] the massacre of the populations of occupied territory and their gradual extermination."²⁸³

Genocide thus is recongized as a crime against humanity which may occur during a time of peace as well as war. The Ninth Circuit Court of Appeals, in *Quinn v. Robinson*, observed that "[c]rimes against humanity, such as genocide, violate international law and constitute an 'abuse of sovereignty' because . . . they are carried out by or with the toleration of authorities of a state."²⁸⁴ The Court noted that crimes against humanity may also, but do not necessarily, constitute war crimes.²⁸⁵

B. *Draft Code on the Peace and Security of Mankind*

The United Nations General Assembly, in 1946, affirmed the "principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal."²⁸⁶ The General Assembly, on November 21, 1947, then voted "to entrust the formulation of the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal to the International Law Commission."²⁸⁷

Principle VI(c) adopted by the International Law Commission reiterated the Nuremberg provision on crimes against humanity.²⁸⁸ The International Law Commission noted that there were two categories of crimes against humanity: inhumane acts committed against any civilian population and persecution on political, racial or religious grounds. These acts constituted international crimes when undertaken in connection with either a war crime or a crime against peace. The Commission repeated the finding of the Nuremberg Tribunal that it had

²⁸³ Secretary-General's Comment, *supra* note 264, at 23.

²⁸⁴ *Quinn v. Robinson*, 783 F.2d 776, 799-800 (9th Cir. 1986).

²⁸⁵ *Id.* at 800.

²⁸⁶ U.N. G.A. Res. 95(I).

²⁸⁷ U.N. G.A. Res. 177(II).

²⁸⁸ U.N. GAOR Supp. (No. 12) Principle 6(c) at 11, 14 U.N. Doc. A/1316 (1950).

C. Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.

Id. at 14.

not been satisfactorily proven that the repression of Jews and the Nazi's political opponents in Germany prior to the war had been undertaken in execution of, or in connection with, a crime within the jurisdiction of the Tribunal.²⁸⁹ The Commission omitted the phrase "before or during the war" contained in Article 6(c) of the Charter of the Nuremberg Tribunal. The Commission stressed in its commentary that "such crimes may take place also before a war in connexion with crimes against peace."²⁹⁰ The Commission also explained that the language specifying that a crime against humanity may be committed against "any" civilian population meant "that these acts may be crimes against humanity even if they are committed by the perpetrator against his own population."²⁹¹

The report of the Sixth Committee endorsed the efforts of the International Law Commission. Some delegates opposed retaining the restriction that crimes against humanity only could be committed in connection with crimes against peace and war crimes. They asserted that this limitation pertained to the jurisdiction of the Nuremberg Tribunal and did not constitute a limitation on crimes against humanity. Crimes against humanity were distinguished by the fact that they were committed, sponsored or tolerated by governments; and therefore, could only be adequately prosecuted and punished at the international level. Genocide was an example of a crime against humanity which may be committed during periods of international peace. Other delegations insisted that the scope of crimes against humanity were limited by the Nuremberg Charter. They regretted, however, that the Commission did not specify in the text that crimes against humanity, if linked to a crime against peace, could be committed both before and during armed conflict.²⁹² The General Assembly, in Resolution 488(v) invited governments to comment on the formulation of the Nuremberg Principles.²⁹³

Resolution 177(II) of November 21, 1947 also instructed the International Law Commission to "prepare a draft code of offences

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² Report of the Sixth Committee, U.N.GAOR, 5th Sess., at Annexes 5, 9-10, U.N. Doc A/1639 (1950), *reprinted in* [1951] II Y.B. INT'L L. COMM'N 43, 55-56 U.N. Doc. A/CN.4/44 (1951) (comments by delegations to the 6th Committee).

²⁹³ G.A. Res. 488(V) U.N. Doc. A/1775 (1950). The International Law Commission was instructed to take account of these observations in formulating the draft code of offenses against the peace and security of mankind. *Id.*

against the peace and security of mankind, indicating clearly the place to be accorded to the [Nuremberg] principles . . .”²⁹⁴ The Commission refused to be restrained by the Nuremberg principles, declaring that if “one or more of the Nuremberg principles . . . should not be incorporated in the draft code, or, at least, not without some modifications, the Commission should not hesitate to act accordingly.”²⁹⁵

The crime of genocide and crimes against humanity initially were both encompassed as separate provisions within the same article. The definition of crimes against humanity shadowed the Nuremberg Charter. Mr. Spiropoulos noted that this broadly-based provision was unsatisfactory. The two offenses differed: genocide is not required to be undertaken during wartime, for, definitionally, it can occur during times of both war and peace; and genocide is aimed against groups whereas crimes against humanity are not necessarily directed at distinct collectivities. He noted that while genocide must be included within the draft code, the inclusion of crimes against humanity created concern. Mr. Spiropoulos concluded that “[p]erhaps it would be preferable to incorporate . . . only the crime of genocide, since governments might be very reluctant to accept the inclusion . . . of the crime against humanity as defined by the Nuremberg Charter.”²⁹⁶ The draft also punished conspiracy to commit crimes within the code, despite the recognition that the International Military Tribunal had interpreted the Nuremberg Charter to preclude punishment of such an inchoate crime.²⁹⁷ The General Assembly instructed the International Law Commission to consider governmental comments.²⁹⁸

The International Law Commission reconsidered the Rapporteur’s Draft and State Comments and reformulated the definition of crimes against humanity. Such offenses, in part, were defined as:

[i]nhuman acts committed by the authorities of a State or by private individuals against any civilian population, such as mass murder, or extermination or enslavement, or deportation, or persecutions on political, racial or religious grounds, when such acts are committed in execution of or in connexion with the offences defined [planning, preparation and

²⁹⁴ U.N. GA 177(II), *supra* note 287.

²⁹⁵ Report by J. Spiropoulos, Special Rapporteur, U.N. Doc. A/CN.4/25, *reprinted in* 1950(II) Y.B. INT’L L. COMM’N 253, 260 (1957).

²⁹⁶ *Id.* at 263.

²⁹⁷ *Id.* at 267.

²⁹⁸ G.A. Res. 488 (V), *supra* note 293.

waging of aggressive war, State terrorism, forceful annexation, war crimes].²⁹⁹

Genocide is included in a separate article.³⁰⁰ Crimes against humanity are required to be connected with various offenses, but the range of such acts is extended to state terrorism and the forceful annexation of territory. The reformulation also extends liability to private individuals, uses the term “mass murder,” and clarifies that the enumerated offenses are only illustrative.³⁰¹

This draft was again modified to prohibit persecution on “political, racial, religious or cultural grounds, when . . . committed in execution of or in connexion with other offences defined in this article.”³⁰² The Commission observed that acts committed on cultural grounds are no less harmful than those motivated by other forms of animus.³⁰³

The next draft added that “[i]nhuman acts” also could be committed on “social” grounds and that in order to be held liable, private individuals must act “at the instigation or with the toleration” of state authorities.³⁰⁴ There was no requirement that these acts must be connected with another crime under the code.³⁰⁵ The International Law Commission noted that this provision was broadened “so as to make the punishment of the acts enumerated . . . independent of whether or not they are committed in connexion with other offences defined in the draft code.”³⁰⁶ In addition, “in order not to characterize any inhuman act . . . by a private individual . . . an international crime, it was . . . necessary to provide that such an act constitutes an international crime only if committed by the private individual at the instigation or with the toleration of the authorities of a State.”³⁰⁷ The decision

²⁹⁹ Second Report by Mr. J. Spiropoulos, Draft Code Of Offences Against The Peace And Security Of Mankind, art. I(9) U.N. Doc. A/CN.4/44 (1951) *reprinted in* [1951] II Y.B. INT'L L. COMM'N, 43, 57, 59, U.N. Doc. 1858 (1951).

³⁰⁰ *Id.* art I(8), at 59.

³⁰¹ *See supra* text accompanying note 301.

³⁰² Draft Code Of Offences Against The Peace And Security Of Mankind, 6 I.L.R. Comm'n 2(10), at 10, 13 U.N. Doc. A/1858 (1951).

³⁰³ *Id.*

³⁰⁴ *Draft Code Of Offences Against The Peace And Security Of Mankind*, U.N. GAOR, 9th Sess., Supp. No. 9, at 9, U.N. Doc. A/12693 (1954). “Inhuman acts such as murder, extermination, enslavement, deportation or persecution, 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.” *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.* (referring to commentary).

³⁰⁷ *Id.*

to delete the requirement that acts must be committed in connection with another offense was adopted by a single vote. Some expressed satisfaction that acts comprising crimes against humanity were not required to be undertaken in connection with other offenses defined in the Code. Others objected that this would extend international jurisdiction into the domestic affairs of states.³⁰⁸

The Sixth Committee believed that it was premature to consider the draft code until the question of aggression had been considered.³⁰⁹ The General Assembly, in Resolution 898 of December 14, 1954, postponed consideration of the Draft Code of Offences Against the Peace and Security of Mankind until the definition of aggression had been resolved.³¹⁰

Crimes against humanity thus were severed from the Nuremberg principles. The Nuremberg Charter was seen as a set of principles which defined the legal jurisdiction of the International Military Tribunal. The Draft Code of Offences Against the Peace and Security of Mankind was considered a more expansive document which memorialized those offenses which posed a threat to the security and stability of the international community. There was general agreement that a crime against humanity entails an officially-sponsored, systematic and substantial atrocity committed against a civilian population during war or peace. There is no geographic requirement and the victims may be domestic or foreign nationals. The crimes became of international concern because the offenses affect large numbers of people and/or are relatively severe.³¹¹

C. *Non-Applicability of Statutory Limitations to Crimes Against Humanity*

The United Nations, in 1967, decided to give priority to the completion of a convention on the punishment of war crimes and crimes against humanity.³¹² One year later, the General Assembly adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. Article One provides that:

³⁰⁸ Summary Record of the Sixth Session, U.N. Doc. A/2807 (1954), *reprinted in* [1954] I.Y.B. INT'L L. COMM'N 129, 132-33 (267th mtg.).

³⁰⁹ Report of the Sixth Committee, U.N. GAOR, 9th Sess, Annexes 1,8, U.N. Doc. A/2807 (1954).

³¹⁰ G.A. Res. 897(IX), U.N. Doc. A/2890 (1954). *See also* G.A. Res. 1186 (XII), U.N. Doc. A/3805 (1957).

³¹¹ *See supra* notes 288-308 and accompanying text.

³¹² G.A. Res. 2338 (XXII), Supp. No. 16 at 281, U.N. Doc. A/6989, A/L.543 (1967).

[i]rrespective of the date of their commission . . . [n]o statutory limitation shall apply to war crimes . . . [and] [c]rimes against humanity whether committed in time of war or in time of peace . . . as defined in the Charter of the International Military Tribunal . . . [and to] eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid, and the crime of genocide . . . even if such acts do not constitute a violation of the domestic law of the country in which they were committed.³¹³

The main consideration of the Convention occurred in the Third Committee. The discussion centered on Article One. Mr. Gyarmati of Hungary explained that this agreement was urgently required to prevent states, such as Germany, from applying statutory limitations to war crimes and crimes against humanity. These limitations threatened to prevent the prosecution of Nazi war criminals as well as those who may commit these offenses in the future.³¹⁴ Mr. Paolini of France stated that the purpose was “to proclaim for the first time in an international instrument, that certain crimes were so serious that the international community could not allow them to be overlooked, and that their perpetrators would be duly punished.”³¹⁵

Greece proposed to limit crimes against humanity as well as genocide to the definition contained in the Nuremberg Charter. Another Greek amendment proposed to exclude domestic offenses from coverage under the Convention which had already been committed and whose prosecution was prohibited under existing statutes of limitations.³¹⁶ A Chilean draft also omitted apartheid and incorporated a phrase stating that the fact that an act constituting a crime against humanity was legal under domestic law did not insulate the act from

³¹³Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2391 (XXXIII), U.N. GAOR 23d Sess., Supp. No. 18, at 40, U.N. Doc. A/7342 (1968) [hereinafter Convention on Statutory Limitations].

If any of the crimes mentioned in article I is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission.

Id. For a legislative history, see Note by the Secretary-General, U.N. Doc. A/6813 (1967).

³¹⁴U.N. GAOR 6th Comm., 23d Sess., 1563rd plen. mtg. at 1, U.N. Doc. A/C.3/SR. 1563 (1970) (Mr. Gyarmati).

³¹⁵U.N. GAOR, 6th Comm., 23d Sess., 1565th mtg. at 2 (1970).

³¹⁶U.N. GAOR, 3d Comm., 23d Sess., 1563th mtg. at 3, (1968) (Mr. Stathatos).

liability.³¹⁷ The British objected to the phrase “inhuman acts resulting from the policy of apartheid.”³¹⁸ England proposed to reformulate Article One to provide that “[t]he present Convention shall apply to war crimes of a grave nature and to crimes against humanity as defined in international law.”³¹⁹

Mr. Paolini advocated the enumeration of an exhaustive list of offenses in order to avoid confounding those who may be called upon to interpret the treaty in the future. He objected to the inclusion of “eviction by armed attack or occupation” as well as the limitation of offenses to those committed “by or with the consent of the authorities of a State.”³²⁰ M. Cao-Pinna of Italy believed that thorough study was required prior to constructing a definition of crimes against humanity. A legal document which was to be incorporated into domestic legal systems “could not be approached primarily from a humanitarian standpoint.”³²¹ Mrs. Picker of the United States argued that the task of formulating a definition was best performed by eminent jurists—the Third Committee should limit itself to the application of a prohibition on a statute of limitations on crimes against humanity.³²² Mr. Amlie of Norway argued that the extension of the statute of limitations violated the principle of non-retroactivity. This could be cured by limiting the convention to grave offenses. Most importantly, the extension of the instrument to “new types of crimes against humanity . . . would weaken the force of the instrument.”³²³ Mrs. De Bromley, the Honduran delegate, opined that “no crime was exempt from statutory limitation and . . . no law had retroactive effect except in criminal matters when it introduced a change in favour of the accused[;]. . . an effort should be made . . . to condemn not the criminals but war itself.”³²⁴

Mr. Gyarmati of Hungary acknowledged the concern with retroactivity, “but believed that it was incumbent upon the countries concerned to take certain steps in view of the exceptional and particularly heinous nature of the crimes under consideration”³²⁵ Mr. Ekondy-

³¹⁷ U.N. GAOR 3d Comm., 23d Sess., 1563rd mtg. at 3 (1970) (Mr. Artaza).

³¹⁸ U.N. GAOR 3d Comm., 23d Sess., 1564th mtg. at 1 (1968) (Lady Gaitskell).

³¹⁹ *Id.*

³²⁰ U.N. GAOR 3d Comm., 23d Sess., 1565th mtg. at 1, 2 (1968) (Mr. Paolini). He noted the complication by introducing the phrase “eviction by armed attack or occupation and inhuman acts resulting from the policy of *apartheid*” *Id.*

³²¹ *Id.* at 4.

³²² U.N. GAOR 3d Comm., 23d Sess., 1565th mtg. at 2 (1970).

³²³ U.N. GAOR 6th Comm., 23d Sess. 1565th mtg. at 3 (1970). Norway proposed to omit the application of Article 1 to offenses “irrespective of the date of their commission.” *Id.*

³²⁴ U.N. GAOR 3d Comm., 23d Sess., 1568th mtg. at 3 (1968).

³²⁵ *See id.* at 4.

Akala of the Congo noted that it was “regrettable that some delegations were basing their position on purely legal grounds without taking sociological considerations into account.”³²⁶ Mr. Nasinovsky of the Union of Soviet Socialist Republics argued that international law prohibited the imposition of statutory limits on war crimes and crimes against humanity. The proposed document was aimed at those countries which were contravening international law by recognizing such constraints.³²⁷

Others challenged the legalistic desire to limit crimes against humanity to those offenses contained in the Nuremberg Charter while ignoring serious contemporary crimes such as apartheid.³²⁸ Mrs. Warzazi of Morocco pointed out that colonialism and apartheid were long-standing intransgressions. The law “was not immutable . . . and international law was subject to evolution. Allegations that certain principles contradicted . . . legal logic were . . . unfounded, and their sole purpose was to mask a lack of reforming zeal.”³²⁹

Mr. Kachurenko of the Ukrainian Soviet Socialist Republic argued that the non-applicability of statutory limitations to war crimes and crimes against humanity was essential if the guilty were to be punished. The deletion of apartheid and genocide would permit these crimes to be “committed with absolute impunity.”³³⁰ Mrs. Conde of Guinea “could not understand how delegations which condemned . . . the nazis . . . could at the same time defend the neo-nazi regime in South Africa, and . . . appealed to the conscience of those who . . . suffered oppression . . . for the retention of . . . Article 1 [sic].”³³¹ Mrs. Ould Daddah of Mauritania pointed out that apartheid was “a cancer ravaging the African continent, an outrage . . . a threat to peace, and an indisputable crime against humanity.”³³² Mr. Kiti of Kenya argued that the existing international definition of crimes against humanity reflected the past experience of developed countries. Apartheid “was one of the gravest crimes against humanity . . . and it would render the draft convention meaningless if the words ‘including inhumane acts resulting from the policy of apartheid were omitted.’”³³³ Mr. Waldron-Ramsey of Tanzania noted that the prosecution of Nazi war criminals

³²⁶ U.N. GAOR, 3d Comm., 23d Sess., 1571st mtg. at 4 (1968).

³²⁷ *See id.* at 5. The Secretary-General concluded that international law did not recognize a limitation since no such constraint was contained in any international instrument. *See id.* at 4 (Mr. Stavropoulos, Legal Counsel).

³²⁸ U.N. GAOR 6th Comm., 23d Sess., 1565th mtg. at 3 (1970) (Mr. Afnan, Iraq).

³²⁹ *See id.*

³³⁰ *See id.*

³³¹ *See id.* at 4.

³³² *See id.*

³³³ U.N. GAOR 3d Comm., 23d Sess., 1566th mtg. at 1 (1970).

currently concerned the countries of Europe more than those in Africa and Asia, and that the Convention should address the present problem of apartheid in Africa as well as the past events in Europe.³³⁴

Mr. Paolini of France, following the adoption of Article One,³³⁵ proclaimed that the original purpose of the Convention was "the drafting of a legal instrument [, and this] had been confused with moral and condemnation of a despicable practice . . . [T]he remainder of the document was no longer of . . . interest to his delegation . . ."³³⁶ He opined that the text "created new and dangerously vague offences, termed 'crimes against humanity,' and confused the drafting of a legal instrument which would have serious consequences in the penal field with the enunciation of a political doctrine."³³⁷ Others reiterated that the Convention contravened the principle of non-retroactivity.³³⁸ Mr. Kiti of Kenya argued that the abrogation of this principle could only be justified in the case of serious offenses.³³⁹

The General Assembly, in 1973, formalized the status of apartheid as a crime against humanity in the International Convention on the Suppression and Punishment of the Crime of Apartheid. Article One declared that apartheid is a "crime against humanity."³⁴⁰ Acts of apartheid are proclaimed as "crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations . . . constituting a serious threat to international peace and security."³⁴¹

Only Mr. Wiggins of the United States objected to apartheid's classification as a crime against humanity. Mr. Wiggins explained that

³³⁴ U.N. GAOR 3d Comm., 23d Sess., 1568th mtg. at 2 (1968).

³³⁵ *See id.* at 5-6.

³³⁶ U.N. GAOR 3d Comm., 23d Sess., 1569th mtg. at 2 (1968). Mr. Stathatos of Greece raised the question whether the statute of limitations would be extended under domestic law on offenses in those instances in which the statute of limitations had expired. *See id.* at 2.

³³⁷ U.N. GAOR 3d Comm., 23d Sess., 1573th mtg. at 3 (1968). Mr. Saint-Remy of Belgium noted that his delegation could not accept the inclusion within crimes against humanity of "essentially political acts which were not regarded as offences by Belgian legislation." U.N. GAOR, 3d Comm., 23d Sess., 1573th mtg. at 3 (1968).

³³⁸ U.N. GAOR 3d Comm., 23d mtg., 1573d mtg. at 4-5 (1968) (Mr. Cuesta, Ecuador; Mrs. De Catarossi, Uruguay; Mr. Siri, El Salvador). Various Islamic delegations relied on the language condemning apartheid to attack Israel. *See* U.N. GAOR 3d Comm., 23d mtg., 1573 mtg. at 3 (1968) (Mr. Babaa Libya; Mr. El-Fattal, Syria).

³³⁹ U.N. GAOR 3d Comm. 23d Sess, 1573d mtg. at 5 (1968).

³⁴⁰ International Convention On The Suppresson And Punishment Of The Crime Of Apartheid, G.A. Res. 3068 (XXVIII), 28 U.N. GAOR, Supp. No. 30 at 75, U.N. Doc. A/9030 (1974) [hereinafter Apartheid Convention].

³⁴¹ *Id.*

“[s]uch crimes were so grave that, at the current stage, their legal definition must be very strictly construed.”³⁴² Mr. Kabinga of Zambia observed that it was necessary to make “international law more progressive, and found it regrettable that it was not possible to relate legal norms to justice. . . . [T]here was a marked parallel between nazism and apartheid, and it was surprising to find one Power affirming that, legally, apartheid was not a crime against humanity. He did not believe that legality could be divorced from reality.”³⁴³ Miss Cao Pinna of Italy observed that the Convention’s characterizat on of apartheid as a crime against humanity and as a serious threat to internatonal peace and security had unnecessarily broadened the “limited meaning of the term ‘crime against humanity.’”³⁴⁴ The Special Rapporteur on Genocide, in 1978, noted that aspects of apartheid constituted genocide, lending support to the characterization of apartheid as a crime against humanity.³⁴⁵

In sum, the General Assembly’s decision to prohibit statutory limits on the prosecution of crimes against humanity clearly indicated that crimes against humanity are of multinational concern. A State’s exercise of jurisdiction over such offenses is constrained by considerations of international law. Thus, “[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *ergo omnes*.”³⁴⁶

The Apartheid Convention also extended the Nuremberg concept of crimes against humanity and affirmed that such acts could occur in time of peace as well as war. This expansion of crimes against humanity reflected the political interest and power of developing countries. Nonetheless, the expansion indicates the international community’s determination to insure that the concept of crimes against humanity retains contemporary relevance.³⁴⁷

The international interest in punishing crimes against humanity also was recognized by the application of universal jurisdiction over crimes against humanity. This extension of jurisdiction was based on the belief that the prosecution and punishment of such severe delicts

³⁴² U.N. GAOR 3d Comm., 28th Sess., 2007th mtg. at 160 (1970).

³⁴³ U.N. GAOR 3d Comm., 28th Sess., 2007 mtg., at 161 (1973).

³⁴⁴ U.N. GAOR 3d Comm., 28th Sess., 2008th mtg., at 167 (1973).

³⁴⁵ See Study of Prevention and Punishment of Genocide, *supra* note 286, at 107–10.

³⁴⁶ *Barcelona Traction, Light and Power Company (Belg. v. Spain)*, 1970 I.C.J. 4, 32 (Feb. 5) (discussing the Genocide Convention).

³⁴⁷ See *supra* notes 340–45.

should not depend upon the domestic politics and principle of a single nation-state.

IV. UNIVERSAL JURISDICTION

A. *Post-World War II War Crimes Trials And Universal Jurisdiction*

The jurisdiction of the International Military Tribunal was based on the Nuremberg Charter. The Nuremberg Tribunal ruled that the Charter was an exercise of sovereign legislative power by the Allied Powers to whom the Reich had unconditionally surrendered. The right of the Allies to legislate for occupied Germany had been recognized by the civilized world. As a result, the Charter was not an exercise of arbitrary power—it was an expression of existing international law.³⁴⁸

The Tribunal noted in confusing and controversial dicta that in creating the Nuremberg Tribunal that the Signatory Powers “have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.”³⁴⁹ The Secretary-General observed that this statement suggested that the Tribunal was recognizing universal jurisdiction over the Nuremberg crimes, and stated “[i]t is possible and . . . probable that the Court considered the crimes under the Charter to be, as international crimes, subject to the jurisdiction of every State.”³⁵⁰

The American tribunals which presided over prosecutions under Control Council Law No. 10 based their jurisdiction on the right of the “occupying powers . . . to set up special courts to try those charged with the commission of war crimes as they are defined by international law.”³⁵¹ The Tribunal in *The Hostage Case* adopted a slightly more expansive view and opined that there is concurrent jurisdiction during and subsequent to the termination of conflict in both the country where a serious war crime was committed and in the belligerent country which has custody over the accused. The rationale offered was that “war is usually followed by political repercussions and upheavals which

³⁴⁸ *Nuremberg Judgment*, *supra* note 79, at 461.

³⁴⁹ *Id.*

³⁵⁰ SECRETARY-GENERAL, THE CHARTER AND JUDGMENT OF THE NUREMBERG TRIBUNAL HISTORY AND ANALYSIS 80 (1949) [hereinafter *The Charter and Judgment*].

³⁵¹ *United States v. Wilhelm List*, reprinted in XI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW NO. 10 1230, 1242 (1950) [hereinafter *Hostage Judgment*].

at times place persons in power who are not, for one reason or another, inclined to punish the offenders."³⁵² The *Einsatzgruppen* panel also invoked the Allied Powers' condominium control over Germany.³⁵³ The Tribunal, in dicta, hinted at a universal basis for the trial: "They [the defendants] are being tried because they are accused of having offended against society itself, and society, as represented by international law, has summoned them for explanation. . . . It is the essence of criminal justice that the offended community inquires into the offense involved."³⁵⁴

Several national war crimes tribunals, in part, explicitly invoked universal jurisdiction. A British military court based its prosecution of the German executives, who supplied the Zyklon Gas used in the death camps, on the universal prerogative to prosecute pirates and war criminals. The Court lacked either a territorial or national basis for jurisdiction—the panel noted that the victims at Auschwitz and Birkenau were German deportees, Jews and Gypsies from Belgium, Holland, France, Italy, Czechoslovakia and Poland.³⁵⁵ Another British military tribunal relied on universal jurisdiction, along with the nationality principle and prerogative of an occupying power, to prosecute Dutch police responsible for the arbitrary execution of British prisoners of war and Dutch civilians.³⁵⁶

An American war crimes tribunal prosecuted and convicted German diplomatic officials stationed in China who continued to assist the Japanese following the German surrender. The tribunal ruled that the "laws and usages of war are of universal application and do not depend for their existence upon national laws and frontiers."³⁵⁷ Another United States military tribunal invoked the universal principle to convict the staff members of a small sanatorium in Hadamar, Germany who delib-

³⁵² *Id.* at 1241–42.

³⁵³ *Einsatzgruppen Judgment*, *supra* note 214, at 454.

³⁵⁴ *Id.* at 462. *The Justice Judgment*, *supra* note 184 (distinguishing between the universal nature of the law and customs of war and the enforcement mechanisms which are constrained by the practicalities of national sovereignty). The Tribunal noted that this distinction between substance and procedure explains the failure to prosecute Allied violations of the humanitarian law of war. *Id.* at 370–71.

³⁵⁵ The Zyklon B Case (Trial Of Bruno Tesch And Two Others), (Brit. Milit. Ct., Hamburg, 1st-8th March, 1946) 1 I.L.R. 93, 96, 103 (U.N. War Crimes Comm'n, Brit. Milit. Ct., Hamburg, 1946).

³⁵⁶ The Almelo Trial, 1 I.L.R. 35, 42 (U.N. War Crimes Comm'n, Brit. Milit. Ct., Alemlo, Holland, 1947).

³⁵⁷ Trial Of Lothar Eisentrager And Others, XIV I.L.R. 8, 15 (U.N. War Crimes Comm'n, U.S. Milit. Ct., Shansai, China 1947).

erately killed over four hundred Polish and Soviet nationals by injections of poisonous drugs.³⁵⁸

These were isolated judgments which failed to fully discuss or develop the scope of universal jurisdiction. The Israeli Supreme Court more fully elaborated upon the universal basis of jurisdiction in the *Eichmann* judgment.

B. *The Trial Of Adolf Eichmann*

Adolf Eichmann was charged and convicted before an Israeli district court in 1961 with crimes against the Jewish people, crimes against humanity, war crimes and membership in a criminal organization during the period of the Nazi regime. Eichmann served as Head of Jewish Affairs in the Office for Reich Security and was central in the persecution, deportation and extermination of Jews, Gypsies and Slavs.³⁵⁹ The Israeli Supreme Court, in affirming the judgment of the district court, concluded that "it has been proved with unchallengeable certainty that he [Eichmann] took his place not only among those who were active in, but also those who activated the implementation of the 'Final Solution,' the total extermination of the Jews of Europe. The appellant was no petty killer in this undertaking, but took a leading part and had a central and decisive role."³⁶⁰ Eichmann "acted independently and . . . exceeded the duties imposed on him through the . . . channels of the official chain of command."³⁶¹

He was charged under the Nazi and Nazi Collaborators (Punishment) Law which incorporated the crimes against humanity provision of the Nuremberg Charter as well as a section sanctioning genocide, entitled Crimes Against the Jewish People. Crimes against the Jewish People which "constitutes the crime of 'genocide,' is nothing but the gravest type of 'crime against humanity' . . . all that has been said in the Nuremberg principles about 'crimes against humanity' applies *a fortiori* to 'crime against the Jewish people.'"³⁶²

³⁵⁸ The Hadamar Trial (Trial Of Alfons Klein And Six Others) I I.L.R. 46, 53 (U.S. Milit. Ct., Wiesbaden, Germany 1945).

³⁵⁹ Attorney-General Of The Government Of Israel v. Adolf Eichmann, 36 I.L.R. 18, 102-03, 273-76 (Israel, District Court of Jerusalem 1961) [hereinafter *District Court Judgment*]. See also Attorney-General of the Government of Israel v. Adolf Eichmann, 36 I.L.R. 277 (Sup. Ct. 1962) (Israel) [hereinafter *Supreme Court Judgment*].

³⁶⁰ *Supreme Court Judgment*, *supra* note 359, at 340.

³⁶¹ *Id.* at 313.

³⁶² *District Court Judgment*, *supra* note 359, at 41. For the provisions of the Nazis and Nazi Collaborators, see *id.* at 20, 30-31.

Eichmann's criminal activity was concentrated on the period subsequent to the invasion of Austria. The Supreme Court observed that it was not necessary to determine whether its jurisdiction over crimes against humanity extended to acts prior to the German invasion of Austria. The Court noted that, in distinction to war crimes, crimes against humanity were limited to delicts against civilians. This was of little relevance in Eichmann's case—the crimes against the Jewish people and crimes against humanity with which he was charged were all directed against the civilian population of the occupied territories and also constituted war crimes.³⁶³

The Israeli Supreme Court ruled that these Nuremberg delicts had ripened into customary crimes under international law at the time of the Nazi barbarities.³⁶⁴ The International Military Tribunal's jurisdiction over acts by the Reich against German citizens did not constitute a retroactive application of the law or an excessive interference with the domestic jurisdiction of Germany. Instead, this development was anticipated in the Martens Clause of the Hague Convention of 1907. Extending this clause to citizens as well as aliens could hardly be characterized as unanticipated and unfair—mass murder is a well-established crime under both domestic and international law.³⁶⁵ The criminal nature of such acts was affirmed in the Nuremberg judgment and in United Nations resolutions. The impact of such barbarities also rises to the level of multinational concern since “such acts can undermine the foundations of the international community as a whole and impair its very stability.”³⁶⁶ The Israeli legislation of 1950 was not a

³⁶³ *Supreme Court Judgment*, *supra* note 359, at 288–89. The Supreme Court thus noted that the central charges were closely connected and could be conveniently categorized and discussed under the category of crimes against humanity. *Id.* at 289. The District Court ruled that the Nuremberg Charter did not “limit the substantive nature of a ‘crime against humanity’ under international law, but has only limited the jurisdiction of the Nuremberg Tribunal to try crimes of this kind which are bound up with ‘war crimes’ or ‘crimes against peace.’” *District Court Judgment*, *supra* note 359, at 49. The definition of crimes against humanity in the Israeli law did not require a connection between crimes against humanity and other Nuremberg offenses. *Id.* at 30–31.

³⁶⁴ See *District Court Judgment*, *supra* note 359, at 294–95. International crimes include the following features: they damage vital international interests; impair the foundations and security of the international community; and violate the universal moral values and humanitarian principles that are implicit in the criminal law codes of civilized States. *Id.* 291–92.

³⁶⁵ *Id.* at 295.

³⁶⁶ *Id.* at 296. The Court cited the humanitarian concern of the international community in the nineteenth and twentieth centuries. *Id.*

retroactive enactment, but was “one by which the Knesset gave effect to [existing] international law and its objectives.”³⁶⁷

The Supreme Court argued that the international condemnation and calamitous character and consequences of crimes against humanity justifies the exercise of universal jurisdiction. This principle, which historically was limited to piracy, vests every State with the sovereign authority to prosecute the perpetrators of such atrocities, regardless of the place or persons involved in the offense.³⁶⁸ The State, in such instances, acts as the “organ and agent of the international community and metes out punishment to the offender for his breach of the prohibition imposed by the law of nations.”³⁶⁹

Israel was not required to extradite Eichmann to Germany—the central situs of his criminal activity—prior to asserting jurisdiction. Germany expressed no interest in prosecution. Unfortunately extradition was based on procedural convenience because in this instance, the bulk of the documents and witnesses were in Israel.³⁷⁰ Other countries with subject-matter jurisdiction also failed to express an interest in prosecution. Further, the “crimes in question and their effects have extended to numerous countries [and this] drains the territorial principle of all content . . . and justifies Israel in assuming criminal jurisdiction . . . [f]or Israel to decide to which particular country the appellant should be extradited would have meant a completely arbitrary choice.”³⁷¹

³⁶⁷ *District Court Judgment, supra* note 359, at 297. Crimes against humanity “must be seen . . . as acts that have always been forbidden by customary international law—acts which are of a ‘universal’ criminal character and entail individual criminal responsibility.” *Id.*

³⁶⁸ *Id.* at 299.

³⁶⁹ *Id.* at 300.

³⁷⁰ *Id.* at 302–03.

³⁷¹ *District Court Judgment, supra* note 359, at 303.

Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant. That being the case, no importance attaches to the fact that the State of Israel did not exist when the offences were committed . . .

Id. at 304.

The District Court supported the view that genocide was an international crime carrying universal jurisdiction by pointing to the advisory opinion of the International Court of Justice. *See* Reservations to the Convention on Genocide, 1951 I.C.J. 15, 23 *quoted in District Court Judgment, supra* note 359, at 33–34 [hereinafter Genocide Convention].

Other domestic courts affirmed the assertion of universal jurisdiction over crimes against humanity. The Special Criminal Court of Amsterdam affirmed Dutch jurisdiction over three former Nazi officials who had been involved in the mistreatment and death of deported Dutch laborers. The Court noted that those charged with crimes against humanity may be prosecuted by any State with custody over the accused. This rule:

[h]as the same universality as that . . . which treats pirates as enemies of mankind. American tribunals . . . have . . . [been] guided by the same principle. . . . [T]he system . . . of abducting large groups of the population . . . for slave labour . . . and . . . subjecting them . . . to an inhumane regime, is a crime which is . . . of concern to the whole of mankind.³⁷²

The Special Court of Cassation, in affirming this judgment, also adopted an expansive view. The Court of Cassation noted that war crime prosecutions generally were guided by territorial jurisdiction. Such prosecutions, however, also may proceed on the basis of the nationality of the victim or the protection of national interests.³⁷³

The United States District Court in *Demjanjuk v. Petrovsky* observed that “[t]he principle that the perpetrators of crimes against humanity and war crimes are subject to universal jurisdiction found acceptance in the aftermath of World War II.”³⁷⁴ The Sixth Circuit Court of Appeals, in affirming the ruling in *Demjanjuk*, noted that the wartime allies created the International Military Tribunal at Nuremberg and courts within the various occupation zones. It was “generally agreed that the establishment of these tribunals and their proceedings were based on universal jurisdiction.”³⁷⁵ Under this jurisdictional premise, “neither the nationality of the accused or the victim(s), nor the location of the crime is significant. The underlying assumption is that the crimes are offenses against the law of nations or against humanity and that the prosecuting nation is acting for all nations.”³⁷⁶

³⁷² *In re Rohrig*, Brunner and Heinze, 17 I.L.R. 393, 395 (1956) (Holland, Special Crim. Ct., Amsterdam, 1949).

³⁷³ *See id.* at 397 (Holland, Special Ct. of Cassation, May 15, 1950).

³⁷⁴ *Demjanjuk v. Petrovsky*, 612 F. Supp. 544, 556 (D.C. Ohio 1985), *aff'd*, 776 F.2d 571 (6th Cir. 1985) *cert. denied*, 475 U.S. 1016 (1986).

³⁷⁵ 776 F.2d at 582.

³⁷⁶ *Id.* at 583.

Article VI of the Genocide Convention seemingly recognizes the territorial principle of jurisdiction.³⁷⁷ Professor Kenneth C. Randall explains that “the requirement that the parties must prosecute genocide only under the territoriality principle does not mean that they have deprived themselves of the customary *right* to exercise universal jurisdiction over the same acts. Nothing suggests that the parties intended such a deprivation of their customary rights.”³⁷⁸

Subsequent instruments provide for modified versions of universal jurisdiction. Article V of the Apartheid Convention provides that persons charged with such acts “may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction with respect to those State Parties which shall have accepted its jurisdiction.”³⁷⁹ Article VII of the Convention Against Torture states that each State Party shall prosecute offenders who are not extradited to States with territorial, national and passive personality jurisdiction.³⁸⁰ Similar provisions are included in the diplomatic,³⁸¹ hostage³⁸² and hijacking conventions.³⁸³ States that are party to the Geneva Conventions of 1949 are under an “obligation to search for persons alleged to have committed . . . grave breaches” or:

[h]and such persons over for trial to another High Contracting Party. . . . [G]rave breaches . . . shall be those involving . . . willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health and extensive

³⁷⁷ Genocide Convention, *supra* note 371, at art. VI. “Persons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction.” *Id.*

³⁷⁸ Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 836 (1988).

³⁷⁹ Apartheid Convention, *supra* note 340, at art. V.

³⁸⁰ Convention Against Torture And Other Cruel Inhumane Or Degrading Treatment Or Punishment, 1984 Y.B.U.N. 813, U.N. Doc. A 1391708.

³⁸¹ Convention On The Prevention And Punishment Of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, G.A. Res. 3166, U.N. GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9030 (1973), 28 U.S.T. 1975.

³⁸² International Convention Against The Taking Of Hostages, June 4, 1983, art. 8, G.A. Res. 34/146 (XXXIV), 34 U.N. GAOR, Supp. (No. 46) 245, U.N. Doc. A/34/786 (1979).

³⁸³ Convention For The Suppression Of Unlawful Seizure Of Aircraft, Dec. 16, 1970, art. 7, 22 U.S.T. 1641, T.I.A.S. 7192, 860 U.N.T.S. 105 (1971); Convention For The Suppression Of Unlawful Acts Against The Safety Of Civilian Aviation, Sept. 23, 1971, art.7, 24 U.S.T. 564, T.I.A.S. 7570 (1970).

destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.³⁸⁴

Randall concludes that the virtually unanimous adoption of these conventions by international organizations represents:

[t]he legitimization of any state's right to prosecute those who commit the proscribed offenses. . . . [J]ust as every state for hundreds of years has had the right to . . . punish piratical acts . . . every state today may have an implied right . . . to define and punish hijacking, hostage taking, crimes against internationally protected persons, apartheid, and torture.³⁸⁵

C. *Regina v. Finta*

In *Regina v. Finta*, the Canadian High Court of Justice upheld the extension of federal jurisdiction over war crimes and crimes against humanity.³⁸⁶ The Canadian statute asserts jurisdiction over individuals seized within Canada who have committed an act or omission outside the country which constitutes a war crime or a crime against humanity. The statute specifies that such acts shall be deemed to have been committed within Canada.³⁸⁷

This was intended to permit Canada to prosecute those responsible for extraterritorial offenses.³⁸⁸ Under the statute, a crime against humanity under the statute must be directed against a civilian population or identifiable group. Such offenses, unlike ordinary crimes, are of "direct concern to the international community and may be prose-

³⁸⁴ Convention For The Amelioration Of The Condition Of Wounded And Sick In Armed Forces In The Field, Aug. 12, 1949, art. 50-51, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 (1949); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces At Sea, Aug. 12, 1949, art. 50-51, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 (1949); Convention Relative To The Treatment Of Prisoners Of War, Aug. 12, 1949, art. 129-130, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (1949); Convention Relative To The Protection Of Civilian Persons In Time Of War, Aug. 12, 1949, art. 146-47, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (1949).

³⁸⁵ See Randall, *supra* note 378, at 826-27. Two questions arise: 1) Is universal jurisdiction based on the conventions or the custom and usage of States? 2) Is the authority to exercise universal jurisdiction over such offenses only binding on Signatory Parties? See *generally id.* at 823-28.

³⁸⁶ *Regina v. Finta*, 1 R.C.S. 701 (1994).

³⁸⁷ *Id.* at 740. Defendant Irma Finta was a captain in the Hungarian Gendarmerie which was under the command of the German Security Service. See *id.* He was charged with involvement in the ghettoization and deportation of Jews to death camps as well as with the confiscation of their property. See *id.* at 724-26.

³⁸⁸ *Id.* at 741, 743, 747.

cuted wherever the alleged offender may be found.”³⁸⁹ The government where the delict occurs also may be reluctant to prosecute offenders and may have been the catalyst for the crime. International law permits other States to assume jurisdiction in order to compensate for this constraint.³⁹⁰

The High Court noted that murder is abhorrent. However, the interests of comity and respect for the sovereignty of other States ordinarily militates against extraterritorial jurisdiction. This limitation also reflects the efficiency and efficacy of prosecuting offenders in the territory in which the crime occurred.³⁹¹ The international community, in the case of crimes against humanity, “does not object to our exercising jurisdiction . . . it actively encourages the prosecution of those whose criminal conduct also constitutes war crimes or crimes against humanity.”³⁹²

The High Court ruled that the trial judge had erroneously instructed the jury that the mental element of a crime against humanity required an awareness of each and every element of the offense. The prosecution, under this ruling, was required to demonstrate that a defendant possessed knowledge that their act constituted a crime against humanity—an inhumane act directed against a civilian population or identifiable group in connection with an aggressive war or war crime.³⁹³ The majority rejected this as “far too high a standard,” ruling that the prosecution only was required to establish the traditional elements of individual liability.³⁹⁴ The factual predicates for a crime against humanity, pertained to the justification for international jurisdiction and did not constitute a mental element of the offense.³⁹⁵ An accused, for instance, was not required to possess knowledge that his or her act was inhumane. It was sufficient that the defendant intentionally and vol-

³⁸⁹ *Id.* at 752.

“[C]rime against humanity” means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognized by the community of nations.

Canadian Criminal Code s. 7(3.76), *quoted in* Regina v. Finta, 1 R.C.S. at 812.

³⁹⁰ *Id.* at 752.

³⁹¹ *Id.* at 770.

³⁹² *Id.* at 772.

³⁹³ Regina v. Finta, I.R.C.S. at 754–55.

³⁹⁴ *Id.* at 756.

³⁹⁵ *Id.*

untarily committed the act: "If an accused knowingly confines elderly people in close quarters within boxcars with little provision for a long train ride, then the fact that the accused subjectively did not consider this inhumane should be irrelevant."³⁹⁶

The prosecution is only required to demonstrate that the defendant satisfies the normal intent or recklessness requirement in relation to the charged act or omission. There is no requirement that a defendant comprehend the requirements of international law.

Piracy or slavery would be contrary to international law as long as the accused had preyed on ships or traded in slaves, regardless of whether the pirates or slavedealers were aware of how their conduct was classified under international law. In the international realm as much as the domestic, blameworthiness in criminal law does not consist of knowingly snubbing the law, but rather in deliberately engaging in certain types of conduct that international law prohibits.³⁹⁷

The High Court also determined that the criminalization of crimes against humanity did not constitute retroactive punishment. The statute required that at the time that a defendant committed the criminal act, with which he or she was charged, that it constituted a crime against humanity according to customary or conventional international law or the general principles of law recognized by the community of nations.³⁹⁸ The Court observed that the acts constituting crimes against humanity were prohibited by virtually all civilized countries prior to 1945.³⁹⁹

³⁹⁶ *Id.* at 758.

³⁹⁷ *Id.* at 763.

[I]n almost all if not every case, I think that our domestic definition of the underlying offence will capture the requisite *mens rea* for the . . . crime against humanity. . . . Thus, the accused need not have known that his act, if it constitutes manslaughter or forcible confinement, amounted to an 'inhumane act' either in the legal or moral sense. One who intentionally or knowingly commits manslaughter or kidnapping would have demonstrated the mental culpability required for an inhumane act. *Id.* at 765.

A defendant is authorized to invoke any defense, excuse or justification available under the laws of Canada or international law. *See id.* But, the fact that an individual acted in conformity with domestic law is not recognized as a defense. *See id.* The latter prevents a regime from passing a statute which insulates individuals from criminal culpability. *See id.* at 776-77, 781. Superior orders provides a defense "unless the act is so outrageous as to be manifestly unlawful. *See id.* Further . . . an accused will not be convicted of any act committed pursuant to an order wherein he or she had no moral choice but to obey." *Id.* at 778.

³⁹⁸ *Id.* at 782.

³⁹⁹ *Id.* at 783-84. The Court recognized that there was no comprehensive codification of

Accordingly, the Canadian High Court in *Finta* ruled that Canada was authorized under international law to exercise extraterritorial jurisdiction over crimes against humanity. The Court clarified the intent requirement and affirmed that crimes against humanity had constituted criminal conduct prior to 1945.⁴⁰⁰

The High Court of Australia upheld the extension of extraterritorial jurisdiction over war crimes and crimes against humanity committed during World War II in *Plyukhovic*.⁴⁰¹ The panel based their opinions upon parliament's plenary power over external affairs, while only three opinions addressed international law concerns. Justice Dean noted that there was no need to address whether genocide or crimes against humanity constituted offences under customary international law: "the wrongful nature of the conduct would . . . have been . . . evident . . . [this] simply could not, in any civilized community, have been described as innocent or blameless conduct merely because of the absence of proscription by law."⁴⁰² Justice Toohey added that there was general consensus that war crimes and crimes against humanity were subject to universal jurisdiction. This reflected the delicts' heinous moral and physical magnitude.⁴⁰³ He observed that there was a consciousness prior to 1939 that acts which offended fundamental human rights constituted crimes against humanity. The character and scope of this category of crime, however, had remained unclear until their codification following World War II.⁴⁰⁴

Justice Toohey noted that the Control Council Law No. 10 trials were based on the Allied Powers' assumption of sovereign jurisdiction over Germany. In contrast, the Nuremberg Tribunal was exercising international jurisdiction. Thus, the latter was a better reflection of the international consensus as to the character of crimes against humanity at the time of the initiation of World War II. The Nuremberg standard indicated that crimes against humanity did not emerge as an independent offense prior to 1945. As a result, Justice Toohey approved the extension of Australia's extraterritorial jurisdiction over crimes

international law. *See id.* But, the common law methodology had equipped the Court to examine disparate sources in determining legal principles. *See id.* at 785.

⁴⁰⁰ *See supra* notes 386-99 and accompanying text.

⁴⁰¹ *Polyukhovich v Commonwealth of Australia*, 91 I.L.R. 3 (1993) (Australia, High Court, 1991). Polyukhovich was alleged to have committed war crimes while serving in a German unit in the Ukraine. *Id.* at 7.

⁴⁰² *Id.* at 65, 105.

⁴⁰³ *Id.* at 111, 121.

⁴⁰⁴ *Id.* at 131.

against civilians “only if it was proved that the conduct was itself a war crime or was done in execution of or in connection with a war crime.”⁴⁰⁵

The international interest in punishing crimes against humanity also resulted in the recognition that such delicts did not constitute non-extraditable political offenses.

V. EXTRADITION

The Declaration on German Atrocities issued by the Allied Powers on October 30, 1943, proclaimed that accused German war criminals “will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished. . . . [M]ajor criminals, whose offenses have no particular geographical localization . . . will be punished by the joint decision of the Governments of the Allies.”⁴⁰⁶ Various countries adjudged these individuals to be political offenders and refused extradition.⁴⁰⁷

Professor Garcia-Mora, writing in 1964, challenged the view that these were political offenders. He argued that the suffering caused by such acts was disproportionate to any political aspiration and were violative of the humanitarian basis of international law. He also pointed out that such atrocities resembled common crimes in that they typically were motivated by animis rather than altruism. A reasonable person inevitably must be aware of the criminal character of such conduct.⁴⁰⁸ Garcia-Mora concluded “barbarity and atrocity which . . . accompany the commission of crimes against humanity weigh so heavily upon the common crime element that any political motivation completely disappears . . . [thus] the surrender of the offender is the only rational course of action.”⁴⁰⁹

The United Nations, in Resolution 3(I) in 1946, recommended that Member States and neutral nations adopt all necessary measures

⁴⁰⁵ *Id.* Justice Brennan, in dissent, disputed the status of genocide and crimes against humanity as international crimes at the time of World War II. *See id.* He argued that genocide was not established as a delict until 1948 and that the status of crimes against humanity was uncertain. *See id.* The Australian statute consequently constituted a retroactive application of the law. *See id.* at 21, 61.

⁴⁰⁶ Declaration on German Atrocities, Nov. 1, 1943, 3 *Benans* 816, 834 *Dep't St. Bull.* (Nov. 6, 1943), at 310-11.

⁴⁰⁷ *See* L.C. Green, *Political Offences, War Crimes And Extradition*, 11 *INT'L & COMP. L. Q.* 329, 342, 347-48 (1962). *See generally* Robert G. Neumann, *Neutral States And The Extradition Of War Criminals*, 45 *AM. J. INT'L L.* 495 (1991).

⁴⁰⁸ Manuel R. Garcia-Mora, *Crimes Against Humanity And The Principle Of Nonextradition Of Political Offenders*, 62 *MICH. L. REV.* 927, 944-53 (1964).

⁴⁰⁹ *Id.* at 947.

to arrest those responsible for crimes against humanity, crimes against peace, and war crimes. These individuals were to be sent back to the site of their serious crimes.⁴¹⁰ In 1970, the United Nations drew attention to the fact that many war criminals and persons who have committed crimes against humanity were continuing to take refuge and enjoy protection in the territories of certain States.

The General Assembly called upon all States to arrest these individuals and extradite them to the countries in which they committed war crimes and crimes against humanity. States also were requested to co-operate in the collection and exchange of information which may contribute to the detection, arrest, extradition, trial, and punishment of persons guilty of war crimes and crimes against humanity.⁴¹¹ Finally, in Resolution 3074 (XXVIII) of December 3, 1975, the United Nations General Assembly declared that persons suspected of war crimes and crimes against humanity shall be subject to tracing, arrest, trial, and if found guilty, to punishment. Individuals ordinarily shall be subject to trial in the territories in which such offenses were committed. The United Nations, however, recognized that States possess the right to prosecute their own nationals for war crimes or crimes against humanity. States were charged with the duty to assist in detecting, arresting, bringing to trial, and punishing persons convicted of crimes against humanity and war crimes.⁴¹²

In 1951, the Federal Republic of Yugoslavia requested the United States to arrest and extradite Andrija Artukovic. Artukovic had served as Minister of Interior in the rump, the pro-Nazi Croatian government of Ante Pavelic, and was charged with ordering the extermination of as many as 200,000 persons.⁴¹³ The District Court noted, in dicta, that Artukovic's alleged delicts were political offenses and that this was a

⁴¹⁰ U.N.G.A. Res. 3(I) (1946).

⁴¹¹ U.N.G.A. Res. 2712 (XXV), Supp. (No. 28) at 294, U.N. Doc. 8233 (1971).

⁴¹² U.N.G.A. Res. 3074 (XXVIII), Supp. (No. 30A) at 448, U.N. Doc. A/9326, A/L.711/Rev.1 (1973). The United Nations Convention Relating To The Status Of Refugees, July 28, 1951, 189 U.N.T.S. 137 (1954) provides in Article 1(F) (a) that the Convention "shall not apply to any person with respect to whom there are serious reasons for considering that . . . 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." *Id.*

⁴¹³ See *Artukovic v. Boyle*, 107 F.Supp. 11 (S.D. Cal. 1952), *rev'd sub nom* *Ivancevic v. Artukovic* 211 F.2d 565 (9th Cir. 1954), *cert. denied*, 348 U.S. 818 (1954), *reh'g denied*, 348 U.S. 889 (1954); *Artukovic v. Boyle*, 140 F.Supp. 245 (S.D. Cal. 1956), *aff'd sub nom*. *Kardozle v. Artukovic* 247 F.2d 198 (9th Cir. 1957), *vacated*, 355 U.S. 393 (1958), *decision on remand*, 170, F. Supp. 383 (S.D. Cal. 1959). Deportation proceedings were reinstated and Artukovic was deported in 1986. See *Artukovic v. United States*, 628 F.Supp. 1370 (C.D. Cal. 1986). For an overview of United States

sufficient basis to refuse his extradition.⁴¹⁴ The Ninth Circuit Court of Appeals specifically rejected Garcia-Mora's contention that war crimes and crimes against humanity were common crimes and that the perpetrators of such delicts should be extradited. The Court noted that various factions had been struggling for power in Croatia and that Artukovic's offenses were political. The Appellate Court dismissed the United Nations' resolutions of 1946 and 1947 as lacking "sufficient force of law" to require Artukovic's extradition.⁴¹⁵

The District Court reiterated its previous ruling in a 1956 hearing on a writ of habeas corpus filed by Artukovic: "the plain reading of the indictment . . . makes it immediately apparent that the offenses for which the surrender of the petitioner is sought, were offenses of a political character . . . and not extraditable under a treaty in terms such as the one before the court."⁴¹⁶ The case later returned to the District Court⁴¹⁷ who again noted that Artukovic's acts had been committed in the context of political competition between the Croatian Government and the Chetniks and other partisan groups.⁴¹⁸

The Ninth Circuit, in *Quinn v. Robinson*, conceded that the analysis in *Artukovic* was in error.⁴¹⁹ The Tribunal observed that:

[w]e erroneously assumed that "crimes against humanity" was synonymous with "war crimes," and then concluded . . . that not all war crimes . . . fall outside the . . . political offense exception. . . . The offenses with which Artukovic was charged were crimes against humanity; it matters not whether or not they were also war crimes; either way crimes of that magnitude are not protected by the exception.⁴²⁰

Crimes against humanity, such as genocide, according to the Court, "violate international law and constitute an 'abuse of sovereignty'

immigration law pertaining to the deportation of Nazi war criminals, See Matthew Lippman, *The Denaturalization Of Nazi War Criminals In The United States: Is Justice Being Served*, *supra* note 1 at 178-89.

⁴¹⁴ *Artukovic v. Boyle*, 107 F. Supp. at 34.

⁴¹⁵ *Kardoze v. Artukovic*, 247 F.2d at 205.

⁴¹⁶ *Artukovic v. Boyle*, 140 F. Supp. at 247.

⁴¹⁷ *Kardoze v. Artukovic*, 355 U.S. at 393.

⁴¹⁸ *Kardoze v. Artukovic*, 170 F. Supp. at 392-93.

⁴¹⁹ *Quinn v. Robinson*, 783 F.2d 776, 799 (9th Cir. 1986). The Court noted that "[it] erred." See *id.* *Artukovic* is distinguished in *Eain v. Wilkes*, 641 F.2d 504, 522 (7th Cir. 1981).

⁴²⁰ *Quinn v. Robinson*, 783 F.2d at 799. "We did not need then, and do not need now, to reach a conclusion about whether all war crimes fall outside the bounds of the exception." *Id.*

because . . . they are carried out by or with the toleration of authorities of a state."⁴²¹

The Appellate Court went on to observe that the label "crimes against humanity" is no mere talisman—"the political offense exception . . . should [not] have been extended to protect those carrying out a governmental policy calling for acts of destruction whose 'nature and scope . . . exceeded human imagination,' . . . [t]hese crimes are . . . generally excluded from the protection of many normally applicable rules."⁴²²

Artukovic was prosecuted and extradited under a new indictment filed in 1984. The District Court, in adopting the opinion of the Magistrate presiding in the case, affirmed that Artukovic's offenses occurred during a political disturbance and uprising. The killings ordered by Artukovic, however, could not be considered political offenses since he had failed to demonstrate a "rational nexus between the alleged crimes and the prevailing turmoil"⁴²³ These atrocities were committed for "personal gain, racial or religious hatred, and/or impermissible vengeance upon disarmed enemy soldiers. Ridding a country of . . . its population for such reprehensible reasons . . . is . . . not covered by the political offense exception to extradition."⁴²⁴

The Ghanan Court of Appeals, in *The State v. Schumann*, in 1966, ordered the extradition of defendant Doctor Horst Schumann to the Federal Republic of Germany. Schumann was charged with the murder of more than 30,000 mental patients and Auschwitz inmates during the course of mass-sterilization experiments. The District Magistrate ruled that these were crimes against humanity which did not qualify as

⁴²¹ *Id.* at 799–800. "While some of the same offenses that violate the laws and customs of war are also crimes against humanity, crimes of the latter sort most notably include murder, extermination, enslavement . . . or persecutions on political, racial or religious grounds of entire racial, ethnic, national or religious groups." *Id.* at 800.

The Court noted that the so-called incidence test, under which American courts adjudge acts undertaken in furtherance of an uprising or political conflict to be political offenses, should not be applied in the case of governmental officials. *See id.* Government officials who acted to suppress an uprising in the past were considered to fall within the ambit of the defense. *See id.* Since the exception is based on a desire to protect those rebelling against autocratic regimes, the Court concluded that officials should not benefit from the incidence test. *See id.* at 800 n.24.

⁴²² *Id.* at 801 (quoting *Excerpts from Speech by German President*, N.Y. TIMES, May 9, 1985, at 10).

⁴²³ 628 F. Supp. at 1376.

⁴²⁴ *See id.* In searching for a nexus between the alleged crimes and the prevailing turmoil, "the focus of inquiry is on the circumstances, and on the status of those harmed, and not on whether the acts merely were committed during the disorder." *Id.*

political offenses.⁴²⁵ Chief Judge Akufo-Addo affirmed that these delicts did not constitute political offenses:

It is not the case that the poor helpless lunatics at the Munsungent Asylum or the Jews at Auschwitz had rebelled against the Nazi ideology and had thereby created some form of disturbance which needed quelling, nor indeed does he claim to have committed the offence charged with a view to avoiding political persecution or prosecution.⁴²⁶

The Swiss Federal Tribunal, in *Kroeger*, refused to prohibit a defendant's extradition on the grounds that his prosecution for ordering the murders of seven thousand Jews, hundreds of communists and the inmates of a mental hospital, constituted political offenses. These acts were seen as an expression of the defendant's political philosophy. The defendant "acted against helpless women, children and sick persons who could not possibly have threatened German dominion over the occupied territories in Southern Poland and Ukraine."⁴²⁷

VI. CRIMES AGAINST HUMANITY: SOME RECENT DEVELOPMENTS IN DOMESTIC COURTS

A. *European Domestic Court Decisions*

Several European municipal court decisions interpreted and applied the concept of crimes against humanity in a manner which was consistent with international developments. The Special Court of Cassation of Holland noted that crimes against humanity should be strictly construed and limited to acts which:

[e]ither by their magnitude and savagery, or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind warranted intervention by States other than those on whose territory the crimes had been committed or whose subjects had become their victims.⁴²⁸

⁴²⁵ *State v. Schumann*, 39 I.L.R. 433, 444-45 (Accra, Ghana, C.A. 1969) (Crabbe, J., concurring).

⁴²⁶ *Id.* at 437; see also *R.V. Wilson ex parte Witness T*, 86 I.L.R. 169, 172-73 (1994).

⁴²⁷ *Kroeger v. Swiss Federal Prosecutor's Office*, 72 I.L.R. 606, 612 (Switzerland, Fed. Trib. 1966) (1987).

⁴²⁸ *In re Ahlbrecht* (No. 2), 16 I.L.R. 396, 398 (1955) (quoting United Nations War Crimes Commission (Holland, Special Court of Cassation, 1949)).

The Dutch Supreme Court later clarified that a crime against humanity must "form part of a system based on terror or constitute a link in a consciously pursued policy directed against particular groups of people."⁴²⁹

The Court of Cassation of Holland held that the isolated shooting of a prisoner and the mistreatment of several others were not of such a character as to constitute crimes against humanity.⁴³⁰ The Court also ruled that enticing Dutch youths residing in Germany to join the Wehrmacht did not fall within the definition of crimes against humanity, particularly given that the young people had voluntarily emigrated to Germany. Crimes against humanity were to be strictly interpreted in accordance with the Nuremberg Charter and were to be limited to acts "committed against the will of the victims and by violence."⁴³¹ In addition, the Special Criminal Chamber of Holland ruled that a German doctor's refusal to provide treatment to a German soldier who had been shot while attempting to escape did not constitute a crime against humanity. The victim did not belong to the civilian population of the occupied territory and the acts directed against him were not part of a system of persecutions on account of political, racial or religious grounds.⁴³²

The Austrian Supreme Court refused to recognize that the killings of the inmates in labor camps could be excused on the basis of superior orders. An order to execute inmates without trial was clearly recognizable "by anybody" as illegal and would not have excused the defendant's acts.⁴³³ The defendant also was not able to point to any facts which established that he had acted in response to duress or coercion.⁴³⁴

The Netherlands, District Court of Roermond, Extradinary Penal Chamber, approved the legislature's exclusion of statutory limitations on the prosecution of war crimes and crimes against humanity. The Court noted that permitting these offenses to remain unpunished

⁴²⁹ Public Prosecutor v. Menten, 75 I.L.R. 331, 362-63 (1987) (The Netherlands, Sup. Ct. 1981).

⁴³⁰ Albrecht, *supra* note 428, at 398.

⁴³¹ *In re Quispel*, 16 I.L.R. 395, 395-96 (1955) (Holland, Special Court of Cassation, 1950).

⁴³² *In re Pilz*, 17 I.L.R. 391, 392 (1957) (Holland, District Ct. of the Hague, Special Criminal Chamber, 1949).

⁴³³ Public Prosecutor v. Leopold L., 47 I.L.R. 464, 465 (1974) (Austria, Supreme Court, 1967). A direct order to engage in such conduct had not been directed the accused—the abuse of inmates was a general policy. *See id.*

⁴³⁴ *Id.* at 466. The duress defense under Austrian law required a proportionality between the harm confronting the defendant and the defendant's criminal act. *See id.* at 471.

offended the country's sense of justice and lessened the deterrent value of the criminal statutes involved. However, the Court ruled that the fact that the trial was taking place thirty-four years following the defendant's crime made the imposition of capital punishment unjustifiable.⁴³⁵ On the other hand, the imposition of life imprisonment was justified in the interests of satisfying the victims' desire for psychological well-being and safety.⁴³⁶

B. *France*

France was unique in limiting the scope of crimes against humanity. Klaus Barbie headed the Gestapo in Lyons, France. The French were able to secure jurisdiction over Barbie when he was expelled from Bolivia in 1982. He was arrested in France and brought to trial for crimes against humanity—arbitrary arrest, imprisonment, murder, and torture. Barbie was alleged to have murdered 4,342 people and deported 7,591 Jews and 14,311 members of the resistance in Lyons.⁴³⁷ He was convicted in July 1987 on 340 counts and sentenced to life imprisonment.⁴³⁸ Barbie was prosecuted under a French Law enacted on December 26, 1964 which, *inter alia* provided that:

Crimes against humanity, as defined by the United Nations Resolution of 13 February 1946, which refers to the definition of crimes against humanity contained in the Charter of the International Military Tribunal of 8 August 1945, are by their nature not subject to statutory limitation of prosecution.⁴³⁹

The Court of Cassation, in its judgment of October 6, 1983, ruled that the failure to initiate extradition proceedings prior to Barbie's expulsion and arrest in France did not prohibit his prosecution. Crimes against humanity under French municipal law were subject to an international criminal order "to which the notions of frontiers and extradition rules arising therefrom are completely foreign."⁴⁴⁰ The Court

⁴³⁵ Public Prosecutor v. L.J.L., 74 I.L.R. 704, 707-08 (1987) (The Netherlands, Dist. Ct. Roermond, Extraordinary Penal Chamber).

⁴³⁶ Kotalla v. State Of The Netherlands, 74 I.L.R. 708, 712 (1987) (Neth. Ct. 1977).

⁴³⁷ Federation Nationale Des Deportees Et Internes Resistants Et Patriotes And Others v. Barbie, 78 I.L.R. 124 (1988) (Court of Cassation, Criminal Chamber 1983-85) [hereinafter Barbie Judgments].

⁴³⁸ *Id.* at 148.

⁴³⁹ *Id.* at 126.

⁴⁴⁰ *Id.* at 128, 130. An arrest warrant was issued for Barbie on November 3, 1982 and was executed on February 5, 1983 by the airport police in French Guiana. See *id.* at 130.

noted that the Nuremberg Charter and United Nations Resolution 3(I), which are referred to in the Law of December 26, 1964, require that States take measures to ensure that the perpetrators of war crimes, crimes against peace, and crimes against humanity are punished. They further require that those suspected of such crimes are returned to the country in which they committed their crimes.⁴⁴¹ International instruments also recognize the permissibility of the retroactive punishment of acts or omissions which, at the time of their commission, were "criminal according to the general principles of law recognized by the community of nations."⁴⁴²

The Court of Cassation, in its judgment in the *Barbie* case of January 26, 1984, declared that crimes against humanity, as defined in the Charter of the International Military Tribunal, are not subject to statutory limitations on prosecution.⁴⁴³ Both the International Covenant On Civil And Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms permit the retroactive punishment of delicts, such as crimes against humanity, which at the time of their commission, contravened the principles recognized by the community of civilized countries.⁴⁴⁴

The Court of Cassation, in its third *Barbie* judgment of December 20, 1985, ruled that war crimes, unlike crimes against humanity, are subject to statutory limitations. This is based on the desirability of abating and ameliorating the accrued animosities of armed conflict. On the other hand, crimes against humanity are unrelated to the conscientious conduct of war and are not subject to statutory limitation, even in those instances in which they also constitute war crimes.⁴⁴⁵

⁴⁴¹ *Id.* at 131.

⁴⁴² International Convention on Civil and Political Rights, Dec. 16, 1966, art. 15(2), G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess. Supp. No. 16 at 52, U.N. Doc. A/6316 (1967) [hereinafter Convention on Civil and Political Rights]; see also European Convention For The Protection Of Human Rights And Fundamental Freedoms, Nov. 4, 1950, art. 7(2), Eur.T.S. No. 5, 213 U.N.T.S. 221 (1953) [hereinafter European Human Rights Convention].

⁴⁴³ *Barbie* Judgments, *supra* note 437, at 132.

⁴⁴⁴ See *supra* text accompanying note 442. *Barbie* argued that the Nuremberg Tribunal was a tribunal of temporary jurisdiction and that there had been no need to provide for statutory limits on prosecution. See *Barbie* Judgments, *supra* note 437, at 134-35. The Tribunal determined that the abrogation of statutory limitations on punishment did not fall within Article 60 of the European Convention which provides that "Nothing in this Convention shall be construed as . . . derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party." See *id.* at 135 (citing European Human Rights Convention, *supra* note 442, at art. 60).

⁴⁴⁵ *Barbie* Judgments, *supra* note 437, at 136-37, 139. Crimes against humanity, according to the Court are "inhumane acts and persecution committed in a systematic manner in the name

The lower courts, which adjudicated the *Barbie* case, ruled that crimes against humanity are limited to the persecution of innocent Jews based upon racial and religious motives. The prosecution of individuals for the unlawful abuse and mistreatment of members of the French Resistance, even those who were Jewish, did not constitute crimes against humanity and was barred by the statute of limitations. These combatants were both motivated and persecuted based upon their patriotic challenge to the Germans rather than as a consequence of their political ideology or racial identity.⁴⁴⁶ The Court of Cassation, however, ruled that the German occupants severe and systematic abuse of members of the Resistance was an expression of National Socialist ideology: "Neither the driving force which motivated the victims, nor their possible membership of the Resistance, excludes the possibility that the accused acted with the element of intent necessary for the commission of crimes against humanity."⁴⁴⁷

The definition of crimes against humanity set forth in the *Barbie* Case was subsequently elaborated upon in *Touvier*.⁴⁴⁸ *Barbie* limited crimes against humanity to "inhumane acts and persecution committed in a systematic manner in the name of a State practising a policy of ideological supremacy, not only against persons by reason of their membership of a racial or religious community, but also against the opponents of that policy, whatever the form of their opposition."⁴⁴⁹ The Court of Cassation also noted, in a June 1988 judgment affirming *Barbie's* conviction for crimes against humanity, that:

[t]he fact that the accused . . . took part, in perpetrating that crime, in the execution of a common plan to bring about the

of a State practicing a policy of ideological supremacy, not only against persons by reason of their membership of a racial or religious community, but also against the opponents of that policy, whatever the form of their opposition." *Id.* at 137. Acts constituting crimes against humanity include the arrest and illegal imprisonment of numerous persons, including the brutal treatment and physical torture of detainees. *See id.* The judgment also listed four actions carried out on the instructions of the accused which resulted in the extermination of over 800 Jews and resistance members. *See id.* at 138.

⁴⁴⁶ *Id.* at 139.

⁴⁴⁷ *Id.* at 140. The lower court failed to find that the murder of a Jewish member of the Resistance was based on his religion. *See id.* The Court of Cassation ruled that the crimes committed "systematically or collectively against persons who were members or could have been members of the Resistance were presented by those in whose name they were perpetrated, as justified politically by the national socialist ideology." *Id.*

⁴⁴⁸ *Touvier*, 100 I.L.R. 341 (1988) (Paris, C.A. First Chamber of Accusation, 1992) [hereinafter *Touvier II*]; *see id.* at 358 (Court of Cassation, Criminal Chamber, 1992) [hereinafter *Touvier III*].

⁴⁴⁹ *Barbie* Judgments, *supra* note 437, at 137.

deportation or extermination of the civilian population during the war or persecutions on political, racial or religious grounds, constitutes not a separate offence or an aggravating circumstance but . . . an essential element of the crime against humanity consisting in the fact that the acts . . . were performed in a systematic manner in the name of a State practising . . . a policy of ideological supremacy.⁴⁵⁰

Touvier involved the prosecution of Paul Touvier, a high-ranking officer in the Militia (Milice) in Vichy France during the wartime German occupation. The Court dismissed ten charges due to an insufficiency of evidence and limited its examination to the collective execution of seven Jews in Rillieux in June 1944. This was in reprisal for the assassination of Secretary of State for Information and Propaganda, Phillippe Henriot.⁴⁵¹

The Court of Appeal of Paris noted that the substantive elements of crimes against humanity "are no different to that of crimes under the ordinary law, except for the specific circumstances of their commission" as defined in Article 6(c) of the Nuremberg Charter.⁴⁵² The required criminal intent, however, differs from ordinary delicts. An individual "cannot be held to have committed a crime against humanity unless it is also established that he had a specific motivation to take part in the execution of a common plan by committing in a systematic manner inhuman acts or persecutions in the name of a State practising a policy of ideological supremacy."⁴⁵³

The Court of Appeals determined that Vichy "[a]t no time" sought "to establish any kind of domination or to impose a conquering ideology."⁴⁵⁴ The Militia "was merely one of the component forces of that State which could not, without falsifying the least contested facts of

⁴⁵⁰ *Id.*

⁴⁵¹ *Touvier II*, *supra* note 448, at 343.

⁴⁵² *Id.* at 351.

⁴⁵³ *Id.* at 352.

(i) In order to be categorized as crimes against humanity, the alleged acts must firstly form part of the execution of a common plan performed in the name of a State practicing in a systematic manner a policy of ideological supremacy.

(ii) Secondly, the alleged acts must have been committed against persons by reason of their belonging to a racial or religious group, or against the opponents of that policy of ideological supremacy.

Id.

⁴⁵⁴ *Id.* at 354.

history, be categorized as a State practising a policy of ideological supremacy”⁴⁵⁵

The German Reich was the prototype of a State imposing ideological domination. Touvier and the Militia, however, were not Hitler’s agents—Touvier had either acted independently or had carried out a reprisal on behalf of the Militia in order to discourage a more draconian German response. Touvier, in either case, had not executed a decision, or acted on behalf of the Reich and the Rillieux killings. Consequently, this did not constitute a crime against humanity and, therefore, was outside the statutory limitation of prosecution.⁴⁵⁶

The Court of Cassation, in November 1992, reversed and remanded the *Touvier* case to the Court of Appeals.⁴⁵⁷ The Court of Cassation conceded that, under the Nuremberg Charter, individuals were required to have acted in the interests of one of the European Axis countries. The Court of Cassation independently evaluated the evidence and ruled that the Court of Appeal “could not . . . declare that the murders . . . did not constitute crimes against humanity while at the same time concluding that they had been perpetrated at the instigation of an officer of the Gestapo”⁴⁵⁸

The *Barbie* and *Touvier* judgments affirmed that crimes against humanity, even those constituting war crimes, were not subject to statutory limitation on prosecution.⁴⁵⁹ The decisions also suggested that continental courts would not question the process through which individuals charged with atrocities were brought within their jurisdiction.⁴⁶⁰ The political persecution component of crimes against humanity was broadly interpreted to encompass persecution against members

⁴⁵⁵ *Id.* at 355.

⁴⁵⁶ *Id.* at 356. The killings were “not . . . part of a systematic plan of extermination coldly executed but rather was essentially a ‘heated’ criminal reaction, spectacular, ferocious and relatively improvised.” *Id.*

⁴⁵⁷ *Touvier III*, *supra* note 448, at 363–64.

⁴⁵⁸ *Id.* at 363. The Court of Cassation noted that the Court of Appeal had concluded that the Regional Head of the Militia in Lyons had conferred with the head of the local Gestapo and had negotiated a reduction in the number of victims. *See id.* The Court of Appeals also argued that the execution was “a heated reaction” which was “relatively improvised” and was a reaction to the death of Philippe Henriot. *See id.* The Court of Appeals concluded that Touvier was responsible for the execution of the hostages, but was influenced by the German’s intent to exact retribution. *See id.* at 363. Touvier was subsequently convicted of one count of having been an accomplice in the commission of a crime against humanity. *See id.* at 364. *See supra* text accompanying notes 437–58.

⁴⁵⁹ *See supra* text accompanying notes 437–58.

⁴⁶⁰ *See supra* text accompanying notes 438–41.

of the resistance.⁴⁶¹ The Court of Appeal narrowly interpreted crimes against humanity, requiring that the acts were undertaken on behalf of a State seeking to impose ideological hegemony. The Court of Cassation stated that the test was whether the defendant had acted on behalf of the European Axis Powers. Barbie thus could be held liable for the abuse and execution of partisans which the Court of Cassation ruled was an expression of the Reich's desire to eradicate political, racial, and religious opponents. French collaborators, on the other hand, who were not determined to have committed such acts at the behest of the German regime, would be exonerated. The Court of Cassation did not propose a legal test for establishing a nexus between a defendant and the Nazi regime.⁴⁶²

The Tel Aviv District Court differed from the French Court of Cassation in interpreting the nexus requirement for crimes against humanity. The Israeli Tribunal ruled that crimes against humanity encompasses the persecution of individuals on racial, religious, and political grounds as well as other inhumane acts. The latter are required to be of a "serious character and likely to embitter the life of a human being, to degrade him and cause him great physical or moral pain and suffering."⁴⁶³ Such acts must be "performed against a civilian population on a broad scale and systematically, as distinct from isolated acts so that it arouses the conscience of mankind against it."⁴⁶⁴ The District Court also ruled that a prisoner in a camp may be liable for a crime against humanity towards a fellow inmate. In contrast to a war criminal, "the perpetrator of a crime against humanity does not have to be a man who identified himself with the persecuting regime or its evil intention."⁴⁶⁵

VII. THE DRAFT CODE OF CRIMES AGAINST PEACE AND THE SECURITY OF MANKIND REVISITED

Crimes against humanity have taken on increased contemporary relevance and have been invoked to condemn disappearances⁴⁶⁶ and

⁴⁶¹ See *supra* text accompanying note 447.

⁴⁶² See *supra* text accompanying notes 453-56.

⁴⁶³ Attorney-General v. Enigster, 18 I.L.R. 540, 541 (Isr., T.A.D.C. 1952).

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.* at 542. The Israeli Supreme Court, sitting as the Court of Criminal Appeals, held that an individual who harms another may be liable for a crime against humanity if the perpetrator possessed the intent to harm a group and his or her act was in furtherance of this intent. See Pal v. Attorney-General, 18 I.L.R. 542 (Isr., Ct. Crim. App. 1952).

⁴⁶⁶ See Organization of American States, Inter-American Convention on the Forced Disappearance of Persons, June 9, 1994, reprinted in 33 I.L.M. 1529 (1994).

the utilization of nuclear weapons.⁴⁶⁷ There is strong support for the view that crimes against humanity are no longer required to be connected to armed conflict. Mr. Doudou Thiam, Special Rapporteur on the Draft Code of Crimes against the Peace and Security of Mankind, in 1989, observed that the concept of crimes against humanity now is “separate from . . . war crimes [N]ot only the 1954 draft code but even conventions which have entered into force (on genocide and *apartheid*) no longer link that concept to a state of war.”⁴⁶⁸ The Special Rapporteur accordingly noted that crimes against humanity “have their own specific characteristics which differentiate them from war crimes.”⁴⁶⁹ Theodore Meron notes that “[t]he tangled meshing of crimes against humanity and human rights militates against requiring a link with war for the former. The better opinion today . . . is that crimes against humanity exist independently of war.”⁴⁷⁰ This view is not universally endorsed. Diane Orentlicher concludes that post-Nuremberg developments have failed to clarify crimes against humanity and to resolve whether a nexus is required between crimes against humanity and other international crimes.⁴⁷¹

The Special Rapporteur on the Draft Code of Offences Against the Peace and Security of Mankind, in his fourth report in 1986, clarifies that crimes against humanity are intended to safeguard human dignity, existence, and culture. The Special Rapporteur notes that the content of crimes against humanity remains uncertain. Acts constituting crimes against humanity are variously characterized as barbarous, brutal, degrading, and humiliating. Others stress the infringement of fundamental rights or of the rights to life, health, and physical well-be-

⁴⁶⁷ See Resolution on Non-use of Nuclear Weapons and Prevention of Nuclear War, G.A. Res. 33/71B (XXXIII), U.N. GAOR, 33d Sess. Supp. No. 45, at 48, U.N. Doc. A/33/45 (1978). The resolution declares that the use of nuclear weapons “will be a violation of the Charter of the United Nations and a crime against humanity.” *Id.* See generally Matthew Lippman, *Nuclear Weapons and International Law: Towards A Declaration on the Prevention and Punishment of the Crime of Nuclear Humancide*, 8 LOY. L.A. INT’L & COMP. L.J. 183 (1986); Matthew Lippman, *First Strike Nuclear Weapons and the Justifiability of Civil Resistance Under International Law*, 2 TEMP. INT’L & COMP. L.J. 155 (1988).

⁴⁶⁸ *Draft Code of Crimes Against the Peace and Security of Mankind Seventh Report*, Mr. Doudou Thiam, Special Rapporteur, [1989] II Y.B. Int’l L. Comm’n 81, 86, U.N. Doc. A/CN.4/419/Add.1 [hereinafter *Special Rapporteur Seventh Report*].

⁴⁶⁹ *Id.* at 87. The two concepts may overlap, but crimes against humanity is more expansive than war crimes. See *id.* War crimes only can be committed in time of war while crimes against humanity can be committed in times of war or peace. See *id.* War crimes can be committed only between belligerents, but crimes against humanity may be committed between nationals or belligerents. See *id.*

⁴⁷⁰ Theodore Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT’L L. 78, 85 (1994).

⁴⁷¹ *Id.* at 85–93.

ing. Some emphasize the mass nature of such delicts. While others argue that a single atrocity could constitute a crime against humanity. There also is disagreement over whether crimes against humanity are limited to State-sponsored acts.⁴⁷² Motive, according to the Special Rapporteur, is the only element which is generally accepted—"the intention to harm a person or group of persons because of their race, nationality, religion or political opinions."⁴⁷³

The Special Rapporteur argued in 1989 that crimes against humanity "has its own content and specific characteristics" which include a specific provision on crimes against humanity in the Draft Code of Crimes against Peace and Security of Mankind.⁴⁷⁴ He reiterated that these delicts are distinguished by motive; they are prompted by "ideological, political, racial, religious or cultural intolerance and strike at a person's innermost being, i.e. his convictions, beliefs or dignity."⁴⁷⁵ A crime against humanity, according to the Special Rapporteur, requires either an act directed against the mass of people or an inhuman act directed against a single person which is part of a plan or system of persecution.⁴⁷⁶

The Special Rapporteur's proposed draft on crimes against humanity includes prohibitions on genocide and apartheid. The text also prohibits murder, deportation, extermination, persecution and the mass destruction of property and other inhumane acts carried out on social, political, racial, religious or cultural grounds. The inclusion of the destruction of property is an amendment to the 1954 text. The Special Rapporteur also incorporates separate clauses sanctioning slavery, the expulsion or forcible transfer of populations and the settlement of peoples in territory, and serious and intentional harm to vital human assets, such as the human environment.⁴⁷⁷ He explains that acts

⁴⁷² *Draft Code of Offences Against the Peace and Security of Mankind, Fourth Report*, Mr. Doudou Thiam, Special Rapporteur, U.N. Doc. A/CN.4/398 (1986) reprinted in II Y.B. Int'l L. Comm'n 53, 57-60, U.N. Doc. A/CN.4/398 [hereinafter *Special Rapporteur Fourth Report*]. Despite the fact that genocide and apartheid overlap with crimes against humanity, both are accorded recognition in separate articles. *See id.* at 58-61.

⁴⁷³ *Id.* at 58.

⁴⁷⁴ Special Rapporteur Seventh Report, *supra* note 468, at 87.

⁴⁷⁵ *Id.* The Special Rapporteur argued that a crime against humanity may involve physical atrocities as well as the "infliction of flagrant public humiliations or forcing individuals to act against their conscience and . . . ridiculing them or forcing them to perform degrading acts . . ." *See id.* at 87.

⁴⁷⁶ *Id.* at 88-89. "[W]here the mass element is absent, an individual act should constitute a link in a chain and be part of a system or plan. The notion of system, plan and repetitiveness is necessary in order to categorize an act committed against an individual victim as a crime against humanity." *Id.* at 89.

⁴⁷⁷ *Id.* art. 14(1)-(6), at 85-86.

against property may constitute crimes against humanity when part of a large-scale depredation or confiscation and are motivated by political, racial or religious animus. He also includes cultural property and other vital human assets, such as the environment, within crimes against humanity.⁴⁷⁸

The International Law Commission only partially ratified the Special Rapporteur's proposal. The Commission abandoned the designation Crimes against humanity and retitled the article "Systematic or mass violations of human rights."⁴⁷⁹ This emphasizes the common factor underlying the crimes contained in this article; the involvement of serious violations of fundamental human rights. Crimes against humanity thus are substantively and symbolically severed from armed conflict and are conceptualized as a safeguard for fundamental human rights.⁴⁸⁰

The text sanctions systematic or mass violations of human rights. The systematic element requires a recurrent practice or plan while the mass-scale component is directed at the number affected. Isolated acts—no matter how atrocious—are not encompassed within the text. The International Law Commission expanded the Special Rapporteur's draft by including torture. The Commission reasoned that a more expansive enumeration safeguarded against claims of retroactive punishment.⁴⁸¹ Murder, torture, slavery and deportations are not required to be motivated by animus—a separate clause sanctions "persecution

⁴⁷⁸ *Id.* at 86.

⁴⁷⁹ [1991] II Y.B. Int'l L. Comm'n 103 [hereinafter 1991 Int'l L. Comm'n].

Article 21. Systematic or mass violations of human rights.

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

- murder
- torture
- establishing or maintaining over persons a status of slavery, servitude or forced labour
- persecution on social, political, racial, religious or cultural grounds in a systematic manner or on a mass scale; or
- deportation or forcible transfer of population shall, on conviction thereof, be sentenced [to . . .]

Id.

⁴⁸⁰ See Convention on Civil and Political Rights, *supra* note 442.

⁴⁸¹ See 1991 Int'l L. Comm'n, *supra* note 479, at 103. Extermination was viewed as encompassed within murder and was not included in the text. See *id.* Murder was covered by all domestic criminal codes. See *id.* The Commission believed that the odious and widespread character of torture merited its inclusion in the draft code. See *id.* "It was pointed out in the Commission that a practice of systematic disappearances of persons was also a phenomenon that deserved to be specifically mentioned in the draft Code." *Id.* at 104.

on social, political, racial, religious or cultural grounds.”⁴⁸² “Persecution” encompasses acts committed on a systematic or mass scale and is intended to include acts such as prohibitions on religious worship or language, prolonged and systematic detention, and the destruction of monuments or buildings.⁴⁸³ There is no general prohibition on inhuman acts. Genocide and apartheid are included in separate articles of the text.⁴⁸⁴

The draft text encompasses public officials as well as private individuals. The Commission did not “rule out the possibility that private individuals with de facto power or organized in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article”⁴⁸⁵

The historical development of the concept of crimes against humanity culminated in a reformulated Draft Code of Offenses. The article sanctioning systematic and mass violations of human rights negates the nexus between crimes against humanity and armed combat and conceptualizes crimes against humanity as a safeguard for fundamental human dignity and rights. The text encompasses atrocious acts as well as conduct which is motivated by racial, religious social, cultural or ideological animus. Both are required to be part of a plan or pattern. Liability is extended to individuals with de facto public power as well as to organized private groups and public officials.⁴⁸⁶ The Special Rapporteur observed that despite the contemporary and comprehensive nature of the draft, the text inevitably would be amended: “The nature of crimes against humanity changes with technological progress Because of that evolving nature, any attempt to list all the crimes against humanity would narrow the scope of the subject and . . . allow offences which are sometimes difficult to imagine before they are committed to go unpunished.”⁴⁸⁷

The Yugoslavian War Crimes Tribunal also affirmed that crimes against humanity are not required to be connected with crimes against humanity.

⁴⁸² *Id.* at 103.

⁴⁸³ *Id.* at 104. Some argued that this provision was overly broad. *See id.*

⁴⁸⁴ *Id.* arts. 19–20, at 101–02. “Apartheid, like genocide, has a certain degree of autonomy in the code, even though both are inhuman acts.” Special Rapporteur Fourth Report, *supra* note 472, at 61. The inclusion of environmental damage was based on the importance of the environment in preserving human existence. *See id.*

⁴⁸⁵ 1991 Int’l L. Comm’n, *supra* note 479, at 103–04.

⁴⁸⁶ *See supra* text accompanying notes 466–85.

⁴⁸⁷ Special Rapporteur Fourth Report, *supra* note 472, at 61.

VIII. THE YUGOSLAVIAN WAR CRIMES TRIBUNAL

The United Nations Security Council, in Resolution 808, established an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law in Yugoslavia. The Secretary-General was requested to submit a draft statute for the Tribunal.⁴⁸⁸ His report was approved by the Security Council on May 2, 1993.⁴⁸⁹

Article One empowers the proposed International Tribunal to prosecute persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia since 1991.⁴⁹⁰ This includes crimes against humanity, which the Secretary-General's commentary notes were initially recognized in the Charter and Judgment of the Nuremberg Tribunal and in Control Council Law No. 10. He notes that crimes against humanity are directed against a civilian population and "are prohibited regardless of whether they are committed in an armed conflict, international or internal in character."⁴⁹¹ The Secretary-General records that a number of such inhumane acts were committed in Yugoslavia, including "ethnic cleansing" and widespread and systematic rape and other forms of sexual assault.⁴⁹²

Article Five authorizes the Tribunal to prosecute those responsible for crimes against humanity "when committed in armed conflict, whether international or internal in character, and directed against any civilian population."⁴⁹³ The enumeration of these crimes generally follows Control Council Law No. 10 and includes murder, extermination, enslavement, deportation, imprisonment, torture and rape. Persecutions on political, racial and religious grounds and other inhumane acts are also punished. The latter anticipates that acts of similar gravity to those enumerated, such as prostitution and sexual assault, might fall within

⁴⁸⁸ Security Council Resolution 808 (1993), U.N. Doc. S/25704/ Add. 1 *reprinted in* 32 I.L.M. 1159, 1164-66 (1993) [hereinafter Secretary-General Resolution 808 Report]. The legislative history is outlined in United Nations Secretary-General, Annexed Report of the Secretary-General Pursuant to Paragraph 2. *See id.*

⁴⁸⁹ Security Council Resolution 827 (1993), U.N. Doc. S/25704/ Add. 1 *reprinted in* 32 I.L.M. 1159, 1203 (1993).

⁴⁹⁰ Secretary-General Resolution 808 Report, *supra* note 488, at art. 1, 1170.

⁴⁹¹ *Id.* para. 47, at 1173.

⁴⁹² *Id.* para. 48, at 1173. "Crimes against humanity refer to inhumane acts of a very serious nature, such as . . . killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds." *Id.*

⁴⁹³ *Id.* art. 5, at 1173-74.

the statutory standard.⁴⁹⁴ Separate articles sanction war crimes and genocide.⁴⁹⁵

Commentator James C. O'Brien observes that this language means that acts undertaken "during" armed conflict fall within the jurisdiction of the International Tribunal, "regardless of their connection to the armed conflict."⁴⁹⁶ This is an advance over the Nuremberg Charter in that crimes against humanity under the Yugoslav statute are not required to be in execution of, or connected to, a crime within the Tribunal's jurisdiction. The result is that crimes against humanity are accorded an autonomous penal status.⁴⁹⁷

There is no explicit requirement of State sponsorship of crimes against humanity. This extends crimes against humanity to the independent militia which operated in Bosnia-Herzegovina. The stipulation that crimes against humanity are to be directed against "any civilian population" presumably requires that acts constituting crimes against humanity are part of a systematic and widespread attack.⁴⁹⁸ The use of the terminology, "any" arguably extends crimes against humanity to atrocities committed by a State or armed band against its own nationals.⁴⁹⁹ Crimes against humanity may, but are not required to be motivated by political, racial or religious animus. The text significantly

⁴⁹⁴ *Id.* art. 5(a)-5(i). The Tribunal possesses concurrent jurisdiction with domestic courts. *See id.* art. 8, at 1176.

⁴⁹⁵ *Id.* art. 3-4, 1172-73. A crime against humanity presumably must contravene international law. *See id.* The deportation or imprisonment of a person pursuant to a valid judicial or administrative decree following a full and fair hearing would not constitute a crime against humanity. *See* VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 79 (1995) [hereinafter AN INSIDER'S GUIDE].

⁴⁹⁶ James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639, 650 (1993).

⁴⁹⁷ *Id.* Legislation in most Member States did not require a connection between crimes against humanity and another crime or an armed conflict. *See id.* at 649-50, 650 n.45. In addition, O'Brien's suggested interpretation is consistent with the Secretary-General's commentary to the provision on crimes against humanity. *See supra* text accompanying note 491. O'Brien also urged the Tribunal to expand its jurisdiction to encompass acts which occurred prior to 1991. *See id.* The limitation of the Court's jurisdiction to acts committed in armed conflict seems to reflect the fact that the Tribunal was established to adjudicate crimes committed during the Yugoslav conflict. *See id.* The latter, according to O'Brien, thus appears to be a jurisdictional rather than substantive limitation on crimes against humanity. *See* O'Brien, *supra* note 496, at 650.

⁴⁹⁸ *See supra* text accompanying notes 493-94. O'Brien suggested that the Tribunal "should note that persons of political or military authority are responsible for repressing and punishing crimes; their failure to do so could be regarded as evidence of governmental approval or instigation . . . it could regard as governmental acts those acts of persons charged with, or asserting, executive or occupation authority in a region." O'Brien, *supra* note 496, at 649.

⁴⁹⁹ O'Brien, *supra* note 496, at 649.

follows Control Council Law No. 10 in including rape as a crime against humanity.⁵⁰⁰

The indictment issued by the International Criminal Tribunal on November 7, 1994 charged Dragan Nikolic with the commission of various crimes against humanity in the Susidca internment camp during a period of armed conflict and as part of a widespread or systematic attack directed against a civilian population. These acts include murder, serious assault, and torture. Nikolic was charged with participating in the persecution on account of political, racial and/or religious grounds of more than five hundred civilians.⁵⁰¹

The February 19, 1995 indictments charged various Serbs with the collection, confinement, murder, sexual assault, starvation and torture of Croats and Muslims in the Omarska mining complex. The 3,000 internees had been forced to flee their homes as a result of intense shelling by the Serbian forces.⁵⁰² The defendants were charged with genocide,⁵⁰³ as well as beatings with "metal batons and cables, a knife . . . fists and kick[ing] the victims with . . . military-style boots."⁵⁰⁴ Others forced prisoners to "drink water like animals from puddles on the ground, jumped on their backs, and beat them until they were unable to move. As the victims were removed in a wheelbarrow, one of the Serbs discharged the contents of a fire extinguisher into the mouth of one of the victims."⁵⁰⁵ Inmates, in some instances, were subjected to sexual perversion and mutilation and then murdered.⁵⁰⁶

In October 1995, the Appellate Chamber of the Yugoslavian War Crimes Tribunal rejected a motion by defendant Dus'ko Tadic' which, in part, challenged the Tribunal's subject matter jurisdiction. The Tribunal noted that the Republic of Bosnia and Herzegovina had approved and cooperated with the International Tribunal's jurisdiction and, at any rate, Tadic lacked standing to challenge this assertion of the Tribunal's jurisdiction.⁵⁰⁷

⁵⁰⁰ See *supra* notes 493-96. Various proposals for crimes against humanity are noted in AN INSIDER'S GUIDE, *supra* note 495, at 77-78, 78 n.77 (1995).

⁵⁰¹ International Criminal Tribunal for the Former Indictment Against Nikolic, (Nov. 7, 1994), *reprinted in* 34 I.L.M. 996, 998-1010 (1995).

⁵⁰² International Criminal Tribunal for the Former Yugoslavia: Indictments Against Meakic & Others And Tadic & Other (Feb. 1995) *reprinted in* 34 I.L.M. 1011, 1014-15 (1995).

⁵⁰³ *Id.* at 1017.

⁵⁰⁴ *Id.* at 1022.

⁵⁰⁵ *Id.* at 1027.

⁵⁰⁶ *Id.* at 1030-31.

⁵⁰⁷ International Tribunal for the Former Yugoslavia, Prosecutor v. Dus'ko Tadic (Oct. 2, 1995), *reprinted in* 35 I.L.M. 32, 50-51 (1996).

The Tribunal also was fully justified in asserting jurisdiction since the defendants' offenses "shock the conscience of mankind."⁵⁰⁸ International tribunals must be recognized as possessing jurisdiction over such offenses. Otherwise, State sovereignty and national borders would frustrate the protection of human rights and the rule of law and "protect those who trample underfoot the most elementary rights of humanity."⁵⁰⁹

Are crimes against humanity limited to international conflicts? According to the Court, the nexus between crimes against humanity and either crimes against peace or war crimes was "peculiar to the jurisdiction of the Nuremberg Tribunal . . . there is no logical or legal basis for this requirement and it has been abandoned in subsequent State practice with respect to crimes against humanity."⁵¹⁰ The obsolescence of the nexus requirement, which was abandoned in Control Council Law No. 10, is evidenced by the Genocide and Apartheid Conventions which prohibit "particular types of crimes against humanity regardless of any connection to armed conflict."⁵¹¹

The Tribunal concluded that it is now a "settled rule of customary international law" that crimes against humanity are not required to be connected, or even related, to an international armed conflict.⁵¹² The Security Council's requirement that crimes against humanity may be committed "in either internal or international armed conflict may have defined the crime in Article five more narrowly than necessary under customary international law."⁵¹³ The Tribunal thus adopted the "wider definition in the commentary, which effectively discards any nexus with war; this tempering may have important consequences on the future development of customary international law in this field."⁵¹⁴

The Security Council adopted a different formula in vesting the International Tribunal for Rwanda with jurisdiction over crimes against humanity. The Tribunal was authorized to prosecute "persons responsible for . . . crimes when committed as part of a widespread or system-

⁵⁰⁸ *Id.* at 51.

⁵⁰⁹ *Id.* at 52.

⁵¹⁰ *Id.* at 72. The Appellate Chamber ruled that the conflict in Yugoslavia possessed both internal and international aspects and that the Security Council had empowered the International Tribunal to adjudicate violations of humanitarian law in either context. *See id.* at 57.

⁵¹¹ *Id.* at 72.

⁵¹² *Id.*

⁵¹³ *Id.* "There is no question, however, that the definition of crimes against humanity adopted by the Security Council in Article 5 comports with the principle of *nullum crimen sine lege*." *Id.*

⁵¹⁴ Theodore Meron, *Preparing to Wage Peace: Toward the Creation of an International Peace-making Command and Staff College*, 88 AM. J. INT'L L. 76, 87 (1994).

atic attack against any civilian population on national, political, ethnic, racial or religious grounds.”⁵¹⁵ The acts constituting crimes against humanity mirrored those set forth in the Yugoslavian statute.⁵¹⁶

Professor Theodore Meron notes that the Rwanda Statute “makes no allusion to armed conflicts, supporting the view that crimes against humanity (like genocide) can be committed in peacetime.”⁵¹⁷ He argues that this language, together with the Secretary-General’s commentary and the Yugoslavian Tribunal’s ruling, all combine to establish that crimes against humanity may be committed in peacetime.⁵¹⁸

Meron observes that the scope of the Rwandan statute is clouded by the requirement that crimes against humanity are required to be committed as part of a “widespread or systematic attack . . . on national, political, ethnic, racial or religious grounds.”⁵¹⁹ In contrast, the Yugoslavia Statute only requires that crimes against humanity are “directed” against “any civilian population.”⁵²⁰ Meron notes that although the “large-scale, systematic nature of attacks against a civilian population appears in the jurisprudence of Nuremberg, there was no need to include it in the statutory definition. . . . One may ask whether . . . the Security Council has not inadvertently made the burden of proving crimes against humanity more difficult to meet.”⁵²¹

IX. CONCLUSION

The Martens Clause introduced the notion of laws of humanity which supplemented the conventional and customary code of war.⁵²²

⁵¹⁵S.C. Res. 955, art. 3 (Nov. 8, 1994) *reprinted in* 33 I.L.M. 1598 (1994). The Tribunal was charged with the prosecution of those responsible for serious violations of international humanitarian law committed in the territory of Rwanda and of Rwandan citizens responsible for such violations committed in the territory of neighboring States. *Id.* art. 1. Article two punishes genocide. *Id.* art. 2.

⁵¹⁶*Id.*

⁵¹⁷Theodore Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT’L L. 238, 242 (1996).

⁵¹⁸Theodore Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT’L L. 554, 557 (1995). The Rwandan statute strengthens the precedent established by the Secretary-General and the Tribunal’s opinion and “enhances the possibility of arguing in the future that crimes against humanity (in addition to genocide) can be committed even in peacetime.” *See id.*

⁵¹⁹*Id.* *See supra* text accompanying note 515.

⁵²⁰*See supra* text accompanying notes 493–94.

⁵²¹Meron, *supra* note 518, at 557. Meron observes that genocide is a “species and particular progeny of the broader genus of crimes against humanity. Crimes against humanity are crimes under customary law. Genocide is a crime under both customary law and a treaty. The core prohibitions of crimes against humanity and the crime of genocide constitute *jus cogens* norms.” *Id.* at 558.

⁵²²*See supra* text accompanying notes 2–6.

The Committee charged with investigating the causes and consequences of World War I relied on this concept in recommending that the Axis military men and leaders be held responsible for atrocities and barbarities brought to the bar of justice. The American representatives dissented, objecting to the prosecution of government officials on such an ambiguous and novel charge. The Treaty of Versailles provided for war crimes prosecutions, but the Allies failed to convene an international tribunal.⁵²³

Crimes against humanity were formally recognized in the Nuremberg Charter. The International Military Tribunal did little to contribute to the doctrine's development, generally interpreting crimes against humanity as co-extensive with war crimes. The Tribunal did convict defendants of acts undertaken prior to 1939 which were connected to the waging of aggressive war. This indicated that international law would extend crimes against humanity to take cognizance of a State's conduct towards its own citizens.⁵²⁴

Control Council Law No. 10 severed the connection between crimes against humanity and armed conflict, providing that such crimes could be committed in periods of peace as well as war. American occupation courts diverged in their interpretation. However, a significant number of judges determined that the nexus requirement was a jurisdictional rather than a substantive limitation.⁵²⁵

The trend towards severing the connection between crimes against humanity and armed conflict was accelerated by the Genocide Convention's specification that genocide could be committed in time of peace as well as war.⁵²⁶ This standard was extended to other acts anointed as crimes against humanity in the Draft Code of Offenses Against the Peace and Security of Mankind as well to Apartheid, which also was recognized as a crime against humanity in the Apartheid Convention.⁵²⁷ The United Nations accorded formal recognition to crimes against humanity, as defined in the Nuremberg Charter, and highlighted the importance of punishing these delicts when it prohibited the imposition of a statute of limitations on prosecutions.⁵²⁸

Various domestic tribunals recognized universal jurisdiction over crimes against humanity. The intellectual rationale for such jurisdic-

⁵²³ See *supra* text accompanying notes 7–21.

⁵²⁴ See *supra* text accompanying notes 88–151.

⁵²⁵ See *supra* text accompanying notes 164–245.

⁵²⁶ See *supra* text accompanying notes 255–85.

⁵²⁷ See *supra* text accompanying notes 286–311.

⁵²⁸ See *supra* text accompanying notes 312–37.

tion was articulated by the Israeli Supreme Court in the *Eichmann* case.⁵²⁹ Commentators and Municipal courts also established that crimes against humanity did not constitute political offenses and that offenders should either be prosecuted or extradited to the requesting State.⁵³⁰ The exercise of universal jurisdiction and the obligation to detect, detain, and extradite those responsible for such offenses was recognized in a series of United Nations resolutions.⁵³¹

International tribunals concurred that crimes against humanity were limited to serious, severe, sustained, and systematic offenses against a civilian population. These general principles were affirmed in the judgments of European domestic courts.⁵³² The French Court of Cassation ruled that crimes against humanity encompassed acts against partisans. The French courts, however, retreated from the expansion of crimes against humanity—holding that only those affiliated with, subordinated to, or acting on behalf of the Axis Powers could be prosecuted for crimes against humanity.⁵³³

The contemporary parameters of crimes against humanity was sketched in the most recent text of the Draft Code of Offenses Against the Peace and Security of Mankind and in the statutes and commentaries of the Yugoslav and Rwandan war crimes tribunals. These texts concur that crimes against humanity are independent of crimes against peace and war crimes.⁵³⁴

Yet, crimes against humanity remains a matter of customary rather than conventional law. This, as illustrated by the formulas adopted in the Yugoslav and Rwandan war crimes statutes, has resulted in a significant degree of uncertainty. What is the content of crimes against humanity? Do crimes against humanity encompass inhumane acts as well as acts animated by racial, religious, political, social and cultural animus? May a single manifestation of abuse constitute a crime against humanity? Are acts directed against property, cultural objects, and the environment encompassed within crimes against humanity? Does State sponsorship remain an element of the offense? May private individuals as well as public officials be prosecuted? Is there a nexus requirement between crimes against humanity and armed conflict? May such offenses be committed against a domestic population? Did crimes against

⁵²⁹ See *supra* text accompanying notes 348–405.

⁵³⁰ See *supra* text accompanying notes 406–27.

⁵³¹ See *supra* text accompanying notes 379–85.

⁵³² See *supra* text accompanying notes 428–65.

⁵³³ See *supra* text accompanying notes 437–65.

⁵³⁴ See *supra* text accompanying notes 466–521.

humanity pre-date the Nuremberg Charter? Is there universal jurisdiction over all crimes against humanity? Under what conditions may the superior orders and necessity defense be recognized? What is the scope of permissible punishment?⁵³⁵

Professor Cherif Bassiouni has persuasively proposed that crimes against humanity should be incorporated into an international convention.⁵³⁶ This would provide the same formal prohibition against crimes against humanity as has been extended to war crimes. The existing protections for fundamental human rights are based upon a flawed, if not futile, set of State-based international procedures.⁵³⁷ The incremental codification of individual crimes against humanity also has resulted in a caesura in coverage. Genocide is prohibited, but there is no criminal convention which condemns extra-judicial executions.⁵³⁸ Existing treaties also are inadequate and inconsistent. The Genocide Convention, for instance, which does not protect gender and political groups, only sanctions acts undertaken with an intent to eliminate designated collectivities, and does not incorporate the customary prosecute or extradite provision.⁵³⁹

The proposed convention should prohibit and punish specified inhumane and persistent State-sponsored delicts as well as the persecution of racial, religious, national, cultural, political and gender groups. Acts already prohibited under separate instruments may be incorporated by reference. The convention might provide uniform procedures for the punishment of such offenses, including universal as well international jurisdiction. The statute of limitations on prosecutions and the superior orders and Act of State defenses also should be abrogated.

⁵³⁵ See *supra* text accompanying notes 7-521.

⁵³⁶ See Cherif Bassiouni, "Crimes Against Humanity"; *The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457 (1994).

⁵³⁷ See Matthew Lippman, *Human Rights Revisited: The Protection of Human Rights Under the International Covenant on Civil and Political Rights*, 10 CAL. W. INT'L L.J. 450 (1980).

⁵³⁸ See generally Matthew Lippman, *Disappearances: Towards a Declaration on the Prevention and Punishment of the Crime of Enforced or Involuntary Disappearances*, 4 CONN. J. INT'L L. 121 (1988); Matthew Lippman, *Government Sponsored Summary and Arbitrary Executions*, 4 FLA. J. INT'L L. 401 (1989); Matthew Lippman, *The Development and Drafting of the United Nations Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*, 17 B.C. INT'L & COMP. L. REV. 275 (1994).

⁵³⁹ See generally Matthew Lippman, *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later*, 8 TEMP. INT'L & COMP. L.J. 1 (1994); Matthew Lippman, *The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide*, 3 B.U. INT'L L.J. 1 (1985).

Liability should be extended to public officials, as well as to civilians and to members of organized criminal, militia and terrorist groups.⁵⁴⁰

The global escalation in ethnic, racial, religious, and tribal violence and animus directly threatens national and global stability. The United Nations should take the bold and historic step of adopting a Convention Prohibiting Crimes Against Humanity in order to protect civilian populations in peril and deter future barbarities.⁵⁴¹

⁵⁴⁰ See Bassiouni, *supra* note 536 at 547.

⁵⁴¹ See Meron, *supra* note 518 at 557.

REVISITING A CONFERENCE COMMEMORATING THE NUREMBERG TRIALS: A COMMENTARY FROM A NUREMBERG PROSECUTOR

AN INTRODUCTION BY ARTHUR L. BERNEY*

Except for students of history, most individuals do not devote much time to studying events which transpired prior to their birth. Students of law may share an expanded vision of time, since so much of importance in law traces itself to the distant past. Students of International Law must have a particularly long range vision because ordinarily that body of law changes in a glacial fashion—slowly and ponderously. However, there are special moments in history when even international law leaps forward.

One such leap occurred at the end of World War II, when surviving leaders of Nazi Germany (and later Japan) were tried by tribunals that constituted themselves as international criminal courts. The European trials were initiated at Nuremberg, Germany and produced what are now known as the Nuremberg Principles. Before Nuremberg, there had never been an international trial criminally charging military, political and financial leaders of a country with violations of international law.¹

In retrospect, it is not a great surprise that this break with tradition involved members of the Nazi regime. The Nazis committed such atrocities and despicable acts that the conscience of the world was shocked and outraged. Six million European Jews were brutally slaughtered by the Nazis. Other minorities, including “Gypsies,” homosexuals and mentally ill persons were also systematically persecuted and killed.² Millions of non-combatant Russians and Slavs were killed. Human brutality accounted for some of this but the driving force behind this massive genocidal campaign was a theory of racial superiority. The

* Professor Arthur L. Berney has been a faculty advisor and friend to both the *Boston College Third World Law Journal* and the Owen M. Kuperferschmid Holocaust/Human Rights Project since their inception.

¹ See Treaty of Peace With Germany (Treaty of Versailles), June 28, 1919, art. 227, 2 Bevans 43, 136-37.

² See D.H. Goldhagen, *There is No Hierarchy Among Victims*, N.Y. TIMES, Jan. 18, 1997, at 21.

chief prosecutor for the French at Nuremberg defined the Nazi evil in the following fashion:

This monstrous doctrine is that of racialism: The German race, composed in theory of Aryans, would be a fundamental and natural concept. Germans as individuals do not exist and cannot justify their existence, except insofar as they belong to the race or Volkstum, to the popular mass which represents and amalgamates all Germans. Race is the matrix of the German people; proceeding therefrom this people lives and develops as an organism. The German body, fulfilling within the collectivity a definite technical function; his activity and his usefulness are the exact gauge and justification of his liberty. This national body must be "moulded" to prepare it for a permanent struggle."³

The urge for vengeance was strong and there were calls for immediate political retribution.⁴ Instead, the major allied powers, the United States, France, the United Kingdom, and the Union of Soviet Socialist Republics, entered an international agreement for the prosecution and punishment of the "major war criminals" of the Axis powers.⁵ As a result of this agreement, ultimately agreed upon by nineteen other nation states, the International Military Tribunal was created. Not only was the establishment of such an institution a unique historical event, but the charter it adopted established novel and important principles of law. Both the establishment of the tribunal and the nature of the crimes charged⁶ were

³ TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 14 Nov. 1945–1 Oct. 1946 (Nuremberg, 1947), Vol. 5. at 373.

⁴ See TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS*, 21–22 (1992). Supposedly, Prime Minister Churchill of England initially had proposed that the leaders of Nazi Germany be executed, as a matter of political decision. See *id.* at 29–31.

⁵ See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Charter of the International Military Tribunal, 59 Stat. 1544, 1546, 82 U.N.T.S. 279, 284.

⁶ See TAYLOR, *supra* note 5, at 4–5. The most commonly heard criticism was that the tribunal created by victorious powers to try the vanquished, was a retroactive form of victors justice. The crimes listed in Article 6 of the Charter were Crimes Against the Peace, War Crimes and Crimes Against Humanity. This is not the place to rehearse the arguments about the legitimacy of the tribunal, but suffice it to say that the criticism that still holds the most sting is that war as an instrument of national policy (crimes against the peace) has not been renounced, and thus victors in war need not be concerned with the application of the Nuremberg principles. This charge can only be put to rest through application of the principles to members of the victorious forces, and finally by establishing international tribunals capable of imposing meaningful sanctions against

controversial. There were certainly some acts of vengeance against the Germans after the war, but in general, responsibility and punishment were meted out in accordance with law and fair trials based upon evidence. That was the impetus, the meaning and the *most enduring legacy* of the Nuremberg trials. Justice Jackson expressed this idea in his eloquent opening statement:

The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.⁷

In April of 1995, almost half a century to the date after those words were uttered, a conference was held at Boston College Law School commemorating the Nuremberg Trials. In a minor way the conference was a historic event in its own right in that like no other meeting on the subject, it brought together almost all the surviving members of the American prosecuting teams. The honoree at the conference was General Telford Taylor, who succeeded Justice Jackson as Chief Prosecutor for the United States after the first round of trials were completed.⁸ The “prosecutors’ panel” consisted of six men: Benjamin Kaplan, Henry J. King, Jr., Thomas Lambert, Jr., Walter Rockler, Drexel Sprecher and Whitney Robson Harris. All had gone on to illustrious careers in the legal profession as attorneys, writers, professors of law, and judges. But in different ways, all counted their involvement in the Trials as a defining period of their lives.⁹

The Nuremberg Conference was the seventh international conference sponsored by the Owen M. Kupferschmid Holocaust/Human

any state that resorts to war and violence in pursuit of any goal other than defending against an armed attack.

⁷ *Id.* at 167.

⁸ The first chief prosecutor, and in some respects the driving force behind the Nuremberg trials, was Justice Robert Jackson of the United States Supreme Court. For a more comprehensive account of the trials see TAYLOR, *supra* note 4.

⁹ For a more in-depth presentation of the prosecutors’ experiences at Nuremberg, see Allan Ryan, *Judgments on Nuremberg: The Past Half Century and Beyond—A Panel Discussion of Nuremberg Prosecutors*, 16 B.C. THIRD WORLD L. J. 193, 193 (1996). A high quality video tape was made of this panel and copies may be ordered by writing the Holocaust and Human Rights Project, Boston College Law School, 885 Centre Street, Newton, MA 02159.

Rights Project (HHRP) of Boston College Law School, a remarkably innovative, student-initiated enterprise begun in 1984.¹⁰ Past conferences had attracted scholars and practitioners from around the world to compare national practices and jurisprudential approaches to prosecuting international human rights violations. Research by HHRP students—in support of deportation and prosecution of Nazi war criminals, in analyzing liability for genocidal policies, and most recently in aiding the definition of war crimes for ongoing prosecutory efforts arising from events in the former Yugoslavia—has provided a unique service to national and international human rights agencies.

With its shared concern for human rights, the *Third World Law Journal* has published portions of the HHRP conferences and related research. By re-submitting papers from the Nuremberg 50th Anniversary Conference, HHRP and the *Boston College Third World Law Journal* hope to present, through a series of occasional papers, as much of the conference as possible. The following commentary, written by one of the Nuremberg prosecutors, Professor Henry J. King, Jr., is meant to reinstate and revive this process. Coming as it does at a time when the first serious effort in fifty years to mount “Nuremberg” trials (concerning violation committed in the former Yugoslavia and in Rwanda) is being made, we can do no less.

¹⁰HHRP was established by Owen M. Kuperferschmid and fellow students of the class of 1986. The organization’s purpose is to study the lessons of the Holocaust experience, the Nuremberg precedents, and state sponsored crimes against humanity in general. The purpose of the study is to apply these historic lessons to contemporary violations of a like nature, in order to advance the causes of humanity and justice. The project was renamed in Owen Kuperferschmid’s honor following his untimely death in 1991 at age 33. The *Boston College Third World Law Journal* dedicated its Spring 1996 issue to the memory of this extraordinary man. See Ryan, *supra* note 10, at 193.