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UNIVERSITY OF SYDNEY

CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW

by

ROBERT EDWARD DUBLER
Student No. 198063588

A THESIS SUBMITTED IN FULFILMENT OF THE DEGREE OF DOCTOR OF PHILOSOPHY, FACULTY OF LAW, UNIVERSITY OF SYDNEY

JUNE 2006

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ABSTRACT

This work aims to discern the meaning or definition of crimes against humanity in international criminal law. The approach is broadly historical. Six chapters trace the history of the development of the crime and the last three chapters offer an analysis of the crime's meaning and the right or duty to prosecute those suspected of perpetrating such crimes. First, the work argues that the modern test of ‘a widespread or systematic attack directed against any civilian population’ can be criticised for its indeterminacy – when is an attack ‘widespread or systematic’? Also, if applied literally, the test travels beyond its historical and technical meaning under international customary law. The conclusion offered is that a ‘crime against humanity’ under current international customary law occurs when there is ‘manifest state inability or unwillingness to protect its people from situations of extreme violence’. ‘Situations of extreme violence’ in this context means an ‘attack’ of sufficient scale, seriousness and organisation that it can be compared with attacks which have warranted humanitarian interventions by states or the Security Council in the past.

Secondly, the work argues that in order to understand the moral and legal tensions inherent in the notion of crimes against humanity in international law, it is necessary to separate the elements of the offence from the jurisdictional right to try. It is argued that the threshold test for crimes against humanity is best viewed as a permissive rule of jurisdiction authorising intervention by the Security Council under Chapter VII of the UN Charter or by the ICC Prosecutor under the Rome Statute for the International Criminal Court in the case of State Parties. The many underlying offences which make up a ‘crime against humanity’, such as murder, rape, torture, enslavement or inhumane treatment, already amount to conduct which is ‘criminal according to the general principles of law recognised by the community of nations’. It is the combination of both a sufficiently serious underlying offence and an international rule of jurisdiction which gives rise to a ‘crime against humanity’ in international law. The conclusion reached is that outside of Security Council or treaty authorisation, the right of one state to exercise universal jurisdiction over the ‘crimes against humanity’ of another state which have no link to the prosecuting state and in the face of opposition by the state of the nationality of the suspect, remains unclear.
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I would like to express my enormous gratitude to Professor Don Rothwell, my supervisor. Single-handedly he supervised me throughout my thesis and afforded me an extraordinary amount of his time. His endless patience, encouragement and wealth of legal knowledge was greatly appreciated.

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Through the latter half of the thesis I was ably assisted by two research assistants, Mr Lucas Bastin and Ms Laura Thomas. Both are undergraduates of the Law School of the University of Sydney who assisted me with obtaining sources, proof reading and checking citation references. I was greatly impressed with their skills and ability and look forward to observing their progression in the law in the coming years.

Finally I would like to thank my wife, Lyndall Thomas, and my family for their tolerance and for putting up with my ‘indulgence’. In particular, Lyndall, as both my best friend and an astute, careful lawyer, was of enormous assistance in proof reading drafts and making a number of insightful suggestions. As always her love, encouragement and moral support was invaluable.

The law is stated at 1 April 2006

Robert E Dubler
Sydney, Australia
29 June 2006
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<td>CCL 10</td>
<td>Allied Control Council Law No 10</td>
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<td>EJIL</td>
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<td>Crimes against Humanity as evidenced by the humanitarian interventions of the Last 200 Years</td>
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PREFACE

‘Our government is engaged in a continuing crime against humanity’ said Kate Reynolds MP on 5 December 2003 in respect of Australia’s policy of mandatory detention of asylum seekers.\footnote{Kate Reynolds MLC, News Release: Democrats – The lone voice for refugees (2003) Australian Democrats <http://sa.democrats.org.au/Media/2003/1205_a%20democrats%20only%20voice%20for%20refugees.htm> viewed 1 May 2006.} One may think that this is just another example of the label ‘crime against humanity’ being used as a rhetorical figure of speech and outside its strict meaning in international law. The term has been used to describe terrorist attacks, policies of assimilation, and the destruction of the social safety net.\footnote{Richard Vernon “What Is a Crime Against Humanity?” (2002) 10 Journal of Political Philosophy 231, 249.} It appears the term can be used to describe everything which outrages us. Julian Burnside QC, barrister and refugee advocate, has argued that the Australian Government’s policy is in fact a ‘crime against humanity’ as defined in Article 7 of the Rome Statute of the International Criminal Court (ICC Statute) and that the members of the Government, including Prime Minister, John Howard, are liable to prosecution before the International Criminal Court (ICC).\footnote{Julian Burnside QC in a speech in 2003 argued this, saying ‘a representative of the International Criminal Court has expressed privately the view that asylum seekers as a group can readily be regarded as a civilian population’: see Margo Kingston, ‘Australian Crime against Humanity’, Sydney Morning Herald (Sydney) 8 July 2003.}

The aim of this work can be simply stated – to describe the meaning of a ‘crime against humanity’ in international law. Today, the liberty of leaders such as the Australian Prime Minister would appear to depend upon the proper interpretation of Article 7 of the ICC Statute. That definition contains loose concepts, such as a ‘widespread or systematic attack’ and ‘organizational policy to commit such attack’. The meaning of these terms is far from clear in international law. Whilst the ad hoc Tribunals created by the Security Council (the ICTY and the ICTR) have recently pronounced upon the crime’s meaning in the context of their own statutory definitions and factual situations, there is no authoritative case law assigning the offence a clear technical meaning, and the various statutes defining it – the London Charter, the Tokyo Charter, Allied Control Council Law No. 10, the ICTY Statute, ICTR Statute, the ICC Statute, the Statutes of the hybrid Tribunals of Sierra Leone, East Timor, Kosovo and Cambodia – all define it differently. Appendix one sets out all of the definitions of the crime in each of these international or ‘hybrid’ instruments.

The approach taken in this work is essentially historical. Every definition of the phrase, a ‘crime against humanity’, has not been drafted in a vacuum. Each has been influenced by what has taken place before it and the historical situation sought to be addressed by the Tribunal in question. Even at Nuremberg, when the crime first entered positive international law in the London Charter, the roots of the concept can be traced back over the centuries. The thesis is broadly in two parts. The first six chapters trace the historical development of this international crime from the antiquities to the present. Wherever possible, contemporary sources have been relied upon. The aim is to let the actors, scholars and publicists of each era speak of their understanding of the concept of crimes against humanity. The remaining three
chapters contain an analysis of the elements of the offence and the jurisdictional right to try the alleged perpetrators under international law.

Chapter 1 contains an outline of the origins of the concept of crimes against humanity, in its non-technical sense, from classical times up to the Second World War. Chapter 2 examines the Nuremberg Precedent after the Second World War. Chapter 3 is entitled ‘From Nuremberg to the Hague’. It chronicles the treatment of the concept of crimes against humanity in the period from 1946 to 1993. This covers the work of the post Second World military tribunals after Nuremberg, international sources, including the work of the International Law Commission and state practice (its legislation and case law). Chapter 4 analyses the treatment of crimes against humanity by the ad hoc Tribunals created by the Security Council, the ICTY (created in 1993) and the ICTR (created in 1994). This includes a history of the drafting of the definitions of the offences in the Statutes for the ICTY and the ICTR and an analysis of the Tribunals’ jurisprudence.

Chapter 5 is devoted to a consideration of Article 7 of the ICC Statute. It considers the history of its drafting, the issues that emerge from the final draft and the underlying offences in Article 7. Chapter 6 attempts to bring matters up to date by looking at state practice since the Rome Conference of 1998. In section 1 it examines the statutes and case law of the so-called hybrid tribunals for Sierra Leone, East Timor, Kosovo and Cambodia. It secondly considers, through fourteen selected countries, recent state practice (statutes and case law). This includes an examination of the approach of states to the incorporation of Article 7 of the ICC Statute into domestic law and the right to try those alleged to have committed crimes against humanity outside the territory of the state.

Chapter 7 is entitled ‘Crimes Against Humanity and International Customary Law’. The chapter examines the practice of the Security Council since 1991 and suggests that it is this practice which is the real driver of the modern concept of crimes against humanity as a matter of international customary law. The chapter offers a definition of a ‘crime against humanity’ under customary law – that of ‘manifest state inability or unwillingness to protect its people from extreme violence’. Whether an ‘attack’ reaches such a threshold is best judged by the types of attacks which in the past have led to humanitarian intervention by the Security Council acting under Chapter VII or by states prior to the First World War in the case of purely internal human rights abuses. An interpretation of Article 7 is put forward which would bring Article 7 into line with this suggested customary law definition. It is further argued that the threshold requirement for a ‘crime against humanity’ is best seen as a rule of jurisdiction for intervention by the Security Council acting under Chapter VII of the UN Charter in the case of purely internal atrocities which in tum was adopted by states at the Rome Conference when drafting the ICC Statute.

Having dealt with the meaning of crimes against humanity, Chapter 8 considers two questions: the right of state courts to exercise universal jurisdiction over crimes against humanity and the duty of states to prosecute or extradite those suspected of committing crimes against humanity. The conclusion reached is that, outside of Security Council or treaty authorisation, the right of state courts to exercise universal jurisdiction over foreign nationals alleged to have committed crimes against humanity which have no link to the prosecuting state – in the face of opposition by the suspect’s state of nationality – remains unclear in international law and difficult in practice. The final chapter offers a theory of crimes against humanity and some suggestions for the future, including the creation of further regional or hybrid tribunals, such as a permanent international criminal tribunal for Africa to be administered jointly by the
United Nations and the African Union. This offers far more hope for the future than the assertion of universal jurisdiction by single states where the ICC has no jurisdiction.

Whilst the judges of the ICC will have a wealth of material to draw upon when construing Article 7, they will also be faced with a number of choices as to how to interpret its meaning. As David Luban has remarked: ‘The concept [of crimes against humanity] is still in the childhood of its legal development, and those wrestling with the appropriate codification are in very much the same position as mathematicians in the early stages of a new field’.4

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CHAPTER ONE

THE ORIGINS OF THE CONCEPT OF CRIMES AGAINST HUMANITY

Crimes against humanity are as old as humanity itself.1

1. INTRODUCTION

The object of this chapter is to explore the main foundations, legal and other, of the concept of crimes against humanity prior to 1945. One has to refer to the ‘concept of crimes against humanity’ because the term ‘crimes against humanity’, in its strict sense, only first entered positive international law in 1945 when the four Allied powers, France, the Soviet Union, the United Kingdom and the United States established the International Military Tribunal at Nuremberg and granted it jurisdiction to try the captured Nazi leaders with three categories of crimes: ‘crimes against peace’ (Article 6(a)); ‘war crimes’ (Article 6(b)); and ‘crimes against humanity’.2 (Article 6(c)).3 Hence, the concept of crimes against humanity is heavily associated with the Nuremberg trial. It would be wrong, however, to think that the idea has no genealogy before that date. Its roots, in fact, can be traced back over the centuries.

Despite its rich tradition, which is explored in this chapter, frequently the historical and legal analyses of crimes against humanity suffer from undue emphasis being placed on the Nuremberg and Tokyo trials after the Second World War and the definition of the crimes as contained in the London Charter (Article 6(c)) and the Tokyo Charter of 1946 (Article 5(c)).4 This places the genealogy of crimes against humanity in the laws and customs of war, an outgrowth of war crimes, and limits such crimes to situations of war or some form of armed conflict.

It is important to appreciate that the concept of crimes against humanity enjoys a legal and historical tradition independent of the laws of war and the Nuremberg Precedent. To trace the history of those roots one has to provide a working definition of ‘the concept of crimes against humanity’. The concept, in essence, has three elements:

(1) The existence of a crime under a higher, basic, natural or international law which applies to all persons, irrespective of position or status, and regardless of any contrary positive or local law.

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1 See Jean Graven, ‘Les crimes contre l'humanité’ (1950-l) 76 Recueil des Cours 427, 433.
2 There appears to be no definitive statement as to how the designation ‘crimes against humanity’ was arrived at. Jackson, the United States representative, said the headings had been suggested to him by an eminent scholar of international law and Clark says Professor Lauterpacht has been credited as the author: R.S. Clark, ‘Crimes against Humanity at Nuremberg’ in G. Ginsburgs and V.N. Kudriavtsev (eds), The Nuremberg Trial and International Law (1990) 172, 189 n54; see also M.C. Bassiouuni, Crimes against Humanity in International Criminal Law (2nd rev. ed, 1999) 17.
3 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, done in London, England, opened for signature 8 August 1945, 82 UNTS 280 (entered into force 8 August 1945), to which was annexed the Charter which established the Nuremberg Tribunal (hereinafter the London Agreement and London Charter respectively).
(2) Such higher law applies to persons of all nations at all times and can never be the subject of any state derogation.

(3) Perpetrators of such crimes can be subject to individual criminal responsibility before courts applying directly that higher law, not merely the local law of a particular state. The concept of crimes against humanity set out above draws heavily upon the traditions of natural law – the tradition that a sovereign is always answerable to a higher law. The defining, though not exclusive, aspect of the concept of crimes against humanity is the notion that certain conduct is always unlawful, even when committed by a sovereign or a Head of State towards its own people. This chapter argues that it is this tradition, rather than the laws of war, which sets the background for the trial of the Nazi leaders for their role in the Holocaust. As there are few international trials to draw upon prior to the Nuremberg Trial, this chapter largely presents the views of scholars on the concept of crimes against humanity along with relevant state practice in five separate historical periods commencing with ancient civilisations and ending with the outbreak of the Second World War. There is a particular reason for discussing the historical aspects of the concept of crimes against humanity. Article 6(c) of the London Charter, discussed in chapter 2, was not drafted in a vacuum. It drew upon problems, debates and resolutions which had been mooted in the past and which remain relevant today.

2. ANCIENT CIVILISATIONS

2.1 Political and Legal Thought

The tradition of natural law is generally traced back to Greek philosophers who denied the absoluteness of the state and its ability to pass laws contrary to justice. For Plato (427-347 BCE) the law ‘is sovereign over the authorities and they its humble servants’. Similarly, Aristotle (384-322 BCE) said ‘...we will not have a man to rule another, for a man rules with one eye to his own interest and becomes a tyrant. We will have the law for our ruler...’. Aristotle drew a distinction between ‘particular’ and ‘universal’ law. The former may be passed by men but the later is unchanging, being ‘the law of nature. For there is a natural and universal notion of right and wrong, one that all men instinctively apprehend’. Sophocles (c496-406 BCE) echoed this idea when he had Antigone justifying his transgression of Creon’s law: ‘Because it was not Zeus who ordered it ... The unchangeable unwritten code of Heaven’.

The tradition of natural law was continued by Roman Stoics, such as Seneca (c4 BCE-65 CE), Epictetus (c55-c135 CE) and Marcus Aurelius (121-180 CE) who

8 Lane Cooper, The Rhetoric of Aristotle (1965) 73.
10 He said: ‘The common possession of reason is synonymous with the necessity of a common law... That common law makes fellow-citizens of us all. If this is so, we are members of some
envisaged one single common law of humanity based on a common possession of reason. Ulpi an (100-228 CE), in company with other lawyers of the Roman era, said that whilst a person could be a slave under civil law, all persons by natural law were free. According to Cicero (106-43 BCE) ‘true law’ is ‘of universal application, unchanging and everlasting . . . And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one external and unchangeable law will be valid for all nations and all times’.

Amartya Sen argues that the notion of the limited authority of the state also has support in the writers of the same time in non-western civilisations. In support, he refers to Confucius (c551-479 BCE), who did not recommend blind allegiance to the state; Buddhism, originating in India in the sixth century BCE as an agnostic form of thought, which places great importance on freedom, free choice and volition; and the works of Kautilya (c350-275 BCE), an influential Indian writer, who, like Aristotle, supported slavery for the lower classes, yet thought slavery unacceptable for the upper classes saying it is wrong for the state to deny the upper classes freedom from undue government interference.

2.2 State Practice

Generally, state practice did not live up to the lofty ideals of the above writers, with the possible exception of the Greek city-state. By the fifth century BC a system developed in Athens where a citizen could complain to a scribe who would gather the Assembly to act as jury and decide all issues. With the jury numbering between ten and as many as 6,000 it had, says Robinson, only the ‘vaguest ideas of the law’. As a result, says Phillipson, Greek rulers realised the need to observe ‘traditional usages and principles spontaneously enforced by human conscience’. Such a system applied the law with equal force to both the poor and the powerful. Pericles himself was prosecuted and fined before a jury in 430 BC. This was, to the Greeks, the essence of the rule of law itself. Whilst the Assembly in both Sparta and Athens passed regulations – psephismata or ‘things voted’ – the law, nomoi, was largely unwritten. It represented

political community in the sense that the world is in a manner of a State’: see H. Lauterparth, International Law and Human Rights (1950) 94.

11 For an account of these writers see: Bertrand Russell, History of Western Philosophy (first published 1946, 2000 ed) 260-276; and Whitney J. Oates (ed), The Stoic and Epicurean Philosophers (1940) 224-280.
12 Ulpi an, Digest (Tony Honoré trans, 2002) 1.17.3.2.
13 Marcus Tullius Cicero, De Re Publica and De Legibus (C. W. Keyes trans, first published 1928, 1977 ed) 211.
15 See Confucius, The Analects of Confucius (S Leys trans, 1997) 14.22, 70. Confucius says loyalty to family may be a higher virtue than obedience to a bad ruler (13.18, 63) and even rebellion may be justified if a state has lost its way (14.3, 66).
16 Amartya Sen, above n 14, 236.
19 C. E. Robinson, above n 18, 273.
20 Coleman Phillipson, The International Law and Custom of Ancient Greece and Rome (1911) 59.
21 C.E. Robinson, above n 18, 180.
the basic laws of the state – the moral and creative power of the polis.²² To the Greek way of thinking such laws represented general principles of morality, immutable and unchanging.²³ The disadvantage of such a system of criminal law, which relied essentially upon custom as interpreted spontaneously by the people, was its uncertainty and potential for abuse. After Socrates’ trial and death in 399 BC, Plato distrusted democratic rule.²⁴

Stoic philosophy and the theory of natural law only had theoretical relevance to the actual law and practice of Rome.²⁵ Nevertheless, the Romans did divide the law, or *jus positivum*, into *jus gentium* and *jus civile*. The *jus gentium* applied to all communities in the Roman Empire. Crimes against the law of nations are sometimes called *delicti jus gentium*.²⁶ This, however, tends to reduce international criminal law to the law of the lowest common denominator – the minimum standards of international criminal law agreed to by all nations. The alternative, and sounder, classical foundation for crimes against humanity, in its non-technical sense, is the Greek concept of *nomoi* with its notion of universal right and wrong inherent in the human condition.

3. **THE MIDDLE AGES IN EUROPE**

3.1 **The Laws of God as Higher Law**

The Church dominated Middle Ages saw an affirmation of the idea of a higher law superior to the authority of the state. St Augustine’s (354-430) highly influential *City of God* emphasised that the sovereign only possessed limited authority on earth, secondary to the laws of God (as interpreted by the Church) and justice.²⁷ He stated: ‘In the absence of justice, what is sovereignty but organised brigandage? For what are bands of brigands but petty kingdoms?’²⁸ Such a doctrine remained dominant for centuries, reinforced, perhaps most influentially, in the works of St Thomas Aquinas (c1225-

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²² According to Professor Kitto, the *nomoi* was designed not only to receive justice in the individual case, but also to inculcate justice, which was one reason why the young Athenian, during his two years with the colours, was instructed in the *nomoi* ‘which are the basic laws of the state’: see H.D.F. Kitto, above n 18, 94.

²³ For example, Sparta, with her laws of Lycurgus, was admired for her *Eunomia* – being well lawed – because it was supposed her laws had not changed for centuries: ibid.

²⁴ C.E. Robinson, above n 18, 274-275.

²⁵ This can, for example, be seen in the Justinian codification *Corpus Juris Civilis*, the *Pandects* of which contain references by Ulpian and others to higher universal values that can be traced to the writings of Plato and Aristotle. For example, there are references to the law being in furthestance of justice and equity, some of the principles or maxims of which continued in the common law: see H. Yntema, ‘Roman Law and its Influence on Western Civilization’ (1949) 77 *Cornell Law Quarterly* 77; and E.D. Re, ‘The Roman Contribution to the Common Law’ (1961) 29 *Fordham Law Review* 447.

²⁶ For example, Bassiouni says ‘Such crimes are appropriately called *delicti jus gentium*’: M.C. Bassiouni, *International Extradition: United States Law and Practice* (3rd revised ed, 1996) 298.

²⁷ For an outline of the writings of St Augustine, see Bertrand Russell, above n 11, 351-363; and H.A. Deane, *The Political and Social Ideas of St Augustine* (1963).

1274)\textsuperscript{29} and echoed by Bracton (c1210-1268) in England when he said the sovereign has two superiors, God and law.\textsuperscript{30} This was also the position of leading continental jurists such as Gratian (died c1155) and Beaumanoir (c1250-1296).\textsuperscript{31} Similarly, Suárez (1548-1617) said: ‘Lex injusta non est lex’.\textsuperscript{32}

This doctrine, described by German writer, Griekie, as ‘radical to the very core’,\textsuperscript{33} led writers such as Thomas More (1478-1535),\textsuperscript{34} Languet (1518-1581)\textsuperscript{35} and Gentili (1552-1608)\textsuperscript{36} to hold that a tyrant who acts contrary to the laws of God or nature is a criminal and rebellion or foreign intervention is justified ‘unless we wish to make sovereigns exempt from the law and bound by no statutes and precedents.’\textsuperscript{37}

Such views came to be known as the theory of a ‘just war’\textsuperscript{38} which can also be found in the Islamic tradition of jihad\textsuperscript{39} and in ancient Chinese philosophical traditions.\textsuperscript{40} By this doctrine certain crimes transcend national boundaries; foreign nations have a right to punish such crimes by intervention; and the crimes in question can be made the subject of legal punishment if thought appropriate. For example, de Victoria (1480-1546) asserted ‘a prince who has on hand a just war is ipso jure the judge of his enemies and can inflict a legal punishment on them, according to the scale of wrongdoing’.\textsuperscript{41} Hugo Grotius (1585-1645), the most influential of the writers on just war theory, also derived the law of nations from the law of nature.\textsuperscript{42} He was quoted by

\textsuperscript{29} Aquinas said: ‘But in order that the volition of what is commanded may have the nature of law, it needs to be in accord with some rule of reason. And in this sense is to be understood the saying that the will of the sovereign has the force of law; or otherwise the sovereign’s will would savour of lawlessness rather than of law’: see St Thomas Aquinas, Treatise on Law: Summa Theologica, Questions 90-97 (Gateway edition, 1969) 4. For an outline of the writings of Aquinas see Bertrand Russell, above n 11, 444-454.

\textsuperscript{30} Henry de Bracton, De Legibus et Consuetudinibus Angliae (George E. Woodbine ed, 1915-42) vol II.29-30. Coke and others used the work in their legal arguments against the King in the English civil war.

\textsuperscript{31} H. Lauterpauch, above n 10, 85.

\textsuperscript{32} ‘An unjust law is not law’: Francisco Suárez, De Legibus ac Deo Legislitore (first published 1612, 1948 ed) II.XIV.8.

\textsuperscript{33} H. Lauterpauch, above n 10, 96.

\textsuperscript{34} Thomas More, Utopia (first published 1516, G.M. Logan, R.A. Adams and C.H. Miller (eds), 1995 ed) 56.

\textsuperscript{35} See the discussion of Hubert Languet’s and Philippe Duplessis-Mornay’s Vindicae Contra Tyrannos in E.C. Stowell, Intervention in International Law (1921) 55.

\textsuperscript{36} Gentili said: ‘as far as I am concerned, the subjects of others do not seem to me to be outside of that kinship of nature and the society formed by the whole world’: Alberico De Gentili, De Jure Belli Libri Tres (first published 1612, John C. Rolfe trans, 1933 ed) I, xvi.

\textsuperscript{37} Ibid.


\textsuperscript{39} See J.T. Johnson, The Holy War Idea in Western and Islamic Traditions (1997); J.T. Johnson and J. Kelsay (eds), Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Traditions (1990).

\textsuperscript{40} See M.C. Bassiouni, above n 2, 49-50.

\textsuperscript{41} James B. Scott, The Spanish Origins of International Law I: Francisc de Victoria and his Law of Nations (1934) 234.

\textsuperscript{42} For a summary of the writings of Grotius, see: H. Lauterpauch, ‘The Grotian Tradition in International Law’ (1946) 23 British Year Book of International Law 1.
Sir Hartley Shawcross\textsuperscript{43} and US prosecutors\textsuperscript{44} at Nuremberg to explain the charges of crimes against humanity. In a series of oft-quoted passages, Grotius set out what can be described as the first modern statement of the concept of crimes against humanity in international law:

But the case is different if the wrong be manifest. If a tyrant like Busiris, Phalaris, Diomede of Thrace, practises atrocities towards his subjects, which no just man can approve, the right of human social connection is not cut off in such a case.\textsuperscript{45}

Also, Grotius submitted that:

It is to be understood also that kings . . . have the right of requiring punishment, not only for injuries committed against them or their subjects, but also for those which do not peculiarly touch them, but which enormously violate the laws of nature and nations in any persons . . . Indeed it is more honourable to punish the injuries of others than your own . . . \textsuperscript{46}

Thus, based upon natural law principles, Grotius asserted both a right of foreign intervention and a right to punish for crimes committed outside a state's jurisdiction. This links the concept of crimes against humanity with the principle of humanitarian intervention discussed in section 5.1.

3.2 State Practice

The Church and the doctrine of a higher law did at times curb the power of the state to commit what may be seen as a crime against humanity, in its loose sense. In 390, St Ambrose (c339-397) forced the Emperor to do public penance in the cathedral of Milan after the slaughter of thousands of civilians by Roman soldiers at Thessalonica.\textsuperscript{47} From about the thirteenth century, however, the papacy was eclipsed by the rising power of the northern towns of Italy and the kings of France and England. Kings began to assert the divine right to rule without interference from the Church. Nevertheless, whilst the dominance of the papacy may have declined, orthodox legal theory still denied the authority of either king or parliament to pass arbitrary or

\textsuperscript{43} See Speeches of the Chief Prosecutors at the Close of the Case Against the Individual Defendants (published under the authority of HM Attorney-General by HM Stationery Office, 26-27 July 1946) (Command Papers 6964) 63 (hereinafter Speeches of the Chief Prosecutors).

\textsuperscript{44} See the address of Brigadier General Taylor, Chief of Counsel for the United States in United States v Flick and others 6 Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No 10, 87-89 (hereinafter Taylor address).

\textsuperscript{45} Hugo Grotius, De Jure Belli ac Pacis Libri Tres (first published 1646, Whewell trans, 1925) II.xxv.\S 8(2).

\textsuperscript{46} Ibid, II.xx.\S 40. Lauterpacht says of the first passage quoted (note 45) that it is the 'first authoritative statement of the principle of humanitarian intervention': see H. Lauterpacht, above n 42, 46. It is important, however, to tie this statement with the second statement quoted above which appears first in Book II, 'On Punishment', to conclude that Grotius supports the proposition that a tyrant's atrocities towards his own people are crimes under international law.

\textsuperscript{47} Bertrand Russell, above n 11, 339-340.
unreasonable laws contrary to justice. English jurists such as Fortescue (c.1394-1476), Hooker (c.1553-1600), Hale (1609-76) and even arguably Blackstone (1723-80) upheld this view. Coke (1552-1634) in cases decided in 1608 and 1610 said the courts may hold laws of parliament to be void, and said ‘Magna Carta is such a fellow that he will have no sovereign’. Some of the principles of Magna Carta were acknowledged by royalty beyond England, for example, by Alfonso IX in 1188 at the Cortes of Leon, by King Andrew II in 1222 in Hungary, by Peter III in 1283 at Aragon, by Philip the Fair of France in 1311 and by Louis X of France four years later.

Of particular interest is the oft-quoted trial of Peter Von Hagenbach. In 1474 in Breisach, Hagenbach was tried before a tribunal of 28 judges from allied States of the Holy Roman Empire. Charles, the Duke of Burgundy, had appointed Hagenbach the Governor of Breisach, Austria. The Duke of Burgundy was allowed to rule the town as an interim pledge until the Archduke of Austria repaid a debt to the Duke. Hagenbach sought to reduce the populace of Breisach to a state of submission by committing such atrocities as murder, rape and illegal confiscation of property. When the town rebelled and was retaken by Austria and her allies, Hagenbach was arrested and accused of having ‘trampled under foot the laws of God and man’. He was found guilty and put to death. The trial, such as it was, possibly represents the first supranational trial for crimes against humanity in its non-technical sense. Some describe the trial as the first

48 According to Sir Frederick Pollock, ‘The omnipotence of Parliament was not the orthodox theory of English law, if orthodox at all, even in Holt’s time’: F. Pollock, ‘A Plea for Historical Interpretation’ (1923) 39 Law Quarterly Review 163, 165.

49 Fortescue said: ‘Thus we have also found that the rules of the political law, and the sanctions of customs and constitutions ought to be made null and void, so often as they depart from the institutions of nature’s law’: John Fortescue, De Natura Legis Angliae (S.B. Chrimes trans, 1942) vol 1, ch 29.


51 ‘Hale described as wild and ‘against all natural justice’ the proposition that the king may make, repeal or alter laws as he pleases’: H. Lauterpacht, above n 10, 96.

52 The controversy with Blackstone is that on the one hand he refers to ‘the immutable laws of nature’ being ‘of course superior in obligation to any other’ and to Acts of Parliament being void where ‘contradictory to common reason’: Sir William Blackstone, Commentaries On The Laws Of England (first published 1765-1769, 4th ed, 1770) 40-41 and 91. He, however, also refers to the power of Parliament to do ‘everything that is not naturally impossible’: 41.

53 Calvin’s Case (1608) 7 Co. Rep. 1, 4b.

54 Doctor Bonham’s Case (C.P. 1610) 8 Co. Rep., 114a and 118a; see also T.F.T. Plucknett, ‘Bonham’s Case and Judicial Review’ (1926) 40 Harvard Law Review 30.


56 See H. Lauterpacht, above n 10, 85.


58 See M.C. Bassiouni, above n 2, 463.

59 G. Schwarzenberger, above n 57, 465.

60 Vaughan says “[t]he execution was resolved on first; the trial was a mere formality”: Charles Vaughan, Charles the Bold: The Last Valois Duke of Burgundy (1973) 284.
international war crimes trial. The Swiss-Burgundian War, however, did not commence until 1476 and, hence, Hagenbach’s atrocities were not committed in the context of war.

The notion that tyranny, itself, is a crime was invoked in the trial of Charles I in England in 1649. He was charged with being a ‘Tyrant, traitor and murderer’ who had ‘traitorously and maliciously levied war against the present Parliament’ contrary to his ‘limited power to govern by and according to the laws of the land and not otherwise’. Less controversial is the proposition, accepted by many modern international law scholars, that piracy is a crime under customary international law dating from the 1600s. Writers from the antiquities through to the Middle Ages, however, did not just single out pirates alone as the outcasts of the world. Cicero referred both to pirates (pirata) and brigands/bandits (praedones – land based predators) as hostis humani generis. Ayala (c1548-1584) referred to piracy as being a crime under the jus gentium of nations, as well as acts contrary to the laws of God including religious persecution. Gentili took pirates to be criminals which called ‘all men to arms’, along with any ‘general violation of the common law of humanity’. Grotius said the same for pirates as well as ‘those who act with impiety towards their parents’ and ‘against those who kill strangers’. In both Roman times and the Middle Ages the phrase hostis humani generis was applied to conduct well beyond that of pirates.

The Middle Ages, however, saw ships which came into contact with pirates on the high seas exercising jurisdiction over them irrespective of the nationality of either the pirate or his victim. This has led some scholars to argue that piracy jure gentium only represents a rule of jurisdiction which grants to nations the right to apply their own municipal law to a pirate, rather than there existing an international crime of piracy as such. Again, the Middle Ages saw other examples of the exercise of extraterritorial...

61 G. Schwarzenberger, above n 57, 462-466. Bassiouni calls it ‘The first modern international prosecution for war crimes’: see M.C. Bassiouni, above n 2, 517.
62 T.L.H. McCormack, above n 57, 38.
63 See Nalson’s Trial of Charles I (1684) in Cobbett’s Complete Collection on State Trials (1809) vol IV, 995.
67 A. De Gentili, above n 36, I.22i.
68 H. Grotius, above n 45, Il.xx. §40(3).
69 In Roman times it was applied to early Christians: Tertullianus, Apologia (J-P. Waltzing and A. Severens trans, 1929) xxxvii, 8. In 1584 it was applied to William the Silent by Phillip II who condemned him by decree leading to his assassination: Herbert H. Rowen (ed), The Low Countries in Early Modern Times (1972) 77-79.
jurisdiction over criminals and heraldic courts enforced codes of conduct over knights generally in the Holy Roman Empire. By its modern definition, piracy is committed for 'private ends' on the high seas or outside the jurisdiction of any state. The Permanent Court of International Justice in 1927 in the Lotus Case said of piracy:

... as the scene of the pirate's operations is the high seas, which it is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry and is treated as an outlaw - as the enemy of mankind - hostis humani generis - whom any nation may in the interests of all capture and punish.

If piracy is used as a general precedent for crimes against humanity it would reduce its application to a very limited sphere - where the locus delicti is the high seas or other places outside the jurisdiction of any state. The better approach is to regard piracy as sui generis, rather than as a precedent for more modern notions of crimes against humanity.

4. FROM THE TREATY OF WESTPHALIA TO THE NINETEENTH CENTURY

4.1 Liberalism and the Principles of Territoriality/Non-Interference

Between the signing of the Treaty of Westphalia (1648) and the nineteenth century, liberalism became the dominant force in western political and legal philosophy. The most influential writer was John Locke (1632-1704), who repeated earlier natural law concepts when he says a person can cede certain powers to a government but the government can never have 'arbitrary power over the life, liberty or possessions of another'. Kant (1724-1804) expanded on this by saying that one ought to treat all persons as an end in themselves and never as a means to an end. There were many followers of Locke over the next 100 years including Sidney and J. S. Mill in England, Paine, Jefferson and Adams in the United States and Voltaire and Montesquieu in

[1934] AC 586, 589 (Privy Council) said 'the trial and punishment of [pirates], are left to the municipal law of each country'.
72 Towns in Northern Italy in the Middle Ages prosecuted banniti (exiles), vagabundi (vagrants), latrones (thieves or robbers) and assassini (murderers) even if the acts were committed outside the town's jurisdiction: see L. Reydams, Universal Jurisdiction: International and Municipal Legal Perspectives (2003) 29.
75 The Case of the SS Lotus (France v Turkey) (Judgment) [1927] P.C.I.J. (ser A) No 10, 70 (hereinafter Lotus Case).
76 This was the view of Judge Moore in the Lotus Case: ibid, 70.
France. They, unlike Grotius, did not support foreign intervention to uphold people’s natural rights. They put forward two other means to curb the power of the state: keeping the legislative, executive, and judicial functions of government separate and permitting a right to rebel.

The influential publicists on international law that followed Grotius continued to conceive of the law of nations as being synonymous with the law of nature, but over time they supported the principles of territoriality and non-interference in a foreign nation’s affairs. De Vattel (1714-67) denied the absolute power of the state, and said any foreign power may rightfully assist the oppressed people who are in revolt, but supported the inviolability of a State’s domestic jurisdiction. He criticised Grotius’ view that princes may punish persons for offences committed outside the territory because it ‘opens the door to all the poisons of zealots and fanatics and gives to ambitious men pretexts without number’. Similarly, Wolff (1679-1754) accepts the ideology of natural rights but said ‘To interfere in the government of another ... is opposed to the natural liberty of nations’. Approval is not to be given to the opinion of Grotius, that kings ... have a right to exact penalties from anyone who savagely violates the law of nature or of nations’. Kant supported a republican liberal constitution for each state, but said ‘No state shall forcibly interfere in the constitution and government of another state’ unless the state ‘should split into two parts’.

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79 For a summary of the influence of Locke, see Bertrand Russell, above n 11, 617-622; and H. Lauterpacht, above n 10, 135-140.
80 Locke paid little attention to the role of the judiciary. His followers, such as Montesquieu in France and Adams in America, saw the courts as being an important check on the power of the state. Adams’ influential Thoughts on Government, published in 1776, advocated an independent judiciary with judges appointed for life: see C.F. Adams (ed), The Works of John Adams (1840); and David McCullough, John Adams (2001) 100-104.
81 Jefferson said ‘The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants’: see Thomas Jefferson, Writings, vol IV, 467, cited in Lauterpacht, above n 10, 92.
82 Puffendorf (1632-94) affirms the view that the legislator is subject to the higher law of nature and of reason: S. Puffendorf, De Jure Naturae et Gentium Libri Octo (first published 1688, 1934 ed) VIII.1. §§2, 6.
83 The moment he attacks the Constitution of the state the Prince breaks the contract which bound the people to him; and the people become free by the act of the sovereign and henceforth they regard him as an usurper seeking to oppress them’: Emer de Vattel, The Law of Nations or the Principles of Natural Law (first published 1758, Fenwick trans, 1916 ed) I, iv, § 51; see also I, iii, §35.
84 Ibid, II.iv.§56.
85 ‘To intermeddle in the domestic affairs of another Nation or to undertake to constrain its council is to do it an injury’: ibid, I.iii. §37.
86 Ibid, II.i.§7.
87 Christian Wolff, Jus Gentium Methodo Scientifica Pertractatum (J. Drake trans, 1934) §16.
88 Ibid, §256.
89 Ibid, §§169. He also said: ‘God himself is capable of punishing a wrong done to himself, nor for that does he need human aid’: §637.
90 Immanuel Kant, Practical Philosophy (first published in 1795, Mary J. Gregor trans, 1996) 8:350.
91 Ibid, 8:346.
Beccaria (1738-1794) also criticised the notion that foreign states have the right to punish others for events that take place outside their territories. 92 By the nineteenth century the general principle of non-intervention in the domestic affairs of another state was well established. The precise limits of this doctrine were, however, unclear. The analogy made by Wolff between states and individuals has been rightly criticised as a poor one when it comes to grave human rights abuses. 93 A state has no intrinsic value or rights itself. Its value lies in the extent to which it can protect the rights of its citizens. If the abuse is manifest, the principle of non-intervention may permit a greater evil to occur. On the other hand, a right of unilateral state action to enforce the law of nature may itself be abused.

4.2 Hobbes and the Rise of Positivism

Hobbes (1588-1679) argued that in a state of nature there is "a war of all against all" which can only be held in check by strong government. 94 Rebellion is an evil only encouraged by the ancient authors' praises of the right to invoke some unwritten higher law and even a despotic sovereign is preferable to anarchy. 95 Because no court of natural justice exists, neither the people nor other states, but only God, can judge a sovereign. 96 St Ambrose, Hobbes said, was wrong to condemn the Emperor after the massacre at Thessalonica because to charge a sovereign with crimes against humanity was both impossible and dangerous. 97 Following revolutions in America and France in the eighteenth century, an avalanche of criticism fell upon the notion of natural rights, for example by Burke (1729-1797), 98 Bentham (1748-1832) 99 and von Gentz (1764-1832). 100 Positivism began to dominate as legal theory over natural law, 101 though the

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92 Beccaria said: 'The place of punishment can certainly be no other than that where the crime was committed': Cesare Beccaria-Boersand, An Essay on Crimes and Punishments (first published 1764, 2nd American ed, 1819; Academic Reprints ed, 1953) 135-136. He also said: 'There are also those who think, that an act of cruelty committed, for example, at Constantinople may be punished at Paris, for this abstracted reason, that he who offends humanity should have enemies in all mankind, and be the subject of universal excommunication, as if judges were to be the knights errant of human nature in general, rather than guardians of particular conventions between men': 135.


95 Ibid.

96 '... there being no Court of Naturall Justice, but in the Conscience onely where not Man, but God raingeth': ibid, II.xxx, 189.


98 Burke criticised the French Declaration of 1789 calling it a 'digest of anarchy', doubting the wisdom of attempting to define natural rights: see Edmund Burke, Reflections on the French Revolution (1910) 56.

99 Bentham's most famous phrase was that 'natural rights is simple nonsense; natural and imprescriptible rights [an American phrase], rhetorical nonsense, nonsense upon stilts': Jeremy Bentham, Anarchical Fallacies (1843 ed) 491.

100 He said the French Declaration as 'destructive of its own purposes': Friedrich von Gentz, Ueber die Deklaration der Rechte (1792), cited in Lauterphant, above n 10, 125 n 27.
legal theory of positivism does not condemn either rebellion or foreign intervention.\textsuperscript{102} In the area of criminal law, most clearly in the German legal tradition but also in the Civilist French system, some special rules developed, such as the principle \textit{nullum crimen sine lege}.\textsuperscript{103} This prohibited \textit{ex post facto} criminal law and required all crimes to be codified with sufficient specificity as a bulwark against the arbitrary rule of judges.\textsuperscript{104}

In one sense the criticism of natural rights made by positivists is valid. The laws of nature cannot supply the solution to the problem of protecting a person from the excesses of the state unless they are grounded in some positive law not a mere declaration on the rights of man.\textsuperscript{105} On the other hand, positivism is not incompatible with subjecting the state to legal controls nor is the principle \textit{nullum crimen sine lege} incompatible with the concept of crimes against humanity. The answer for the positivist is to make the state subject to a written constitution. This avoids the vice of subjecting the validity of the law to someone's interpretation of an unspecified and unwritten higher law. Crimes against humanity can be defined in some written law like any other crime.

The real issue is whether it is preferable to accept absolute sovereign immunity rather than to permit subjects to rebel, foreign countries to intervene or international agencies to respond when a state mistreats its people. Every argument in favour of strong government put forward by Hobbes is valid in favour of strong \textit{international} government (including a strong international criminal law) to prevent states falling into a war of all against all and a state abusing its own people.

\section*{4.3 State Practice}
\subsection*{4.3.1 Fundamental rights in State constitutions}

From the seventeenth and eighteenth century, the liberal principle that no person may be harmed in his life, health and liberty without due process became enshrined in the state constitutions of many nations. In 1688, England built on Magna Carta with the Habeas Corpus Act, the Petition of the Rights, the Act of Settlement, and the Bill of

\textsuperscript{101} In England this was led by John Austin, \textit{The Province of Jurisprudence Determined} (first published 1832, David Campbell and Philip Thomas eds, 1998).

\textsuperscript{102} The \textit{legal} theory of positivism is merely that a law remains the law even if it offends nature or is immoral; the right to resist remains: see H.A. Cohn, 'The Right and Duty of Resistance' (1968) 1 \textit{Human Rights Journal of International and Comparative Law} 491. Others, such as Hobbes, say it is better to obey the law because it is the law, otherwise anarchy will result if the people are encouraged to disobey any law with which they disagree. This is a philosophical issue, not a legal one.

\textsuperscript{103} In the 1800's the principles were developed by von Feuerbach, Enrico Ferri and Franz von Liszt in the German tradition, but it had a tradition before that in the eighteenth century in the writings of Voltaire, Montesquieu, Rousseau and Beccaria who dealt with the 'principles of legality'. For a review of these writings see M.C. Bassiouini, above n 2, 91-97 and 123-140.

\textsuperscript{104} According to Beccaria, 'If the interpretation of laws is an evil, their obscurity, which necessarily entails interpretation, is obviously another evil': Cesare Beccaria-Boresand, \textit{On Crimes and Punishment} (D. Young trans, 1986) 12-13. Montesquieu said the nation's judges were only the mouths through which the law spoke, they were unable either to address the law's force or its rigor: C. Montesquieu, \textit{L'Esprit Des Lois} (1748) XI.iii.§127.

\textsuperscript{105} The most telling complaint made against the concept of natural rights by Bentham, amongst others, is that mere declarations of rights do nothing to protect person's so-called natural rights because people are no more born free than they are born fully clothed. Better to have one Act of Habeas Corpus than a declaration of so-called natural rights.
Rights. The right to be free from arbitrary killing, arrest, and torture found expression in the United States Declaration of Independence (1776), its Constitution (1789), the amendments to it passed two years later and the French Declaration of the Rights of Man (1794). Lauterpacht, writing in 1950, said that the recognition of persons' fundamental rights exists in the constitutions of so many states that it has become a general principle of the constitutional law of civilised nations.106

4.3.2 The principle of non-intervention

The 1648 Treaty of Westphalia, signed after the Thirty-Years' War of religion, saw a decline in the exercise of the right to intervene on religious grounds but it did not see a decline in interventions on other grounds.107 Following revolutions in the United States and France, set alight by notions of the inalienable rights of man, monarchical Europe looked on with horror. The British fought a long war against American independence. The powers of Europe tried to intervene against Revolutionary France. In response to such conduct the Jacobin Constitution of 1793 said: 'The French people declares itself the friend and natural ally of free peoples; it does not interfere in the government of other nations, it does not allow other nations to interfere in its own'.

The rest of Europe paid little attention to such notions. Great Britain, Austria, Prussia and Russia formed an alliance, later joined by France, to intervene in other countries to stop revolutionary uprisings.109 Expeditions followed to crush revolutions in Naples, Greece and Spain. In such circumstances it is little wonder that liberals such as Kant supported both republican governments and the principle of non-interference at the international level.

In 1823, Spain's South American colonies revolted leading to the United States' adoption of the Monroe Doctrine. The Monroe Doctrine was a highly qualified policy of non-intervention. It opposed 'any interposition for the purposes of oppressing..., or controlling in any other manner the destiny of those states whose independence the United States had recognised'.111 In 1823, British Foreign Secretary Canning disclaimed for Great Britain and denied for others, the right to require any changes in the internal institutions of independent states.112 This principle came thereafter to be accepted by other nations. Thus, the principle of non-interference only became widespread in international relations well after the Treaty of Westphalia. Even the limited formulation of the principle of non-intervention adopted by Britain in 1823 left unresolved the right to intervene where a state commits atrocities against its own people.

5. THE LAWS OF HUMANITY FROM THE EIGHTEENTH CENTURY TO WORLD WAR I

5.1 Humanitarian Interventions

106 See H. Lauterpacht, above n 10. The number has increased since 1950.
109 Ibid.
110 See Sylvester John Hemleben, Plans for World Peace Through Six Centuries (1943) 103.
111 President Monroe's Annual Message of 2 December 1823: see John Basset Moore, A Digest of International Law (1906) Vol VI, 401-403.
112 Annual Register (1823) LXV, 114: see S. Chesterman, above n 108, 23.
The link between humanitarian interventions, being foreign interventions by force to stop or prevent gross abuses of human rights occurring within another state, and crimes against humanity, in its loose sense, is obvious. Both stem from the liberal proposition that persons throughout the world are endowed with certain inalienable rights and a gross violation of such rights is an affront felt by all. The link was made, for example, by Sir Hartley Shawcross, US prosecutors and military tribunals at Nuremberg to explain the juridical foundation of crimes against humanity in international law. As Shawcross put it: ‘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?’ This section considers the frequently referred to interventions of the period.

5.1.1 Intervention in Turkish Held Greece in 1827

In 1826-7 Greece, then part of the Turkish Empire, was involved in a revolutionary struggle with the Ottoman Porte. Public opinion in the European Powers favoured Greece as reports of atrocities and cruelties were received. In Great Britain, the Secretary of State for the Colonies reported on 8 February 1826:

But when it is understood, that, whether with the consent of the Porte or not, designs avowed by Ibrahim Pacha to extirpate systematically a whole community, to seize upon the women and children of the Morea, to transport them to Egypt, and to re-people the Morea from Africa and Asia, to change, in fact, that part of Greece from a European state, into one resembling the States of Barbary; His Majesty cannot, as the sovereign of an European state, hear of such an attempt.

On 6 July 1827 Great Britain, France and Russia signed a treaty which stated that the powers felt compelled to intercede ‘no less by sentiments of humanity, than by

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113 Speeches of the Chief Prosecutors, above n 43.
114 See Taylor address, above n 44. Taylor made the same submissions in United States v von Weizsäcker 13 Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No 10 (hereinafter CCL 10 Trials).
115 See United States v Altstötter et al 3 CCL 10 Trials 981-982.
116 Speeches of the Chief Prosecutors, above n 43.
118 For an account of this intervention see J.L. Fonteyne, above n 117, 208; S. Chesterman, above n 108, 29-32; J.N. Moore, above n 117, 220-221; I. Brownlie, above n 117, 339.
119 See R. Jennings and A. Watts, above n 64, Vol I, 441 n 18: ‘thus Great Britain, France and Russia intervened in 1827 in the struggle between revolutionary Greece and Turkey when public opinion reacted with horror to the cruelties committed during the struggle’.
interests for the tranquillity of Europe'. When Turkey rejected the declaration, a blockade was imposed and the Turkish forces were defeated in battle at Navarino on 20 October 1827. The Ottoman Porte accepted the terms of the London treaty and his Egyptian army withdrew from Morea.

5.1.2 Intervention in Turkish Held Lebanon in 1860

There were reports of atrocities again in the Ottoman Empire in 1860 in Greater Syria. In June and July 1860 several hundred Maronite Christians sought refuge on Mt Lebanon, in a walled town near Damascus under the supposed protection of the Turkish Governor. Sohn and Buergenthal reproduce the account of an anonymous contemporary writer:

[A]fter a conversation between the governor and the Druses, the gate was thrown open and in rushed the fiends, cutting down and slaughtering every male, the soldiers cooperating ... I have good reason to believe, after a careful comparison of all the accounts, that from 1,000 to 1,200 males actually perished in that one day.

On 3 August 1860, under strong compulsion from the western powers, the Turkish Sultan in a conference between Austria, Great Britain, France, Prussia, Russia and Turkey adopted a Convention. Under the protocol France landed troops and patrolled the coast of Syria to prevent a recurrence of the massacres. At the request of the European powers, Turkey established the Extraordinary Tribunal of Beyrut which, under the supervision of a commission of the Treaty powers, tried some of those responsible for the atrocities.

5.1.3 US Intervention in Cuba in 1898

In 1898 there were reports of atrocities committed by the Spanish military against the local Cubans fighting for independence including accounts of forcing vast numbers of the Cuban population into concentration camps. One report estimated that 200,000 Cubans died in such camps. The United States decided to intervene in favour of

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122 S. Chesterman, above n 108, 30.
125 L.B. Sohn and T. Buergenthal, above n 123, 145.
126 Convention Between Great Britain, Austria, Prussia, Russia and Turkey, respecting Measures to be Taken for the Pacification of Syria, done in Paris, France, 5 September 1860, reproduced in E. Hertslet, above n 121, vol 2, 1455, preamble paragraph 1 (entered into force 5 September 1860).
127 J. Merriam, above n 124, 119.
128 See L.B. Sohn and T. Buergenthal, above n 123, 165; G. Schwarzenberger, above n 71, 21.
129 See S. Murphy, above n 117, 55-56; J.L. Fonteyne, above n 117, 206; I. Brownlie, above n 117, 46; S. Chesterman, above n 108, 33-35; M.W. Reisman and M.S McDougal, above n 117, 182-183; Sohn and Buergenthal, above n 123, 180.
Cuban independence. President McKinley's Message to Congress on 11 April 1898 outlined four justifications for the intervention including "the cause of humanity." A subsequent joint resolution of Congress stated: "The abhorrent conditions which ... have shocked the moral sense of the people of the United States have been a disgrace to Christian civilisation..." After a short military engagement, Spain conceded defeat and Cuba became independent.

The relevance of the Cuban intervention to crimes against humanity, in its non-technical sense, is demonstrated by the remarks of President Theodore Roosevelt (who fought in Cuba) in his famous State of the Union address in 1904:

... there are occasional crimes committed on so vast a scale and of such particular horror as to make us doubt whether it is not our manifest duty to endeavour at least to show our disapproval of the deed and our sympathy with those who have suffered by it. ... in extreme cases action may be justifiable and proper. What form the action shall take must depend upon the circumstances of the case; that is, upon the degree of the atrocity and upon our power to remedy it. The cases in which we could interfere by force of arms as we interfered to put a stop to intolerable conditions in Cuba are necessarily very few. Yet ... it is inevitable that such a nation should desire eagerly to give expression to its horror on an occasion like that of the massacre of the Jews in Kishenef, or when it witnesses such systematic and long extended cruelty and oppression of which the Armenians have been victims, and which have won for them the indignant pity of the civilised world. ... [C]hronic wrongdoing, or an impotence which results in a general loosening of the ties of civilised society, may in America, as elsewhere, ultimately require intervention by some civilised nation, and in the Western Hemisphere the adherence of the United States to the Monroe doctrine may force the United States, however reluctantly, in flagrant cases of such wrongdoing or impotence, to the exercise of an international police power. 133

5.1.4 Some Other Interventions of the Nineteenth and Twentieth Centuries

In 1877-8 Russia declared war upon the Ottoman Porte relying upon Turkey's alleged mistreatment of the Christian populations in Bosnia, Herzegovina and Bulgaria. In 1913, Bulgaria, Greece and Serbia intervened in Macedonia. Again, protection of the Macedonian Christians was given as a reason. Whilst there was mistreatment of the Christian population in the Balkans under Ottoman rule, most

131 J.B. Moore, above n 111, Vol 6, 219-220.
132 Joint Resolution of April 20 1898, 30 Stat. 738 (Spanish-American War).
133 State of the Union Message, 6 December 1904: see J.B. Moore, above n 111, vol 6, 596.
136 Christian inhabitants were exhorted to convert to Islam or they faced extreme taxation, subjugation and even execution: see Michael P. Scharf, Balkan Justice: The Story behind the First International War Crimes since Nuremberg (1997) 22.
writers conclude that territorial conquest was the primary motive for these interventions.  

In addition there were many instances of complaints by the western powers about Turkey’s alleged mistreatment of its Christian population without any military intervention – Great Britain in 1843 against the execution of apostates from Islam and in 1866 on behalf of the Christians of Crete; Austria-Hungary and Russia in 1903 on behalf of the Christians of Macedonia; the United States in the period 1904-1914, and Russia in 1913, both on behalf of the Armenians.

5.1.5 Conclusion

How do these instances of ‘humanitarian intervention’ inform us about crimes against humanity, in its loose sense? Five points can perhaps be made.

(i) The principles of sovereignty and non-intervention

The oft-stated premise that the Treaty of Westphalia ‘signalled a new political commitment to sovereignty, heralding the development of a new norm of non-intervention’ is something of an exaggeration, particularly where grave breaches of human rights are involved. Throughout the period from 1648 to World War I and even 1939, nations invoked exceptions to such a norm for conduct said to be an affront to ‘the sentiments of humanity’. For example, at the Peace Conference of 1856 which was considering alleged misrule in Naples, the British representative, Clarendon, acknowledged the principle of non-interference in the internal affairs of other states, but affirmed exceptions to the rule which allowed foreign powers the right and duty to demand of governments improvements.

(ii) Crimes which shock the conscience of humanity

In 1905 Oppenheim said ‘public opinion and the attitude of the Powers are in favour of such [humanitarian] interventions’. This is of significance in itself. It supports the basic liberal premise that gross abuses of human rights do in fact shock the conscience of humanity and are felt throughout the world. For example, British Foreign Secretary Palmerston in 1833 relied upon ‘the ground of humanity’ as justification for its protest to Brazil about that country’s treatment of slaves.

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137 Great Britain at the time referred to the Russian intervention as a ‘power grab’: see S. Murphy, above n 117, 54-56.
139 See J.L. Fonteyne, above n 117, 210-211; M.W. Reisman and M.S. McDougal, above n 117, 181; and S. Chesterman, above n 108, 25 n 132.
140 See J.L. Fonteyne, above n 117, 212-213; M.W. Reisman and M.S. McDougal, above n 117, 183; and S. Chesterman, above n 108, 25 n 133.
141 See S. Chesterman, above n 108, 25-26; Sohn and Buergenthal, above n 123, 181-194; and I. Brownlie, above n 117, 340.
142 S. Chesterman, above n 108, 42.
143 Treaty Between Great Britain, France and Russia for the Pacification of Greece, above n 121.
144 G. Schwarzenberger, above n 71, 21.
146 G. Schwarzenberger, above n 71, 20.
(iii) The content of crimes against humanity

Crimes against humanity, in its non-technical sense, may be evidenced by the 'crimes' which prompted the interventions discussed. This included genocide in Morea, widespread and systematic murder, religious persecutions, deportations and arbitrary internment in inhumane conditions. The atrocities were often, though not always, the result of an explicit state policy. State impotence or inaction was also regarded as a sufficient ground for intervention in the case of Morea and the Lebanon.

(iv) Was the right of humanitarian intervention part of customary international law?

According to Brownlie, a majority of publicists at the time recognised the right. Chesterman, after a comprehensive review of such writers, says a majority is only arrived at by combining those who assert the right exists with those who say such interventions are morally blameless, but essentially outside international law. His conclusion is that 'the status of humanitarian intervention at the start of the twentieth century was unclear'. This also was the conclusion of Oppenheim. On the other hand, Fonteyne, like the International Law Association, says that whilst divergent views existed as to when humanitarian intervention could be instituted 'the principle itself was widely, if not unanimously, accepted as an integral part of customary international law'.

If one assumes such a principle exists in customary international law, then there is force in the view that crimes which justify humanitarian interventions are crimes in international law. The missing element may be said to be the question of individual responsibility. This was addressed after the First World War, discussed below.

(v) The laws of humanity and of nations

Whilst Grotius referred to the 'laws of nature and nations', several writers on international law in the nineteenth century referred to the interests, rights, grounds or laws of 'humanity', but their sense, at times, appears to be the same. Wheaton in 1836 referred to a right of foreign interference 'where the general interests of humanity are infringed by the excesses of a barbarous and desperate government'. Antoine Rougier in 1910 justified humanitarian intervention for acts contrary 'aux lois de l'humanite'. Arntz in 1875 said 'however worthy of respect the rights of sovereignty and independence of states may be, there is something even more worthy of respect,
namely the law of humanity or of human society that must not be violated’. 155 Hershey in 1918 said forcible interference ‘has been justified on grounds of humanity’ ‘where great evils existed, great crimes were being perpetrated, or where there was a danger of race extermination’. 156 Similarly, Oppenheim in 1905, whilst not endorsing the position, referred to the fact that many jurists supported interventions ‘in the interests of humanity’. 157 De Martens in 1883 referred to interventions to stop persecutions and massacres as being justified ‘by common religious interest and by considerations of humanity’. 158

The publicists who referred to the ‘laws of humanity’ frequently did not speak in terms of international crimes (a term of uncertain meaning at the time) 159 but the majority of the discourse may be regarded as containing such an underlying premise.

5.2 Slavery as a Crime against Humanity

In 1772 Lord Mansfield in England held that slavery was unlawful on the soil of England. 160 This was not a popular judgment at the time. 161 By 1807, England led a legislative attack on the slave trade, banning its ships from engaging in the trade. 162 For most of the nineteenth century the British Navy liberated the victims of Arab slavers by intercepting ships, freeing the victims and educating them in schools on the Seychelles. 163 The first international declaration about slavery occurred in 1815 at the Congress of Vienna. It stated that slavery was ‘repugnant’ to the values of the civilised international community. 164 Subsequent treaties outlawing slavery included the Treaty of London of 20 December 1841, the Treaty of Washington of 7 April 1862 between the United States and the United Kingdom, and The General Act of Brussels of 2 July 1890. 165 By 1945 there were 26 international instruments prohibiting slavery and

158 F. de Martens, Traité de droit international (Alfred Léo trans, 1883) vol 1, 398.
159 There was reference at the time to offences against the law of nations such as in Article 1, section 8, clause 10 of the Constitution of the United States and in Blackstone’s Commentaries, which listed piracy, violations of safe conduct and infringement of the rights of ambassadors: Blackstone, above n 52, Vol IV, v.
161 At the time slavery was widely practised on colonial plantations and according to Mason there were 15,000 slaves then in England: ibid, 77.
163 Ibid, 14.
164 Declaration Relative to the Universal Abolition of the Slave Trade, done in Vienna, Austria, 8 February 1815, 63 Consolidated Treaty Series 473 (entered into force 8 February 1815).
165 See M.C. Bassiouni and E.M. Wise, Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law (1995) 132-137 where these treaties are reproduced.
slavery related practices, the most significant being the widely ratified Slavery Convention of 1926.

Based upon these treaties, it is often said that slavery is an international crime and was by 1945. In an article written in 1906, Robert Lansing, a former United States Secretary of State, wrote that the slave trade had become a “crime against humanity” – possibly the first use of the term as such in the international arena. The prohibition against slavery within a nation’s territory, unlike piracy, however, came without any rules governing jurisdiction or the enforcement of such crimes.

5.3 War Crimes and the Laws of Humanity

The discourse on the ‘laws of humanity’ exerted its influence on the laws of war. In 1868, by the Saint Peters burg Declaration, the use of certain weapons in times of war was declared to ‘be contrary to the laws of humanity’. Following the First Hague Convention of 1899, came the 1907 Hague Convention, being a comprehensive convention on the rules of war on land. It provided in its Preamble:

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

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168 Bassiouni says “the cumulative effect of these instruments establishes that slavery, slave related practices and forced labor were prohibited before 1945 under conventional international law… These instruments also establish the customary international law basis for the prohibition of these practices and for their inclusion as part of “crimes against humanity””: M.C. Bassiouni, above n 2, 309-310. See also M.C. Bassiouni, ‘Enslavement as an International Crime’ (1991) 23 *New York University Journal of International Law and Politics* 445; and R. Jennings and A. Watts, above n 64, 979-982.

169 For example, Bassiouni says ‘no-one can doubt’ that even before 1945 slavery constituted a violation of ‘general principles of law’: M.C. Bassiouni, above n 2, 309-310.

170 R. Lansing, ‘Notes on World Sovereignty’ (1921) 15 *AJIL* 13, 25. Clark also gives this opinion, noting that the article was written in 1906: R.S. Clark, above n 2, 179.

171 Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles, done in St. Petersburg, Russia, 29 November 1868 and 11 December 1868, 138 Consolidated Treaty Series 297 (entered into force 11 December 1868).


This became known as the Martens Clause after Fyodor Martens who drafted it. According to Schwelb the 'laws of humanity' had thereby become a source of the law of nations itself.\textsuperscript{174} Bassiouni says the Martens Clause, by its reference to the 'laws of humanity', draws upon a collective experience of the conduct of armed conflict and in particular the protection of civilians by combatants.\textsuperscript{175} Alternatively, as argued above, the 'laws of humanity' in the Martens Clause draws upon the tradition of natural law and confirms that in times of war states 'remain' bound by those minimal obligations of humanity which it was assumed the law of nations already imposes on states in times of peace.

6. \textbf{FROM 1914 TO 1939}

6.1 \textbf{Atrocities in Armenia and World War I}

It is estimated a million Armenians under Turkish rule lost their lives during a genocide which pre-dated the outbreak of the First World War.\textsuperscript{176} In 1913 Russia's Foreign Minister warned of possible intervention.\textsuperscript{177} In a joint declaration on 28 May 1915 the Governments of France, Great Britain and Russia denounced the Ottoman Government's massacre of the Armenian population as 'crimes against humanity and civilisation'.\textsuperscript{178} It stated that all members of the Turkish Government and its agents would be held responsible.\textsuperscript{179} After World War I a commission from ten Allied countries was established to report on war crimes. The Greek delegation presented to the Commission the Armenian Memorandum which quoted the 1915 Declaration of France, Great Britain and Russia.\textsuperscript{180}

The Commission found that in respect of its Armenian and Greek speaking civilians Turkey had engaged in internments under inhumane conditions, the forcible deportation of several million people, massacres, torture, rape, enforced prostitution and pillage.\textsuperscript{181} There was also a charge of pillage against Austrian troops for their conduct at Gorizia, an Austrian town.\textsuperscript{182} The Commission concluded that these acts, whilst not war crimes, were breaches of international law, described as 'offences' against 'the laws of humanity'.\textsuperscript{183} The Commission called for the establishment of a

\textsuperscript{174} E. Schwelb, 'Crimes Against Humanity' (1946) 23 British Year Book of International Law 178, 180.
\textsuperscript{175} See M.C. Bassiouni, above n 2, 60-61.
\textsuperscript{177} G.P. Gooch and Harold Temperly (eds), British Documents on the Origins of the War 1898-1914 (1926) Vol 10, part i, no. 429 (at 381-2) and no. 494 (at 441-2).
\textsuperscript{178} The statement is reproduced in E. Schwelb, above n 174, 181.
\textsuperscript{179} Ibid.
\textsuperscript{180} Ibid, 181 n 2.
\textsuperscript{182} Ibid; see also E. Schwelb, above n 174, 181.
\textsuperscript{183} Commission's Report, above n 181, in the heading to Annex 1, 127.
High Tribunal to try offenders\textsuperscript{184} according to 'the principles of the law of nations as they result from the usages established amongst civilised peoples, from the laws of humanity and from the dictates of public conscience'.\textsuperscript{185}

A Memorandum of Reservations was presented by the two United States' representatives.\textsuperscript{186} They objected to the Report's use of 'laws of humanity' writing:

\ldots a judicial tribunal only deals with existing law and only administers existing law, leaving to another forum infractions of the moral law and actions contrary to the laws and principles of humanity \ldots the laws and principles of humanity are not certain, varying with time, place, and circumstance \ldots There is no fixed and universal standard of humanity.\textsuperscript{187}

The Treaty of Sèvres with Turkey, signed on 10 August 1920 by 21 nations, called for the trial and punishment of those responsible for the Armenian genocide.\textsuperscript{188} The Allied Powers reserved 'to themselves the right to designate the Tribunal' to be recognised by Turkey.\textsuperscript{189} Article 144 required the Turkish Government to repatriate those driven from their homes by fear of massacre from 1 January 1914 – a date before the commencement of war.\textsuperscript{190} This Treaty was never ratified and in the end there were no international prosecutions arising out of World War I. Instead the Treaty of Lausanne included a Declaration of Amnesty for all offences committed between 1914 and 1922\textsuperscript{191} which covered events after the conclusion of the war, said to be connected with the political events of that period.\textsuperscript{192}

In early 1919 Turkey did establish a Special Military Tribunal which prosecuted and convicted a number of offenders between April 1919 and July 1920\textsuperscript{193} but many were later released to assuage local opinion.\textsuperscript{194} When Great Britain requested the transfer of certain criminals to British custody\textsuperscript{195} the Turkish Government responded that such transfer 'would be in direct contradiction with its sovereign rights in view of the fact that by international law each state has the right to try its own nationals'.\textsuperscript{196}

\textsuperscript{184} Ibid, 123.
\textsuperscript{185} Ibid, 122; see also M.C. Bassiouni, above n 2, 65.
\textsuperscript{186} Commission's Report, above n 181, 127. There was a separate reservation by Japan on similar grounds: ibid, 151.
\textsuperscript{187} Ibid, 144. The American Representatives also objected to a Head of State being subjected to criminal responsibility saying this would deny 'the very conception of sovereignty': ibid, 136.
\textsuperscript{188} Treaty of Peace between the Allied Powers and Turkey, done in Sèvres, France, opened for signature 10 August 1920, British Treaty Series No 11 (1920) (never ratified) in particular articles 226, 230.
\textsuperscript{189} Ibid, article 230.
\textsuperscript{190} Ibid, article 144.
\textsuperscript{191} Treaty of Peace Between the Allied Powers and Turkey, done in Lausanne, Switzerland, opened for signature 24 July 1923, 28 L.N.T.S. 11 (entered into force 24 July 1923).
\textsuperscript{192} See E. Schwelb, above n 174, 182.
\textsuperscript{194} When Kemal came to power the prosecutions stopped and those convicted were released such that none of the defendants served out their full sentences: T. McCormack, above n 193, 123-125.
\textsuperscript{195} M.C. Bassiouni, above n 2, 67 n 103.
\textsuperscript{196} Reprinted in V. Dadrian, above n 176, 285.
May 1919, Britain seized 67 detainees from the military prison but in the end they were released.  

Bassiouni and Clark suggest that the opinio juris described above dealing with the atrocities in Armenia should be seen as having its intellectual or historical antecedents in the laws of war and the Preamble to the 1907 Hague Convention. This seems too narrow an interpretation. The war only serendipitously intersected with the atrocities in Armenia, which had been the subject of complaint and threatened intervention before the war commenced. Clark rightly points out that there was no attempt in the Declaration of 1915 to link the atrocity with the war. In two instances, described above, the Allies went beyond the dates of the war in their treatment of the events in Armenia.

6.2 Events between the Wars

Following the failure effectively to prosecute war criminals after the First World War there were some attempts to establish an international criminal court. The League of Nations’ Advisory Committee of Jurists in 1921 recommended that the League consider the President’s proposal for setting up a High Court of International Justice to try ‘crimes against public order and against the universal law of nations’ said to be already recognized in international law. The Committee on the Permanent Court of International Justice of the First Assembly of the League of Nations in 1920, however, said ‘There is not yet any international penal law recognised by all nations’. The Rapporteur of the Third Committee stated ‘there was no defined notion of international crimes and no international Penal Law’ and no agreement was reached on the proposal. Between the wars the view that only states are subjects of international law reached its height in the textbooks of the time. This led to the view, for example, that if a nation’s treatment of an alien’s life, liberty or possessions fall below certain minimal standards, upon protest by the foreign state (not the individual), the law of nations will be engaged and the host state will be in breach of its

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197 Ibid and see M.C. Bassiouni, above n 2, 67 n 103.
198 Ibid. Lord Curzon said ‘I think we made a great mistake in ever letting these people out. I had to yield at the time to a pressure which I always felt to be mistaken’: J.F. Willis, Prologue To Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War (1982) 163.
199 See M.C. Bassiouni, above n 2, Chapters 2 (in particular at 69-72) and 4.
200 Clark says the 1915 Declaration of Britain, France and Russia on Armenia has its intellectual antecedents in the laws of war and the Martens Clause to the Hague Convention: see R.S. Clark, above n 2, 178.
201 Ibid.
202 According to Lippman, calls for the establishment of an international penal code began after the inadequate results of the Leipzig trials after World War One where only a handful of war criminals were tried and frequently acquitted before German courts: M. Lippman, ‘Nuremberg: Forty-five Years Later’ (1991) 7 Connecticut Journal of International Law 1, 12-16.
203 T. McCormack, above n 57, 51-53. The proposal was not accepted by all of the Committee: ibid.
204 G. Schwarzenberger, above n 71, 23.
205 T. McCormack, above n 57, 52.
206 Ibid., 51-55.
207 H. Lauterpacht, above n 10, 3-47.
international obligations.²⁰⁸ It will not breach international law, however, if it mistreats its own nationals. The notion of an international criminal law did not progress very far when war broke out again.

7. CONCLUSION

This chapter has argued that the concept of crimes against humanity, in a non-technical sense, has a long and rich tradition independent of the laws of war. It rests on the idea that certain values are both universal to the human condition and ultimately superior to the state and any of its laws – an idea with a continuous thread in legal and political thought since the antiquities. As explained by Locke and enshrined in the constitutions of most countries of the world, no state (or person) is entitled to commit a serious and manifestly arbitrary – meaning without due process of law – attack upon a person’s life, liberty, well-being or possessions. Despite this rich tradition, frequently scholars have placed the genealogy of crimes against humanity in the laws and customs of war, an outgrowth of war crimes, rather than the laws of humanity or natural law.²⁰⁹ The more relevant precursor of what became crimes against humanity, in its strict sense, in 1945 is the doctrine of humanitarian intervention (considered in section 5.1), not the Preamble to the Hague Conventions on the laws of war – the traditional starting point for the history of crimes against humanity. The doctrine of humanitarian intervention, best enunciated in President Roosevelt’s 1904 address,²¹⁰ with all its unresolved status in international law, represents an attempt to reconcile the notion of universal crimes with an international system made up of equally sovereign states.

This chapter has also argued that it is inaccurate to suggest, as some have, that the inviolability of acts within a sovereign’s own territory is at the heart of modern international legal theory since its enunciation after the Treaty of Westphalia.²¹¹ The so-called Westphalian model of sovereignty did not occur immediately after the Treaty of Westphalia was signed. This was a myth invented much later to exaggerate the lineage of the principle of non-intervention.²¹² It was only in the nineteenth century that it became the dominant view. Even then, the principle never clearly covered cases of widespread human rights abuses.

Whilst the concept of crimes against humanity, in its non-technical sense, has a tradition over many centuries, its status in international law in 1945 was replete with uncertainty and controversy. It was only the extraordinary events of the Second World War which led to crimes against humanity, in its strict sense, entering positive international law for the first time.

²⁰⁹ For example, see: R.S. Clark, above n 2, 177-179; E. Schwelb, above n 174, 179-83; M. Lippman, ‘Crimes Against Humanity’ (1997) 17 Boston College Third World Law Journal 171, 173, where the author says the ‘history of crimes against humanity begins with the Martens Clause’; and M.C. Bassioumi, above n 2, Chapters 2 and 4.
²¹⁰ State of the Union Message, above n 133.
²¹¹ S. Chesterman, above n 108, 42.
²¹² L. Gross, above n 107.
CHAPTER TWO

THE NUREMBERG PRECEDENT

The defendants denounce the law under which their accounting is asked. Their dislike for the rule which condemns them is not original. It has been remarked before "that no man e'er felt the halter draw, With good opinion of the law".  

1. INTRODUCTION

The chilling parallels between the Armenian genocide before the First World War and the genocide of Jews before the Second World War may be more than mere coincidence. Hitler, in a speech to his generals before invading Poland, is alleged to have exhorted them to strike hard, saying: 'Who after all is today speaking about the destruction of the Armenians?' This time the Allies made good their promise to bring to trial the perpetrators. But when the Allies defined crimes against humanity in Article 6(c) of the London Charter,3 were they creating a new offence or merely codifying an existing one? What was the juridical basis in international law for the first trial for crimes against humanity at Nuremberg? This chapter explores these questions.

The discussion in chapter one suggests three possible precedents for the Nuremberg Trial in international law. First, there is the reference to 'the laws of humanity' in the Preamble to the Hague Convention of 1907,4 the traditional starting point for most analyses of crimes against humanity in international law. After the First World War, however, the United States objected to any international prosecutions based upon the so-called 'laws of humanity' because it had no specific content, and the proposal to try the Turks went nowhere.5 U.S. Supreme Court Justice Robert Jackson, the chief U.S. prosecutor at Nuremberg and the head of the American delegation to the London Conference that framed the Charter, made reference to the Preamble to the 1907 Hague Convention, but, ultimately, he did not invoke this precedent to which his own

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1 Closing address of Justice Jackson (Counsel for the United States at the Nuremberg Trials), Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946 (26 July 1946) vol XIX, 398 (hereinafter Trial of the Major War Criminals). The quotation comes from John Trumbell's poem, McFingal (1776) III.489.
2 See M.C. Bassiouni, Crimes against Humanity in International Criminal Law (2nd revised ed, 1999) 68 n107.
3 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, done in London, England, opened for signature 8 August 1945, 82 UNTS 280 (entered into force 8 August 1945), to which was annexed the Charter which established the Nuremberg Tribunal (hereinafter the London Agreement and London Charter respectively).
5 See Chapter 1, section 6.
government had earlier objected. Secondly, chapter one argued that the strongest precedent for the concept of crimes against humanity prior to the Second World War is the doctrine of humanitarian intervention. The problem for the Allies was that Hitler relied upon the doctrine at the commencement of the Second World War to justify his intervention in Czechoslovakia and the Allies, particularly the United Kingdom, did not want to invoke this precedent either.

Finally, there is the natural law tradition which says that inherent in the human condition is the need for all persons to be protected from any serious and arbitrary attack on a person’s life, liberty, well being and possessions. Jackson in an early draft did invoke ‘the principles of criminal law as they are generally observed in civilised states’, but, in the result, the Allies drafted a definition of crimes against humanity that contained an element with no real precedent at all – the need for a connection with either acts of international aggression or war crimes, the so-called ‘war nexus’.

This chapter traces the history of the drafting of Article 6(c) of the London Charter followed by a consideration of the Nuremberg Trial and Judgment. The Tokyo Charter is also briefly examined. An analysis is undertaken of the meaning and content of crimes against humanity under the law of the London Charter and the Nuremberg Judgment. Consideration is given as to whether Article 6(c) codified existing crimes or legislated for new offences under international law. The final section considers the entry of Article 6(c) into international customary law after 1945. Some concluding remarks are made about the introduction of the ‘war nexus’ to the nascent concept of crimes against humanity in international law.

2. THE DRAFTING OF THE LONDON CHARTER

2.1 The Declarations of the Allies

During the Second World War, as in the First World War in respect of Armenia, the Allies issued a number of declarations condemning the persecution of the Jews and other atrocities of the Nazis in occupied territories. At first, the declarations did not

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7 See Chapter 1, sections 5.1 and 7.
9 See text accompanying note 31.
explicitly deal with conduct beyond traditional notions of war crimes.\textsuperscript{12} The London International Assembly\textsuperscript{13} recommended that the Allies prosecute acts beyond war crimes because the Nazis’ ‘criminal policies concerned humanity as a whole, and [the] condemnation should be pronounced, not by one individual country, but by the United Nations, in the name of mankind’.\textsuperscript{14} On 24 March 1944, President Roosevelt made a statement condemning the Nazis for committing ‘crimes against humanity in the name of the German people’ – probably the first reference to the phrase ‘crimes against humanity’ in the Second World War.\textsuperscript{15} The President said that:

In one of the blackest crimes of all history – begun by the Nazis in the day of peace and multiplied by them a hundred times in time of war – the wholesale systematic murder of the Jews of Europe goes on unabated every hour.\textsuperscript{16}

Whether pre-war atrocities were international offences was controversial at the time. In a memorandum of 22 January 1945 to the President to assist him at the Yalta Conference, the Secretary of War, H L Stinson, Secretary of State, E R Stettinus, and Attorney-General, F Biddle said ‘pre-war atrocities are neither ‘war crimes’ in the technical sense, nor offences against international law . . . Nevertheless the declared policy of the United Nations is that these crimes, too, shall be punished’.\textsuperscript{17}

The United Nations War Crimes Commission (UNWCC) recommended that the United Nation’s retributive action cover crimes beyond war crimes but consensus could not be reached on this issue.\textsuperscript{18} The British Ambassador, Lord Halifax, stated the United Kingdom’s position in a dispatch of 19 August 1944 to the US Secretary of State:

... a clear distinction exists between offences in regard to which the United Nations have jurisdiction under International Law, i.e. war crimes, and those in regard to which they had not. Atrocities committed on racial, political or religious grounds in enemy territory fell within the latter category . . . . the prosecution of [such] offenders by enemy authorities would give rise to serious difficulties of practice and principle.\textsuperscript{19}

It is not hard to surmise that the UK had in mind Hitler’s reliance upon humanitarian intervention at the commencement of the Second World War. On 15 March 1939 Hitler justified his intervention in Czechoslovakia upon the ‘assaults upon life and liberty’ perpetrated on ‘our German brethren’ who were being persecuted by

\textsuperscript{12} See E. Schwelb, above n 11, 183-187.
\textsuperscript{14} The Punishment of War Criminals: Recommendations of the London International Assembly (London International Assembly) vol I, 8: see M.C. Bassiouni, above n 2, 72-73.
\textsuperscript{15} The Jackson Report, above n 11, 12-13.
\textsuperscript{16} Ibid, 12.
\textsuperscript{17} Ibid, 5-6. On 2 May 1945, the President of the United States issued Executive Order 9547 to provide for the prosecution of ‘atrocities’ and ‘war crimes’: ibid, 21.
\textsuperscript{18} It was established by decision of a diplomatic conference of the Allies in 1943: R.S. Clark, ‘Crimes against Humanity at Nuremberg’ in G. Ginsburgs and V.N. Kudriavtsev (eds), The Nuremberg Trial and International Law (1990) 177, 179-180; E. Schwelb, above n 11, 184-5; Anne Tusa and John Tusa, The Nuremberg Trial (1983) 22-23.
\textsuperscript{19} R.S. Clark, above n 18, 180.
the ‘intolerable terroristic regime’. The UK feared that the concept of crimes against humanity could be misused to justify similar interventions in the future. In the House of Commons the British Foreign Secretary on 4 October 1944 and the Minister of State on 31 January 1945 said the preferred position of the UK was that post-war German authorities, not the Allies, ought to punish for atrocities that are not strictly war crimes. In its Aide-Memoire of 23 April 1945, Britain expressed doubts about putting on trial the Nazis for crimes beyond war crimes and argued for summary execution of the Nazi leaders. The USSR, whilst the most vocal and active in calling for the trial and punishment of war criminals, including the Nazi leaders, did not in its public statements deal with conduct beyond war crimes.

At the Potsdam Conference of July–August 1945, the US position prevailed. Summary execution for the Nazi leaders was rejected. Instead, the Allies said Nazi leaders ‘who have participated in . . . atrocities or war crimes shall be arrested and brought to judgment’. With the Nazi leaders captured and awaiting trial, a definition for the most commonly used term to date – ‘atrocities’ – had to be agreed upon.

2.2 The London Conference

Teams from the four major powers, the United States, the United Kingdom, France and the Soviet Union met in London between 26 June and 8 August 1945 to draft the treaty for the prosecution of Nazi leaders. On 6 June 1945, Justice Jackson, the United States’ representative at the conference, sent a report to the President, who approved it. It was widely published in Europe and the United States and accepted as the official position of the United States at the London Conference. His remarks about crimes against humanity are thoughtful, radical and remarkable, given the final definition adopted. As to the doctrine of act of state, Jackson states ‘We stand on the principle of responsible government declared some three centuries ago to King James by Lord Chief Justice Coke, who proclaimed that even a King is still “under God and law”’. As to the danger of being ‘ennmeshed’ in a ‘multitude of doctrinal disputes’ in defining the crimes which should be charged, he said ‘We propose to punish acts

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20 See E.L. Woodward and R. Butler above n 8, no. 257 and 259, 256-257.
21 See especially Hansard, House of Commons, 4 October 1944, col. 906 and 31 January 1945: see E. Schwelb, above n 11, 186.
24 See E. Schwelb, above n 11, 187, quoting The Times, 3 August 1945.
25 For an account of the drafting process, see: R.S. Clark, above n 18, 180-192; M.C. Bassiouni, above n 2, 19-29; E.Schwelb, above n 11, 188-197; M. Lippman, ‘Crimes against Humanity’ (1997) 17 Boston College Third World Law Journal 171, 177-188; B. Smith, The American Road to Nuremberg: The Documentary Record 1944-1945 (1982); and B. Smith The Road to Nuremberg (1981). Most accounts of the drafting process rely heavily on The Jackson Report, which includes a collection of the main documents used prior to and during the conference along with notes by Jackson’s assistant of proceedings at the conference.
26 The Jackson Report, above n 11, 42-54.
28 The Jackson Report, above n 11, 47.
29 Ibid, 48.
which have been regarded as criminal since the time of Cain and been so written in every civilized code.\textsuperscript{30}

Jackson used the following wording:

(b) Atrocities and offences, including atrocities and persecutions on racial or religious grounds, committed since 1933. This is only to recognise the principles of criminal law as they are generally observed in civilised states. These principles have been assimilated as a part of International Law at least since 1907. The Fourth Hague Convention provided that inhabitants and belligerents shall remain under the protection and the rule of "the principles of the law of nations, as they result from the usage established amongst civilised peoples, from the laws of humanity and the dictates of the public conscience".\textsuperscript{31}

Jackson appears to rely upon the 'general principles of law recognised by civilised nations'\textsuperscript{32} as both higher law and a source of international law, a view that can be traced back to Plato, Saint Augustine and the tradition of Grotius.\textsuperscript{33} The American draft definition of 14 June 1945 proposed prosecuting: 'Atrocities and offences 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'.\textsuperscript{34} As Clark says this provision made no attempt to apply an international standard.\textsuperscript{35}

The British on 28 June 1945 altered the US draft to read:

Atrocities and persecutions and deportations on political, racial, religious grounds in pursuance of the common plan or enterprise referred to in subparagraph (d) hereof [common plan or enterprise aimed at aggression], whether or not in violation of the domestic law of the country where perpetrated.\textsuperscript{36}

This was clearly an international standard, applicable irrespective of, not pursuant to, the local law.\textsuperscript{37} The British Representative, Sir David Fyfe, said, however, that there should be no discussion at the trial 'as to whether the acts are violations of international law or not. We declare what the law is so that there won't be any discussion on whether it is international law or not.'\textsuperscript{38} The British draft introduced the 'war nexus' for the first time – offences had to be 'in pursuance of the common plan or enterprise' to launch a war of aggression. This likely stemmed from the British view that atrocities committed within a nation's territory do not otherwise attract a right of intervention by other States under international law.

On 19 July 1945 the French, drawing upon the preamble to the 1907 Hague Convention, proposed prosecuting any person responsible for preparing or carrying out 'the policy of atrocities and persecutions against civilian populations . . . and who is responsible for the violations of international law, the laws of humanity, dictates of the

\textsuperscript{30} Ibid, 50.
\textsuperscript{31} Ibid, 50-51.
\textsuperscript{32} Statute of the International Court of Justice, art 38(1)(c).
\textsuperscript{33} See Chapter 1, section 2 and 3.
\textsuperscript{34} The Jackson Report, above n 11, 55.
\textsuperscript{35} R.S. Clark, above n 18, 182.
\textsuperscript{36} The Jackson Report, above n 11, 87.
\textsuperscript{37} See R.S. Clark, above n 18, 183.
\textsuperscript{38} The Jackson Report, above n 11, 99.
public conscience, committed by the armed forces and the civilian authorities in the service of those enemy Powers.\(^\text{39}\)

On 20 July 1945, the British delegation put forward a re-draft which referred to ‘systematic atrocities’ without a war nexus.\(^\text{40}\) At the session of 23 July, Fyfe, however, said: ‘I have in mind only such general treatment of the Jews as showed itself as a part of the general plan of aggression’.\(^\text{41}\) Going into that session no war nexus existed in the latest drafts of the United States, France and Great Britain.

The Soviet Union then proposed its own draft which limited ‘atrocities against the civilian population’ to ‘violations of the laws and customs of warfare’.\(^\text{42}\) Things were obviously fluid. On 23 July, the British delegate, Fyfe, said that it was ‘important politically’ to extend the definition to cover the ill treatment of Jews in Germany before the war but only for such acts as the terrorization and murder of their own Jewish population in order to prepare for war; that is, preparatory acts inside the Reich in order to regiment the state for aggression and domination’.\(^\text{43}\) Jackson agreed, saying:

> It has been a general principle of foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business; that is to say, the way Germany treats its inhabitants ... is not our affair any more than it is the affair of some other government to interpose itself in our problems. The reason that this program of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was a part of a plan for making an illegal war. Unless we have a war connection as a basis for reaching them, I would think we have no basis for dealing with atrocities.\(^\text{44}\)

Jackson also wanted the atrocities to be limited to acts involving a sectarian animus,\(^\text{45}\) but this appeared to be objected to by Professor Trainin.\(^\text{46}\) The next day the delegates considered a compromise Soviet draft (submitted by the British to the conference) which separated out ‘atrocities’ from ‘persecutions’ in paragraph (b):

> Atrocities against civilian populations including (inter alia) murder and ill-treatment of civilians and deportation of civilians to slave labour, and persecutions on racial or religious grounds where such persecutions were inflicted in pursuance of the aggression or domination referred to in paragraph (a) above.\(^\text{47}\)

\(^{39}\) See the Draft Article on Definition of “Crimes” submitted by the French Delegation on 19 July 1945: ibid, 293.

\(^{40}\) See the Proposed Revision of Definition of “Crimes” (Article 6) submitted by the British Delegation on 20 July 1945: ibid, 312.

\(^{41}\) Ibid, 329.

\(^{42}\) See the Redraft of Definition of “Crimes” submitted by the Soviet Delegation on 23 July 1945: ibid, 327.

\(^{43}\) Ibid, 329.

\(^{44}\) Ibid, 331.

\(^{45}\) Ibid, 332-333, see also the American Redraft of 25 July 1945, where the acts were required to be ‘on political, racial or religious grounds’: ibid, 374.

\(^{46}\) Ibid, 333.

\(^{47}\) See the Redraft of the Soviet Definition of “Crimes” submitted by the British Delegation on 23 July 1945: ibid, 359.
On 24 July 1945 Professor Gros, a member of the French delegation, objected to Jackson's reasoning in linking persecutions with waging an aggressive war:

I have one remark on (b), where we appear as wanting to prosecute because of racial or religious treatments only because they were connected with the war. I know it was very clearly explained at the last session by Mr Justice Jackson that we are in fact prosecuting those crimes only for that reason, but for the last century there have been many interventions for humanitarian reasons. All countries have interfered in the affairs of other countries to defend minorities who were being persecuted... perhaps if we could avoid to appear as making the principle that those interventions are only justified because of the connection with aggressive war...48

Professor Gros thereby wanted to bring the concept of crimes against humanity within the doctrine of humanitarian intervention. His account of history is probably closer to the mark than that of Jackson who overlooks the United States' intervention in Cuba and President Roosevelt's State of the Union address of 1904.49 Professor Gros also stated that it could be difficult for the prosecution to establish that pre-war atrocities were limited to Hitler's plans for aggression.50 Fyfe for the UK insisted proof would not be a problem51 and the French came to accept the definition proposed by the UK.52 On 31 July 1945, Jackson accepted making persecutions a separate offence and came back with a proposed Article 6. It had three defined categories of crimes – 'crimes against peace' (Article 6(a)); 'war crimes' (Article 6(b)); and 'crimes against humanity'53 (Article 6(c)). The last category was defined as:

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 International Tribunal, whether or not in violation of the domestic law of the country where perpetrated.54

This became the adopted draft in the Charter appended to the Treaty signed on 8 August 1945, except the final English and French text had a semi-colon between the different types of crimes after the words 'before or during the war' but the comma remained in the Russian text. This suggests the 'war nexus' may not apply to the 'murder-type' crimes. By a Berlin Protocol on 6 October 1945, the parties stated that the Russian text was correct and the semi-colon in the English and French version should be amended to a comma and 'the French text should be amended'.55 Whilst a

48 Ibid, 360.
49 See Chapter 1, section 5.1.3. Clark writes that Gros' comment is a 'little hyperbole': above n 18, 187
50 Ibid, 361.
51 Ibid, 361-362.
52 The British redraft of 28 July 1945 was accepted by the French: Ibid, 390.
53 There appears to be no definitive statement as to how the designation 'crimes against humanity' was arrived at. Jackson said the headings had been suggested to him by an eminent scholar of international law and Clark says Professor Lauterpacht has been credited as the author: R.S Clark, above n 18, 189 n 54; see also M.C. Bassiouni, above n 2, 17.
54 The Jackson Report, above n 11, 395.
55 R.S. Clark, above n 18, 190-192.
comma in the English still leaves its meaning ambiguous, the amendment to the French text makes it clear that both the murder-type crimes and the persecution-type crimes only come within the jurisdiction of the new tribunal when such crimes are committed in execution of or in connection with war crimes or crimes against peace.56 Jackson's position, supported by the British, thereby prevailed, but it is curious that the French support for a broader definition remained in the French text until it was amended after execution.57

2.3 The War Nexus in the Definition of Crimes against Humanity in Article 6(c)

The war nexus as formulated in Article 6(c) was novel. No support for such a proposition can be found in any treaties, statements of governments or publicists, the custom and practice of states or general principles of law recognised by civilised nations. Further, it lacks coherence as a general principle of criminal law. The first category of crimes may be committed before the war but only when committed in execution of or in connection with a war of aggression or war crimes. It is hard to imagine how a sensible prosecution can be mounted for such a crime before the outbreak of war. Even after war has broken out, the drawing of a connection between the ill-treatment of civilians and the waging of war is difficult to comprehend — is it a temporal connection or a causal connection? As Schwarzenberger says:

[The] limited and qualified character of the rule on crimes against humanity as formulated in the charters of the Nuremberg and Tokyo Tribunals militates against the rule being accepted as one declaratory of international customary law. This rudimentary legal system does not know of distinctions as subtle as those between crimes against humanity which are connected with other types of war crimes and, therefore, must be treated as analogous to war crimes in the strict sense and other types of inhumane acts which are not so linked and, therefore, are beyond the pale of international law.58

Schwelb says '... it is clear that what has been introduced by the Charter are not international criminal provisions of universal application'.59 Lambois refers to the London Charter and Judgment as 'un droit ad hoc'.60 Bassiouni says 'The policies of the United States and the United Kingdom ... were a combination of principle and pragmatism, procedural fairness and technical laxity, establishing an ad hoc system of justice ... In that experience ... experience was not conducive to sound and valid outcomes'.61

Why did Justice Jackson on 23 July, contrary to his initial definition, insist on a connection with waging a war of aggression? According to Bassiouni it 'was probably motivated by a desire ... to strengthen its legality by connecting it to the more

56 Ibid; E. Schwelb, above n 11, 194-195.
57 See E. Schwelb, above n 11, 187-188 and 193-195; R.S. Clark, above n 18, 190-192; M.C. Bassiouni, above n 2, 25-30.
59 E. Schwelb, above n 11, 207.
61 M.C. Bassiouni, above n 2, 18-19.
established notion of war crimes’. Lippman, relying on some comments of Jackson on 23 July 1945, says ‘Jackson may have feared that a contravention of Germany’s domestic jurisdiction would lead to scrutiny of racial segregation in the United States’.

The answer likely lies in Jackson coming to accept the British position that to permit international intervention on the ground of humanity was a dangerous precedent abused by Hitler himself. To Stalin, Churchill and Roosevelt their primary objective in having an international trial was to firmly establish a new crime, being ‘crimes against peace’, not an existing crime. Hence, as evil as ‘crimes against humanity’ were, they could not be given too great a prominence on their own lest they be used in the future as a pretext for aggression.

With the drafting done the trial could begin. The inherent flaws in Article 6(c), however, resulted in crimes against humanity being dealt with in the judgment in a way which satisfied very few.

3. THE TOKYO CHARTER OF 1946

General McArthur, by Special Proclamation issued on 19 January 1946, established the International Military Tribunal for the Far East. The Proclamation cannot claim the status of an international treaty because General McArthur only cursorily consulted the other Allied Powers. By Article 5(c), crimes against humanity were at first defined in similar terms to those in the London Charter with the omission of religious grounds for persecution. The words ‘against any civilian population’, which originally appeared in the text, were omitted shortly before the trial opened. This was done so that the prosecution could bring charges for killing enemy combatants and foreign civilians in connection with crimes against peace and, like the war nexus in Article 6(c) of the London Charter, has no basis in customary law. These charges did not clearly go beyond traditional notions of war crimes because the victims were persons other than Japanese nationals and were committed outside Japan. In its

62 Ibid, 78.
63 ‘We have some regrettable circumstances at times in our own country in which minorities are unfairly treated’: The Jackson Report, above n 11, 333.
64 See M. Lippman above n 25, 184 n 52.
65 See M.C. Bassiouni above n 2, 17.
66 Tokyo Charter, above n 10.
67 See M.C. Bassiouni, above n 2, 32;
71 E. Schwelb, above n 11, 215-216.
judgment, the Tribunal did not deal with these charges saying that they were subsumed under the crimes against peace charges.\textsuperscript{72}

4. **THE TRIAL AND JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG**

4.1 The Indictment

Count Four of the Indictment dealt with crimes against humanity.\textsuperscript{73} It stated that the prosecution would rely on the facts in Count Three (war crimes) as also constituting crimes against humanity. War crimes were set forth in categories which followed those set out in Article 6(b), including offences such as plundering of public and private property. Count Four said that 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 civilised nations and were involved in and party to a systematic course of conduct’.\textsuperscript{74} The reliance on ‘general principles’ suggests the prosecutors wanted to ground their case on some recognised international source, not solely the terms of the London Charter.

4.2 The Addresses

The French Chief Prosecutor, François de Menthon, in his opening address of 17 January 1946 said:

\ldots this body of Crimes against Humanity constitutes, in the last analysis, nothing less than the perpetration for political ends and in a systematic manner, of ordinary crimes (\textit{crimes de droit commun}) such as theft, looting, ill treatment, enslavement, murder, and assassinations, crimes that are provided for and punishable under the penal laws of all civilised States. No general objection of a juridical nature, therefore, appears to hamper your task of justice. \ldots though they be not codified in an inter-State penal code, [they] exist in the penal code of every civilised country.\textsuperscript{75}

He thus treats crimes against humanity as being analogous with serious domestic crimes but committed for political ends and in a systematic manner. He further submitted that the London Charter was in effect the method by which the ‘territorial jurisdiction of sovereign States’ affected by the crimes of the Nazis was ceded to the Tribunal in respect of the crimes committed in their territories.\textsuperscript{76} Whilst it would be foremost the duty of the German state to punish its own nationals who have violated


\textsuperscript{73} See Trial of the Major War Criminals, above n 1, vol I, 27 and 65-67. See M. Lippman, above n 25, 189-190; and R.S. Clark, above n 18, 193.

\textsuperscript{74} See Trial of the Major War Criminals, above n 1, vol I, 65.

\textsuperscript{75} Ibid, vol V, 340-1. Whilst the frequent translation of ‘\textit{crimes de droit commun}’ is ‘common law crimes’, the author prefers the translation ‘ordinary crimes’ as the French legal system does not recognize a ‘common law’ as it is known in the Anglo-American legal system: see Wexler, above n 11, 317 n115.

\textsuperscript{76} Trial of the Major War Criminals, above n 1, vol V, 340.
international law, following Germany's unconditional surrender, 'there is no German State and the four occupying Powers were the highest authority and had the right to adjudge the guilt of German nationals for the crimes committed.\textsuperscript{77}

Sir Hartley Shawcross, Chief Prosecutor for the United Kingdom, in his closing argument delivered on 26 and 27 July 1946 dealt with the charge of crimes against humanity on the basis of international law. He referred to the works of Grotius, John Westlake and to State practice in support of a right of humanitarian intervention, saying: '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?'.\textsuperscript{78} But in the end, he did not ground the charges on this doctrine. He said the Allies:

\ldots thought it right to deal with matters which the Criminal Law of all countries would normally stigmatise as crimes: murder, extermination, enslavement, persecution on political, racial or economic grounds \ldots when committed with the intention of affecting the international community - that is in connection with the other crimes charged - [they become] not mere matters of domestic concern but crimes against the Laws of Nations.\textsuperscript{79}

\section{4.3 The Nuremberg Judgment\textsuperscript{80}}

The Tribunal, in dealing with certain legal arguments about the London Charter, followed mostly the submissions of the French Prosecutor. It said 'the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognised by the civilized world. \ldots In doing so, they have done together what any one of them might have done singly'.\textsuperscript{81} Whilst it remarked that 'The law of the Charter is decisive, and binding upon the Tribunal',\textsuperscript{82} the Tribunal also stated that 'The Charter is not an arbitrary exercise of power on the part of the victorious Nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law'.\textsuperscript{83}

Relying upon various treaties (principally the Kellogg-Briand Pact\textsuperscript{84}) and international declarations, the Tribunal concluded that aggressive war is a crime under international law, and State immunity cannot apply 'to acts which are condemned as criminal by international law'.\textsuperscript{85} It came to the same conclusion for war crimes, largely by relying upon the prohibitions provided for in the Hague Convention.\textsuperscript{86} The Judgment conspicuously contains no discussion as to the status of crimes against humanity in

\textsuperscript{77} Ibid, vol V, 352.
\textsuperscript{78} Quoted in E. Shweib, above n 11, 198.
\textsuperscript{79} Ibid.
\textsuperscript{80} International Military Tribunal (Nuremberg), Judgment and Sentences (1 October 1946) (1947) 41 AJIL 172, 172-333 (hereinafter Nuremberg Judgment).
\textsuperscript{81} Ibid, 216.
\textsuperscript{82} Ibid.
\textsuperscript{83} Ibid.
\textsuperscript{84} Treaty between the United States and other Powers providing for the renunciation of war as an instrument of national policy, done in Paris, France, opened for signature 27 August 1928, 94 L.N.T.S. 57 (entered into force 24 July 1929).
\textsuperscript{85} Nuremberg Judgment, above n 80, 221 and see 217-224.
\textsuperscript{86} Ibid, 218.
international law. The Tribunal said 'The Tribunal is of course bound by the Charter, in the definition which it gives both of War Crimes and Crimes Against Humanity. With respect to War Crimes, however, as has already been pointed out, the crimes defined in Article 6, Section (b), of the Charter were already recognized as War Crimes under international law'.\(^87\) This may be taken as stating that crimes against humanity, in contrast, were not already recognized under international law.

The Tribunal stated that the principle *nullum crimen sine lege* 'is not a limitation of sovereignty, but is in general a principle of justice'\(^88\) and because the defendants must have known that what they were doing was wrong 'it would appear that the maxim has no application to the present facts'.\(^89\) The last statement does not appear in the French text which is equally authoritative and, hence, it may not be valid to take from the judgment acceptance that any conduct which the Tribunal took to be wrong or which the defendants thought was wrong is an exception to the general principle.\(^90\) Whilst these remarks were directed to crimes against peace, the principle was likely thought to have relevance to the counts dealing with crimes against humanity.

The Judgment followed the approach in the Indictment by dealing with war crimes and crimes against humanity in the one narrative under different headings.\(^91\) In respect of civilians, this covered 'Murder and Ill-treatment of Civilian Population'; 'Pillage of Public and Private Property'; 'Slave Labour Policy' and 'Persecution of the Jews'. The narrative covered conduct before the war and where the victims were German nationals in Germany. The Tribunal then made its only statement about Article 6(c):

To constitute Crimes against Humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were Crimes against Humanity within the meaning of the Charter, but from the beginning of the war in 1939 War Crimes were committed on a vast scale, which were also Crimes against Humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute War Crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted Crimes against Humanity.\(^92\)

Hence, the thesis that Nazi pre-war atrocities were linked to the making of war was rejected and the Allies' hopes of punishing those responsible for these acts were dashed.\(^93\) Many, such as Lauterpacht,\(^94\) Sadat-Wexler,\(^95\) and van Schaack,\(^96\) have

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87 Ibid, 248.
88 Ibid, 217.
89 Ibid.
90 Trial of the Major War Criminals, above n 1, vol I, 231. This is supported by the French version which reads: *la maxime Nullum crimen sine lege ne limite pas la souverainetée des Etats: elle ne formule qu'une règle généralement suivie.‘: ibid.
91 Ibid, 229-247.
92 Ibid, 249.
95 L. Sadat-Wexler, above n 11, 308.
criticised the Tribunal for being too literal in its interpretation of Article 6(c). Such a view is unwarranted as the flaw lies in the drafting not the finding which has stood the test of time. To the Tribunal’s credit it held that the tender of Mein Kampf was not enough to make out a criminal conspiracy, just as Gros had feared may be the result.

The Tribunal then dealt with the individual defendants. Of the 22 defendants indicted only two were convicted of crimes against humanity alone (Julius Streicher and Baldur von Schirach). Streicher was accused of ‘speaking, writing, and preaching hatred of the Jews’ for 25 years including calling for their annihilation from 1938. The Tribunal ruled that this continued after knowledge of mass exterminations of Jews in the occupied territories of Eastern Europe, and concluded: ‘Streicher’s incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with War Crimes, as defined by the Charter, and constitutes a Crime Against Humanity’. The reasoning, which has somewhat harshly been the subject of criticism, is sound. Incitement to murder Jews, including those of German nationality, constitutes persecution within the meaning of Article 6(c). Because the incitement encompasses Jews of non-German nationality who were being murdered in the East – being a war crime – such persecution is in connection with war crimes. This is made clear in the French text which says the persecution is a war crime as defined by the Charter and equally a crime against humanity.

Von Schirach was convicted of crimes against humanity for his role in deporting Jews from Vienna to ghettos in the East. The Tribunal said: ‘As has already been seen, Austria was occupied pursuant to a common plan of aggression. Its occupation is...

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96 B. Van Schaack, above n 68, 803-807.
97 See B. Smith, The Road to Nuremberg, above n 25, 234: ‘Today no serious historian would maintain that Hitler slaughtered Jews and Gypsies of Europe merely as a calculated step in a fixed plan to conquer first Europe and then the world’.
98 The Tribunal said ‘The planning, to be criminal, must not rest merely on the declarations of a party program, such as are found in the 25 points of the Nazi Party, announced in 1920, or the political affirmations expressed in Mein Kampf in later years’: Nuremberg Judgment, above n 80, 222.
99 See text accompanying notes 50-52.
100 Nuremberg Judgment, above n 80, 293-296.
102 Ibid, 294.
103 Ibid, 295.
104 Ibid, 296.
105 Sadat-Wexler wrote that the Tribunal does ‘not in any way explain how exactly those acts violated Article 6(c)’; L. Sadat-Wexler, above n 11, 308. Similarly, Van Schaack concludes that the case ‘reveals that the Tribunal was satisfied by evidence of a merely tenuous connection between the acts alleged to be crimes against humanity and the war’: B. Van Schaack, above n 68, 806. Schweb and Lippman suggest, by reason of the Tribunal’s reference to Streicher’s conduct against Jews prior to 1 September 1939, that it may have relied on pre-war conduct: E. Schweb, above n 11, 205; M. Lippman, above n 25, 195. This is not consistent with the Tribunal’s ultimate finding of a connection with war crimes. This alone appears to ground the finding of guilt, not the pre-war conduct. This may seem an extraordinary result as the pre-war conduct was the principal basis for the charge against him. Nevertheless, he received the death sentence and, as has been said, no matter how heinous a crime may be, you can only hang a man once.
106 Trial of the Major War Criminals, above n 1, vol I, 324.
107 Nuremberg Judgment, above n 80, 311.
therefore, a "crime within the jurisdiction of the Tribunal," as that term is used in Article 6(c) of the Charter. As a result, "murder, extermination, enslavement, deportation, and other inhumane acts" and "persecution on political, racial, or religious grounds" in connection with this occupation constitute a Crime against Humanity under that Article.\textsuperscript{108}

The majority of the other defendants were convicted of both war crimes and crimes against humanity. The Tribunal dealt with both crimes in a single narrative which included conduct towards German nationals in Germany. Sometimes that narrative included references to persecutions which took place before the outbreak of war (in the cases of Goering\textsuperscript{109}, Frick\textsuperscript{110} and Funk\textsuperscript{111}) but presumably the Tribunal did not take that into account.

Thus, the Judgment ended with a whimper so far as crimes against humanity were concerned.\textsuperscript{112} Many writers such as Lippman,\textsuperscript{113} Sadat-Wexler,\textsuperscript{114} and Hwang\textsuperscript{115} along with those writing closer to the events in time such as Schwebel,\textsuperscript{116} Kelsen,\textsuperscript{117} and Herzog,\textsuperscript{118} have been critical of the Tribunal's reasoning and, in particular, its failure to explain the meaning, content or juridical basis for crimes against humanity where such crimes are separate from war crimes. These comments expect too much of the Tribunal. The Tribunal was not an international court established to decide issues of international law. It was a combined military tribunal of four nations appointed to decide upon the enemies' guilt of defined charges. The status of crimes against humanity in customary international law, discussed in the next section, was the subject of mixed signals by the Allies. They wished to condemn the Nazi pre-war atrocities, but did not want to support the view that ordinarily States have the right to intervene in such circumstances. For the Tribunal to have produced a dissertation on the status and meaning of crimes against humanity in international law — including the likely conclusion that it was new law — would have been fraught with political controversy.

5. \textbf{THE MEANING OF CRIMES AGAINST HUMANITY UNDER THE LAW OF THE CHARTER AND THE NUREMBERG JUDGMENT}

\textsuperscript{108} Ibid, 310.
\textsuperscript{109} Ibid, 274.
\textsuperscript{110} Ibid, 292.
\textsuperscript{111} Ibid, 297.
\textsuperscript{112} Cassese says the reticence and what could be viewed as the embarrassment of the Tribunal to deal with crimes against humanity are striking: Antonio Cassese, \textit{International Criminal Law} (2003) 70.
\textsuperscript{113} "[T]he Nuremberg Tribunal failed to provide a principled distinction between war crimes and crimes against humanity": M. Lippman, above n 25, 201.
\textsuperscript{114} "... one of the most unfortunate legacies of the IMT Judgment is that it failed to provide any criteria that could be used to distinguish crimes against humanity either from war crimes or from ordinary municipal crimes such as torture, murder or rape": L. Sadat-Wexler, above n 11, 310.
\textsuperscript{116} E. Schwebel, above n 11, 206-207.
\textsuperscript{117} H. Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?' (1947) 1 \textit{International Law Quarterly} 153.
\textsuperscript{118} Jacques-Bernard Herzog, 'Contribution a l'étude de la définition du crime contre l'humanité' (1947) 18 \textit{Revue International De Droit Pénal} 155, 162.
5.1 The meaning of 'in execution of or in connection with any crime within the jurisdiction of the Tribunal'

In the Judgment, crimes against humanity went beyond war crimes in only two cases: where the crimes took place in territories occupied not only by war, but also by aggressive threats of war (as in the case of Schirach); and where, in the course of committing war crimes, attacks on civilians not protected by the laws of war also took place (as in the case of Streicher). For example, during the war the Nazis implemented a slave labour policy and a policy to exterminate Jews. Such policies reached foreign nationals in occupied territories and German nationals in Germany. The former constituted war crimes (and crimes against humanity) and the latter, crimes against humanity in connection with those war crimes. The alternative analysis is that the acts, as the Tribunal said, were connected with the aggressive war.\(^{119}\) This suggests the atrocities were performed in fulfilment of some war aim but this was not explored in the Judgment.\(^{120}\)

5.2 Are the elements of war crimes and crimes against humanity, apart from the nationality of the victim, synonymous?

Biddle, the American judge on the Tribunal, dealt with the suggestion that the Nuremberg Judgment had reduced ‘the meaning of crimes against humanity to a point where they became practically synonymous with war crimes’, by saying: ‘I agree. And I believe that this inelastic construction is justified by the language of the Charter and by the consideration that such a rigid interpretation is highly desirable in this stage of the development of international law’.\(^{121}\) The French member of the Tribunal, Donnedieu de Vabres, writing after the Judgment said that, except for von Schirach, crimes against humanity and war crimes were found to be within the same rubric (même rubrique) and by always linking crimes against humanity with war or aggression the Tribunal did not breach the nullum crimen sine lege principle.\(^{122}\) He further thought the murder-type crimes in Article 6(c) had the same elements as war crimes.\(^{123}\) This means if a Nazi soldier kills two Jews in his custody, one an alien from an occupied territory and the other a German national from Germany, the former is a war crime (and a crime against humanity) and the later, a crime against humanity alone. Herzog, in an influential article of 1947, followed the approach of the French Prosecutor. He wrote that crimes against humanity are international ‘ordinary crimes’ (‘crime international

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119 See text accompanying note 92.
120 Elisabeth Zoller says the connection drawn at times between crimes against humanity and the other crimes was ‘juridically fragile’: E. Zoller, ‘La Définition des Crimes Contre L’humanité’ (1993) 120(3) Journal du droit international 549, 554. Schwelb says the connection with other war crimes or crimes against peace was presumed after the outbreak of war: E. Schwelb, above n 11, 204.
121 F. Biddle, ‘The Nürnberg Trial’ (1947) 33 Virginia Law Review 679, 695. Biddle also said: ‘With one possible exception, von Schirach, crimes against humanity were held to have been committed only where the proof also fully established the commission of war crimes’: ibid.
123 D. de Vabres, ‘Le Jugement de Nuremberg’, above n 122, 823
de droit commun’) which, until international criminal law is properly codified, must be defined by analogy to the elements of the applicable municipal crimes – murder, assault, false imprisonment, etc.\textsuperscript{124}

On the whole, the suggestion that the underlying elements of war crimes and crimes against humanity, apart from the nationality of the victim, are largely synonymous and are to be defined by analogy to the elements of the applicable domestic crimes is consonant with the text of the Charter (at least for crimes of the ‘murder-type’), the way in which the Indictment was framed and the approach of the Nuremberg Tribunal.\textsuperscript{125}

5.3 Are there any other elements to crimes against humanity under Article 6(c)?

Frequently, further elements are put forward as being required under Article 6(c) in order to distinguish crimes against humanity from either war crimes or municipal crimes. The need for a discriminatory animus is sometimes mentioned,\textsuperscript{126} but outside the persecution-type crimes in Article 6 (c), there is little basis in the text of the Charter, its drafting\textsuperscript{127} or the Judgment for requiring a special motive for all of the listed crimes. This was the conclusion of the Secretary-General in 1949.\textsuperscript{128}

It has also been said that the phrases ‘crimes against humanity’ and ‘other inhumane acts’ makes ‘inhumanity’, ‘cruelty or barbarism’ an element of all crimes against humanity.\textsuperscript{129} ‘Humanity’ can mean either the quality of being human – humaneness – or, all human beings, that is, ‘humankind’.\textsuperscript{130} In the former sense, ‘crimes against humanity’ suggests that the offences’ defining feature is the value they injure, namely humaneness. De Menton supported this view, saying the offences are ‘crimes against the human status’.\textsuperscript{131} Somewhat more cryptically, he said that if the authorities arrest and judge a woman for acts of resistance, it is a legitimate act; if they interrogate her

\textsuperscript{124} J.-B. Herzog, above n 118, 160-166, in particular, 164 ‘Le crime contre l’humanité est matérialisé par le même fait que le crime de droit commun, et, partant, trouve sa qualification dans la même loi pénale’. He concludes that crimes against humanity are ordinary crimes committed against the individual in the service of a bandit State (l’état bandit): 160. Eugène Aroneanu also referred to the crime as a ‘crime international de droit commun’: E. Aroneanu, ‘Le crime contre l’humanité’ (1946) 13 Nouvelle Revue de Droit International Privé 369, 411.

\textsuperscript{125} This was the conclusion of the International Association of Penal Law which in 1947 passed a resolution defining ‘crimes against humanity’ simply by reference to the underlying crimes and without the war nexus: J. Y. Dautricourt, ‘Crime Against Humanity: European View on its Conception and its Future’ (1949) 40 Journal of Criminal Law and Criminology 170, 171-172.

\textsuperscript{126} See, for example, the International Law Commission, Draft Code of Offences against the Peace and Security of Mankind, UN GAOR, 9\textsuperscript{th} sess, Supp 9, 11, UN Doc. A/2693 (1954) discussed in Chapter 3, section 3.3.2(ii); and Regina v Finta [1994] 1 SCR 701 discussed in Chapter 3, section 4.3.

\textsuperscript{127} See text accompanying notes 45-54.

\textsuperscript{128} Memorandum of the Secretary-General on the Charter and Judgment of the Nürnberg Tribunal, 67-68, UN Doc A/CONF.4/5 (1949).


\textsuperscript{130} The distinction is referred to by Schwelb, above n 11, 194-55; Richard Vernon, ‘What is a Crime against Humanity?’ (2002) 10 Journal of Political Philosophy 231, 236-237; and Antonio Cassese, above n 112, 67.

under torture, it is a war crime; if they deport her to an extermination camp or use her
for medical experiments, it is a crime against humanity. Such an element is
particularly vague and, apart from some minor property crimes, could be said to exist
already in most war crimes and municipal crimes. The problem with this approach lies
in trying to discover the elements of a ‘crime against humanity’ from the label itself.
There is the frequent suggestion that the crimes under Article 6(c) must be part of a
large-scale atrocity (which emphasises the second meaning of humanity – that is, all
humbankind) and/or be carried out pursuant to State policy. The Nuremberg
Judgment found these elements existed but did not suggest that this was a necessary
requirement. The case for this view is often based upon the phrase ‘any civilian
population’ in Article 6(c), as opposed to ‘any civilian’. For example, Schweb says the
word ‘population’ suggests ‘that a larger body of victims is visualised and that single or
isolated acts committed against individuals are outside its scope’. In 1948 the
UNWCC issued a highly influential report which put forward eight principles
summarising the elements of crimes against humanity derived from the London and
Tokyo Charters and Control Council Law 10. The third principle said:

(c) Isolated offences did not fall within the notion of crimes against
humanity. As a rule systematic mass action, particularly if it was
authoritative, was necessary to transform a common crime, punishable only
under municipal law, into a crime against humanity, which thus became also
the concern of international law. Only crimes which either by their
magnitude and savagery or by their large number or by the fact that a similar
pattern was applied at different times and places, endangered the
international community or shocked the conscience of mankind, warranted
intervention by States other than that on whose territory the crimes had been
committed, or whose subjects had become their victims.

This reasoning tries to link Article 6(c) with previous humanitarian interventions, a
proposition expressly rejected by the drafters. The Report also relied upon the word
‘population’ for its conclusions. There are some difficulties with this argument. The
text refers to murder and extermination separately, suggesting perhaps that one murder
can be a crime against humanity. The crime of ‘persecution’ does not include a

132 Quoted in Georges Levasseur, ‘Les crimes contre l’humanité et le problème de leur
133 D. Luban, above n 129, 90.
135 See, for example, United States v Alstötter et al. (1947) 3 Trials of War Criminals Before
the Nuremberg Military Tribunals under Control Council Law No 10, 954 (US Government
Printing Office, Washington DC, 1950), 983-985 and 1114, discussed in Chapter 3, section
2.2.2; and Federation Nationale des Resorptes et Internes Resistants et Patriotes and Others v
Barbie 78 ILR 124 (1988) (Court of Cassation, Criminal Chamber 1983-1985), 137, discussed
in Chapter 3, section 4.4.
136 E. Schweb, above n 11, 191; see also Memorandum of the Secretary-General, above n 128,
67.
138 Ibid, 179.
139 Ibid, 193.
140 Alternatively, Schweb says extermination was intended to cover the early stages of
formulating a policy of large scale murder which are too remote to amount to complicity: E.
Schweb, above n 11, 192.
requirement that it be committed against ‘any civilian population’. It also covers political persecutions, the victims of which do not readily form a ‘population’. Early in the drafting of Article 6(e), there were references to a ‘policy of atrocities’ and persecutions but ultimately the term atrocity was dropped and it was the war nexus alone that was chosen as the so-called international element — the feature distinguishing crimes against humanity from domestic crimes. It needs to be remembered that the phrase ‘against any civilian population’ was deleted from the definition in the Tokyo Charter. The phrase ‘any civilian population’, on the history of the drafting, was primarily directed towards ensuring that the offences applied to cases where the civilians were of the same nationality as the perpetrator. Hence, the phrase may simply mean that the victim can be a civilian of any population, not that a civilian population as such must be the target.

The UNWCC thought offences of the murder-type and ‘probably’ of the persecution-type could not be committed against members of the armed forces. Again, this does not appear to be born out by the text, at least where the persecution-type crimes are concerned.

The common law rule of interpretation, known as the ejusdem generis rule, may suggest that violence to the person is a requirement of ‘other inhumane acts’, thereby excluding property offences. The Nuremberg Judgment, however, was clear in its finding that plunder of public and private property is both a war crime and a crime against humanity. It also referred to numerous acts of economic or social persecution of the Jews without always making it clear whether they were relied upon as crimes against humanity or just as historical background. For example, the Judgment refers to the progressively more oppressive treatment of Jews consisting of discriminatory laws limiting the offices and professions open to Jews, restrictions on family life and rights of citizenship, burning and demolishing synagogues, looting businesses, imposing collective fines, seizing assets, restricting movement, creating ghettos and forcing the wearing of a yellow star. This narrative was repeated for individual defendants such that it is fair to conclude that at least the more severe of these acts of persecution were regarded as crimes against humanity. That is the view that has been taken in subsequent cases. Both Schwelb and Lauterpacht support the view that ‘Pillage, plunder, and arbitrary destruction of public and private property may, in their effects, be no less cruel and deserving of punishment than acts of personal violence’.

One additional element does clearly exist in Article 6(e) over municipal crimes, which is also shared by war crimes — State action or policy. A crime in connection with a war of aggression presupposes conduct in support of an explicit State policy. A crime

141 See the text accompanying note 39.
142 History of The United Nations War Commission, above n 137, 178.
143 Nuremberg Judgment, above n 80, 243–247.
144 Prosecutor v Tadić (Trial Chamber Judgment), Case No IT–94–1–T (7 May 1997) [632] [704]–[708]; and United States v Flick and others 3 Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No 10, 27. See also United States v von Weizsäcker 13 Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No 10, 471 and 675-678; Prosecutor v Kvočka (Trial Chamber Judgment), Case No IT–98-30-1-T (2 November 2001) [184]–[205]; Prosecutor v Ruggiu (Judgment and Sentence), Case No ICTR-97-32-I (1 June 2000) [21].
145 E. Schwelb, above n 11, 191.
147 Ibid.
in connection with war crimes requires State actors or at least State favouring action. This is made clear by the opening sentence of Article 6 of the London Charter which limits the jurisdiction of the Tribunal to persons ‘acting in the interests of the European Axis countries’. Hence, a private person not acting in support of a State policy cannot commit a crime against humanity under Article 6(c).

6. WERE CRIMES AGAINST HUMANITY NEW CRIMES IN INTERNATIONAL LAW?

Much has been written on this issue. It was submitted by the defendants that the London Charter was an illegitimate legislative act which created new crimes ex post facto based on the victors’ power not international law.148 Three separate propositions are involved:

(1) the Nuremberg Tribunal was applying international law;
(2) crimes against humanity were not existing crimes under international law; and
(3) the Allies had no right under international law to punish German state officials for conduct towards German nationals in Germany.

6.1 Was the London Charter International Law?

The Nuremberg Tribunal could have been exercising the law of the Allies over enemy combatants; German occupation law as the sovereign power in Germany under that country’s unconditional surrender;149 or international law. The terms of the London Agreement and Charter are somewhat confused on this question,150 as were the addresses of the prosecutors151 and the judgment of the Nuremberg Tribunal.152 The four nations were unquestionably the controlling powers in Germany. The political leaders of the four nations were, however, endeavouring to enact an international instrument, not just an occupation ordinance. It was intended to set a precedent in international law, particularly in outlawing aggression. This is reinforced by the fact that 19 countries subsequently signed the London Agreement. Accordingly, the Nuremberg Tribunal was purporting to be an international court trying its enemies for international offences pursuant to an international treaty enacted for that purpose.153

148 See the Motion Adopted by All Defence Counsel on 19 November 1945 and the Statement Before the Nuremberg Tribunal of Dr Herman Jahreis, Counsel for Defendant Jodl in W. Benton and G. Grimm, Nuremberg: German Views of the War Trials (1955) 27-75.
150 See E. Schweb, above n 11, 209-212.
151 See text accompanying notes 75-79.
152 See text accompanying notes 81-83.
153 The view of writers is varied on the question. Schwarzengerger, for example, says the Nuremberg and Tokyo Tribunals ‘were in substance more akin to municipal war crime courts than to truly international tribunals’: G. Schwarzengerger, ‘The Problem of an International Criminal Law’ in G.O.W. Mueller and E.M. Wise (eds), International Criminal Law (1965) 31. Kranzbühler, counsel for Admiral Dönitz, questioned whether the Nuremberg Tribunal was truly an international court, stating that it was merely a joint occupation court: Otto Kranzbühler, ‘Nuremberg Eighteen Years Afterwards’ (1963-1964) 13 De Paul Law Review
6.2 Were the Proceedings on Count 4, Crimes Against Humanity, Permitted Under International Law?

On the assumption that the Tribunal was applying international law, three schools of thought exist. The first holds that crimes against humanity were not international crimes and the defendants' convictions for these crimes were not valid under international law. This camp includes Schwarzenberger, Schick, Jaspers, many German writers such as Ehard, Kranzbühler and Knieriemen, Chief Justice Stone of the US Supreme Court and many government officials from the Allies themselves. The main arguments are twofold: first, that the ill treatment of nationals by the State in their own country is not an international offence and, secondly, international law 'provides that no state shall intervene in the territorial and personal sphere of validity of another national legal order'.

The second school of thought more or less accepts the novelty of this category of crimes under international law but holds that international law at that time did not recognise the *nullum crimen sine lege* rule in the same way as it applied in some domestic legal traditions, particularly in civil law countries with a codified criminal law. In this category are Kelsen, Bassiouni, Woetzel, Wechsler and Cassese. It is said that the strict prohibition against *ex post facto* laws was then 'a
moral maxim destined to yield to superior exigencies whenever it would be contrary to justice'.  

Bassiouni, in his book, length consideration of the matter, does not go so far. He says international law did prohibit *ex post facto* criminal laws but not completely. 

There existed some, not total flexibility, to create new crimes by analogy. Hence, war crimes may be extended by analogy during war when directed at a belligerent's own nationals. Whilst this matches the result at Nuremberg, the actual terms of Article 6(c) extended to conduct committed before the war.

The third school holds that the crimes set out in Article 6(c) were existing crimes under international law. In this school are Lord Wright, Quincy Wright, Graven, Aroneau, Pella, Levasseur and the many decisions of courts and tribunals after Nuremberg discussed in chapter 3. Typical of the eclectic approach of this school, Quincy Wright draws upon 'humanitarian interventions' by States, the preamble to the Hague Convention of 1907, statements of governments at international conferences, conventions dealing with the rights of minorities, the content of extradition treaties, and the views of publicists such as Grotius. Frequently, writers try to overcome the lack of precedence by saying international law is more like the common law not the civil law system. It is based on custom which is declared to be law though such a declaration may not have any legal precedent.

6.3 The Juridical Bases for Crimes against Humanity in 1945

In the broad, three possible juridical bases existed for crimes against humanity in 1945, each yielding a different definition.

6.3.1 The doctrine of humanitarian intervention

The custom and practice of States, as detailed in the last chapter, may be said to evidence both a doctrine of humanitarian intervention and international crimes under customary international law. If international law allows intervention by force in the case of internal atrocities, it may be regarded as also permitting a belligerent in the course of its intervention to take into custody and try any individual suspected of being a party to such atrocities. The closest precedent for such a principle is the case of the intervention in Lebanon in 1860. The European Powers, after strong threats of intervention, won the agreement of Turkey both to a right to send troops to the area and

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169 Ibid, 72.
170 M.C. Bassiouni, above n 2, chapter 4.
173 Jean Graven, 'Les crimes contre l'humanité' (1950-1) 76 Recueil des Cours 427, 466-467 and 543-544.
177 Q. Wright, 'The Law of the Nuremberg Trials', above n 172, 60-61.
178 Lord Wright, above n 171, 51.
179 See Chapter 1, section 5.1.
to the creation of a Tribunal to try those responsible for atrocities against Christians with the Treaty Parties to have input into the Tribunal’s proceedings.¹⁸⁰ On such a view, crimes against humanity are atrocities committed against persons on a large scale where the territorial State concerned is either unable or unwilling to respond.

The problem with this source, apart from the doctrine’s unclear status before 1914, was that after the First World War the sources relied upon in support of the outlawing of aggression can also be relied upon to deny the right of humanitarian intervention by force. That was certainly how many of the Allies and, ultimately, the drafters of the London Charter viewed the matter at the time. Crimes against peace pull in the opposite direction to crimes against humanity.

6.3.2 The general principles of law as recognised by civilised nations¹⁸¹

This represents the widest juridical basis for crimes against humanity and probably the most controversial. Chapter 1 explored the strong link between the natural law tradition and the concept of crimes against humanity. From the antiquities to the present there is a golden thread – certain values are universal to all humanity, and hence, certain crimes, such as murder, extermination, enslavement, deportation, persecution and other inhumane acts,¹⁸² are universal crimes the world over. Can this be a ‘general principle of law as recognised by civilised nations’? Schwarzenberger¹⁸³ and Meron¹⁸⁴ think this source is the strongest foundation for crimes against humanity at Nuremberg. ‘General principles’, including the domestic penal law of civilised nations, as a source for crimes against humanity, features in Jackson’s paper before the London Conference, the Indictment at Nuremberg and in de Menthon’s address.¹⁸⁵ It also features in several cases under the Allies’ Control Council Law No 10 and Canadian law which enacted the offence of crimes against humanity after the London Charter.¹⁸⁶

Resort to ‘general principles’ in international criminal law is controversial. Whilst the principle may only require the objective fact that most countries uphold the same principle of law in their legislation or case law, eminent publicists immediately after the War did not consider that, for example, murder was an international crime by reason of this source.¹⁸⁷ According to Schachter,¹⁸⁸ Cassese¹⁸⁹ and Bassiouni,¹⁹⁰ neither domestic

¹⁸⁰ Ibid, section 5.1.2.
¹⁸¹ See Statute of the Permanent Court of International Justice, art 38(c).
¹⁸² These are the crimes listed in Article 6(c) of the London Charter.
¹⁸³ G. Schwarzenberger, above n 58, 23-27.
¹⁸⁵ See text accompanying note 75 and section 5.2.
¹⁸⁶ See Chapter 3, sections 2.2, and 4.3.
¹⁸⁷ See, for example: L. Oppenheim and H. Lauterpacht, International Law – A Treatise (8th revised ed, 1955) Vol 1, 29-30; and M. Sorensen, ‘Principes de droit international public’ (1960-III) 101 Recueil des Cours 26, 26-34.
¹⁸⁸ The universally accepted common crimes – murder, theft, assault, incest – that apply to individuals are not crimes under international law by virtue of their ubiquity remarks Schachter: Oscar Schachter, International law in Theory and Practice (1991) 50ff. The US Court of Appeal for the Second Circuit in Flores v Southern Peru Copper Corp 343 F. 3d 140 (2nd Cir 2003), 155 said: ‘[T]he mere fact that every nation’s municipal [i.e.: domestic] law may prohibit theft does not incorporate the Eighth Commandment Thou Shalt not steal... [into] the law of nations’. It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognised becomes an international law violation’.
penal law nor 'general principles' can create international crimes, at least not consistently with some minimal requirement of specificity. For example, Cassese writes:

One can also add that it is indeed very difficult for conduct to be internationally criminalised on the sole basis of a general principle of law; such general principles, it is submitted, may rather fulfil the role of filling gaps in the treaty or customary regulation of offences, or the way such offences are prosecuted and punished.]{691}

To others the intuitive belief that the conduct is criminal is a sufficient source of international law. Hence, the debate is often seen as a battle between the naturalists and the positivists.\footnote{\footnotetext{691} \ldots \ldots such [general] principles of law do not contain any specific prohibition of crimes, which can only be found in customary international law': A. Cassese, above n 112, 149 n 27. \footnotetext{690} \ldots \ldots general principles of law can seldom satisfy the minimum standards of specificity that legality requires': M.C. Bassiouni, \textit{Introduction to International Criminal Law} (2003) 207. The author also says 'it is important to bear in mind that 'general principles' are not, in this writer's opinion, capable in and of themselves, of creating international crimes unless they rise to the level of \textit{jus cogens}': M.C. Bassiouni, above n 2, 283.}

The Hague Convention may demonstrate state 'recognition' of the general principles of criminal law of civilised nations during times of war. After the First World War, however, no definition of the 'laws of humanity' was agreed upon and, hence, its content remained unclear. Again, this source does not answer the complaint about jurisdiction.

In the result, it is probably more persuasive to accept that crimes against humanity were novel international crimes. More clearly, the Allies, merely by their own treaty, had no right under international law to force German officials to appear before their military tribunal for conduct towards German nationals.

\footnote{\footnotetext{691} Antonio Cassese, ‘Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law: The Kolk and Kistiwy v Estonia Case before the ECHR’ (2006) 4 Journal of International Criminal Justice 410, 416. Citing Prosecutor v Furundžija \textit{(Judgment)}, Case No IT-95-17/I-T (10 December 1998) [177]-[178], Cassese also says: 'General principles of law recognised by the community of nations constitute a subsidiary source, which courts may resort to whenever primary sources of international law (treaty and custom) do not yield any results': ibid, 415. See also G. Werle, \textit{Principles of International Criminal Law} (2005) 47-48. \footnotetext{692} See Q. Wright, 'Legal Positivism and the Nuremberg Judgment', above n 172; and M.C. Bassiouni, above n 2, chapter 3. \footnotetext{693} See Chapter 1, section 6.}
6.4 The Principle Nullum Crimen Sine Lege

The proposition that an international treaty of four nations in 1945 could, but cannot now,\(^{194}\) create *ex post facto* international offences in order to avoid injustice is not a very attractive principle. It really accepts the argument that the punishment at Nuremberg may have been just but it was not grounded in any existing rule of international law. Much less has been written about the Allies’ right to prosecute the Nazis acting as the occupying powers.\(^{195}\) Finch says an occupation law could cover conduct after but not before the commencement of hostilities.\(^{196}\) The reason for such a distinction is not clear. Perhaps a better commencing date would be after the Allies declared they would hold the enemy individually accountable for atrocities perpetrated against their own nationals so that the perpetrators were on reasonable notice of potential criminal prosecutions. Schwarzenberger assumes the Allies as the sovereign power in Germany could enforce retrospective laws for Germany.\(^{197}\) The Allies were, however, at pains to distance themselves from the exercise of any arbitrary power. For example, Wechsler (Assistant Attorney General) in a memorandum to the US Attorney General, said:

> It may be opposed to this view that any treaty definition which goes beyond the laws of war would have retrospective application in violation of the principle *nullum crimen sine lege* ... I think it a sufficient answer that the crime charged involves so many elements of criminality under the accepted laws of war and the penal laws of all civilized states so that the incorporation of the additional factors in question does not offer the type of threat to innocence which the prohibition of *ex post facto* laws is designed to prevent.\(^{198}\)

This was the submission of de Menthon and was likely what the Tribunal had in mind when it said the principle *nullum crimen* is a ‘principle of justice’.\(^{199}\) Alternatively, some suggest the Nuremberg Tribunal was supporting the view that ‘any conduct that is socially harmful or causes danger to society’ can be made the subject of *ex post facto* punishment.\(^{200}\) In the Nuremberg proceedings which followed the IMT Judgment, the Tribunals resorted to the ‘general principles of criminal justice’ to deny that the charges of crimes against humanity infringed the *nullum crimen* principle.\(^{201}\) Some have criticised this approach because it does not sufficiently pay regard to the principle of legality.\(^{202}\) but the approach could be said to be reflected in Article 15(2) of the International Covenant of Civil and Political Rights (‘ICCPR’) which permits

\(^{194}\) This is said to be because of the more recent adoption of a principle of strict legality: see Chapter 7, section 2.1.

\(^{195}\) Schick does not consider the matter because he says the Allies were not proceeding pursuant to their powers as occupiers: F.B. Schick, above n 153, 781.

\(^{196}\) G. Finch, above n 149, 22-23.

\(^{197}\) G. Schwarzenberger, above n 153, 30-31.

\(^{198}\) Memorandum dated 29 December 1944: see B. Smith, *The American Road to Nuremberg*, above n 25, Doc. 27, 84 at 86.

\(^{199}\) See text accompanying note 75.

\(^{200}\) This is the view of Cassese. See: A. Cassese, above n 191, 416-417.

\(^{201}\) See Chapter 3, section 2.2.4 and *List and others* (1948) 15 Annual Digest 632, 634-635.

retroactive punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations. Such a view is denied by Cassese\textsuperscript{203} and Bassioumi,\textsuperscript{204} but is supported by scholars such as Scharf\textsuperscript{205} and Meron, who says the crimes charged at Nuremberg 'were so clearly criminal under every domestic legal system in the world that it could hardly be said that the prospect of criminal liability for them was unpredictable'.\textsuperscript{206} The travaux préparatoires suggest that the goal of Article 15(2) was 'to confirm and strengthen' the principles of Nuremberg and Tokyo and to 'ensure that if in the future crimes should be perpetrated similar to those punished at Nürnberg, they would be punished in accordance with the same principles'.\textsuperscript{207} There have been few decisions of the Human Rights Committee on Article 15 and none have relevantly considered the meaning of Article 15(2).\textsuperscript{208}

Article 7(2) of the European Convention on Human Rights\textsuperscript{209} is in the same terms as Article 15(2) of the ICCPR. The preparatory works also disclose an intention to prevent the nulliam crimen principle affecting 'laws, which under the very exceptional circumstances at the end of the Second World War, were passed in order to suppress war crimes, treason and collaboration with the enemy and do not aim at any legal or moral condemnation of these laws'.\textsuperscript{210} The European Commission of Human Rights has relied upon Article 7(2), rather than the 7(1),\textsuperscript{211} to uphold the validity of ex post facto local prosecutions for crimes of collaboration committed during the Second World War.\textsuperscript{212}

In Kolk And Kislyiy v. Estonia\textsuperscript{213} the European Court on Human Rights had to consider the validity of convictions entered on 10 October 2003 for 'crimes against humanity' committed by the defendants (who were of Estonian and Russian nationality) in March 1949 when that offence was first introduced into Estonian law in 1994.\textsuperscript{214} The

\textsuperscript{203} See A. Cassese, above n 191, 414-417.
\textsuperscript{204} See M.C. Bassioumi, above n 190, 218.
\textsuperscript{206} See above n 184, 830; see also Theodor Meron, 'International Criminalization of Internal Atrocities' (1995) 89 AJIL 554, 567.
\textsuperscript{208} See Communication No. R.7/28, Weinberger v Uruguay (29 October 1978), UN GAOR, UN Doc A/36/40; and S. Joseph et al., above n 207, 341.
\textsuperscript{211} This permits a State to apply ex post facto local criminal law to conduct that was criminal under international law at the time.
\textsuperscript{214} See Chapter 6, section 3.5 for a discussion of this section.
conduct consisted of participating in the deportation of civilians (which totalled more than 20,000)\textsuperscript{215} from Estonia to remote parts of the USSR whilst the defendants were acting as officials of the then Estonian Soviet Socialist Republic. The USSR invaded Estonia in June 1940, incorporating it into the Soviet Union. Interrupted by the German occupation in 1941-1944, Estonia remained occupied by the Soviet Union until its restoration of independence in 1991. The defendants argued that even if the Convention permitted the retroactive application of local laws for crimes against humanity committed during the war, it did not apply to conduct \textit{after} the war as no such prosecution would have been within the jurisdiction of the Nuremberg Tribunal. The Court noted that deportation of the civilian population was expressly recognised as a crime against humanity in the London Charter (Article 6 (c)) which had been affirmed as a principle of international law by Resolution No. 95 of the General Assembly of the United Nations on 11 December 1946.\textsuperscript{216} After quoting Article 7(2) of the Convention, with its reference to ‘general principles’, it stated ‘[t]his is true of crimes against humanity’.\textsuperscript{217} This suggests the Court regarded the offences in Article 6(c), including the deportation of civilians from the country of their nationality, as being ‘criminal according to the general principles of law recognised by the community of nations’, at least, perhaps, if done in a manifestly arbitrary manner and without due process as occurred in Estonia.\textsuperscript{218} Alternatively, the Court viewed ‘crimes against humanity’ without any nexus to war or aggression (the alternative definition of which it did not explore) as being an international offence in 1949.\textsuperscript{219}

In the Čelebići case the ICTY Trial Chamber said of charges of war crimes in internal armed conflict:

Moreover, the second paragraph of Article 15 of the ICCPR is of further note, given the nature of the offences charged in the Indictment. It appears this provision was inserted to avoid the situation which had been faced by the International Tribunals in Nürnberg and Tokyo after the Second World War. These tribunals had applied the norms of the 1929 Geneva Conventions and the 1907 Hague Conventions, among others despite the fact that these instruments contained no reference to the possibility of criminal sanctions. It is undeniable that acts such as murder, torture, rape and inhumane treatment are criminal according to “general principles of law” recognised by all legal systems. Hence, the caveat contained in Article 15, paragraph 2, of the ICCPR should be taken into account when considering the application of the principle of \textit{nullum crimen sine lege} to the present case. The purpose of the principle is to prevent the prosecution and punishment of an individual for acts which he reasonably believes to be lawful at the time of their commission. It strains credulity to contend that the accused would not recognise the criminal nature of the acts alleged in the Indictment. The fact that they could not foresee the creation of an

\textsuperscript{215} Kolk and Kislyiy above n 213, 8.
\textsuperscript{216} Ibid, 8-9.
\textsuperscript{217} Ibid, 9.
\textsuperscript{218} Cassese faults the reasoning of the Court saying: ‘crimes against humanity manifestly did not amount to a general principle of law, let alone a rule laid down in the legislation of most countries of the world’: A. Cassese, above n 191, 415. This does not consider the possibility of deportation of a national without due process, as opposed to a ‘crime against humanity’ as an international offence, being criminal according to ‘general principles of law’.
\textsuperscript{219} The Court did remark that it saw no reason to dispute the finding of the local courts that the acts were crimes against humanity under international law at the time of their commission: \textit{Kolk and Kislyiy}, above n 213, 9.
International Tribunal which would be the forum for prosecution is of no consequence.220

The above passage was applied by a Special Panel of the District Court in East Timor in respect of the retroactive application of charges of crimes against humanity in *Mendonca*.221 Hence, a credible argument exists for the view that international law permits, and has always permitted, an exception to the *nullum crimen* principle for certain serious crimes, such as those prosecuted at Nuremberg as 'crimes against humanity'. This suggests that a new government in a post-conflict society, such as the Allies in post-war Germany, could, without violating international law, overturn amnesties, statutes of limitation or any other legal immunity enjoyed by a prior regime provided its retroactive punishment is limited to conduct universally recognised as criminal under the penal laws of all civilized states and which reaches the same level of seriousness as the crimes prosecuted at Nuremberg. This would cover, for example, murder, enslavement, deportation and inhumane treatment, such as torture or rape.222

7. CRIMES AGAINST HUMANITY ENTERS CUSTOMARY LAW

Nineteen countries signed the London Agreement after the Allies, France, the United Kingdom, the Soviet Union and the United States executed it. This enhanced its status in international law. The Peace Treaties with Italy, Romania, Hungary, Bulgaria and Finland covered the surrender for trial of persons suspected of committing 'crimes against humanity' without defining the term.223 As concluded by Schweb, it is likely the terms were intended to have the same meaning as under Article 6(c).224 Thus, 28 countries endorsed in treaties the concept of crimes against humanity.

The General Assembly of the United Nations on 11 December 1946 unanimously affirmed 'the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal'.225 Whilst not generally commented upon by scholars, one of those 'principles of international law' may be the exception to the prohibition on *ex post facto* punishment argued for in the last section. The majority of international law scholars rely on these sources to conclude that, at least after December 1946, crimes against humanity as defined under Article 6(c) entered customary international law.226 A minority view points out that General

220 *Prosecutor v Delalic et al. (Judgment)*, Case No IT-96-21-A (20 February 2001) [313].

221 *The Public Prosecutor v Sarmento and Mendonca (Judgment of the Special Panel)*, Case No 18a/2001 (24 July 2003) [20] and [30]; see Chapter 6, section 2.3.2(ii).

222 The status of the persecution-type crimes as a general principle of law is more problematic as such an offence was, and is, not widely in existence in the penal laws of States: see, for example, M.C. Bassouoni, above n 2, 326-7. The crime does not present a problem if it is confined to conduct already covered as 'other inhumane acts' but which is carried out for prohibited reasons. This question is discussed further in chapter 5, section 4.9.

223 See E. Schweb, above n 11, 212; and A. Cassese, above n 112, 73.

224 E. Schweb, above n 11, 212.


226 'Its [the General Assembly] pronouncements on the international law of war crimes and crimes against humanity must be regarded as authoritative': David Matas and Susan Charendoff, *Justice Delayed: Nazi War Criminals in Canada* (1987) 90. 'But whatever the state of the law in 1945, Art. 6 of the Nuremberg Charter has since come to represent general international law': Ian Brownlie, *Principles of Public International Law* (4th revised ed, 1990)
Assembly declarations are not binding and that its resolution simply acknowledged the outcome reached not necessarily a principle of general application. The latter argument can be discounted because the intention at Nuremberg was for the crimes in Article 6 of the London Charter to have general application. Justice Jackson described the drafting process as follows:

The Soviet Delegation proposed and until the last meeting pressed a definition which, in our view, had the effect of declaring certain acts crimes only when committed by the Nazis. The United States contended that the criminal character of such acts could not depend on who committed them and that international crimes could only be defined in broad terms applicable to statesmen guilty of the proscribed conduct. At the final meeting the Soviet qualification was dropped and agreement was reached on a generic definition acceptable to all.

It is hard to ignore a unanimous declaration of all members of the United Nations which expressly affirms a principle of international law. It may be regarded as an interpretative declaration of the collective measures members may take 'for the prevention and removal of threats to the peace' as provided for in Article 1(1) of the UN Charter. According to Schwarzenberger the 'maximum of legal significance that can be attributed to this Resolution is that, in future, any member of the United Nations will be estopped from contesting these principles as rules of international law'. The minority view has few supporters today and the customary law status of crimes against humanity as defined in Article 6(c) is generally accepted. The Secretary-General in 1993 said Article 6(c) has 'beyond doubt become part of customary international law'.

8. CONCLUSION

The first actual trial for crimes against humanity at Nuremberg has been overshadowed by its legacy. Sixty years later, Nuremberg is still described as 'the precedent'. But for what is it a precedent? Many point to the principle that

562. See also: Dinh Nguyen Quoc, Patrick Daillier and Alain Pellet, Droit international public (6th revised ed, 1999) 677; and A. Cassese, above n 192, 415-416.
228 This was accepted as the effect of General Assembly Resolution 95 (1) by the European Court of Human Rights in Koik and Kislyiy v Estonia, above n 213, 8-9, though the French Court of Cassation in 1993 in Boudarel took the view that under a law which incorporated the London Charter only acts of the Nazis or their supporters were covered: Boudarel, Judgment of 1 April 1993, in Bulletin des arrêts de la Cour de Cassation, Chambre Criminelle, 1993, no 143, 351-355.
229 Jackson Report, above n 11, vii-viii.
individuals can be held responsible for the purported international crimes in the London Charter.\(^{233}\) The desire to put on trial a nation’s enemies may, however, need to be curtailed as much as encouraged.\(^{234}\)

One of the legacies of Nuremberg is the principle that crimes against humanity is only engaged when international peace or the interests of States are affected. The General Assembly’s unanimous endorsement of crimes against humanity has made the concept a part of the constitutional order of the international community – a law of the United Nations to be read with its Charter. Crimes against humanity when linked to war means such crimes are no longer based upon the laws of humanity but upon the need to preserve international peace. Support for these general themes can be found in the United Nations Charter, the drafting of which was taking place at about the same time (May-June 1945) as the London Conference.\(^{235}\) Whilst there are references to fundamental human rights in the United Nations Charter,\(^{236}\) Article 2(4) prohibits the resort to force, except with Security Council authorisation, and even then it can only act in response to a threat to international peace. Both the sovereign equality of States and the inviolability of a State’s ‘domestic jurisdiction’ are expressly recognised in Article 2.

The Nuremberg definition of crimes against humanity and the UN Charter, with their radical potential to penetrate statehood, only justify crimes against humanity and human rights respectively, as a State value, not as a human value; they override State sovereignty only when their perpetration or breach threatens the peace and security between States. For hundreds of years, and right up to the Nuremberg Trial, the concept of State sovereignty has had to compete with the natural law notion that there exists a higher law, the ‘law of humanity’. Crimes against humanity, as drafted and interpreted at Nuremberg, put an end to such notions, just as the UN Charter put an end to the notion of humanitarian intervention. The UN Charter, along with the criminalisation of aggression, committed the international community to unreachable nation-states beyond that experienced in the past. Crimes against humanity are to be grounded in international peace and the security of relations between States, not the right of individuals to be protected from States. As Louis Henkin writes: ‘Perhaps because we now wish to, we tend to exaggerate what the Charter did for human rights’.\(^{237}\) The same can be said in respect of what Article 6(c) did for the concept of crimes against humanity in international criminal law.\(^{238}\) As Luban concludes, its legacy is at best equivocal and at worst immoral.\(^{239}\)

\(^{233}\) For example, see: D. McGoldrick, above n 232, 19 and R.S. Clark, above n 18, 198-199.

\(^{234}\) Schwarzenberger says its legacy is that still tighter ropes can be ‘drawn in advance round the necks of the losers of any other world war’: G. Schwarzenberger, above n 153, 31.


\(^{236}\) Charter of the United Nations, arts 1, 13, 16, 55-57, 62, 68, 73 and 76.


\(^{238}\) As Lippman concluded: ‘The drafters thus defaulted on the opportunity to provide protection for human rights in times of peace as well as war’: M. Lippman, above n 25, 188.

\(^{239}\) See D. Luban, Legal Modernism (1994) 336ff.
CHAPTER THREE

FROM NUREMBERG TO THE HAGUE

The phrase 'crimes against humanity' has, in the last half-century, also become a commonly used one in international treaties and the writing of publicists. There is little real difficulty about its meaning.

1. INTRODUCTION

This chapter considers the period between 1945 and when the next international instrument, the ICTY Statute, defined crimes against humanity in 1993. This was a period when the concept of crimes against humanity grappled with, but did not resolve, its own definition. Immediately after the Nuremberg Judgment, experts, commentators and judges tried to depart from the definition contained in Article 6(c) of the London Charter, including the requirement that the crimes be committed in connection with war crimes or crimes against peace – the so-called war nexus. The war nexus was frequently said to be an ad hoc jurisdictional requirement of the Nuremberg Tribunal rather than a necessary element of the offence itself. The alternative definitions put forward, however, varied widely and no consensus emerged.

In addition, there is the difficulty presented by the legacy of Nuremberg itself. As discussed in chapter 2, the cornerstone for the case that crimes against humanity is part of international customary law rests upon a combination of the Nuremberg Trial and General Assembly Resolution 95(I), which affirmed the London Charter and the war nexus for crimes against humanity. In contrast, what are the sources relied upon for the oft-made assertion that by 1993 the war nexus in the definition of crimes against humanity had 'withered away'? This chapter considers this question.

The first section considers the jurisprudence of the post war military tribunals under Control Council Law No 10 (CCL 10); the second section examines international sources; and the third section considers State practice. The final section attempts an analysis of the incoherence that marks the attempts to define crimes against humanity in international law at this time. It is suggested in this analysis that three different principles underlie the concept of crimes against humanity. No satisfactory definition of this offence can be offered which does not take account of each of these principles.

2. CONTROL COUNCIL LAW NO. 10

2.1 Introduction

The Allies (USSR, the United States, Great Britain and France) after the war administered Germany through the Control Council. Law No 10 established Tribunals in

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2 Discussed in Chapter 4.
4 Affirmation of the Principles of International Law Recognized by the Charter of The Nuremberg Tribunal, GA Res 95(I), UN GAOR, 1st sess, 2nd pt, 188, UN Doc A/64/Add.1 (1946).
each of the zones of occupation in Germany to try persons accused of committing war crimes, crimes against peace and crimes against humanity. It clearly was an occupation law rather than international law. The reference to the London Charter and the Moscow Declaration in the Preamble suggests the Council was, however, purporting to follow those international precedents. Generally, that is how the Tribunals in the US Zone viewed CCL 10. Article II (1)(c) of CCL 10 defined crimes against humanity as follows:

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

The main difference with the London Charter is that the 'war nexus' is not included. Unfortunately the legislative history of CCL 10 is sparse and no record exists as to the Allies' intent in excluding reference to the war nexus. Both Schwelb and Bassioumi assume the nexus was dropped because the law was not an international instrument. In the French and Soviet zones the prosecutions for crimes committed against nationals of Axis countries were less influenced by CCL 10 than the US and British proceedings which are discussed below.

2.2 The US Zone

The United States prosecuted 12 cases and 177 defendants under CCL 10 before US military tribunals sitting at Nuremberg. These trials have been influential in the search

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2 In United States v Alstötter et al. (1947) 3 Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No 10, 954 (US Government Printing Office, Washington DC, 1950) ('The Justice Case') (hereinafter CCL 10 Trials), the Tribunal said at 964 that the Allies were exercising 'supreme legislative power in governing Germany'. But it also said at 984: 'it enforces international law as superior in authority to any German statute or decree'.
3 For example, see United States v Flick and others 6 CCL 10 Trials 3, 1212-1213 ('The Flick Case'); United States v von Weizsäcker 13 CCL 10 Trials 114-117 ('The Ministries Case'); The Justice Case, above n 6, 972 and 982; United States v List et al. 11 CCL 10 Trials 757, 1241-1242 ('The Hostages Case').
4 The other differences are the inclusion of the words 'atrocities and other offences'; the specific crimes are but examples of 'atrocities and other offences' and imprisonment, rape and torture are included in the specific crimes.
5 B. Van Schaack, above n 3, 808.
8 See T. Taylor, The Anatomy of the Nuremberg Trials (1992); and T. Taylor, Final Report to the Secretary of the Army on the Nuremberg War Crime Trials under Control Council Law No. 10 (1949). Telford Taylor was the lead counsel for the United States.
for the definition of crimes against humanity and three of the main cases are now discussed.\textsuperscript{13}

\subsection*{2.2.1 The Flick Case}

The defendants were charged with crimes against humanity, including in respect of their pre-war appropriation of Jewish owned German industries and use of slave labour during the war.\textsuperscript{14} Based on the reference to the London Charter in the Preamble to CCL 10, the Tribunal held the same war nexus ought to be implied into the definition\textsuperscript{15} and, following the Nuremberg Tribunal's ruling, it concluded that it had no jurisdiction over crimes committed before the war.\textsuperscript{16} This ruling was followed in the \textit{Ministries Case} where the Tribunal said, without the nexus to war, CCL 10 would be an impermissible \textit{ex post facto} criminal law.\textsuperscript{17}

The \textit{Flick} Tribunal also considered whether the compulsory confiscation of industrial property could be a 'crime against humanity'. The Tribunal noted the distinction between industrial property (such as ore and coal mines) and the dwellings, household furnishings, and food supplies of the Jewish people.\textsuperscript{18} Applying the doctrine of \textit{ejusdem generis}, it said 'other persecutions' must be deemed 'to include only such as affect the life and liberty of the oppressed peoples. Compulsory taking of industrial property, however reprehensible, was not in that category.'\textsuperscript{19} The Tribunal did hold, however, that it did not matter that the defendants were not State agents or officials. It was enough if they were acting in furtherance of State policy.\textsuperscript{20}

The issue of property offences arose in other CCL 10 trials. In \textit{Farben}, the Tribunal held that plunder and spoilation of property located in German-occupied countries was a war crime but declined to hold the conduct a crime against humanity.\textsuperscript{21} In the \textit{Ministries Case}, the Tribunal held stealing personal property of concentration camp inmates was a crime against humanity.\textsuperscript{22} In \textit{Pohl}, the defendants were convicted for crimes against humanity for the confiscation of personal property.\textsuperscript{23}

\subsection*{2.2.2 The Justice Case}

The \textit{Justice Case} involved allegations that various German jurists (legal officials, judges and lawyers) had distorted the law to assist the perpetration of Nazi atrocities.

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\textsuperscript{14} \textit{The Flick Case}, above n 7, 1212; see M. Lippman, above n 3, 205-207; and M. Lippman, 'War Crimes Trials of German Industrialists: the "Other Schindlers"' (1995) 9 Temple International and Comparative Law Journal 173, 185-206.
\textsuperscript{15} \textit{The Flick Case}, above n 7, 1212-1214; see B. Van Schaack, above n 3, 813-814; M. Lippman, above n 3, 205-206.
\textsuperscript{16} \textit{The Flick Case}, above n 7, at 1213.
\textsuperscript{17} \textit{The Ministries Case}, above n 7, 116-117 where the Tribunal held it was not established 'that crimes against humanity perpetrated by a government against its own nationals, are of themselves crimes against international law'; see B. Van Schaack, above n 3, 817 n 143.
\textsuperscript{18} \textit{The Flick Case}, above n 7, 1212-1215.
\textsuperscript{19} \textit{The Flick Case}, above n 7, 1215.
\textsuperscript{20} Ibid, 1201-1202; followed in \textit{United States v Krauch} 8 CCL 10 Trials 1081, 1167-1192 ('The Farben Case').
\textsuperscript{21} \textit{The Flick Case}, above n 7, 1201-02.
\textsuperscript{22} \textit{The Ministries Case}, above n 7, 611.
\textsuperscript{23} \textit{United States v Oswald Pohl}, 5 CCL 10 Trials 958, 978.
\end{flushright}
Whilst the judgment only dealt with conduct during the war, the Tribunal addressed itself fully to the question of the war nexus, saying it had been 'deliberately omitted from the definition'. The Tribunal referred to interventions and threatened interventions in Greece, Turkey, Lebanon, Romania, Russia and Cuba. It concluded that crimes against humanity did not require a nexus to war, but rather involved 'acts of such scope and malevolence, and they so clearly imperilled the peace of the world that they must be deemed to have become violations of international law'. The juridical basis for crimes against humanity therefore was the doctrine of humanitarian intervention – a proposition the Allies at the London Conference explicitly rejected. Based on the words 'against any civilian population' in CCL 10, the Tribunal said crimes against humanity must be strictly construed to exclude isolated cases of atrocity or persecution. The required elements were said to be a 'conscious participation in systematic government organized and approved procedures on a nation wide basis' and 'governmental participation is a material element of the crime against humanity'. Apart from these elements having, at best, a tenuous grounding in the Nuremberg Judgement and the text of either CCL 10 or the London Charter, these elements have not always been present in the instances of humanitarian intervention referred to by the Tribunal. Despite these flaws in the reasoning, the judgment has been frequently cited when it comes to defining a crime against humanity.

2.2.3 The Einsatzgruppen Case

The Einsatzgruppen Case involved the prosecution of 22 defendants who, as part of an extermination squad, were accused of slaughtering over a million people. The Tribunal said CCL 10 had removed the war nexus, but, instead of relying on the doctrine of humanitarian intervention, it said 'the present Tribunal has jurisdiction to try all crimes against humanity as long known and understood under the general principles of criminal law'. Accordingly, the nullum crimen principle cannot apply as 'no one can claim the slightest pretense at reasoning that there is any taint of ex post factoism in the law of murder'. The Tribunal also declared that:

Crimes against humanity...can only come within the purview of this basic code of humanity because the state involved, owing to indifference, impotency or

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24 The Justice Case, above n 6, 974.
25 Ibid, 981-982. These are discussed in chapter 1, section 5.1.
26 Ibid, 982.
27 See Chapter 2, section 2.
28 The Justice Case, above n 6, 982.
29 Ibid.
30 Ibid, 984-985: 'Simple murder and isolated atrocities do not constitute the gravamen of the charge...The charge in brief, is that of conscious participation in a nation wide government-organised system of cruelty and injustice'.
31 Ibid, 984.
32 See Chapter 1, section 5.1.
33 For example, see the judgment of Toohey J in Polyukovich, above n 1, discussed in section 4.2 below.
35 The Einsatzgruppen Case, above n 34, 499.
36 Ibid, 459.
complicity, has been unable or has refused to halt the crimes and punish the criminals.\textsuperscript{37}

2.2.4 Other CCL 10 Trials

Other cases accepted the pre-existing status of crimes against humanity in international law by resort to ‘general principles of law’. These cases did not deal with the war nexus directly because the indictments were limited to acts committed during the war. In the Medical Case the Tribunal said performing medical experiments on persons (including German nationals) which sometimes lead to their death was ‘in complete disregard of international conventions, the laws and customs of war, the general principles of criminal law as derived from the criminal law of all civilized nations and Control Council Law No 10.’\textsuperscript{38} In the Hostages Case, the Tribunal said:

It is not essential that a crime be specifically defined and charged in accordance with a particular ordinance, statute or treaty if it is made a crime by international convention, recognised customs, and usages of war, or the general principles of criminal justice common to civilized nations generally. If the acts charged were in fact crimes under international law when committed, they cannot be said to be \textit{ex post facto} acts or retroactive pronouncements\textsuperscript{39}

In the RuSHA Case, the Tribunal referred to the Hague Convention of 1907\textsuperscript{40} and said the acts of the defendants were in violation ‘of the laws and customs of war, of the general principles of criminal law as derived from the criminal law of all civilised nations, of the internal penal laws of the countries in which such crimes were committed’.\textsuperscript{41}

2.3 The British Zone

The British authorities assigned prosecutions for crimes against humanity under CCL 10 to the German courts when committed by persons of German nationality against German nationals or stateless persons where charges under German domestic law could also be laid.\textsuperscript{42} This perhaps suggests that the UK, consistent with its position before the London Conference, believed that offences against German nationals should be prosecuted by the new German authorities rather than the Allies.\textsuperscript{43} This jurisprudence has frequently been overlooked by commentators and judges writing in English, but the ICTY, particularly under the influence of Judge Cassese, has made use of this case law.\textsuperscript{44}

\textsuperscript{37} Ibid, 498.
\textsuperscript{38} United States v Karl Brandt (“The Medical Case”) 2 CCL 10 Trials 171, 183.
\textsuperscript{39} The Hostages Case, above n 7, 1239. The Tribunal also said that customary international law must be elastic enough to meet new conditions.
\textsuperscript{40} Convention respecting the Laws and Customs of War on Land, done at The Hague, The Netherlands, opened for signature 8 October 1907, 187 Consolidated Treaty Series 227 (entered into force on 26 January 1910).
\textsuperscript{41} United States v Ulrich Greifelt 4 CCL 10 Trials 597 (“The RuSHA Case”) United States v Ulrich Greifelt 4 CCL 10 Trials 597 618.
\textsuperscript{42} Ordinance No 47, published in Military Government Gazette, Germany, British Zone of Control, no 13, 306, cited by E. Schwelb, above n 10, 219.
\textsuperscript{43} See Chapter 2, section 2.1. For an account of these trials see Henri Meyrowitz, \textit{La répression par les tribunaux allemands des crimes contre l’humanité et de l’appartenance à une organisation criminellex} (1960).
\textsuperscript{44} See Chapter 4.
2.3.1 The denunciation cases

There were a number of prosecutions of defendants for ‘denouncing’ persons to the Nazi authorities which then lead to the persons’ arrest and persecution. In Sch., the accused had denounced her landlord to the Gestapo solely out of revenge which ended with the landlord’s conviction and execution. Following conviction, the accused appealed against the decision, arguing that crimes against humanity were limited to participation in mass crimes and did not include action against a single person for personal reasons. The Supreme Court dismissed the appeal and stated:

... a crime against humanity as defined in CCL 10 Article II 1(c) is committed whenever the victim suffers prejudice as a result of the National Socialist rule of violence and tyranny (Gewalt-oder, Willkürherrschaft) to such an extent that mankind itself was affected thereby... [which occurs] if the character, duration or extent of the prejudice were determined by the National Socialists rule of violence and tyranny or if a link between them existed.

This was followed in other cases, which confirmed that ‘the motives (“Beweggründe”)’ prompting a denunciation are not decisive (nicht entscheidend) and the accused need not support the tyranny, nor must the accused act systematically. It is sufficient if his single action is objectively connected with the system of violence and tyranny.

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45 See, for example, the judgments of the Supreme Court for the British zone in Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen, vol I, 6-10, 11-18, 19-25, 45-9, 49-52, 91-95, 385-391; vol II, 17-19, 67-69, 144-147; vol III, 56-57 (hereinafter Entscheidungen); cited in A. Cassese, International Criminal Law (2003) 83.
47 Decision of the Supreme Court for the British zone (26 October 1948) in Entscheidungen, vol I, 122-126.
48 Ibid, 124 translated in Prosecutor v Tadić (Appeals Chamber Judgment), Case No IT–94–1–A (15 July 1999 (Tadić – Appeal), [260].
49 Decision of the Braunschweig District Court (22 June 1950) in Justiz und NS-Verbrechen, vol VI, 631-644, 639 translated in Tadić – Appeal, above n 48, [260].
50 In P, the Defendants, who were doctors and a jurist, participated in the transfer of mentally ill persons to other institutions where the patients were secretly killed in gas chambers. In most cases they objected to these instructions and tried to save their patients’ lives, but the Supreme Court for the British zone said a crime against humanity can be committed by a person who may not wish ‘to promote National Socialist rule’ and ‘who acts perhaps out of fear, indifference, hatred for the victim or to receive some gain...’ if the action remains linked to this violent and oppressive system (‘Gewaltherrschaft’): Decision of the Supreme Court for the British zone (5 March 1949), Entscheidungen, vol I, 321-343, 341, translated in Tadić – Appeal, above n 48, [258] n320.
51 In G, a member of the SA (Stormtroopers) participated in the mistreatment of a political opponent, not pursuant to orders, but for personal motives. The Supreme Court for the British zone held that an attack against a single victim for personal reasons can be considered a crime against humanity if there is a nexus between the attack and the National Socialist rule of violence and tyranny: Decision of the Supreme Court for the British zone (8 January 1949) Entscheidungen, vol I, 246-249, 247 translated in Tadić – Appeal, above n 48, [260] n322.
52 J and R, Decision of the Supreme Court for the British zone (16 November 1948), Entscheidungen, vol I, 167-171 quoted in A. Cassese, above 45, 66 n1. The Court also held that it is not necessary for the accused to act out of inhumane motives: K, Decision of the Supreme
Harlan Veit the Court of Assizes summarised the jurisprudence of the Supreme Court, by saying crimes against humanity involves 'any conscious and willed attack that, in connection with the Nazi system of violence and arbitrariness, harmfully interferes with the life and existence of a person or his relationship with his social sphere, or interferes with his assets and values, thereby offending against his human dignity as well as humanity as such'.

2.3.2 The case of Weller

The Weller case involved the ill-treatment and assault of Jewish civilians by three persons including Weller, a member of the SS, who was at the time not in uniform and acting on his own initiative. The Jewish community complained to the head of the Gestapo who said Weller's actions were not condoned. Weller was reprimanded by the district leader of the Nazi party and possibly fined 20RM. The Supreme Court said crimes against humanity do not only cover 'actions which are ordered and approved by the holders of hegemony' but also:

... when those actions can only be explained by the atmosphere and conditions created by the authorities in power. The trial court was [thus] wrong when it attached decisive value to the fact that the accused after his action was 'rebuked' and that even the Gestapo disapproved of the excess as an isolated infringement. That this action nevertheless fitted into the persecution of Jews affected by the State and the party, is shown by the fact that the accused ... was not held criminally responsible in proportion to the gravity of his guilt.

2.4 Attacks on Members of the Military

The Supreme Court for the British zone determined that crimes against humanity were applicable even if the victim was a member of the military. For example, in P. and others, three German soldiers were tried for trying to escape and were executed by order of a German Court Martial on the day of Germany's surrender (10 May 1945). The Court held the executions were crimes against humanity because of the disparity between the offences and the punishment, even if the action could not actually support the Nazi tyranny. The reference to 'civilian population' in Article II (1)(c) was only 'illustrative'
of the crimes under consideration and did not preclude action between soldiers being a crime against humanity.\footnote{Ibid. Similarly, convictions for crimes against humanity were upheld by the Supreme Court for the British zone in $H$, which involved the Court Martial of two German naval officers, and in $R$, which involved the denunciation of a member of the SA for remarks made by him: see $H$, Decision of the Supreme Court for the British zone (18 October 1949), Entscheidungen, vol II, 231; and $R$, Decision of the Supreme Court for the British zone (27 July 1948) Entscheidungen, vol I, 45, both quoted in A. Cassese, above n 45, 86-87.}

Such an interpretation is to be contrasted with decisions of British and US tribunals. In \textit{Neddermeier}, a British Court acting under CCL 10 held the mistreatment of Polish soldiers whilst prisoners of war were only war crimes not crimes against humanity.\footnote{\textit{Neddermeier}, Judgment of 10 March 1949, in German-British Zone of Control, Control Commission Courts, Court of Appeal Reports, Criminal Cases, 1949, no 1, 58-60, quoted in A. Cassese, above n 45, 88.} In the \textit{Medical Case}, two defendants, accused of performing medical experiments on persons (including prisoners of war) which sometimes lead to their death, advanced a defence of State sanctioned euthanasia towards the chronically ill and the condemned.\footnote{The \textit{Medical Case}, above n 38, 174-178, 183 and 197-198 (regarding the defendant Brandt) and 224-226 (regarding the defendant Gerhardt).} Assuming a State \textit{could} act towards its citizens in such a way, the US Tribunal under CCL 10 said 'the Family of Nations is not obligated to give recognition to such legislation when it manifestly gives legality to plain murder and torture of defenceless and powerless human beings of \textit{other nations}' (emphasis added).\footnote{Ibid, 198 (regarding Brandt) and 227 (regarding Gerhardt). The same view was expressed in the \textit{RusHA Case}, above n 41, 654-655.}

\section{2.5 Conclusion}

\subsection{2.5.1 The War Nexus}

When the case is made for the 'withering away' of the war nexus in the definition of crimes against humanity after Nuremberg, CCL 10 is usually the first cited source.\footnote{See, for example, A. Cassese, above n 53, 73; \textit{Prosecutor v Tadić (Defence Motion for Interlocutory Appeal on Jurisdiction)}, Case No IT-94-1-AR72 (2 October 1995) [140] ('Tadić – Jurisdiction'); and Report of the International Law Commission on the work of its forty-eighth session, 6 May – 26 July 1996, UN GAOR, 51\textsuperscript{th} sess, Supp. 10, UN Doc A/51/10 (1996) (hereinafter 1996 ILC Report).} However, there are difficulties in relying upon CCL 10 in this way. The law was an occupational ordinance and it is not clear that the Allies were intending to codify an international offence when they defined crimes against humanity differently from that in Article 6(c) of the London Charter. Further, the jurisprudence under CCL 10, particularly in the US zone, is mixed. Two cases (\textit{Flick} and the \textit{Ministries Case}) held the London Charter impliedly governed CCL 10 and two (\textit{Justice} and the \textit{Einsatzgruppen Case}) said it did not. Bassiouni says the approach in \textit{Flick} is more authoritative as it follows the Nuremberg Judgment and is, in his view, more consistent with the principles of legality.\footnote{M. C. Bassiouni, above n 10, 30 n 66 and 155.} Van Schaack says the holding in \textit{Justice} and \textit{Einsatzgruppen} was 'arguably mere obiter dicta' because only acts during the war were considered.\footnote{B. Van Schaack, above n 3, 809-810.} The German Courts did not imply a need for a war nexus, however, the Supreme Court took the view that CCL 10
was new law, not the codification of existing international law, which could be applied retrospectively in order to meet the demands of 'justice'.

### 2.5.2 The Definition of Crimes against Humanity

A number of different interpretations of crimes against humanity were put forward by the tribunals acting under CCL 10. The *Justice Case* required the persecution of civilian populations by State authorities carried out on a vast scale. Other US cases simply referred to general principles of criminal law, which did not necessarily imply a requirement of scale. In *Einstasgruppen*, it was State 'indifference, impotency or complicity' which led to a crime against humanity. By the jurisprudence in the British zone, there had to be a State policy of 'violence and tyranny', which was not a particularly clear standard of criminal law. Cassese draws upon the cases in the British zone, particularly the *Weller Case*, to conclude that a crime against humanity can occur when there is merely State toleration or acquiescence in the violence of the defendant.

In the absence of other sources, there is a temptation to draw principles of wider application from CCL 10 and its jurisprudence. One has to be cautious about taking this approach too far. In reality CCL 10 represented the exercise of a special municipal criminal jurisdiction for a country in transition from tyranny to democracy, rather than the exercise of a true international jurisdiction. Viewed in that light, CCL 10 supports the argument made in chapter 2, section 6.4 that part of the Nuremberg Precedent is that a new government may punish retroactively conduct of the type prosecuted at Nuremberg because such conduct is 'criminal according to the general principles of law recognised by the community of nations'.

### 3. INTERNATIONAL SOURCES

#### 3.1 The Convention on the Non-Applicability of Statutory Limitations

Precipitated by concern that offences of the Nazi era were about to be barred by laws of statutory limitation in Germany and other States, the General Assembly on 26 November 1968 adopted The Convention on the Non-Applicability of Statutory

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66 *Bl*, Decision of the Supreme Court for the British zone (4 May 1948), *Entscheidungen*, vol I, 1-6: '[r]etroactive punishment is unjust when the action, at the time of its commission falls foul not only of a positive criminal law, but also of the moral law. This is not the case for crimes against humanity. . . . The subsequent cure of such dereliction of a duty through retroactive punishment is in keeping with justice': 5 quoted in A. Cassese, above n 45, 72 n15.

67 See section 1.2(d) above.

68 A. Cassese, above n 53, chapter 4 and in particular, 83-84.


Limitations to War Crimes and Crimes Against Humanity. Article I stated that no statutory limitation shall apply to:
(b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3(I) of 13 February 1946 and 95(I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of 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.

Many western countries (United States, Belgium, Italy, Greece, the United Kingdom, France and New Zealand) complained in its drafting that the Convention ought not attempt to redefine crimes against humanity or go beyond the London Charter. Complaints were made in particular about the lack of specificity and the political nature of the new crimes: ‘eviction by armed attack or occupation’ and ‘inhuman acts resulting from the policy of apartheid’. Other States were of the view that the opportunity should be taken to update the definition to take account of modern circumstances given that the original definition was drafted only by the four Allied nations and the composition of the UN had changed since that time. The vote was split along ideological lines and the Convention was adopted by less than half of the members of the United Nations and has not been well supported since. The 1974 European Convention on the Non-

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73 Greece proposed limiting crimes against humanity to the definition in the London Charter (UN GAOR 3rd Comm., 23rd Sess., 1563th mtg, 3, (1968) (Mr Statathos)); Britain argued that Article I should be limited to ‘crimes against humanity as defined in international law’ (UN GAOR 3rd Comm., 23rd Sess., 1564th mtg., 1 (1968) (Lady Gaitskell)); Italy believed a thorough study should be done before constructing a definition of crimes against humanity (UN GAOR 3rd Comm., 23rd Sess., 1564th mtg., 4 (1968) (Mr Paolini)); The United States argued that the formulation of a definition was best performed by eminent jurists which should not be undertaken by the Third Committee (UN GAOR 3rd Comm., 23rd Sess., 1564th mtg., 2 (1970) (Mrs Pickcr)); Norway argued the Convention should be limited to grave offences and any extension to ‘new types of crimes against humanity . . . would weaken the force of the instrument’ (UN GAOR 6th Comm., 23rd Sess., 1564th mtg., (1970) (Mr Amlie)); see R.H. Miller, above n 71, 485, M. Lippman above n 3, 233-234.

74 This was proposed by Arab states with Israel’s occupation in mind. France and Madagascar opposed the vagueness of the crime, and also said that not all expropriations could be regarded as a crime against humanity: R.H. Miller, above n 71, 490; M. Lippman above n 3, 233-236.

75 This was inserted at the insistence of African-Asian states with South Africa and colonial domination in mind. It was opposed by France, New Zealand, Norway, United Kingdom and Chile both because of the political nature of the crime and its lack of specificity: ibid, 491-492; M. Lippman above n 3, 233-234.

76 Syria, Iraq, Morocco, the USSR, Guinea, Mauritania, Kenya and Cyprus: R.H. Miller, above n 71, 485 and 487; M. Lippman above n 3, 233-234.

77 Of the 126 Member States, 58 voted in favour, 7 against with 36 abstentions: R.H. Miller, above n 71, 477.

78 There are 49 States Parties as at 7 October 2005: see Office of the United Nations High Commissioner for Human Rights, Convention on the Non-Applicability of Statutory Limitations
Applicability of Statutory Limitations only added the crime of genocide to the definition of crimes against humanity in the London Charter. According to some this Convention evidences recognition by States that crimes against humanity can occur outside the context of armed conflict because there was no opposition in the drafting to the words ‘whether committed in time of war or in time of peace’ as such. This wording, in fact, may not advance the argument because those words still apply to the crimes ‘as they are defined in’ the London Charter. The words may simply convert the statement in Article 6(c) of the London Charter (‘before or during the war’) to one capable of application beyond the Second World War. For example the International Law Commission’s Nuremberg Principles also stated that crimes against humanity are not limited to times of war because ‘such crimes may take place also before a war in connexion with crimes against peace.’ In any event, this argument ignores the opposition at the time to any departure from the London Charter or to the introduction of ‘new crimes’ (at least in a Convention that was dealing principally with the issue of statutory limitations) which was expressed by some delegations in strong terms. Mr Paolini of France said 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’ and the document was no longer of ‘interest to his delegation.’ The argument also ignores the poor support the Convention received in the General Assembly and has since. In the result, the 1968 Convention does not greatly advance the debate as to the definition of crimes against humanity in international law or the status of the war nexus, other than to highlight that its definition remained controversial.

3.2 Other Conventions

The 1948 Convention on the Prevention and Punishment of Genocide confirmed genocide as ‘a crime under international law’ applicable during times of war or peace. Genocide is defined to cover acts performed ‘with intent to destroy, in whole or part, a national, ethnic, racial or religious group’. The 1973 International Convention on the Suppression and Punishment of Apartheid, declared apartheid a ‘crime against

to War Crimes and Crimes against Humanity (1968)


81 Principles of the Nuremberg Tribunal 1950, UN GAOR, 5th sess, Supp 12, [123], UN Doc A/1316 (1950) (hereinafter Principles of the Nuremberg Tribunal). See also section 3.3.1 below.

82 UN GAOR 3rd Comm., 23rd Sess., 1569th mtg., 2 (1968): M. Lippman above n 3, 236. France in 1964 had introduced into domestic law the imprescriptibility of crimes against humanity based solely upon the London Charter: see section 4.4 below.


84 Art 1.

85 Ibid, art 2.
humanity'. Apartheid was defined in Article 2 as 'inhuman acts [as defined] committed for the purpose of establishing and maintaining domination by one racial group of persons over other racial groups of persons and systematically oppressing them'. Article 3 defined individual criminal responsibility in very broad terms, encompassing members of organisations who 'co-operate' in acts of apartheid. Some Western countries complained about the political nature of the Convention and the indeterminacy of the crimes. Few Western countries have ratified the Convention and Cassese says it has not reached customary law status.

Some have said that these conventions have progressed the definition of crimes against humanity under customary international law including the need for the war nexus. It is difficult to place much weight on these Conventions, given the discreet topics covered. Both genocide and apartheid fall into their own categories and their elements (including the absence of a nexus to aggression or war) cannot be applied to all crimes against humanity.

3.3 International Law Commission

3.3.1 The Nuremberg Principles

The General Assembly in 1947 asked the ILC 'to formulate the principles of international law recognised in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal'. In 1950 it issued its Nuremberg Principles. It expressly declined to comment on whether those principles were existing principles or not. Its formulation of crimes against humanity (Principle VI(c)) largely follows Article 6(c). The Sixth Committee of the UN endorsed the Nuremberg Principles, though some delegates voiced concern at the continuation of the war nexus. The General Assembly

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89 A. Cassese, above n 45, 25.
90 Ibid, 73; see also 1996 ILC Report, above n 63, and Tadić - Jurisdiction, above n 63, [140].
91 By Establishment of an International Law Commission, GA Res 174(II), 2nd sess, 123rd plen mtg, 105, UN Doc A/RES/174(II) (1947), the General Assembly created the ILC with 34 elected members to promote the progressive development of international law and its codification.
92 Formulation of the Principles Recognised in the Charter of the Nürnberge Tribunal and in the Judgment of the Tribunal, GA Res 177(II), UN GAOR, 2nd sess, 123rd plen mtg, 111-112, UN Doc A/519 (1947).
93 Principles of the Nuremberg Tribunal, above n 81.
94 Ibid, [96]
95 Ibid, [120]-[124].
97 Ibid.
invited governments to comment on them and instructed the ILC to prepare a draft code of offences against the peace and security of mankind.\textsuperscript{98}

\subsection*{3.3.2 Draft Code of Offences}

(i) \textit{The 1951 Draft}

The ILC took the view that the Nuremberg Principles did not bind it.\textsuperscript{99} According to the Rapporteur, Mr. J Spiropoulos, crimes against humanity should largely follow the London Charter’s definition, though in his second draft, crimes against humanity were tied to genocide not just war crimes or crimes against peace and the word ‘mass’ was added to ‘murder’.\textsuperscript{100} In the 1951 proceedings, some delegates wanted the word ‘mass’\textsuperscript{101} and the nexus to other offences in the Draft code (said to be a jurisdictional requirement of Nuremberg)\textsuperscript{102} removed, whilst the majority thought these conditions necessary to exclude isolated domestic crimes.\textsuperscript{103} Article 1, paragraph 10 of the 1951 Draft defines crimes against humanity as follows:

Inhuman acts 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 persecution on political, racial, religious or cultural grounds when such acts are committed in execution of or in connexion with the offences defined in Nos. 1, 2, 3 and 10.\textsuperscript{104}

(ii) \textit{The 1954 Draft}

In the 1954 proceedings, over the objection of many delegates, the word ‘mass’ and the nexus to other offences were deleted by a majority of just one vote.\textsuperscript{105} Article 2(11) of the 1954 Draft defines crimes against humanity as follows:

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.\textsuperscript{106}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{98} Formulation of the Nürnberg Principles, GA Res 488, 5\textsuperscript{th} sess, 320\textsuperscript{th} plen mtg, UN Doc A/1775 (1950).
\item \textsuperscript{99} See [1951] 2 Year Book of the International Law Commission 253, 260.
\item \textsuperscript{100} International Law Commission, Draft Code of Offences against the Peace and Security of Mankind, UN GAOR, 6\textsuperscript{th} sess, UN Doc A/CN 4/44 (1951), reprinted in [1951] 2 Year Book of the International Law Commission 43, [120], 57 and 59 (hereinafter 1951 Draft Code of Offences).
\item \textsuperscript{101} See ‘Summary Records of the 3\textsuperscript{rd} Session, 91\textsuperscript{th} meeting’, [1951] 1 Year Book of the International Law Commission 69, 69-75.
\item \textsuperscript{102} Ibid, 75.
\item \textsuperscript{103} Ibid, 69-70 and 74.
\item \textsuperscript{104} 1951 ILC Draft Code, above n 100. Article I also covered genocide, aggression, state terrorism and war crimes.
\item \textsuperscript{105} See ‘Summary Records of the 3\textsuperscript{rd} Session, 267\textsuperscript{th} meeting’, [1954] 1 Year Book of the International Law Commission 131, 132-133. Mr Scelle of France invoked the precedent of humanitarian intervention, 132 [48].
\item \textsuperscript{106} International Law Commission, Draft Code of Offences Against the Peace and Security of Mankind, UN GAOR, 9\textsuperscript{th} sess, Supp 9, 11, UN Doc. A/2693 (1954) (hereinafter 1954 ILC Draft Code). See also D.H.N. Johnson, ‘The Draft Code of Offences against the Peace and Security of
\end{itemize}
\end{footnotesize}
Some say this draft is evidence of the severing of the connection between war and crimes against humanity. Such a view ignores that some members assumed the task of the ILC was progressively to develop the law, not codify existing crimes. It also ignores the opposition to the draft which proved too difficult for the international community at the time. The Sixth Committee of the UN held that it was premature to consider the Draft Code and the General Assembly on 4 December 1954 postponed consideration of the Draft Code until the definition of aggression had been resolved.

(iii) The 1991 Draft

Nothing further happened for 27 years after which the General Assembly in 1981 called upon the ILC to resume work on the Draft Code. Mr Doudou Thiam was appointed Special Rapporteur. In his report of 1984 he said international crimes cover ‘all offences which seriously disturb international public order’. In 1986, he said ‘today’ crimes against humanity can be committed not only within the context of an armed conflict. He doubted that there was a need for a mass element or State involvement. Rather, drawing upon the work of Meyrowitz and the jurisprudence of the German courts under CCL 10, he submitted that the crime’s defining feature was an attack upon ‘human dignity’ or the ‘human person’. He also said that what ‘unanimously’ was accepted as a feature of crimes against humanity was ‘the intention to harm a person or group of persons because of their race, nationality, religion or political opinion’. By the 1986 proceedings a clear consensus had emerged on the war nexus. All delegates who spoke on the issue agreed the nexus was no longer required.


109 Report of the Sixth Committee, UN GAOR, 9th sess, Annexes 1 and 8, UN Doc A/2807 (1954).
111 See M.C. Bassioni, above n 10, 185; and B. Ferenez, above n 34, 39.
115 Ibid, 58 [23]-[24].
116 Fourth Report, above n 114, 56-58 and in particular at 56 [12]-[13], 57 [20]-[22]. See Meyrowitz, above n 43, 60 and section 2.3, above.
117 Ibid, 58 [25].
In 1991 the ILC issued its Draft Code. Articles 15 to 26 covered a number of novel and difficult offences such as colonial domination (Article 18) and willful and severe damage to the environment (Article 26). Article 21 was called ‘Systematic or Mass Violation of Human Rights’:

An individual who commits or orders the commission of any of the following violations of human rights: a) murder; b) torture; c) establishing or maintaining a person in the status of slavery, servitude or forced labor; d) persecutions on social, political, racial, or cultural grounds in a systematic manner or on a mass scale; or the deportation or forcible transfer of a population shall, on conviction thereof, be sentenced...  

Whilst the debate was often couched in terms of codifying existing law, the actual draft offences suggest the ILC was not being particularly rigorous in this regard. Many commentators were critical of the Draft, particularly on the ground of lack of specificity of many of the proposed offences. Nevertheless, the consensus on the issue of the war nexus from at least 1986 is of some significance.

(iv) The 1996 Draft

The ILC, aided by a drafting committee of experts which included Professor James Crawford, submitted in 1994 its Draft Statute for an International Criminal Court with jurisdiction over crimes against humanity defined at Article 20(d). The crimes were not defined because of ‘unresolved issues about the definition’ which the Statute could not address. The ILC produced its last Draft Code in 1996. Clearly influenced by the ICTY and ICTR Statutes (discussed in chapter 4), the enumerated crimes were reduced and included ‘crimes against humanity’ in Article 18 as follows:

... any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organisation or group: a) murder; b) extermination; c) torture; d) enslavement; e) persecution; f) institutionalized discrimination; g) arbitrary deportation or forcible transfer of a population; h) arbitrary imprisonment; i) forced disappearance of persons; j) rape, enforced prostitution and other forms of sexual abuse; k) other inhumane acts...

The ILC in its Report justified the omission of any war nexus by reference to events since Nuremberg (CCL 10, the Genocide Convention, the Statutes for the ICTY and the

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120 Ibid, 21.
121 See, for example: D. Thiam, above n 113, 90 (‘the purpose [of the report] is to formulate a list of offences today considered as offences’); and ‘Summary Records of the 1820th meeting’, [1984] 1 Year Book of the International Law Commission 28, 29 (especially the statement of Mr Sinclair who said the crimes had to be recognised by the international community as offences).
122 M.C. Bassiouni, above n 10, 187-191.
124 1994 ILC Report, above n 123, 75 and 77.
125 1996 ILC Report, above n 63.
126 Ibid, 93-94.
ICTR and the case law of the ICTY). It noted that the requirement that the acts be committed in a 'systematic manner or on a large scale' was not included in the London Charter. According to the Report's commentary, 'systematic' means 'pursuant to a preconceived plan or policy' and 'large scale' means acts 'directed against a multiplicity of victims' so 'an isolated inhumane act 'directed against a single victim is excluded'. In addition, the definition required the acts to be 'instigated or directed by a Government or by any organisation or group'. The Report failed to explain what 'organisation or group' means, merely saying that it 'may or may not be affiliated with a Government'. The Draft itself was overtaken by the creation of the ICC discussed in chapter 5.

3.4 Conclusion

Like the case-law under CCL 10, discussed in section two, there is a temptation to place reliance upon the work of the ILC as evidencing the development of crimes against humanity under customary law. Upon analysis, it is in fact easy to be cynical about the efforts of the ILC in drafting a definition of crimes against humanity. Not regarding itself as bound by either the London Charter, which had been endorsed by the General Assembly, or by its own Nuremberg Principles, which had been endorsed by the Sixth Committee, the ILC oscillated and vacillated between definitions which have varied markedly on the key aspects, such as the need for a discriminatory motive, a mass element or State policy. Whilst the abandonment of the war nexus no longer proved controversial by at least 1986, it is difficult to regard the work of the ILC as codifying the true meaning of 'crimes against humanity' in international law. It is not at all clear that the ILC always saw this as its role so far as crimes against humanity was concerned. The conclusion must be that the drafts of the ILC, including that of 1996, did not resolve the problem of the definition of crimes against humanity under customary law, certainly not in the absence of any consideration of State practice.

4. STATE PRACTICE

4.1 Introduction

Between 1945 and 1993, the concept of crimes against humanity was rarely incorporated into the domestic law of States. This is hardly surprising. If a State wished to prosecute a defendant for, say, murder, it did not need to turn to this international crime; nor was there any international treaty requiring the suppression of such offences. Exceptions arose in the cases of Australia, Canada, France, Israel and the Netherlands, which are analysed in this section.

4.2 Australia

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127 Ibid, 96, [6].
128 Ibid, 94, [3]-[4].
129 Ibid, 94, [3].
130 Ibid, 95, [4].
131 Ibid, 95, [5].
132 This is the view of B. Van Schaack, above n 3, 826; and M.C. Bassiouni, above n 10, 192-193; contra P. Hwang above n 3, 487-488
The War Crimes Amendment Act 1989 (Commonwealth) made punishable 'war crimes' committed in Europe between 1 September 1939 and 8 May 1945.\textsuperscript{133} This included certain serious crimes\textsuperscript{134} if committed 'in the course of political, racial or religious persecution' or 'with the intent to destroy in whole or in part a national, ethnic, racial or religious group' and if committed in a territory involved in or occupied during the Second World War.\textsuperscript{135} Accordingly, it only incorporates the persecution-type crimes of Article 6(c) of the London Charter and only when committed during the war.

In the High Court decision of \textit{Polyukovich v The Commonwealth},\textsuperscript{136} Toohey J, in the majority, said the London Charter and CCL 10 codified crimes against humanity in international law\textsuperscript{137} but the former represented the better codification of international law (which required a war nexus) because it was the exercise of an international jurisdiction over Nazi war criminals.\textsuperscript{138} Citing the \textit{Justice Case}, Toohey J said the reference to civilian population in Article 6(c) of the London Charter meant isolated acts unconnected with a larger design to persecute or exterminate a population, did not come within the definition.\textsuperscript{139} Brennan and Deane JJ, in dissent, would have struck down the statute as impermissible retroactive criminal law. Brennan J thought crimes against humanity had an uncertain status at the time of the Second World War.\textsuperscript{140} Deane J said crimes against humanity referred 'to heinous conduct in the course of a persecution of civilian groups'.\textsuperscript{141} Dawson J did not consider whether or not crimes against humanity were existing offences because, in his view, 'the wrongful nature of the conduct' could not 'have been described as innocent or blameless conduct merely because of the absence of proscription by law'.\textsuperscript{142}

Hence, the three main schools of thought as to the customary law status of Article 6(c) of the London Charter, discussed in chapter 2, are reflected in these judgments.\textsuperscript{143} The view of Toohey J that the London Charter, with its war nexus, codified, or intended to codify, international law is particularly unpersuasive and is not born out by the history of its drafting.\textsuperscript{144}

### 4.3 Canada

The Criminal Code in 1987 granted extraterritorial jurisdiction over crimes against humanity, if also a crime under domestic law, defined as follows:

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\textsuperscript{133} See \textit{War Crimes Amendment Act 1989 (Cth)} sections 5, 6 and 7.

\textsuperscript{134} Such as murder: see \textit{War Crimes Amendment Act 1989 (Cth)} s 6(1).

\textsuperscript{135} \textit{War Crimes Amendment Act 1989 (Cth)} s 7(3). Section 17(2) provided for a defence if the laws of war permitted the act provided the act was not 'under international law a crime against humanity' which was not defined.

\textsuperscript{136} (1991) 172 CLR 501.

\textsuperscript{137} Ibid, 675-676. Toohey J relies upon diplomatic instances and legal commentary in the nineteenth century, the report to the Peace Conference of 1919, the Martens clause in the Hague Convention and the municipal penal law of states.

\textsuperscript{138} Ibid, 676.

\textsuperscript{139} Ibid, 669.

\textsuperscript{140} Ibid, 587-588.

\textsuperscript{141} Ibid, 596.

\textsuperscript{142} Ibid, 643. This conclusion was in respect of the law's validity under the Australian Constitution rather than under international law.

\textsuperscript{143} See Chapter 2, section 6.2.

\textsuperscript{144} See Chapter 2, section 2.
... 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 recognised by the community of nations.\(^{145}\)

The Supreme Court in *Regina v Finta* considered this definition.\(^{146}\) *Finta* was charged with unlawful confinement, robbery, kidnapping and manslaughter in respect of his involvement in deporting Jews to concentration camps in Auschwitz and Stranshof. At trial, Professor Bassioumi led a team of experts who gave evidence as to the criminal law of 39 as a selection of the 74 nations existing at the time. This was relied upon by the prosecution to demonstrate that the acts were ‘criminal according to the general principles of law recognised by the community of nations’.\(^{147}\)

According to Cory J (for the majority) crimes against humanity are ‘inhumane acts’ ‘based on discrimination against or the persecution of an identifiable group of people’;\(^{148}\) pursuant to state policy.\(^{149}\) There must be an added element of ‘inhumanity’, ‘cruelty and barbarism’ which requires a more severe punishment than an ordinary robbery or manslaughter.\(^{150}\) The required mental element, the majority said, ‘is that the accused was aware of or wilfully blind to the facts or circumstances which would bring his or her acts within the definition of a crime against humanity’.\(^{151}\) Whilst this includes knowledge of the ‘inhumanity’, ‘cruelty and barbarism’ that was involved, the accused need not believe his or her actions were inhumane.\(^{152}\) Cory J followed the view of Kelsen that any retrospective application of the law was just and permissible.\(^{153}\)

In dissent, La Forest J (joined by L’Heureux-Dubé and McLachlin JJ) agreed that state sponsored or sanctioned persecution against a particular group or population is a prerequisite of crimes against humanity, but said this related to the conditions needed to ground universal jurisdiction and it was misleading to suggest a higher degree of individual culpability is needed.\(^{154}\) The prosecution only had to establish the requisite mens rea for the ordinary crimes with which the defendant was charged.\(^{155}\) Relying principally upon ‘the common domestic prohibitions of civilised nations’ (citing Schwarzenberger in support), La Forest J concluded that no retroactive punishment for crimes against humanity was involved.\(^{156}\)

The decision was heavily criticised by academics and the government for adding elements to the crime beyond international law requirements, particularly so far as the defendant’s knowledge is concerned.\(^{157}\) This was given as the reason for the defendant’s

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147 M.C. Bassioumi, above n 10, 300 n62.
149 Ibid, 822-823.
150 Ibid, 818, 820.
151 Ibid, 820. This would include knowledge of the policy of persecution: ibid, 822-823.
152 Ibid.
154 Ibid, 754-755.
155 Ibid, 756 and 763-765.
156 Ibid, 764, 783-784.
157 See J.H. Bello and I. Cotler, above n 146; and R. Cryer, above n 11, 121.
acquittal, despite strong evidence, and the government’s decision to abandon further prosecutions.  

4.4 France

In 1964, France passed a law which stated that crimes against humanity, as defined in the London Charter, are imprescriptible by their nature. The Court of Cassation in its first ruling on jurisdiction in *Touvier* in 1975 followed the approach of Herzog and held ‘crimes against humanity...are ordinary crimes (crimes de droit commun) committed under certain circumstances and for certain motives specified in the text that defines them’, without further elaboration. 

Meanwhile Barbie, a German member of the Gestapo in Lyon, was prosecuted in 1982 for crimes against humanity (murder, torture and deportations). The Court of Cassation ruled the law was not retroactive even if the period of prescription had already expired before introduction of the 1964 law. The Court also ruled that:

The following acts constitute crimes against humanity... 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. 

In *Touvier*, where the defendant was a Frenchman working for the Vichy Government, the Court of Cassation in 1992 agreed with the lower court’s ruling that the Vichy government could not ‘be categorised as a State practising a policy of ideological supremacy’. Based on the London Charter, it said the defendant must be acting ‘in the interests of the European Axis countries’. It ruled that the evidence left open the conclusion that Touvier had acted at the instigation of the Gestapo. Touvier was then convicted on the basis that he acted in furtherance of Nazi policy. In the *Boudarel* case, the Court of Cassation in 1993 confirmed that crimes against humanity are limited to

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158 Ibid.
163 See *Barbie*, above n 162, 132.
164 Ibid, 137. This would therefore cover ‘combatants’, such as members of the Resistance: ibid, 140.
165 *Touvier* 100 ILR 358 (Court of Cassation).
166 Ibid, 363.
167 Ibid.
168 L. Sadat-Wexler, above n 159, 363.
World War Two crimes committed by or on behalf of the Axis powers and could not apply to the alleged atrocities of a French serviceman in Vietnam in 1952-4.\(^{169}\)

Sadat-Wexler\(^{170}\) and Cryer criticise the French jurisprudence for adding vague notions such as ‘policy of ideological supremacy’ which are ‘entirely extraneous to any international definition’.\(^{171}\) This of course begs the question as to what is the ‘international definition’. In 1992 with effect from 1994, crimes against humanity was incorporated into the penal law. It did not require a policy of ideological supremacy but it did require ‘massive and systematic’ action on discriminatory grounds as part of a common plan against a civilian population.\(^{172}\)

4.5 Israel

By article 1(a)(2) of the Nazi and Nazi Collaborators (Punishment) Law 1950, crimes against humanity are punishable in Israel if committed ‘in enemy territory’ during ‘the Nazi regime’.\(^{173}\) Crimes against humanity are defined as:

Murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population, and persecution on national, racial, religious or political grounds.\(^{174}\)

Whilst there are some other cases of interest,\(^{175}\) undoubtedly, the most influential Israeli case is that of Eichmann.\(^{176}\) The Supreme Court said crimes against humanity


\(^{170}\) L. Sadat-Wexler, above n 159, 273, 353 and 366.

\(^{171}\) R. Cryer, above n 11, 122.

\(^{172}\) French Criminal Code, art 212-1, [1], see also Chapter 6, section 3.6.

\(^{173}\) For comments on the Act and prosecutions under it see: Orna Ben-Naftali and Yoge.

\(^{174}\) See also Chapter 6, section 3.6.

\(^{175}\) See also Chapter 6, section 3.6.

\(^{176}\) Attorney-General of the State of Israel v Yehezkel Ben Alish Enigster, Tel Aviv District Court, 4 January 1952, 18 ILR 540 (1951) (‘Enigster’) involved the persecution of Jewish concentration inmates by another Jewish inmate. The Court said inhumane 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’: 541. The Court said no discriminatory intent is required for crimes other than persecution and a prisoner in a concentration camp could commit a crime against humanity against another prisoner because ‘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’: 542. In Pal v The Attorney General, 18 ILR 542 (1952), the Israeli Supreme Court said 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. In Honigman, the Israeli Supreme Court said that, as the death penalty was mandatory under the Act for crimes against humanity, the acts must not only be of the most severe kind, but also must be part of systematic, planned and organised actions of wider scope: see Orna Ben-Naftali and Yoge.

\(^{177}\) Attorney-General v Adolph Eichmann, District Court of Jerusalem, Criminal Case No. 40/61; see also Attorney-General of Government of Israel v Eichmann, 36 ILR 277 (Sup. Ct., Israel, 1962) (‘Eichmann’). For a comment on the case see J.E.S. Fawsett, ‘The Eichmann Case’ (1962) 27 British Yearbook of International Law 181.
'have always been forbidden by customary international law' and are those that 'damage vital international interests' and 'violate the universal moral values' implicit in the penal codes of civilized States. The Court said, citing humanitarian interventions and concerns of the international community in the nineteenth and twentieth century as referred to in the Justice case, that the crimes of the Nazis 'undermine the foundations of the international community as a whole and impair its very stability' and were 'so embracing and widespread as to shake the international community to its very foundations'.

Hence, the humanitarian interventions of the past were seen as the progenitor of the concept of crimes against humanity in international law.

4.6 The Netherlands

In the Netherlands, municipal law was amended to make punishable war crimes and crimes against humanity as defined in the London Charter. In Ahlbrecht (No 2), the Special Court of Cassation followed the UNWCC and said 'crimes against humanity' are characterised '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'. It held the isolated shooting of a prisoner and the mistreatment of several others were war crimes but were not crimes against humanity. The Special Court of Cassation in Pilz held that a German doctor's refusal to provide treatment to a German soldier (of Dutch nationality) who had been shot while attempting to escape did not constitute a crime against humanity because the victim 'no longer belonged to the civilian population of occupied territory, and the acts committed against him could not be considered as forming part of a system of "persecution on political, racial or religious grounds".'

The Special Court of Cassation in 1950 in Quispel ruled that persuading Dutch youths in Germany to join the Wehrmacht was not a crime against humanity because such crimes were to be limited to acts committed against the will of the victims and by violence. The Supreme Court (Hoge Road) in 1981 in Public Prosecutor v Menten said crimes against humanity require 'that the crimes in question form a part of a system based on terror or constitute a link in a consciously pursued policy directed against particular groups of people'.

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177 Eichmann, above n 176, 297.
178 Ibid, 291.
179 Ibid, 296, see the Justice case above n 6.
180 Ibid.
181 Ibid, 304.
182 See R. Baxter, 'The Municipal and International Law Basis of Jurisdiction over War Crimes', (1951) 28 British Year Book of International Law 582, 384; and E. Schweb, above n 10, 224 for a translation of the law.
183 Special Court of Cassation, 11 April 1949, (1955) 16 ILR 396.
184 See Chapter 2, section 5.3.
185 Ahlbrecht (No 2), above n 183, 397-398.
186 Ibid.
187 Pilz (Holland, District Ct of the Hague, Special Criminal Chamber) (1950) 17 ILR 391.
188 Ibid, 392.
190 Public Prosecutor v Menten (1987) 75 ILR 331, 362-363.
4.7 Conclusion

The exceptional nature of taking jurisdiction over crimes against humanity is confirmed by the fairly limited examples of domestic prosecutions in the period. In the cases of Australia, Canada and Israel, it was introduced into domestic law in order to permit the extraterritorial prosecution of Nazi war criminals. In the Netherlands, crimes against humanity was introduced into local law because of a decision of its courts that the jurisdiction to charge the German military for war time acts could not simply be based upon breaches of domestic penal law unless the individuals also violated the laws of war.\textsuperscript{191} In France, the offence was introduced in order to avoid wartime atrocities being statute barred by domestic law.

By and large, the war nexus was retained in the limited number of State prosecutions of the period. The legislation in Australia and Israel limited prosecutions of 'crimes against humanity' to Nazi wartime atrocities. This also was the case in France and the Netherlands by reason of the adoption of the London Charter into domestic law. Only France's latter law of 1992 (which entered force in 1994) unequivocally granted its courts jurisdiction over crimes against humanity outside the context of the Second World War. Canada's law did not require a war nexus, but it did require that 'crimes against humanity', as defined, be existing crimes under international law or at least be 'criminal according to the general principles of law recognised by the community of nations'. Whether this could have encompassed crimes against humanity without a war nexus was not explicitly dealt with by the Canadian courts because its only trial for crimes against humanity was for conduct committed during the Second World War.

With the exception of \textit{Finta},\textsuperscript{192} all national prosecutions readily accepted that crimes against humanity were existing crimes at the time of the Second World War.\textsuperscript{193} The stated elements of the offence have, however, varied markedly in these prosecutions and is now further analysed.

5. ATTEMPTING TO RESOLVE THE INCOHERENCE

5.1 Introduction

It is hardly surprising that widely different definitions of crimes against humanity were put forward in the period 1945-1993. Significant issues of international law and practice are involved. The moral and legal tensions involved in the concept of crimes against humanity are best analysed by recognising that two distinct issues are involved. The first involves the elements of the crime itself, meaning the \textit{actus reus} and \textit{mens rea}. The second involves the question of the jurisdiction to try such crimes. Whilst the two questions ought to be kept separate,\textsuperscript{194} this has rarely occurred when the definition of crimes against humanity has been debated. It is generally accepted that some element is

\textsuperscript{191} See Albrecht (No 1) as referred to in R. Baxter, above n 187, 384.

\textsuperscript{192} Regina v Finta [1994] 1 SCR 701.

\textsuperscript{193} This also was the conclusion of the courts in the United States: see Matter of Extradition of Demjanjuk, 612 F. Supp. 571 (DC), aff'd 776 F.2d 571 (6th Cir. 1985), cert denied 475 US 1016 (1986), 567-568.

\textsuperscript{194} As Meron says, '[t]he question of what actions constitute crimes' ought be 'distinguished from the question of jurisdiction to try those crimes': Theodor Meron, 'International Criminalization of Internal Atrocities' (1995) 89 AJIL 554, 555.
required beyond that found in domestic crimes.195 What is unclear, however, is whether this additional element is part of the offence itself or a jurisdictional issue.

Crimes against humanity have never had the luxury of being merely a normative prescription, such as is the case with the prohibition against slavery. By the Nuremberg Precedent, crimes against humanity are necessarily associated with foreign intervention. From the moment Grotius asserted a right of foreign states to prosecute for crimes against the law of nations, objection has been made against the concept on the ground that it may lead to pretextual and unjustified interference in the affairs of other States196 – hence, the need for high thresholds to prevent this occurring. As one delegate said in the 1951 ILC proceedings, the war nexus was necessary to ensure the draft code was limited to threats to the peace rather than becoming some Utopian international penal code.197 At the risk of over simplifying matters, three broad principles can be seen to be at work.

5.2 Threats to International Peace

As discussed in chapter 2, the war nexus links crimes against humanity to threats to international peace. This contributed to its dwindling use after 1945 as the incidence of international armed conflict declined. There are two schools of thought as to the status of the war nexus by 1993. First, there is the view, popular amongst European scholars, that crimes against humanity was an existing international offence in 1945 and the war nexus in Article 6(c) of the London Charter was an ad hoc jurisdictional requirement not necessary as a matter of lex lata.198 The conclusion reached in chapter 2 was that, on balance, it was more persuasive to regard the offence as novel at that time and, more clearly, no rule of jurisdiction had been established to permit its extraterritorial enforcement by other States. Chapter 2 argued that the war nexus is best seen as a novel, ad hoc rule of jurisdiction for the Nuremberg Tribunal. Nevertheless, after 1946, one has to confront the fact that it was endorsed by unanimous resolution of the General Assembly199 and the Sixth Committee of the UN.200 If one accepts that Article 6(c) has come to represent at least a rule of the United Nations, if not general international law, this suggests that the war nexus at that time may have displaced any nascent competing principle in international law.

The second school of thought tends to accept the customary law status of the war nexus during the crime’s infancy,201 but holds that it was subsequently ‘abandoned’. This was the approach of the Appeals Chamber of the ICTY in Tadić and its much relied upon obiter remarks that ‘Although the nexus requirement in the Nuremberg Charter was carried over to the 1948 [sic] General Assembly resolution affirming the Nuremberg

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195 See, for example: M.C. Bassiouni, above n 10, chapter 6.
196 See Chapter 1, sections 3 and 4.
197 'Summary Records of the 3rd Session, 91st meeting', [1951] 1 Year Book of the International Law Commission, 71 and 76.
198 See Chapter 2, section 6.2.
199 See Affirmation of the Principles of International Law Recognized by the Charter Of The Nürnberg Tribunal, GA Res 95(I), UN GAOR, 1st sess, 2nd pt, 188, UN Doc A/64/Add.1 (1946).
200 See Report of the Sixth Committee, above n 96.
201 Bassiouni’s view is that a connection with war was necessary at the time: M.C. Bassiouni, above n 10, chapter 4; similarly McCormack says, rightly in the author’s view, that ‘one incontrovertible legacy’ of Nuremberg ‘is the requisite nexus with armed conflict as an element of any crime against humanity’: Timothy McCormack, ‘Crimes against Humanity’ in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), The Permanent International Criminal Court (2004) 179, 184.
principles, there is no logical or legal basis of the requirement and it has been abandoned in subsequent state practice’. 202 Lord Millett in Pinochet No 3203 had the same view, as did Judges Loucaides and Levits in the European Court of Human Rights who held that East Germany’s ‘shoot to kill’ policy at the Berlin border from the 1960’s amounted to a crime against humanity. 204 This school of thought includes Cassese, 205 Ratner and Abrams, 206 and the UN appointed Group of Experts for Cambodia. 207 Oppenheim’s 1992 edition said the war nexus was ‘somewhat artificial’ and the autonomy of crimes against humanity is ‘now generally regarded’. 208 In Kolk and Kislyiy v Estonia, 209 the European Court of Human Rights considered a conviction for crimes against humanity imposed by the courts of Estonia in 2003. The defendants were convicted for the act of deporting Estonian civilians in 1949 on the orders of the then Soviet authorities. It held, without greatly exposing its reasoning, that the retroactive application of Estonian law was permissible because such acts, under Article 7(2) of the European Convention on Human Rights, were ‘criminal according to the general principles of law recognised by civilised nations’.

The sources relied upon for this view have been discussed in this chapter and generally found to be wanting. It is easy to regard the war nexus as obsolete after Nuremberg if one is focussing on the elements of the crime. In chapter 2 it was argued that at Nuremberg, the actual elements of the offence(s) were seen as being synonymous with either war crimes or analogous domestic crimes, such as murder. If one focuses on the war nexus as a rule of jurisdiction designed to prevent an excessive interference in a sovereign State’s criminal law, it is less clear that States regarded the rule as obsolete. The position of the United States today, with its opposition to the ICC (shared by other countries), suggests it still refuses to recognise any rule of jurisdiction which permits an extraterritorial or international prosecution of US nationals without its consent. Further, there is the problem about the lack of consensus as to the alternative threshold or jurisdictional requirement. Whilst a consensus was reached on the crime of genocide in times of peace (without any rules of enforcement), no consensus emerged as to the meaning of crimes against humanity in times of peace. In the end, the war nexus may be

202 Tadić – Jurisdiction, above n 63, [140].

203 R v Bow Street Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No 3) [2000] 1 AC 146 (‘Pinochet No 3’) 272: ‘But this [the war nexus] appears to have been a jurisdictional restriction based on the language of the Charter. There is no reason to suppose that it was considered to be a substantive requirement of international law. The need to establish such a connection was natural in the immediate aftermath of the Second World War. As memory of the war receded, it was abandoned’ (see also Lord Brown-Wilkinson at 197, cf Lord Goff at 211). On the other hand, Lord Slyn said ‘Indeed, until Prosecutor v Tadić after years of discussion and perhaps even later there was a feeling that crimes against humanity were committed only in connection with armed conflict even if that did not have to be international armed conflict’: R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte, [2000] 1 AC 61, 81.


205 Cassese refers to most of the sources discussed in this chapter to conclude ‘[t]his evolution gradually led to the abandonment of the nexus between crimes against humanity and war’: A. Cassese, above n 45, 73.


207 See Experts’ Report (Cambodia), above n 80.


209 Kolk, above n 204. See Chapter 2, section 6 for a discussion of this case.
like a piece of bad legislation; a consensus may exist that it needs reform, but until it is repealed and replaced with something new, it simply remains the law.

5.3 The Humanity Principle

Frequently, the notion of 'crimes which shock the conscience of humanity' is seen as a threshold requirement of crimes against humanity. But what does 'shock the conscience of humanity'? First, there is the notion of conduct which is 'criminal according to the general principles of law recognised by the community of nations'. This was influential at the time of Nuremberg. It was also referred to in some cases under CCL 10, in the Canadian legislation and the remarks of La Forest J in Finta. Secondly, it has been said the crime must also constitute a sufficiently serious attack on the victim's 'humanity', which may limit the offence to acts of personal violence. In the Nuremberg Judgment, this requirement of 'seriousness' was satisfied if the conduct was analogous to war crimes and could encompass some forms of personal property offences, which was followed in some subsequent cases. Thirdly, given the breadth of both conceptions of crimes against humanity, some cases, such as Justice and Eichmann, ground the concept of crimes against humanity in the former doctrine of humanitarian intervention. This suggests crimes against humanity involve notions of scale, persecution of a group or population and a discriminatory intent. What was unresolved was whether all or some of these elements were necessary and whether they were elements of the offence or a rule of jurisdiction. Further, it needs to be recalled that the drafters of the London Charter in 1945 specifically rejected the doctrine of humanitarian intervention as a source for the concept of crimes against humanity. As discussed above, outside the prosecution of Nazi war criminals, the proposition that purely internal atrocities can give rise to an international criminal jurisdiction had little or no support in the State practice of the time.

5.4 The Impunity Principle

See Chapter 2.

See sections 2.2.3 and 2.2.4 above.

See section 4.3 above.

See The Flick Case, above n 7 ('affect the life and liberty of the oppressed people'); Harlan Veit, above n 53 ('harshly interferes with the life and existence of a person or his relationship with his social sphere, or interferes with his assets and values, thereby offending against his human dignity as well as humanity as such'); History of The United Nations War Commission (UNWCC), HMSO, London, (1948) 179, which referred to a requirement of 'savagery'; Meyrowitz, above n 43, 60 and in Regina v Finta [1994] 1 SCR 701, 818, 820 the Court said there must be an added element of 'inhumanity', 'cruelty and barbarism' which requires a more severe punishment than an ordinary robbery or manslaughter.

See Chapter 2, section 2.2.1.

See: The Justice Case, above n 6, discussed in section 1.2 (a); 1951 Draft Code of Offences, above n 100; History of The United Nations War Commission, above n213, 179; Polyukovich v The Commonwealth (1991) 172 CLR 501; the French practice discussed at section 4.3 above; and the practice of the Netherlands discussed at section 4.6 above.

See The Justice Case, above n 6; Regina v Finta [1994] 1 SCR 701, the practice of France, and the Netherlands discussed at sections 4.3 and 4.6 above.

Fourth Report of Mr D. Thiam, above n114; the Australian legislation and case law discussed at section 4.2 above; Regina v Finta [1994] 1 SCR 701, discussed at section 4.3 above; and French Criminal Code, art 212-1, [1].

See Chapter 2, section 2.
There has always been associated with the concept of crimes against humanity the proposition that the international offence arises because the perpetrator enjoys protection or impunity from the territorial state. This may be referred to as the ‘impunity principle’. At Nuremberg, this was reflected in the requirement of Article 6 of the London Charter that the defendants be persons who were acting in the interests of the Axis powers. After Nuremberg, as summarized above, the need for a State policy was referred to in the case law in Canada, France, and the Netherlands and under CCL 10. Most scholars writing at the time, such as Mendelsohn, Levasseur, Francillon, Pella, Herzog, Meyrowitz, and Aroneanu all regarded State policy as a requirement. This, however, can cover a range of circumstances, such as actual State participation pursuant to a clearly formulated State policy, non-State actors acting with the approval of the State, non-State actors acting without explicit approval but with some loose form of toleration or acquiescence and, finally, non-State actors who enjoy impunity simply because of State indifference or impotency which may arise after the crime in question. Apart from the 1991 ILC Draft Code and the somewhat cryptic reference to ‘organisation or group’ in the 1996 ILC Draft Code, all of the formulations of crimes against humanity in the period have required, as a minimum, some form of State indifference, impotency or complicity.

6. CONCLUSION

The title of this chapter, which is a popular one in the literature, suggests some orderly linear progression in the development of international criminal law and the concept of crimes against humanity in the period from 1945 to 1993. As Koskenniemi

219 B. Mendelsohn, ‘Les infractions commises sous le régime Nazi sont-elles des ‘crimes’ au sans du droit commun?’ (1966) 43 Revue de Droit International De Sciences Diplomatique et Politics 333, 337-338 where the author argues that the distinguishing feature is that the crimes are sanctioned by the State.
221 J. Francillon, ‘Crimes de guerre, crimes contre l’humanité’ Juris-Classeurs, Droit International (1993) Fascicule 410, [63]-[64], where the author suggests state action is a required element of crimes against humanity.
224 Henri Meyrowitz, La répression par les tribunaux allemands des crimes contre l’humanité et de l’appartenance à une organisation criminelle (1960) 255-257.
226 See The Justice Case, above n 6, discussed at section 2.2.2.
227 See The Flick Case, above n 6, 1201-1202 discussed at section 2.2.1 and United States v Krauch 8 CCL 10 Trials 1081, 1167-1192 (‘The Farben Case’).
228 See the cases in section 2.3 and the 1954 Draft Code of Offences discussed at section 3.3.2 above.
229 The Einsatzgruppen Case, 498, discussed at section 2.2.3 above and the cases at section 2.3.
230 See Weller, Decision of the Supreme Court for the British zone (21 December 1948) in Entscheidungen, vol I, 203-208, discussed at section 2.3.2 above.
231 See section 3.3.2 above.
points out, nothing could be further from the truth. In reality, prosecutions for crimes against humanity were limited to an ever-dwindling supply of former Nazis. Core aspects of its definition were clouded by doubts and the whole notion of an international criminal law in 1992 appeared to be falling into desuetude. Sadly, it took the shock of Europe experiencing its third episode of genocide in the one century to advance matters in any meaningful way.

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CHAPTER FOUR

THE LAW OF THE AD HOC TRIBUNALS

Nuremberg is 'like a volcano, one could say, that it is inactive but not extinct'.

1. INTRODUCTION

In 1993-4 there was an explosion in the development of international criminal law, including the notion of crimes against humanity. Crimes against humanity in the hesitant state practice after the Second World War was heavily associated with prosecuting Nazi war criminals. Suddenly, the concept was applied to two new situations: the 'ethnic cleansing' in Yugoslavia and the genocide in Rwanda. This was achieved by the Security Council taking the novel approach of creating two ad hoc Tribunals (the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR)) to try persons responsible for grave breaches of humanitarian law in Yugoslavia and Rwanda. The Security Council acted pursuant to its powers under Chapter VII of the UN Charter to take measures in response to threats to international peace.

The cynical may say this was a poor substitute for the Security Council’s failure to authorise the use of force to stop the atrocities continuing. Nevertheless, the experiment laid the foundation for the Statute of the International Criminal Court at the Rome Conference of 1998, considered in chapter 5. This chapter considers crimes against humanity in the law of the ad hoc Tribunals. The first part examines the drafting of the ICTY Statute and the ICTR Statute. Part two examines the jurisprudence of the ICTY and the ICTR through four selected cases. The four cases are intended to highlight the factual situations confronted by the Tribunals and how the jurisprudence in respect of crimes against humanity has developed and expanded over time, often in ways somewhat removed from the actual language used in the Statutes. Part three provides a summary of the chapeau elements of crimes against humanity according to the case law of the two Tribunals, whilst part four presents a critique of the ad hoc Tribunals’ treatment of crimes against humanity. The elements of the underlying offences that make up crimes against humanity in the law of the ad hoc Tribunals are considered in chapter 5.

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1 C. Lombois, Droit Pénal International (1979) 162.
As the first truly international courts to consider the meaning of crimes against humanity in international criminal law, their decisions undoubtedly provide the starting point for an assessment of the crimes' modern definition.

2. THE STATUTES FOR THE ICTY AND THE ICTR

2.1 The ICTY Statute

In response to reports of atrocities, including ‘ethnic cleansing’ in the former Yugoslavia, the Security Council in February 1993 resolved to establish an international tribunal for the prosecution of persons responsible for violations of international humanitarian law in Yugoslavia. The Secretary-General was requested to submit a report and draft a statute for the Tribunal.

A number of states made representations on the Tribunal’s jurisdiction over crimes against humanity. Russia said crimes against humanity are reflected ‘in particular, in the Charter of the Nuremberg Tribunal’. Canada referred to serious crimes committed against any civilian population or identifiable group of persons provided such crimes were existing crimes under international law. Italy suggested crimes against humanity consisted of systemic or repeated violations of human rights... or discriminating against them on social, political, religious, or cultural grounds; or deporting or forcibly transferring populations. The Netherlands said crimes against humanity are committed as part of the deliberate, systematic persecution of a particular group of people and/or are designed systematically to deprive that group of people of their rights with government tolerance or assistance. The United States submitted crimes against humanity are serious crimes that are part of a campaign or attack against any civilian population ‘on national, social, ethnic or religious grounds’. The communiqué from Egypt, Iran, Malaysia, Pakistan, Saudi Arabia, Senegal and Turkey proposed that crimes against humanity be as ‘defined in articles 6(c) and 5(c) of the London and Tokyo Charters, respectively, and as further developed by customary international law, which covers certain serious crimes of violence,

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6 Letter Dated 5 April 1993 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General, 5, UN Doc S/25537.

7 Letter Dated 13 April 1993 from the Permanent Representative of Canada to the United Nations Addressed to the Secretary-General, 3, UN Doc S/25594.

8 Letter Dated 16 February 1993 from the Permanent Representative of Italy to the United Nations Addressed to the Secretary-General, 3, UN Doc S/25300.

9 See Observations of the Kingdom of The Netherlands on the Establishment of an Ad Hoc Tribunal for the Prosecution and Punishment of War Crimes in the Former Yugoslavia dated 26 March 1993 quoted in J.C. O’Brien, above n 5, 649 n45. New Zealand, in its comment, also defined crimes against humanity without reference to armed conflict: ibid.

10 Letter Dated 5 April 1993 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General, 6, UN Doc S/25575.
systemic pillage and looting, systemic destruction of public and private property, when committed as part of a policy of persecution on social, political, racial, religious or cultural grounds'.

These submissions, whilst far from uniform, emphasise the need for large-scale atrocities committed as part of a discriminatory policy of persecution rather than any war nexus in the definition of crimes against humanity. This is repeated in the Secretary-General's Report of May 1993 where he wrote 'Crimes against humanity' are prohibited regardless of whether they are committed in an armed conflict, international or internal in character'. The only source cited in support is the Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits). The Report of the Commission of Experts appointed by the Security Council in May 1994 also stated 'crimes against humanity apply to all contexts' and are 'no longer dependent upon their linkage to crimes against peace or war crimes'. To support its view the Commission took a somewhat strained view of the Nuremberg Judgment. It said the Nuremberg Tribunal ascertained that there are 'elementary dictates of humanity' to be recognised under all circumstances and that crimes against humanity in the London Charter were 'conceived to redress crimes of an equally serious character [to war crimes] and on a vast scale, organized and systematic, and most ruthlessly carried out'. The Nuremberg Tribunal did refer to the charged conduct in these terms but the Tribunal did not suggest they were legal requirements or that the 'dictates of humanity' were recognised under international law in all circumstances.

Instead of requiring a nexus with war, the Secretary-General stated 'Crimes against humanity refer to inhumane acts of a very serious nature, such as wilful 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'. No source is cited for this proposition which appears to be the first use of the phrase 'widespread or systematic attack against any civilian population' in an international source on crimes against humanity. The Commission of Experts similarly concludes that crimes against humanity 'must be part of a policy of persecution or discrimination'.

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11 Letter Dated 5 April 1993 from the Representatives of Egypt, the Islamic Republic of Iran, Malaysia, Pakistan, Saudi Arabia, Senegal and Turkey to the United Nations Addressed to the Secretary-General, 2-3, UN Doc A/47/920, S/25512.
12 The Secretary-General's Report, above n 5, [47].
13 [1986] ICJ Rep 4, especially at 114, [218] where the Court refers to 'elementary dictates of humanity' which must be abided by in any armed conflicts.
16 Ibid, [73]-[74].
17 See Chapter 2, sections 4 and 5.
18 The Secretary-General's Report, above n 5, [48]. The definition in turn was probably based upon the submission of the United States: see above n 10.
19 Experts' Report (Yugoslavia), above n 15, [84]-[85].
On 25 May 1993 the Security Council, by Resolution 827, approved the Secretary-General’s Report and adopted unanimously the draft ICTY Statute, which defined crimes against humanity at Article 5 as:

. . . the following crimes when committed in armed conflicts, whether international or internal in character, and directed against any civilian population:

a) murder;
b) extermination;
c) enslavement;
d) deportation;
e) imprisonment;
f) torture;
g) rape;
h) persecution on political, racial and religious grounds;
i) other inhumane acts.

Despite the Secretary-General’s comments that a link to armed conflict is unnecessary, in Article 5 it is the nexus to armed conflict which distinguishes crimes against humanity from domestic crimes. The link to armed conflict may be due to the view of the Secretary-General that ‘the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law’ and that the London Charter (with its link to armed conflict) has ‘beyond doubt become part of customary international law’.

This suggests the Secretary-General may have accepted, as discussed in chapter 3, that doubt still remained as to whether customary law required a link with war or, at least, armed conflict. Others have suggested that the wording simply reflects the Security Council describing the factual situation (that of armed conflict) which the Council was dealing with at the time and that it was not providing a general definition applicable in all situations.

At the time of adoption of the ICTY Statute, some members of the Security Council made interpretative statements that Article 5 applies to crimes committed during a period

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21 Bassiouni says the required link to armed conflict is ‘troublesome’: M.C. Bassiouni, Crimes Against Humanity in International Law (2nd revised ed, 1999) 194.

22 The Secretary-General’s Report, above n 5, [34]. The Secretary-General also says the draft statute does not create new law it only applies existing law: ibid [29]. Such a view was also expressed at the Security Council: UN SCOR, 48th sess, 3217th mtg, UN Doc S/PV.3217 (1993) 7 (Venezuela), 19 (United Kingdom), 23 (New Zealand), 37 (Brazil) and 41 (Spain). Bassiouni speculates that its inclusion was probably over concern about potential challenges to the legality of the statute: M.C. Bassiouni, above n 21, 195.

23 The Secretary-General’s Report, above n 5, [35]. Morris and Scharf express the view that the definition is based upon the London Charter because this met the standard of being beyond doubt part of customary international law when the proposals of states varied so much they could not provide a clear position: Morris and Scharf above n 20, 77.

of armed conflict' as part of a ‘widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds’. Based on these statements, the Tribunal has held that Article 5 requires the acts to be undertaken ‘during’ armed conflict, as a mere temporal and geographic requirement governing the Tribunal’s jurisdiction, not as a requirement of the offence itself. By this interpretation, which has the support of many commentators, it will suffice if the acts occur at a time and place of armed conflict, in a general sense, such as when one speaks of ‘Germany during the war’. O’Brien says this interpretation of Article 5 is consistent with the approach of the Nuremberg Tribunal (if not the words of Article 6(c) of the London Charter), which assumed a link with war crimes or crimes against peace after the outbreak of war. It may not be fair to assume that the Nuremberg Tribunal, whilst not fully articulating the nexus, did not require a substantive connection between crimes against humanity and the two other crimes. This approach is consistent, however, with the view of Bassiouni that at the time of the Second World War the principles of legality required that crimes against humanity be limited to conduct analogous to war crimes committed in times of war.

2.2 The ICTR Statute

Following the shooting down at Kigali airport on 6 April 1994 of the plane carrying President Habyarumnda of Rwanda and President Ntayamira of Burundi, a campaign of

23 See UN SCOR, 48th sess, 3217th mtg, UN Doc S/PV.3217 (1993) 11 (France), 16 (United States), 19 (United Kingdom which referred to ‘in time of armed conflict’ but without reference to the need for a discriminatory attack) and 45 (Russia).
27 J.C. O’Brien, above n 5, 649–650; M. Lippman, ‘Crimes against Humanity’ (1999) 27 Boston College Third World War Journal 171, 266 n 497 (Lippman calls in aid the fact that legislation in most Member States did not require a connection between crimes against humanity and another crime or armed conflict. In fact, the legislation then in force, with the exception of Canada, required a link to the Second World War: see Chapter 3); V. Morris and M.P. Scharf, above n 20, 83; B. van Schaack, ‘The Definition of Crimes Against Humanity: Resolving the Incoherence’ (1999) 37 Columbia Journal of International Law 787, 827 n 191; and G. Mettraux, International Crimes and the Ad Hoc Tribunals, above n 2, 152.
28 For example, see Tadić – Jurisdiction, above n 26, [70]. Of course, in the case of non-international armed conflict, it is more difficult to be precise about the temporal and geographic parameters of the conflict.
29 J.C. O’Brien, above n 5, 650.
30 See Chapter 2, sections 4 and 5.
31 M.C. Bassiouni, above n 21, chapters 1–4.
orchestrated violence by the Hutu militia with the support of the interim Rwandan government was unleashed against the Tutsi population. Within months, hundreds of thousands were killed with an eventual death toll estimated at one million. The Secretary-General and others called for 'the immediate and massive reinforcement' of UN troops with enforcement powers under Chapter VII of the Charter. Instead, the Security Council on 1 July 1994 requested the Secretary-General to establish 'as a matter of urgency' a Commission of Experts to report on grave violations of international humanitarian law, including 'possible' acts of genocide.

The Commission of Experts' Report of 1 October 1994 accepted a certain level of ambiguity existed about the content and legal status of crimes against humanity. It reported that since Nuremberg, crimes against humanity have 'undergone substantial evolution'. The origins of crimes against humanity lay in 'principles of humanity' first invoked in the early 1800s by a state to denounce another state's human rights violations of its own citizens. Whilst not stating expressly what was being referred to, the context suggests the Commission had in mind the examples of so-called humanitarian interventions of the nineteenth century. The Commission, following the remarks of the Commission of Experts for Yugoslavia, concluded that crimes against humanity 'are gross violations of fundamental rules of humanitarian and human rights law committed by persons demonstrably linked to a party to the conflict, as part of an official policy based on discrimination against an identifiable group of persons, irrespective of war and the nationality of the victim'.

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33 This was the estimate of the Secretary-General. See The United Nations and Rwanda 1993-96, above n 32, 4.

34 Special Report of the Secretary-General, above n 32, [13]-[14].

35 SC Res 935, UN SCOR, 49th sess, 3400th mtg, UN Doc S/Res/935 (1994). Of course by 1 July 1994 it was already obvious to the world that genocide was taking place and continuing. For example, the Special Rapporteur for Rwanda of the UN Commission of Human Rights in his first report of 28 June 1994 indicated that large-scale massacres of Tutsi had occurred and was organised by the Hutu militia for which the transitional Government of Rwanda bore responsibility: UN GAOR, 49th sess, 3400th mtg, Annex I, [43], UN Doc S/1994/1127, UN Doc E/CN.4/1995/7 (1994).


37 Ibid, [114] and [116], where the Genocide Convention and the Apartheid Convention are relied upon.

38 Ibid, [115].

39 See Chapter 1, section 5.1.

40 Experts' Preliminary Report (Rwanda), above n 36, [118], quoting from the Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), 48th sess, annex I, [49], UN Doc S/25274 (1993). It is noteworthy that in due course the Tribunals were to reject all these tests as being elements of the crime under customary international law: see section 3 and 4 below.
On 8 November 1994, the Security Council, acting under Chapter VII of the Charter, adopted the ICTR Statute. According to the Secretary-General, it was an adaptation of the ICTY Statute to the circumstances of Rwanda, drafted by the sponsors of the resolution in consultation with other members of the Council. Article 3 (crimes against humanity) is as follows:

The ICTR shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts.

The key element of the definition is 'a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds'. This can be traced to the Secretary-General’s Report on the ICTY Statute and the comments of some members of the Security Council on 25 May 1993. Of those writing at the time, Morris and Scharf criticised the test as being too onerous and possibly a higher standard than that under the ICTY Statute. Meron wrote that by requiring both a discriminatory and a widespread or systematic attack the Security Council may have inadvertently raised the burden for the prosecution beyond that required. Paust asserted it was deliberately done to ensure a limited definition for any future permanent court. The most persuasive conclusion is that the definition of crimes against humanity was so fluid in 1994 that many states, and others, considered 'a widespread or systematic attack' on discriminatory grounds to be a requirement for all crimes against humanity. It is the first time that the requirement of a 'widespread or systematic attack' appears in a definition of crimes against humanity in an international statute or treaty. In the English, Chinese, Russian and Spanish versions, the disjunctive 'or' is used whilst in the French version the conjunction 'et' is used. There does not appear to be any explanation for the difference in the record of proceedings or the literature. The ICTR has held that because international customary law

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43 See text accompanying notes 18 and 25.
45 Theodor Meron, 'International Criminalization of Internal Atrocities' (1995) 89 AJIL 554, 557.
47 This is the conclusion of Cryer: see Rober Cryer, Prosecuting International Crimes (2005) 253.
supports the disjunctive ‘or’ the French version must be taken (without direct evidence being offered) to suffer from an error in translation.48

On the face of things the definition is vastly different to Article 5 of the ICTY Statute. Had the Secretary-General’s possible previous concerns about the need for a link to armed conflict under customary law been removed? In his Report of 13 February 1995 he said:

[T]he Security Council has elected to take a more expansive approach to the choice of the applicable law than the one underlining the statute of the Yugoslav Tribunal, and included within the subject matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator...49

Hence, the extent to which Article 3 was intended to be confined by existing customary law may be open to doubt. Others have suggested that any such distinction between the two statutes may have been ‘unintentional’.50 Hwang points out the articles on crimes against humanity in both the ICTY Statute and the ICTR Statute open with the phrase ‘The International Tribunal...shall have the power to prosecute persons responsible for the following crimes’. As a result, he concludes, ‘these articles are not intended to define crimes against humanity, but, rather to define the scope of the Tribunal’s jurisdiction over crimes against humanity’.51 In the end, the ICTR has held that the need for a discriminatory motive in Article 3 is only jurisdictional and is not a requirement under customary international law.52 If neither a link to armed conflict nor an attack on discriminatory grounds is a requirement of the offence, what then are the elements of crimes against humanity according to the ad hoc Tribunals?

3. THE JURISPRUDENCE OF THE ICTY AND THE ICTR: FOUR SELECTED CASES

3.1 Tadić


49 Special Report of Secretary General, above n 32, [12].

50 M.C. Bassioumi and P. Manikas, above n 20, 458.


The ICTY's first defendant was Duško Tadić, a local Serbian nationalist politician, café owner and part-time traffic policeman. He was convicted of crimes against humanity in respect of his participation in assaults and torture of non-Serbian civilians at the Omarska concentration camp in Bosnia. Tadić challenged the ICTY's jurisdiction under Article 5, arguing that customary international law only conferred jurisdiction over crimes against humanity in connection with an international, not purely internal, armed conflict. The Trial Chamber said the war nexus 'was peculiar to the context of the Nuremberg Tribunal'. It ruled a link to armed conflict was not necessary under customary law, relying on the Einsatzgruppen case, the ILC's Special Rapporteur's Report of 1989 and the 1992 edition of Oppenheim's International Law. The point was abandoned on appeal, but the Appeals Chamber said that whilst the London Charter was affirmed by the General Assembly, 'there is no legal or legal basis for this requirement [the war nexus] and it has been abandoned in subsequent state practice'. It cited Allied Control Council Law No 10, the Genocide Convention and the Apartheid Convention as evidence of the relevant state practice. The Appeals Chamber concluded that under customary international law, crimes against humanity do not require a connection to international armed conflict and 'may' not require a connection with any conflict at all. For the reasons explored in chapter 3, one could question the extent to which these sources justify the conclusion reached. The question of the war nexus, as a matter of customary law, is considered further in chapter 7.

The Trial Chamber in its Judgment of 7 May 1997 rendered the first decision of a truly international court on the meaning of crimes against humanity. In particular, it turned to the word 'population' 'as the rug under which all the remaining elements of crimes against humanity were swept' . Whilst 'population' does not mean that an entire population of a state or territory must be targeted, the Chamber stated:

[T]he 'population' element is intended to imply crimes of a collective nature and thus exclude single or isolated acts . . . . Thus the emphasis is not on the individual victim but rather on the collective, the individual being victimized not because of his individual attributes but rather because of his membership of a targeted civilian population. This has been interpreted to mean, as elaborated below, that the acts must occur on a widespread or systematic basis, that there must be some form of a governmental, organisational or group policy to commit these acts and that the perpetrator must know of the context within which his

53 Tadić – Trial, above n 26, [180]-[192].
54 See Prosecutor v Tadić (Defence Motion for Interlocutory Appeal on Jurisdiction), Case No IT–94–1–TR72 (10 August 1995) [77].
55 Ibid, [78].
56 Ibid, [79]-[81]. The Einsatzgruppen case and the work of the ILC are discussed in Chapter 3, sections 2.2.3 and 3.3.2 respectively. The 1992 edition of Oppenheim's International Law said the link to war was 'somewhat artificial' and the autonomy of crimes against humanity 'now generally regarded' 'in practice they are often treated together with war crimes: Robert Jennings and Arthur Watts (eds), Oppenheim's International Law (9th revised ed, 1992) 996.
57 Tadić – Jurisdiction, above n 26, [140].
58 Ibid. These sources are discussed in Chapter 3, section 3.2.
59 Tadić – Jurisdiction, above n 26, [141].
60 P. Hwang, above n 51, 482.
actions are taken, as well as the requirement…that the actions must be taken on discriminatory grounds.\textsuperscript{61}

The Chamber relied principally upon the report of the United Nations War Crimes Commission of 1948 (which referred to crimes which ‘shocked the conscience of mankind, warranted intervention by states other than that on whose territory the crimes had been committed’) and the work of the ILC to discern all of these requirements from the single word ‘population’.\textsuperscript{62} It is of interest that the Trial Chamber went back to the UNWCC report of 1948 (which emphasises the former doctrine of humanitarian intervention) to discern the definition under customary law. As argued in chapter 2, this report, in fact, represents a marked break from the Nuremberg Precedent and Article 6(c) of the London Charter, which placed emphasis on world peace above any right of interference in a state’s internal affairs except where there is a link with aggression or international armed conflict. The report was, however, widely quoted after Nuremberg.\textsuperscript{63} The Trial Chamber held that the required ‘policy’ need not be explicit and that whilst the ‘traditional conception was . . . that the policy must be that of a State’, ‘the law in relation to crimes against humanity has developed’ to cover non-state actors (‘organisations or groups’) which have de facto control over, or are able to move freely within, defined territory.\textsuperscript{64} The Trial Chamber also noted that the ILC in its 1991 commentary to the Draft Code did not rule out groups organised in criminal gangs as possible actors.\textsuperscript{65} In respect of intent, it held the defendant must act out of discriminatory motives (relying on the statements of the members of the Security Council at the time), know there is an attack on the civilian population and know that his acts fit in with the attack (described as either actual or constructive).\textsuperscript{66}

The Trial Chamber found there was an armed conflict in the territory of obstinately Prejdor in Bosnia which involved a discriminatory policy by Serbian armed forces to commit inhumane acts against the non-Serb population and Tadić was knowingly involved.\textsuperscript{67}

The Appeals Chamber agreed, without citing any source, that there must be ‘a pattern of widespread or systematic crimes directed against a civilian population and that the

\textsuperscript{61} Tadić – Trial, above n 26, [644].
\textsuperscript{62} Ibid, [644], [645]-[649]. The UNWCC report is discussed at chapter 2, section 5.3 and the work of the ILC is dealt with in chapter 3, section 3.3.
\textsuperscript{63} See chapter 3.
\textsuperscript{64} Ibid, [653]-[655].
\textsuperscript{65} Ibid, [654]-[655]. The Prosecution asserted and the Defence did not challenge the proposition that the actor may be a ‘terrorist group or organization’ and the Trial Chamber, somewhat guardedly said the assertion ‘conforms with recent statements regarding crimes against humanity’: ibid, [645].
\textsuperscript{66} Ibid, [652], [659].
\textsuperscript{67} Ibid, [660]. In July 1998, states met at Rome to draft the Statute of the ICC. The decisions in Tadić up to that point in time were taken by some delegations to reflect customary law and significantly influenced the drafting of Article 7, which defined crimes against humanity. Its principal threshold requirements are that of knowing involvement in a ‘widespread or systematic attack against any civilian population’ ‘pursuant to or in furtherance of a State or organizational policy to commit such attack’: see Appendix I.
accused must have known that his acts fit into such a pattern'. 68 The Appeals Chamber also ruled, based on the text, that a discriminatory intent was only relevant for ‘persecutions’ under Article 5(h), despite the remarks of members of the Security Council at the time. 69 Reverting back to the Nuremberg Precedent in this regard, it held that such a requirement was not consistent with customary law. 70 It said, for example, a campaign of terror carried out on random members of the population could constitute a crime against humanity. 71 It is hard not to think that the discovery of this new touchstone – ‘a widespread or systematic attack against a civilian population’, but without the need for a discriminatory animus – as an existing customary law requirement, may have been influenced by events subsequent to the ICTY Statute, such as the 1996 ILC Draft Code and Article 7 of the ICC Statute (discussed in chapter 5).

3.2 Akayesu

Akayesu, as the bourgmestre of the Taba commune in Rwanda, was accused of complicity in the murder, beatings and sexual assaults of Tutsi civilians that left up to 2,000 dead. 72 The Trial Chamber found a widespread and systematic attack began in April 1994 in Rwanda targeting the civilian Tutsi population. 73 It said ‘the concept of crimes against humanity had been recognised long before Nuremberg’ and was applicable regardless of whether it occurs in armed conflict or not. 74 It did not, however, consider the status of crimes against humanity in customary international law. The Trial Chamber said the acts of the accused must be ‘inhumane’ – that is, causing great suffering, or serious injury to body or to mental or physical health – and both the attack and the act of the accused must be undertaken because of a discriminatory intent on national, ethnic, racial, political or religious grounds. 75

On appeal, the Appeals Chamber followed the Tadić Appeal Chamber and held that international customary law does not require a discriminatory intent. 76 It concluded the chapeau requirement in Article 3 is a jurisdictional limitation upon the Tribunal, not an element of the mens rea of the crime. The accused need only be aware that his acts objectively ‘could further a discriminatory attack against a civilian population’ and there was no need to show the accused had a discriminatory intent. 77

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68 Tadić – Appeal, above n 26, [248]. The Appeals Chamber did not discuss any sources or basis for this conclusion. The Appeals Chamber, unlike the Trial Chamber, did not say that knowledge could be ‘constructive’ as well as actual.
69 Ibid, [282]-[292].
70 Ibid.
71 Ibid, [285].
72 Akayesu – Trial, above n 48, [6]. Rwanda is divided into 11 prefectures, each governed by a prefect. The prefectures are subdivided into communes under the authority of a bourgmestre.
73 Ibid, [173].
74 Ibid, [565]-[566]. It referred to the example of the Armenian genocide in Turkey, see chapter 1, section 6.
75 Ibid, [578] and [590].
76 Prosecutor v Akayesu (Judgment), Case No ICTR-96-4-A (1 June 2001) [464] (‘Akayesu – Appeal’).
77 Ibid, [467].
3.3 Kupreškić

The defendants participated in an attack by Bosnian Croatian forces on the Bosnian town of Ahmici, which involved the murder of scores of Muslim men, women and children, the destruction of homes, farms and the two mosques of the town, and the detention or expulsion from Ahmici of Muslims residents. The Trial Chamber concluded the attack was pursuant to a policy of the HVO (Bosnian Croatian Army) and Bosnian Croatian military police of 'ethnically cleansing' the town of the Muslim population. It said the essence of 'crimes against humanity' is a systematic policy of a certain scale and gravity directed against a civilian population. This suggests the crimes must be both widespread and systematic, though the Chamber later said the requirements were disjunctive. The Trial Chamber noted that 'although the concept of crimes against humanity necessarily implies a policy element, there is some doubt as to whether it is strictly a requirement as such'. The Chamber thought the authors of such crimes could be private individuals acting without direct governmental authority but some sort of explicit or implicit approval or toleration by governmental authorities was a requirement.

3.4 Kunarac

In April 1992, the municipality of Foca in Bosnia was taken over by Serb forces. The Mosques were destroyed and the Muslim inhabitants were beaten, killed and kept in detention centres in atrocious conditions. The defendants were part of the Serb forces who were alleged to have raped women taken from detention centres and kept some at houses for that purpose for up to six months. The Trial Chamber said Article 5 requires 'an attack (sic) directed against any civilian population' which encompasses the following five sub-elements (which has become the locus classicus):

(i) there must be an attack;

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78 See Kupreškić – Trial, above n 26.
79 Ibid, [33] and [180].
80 Ibid, [149].
81 Ibid, [337]-[338]. The attack was alleged to be committed in the context of an ideology of Croatian hegemony and Croatian aspirations for parts of Bosnia but the Trial Chamber was unable to reach any finding on this alleged plan for a 'Greater Croatia': see [52] and [337]-[338].
82 Ibid, [543].
83 Ibid, [544].
84 Ibid, [551] (emphasis in the original).
85 Ibid, [555].
86 Kunarac – Trial, above n 26, [2].
87 Ibid, [46].
88 The Muslim population went from 40,513 to about 10: ibid, [2], [22]-[44] and [47].
89 Ibid, [3].
90 Ibid, [410]. It is of some significance that the Trial Chamber wrongly quotes Article 5 as including the words 'an attack'. This does not appear in Article 5 but has been written into the text with the result that the definition has been brought into line with the definitions in the ICTR Statute and the ICC Statute, the texts of which are markedly different.
(ii) the acts of the perpetrator must be part of the attack;
(iii) the attack must be ‘directed against any civilian population’;
(iv) the attack must be ‘widespread or systematic’;
(v) the perpetrator must know of the wider context in which his acts occur and know that his acts are part of the attack. 91

The Trial Chamber noted ‘that there has been some difference of approach’ ‘as to whether a policy element is required under existing customary law’. 92 The Trial Chamber concluded that the defendants tortured, raped and enslaved Muslim women knowing that such conduct was part of an extensive and systematic attack on the Muslim civilian population in the Foca area by the local authorities, the Bosnian Serb Army and paramilitary groups. 93 Referring to the Flick Case, the Trial Chamber held ‘the involvement of the state does not modify or limit the guilt or responsibility of the individual’ and torture, as a crime against humanity, does not require ‘the presence of a state official or of any other authority-wielding person’. 94

The Appeals Chamber in 2002 agreed with the Trial Chamber’s five sub-elements 95 and said:

It is sufficient to show that enough individuals were targeted in the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian ‘population’, rather than against a limited and randomly selected number of individuals. 96

It held that under customary law ‘neither the attack nor the acts of the accused needs to be supported by any form of ‘policy’ or ‘plan’. 97 This may be relevant to prove that the attack was systematic or directed against a population, but it is not a legal element of the crime. 98 The Appeals Chamber referred to many cases which have suggested that there is a requirement for a state policy, but concluded that the existence of a policy or plan (whilst sometimes found on the facts and held to be a requirement by the courts) was neither an element of Article 6(c) of the London Charter nor the other relevant statutes such as CCL 10. 99 This of course ignores that the London Charter and most of the statutes prior to 1994 (with the exception of CCL 10) did require a connection with aggression or the Second World War, which could be said to imply the need for a state policy. 100 The view that there is no legal requirement for a ‘policy’ has been followed by the ICTR. 101

91 Ibid.
92 Ibid, [432].
93 [570]-[578]
94 Ibid, [493],[496]. See chapter 3, section 2.2.1 for a discussion the Flick Case.
95 Kunarac – Appeal, above n 26, [85].
96 Ibid, [90].
97 Ibid, [98].
98 Ibid.
99 Ibid, [98] n 114. See Chapters 2 and 3 for a discussion of these sources.
100 See Chapters 2 and 3.
In the end, according to the *ad hoc* Tribunals, the threshold requirements of crimes against humanity are merely the nominated five sub-elements. The Tribunals’ treatment of these elements are likely to be influential in interpreting Article 7 of the ICC Statute and are now discussed.

4. **THE COMMON ELEMENTS OF CRIMES AGAINST HUMANITY IN THE JURISPRUDENCE OF THE AD HOC TRIBUNALS**

4.1 The ‘attack’

The Trial Chamber in *Kunarac* said an ‘attack’ involves ‘the commission of acts of violence’ and ‘generally’ ‘will not consist of one particular act but of a course of conduct’. The Appeals Chamber said the attack need not involve the use of armed force and ‘encompasses any mistreatment of the civilian population’. The Trial Chamber in *Akayesu* explicitly said the ‘attack’ might be non-violent in character, such as imposing a policy of apartheid which is not listed in Article 3. Mettraux disputes that a system of apartheid could be regarded as ‘non-violent’ or that any ‘attack’ within the meaning of crimes against humanity could be non-violent in the broad sense of the word. David Luban also agrees with this view stating:

> The requirement of an attack means that something more is going on than the erection of a stable system of group subordination or oppression, such as the subordination of women throughout most of recorded history. . . . No good purpose is served by labeling all the world’s oppressions crimes against humanity. . . . [Attack] requires specific flash points of criminality over and above the general evil of erecting a social system of oppression and domination.

In the case law of the ICTR, ‘attack’ is generally defined as an unlawful act, event, or series of events of the kind listed in Article 3(a)-(i) of the Statute. This suggests that the acts making up the ‘attack’ need not be the crimes provided for in the Statute.

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102 *Kunarac – Trial*, above n 26, [415] and [422]; followed in *Prosecutor v Vasiljević* (Judgment), Case No IT-98-32-T (29 November 2002) [29] (‘Vasiljević – Trial’); *Naletilić – Trial* below n 141 [233] and *Prosecutor v Brdjanin (Judgment)*, Case No IT-99-36-T (1 September 2004) [131] (‘Brdjanin – Trial’).

103 *Kunarac – Appeal*, above n 26, [86]; followed in *Prosecutor v Limaj* (Judgment), Case No IT-03-66-T (30 November 2005) [182] (‘Limaj – Trial’); *Prosecutor v Brima, Karmara and Kanu (Decision on Defence Motion for Judgment of Acquittal Pursuant to Rule 98)*, Case No SCSL-2004-04-16-TR98 (31 March 2006) [42] (Special Court for Sierra Leone) (‘Brima – Decision’).

104 *Akayesu – Trial*, above n 48, [581]; followed in *Musema – Trial*, above n 48, [205]; *Rutaganda – Trial*, above n 48, [70], *Brima – Decision*, above n 103, [42].


106 David Luban, ‘A Theory of Crimes against Humanity’ (2004) 29 Yale Journal of International Law 85, 101-102. The matter is taken up further in Chapter 7 where the conclusion is offered that what is required are situations of extreme violence as judged by the type of internal atrocities which have warranted interventions in the past by states in the cause of humanity as a whole.

107 *Muhamuna – Trial*, above n 48, [525]; *Gacumbitsi – Trial*, above n 48, [298]; *Semanza – Trial*, above n 101, [327]; *Musema – Trial*, above n 48, [205]; *Rutaganda – Trial*, above n 48, [70]; *Akayesu – Trial*, above n 48, [581]; *Kayishema – Trial*, above n 48, [122]; and also followed in
An attack for the purposes of the definition of crimes against humanity is distinct from the notion of armed conflict. The attack need not be directed at an enemy and may take place entirely in peacetime; it may precede or outlast any period of armed conflict or it may overlap with and form part of the armed conflict in a territory. In a military operation where combatants use armed force, civilian casualties or violations of the laws of war will not of itself amount to an attack for the purpose of the threshold for crimes against humanity. There may be the commission of crimes against humanity even if the ‘attack’ had some legitimate military objective if, for example, civilians and their buildings are also targeted.

4.2 The Link between the Attack and the Acts of the Accused

For the acts of the accused to amount to crimes against humanity they must objectively form ‘part of’ some ‘attack’. The accused’s acts will form part of an attack if, by their nature or consequences, they are objectively part of the attack and are liable to have the effect of furthering that attack. What is required is a consideration of the ‘characteristics, aims, nature and consequence’ of the acts of the accused compared with that of the ‘attack’ as a whole. Accordingly, in Kunarac, the Trial Chamber held that the torture, enslavement and sexual assaults carried out by the Bosnian Serb defendants on Muslim women were part of the ‘attack’ because the victims were chosen by reason of their ethnicity and the crimes in question corresponded with other such acts occurring against Muslim civilians in the same region of Foča at the time. The Trial Chamber also held that the accused need not be acting on the orders, or as agent, of the organisation or state which may be responsible for the attack, as long as the acts, viewed objectively, can be seen as furthering that attack. The crimes of the accused need not share all of the features of the attack. The accused’s acts can take place before or after, and at places away from, the main attack and still be regarded as part of it, if there is sufficient connection between the two. The Kroneljac Trial Chamber said the acts of the accused ‘need not be committed when that attack is at its height. ... A crime committed several months after,...

Prosecutor v Kajeljeli (Judgment and Sentence), Case No ICTR-98-44A-T (1 December 2003) [867] (‘Kajeljeli – Trial’).

Kunarac – Trial, above n 26, [415]; and Vasiljević – Trial, above n 102, [29].

Kunarac – Appeal, above n 26, [86]; Tadić – Appeal, above n 26, [251]; Semanza – Trial, above n 101, [327]; Vasiljević – Trial, above n 102, [30]; Limaj – Trial, above n 103, [182].

Kunarac – Appeal, above n 26, [86], Tadić – Appeal, above n 26, [251]; Vasiljević – Trial, above n 102, [30]; Limaj – Trial, above n 103, [182].

Blaškić – Trial, above n 26, [425]-[428], [573]-[579], [623]-[634] and [676]-[678]; Kupreškić – Trial, above n 26, [524] and [526]; and Kunarac – Trial, above n 26, [416].

Kunarac – Appeal, above n 26, [85], [99]; Kunarac – Trial, above n 26, [417]-[418]; Tadić – Appeal, above n 26, [248] and [255]; and Kayishema – Trial, above n 48, [135].

Ibid. See also Vasiljević – Trial, above n 101, [32].

Kajeljeli – Trial, above n 107, [866]; and Semanza – Trial, above n 101, [326].

Kunarac – Trial, above n 26, [592].

Kunarac – Trial, above n 26, [493] and Kupreškić – Trial, above n 26, [555]. This would be consistent with the jurisprudence of the German Courts under CCL 10 discussed in Chapter 3.

Semanza – Trial, above n 101, [326].

Kunarac – Appeal, above n 26, [100].
several kilometres away from, the main attack against the civilian population could still, if sufficiently connected, be part of that attack'. There comes a point, however, when the acts of the accused are so far removed from the attack, either in terms of time, distance or characteristics, that they become an 'isolated or random' act and, hence, outside the parameters of a crime against humanity. For example, a Special Panel in East Timor held that a revenge killing by one militia member against another militia member was not a crime against humanity because it could not be related to the attack against the civilian population.

4.3 Directed against any Civilian Population

This element involves a number of sub-elements: the meaning of 'directed against', 'any civilian' and 'population'.

4.3.1 The meaning of 'directed against'

The phrase 'directed against' has been interpreted to mean that the civilian population must be the primary object of the attack. Accordingly, civilian casualties as an unintended outcome of military operations will not suffice. The Appeals Chamber has indicated that during armed conflict, the laws of war, with its prohibition on targeting civilians, will provide a benchmark for determining whether an attack committed in the course of armed conflict will amount to a crime against humanity. The means and methods used, the status and number of the victims, the discriminatory nature of the attack, the level of resistance and the extent of the attempts to comply with the laws of war are relevant to decide whether a civilian population was the primary object of the attack. The Special Court of Sierra Leone has said, however, that defences relevant to the laws of war relating to the legitimacy and proportionality of an armed attack against a civilian population do not apply as such to crimes against humanity which can take place in times of peace or armed conflict. The targeted population must be predominantly civilian. The presence of some soldiers in the population may not alter the character of the population, depending on the number and whether they are on leave. The presence of soldiers in large numbers may deprive the population of its civilian character.

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119 Prosecutor v Krajnec (Judgment), Case No IT-97-25-T (15 March 2002) [55] ('Krajnec – Trial').
120 Prosecutor v Blažič (Judgment), Case No IT-95-14-A (29 July 2004) [101] ('Blažič – Appeal'); Kunarac – Appeal, above n 26, [100].
122 Kunarac – Trial, above n 26, [421] and [422]; and Kunarac – Appeal, above n 26, [91].
123 Kunarac – Appeal, above n 26, [91].
124 Ibid.
125 Prosecutor v Norman, Fofana and Kondewa (Decision on Motion for Pursuant to Rule 98), Case No SCSL-2004-04-14-T473 (21 October 2005) [66] ('Norman – Decision').
126 Tadić – Trial, above n 26, [638]; Kordić – Trial, above n 26, [180]; Kayîshema – Trial, above n 48, [128]; Kunarac – Trial, above n 26, [425]; and Bagilishema – Trial, above n 48, [80].
127 Blažič – Appeal, above n 120, [115]; and Kunarac – Appeal, above n 26, [91].
128 Blažič – Appeal, above n 120, [115]; and Brđanin – Trial, above n 102, [134].
4.3.2 The meaning of ‘any civilian’

The term ‘any civilian’ can be traced to the Nuremberg Precedent and the fact that crimes against humanity can be committed against persons regardless of their nationality. In the context of internal armed conflict, it means the victim and the accused need not be linked to opposite sides of the conflict.129

The victim of a crime against humanity has to be a member of a ‘civilian population’. This has led to some confusion in the jurisprudence of the ad hoc Tribunals. In times of armed conflict the laws of war have developed a notion of civilian status. It essentially defines ‘civilian’ negatively, such that all who are not combatants are considered to be civilians, but a combatant cannot be a ‘civilian’.130 In Kunarac, the Trial Chamber, following the approach under the laws of war, said in case of doubt a person shall be considered a civilian.131 The Appeals Chamber has, however, said that the Prosecution must discharge the burden of showing that the person was a civilian as well as showing that the accused knew or accepted the risk that the victim was a civilian.132

The difficulty with applying the concept of civilian, as understood by the laws of war, to crimes against humanity is that such crimes may take place in times of peace where the notion of ‘combatants’ versus ‘civilians’ has no meaning. Even in times of armed conflict, crimes against humanity are intended to afford protection to victims who are being persecuted by perpetrators who may, so far as the laws of war are concerned, be on the same side of the conflict. The laws of war are simply inapposite in such a case. This was recognised by the Trial Chamber in Tadić which determined that:

[The] definition of civilians contained in Common Article 3 is not immediately applicable to crimes against humanity because it is a part of the laws or customs or war and can only be applied by analogy. The same applies to the definition contained in Protocol I and the Commentary, Geneva Convention IV, on the treatment of civilians, both of which advocate a broad interpretation of the term ‘civilian’.133

In times of peace, the Trial Chamber in Kayishema said ‘civilian’ excluded those ‘who have the duty to maintain public order and have the legitimate means to exercise force’ such as the rebel forces, the police and the Gendarmerie Nationale.134 Again, it is not clear

129 Kunarac – Trial, above n 26, [423].
131 Kunarac – Trial, above n 26, [426].
132 Blaškić – Appeal, above n 120, [111].
133 Tadić – Trial, above n 26, [639], followed in Limaj – Trial which stated ‘The Chamber acknowledges, however, that the definition of “civilian” employed in the laws of war cannot be imported wholesale into discussion of crimes against humanity’: above n 102, [223].
why a local policeman who is being persecuted by a state in times of peace and as part of an attack on the civilian population could not be a victim of a crime against humanity. The Commission of Experts’ Report (Yugoslavia) said crimes committed against those who use arms to defend themselves or their community, such as a ‘sole policeman or local defence guard’, may still be a victim of a crime against humanity.\(^\text{135}\)

The wording of Article 6(c) of the London Charter,\(^\text{136}\) the Tokyo Charter (which deleted the words ‘civilian population’)\(^\text{137}\) and decisions of the German Courts under CCL 10,\(^\text{138}\) suggest that members of the military may be victims of crimes against humanity, at least of the crime of persecution. The French Cour de Cassation in Barbie held that members of the French Resistance, who were ‘combatants’ and ‘dangerous adversaries’ opposing the Nazis, may be victims of crimes against humanity whatever the form of their opposition.\(^\text{139}\) Hence, it may be persuasively argued, as Cassese does, that under customary international law a victim of a crime against humanity does not have to be a ‘civilian’, as understood by the laws of war, provided the victim’s suffering can be linked to the ‘attack’ as a whole.\(^\text{140}\) For example, a Jewish member of the German Army who is rounded up with other members of the Jewish community, and sent to a concentration camp, may be a victim of a crime against humanity. Of course, if the member of the armed forces is attacked in the course of actual hostilities, the laws of war can provide a defence to any criminal charge, whether domestic or international.

Such an approach is not far removed from the approach of the Tribunals when considering whether or not a victim has to share the same characteristics as the targeted population. The Tribunals have held, consistently with previous case law,\(^\text{141}\) that persons opposing a policy of ideological supremacy can be victims, even if not part of the community targeted on religious or racial grounds.\(^\text{142}\) It will suffice if the victim was targeted as part of the attack or to further the goals of the attack.\(^\text{143}\) For example, if certain Hutus are targeted because of their sympathy for the plight of the Tutsis, or because they oppose the regime responsible for the attack, they can be victims of the crimes against humanity as part of the attack being committed against the Tutsis.

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\(^{135}\) Experts’ Report (Yugoslavia), above n 15, [78].

\(^{136}\) Under Article 6(c), persecution did not need to be committed against a ‘civilian population’.

\(^{137}\) See Chapter 2, section 3.

\(^{138}\) See Chapter 3, section 2.4.

\(^{139}\) Federation Nationale des Désportés et Internés Résistants et Patriotes and Others v Barbie 78 ILR 124 (1988) (Court of Cassation, Criminal Chamber 1983-1985) (‘Barbie’) 137, 139-140.

\(^{140}\) Antonio Cassese, International Criminal Law (2003) 85-91; ‘One fails to see why only civilians and not also combatants should be protected from these rules (in particular by the rule prohibiting persecution), given that these rules may be held to posses a broader humanitarian scope and purpose than those prohibiting war crimes’: Kupreškić – Trial, above n 26, [547]; cf G. Mettraux, International Crimes and the Ad Hoc Tribunals, above n 2, 168-169.

\(^{141}\) See Barbie above n 137, and some of the cases under CCL 10 discussed in Chapter 3, section 2.3.

\(^{142}\) Akayesu – Trial, above n 48, [584].

\(^{143}\) Semanza – Trial, above n 100, [331]; Musema – Trial, above n 48, [209]; Rutaganda – Trial, above n 48, [74]; and Prosecutor v Ndalitibici (Judgment), Case No IT-98-34-T (31 March 2003) [636] (‘Ndalitibici – Trial’); Muhimana – Trial, above n 48, [529].
Some decisions have gone a long way towards adopting this approach. The Tribunals have said ‘civilian population’ should be given a wide definition, but there is a divergence in approach. Prior to the Appeals Chamber’s decision in Blaškić, a number of cases stated that if persons, including members of the armed forces, are no longer taking active part in the hostilities and have laid down their arms or been placed hors de combat by sickness, wounds, detention or any other cause, they are ‘civilians’. Some cases have also followed Barbie, saying resistance fighters and others bearing arms, who are not strictly members of the armed forces, can be part of the ‘civilian population’, either generally, or because they have laid down their arms. This broad approach has some support in the Commission of Experts’ Report (Yugoslavia) which stated that no quick conclusion can be made about whether persons who once bore arms cannot be part of the ‘civilian population’.

The Appeals Chamber in Blaškić, however, stated the fact that a person is not armed or in combat at the time of the act does not accord him civilian status. It said the meaning of ‘civilian’ could be taken from the definition in Article 50, paragraph 1 of Additional Protocol I to the Geneva Conventions, such that members of the armed forces, militia forming part of the armed forces and organized resistance groups complying with the laws of war, cannot claim civilian status. Some cases since this decision, including two decisions of the Special Court of Sierra Leone, have still held that members of the armed forces who are no longer taking active part in the hostilities and have laid down their arms or been placed hors de combat by sickness, wounds or detention are civilians, frequently citing the remarks of the Trial Chamber in Blaškić that ‘[t]he specific situation of the victim

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144 Tadić – Trial, above n 26, [643]; Kupreškić – Trial, above n 26, [547]; Kayışhema – Trial, above n 48, [127] and Kordić – Trial, above n 26, [180].

145 Blaškić – Trial, above n 26, [208]-[214]. It said it is not the status of the victim but the scale and organisation of the crimes that results in crimes against humanity: [208]; and former combatants not engaged in hostilities at the time can be civilians: [548]. See also: Kordić – Trial, above n 26, [180]; Prosecutor v Jelisić (Judgment), Case No IT-95-10-T (14 December 1999) [54] (‘Jelisić – Trial’); Akayesu – Trial, above n 48, [582] and [591]; Musema – Trial, above n 48, [207]; and Rutaganda – Trial, above n 48, [72]. It has also been said that civilians can include persons who once bore arms, ‘so long as the population is ‘predominantly civilian’’: Semanza – Trial, above n 100, [330]; Kayışhema – Trial, above n 48, [127].

146 In Kupreškić – Trial, above n 26, [548]-[549] and Tadić – Trial, above n 26, [636]-[643] it was said that those actively involved in a resistance movement can qualify as victims of crimes against humanity. Mettraux criticises this statement, saying a person killed while undertaking some act of ‘resistance’ is not a civilian: G. Mettraux, International Crimes and the Ad Hoc Tribunals, above n 2, 169. It is the author’s view that the only relevant defence to an assault on a resistance fighter is that under generally applicable principles of international humanitarian law, otherwise, the person may be a victim of a ‘crime against humanity’. Apart from Barbie, above n 139, this approach also has support in the case law of Estonia where resistance fighters to the Soviet regime have been held to be victims of crimes against humanity: see Case of Paulov, Case no. 3-1-1-31-00; Riigi Teataja (The State Gazette) III 2000, 11, 118 (in Estonian) discussed in chapter 6, section 3.5.

147 Blaškić – Trial, above n 26, [214]; and Kordić – Trial, above n 26, [180].

148 Experts’ Report (Yugoslavia), above n 15, [78].

149 Blaškić – Appeal, above n 120, [114].

150 Ibid, [113]; Prosecutor v Kordić (Judgment), Case No IT-95-154/2-A (17 December 2004) [97] (‘Kordić – Appeal’). See also Kumarac – Trial, above n 26, [425] where it said members of the armed forces and other legitimate combatants are not civilians.
at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian".  

4.3.3 The meaning of ‘population’

The word ‘population’, under the Tribunals’ jurisprudence, is taken to imply crimes of a collective nature, where the target is a geographic entity (a state, a municipality or another circumscribed area) and/or a group marked out by some common feature such as race, religion or ethnicity. The Tribunals have said that the entire population of a geographic area need not be the subject of the attack. Further, it appears that the geographical area need not be large. Hence, according to the Prosecution case, the ‘population’ in Tadić, was the Muslim inhabitants in a 20km diameter area; in Kunarac, it consisted of three small municipalities; in Rutaganda, it was the Tutsi inhabitants of two prefectures; in Musema, it was two communes within the Kibuye Prefecture; and in Kupreškić, the attack was on the 600 Muslim inhabitants of the village of Ahmici. One can understand the Prosecution wanting to limit its task, but to allege that each separate ‘attack’ on a village or municipality in Bosnia was the relevant ‘attack’ on a ‘population’ for the purposes of Article 5 of the Statute seems somewhat removed from the reality of the circumstances which prompted the intervention of the Security Council. The Trial Chamber in Tadić said the victim must have been chosen because of their membership of the targeted group, not their individual attributes. Can the systematic killing or persecution of opposition figures, dissidents or opponents during armed conflict, who are selected because of their individual traits, not because of their membership of a ‘group’, be an attack on a ‘civilian population’?

The three accused in Limaj were indicted for crimes against humanity allegedly committed by them and other members of the Kosovo Liberation Army (KLA) from May to around 26 July 1998 against civilians in central Kosovo. In 1998, KLA elements, apart

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151 Blaškić – Trial, above n 26, [214]. For example, Brđanin – Trial, above n 101, [134] said ‘civilians’ included combatants placed hors de combat. In Limaj – Trial, above n 103, [186], the Trial Chamber stated: ‘As a result, the definition of a “civilian” is expansive and includes individuals who at one time performed acts of resistance, as well as persons who were hors de combat when the crime was committed’. In The Prosecutor v Bisengimana (Judgment), Case No ICTR-00-60-1 (13 April 2006) [48] (‘Bisengimana – Trial’), the Trial Chamber continued to follow the jurisprudence of the ICTR (rather than Blaškić – Appeal) to say that persons who are no longer taking active part in the hostilities and have laid down their arms or been placed hors de combat by sickness, wounds, detention or any other cause are ‘civilians’. Meanwhile, the Trial Chamber of the Special Court of Sierra Leone has specifically adopted the broader approach of Blaškić – Trial: see Norman – Decision, above n 125, [58]; and Brima – Decision, above n 103, [42(c)].

152 Tadić – Trial, above n 26, [644]; Kunarac – Appeal, above n 26, [90] and Kunarac – Trial, above n 26, [424].

153 Ibid.

154 See G. Mettraux, International Crimes and the Ad Hoc Tribunals, above n 2, 161, based upon the author’s review of the indictments.

155 Kupreškić – Trial, above n 26, [149].

156 Tadić – Trial, above n 26, [644].

157 Limaj – Trial above n 102.
from attacking the Serbian special forces operating in Kosovo, launched acts of retribution against Serbs suspected of having a role in the political or governmental organs of Serbia, especially the military or police, along with Kosovo Albanian civilians believed to be collaborating with Serbs. The acts included bombing businesses, murdering their proprietors, abducting, detaining, questioning and mistreating civilians. The Trial Chamber stated, without citing any authority in support: 'It is established that the targeting of a select group of civilians – for example, the targeted killing of a number of political opponents – cannot satisfy the requirements of Article 5.' It concluded that there was at most a 'systematic' attempt by the KLA to target both Kosovo Albanian and Serbian civilians believed to be, or suspected of, being associated or collaborating with the Serbian authorities, 'but no attempt to target a civilian population as such'. The Tribunal accepted that 'perceived collaborators abducted by the KLA were entitled to civilian status.' Nevertheless, the small number of abductions involved and the limited level of organisation displayed by the KLA in respect of the alleged 'attack', along with the fact that most persons 'were singled out as individuals' not because of their membership of a 'population', led the Tribunal to conclude that their was no 'attack directed against any civilian population' and it dismissed the charges of crimes against humanity.

Such a view comes close to reintroducing a requirement for a discriminatory attack by virtue of the 'civilian population' test. The reasoning in Limaj may also be hard to reconcile with the Nuremberg Precedent where the charges of crimes against humanity covered acts towards non-Jewish opponents of the Nazi regime which was followed in the French jurisprudence to cover Nazi acts of retribution against the French Resistance. As discussed in section 5, the reason why the KLA did not commit a 'crime against humanity' may lie in the fact that the KLA was itself a non-state resistance movement of limited resources operating against a superior state force. On the other hand, the formulation of the Appeals Chamber in Kunarac suggests that if a Government targets 'enough' opposition leaders, dissidents, or perceived opponents to a regime or de facto power, it may be inferred that the attack is against a 'population'. It has been held that the attacks on

158 Ibid, [196], [199] and [207].
159 Ibid, [196], [199].
160 Limaj – Trial, above n 103, [187]. This does have the support of Mettraux who writes '... the killing of only a select group of civilians – a number of political opponents to the regime – could not be regarded, in principle, as a crime against humanity; in such a case, no population can be said to have been attacked .... The population must form a self-contained group of individuals, either geographically or as a result of other common factors': G. Mettraux, 'Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals For The Former Yugoslavia and For Rwanda', above n 2, 255.
161 Limaj – Trial, above n 103, [211]-[225] and, in particular, [211], [215].
162 Ibid, [224].
163 '... it is not possible to discern from them [the abductions] that the civilian population itself was the subject of an attack, or that Kosovo Albanian collaborators and perceived or suspected collaborators and other abductees were of a class or category so numerous and widespread that they themselves constituted a "population" in the relevant sense': ibid, [216]. See also the text accompanying notes 185 and 186 below.
164 Ibid, [226]-[227].
165 See, for example, Barbie above n 137 and chapters 2 and 3.
166 See Kunarac – Appeal, above n 26, [90]; and followed in Jelisić – Trial, above n 143, [235].
supporters of independence in East Timor and political dissidents in Argentina can be a crime against humanity, even though, no doubt, the individual attributes of the victims played a role in the individuals being targeted. Ratner and Abrams go so far as to speculate that the assassination of a single political figure, such as the killing of Hungarian leader Imre Nagy in 1956 by the Soviet authorities, may suffice if it is intended to threaten the entire ‘civilian population’. On the other hand, the Tribunals have consistently said that the attack must be ‘directed against a civilian “population”, rather than a limited and randomly selected number of individuals’, which appears to imply that some minimal level of scale is required.

4.4 Widespread or Systematic

The Tribunals have tended to follow the commentary of the ILC as to the meaning of these terms: ‘widespread’ refers to large scale action with a significant number of the victims and ‘systematic’ describes the organised nature of the attack and the improbability of their random occurrence. In Akayesu, the Trial Chamber said the ‘concept of widespread may be defined as massive, frequent, large scale action carried out collectively with incredible seriousness and directed against a multiplicity of victims. The concept of systematic may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources’. There is no legal requirement that there be some plan or policy; at best it will be evidentially relevant to determining if the attack was systematic and directed against a

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167 See Chapter 6, section 2.3.
168 See Scilingo in Chapter 6, section 3.13.2.
170 Kunarac – Appeal, above n 26, [90](emphasis added) and see Brdjanin – Trial, above n 101, [134]. In Limaj – Trial, above n 103, it stated ‘the requirement that a “civilian population” be the target of an attack may be seen as another way of emphasising the requirement that the attack be of large scale or exhibit systematic features’: at [218], see also [187].
171 In Bisengimana – Trial, above n 149, [44] the Trial Chamber said widespread is always taken to refer to the scale of the attack and sometimes to the number of victims, adopting the test of “large scale, involving many victims”.
173 Akayesu – Trial, above n 48, [580].
population. The plan need not be conceived ‘at the highest level of the state’ or be explicit, and can be the plan of a non-state group with ‘de facto power’ or (possibly) of a criminal gang.

Whilst the Tribunals have consistently said the two are alternatives, some ambiguity remains about the minimal level of violence required before the threshold can be met. Some Trial Chambers have said ‘systematic’ overlaps with ‘widespread’ and the two will be difficult to separate in practice. According to Mettraux, all but one of the Trial Chambers have found that the attack relevant to the charges was both widespread and systematic. The Yugoslavia Commission of Experts, under the heading, ‘Widespread and systematic nature of acts’, said: ‘It is the overall context of large-scale victimization carried out as part of a common plan or design which goes to the element of systematicity and ‘the number of crimes and perpetrators are characteristically high’. This suggests, consistent with the heading, that the acts must reach a certain scale and be, in substance, both widespread and systematic. The notions of ‘population’ and ‘attack’, as discussed above, can also import a requirement of scale.

Only the attack, not the acts of the accused, must be widespread or systematic. A single act with a single victim could, if part of the overall attack, be a crime against humanity. It is clear, however, that so-called ‘isolated and random acts’ are excluded.

But when is an attack ‘widespread or systematic’? The elasticity of the concept was recognised by the Trial Chamber in Kunarac:

The widespread or systematic nature of the attack is essentially a relative notion. The Trial Chamber must first identify the population which is the object of the attack and, in light of the means, methods, resources and result of the attack upon the population, ascertain whether the attack was indeed widespread or systematic.

The Appeals Chamber said:

174 Muhimana – Trial, above n 48, [527]; Gacumbitsi – Trial, above n 48, [299]; Prosecutor v Ntagura et al. (Judgment), Case No ICTR-99-46-T (25 February 2004) [698] (‘Ntagura – Trial’); Kunarac – Appeal, above n 26, [98]; Vasiljević – Trial, above n 101, [36]; Blaškić – Appeal, above n 119, [100], [120] and Semanzo – Trial, above n 100, [329]-[332].
175 Tadić – Trial, above n 26, [653]-[655]; and Blaškić – Trial, above n 26, [205], citing 1991 ILC Report, above n 163.266 and the 1996 ILC Report, above n 163.
176 Kunarac – Appeal, above n 26, [93]; Blaškić – Appeal, above n 119, [98]; Rutaganda – Trial, above n 48, [67]-[68]; Jelisić – Trial, above n 143, [33]; and Kordić – Trial, above n 26, [178].
177 Blaškić – Trial, above n 26, [207]; Jelisić – Trial, above n 143, [53].
178 G. Mettraux, International Crimes and the Ad Hoc Tribunals, above n 2, 171, citing Tadić – Trial, above n 26, [660]; Akayesa – Trial, above n 48, [652]; Kayishema – Trial, above n 48, [576]; Rutaganda – Trial, above n 48, [417]; Jelisić – Trial, above n 143, [56]-[57]; Kunarac – Trial, above n 26, [578] (saying that only an express finding of systematic was made); Kordić – Trial, above n 26, [800] and [806]; Prosecutor v Krstić (Judgment), Case No IT-98-33-T (2 August 2001) [482]. In the author’s view it is clear that in all these cases there was a finding of a course of conduct that could be regarded as a ‘widespread’ attack.
179 Experts’ Report (Yugoslavia), above n 15, [84]-[85].
180 Kordić – Appeal, above n 148, [94] and Kunarac – Appeal, above n 26, [96].
181 Kordić – Appeal, above n 148, [94] and Blaškić – Appeal, above n 119, [101].
182 Kordić – Appeal, above n 148, [94]; Tadić – Trial, above n 26, [648].
183 Kunarac – Trial, above n 26, [430].
The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes, could be taken into account to determine whether the attack satisfies either or both requirements of a ‘widespread’ or ‘systematic’ attack vis-à-vis this civilian population.\(^{184}\)

The difficulty with this ‘relative’ approach is that it is both vague and suspect on moral grounds. It suggests that if 100 men in a village of 300 are killed a crime against humanity has occurred, but not if it occurs in a city of a million people. The notion of a ‘widespread or systematic’ attack is further criticised in section four.

In Limaj, where the alleged attack by the KLA consisted of reports of only a few killings or disappearances, along with abductions of around 140 civilians,\(^{185}\) the Trial Chamber concluded ‘in the context of the population of Kosovo as a whole the abductions were relatively few in number and could not be said to amount to a “widespread” occurrence for the purposes of Article 5 of the Statute.’\(^{186}\)

### 4.5 Mens Rea

The perpetrator needs to know that there is an attack on the civilian population and that her or his acts comprise part of the attack.\(^{187}\) The perpetrator need not know the details of the attack or approve of the context in which his or her acts occur.\(^{188}\) It is irrelevant whether the accused’s acts were directed against the targeted population or merely against the one victim – it is the attack, not the acts of the accused, which must be directed against the targeted population.\(^{189}\) The accused need neither support the goals of the attack\(^{190}\) nor act out of any discriminatory motives.\(^{191}\) The accused may act out of purely personal motives unrelated to furthering the attack, provided the accused intended to injure the victim and the perpetrator was aware that his or her acts will, viewed objectively, form part some attack on a civilian population.\(^{192}\) This may lead to some odd results. For example, if two persons are charged with rape – both acting out of private motives – one will have committed a crime against humanity, if aware of the attack at the time, and the other will be innocent of that crime, if unaware of the attack. Difficulties may arise as to proof of that

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184 Kunarac – Appeal, above n 26, [95]; and Brđanin – Trial, above n 101, [136].
185 Limaj – Trial above n 103, [209].
186 Ibid, [210].
187 Kordić – Appeal, above n 148, [99]; Blaškić – Appeal, above n 119, [124]; Kunarac – Appeal, above n 26, [99]; Tadić – Appeal, above n 26, [248]; Bagilishema – Trial, above n 48, [94].
188 Kunarac – Appeal, above n 26, [102] and Limaj – Trial above n 103, [190].
189 Kordić – Appeal, above n 148, [99]; Tadić – Appeal, above n 26, [248]; and Kunarac – Appeal, above n 26, [103].
190 Kordić – Appeal, above n 148, [99]; Blaškić – Appeal, above n 119, [124]; Kunarac – Appeal, above n 26, [103]; Tadić – Appeal, above n 26, [248]; and [255]-[270]; Semanza – Trial, above n 100, [3] and [223]; Ntakirutimana – Trial, above n 48, [803]; Bagilishema – Trial, above n 48, [94]; Musema – Trial, above n 48, [206]; Akayesu – Appeal, above n 52, [252] and [269] and Limaj – Trial above n 103, [190].
191 Tadić – Appeal, above n 26, [282]-[292]; Akayesu – Appeal, above n 52, [467].
192 Kordić – Appeal, above n 148, [99]; Tadić – Appeal, above n 26, [248], [255]-[270].
knowledge. The Tribunals have said because ‘explicit manifestations of criminal intent are... often rare’, ‘the requisite intent may normally be inferred from relevant facts and circumstances’. The required knowledge has been the subject of three formulations:
(a) ‘knowledge’ (without explaining whether this can only mean actual knowledge),
(b) ‘actual or constructive knowledge’ (though it is not clear what ‘constructive knowledge’ means in this context), or
(c) actual knowledge or, at least, ‘taking the risk that his or her acts will further the attack’.

The Appeals Chamber in Blaškić referred to the text of ‘knowledge’ but cited the Appeals Chamber decision in Kunarac which in turn referred to the accused taking ‘the risk that his acts were part of the attack’. For the crime of ordering, it held the required mens rea was acting with the awareness of the substantial likelihood that a crime will be committed and merely accepting a risk of a crime being committed was not enough. This may also apply to the accused’s knowledge that his acts are part of the attack. The Trial Chamber in Limaj, citing Blaškić stated, ‘It does not suffice that an accused knowingly took the risk of participating in the implementation of a policy’.

5. A CRITIQUE OF THE AD HOC TRIBUNALS’ TREATMENT OF CRIMES AGAINST HUMANITY

On the face of the texts, the definitions of crimes against humanity in Article 5 of the ICTY Statute, Article 3 of the ICTR Statute and Article 7 of the ICC Statute (discussed in chapter 5) are very different. These differences have been minimised by the ad hoc Tribunals characterising the need for a link to armed conflict (in the ICTY Statute) and the need for an attack on discriminatory grounds (in the ICTR Statute) as being merely jurisdictional requirements. Instead, the notion of a ‘widespread or systematic attack directed against any civilian population’ has become the centrepiece of the definition of crimes against humanity in the law of the ad hoc Tribunals. How did this come about?

According to the Tribunals they have merely been interpreting this crime in accordance with existing customary law. For example, the Trial Chamber in Tadić stated: ‘As the first international tribunal to consider charges of crimes against humanity alleged to have occurred after the Second World War, the International Tribunal is not bound by past doctrine but must apply customary international law as it stood at the time of the

193 Prosecutor v Kayishema (Judgment (Reasons)), Case No ICTR-95-1-A (1 June 2001) [159]; followed in Prosecutor v Kamuhanda (Appeal Judgment), Case No ICTR-99-54A-A (19 September 2005) [87]. Evidence of knowledge depends on the facts of a particular case; as a result, the manner in which this legal element may be proved may vary from case to case: see Blaškić – Appeal, above n 119, [126] and Limaj – Trial, above n 103, [190].
194 Kordić – Appeal, above n 148, [99]; Tadić – Appeal, above n 26, [248]; and Blaškić – Appeal, above n 119, [124] and [126]; Gacumbitsi – Trial, above n 48, [302].
195 Kordić – Trial, above n 26, [185]. Kupreškić – Trial, above n 26, [556]-[557]; Tadić – Trial, above n 26, [659], Kayishema – Trial, above n 48, [133]-[134]; Musema – Trial, above n 48, [206].
196 Kunarac – Appeal, above n 26, [102]; and Knorjelac – Trial, above n 118, [59].
197 Blaškić – Appeal, above n 119, [124].
198 Ibid, [42].
199 Limaj – Trial, above n 103, [190].
offences. The ICTY has consistently accepted that the principle *nullum crimen sine lege* applies, irrespective of the words of the Statutes. It has said that the crimes charged must rest ‘on firm foundations of customary law’ and be defined with sufficient clarity for them to have been reasonably foreseeable and accessible at the date of the offence. Two criteria are traditionally necessary to evidence customary international law: general state practice and *opinio juris* – the acceptance of the practice as law. Hence, it is the combined effect of the Nuremberg Trial, supported by 23 nations, along with the *opinio juris* of Resolution 95(1) which provided the basis for the customary law status of crimes against humanity with its war nexus. Statements in binding treaties intended to be of universal application or codify principles of international law are often relied upon to evidence customary law, at least in the absence of contrary state practice. Hence, genocide as a customary international crime is based principally upon the well-ratified Genocide Convention of 1948, along with the incorporation of its provisions by some states. In the field of war crimes, it is traditional to look to the content of military manuals, the practice of military tribunals, and the content of relevant treaties, such as the four Geneva Conventions, to ascertain the content of war crimes under customary law.

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200 Tadić – Trial, above n 26, [654].
201 See Prosecutor v Hadžihasanović et al. (*Jurisdiction in Relation to Command Responsibility*), Case No IT-01-47-AR72 (16 July 2003) [55] (‘Hadžihasanović – Jurisdiction’); Blaškić – Appeal, above n 119, [110], [139] and [141]; Vasiljević – Trial, above n 101, [193], [199], [202]; Prosecutor v Milutinovic et al. (*Decision on Motion Challenging Jurisdiction*), Case No IT-99-37-AR72 (21 May 2003) [9]-[10]. The ICTR has at times purported to go beyond customary law and has relied on treaty law binding on Rwanda and has also referred to Rwandan domestic law: Akayesu – Trial, above n 48, [604]-[609]; Kayishema – Trial, above n 48, [156]-[158], [597]-[598]; Musema – Trial, above n 48, [242]; and Semanza – Trial, above n 100, [353]. The Appeals Chamber, however, has accepted that the conduct must be clearly defined under international criminal law: Prosecutor v Bagilishema (*Judgment (Reasons)*), Case No ICTR-95-1A-A (3 July 2002) [34]. In Kordić – Appeal above n 150, [44]-[46] the Tribunal appeared to suggest that it was enough if a treaty was binding on all the parties concerned which made the conduct criminal, though it may be regarded as difficult to see how a treaty can provide for individual criminal responsibility outside of customary law: see G. Mettraux, *International Crimes and the Ad Hoc Tribunals*, above n 2, chapters 2 and 3; Thedor Meron, ‘Revival of Customary Humanitarian Law’ (2005) 99 A/JIL 817.
203 *Affirmation of the Principles of International Law Recognized by the Charter Of The Nürnberg Tribunal*, GA Res 95(l), UN GAOR, 1st sess, 2nd pt, 188, UN Doc A/64/Add.1 (1946).
Alternatively, the resolution may be seen as an interpretative statement under the UN Charter, binding on all members: see chapter 2, section 7.
For the prosecution of Nazi war criminals between 1946 and 1993 moral righteousness generally provided the justification for the ready acceptance of crimes against humanity as a pre-existing customary international crime before 1945, though with widely different definitions. In discerning the customary law elements of crimes against humanity without a war nexus, the ad hoc Tribunals have resorted to opinio juris and subsidiary sources, sometimes in a selective way. At first, the Trial Chamber in Tadić relied heavily upon the report of the UNWCC and the work of the ILC (which at best is a subsidiary source), and for the requirement of a discriminatory intent, it referred to the remarks of some members of the Security Council at the time, rather than the text of the Statute. The Appeals Chamber then took a literal approach to the Statute and said a discriminatory motive was not necessary, despite the content of Article 3 of the ICTR Statute and the statements of governments in 1993-4 which suggested an attack on ‘national, political, ethnic, racial, or religious grounds’ was required. One suspects the Appeals Chamber may have been influenced by the definition in Article 7 of the ICC Statute adopted at the Rome Conference in July 1998 which does not require an attack on discriminatory grounds. Other Tribunals have explicitly relied upon the ICC Statute as evidence of opinio juris which for some issues may be taken to crystallise customary law. The validity of such an approach for Article 7 of the ICC Statute is considered in chapter 5.

Then the Appeals Chamber in Kunarac went back to the Nuremberg Precedent to rule that the existence of a ‘policy’ is not a legal requirement, despite the notion of a ‘state policy’ having much support in the literature after Nuremberg, as well as ‘a State or organizational policy’ being a requirement under Article 7 of the ICC Statute. It is not entirely persuasive to use part of the Nuremberg Precedent (being the absence of a need for a discriminatory animus or a ‘policy’ in Article 6(c) of the London Charter) as evidencing existing customary law, but to reject its central aspect – the war nexus. For example, chapter 2 argued that the Nuremberg Precedent does not include any requirement for a ‘widespread or systematic attack directed against any civilian population’ in the definition of crimes against humanity under Article 6(c) of the London Charter. This only arose as an

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206 See Chapter 3 and, for example, United States v Otto Ohlendorf ("The Einsatzgruppen Case") 4 Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No 10 Trials, 497: ‘Humanity is the sovereignty which has been offended and a tribunal is invoked to determine why.’ Bassiouni says: ‘with respect to “crimes against humanity”, the conduct was so abhorrent that technical legal rigor was swept aside by emotional reactions.’ M.C. Bassiouni, Introduction to International Criminal Law (2003) 204.

207 Members are appointed to the ILC in their private capacity and, when codifying existing principles, their work is often afforded great weight as the views of eminent experts in the field. For the reasons discussed in Chapter 3, section 3.3 there are difficulties in relying upon the ILC Draft Codes as evidence of the codification of the customary law definition of crimes against humanity at the time of the Draft Codes. See also Hadžihasanović – Jurisdiction, above n 188 (Separate and Partially Dissenting Opinion of Judge Hunt), [26] where Judge Hunt was reluctant to place too much weight on the work of the ILC as evidencing customary norms and his remarks to similar effect in Vasićević – Trial, above n 101, [200].

208 See sections 2.1 and 3.1 above.

209 Prosecutor v Furundžija (Judgment), Case No IT-95-17/1-T (10 December 1998) [227]; cf Kupreškić – Trial, above n 26, [580], where the Chamber said Article 7 ‘may’ be indicative of opinio juris.
alternative requirement in lieu of the war nexus in the deliberations of the Secretary General and the Security Council in 1993-4.

As Mettraux remarks: 'Regrettably, many a Chamber of the ad hoc Tribunals has been too ready to brand norms as customary, without giving any reason or citing any authority for that conclusion.'\textsuperscript{210} The difficulty for the Tribunals of course was that prior to 1993 there existed little state practice beyond the Nuremberg Precedent and the prosecution of some Nazi war criminals. In the end, it seems that the 'rules laid down by judges have generated custom, rather than custom [which has] generated the rules'.\textsuperscript{211} This creates a continual tension with the prohibition against \textit{ex post facto} criminal punishment which the Tribunals have accepted applies to their work.

What the Tribunals have overlooked in terms of state practice, which was the real driver of the concept of crimes against humanity in 1993-94, was the practice of the Security Council itself. It was the Security Council's reinterpretation of 'threats to international peace' which led to the international criminalisation of internal atrocities and the application of the concept of 'crimes against humanity' to situations not involving war or aggression. This conclusion is taken up further in chapter 7, when an attempt is made to assess the current status of crimes against humanity under customary law.

If one examines the central test of crimes against humanity under the law of the ad hoc Tribunals – a 'widespread or systematic attack directed against any civilian population' – a number of criticisms of the test can be made. As Bassioumi points out, the requirement is subjective and vague.\textsuperscript{212} It is largely indeterminate. It contains an unarticulated premise of both scale and seriousness. But against what \textit{objective} criteria is it to be measured? The principle \textit{nullum crimen sine lege} requires that a crime be sufficiently certain so as to be reasonably accessible and foreseeable for an accused.\textsuperscript{213} The 'widespread or systematic attack' requirement does not easily meet this test. Prior to the ICTR Statute, the requirement that there be a 'widespread or systematic attack against any civilian population' was not well grounded in state practice. It did not appear in any international source until the Secretary-General's Report on the ICTY Statute and the comments of some members of the Security Council on 25 May 1993,\textsuperscript{214} though the definition in the 1991 ILC Draft Code does contain similar elements.\textsuperscript{215} The Trial Chamber in \textit{Semanza} noted that the case-law of the Tribunals did not 'fully articulate' the basis of state custom in support of the 'widespread or systematic' test, saying the Trial Chamber in \textit{Tadić} had reviewed the 'limited practice' on this issue.\textsuperscript{216}

If taken literally, the 'widespread or systematic' requirement has radical consequences. A spontaneous wave of 'widespread', but disorganised violence, such as race riots, will be a 'crime against humanity'. Such riots, however, do not require any international response if the territorial state is both willing and able to respond. Similarly, a merely 'systematic' attack is not always a crime of international concern. Examples would include a campaign

\textsuperscript{210} G. Mettraux, \textit{International Crimes and the Ad Hoc Tribunals}, above n 2, 15.

\textsuperscript{211} J.C. Gray, \textit{The Nature and Sources of the Law} (1931) 297.

\textsuperscript{212} M.C. Bassioumi, above n 21, 244.

\textsuperscript{213} See above n 201; and chapter 7, section 2.1 where the \textit{nullum crimen} principle is further considered.

\textsuperscript{214} See text accompanying notes 18 and 25.

\textsuperscript{215} See Chapter 3, section 3.3.2(iii).

\textsuperscript{216} \textit{Semanza – Trial}, above n 100, [329].
of killings by the mafia in Italy or the IRA in the UK. This is particularly so if the killings are on a small scale. If the state is willing and able to respond the need for an international reaction does not arise.

In terms of the analysis presented in chapter 3, what is missing from the Tribunals’ treatment of crimes against humanity is any link with either ‘threats to international peace’ or ‘the impunity principle’. This is of particular relevance when considering whether there is a need for some link between the ‘attack’ as a whole and either a state or a state-like entity, particularly in the case of civil war or internal armed conflict. This is not included as a requirement in the five sub-elements set out in *Kumarac*. Acting in the interests of the Axis powers was a requirement under the London Charter. As discussed in Chapter 3, most sources and scholars prior to the ICTY Statute suggested that some form of state policy, toleration or indifference, if not actual state participation, was an element of crimes against humanity. This was the view of the Trial Chamber in *Kupreškić*. Some more recent writings, consistent with the approach of the Trial Chamber in *Tadić*, suggest this requirement is outdated as it fails to recognize the proliferation of powerful non-state actors. *Bassiouni* argues ‘state action or policy’ generally remains a necessary element but that it may extend to state like entities which share the same legal characteristics as state actors such as having control over territory or people. *Cassese* argues that acquiescence or toleration by a state or de facto authority or an organised political group is at least required under customary law.

One can understand equating a ‘state-like’ organization, which has de facto control over territory or which is able to act with impunity, with recognised central governments. What remains more controversial is the extent to which a terrorist group or a criminal gang, particularly if acting out of non-political motives, can be the author of a crime against humanity when the states involved are actively attempting to bring the perpetrators to trial. The question remains unresolved in the jurisprudence of the *ad hoc* Tribunals. Generally, the *ad hoc* Tribunals, following the work of the ILC in their 1991 and 1996 Draft Codes, have suggested that the author of an attack must at least be a ‘state, group or organisation’ and whether this can include a criminal gang or terrorist group has not been ruled upon. Some commentators have suggested that crimes against humanity can apply to the conduct of terrorist groups such as Al-Qaeda’s attack on September 11, 2001. With the exception of *Limaj*, the *ad hoc* Tribunals have only dealt with ‘attacks’ in Yugoslavia and Rwanda which, on any view, were both widespread and systematic and

217 *Kupreškić – Trial*, above n 26, [552]-[555].
219 M.C. Bassiouni, above n 21, 273-275.
220 A. Cassese, above n 138, 64.
222 *Tadić – Trial*, above n 26, [654]-[655].
224 *Limaj – Trial* above n 103.
were carried out with the support and active encouragement of states or local authorities with de facto power over people and territory. According to the Trial Chamber in Limaj:

Special issues arise, however, in considering whether a sub-state unit or armed opposition group, whether insurrectionist or trans-boundary in nature, evinces a policy to direct an attack. One requirement such an organisational unit must demonstrate in order to have sufficient competence to formulate a policy is a level of de facto control over territory.225

The Kosovo Liberation Army was found to be ‘a guerrilla force engaged in limited combat with superior, conventional military forces’ and with de facto control over different areas in Kosovo for short periods of time.226 Therefore, in theory, it was found to be an ‘organisation or group’ capable of formulating a ‘policy’ to commit ‘crimes against humanity’.227 The Trial Chamber, however, noted:

The nature of the “attack” alleged by the Prosecution in this case covers a set of circumstances considerably different from those considered previously by this Tribunal when dealing with the application of Article 5. Due to structural factors and organisational and military capabilities, an “attack directed against a civilian population” will most often be found to have occurred at the behest of a State. Being the locus of organised authority within a given territory, able to mobilise and direct military and civilian power, a sovereign State by its very nature possesses the attributes that permit it to organise and deliver an attack against a civilian population; it is States which can most easily and efficiently marshal the resources to launch an attack against a civilian population on a “widespread” scale, or upon a “systematic” basis. In contrast, the factual situation before the Chamber involves the allegation of an attack against a civilian population perpetrated by a non-state actor with extremely limited resources, personnel and organisation.228

The Trial Chamber’s conclusion that there was no ‘widespread or systematic attack directed against any civilian population’ by the KLA appears to have been influenced by the fact that the KLA was a non-state entity confronting superior state forces. For example, it stated, ‘the existence of an attack is most clearly evident when a course of conduct is launched on the basis of massive state action’ and ‘[t]he existence of a “policy” to conduct an attack against a civilian population is most easily determined or inferred when a State’s conduct is in question.’229 How such an analysis fits in with the statement of principles set out by the Appeals Chamber in Kunarac remains unclear.

The question of the customary law definition of crimes against humanity, the requirement for a ‘widespread or systematic attack directed against any civilian population’ and whether a terrorist group or other non-state actors can be an author of a crime against humanity, and in what circumstances, are considered further in chapter 7.

6. CONCLUSION

225 Limaj – Trial above n 103, [213], citing Kupreškić – Trial, above n 26, [552].
226 Ibid, [195], [214].
227 Ibid.
228 Ibid, [191].
229 Ibid, [194], [212].
States, courts and scholars frequently cite the judgments of the Tribunals for the meaning of crimes against humanity under customary law.\textsuperscript{230} Aspects of its jurisprudence remain controversial, however, particularly where they diverge from Article 7 of the ICC Statute. It must be the extent and validity of the reasoning which conditions the precedential value of the court’s pronouncements. Its judgments on the elements of crimes against humanity under customary international law, including the need for a widespread or systematic attack against a civilian population instead of a war nexus, are not always persuasively reasoned. Nevertheless, the undoubtedly achievement of the \textit{ad hoc} Tribunals has been the development of recognisable legal principles which have fleshed out what was at best a skeleton of a criminal offence with many unresolved elements. Many of these principles are undoubtedly here to stay. In the 1950’s, Schwarzenberger was able persuasively to argue, notwithstanding the Nuremberg Precedent, that an ‘international criminal law’ does not exist.\textsuperscript{231} The work of the ICTY and the ICTR demonstrates beyond argument that an international criminal law does exist and it includes at the forefront crimes against humanity.


CHAPTER FIVE

ARTICLE 7 OF THE STATUTE FOR THE INTERNATIONAL CRIMINAL COURT

For as long as no permanent international criminal court exists 'international criminal law is admittedly beclouded by doubts'.

1

1. INTRODUCTION

On 17 July 1998, the Statute of the International Criminal Court ('ICC Statute') was adopted at the Rome Conference. The Statute defines crimes against humanity at Article 7. It entered force on 1 July 2002, but the International Criminal Court ('ICC') is yet to hear its first case. One cannot, of course, underestimate the historical significance of Article 7 and its definition of crimes against humanity. It had been 53 years since the crime was defined in an international treaty. It was the first ever attempt at a global treaty definition.

That said, there is a temptation to regard Article 7 as the most authoritative statement of this difficult crime's definition in customary law. On this view, all of the complex issues that have bedevilled the notion of crimes against humanity in international law -- such as the status of the war nexus or the requirements for a discriminatory intent, state action or policy or a special mens rea -- can now be regarded as resolved.

Such a view is both too simplistic and premature. It ignores that states at the Rome Conference were not called upon to codify the crimes' definition or even consider its application beyond the confines of the ICC. Further, the ad hoc Tribunals have not accepted that Article 7 is entirely reflective of international customary law. In the end, the actual weight to be given to Article 7 of the ICC Statute has to be carefully analysed along with other sources such as state practice since the Rome Conference.

This Chapter outlines the negotiations leading up to the Rome Conference and the process of drafting Article 7 at that Conference. The chapeau elements of Article 7 are then analysed with particular emphasis being placed on the novel and controversial

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1 Yoram Dinstein, 'International Criminal Law' (1975) 5 Israel Year Book on Human Rights 55, 73.
3 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, done in London, England, opened for signature 8 August 1945, art 6(c), 82 UNTS 280 (entered into force 8 August 1945), to which was annexed the Charter which established the Nuremberg Tribunal (hereinafter the London Agreement and London Charter respectively). The ICTY and ICTR Statutes are Security Council Resolutions, not international treaties as such.
aspects of those elements. There then follows an analysis of the underlying offences in Article 7 which are set out in more detail than in previous international instruments. Some preliminary, but not final, remarks are then made about the relationship between Article 7 and customary international law as at the time of the Rome Conference. This is intended to provide the background for Chapter 6 which considers state practice, other than that of the Security Council, since the Rome Conference. Chapter 7 then provides a final analysis of the current contours of the concept of crimes against humanity as a matter of international customary law with particular emphasis being placed on the relevant practice of the Security Council as the real driver of customary law in the field.

2. THE DRAFTING OF ARTICLE 7

2.1 Preparing for the Rome Conference

After the ILC submitted its Draft Statute for an International Criminal Court in 1994 (which merely referred to ‘crimes against humanity’ without definition), the General Assembly established an Ad Hoc Committee to review the Draft Statute. The Committee expressed the view that the elements of the offence needed to be specified in Statute, but when it came to debating the Draft Statute’s definition of crimes against humanity, some delegations wanted to keep a nexus to armed conflict (saying customary law was ‘questionable’ on this issue), some emphasised ‘usually’ a ‘widespread or systematic’ attack was required and others said the need for a discriminatory motive was ‘questionable and unnecessary’. In the end, the Ad Hoc Committee ‘discussed’ but did not draft a statute.

The General Assembly then established the Preparatory Committee which met five times between 1995 and 1998. Almost all states on the Committee wanted a revision of the definition of crimes against humanity in Article 6(c) of the London Charter. The

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4 Report of the International Law Commission on the Work of its Forty-Sixth Session, UN GAOR, 49th sess, Supp 10, [75] and [77], UN Doc A/49/10 (1994) (hereinafter 1994 ILC Report), which stated that the crimes were not defined because of ‘unresolved issues about the definition’. For discussion see J. Crawford, ‘The ILC Adopts a Statute for an International Criminal Court’ (1995) 89 AJIL 404.


6 Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN GAOR, 50th sess, Supp. 22, [52], [57], [77]-[79] UN Doc A/50/22 (1995) (hereinafter Ad Hoc Committee Report); B. Broomhall, above n 5, 32; P. Hwang, above n 1, 492.


United States took the lead by submitting a paper⁹ and arguing at the first session that there was ‘no sound reason in theory or precedent’ to require that the crimes be linked with armed conflict.¹⁰ At the fifth session the US repeated this position.¹¹ A majority of delegates agreed, but some opposed this view.¹² Whilst a large number of states supported the criterion of ‘widespread or systematic’, some states thought crimes against humanity ought be both ‘widespread and systematic’¹³ and the difference in these views was not resolved in the Committee’s 1996 draft definition.¹⁴

In 1997, a working group of the Preparatory Committee produced a definition in two paragraphs. The first said:

For the purposes of the present Statute, any of the following acts constitutes a crime against humanity when committed [as part of a widespread [and] [or] systematic commission of such acts against any population]; [as part of a widespread [and] [or] systematic commission of such acts against any [civilian] population [committed on a massive scale in armed conflict on political, philosophical, racial, ethnic or religious grounds or any other arbitrarily defined grounds].¹⁵ (Brackets in original)

The second paragraph listed the relevant acts, which went beyond the crimes in Article 6(c) of the London Charter to include forcible transfers of population (meaning within national borders), detention or imprisonment, torture, rape and other forms of sexual abuse and the forced disappearance of persons.¹⁶ The text of both paragraphs was incorporated largely unchanged into the Committee’s Draft Statute in 1998.¹⁷ Hence, despite the Committee’s work between 1995 and 1998, by the time of the Rome Conference the definition of crimes against humanity was not resolved.¹⁸

2.2 The Rome Conference

A total of 160 states, 33 international organisations and 236 non-governmental organisations (NGO’s) participated in the Rome Conference, held from 15 June to 17

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¹¹ See D.J. Scheffer, above n 9, 14.
¹⁶ Ibid, 5; C. Hall, ‘The Third and Fourth Sessions’, above n 7, 127-128. The definitions of many of these crimes, however, were still unresolved.
¹⁷ Report of the Preparatory Committee of the Establishment of an International Criminal Court, Draft Statute and Draft Final Act, UN Doc A/Conf.183/2/Add 1 (1998); see also P. Hwang, above n 2, 494; M.C. Bassiouni, above n 5, 176; B. Broomhall, above n 5, 71.
July 1998. On 17 June 1998, the definition of crimes against humanity was discussed in the Committee of the Whole. Some states (including China, India, Russia and some Middle Eastern states) expressed the view that crimes against humanity ought be limited to situations of armed conflict. There was considerable disagreement over whether the criteria of ‘widespread’ and ‘systematic’ should be treated cumulatively or as alternatives. The French delegate raised the requirement of a discriminatory motive, but three delegates spoke against this.

The definition was next discussed in a working group on 22 June. Two states (China and Turkey) still sought a link with armed conflict. The treatment of ‘widespread’ and ‘systematic’ as either alternative or cumulative criteria continued to be debated with two states proposing deletion of ‘widespread’ altogether. The ‘Like-Minded’ group argued that the conjunctive test was established by existing authorities. According to Robinson, ‘another sizable contingent, including some permanent members of the Security Council and many delegations from the Arab Group and the Asian Group, pointed out that, as a practical matter, a conjunctive test would be overinclusive... because a spontaneous wave of widespread, but completely unrelated crimes does not constitute “crimes against humanity”’. The UK argued that planning by a government or an organisation ought be a requirement, and the US proposed that ‘systematic’ means an ‘attack that constitutes or is part of, a preconceived plan or policy, or repeated practice over a period of time’. France no longer argued for a discriminatory motive which was not pursued by any other state.

20 See P. Hwang, above n 2, 494-495: based on the author’s notes of the Proceedings. The Committee of the Whole was the forum where government delegations expressed their general positions on issues, which were then referred to working groups and coordinators: P. Kirsch and J.T. Holmes, above n 18, 3 n5.
22 P. Hwang, above n 2, 495.
23 Ibid.
24 Ibid. 496.
25 Ibid.
26 Ibid.
27 An informal group of more than 60 countries that were generally in favour of a strong and independent court: P. Kirsch and J.T. Holmes, above n 18, 4; T.L.H. McCormack, above n 2, 181 n 6.
28 D. Robinson, above n 19, 47; T.L.H. McCormack, above n 2, 186.
29 D. Robinson, above n 19, 47.
31 Ibid.
On 1 July, when matters appeared to have reached a standstill, Canada issued a *Background Paper on Some Jurisprudence on Crimes against Humanity*. It argued (relying on the *Tadić* Jurisdiction Decision) that customary international law no longer required a link with armed conflict and (relying on the *Tadić* Trial) that, whilst ‘widespread’ or ‘systematic’ ought be alternatives, all crimes must be carried out pursuant to some governmental, organisational or group policy. It put forward a compromise chapeau which read as follows:

(1) For the purpose of the present Statute, a crime against humanity means any of the following acts when knowingly committed as part of a widespread or systematic attack against any civilian population ...

(2) For the purpose of paragraph 1: (a) ‘attack against any civilian population’ means a course of conduct involving the commission of multiple acts referred to in paragraph 1 against any civilian population, pursuant to or knowingly in furtherance of a governmental or organisational policy to commit those acts'.

The requirement of a governmental or organisational policy as a prerequisite of all crimes against humanity was subsequently rejected by the ICTY and the ICTR. One may speculate whether the final outcome of the Rome Conference may have been different if this had been known at the time.

On 1 July, at an informal session, some delegations thought the Canadian draft went too far, whilst others thought it did not go far enough. In the first camp, China continued to press for the nexus with armed conflict. In addition some delegations feared the term ‘commission of multiple acts’ – which could merely be more than one act – did not ensure that the attack was committed on a ‘massive’ scale. In addition, according to Robinson:

... another sizable group of delegations, including some Permanent members of the Security Council and many delegations from the Arab Group and the Asian Group, pointed out that, as a practical matter, a disjunctive test would be overinclusive. For example, a legitimate question was raised whether the “widespread” commission of crimes should be sufficient, since a spontaneous wave of widespread, but completely unrelated crimes does not constitute a “crime against humanity” under existing authorities.

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32 P. Kirsch and J.T. Holmes, above n 18, 5.
33 Canada’s legal adviser, Kirsch, chaired the Committee of the Whole: B. Broomhall, above n 5, 72.
35 *Prosecutor v Tadić (Defence Motion for Interlocutory Appeal on Jurisdiction)*, Case No IT-94-1-AR72 (2 October 1995); see Chapter 4, section 3.1.
36 *Prosecutor v Tadić (Trial Chamber Judgment)*, Case No IT–94–1–T (7 May 1997).
37 P. Hwang, above n 2, 497.
38 Ibid.
40 P. Hwang, above n 2, 497-498.
41 Ibid.
42 Robinson, above n 19, 47.
In the second camp, Costa Rica raised concerns about the difficulties a prosecutor would face in having to prove the existence of a policy in all cases.\textsuperscript{43} On 3 July, the Chair of the Informals on Crimes Against Humanity, whilst noting that some delegates had problems with ‘knowingly’ and ‘multiple acts’, adopted it.\textsuperscript{44}

On 6 July, recognising that agreement would not be reached on a range of controversial issues, the Bureau of the Committee of the Whole released a Discussion Paper aimed at a compromise package.\textsuperscript{45} The definition of attack was revised and it read:

7(2) ... ‘Attack against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack.\textsuperscript{46}

The changes from the Canadian proposal were subtle: ‘commission of multiple acts’ became ‘multiple commission of acts’ (because otherwise the expression may be taken to require more than one separate category of crimes in paragraph 1);\textsuperscript{47} the word ‘knowingly’ was removed (probably because of a fear that it may mean the prosecutor would have to prove that all parties behind the attack were acting with knowledge of the policy);\textsuperscript{48} ‘policy to commit such acts’ became ‘policy to commit such attack’ (so that the policy need not encompass the specific crimes charged such as rape);\textsuperscript{49} and ‘governmental’ became ‘State’.

Apart from a minor grammatical change,\textsuperscript{50} the draft became Article 7 of the ICC Statute which was adopted by 121 votes to 8 with 23 abstentions.\textsuperscript{51} The Article and some other provisions of the Statute are set out in Appendix 1.

2.3 Conclusion

The immediate reaction of most human rights commentators to Article 7, and in particular its definition of ‘attack against any civilian population’, was to criticise it for defining crimes against humanity more narrowly than that required under customary law.\textsuperscript{52} On the other hand, the definition required neither a link to armed conflict nor a

\textsuperscript{43} Ibid.

\textsuperscript{44} At the Rome Conference, there were two types of working groups, the formal and the informal. The “Informals”, as it became known, commissioned subcommittees for various topics, one being a subcommittee on crimes against humanity: P. Kirsch and J.T. Holmes, above n 18. McCormack says the Chair insisted on the removal of the war nexus over the objection of at least two states: T.L.H. McCormack, above n 2, 185.


\textsuperscript{46} Bureau Discussion Paper, above n 45, 2-3.

\textsuperscript{47} D. Robinson, above n 19, 48 n 26.


\textsuperscript{49} This was the concern of the Women’s Caucus: see H. von Hebel and D. Robinson, above n 2, 95-96 n 47

\textsuperscript{50} The final ‘and’ in paragraph 1 was substituted with a comma: see P. Hwang, above n 2, 501 n 259; P. Kirsch and J.T. Holmes, above n 18, 6-8.

\textsuperscript{51} The vote was not recorded but it is known that states which opposed the draft included the United States, India, China and Israel.

\textsuperscript{52} For example, such complaints were made by the South Asian Human Rights Documentation Centre and Human Rights Watch: B van Schaack, above n 21, 498-500.
discriminatory motive. The remaining issue of controversy was whether the required ‘attack’ should be ‘widespread and systematic’ or ‘widespread or systematic’. In the end a compromise was reached. As Hwang concludes: ‘As can be said of much of the Rome Statute, the definition of crimes against humanity in Article 7 gives cause for celebration in certain respects and continued vigilance or possible concerns in others’.

3. THE CHAPEAU REQUIREMENTS OF ARTICLE 7

The chapeau requirements of Article 7 largely, but not entirely, reflect the five sub-elements set out in the jurisprudence of the ad hoc Tribunals summarised in chapter 4. The analysis below flags the difficult areas of interpretation that the ICC will confront in the future. In chapter 7, after consideration of state practice since the Rome Conference, an attempt is made to provide some possible answers to these difficult issues of interpretation.

3.1 A Widespread or Systematic Attack against any Civilian Population

Chapter 4 argued that a persuasive case could be made for saying that a member of the armed forces can be a victim of a crime against humanity if the victim’s suffering is part of, or furthers the objects of, an ‘attack against any civilian population’. Some of the latest case law of the ad hoc Tribunals suggests otherwise. The word ‘civilian’ was in brackets before the Rome Conference and some delegations at Rome questioned whether the term ‘civilian population’ wrongly prevented members of the armed forces from being victims of crimes against humanity. It remained in the draft probably because of the precedents in the ICTY and ICC Statutes. Hence, doubts remain over this question under Article 7. Cassese suggests a member of the armed forces may not be a victim of crimes against humanity under Article 7 but that this is narrower than customary law.

Chapter 4 criticised the ‘widespread or systematic attack against any civilian population’ test on the grounds of lack of specificity. The debate at the Conference does not assist in providing any specificity to the meaning to be given to these words. There was no clear statement at the Rome Conference as to the juridical or philosophical basis

53 This is surprising because jurisprudence from Canada and France (see Chapter 3, sections 4.3 and 4.4), the ICTR Statute, the Tadić Trial Judgment, the Secretary-General’s Report on the draft ICTY Statute, the submissions of states on the draft ICTY Statute and both Commissions of Experts on the ICTY and the ICTR (see Chapter 4, section 2 and 3.1) suggested it was a necessary element: see D. Robinson, above n 19, 46-47.

54 Bassionu says ‘the ICC is a product of compromise, and like other international and national legal institutions it must sacrifice efficiency in order to safeguard other competing interests, such as state sovereignty and the right of those who will be impacted by its process’: M.C. Bassionu, above n 5, 211.

55 P. Hwang, above n 2, 501.

56 See Chapter 4, section 4.

57 See Chapter 4, section 4.3.

58 Ibid. See especially Prosecutor v Blaškić (Judgment), Case No IT-95-14-A (29 July 2004) [113]-[114] (‘Blaškić – Appeal’) discussed in chapter 4, section 4.3.

59 See text accompanying note 15 above and D. Robinson, above n 19, 47 n 22 and 51 n 50; P. Hwang, above n 2, 496.


61 See Chapter 4, section 5.
of crimes against humanity in international law without a war nexus. At the 1945 London Conference, it was Justice Jackson's statement—that it is only when domestic crimes are committed in connection with aggression that other countries can become involved—which shaped the definition of crime against humanity at Nuremberg.62 Without some alternative defining principle, the 'widespread or systematic' test remains largely indeterminate. Chapter 7 offers a principle which may act as a guide to its interpretation.

3.2 A Course of Conduct Involving the Multiple Commission of Acts

This requirement is novel and clearly represents a political compromise. Literally, it means more than one act—for example, two murders. It may be argued that two such crimes could not constitute an 'attack on a civilian population' because that term, as understood in customary international law, requires some minimal level of scale.63 The problem with this view is that the phrase 'multiple commission of acts' appears in the definition of 'attack on a civilian population' in Article 7(2). Hence, it may be interpreted literally so that the meaning under Article 7 may be wider than customary law. Robinson, who was part of the Canadian delegation which drafted the definition, says 'multiple commission of acts' is a requirement less than 'widespread', which of course is a vague test in itself.64 On the other hand, one act of extraordinary magnitude—such as the dropping of a chemical bomb on a village leading to the extermination of thousands—may not come within the definition, unless 'multiple acts' covers a case involving one act of the perpetrator where there is more than one victim. The ILC in 1996 noted that the 'widespread' criteria could be fulfilled by the 'singular effect of an inhumane act of extraordinary magnitude'.65 This certainly seems commonsensical. Accordingly, if taken literally, the term, 'multiple commission of acts', may lead to crimes against humanity under Article 7 having a meaning which is both narrower and broader than that under customary law.

3.3 The Requirement of a Policy

Article 7 requires the attack to be pursuant to a state or organisational 'policy' to commit such an attack. This is one of the controversial aspects of Article 7 because the ad hoc Tribunals have held it is not a requirement under customary law.66 Robinson argues that the mere existence of a policy is a low threshold relative to the 'systematic' test.67 Hence, he writes, it is wrong to say that 'attack', as defined in Article 7, must be

62 See Chapter 2, section 2. For example, Robinson says 'the plain meaning of the term 'attack directed against any civilian population' implies some element of scale': Robinson above n 19, 48 (emphasis added). But when is this element satisfied?
63 See Chapter 3, section 5.3 and chapter 4, section 4.3; Robinson above n 19, 48 and R. Dixon, 'Commenting on Article 7' above n2, 123.
64 D. Robinson, above n 19, 47.
66 Kunarac – Appeal, above n 39, [98]; Blaškić – Appeal, above n 58, [100], [120], [126] and [130].
67 D. Robinson, above n 19, 47. In support of a high threshold for the 'systematic' test, Robinson cites Prosecutor v Akayesu (Judgment), Case No ICTR-96-4-T (2 September 1998) [580]('Akayesu – Trial') where it held 'The concept of systematic may be defined as thoroughly
both widespread and systematic. He argues the result lies somewhere between treating, ‘widespread’ and ‘systematic’ cumulatively or as alternatives. He draws on a wealth of sources discussed in chapter 3, as well as the Tadić Trial Judgment, to conclude that the ‘plain meaning of the phrase “attack directed against any civilian population” also implies an element of planning or direction (the “policy element”).68 On the other hand, in more recent times, others, such as Judge Hunt of the ICTY, have criticized the definition as setting too high a threshold for the prosecution and beyond that set by customary law.69 At the time of the Conference, human rights commentators, such as Human Rights Watch, declared that the ‘policy’ requirement may take the matter beyond ‘systematicity’ as understood under customary law:

While systematic has an established meaning in international law and can be demonstrated by a pattern of official actions or tolerance of abuse, ‘governmental or organisational policy’ may be susceptible to a narrower interpretation, such as a showing of affirmative and formal administrative acts.70

This view is now supported by the jurisprudence of the ICTY and the ICTR, which has held that a policy is not an element of the crime. Even the ‘systematic’ requirement can be demonstrated by a course of conduct or understanding existing at a level less formal than an actual ‘policy’.71 The likely compromise for the ICC is not to make the ‘policy’ requirement too demanding, thereby following the jurisprudence of the ad hoc Tribunals which have held that the ‘policy’ need neither be conceived at the highest level nor be formalised or be explicit; it can be deduced from the way in which the acts occur.72

Some cases, supported by other sources, suggest that loose forms of state toleration or acquiescence, including failing to prosecute after the event,73 or state impotency,74 may elevate domestic crimes to a crime against humanity. Can state ‘toleration’ or

organised and following a regular pattern on the basis of a common policy involving substantial public or private resources’.75

68 D. Robinson, above n 19, 47-51; see also R. Dixon, ‘Paragraph 2: Definitions of Crimes of Their Elements – (a) Attack’ in O. Triffterer, above n 2, 158, 158-159.
70 See P. Hwang, above n 2, 499 n 252. See also The South Asian Human Rights Documentation Centre, An ‘And’ By Any Other Name is Still an ‘And’, above n 48, 499 n 249.
71 Kunarac – Appeal, above n 39, [98]; Prosecutor v Vasiljević (Judgment), Case No IT-98-32-T (29 November 2002) [36] (‘Vasiljević – Trial’); Blaškić – Appeal, above n 58, [100], [120], [126] and [130]; Prosecutor v Semana (Judgment and Sentence), Case No ICTR-97-20-T (15 May 2003) [329] (‘Semana – Trial’).
73 See the case law of the German Supreme Court under CCL 10, particularly the case of Weller, Decision of the Supreme Court for the British zone (21 December 1948) in OGHBZ, vol 1, 203-208, and the work of the ILC, particularly in 1954 (discussed in Chapter 3, sections 2.3 and 3.3.2 respectively) and Prosecutor v Kupreskić (Trial Chamber Judgment), Case No IT–95–16–T (14 January 2000) [555] (‘Kupreskić – Trial’).
`acquiescence' amount to a ‘policy to commit such attack' under Article 7? The issue proved controversial at the Preparatory Commission when drafting the Elements of Crimes. By Article 9 of the ICC Statute, the Elements of Crimes may ‘assist', but not bind, the Court. Some delegations wanted to state that the policy must be ‘actively promoted or encouraged'.\textsuperscript{75} The Swiss delegation referred to Kupreškić in support of the view that ‘state toleration' of an attack can amount to a crime against humanity, leading to ‘a heated and protracted confrontation'.\textsuperscript{76} The Assembly of States Parties in 2002 adopted the Draft Elements of Crimes formulated by the Preparatory Commission.\textsuperscript{77} Paragraph 3 of the Introduction to the Elements of Crimes states: ‘It is understood that ‘policy to commit such attack' requires that the state or organisation actively promote or encourage such an attack against a civilian population'. The footnote to the paragraph reads: ‘A policy which has a civilian population as the object of the attack would be implemented by State or organisational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organisational actions'. This suggests mere state toleration or acquiescence will not be enough, which again may make Article 7 narrower than customary law.

3.4 State or Organisation

There is nothing in Article 7 or the Elements of Crimes to assist in the meaning of ‘organization'. The ad hoc Tribunals have at times followed the commentary of the ILC to say the author of the attack must be a ‘State, group or organisation',\textsuperscript{78} though it is still unresolved whether this can include, for example, a terrorist group or criminal gang.\textsuperscript{79} The Swiss delegation at the Rome Conference questioned why, contrary to the formula in Tadić, the draft did not refer to the policy of a ‘group' as well as that of an ‘organization'.\textsuperscript{80} According to Robinson to the extent that there is a difference between ‘group' and ‘organisation' at Rome ‘it was considered that the planning of an attack against a civilian population requires a higher degree of organization, which is consistent with the latter concept’.\textsuperscript{81} It may be argued that as a matter of customary law neither a criminal gang nor a terrorist group can be an ‘organization' in Article 7 unless it is a de facto political authority with control of some territory or over people. This appears to be


\textsuperscript{76} Ibid, 100, see Kupreškić – Trial, above n 73, [552]-[555].


\textsuperscript{78} Tadić – Trial, above n 72, [654]-[655]; Kupreškić – Trial, above n 73, [552]-[555]; Prosecutor v Kayishema and Ruzindana (Judgment), Case No ICTR-95-1-T (21 May 1999) [126] (‘Kayishema – Trial'); Blaskić – Trial, above n 72, [205], which cites the 1991 ILC Report, above n 65, 266; Report of the International Law Commission on the work of its forty-eighth session, 6 May – 26 July 1996, UN GAOR, 51\textsuperscript{st} sess, Supp. 10, 93, UN Doc A/51/10 (1996) (hereinafter 1996 ILC Report) (discussed at chapter 3, section 3.3.2) and ICC Statute, art 7. The fact that the perpetrator need not be a state official or agent is well established in customary law, but this has always been associated, at least, with some form of state complicity, indifference or impotence: see chapter 3, section 5.4.

\textsuperscript{79} See Chapter 4, section 5.

\textsuperscript{80} P. Hwang, above n 2, 498.

\textsuperscript{81} D. Robinson, n 19, at 50 n 44.
the view of both Cassese \(^{82}\) and Bassiouni, \(^{83}\) at least so far as customary law is concerned. This view may be supported by the fact that at the Rome Conference India, Sri Lanka, Algeria, and Turkey proposed that terrorism be included within the definition of crimes against humanity, but this did not occur. \(^{84}\) Similarly, the governments of Barbados, Dominica, Jamaica and Trinidad and Tobago (originally in 1992) called for a permanent international court to prosecute international drug traffickers which was supported by the Vatican, but this too was not taken up. \(^{85}\)

The problem with a narrow view of ‘organization’ is that militia or private groups, with only a loose or indirect connection with a state, frequently carry out atrocities. For example, there were Arkan’s Tigers in Bosnia, the Interahamwe in Rwanda and around 23 militia in East Timor in 1999. All gained support from state agencies. If these groups are not ‘organizations’ under Article 7, then a state policy must be proved before the threshold under Article 7 can be made out. This may lead a state to encourage the activities of private militia or secret death squads whilst carefully distancing itself from any alleged official links. This question is considered further in chapter 7.

### 3.5 The Principle of Complementarity and the Impunity Principle

It needs to be borne in mind that under the ICC Statute, unlike the case of the ICTY and the ICTR, the principle of complementarity governs. \(^{86}\) This principle is expressed in Article 17, which states that it is only if the relevant state is ‘unable or unwilling’ to investigate and prosecute the perpetrators that the ICC will have jurisdiction. As has been remarked, ‘[t]he theme of complementarity runs through the Statute, coming in at many places, but it is clear it is a major aspect of the ICC’. \(^{87}\) For example, if states are vigorously pursuing a non-state actor, such as a terrorist organisation or criminal gang, then the ICC will not have jurisdiction. This is consistent with the impunity principle outlined in chapter 3 – the principle that crimes against humanity only arise when the defendant enjoys impunity from prosecution by the territorial or national state. The principle of complementarity reflects, for example, the remarks of the post-war US military tribunal in *Einsatzgruppen*:

> Crimes against humanity ... can only come within the purview of this basic code of humanity because the State involved, owing to indifference, impotency or complicity, has been unable or has refused to halt the crimes and punish the criminals. \(^{88}\)

In the past this has often been assumed to be an element of the crime itself rather than a rule of jurisdiction, but, as discussed in chapter 3, when it comes to crimes against humanity, the distinction between the two has not always been sharply drawn. It may be premature to regard Article 7, *on its own*, as defining all of the concepts relevant to the

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82 A. Cassese, above n 60, 64.
84 H. Von Hebel and D. Robinson, above n 2, 85-86.
88 *The Einsatzgruppen Case*, above n 74, 498.
notion of crimes against humanity under international law. It may be better to regard Article 7, *in conjunction with* the principle of complementarity under the ICC Statute, as equating with the complex, and at times fluid, idea of crimes against humanity under international law.

Further, it may be legitimate to give a broad meaning to the term 'organization' in Article 7 (perhaps beyond its customary law meaning) because, under the principle of complementarity, this will not lead to any excessive interference in a state’s ordinary criminal jurisdiction over non-state actors provided the state is at least willing to punish the perpetrators. This question is considered further in Chapter 7.

### 3.6 Mens rea

Article 7 requires the accused to be knowingly involved in a widespread or systematic attack. At the Rome Conference, some delegations agreed to exclude the defence of superior orders for ‘orders to commit crimes against humanity’ in Article 33 ‘subject to the understanding that the definition of crimes against humanity ... will identify an appropriately high level of *mens rea*.89 Paragraph 3 of the Introduction to the Elements of Crimes states that an accused must have either knowledge of the attack or an intention to further the attack, but that the *mens rea* element ‘should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization’. Similarly, a defendant must have at least knowledge of the factual circumstances which make up the underlying crime charged. As Bassiouini points out, if persons, because of the limited role played, are honestly unaware that they have contributed to a crime against humanity, the required *mens rea* cannot be made out.90 This is not inconsistent with Article 33 because in the case of defendants who do not have such knowledge, any orders being followed cannot be ‘orders to commit crimes against humanity’.

### 4. THE SPECIFIC CRIMES UNDER ARTICLE 7

#### 4.1 ‘Manifestly Unlawful’ Conduct

Article 7 has expanded the list of crimes against humanity over those in the London Charter. Whilst its ‘clarifications’ of the underlying crimes at paragraph (2),91 have brought much needed specificity to some of the enumerated crimes, there is still much room for future interpretation. This will particularly be the case where the conduct is carried out under colour of local law or authority. For example, consider the case of an execution after a military trial, a state sponsored transfer of persons or a preventative detention, all of which may have occurred under state emergency powers. The ICC will have to decide if such conduct amounts to murder, forcible transfer or imprisonment as crimes against humanity.

Some crimes in Article 7 are said to depend upon a breach of international law. For example, the crime of imprisonment can occur if the imprisonment is ‘in violation of fundamental rules of international law’. At the Rome Conference a number of Arab

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91 McCormack prefers this term to definitions because they still leave much room for future interpretation: T.I.H. McCormack, above n 2, 183.
States were suspicious of such a loose definition. They proposed that the draft be amended to state that the rules have ‘universal recognition’, but this was deleted in the final drafts. Further, a breach of international human rights law, even if ‘universal’, does not necessarily establish an international crime. It is international humanitarian or criminal law which establishes individual criminal responsibility, but its contours, particularly, outside the context of war, are often unclear. It was this uncertainty which the definitions in Article 7 were intended to address.

The question was brought up again when drafting the Elements of Crimes. Some states said ‘fundamental rights’ in human rights law are too numerous and this will breach the principles of legality. In the end, the Introduction to the Elements of Crimes states that Article 7 as a whole must be strictly construed and ‘require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world’.

The meaning to be given to this wording is far from clear. One view may be that the enumerated crimes in Article 7 must occur in circumstances which are manifestly unlawful, meaning conduct so clearly brutal or arbitrary that it can immediately be recognised as being both criminal according to the penal laws of the community of nations and a breach of international law so as to give rise to individual responsibility. As Bassiouni remarks: ‘“Crimes against humanity” are mal in se acts, which are manifestly contrary to the norms, rules and principles of international criminal law, and to those of the world’s major criminal justice systems, for which most reasonable persons would not [sic] have consciousness of wrongdoing.’ A number of sources, both domestic and international, may have to be relied upon. In the Justice case, Nazi state officials, who administered the courts in a perverted way to punish enemies of the state, were guilty of crimes against humanity because their use of the legal system was manifestly arbitrary and hence, ‘unlawful’. Similarly, Article 33 allows a defence of superior orders if the ‘order was not manifestly unlawful’ but it goes on to say that ‘orders to commit’ ‘crimes against humanity . . . are manifestly unlawful’. This suggests that the assumption was made that all crimes against humanity, unlike war crimes, involve ‘manifestly unlawful’ conduct.

4.2 Murder

Murder in Article 7 and the Elements of Crimes does not set out the mens rea requirement. In the jurisprudence of the ad hoc Tribunals the accused must intend:

(a) to kill the victim; or

(b) to wilfully cause serious bodily harm which the perpetrator should reasonably have known might have lead to death.

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92 K. Kittichaisaree, above n 75, 100.
93 Ibid.
94 International human rights law is generally directed to state, not individual, responsibility: see, for example, M Cherif Bassiouni, ‘International Criminal Law and Human Rights’ (1982) 9 Yale Journal of World Public Order 193 and Bassiouni and Wise warn that failing to distinguish between the two is a fertile source of confusion: M.C. Bassiouni and E.M. Wise Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law (1995) 6 n 11.
95 K. Kittichaisaree, above n 75, 100-101.
96 M.C. Bassiouni, above n 90, 287.
97 See United States v Altstötter et al (1947) 3 CCL No 10, 954 (‘The Justice Case’).
4.3 Extermination

Article 7(2)(b) added the clarification that extermination includes ‘the intentional infliction of conditions of life . . . calculated to bring about the destruction of a part of a population’. This was intended to cover more protracted or indirect means of killing persons with the examples of deprivation of access to food and medicine being offered in the clarification.100 The Elements of Crimes refer to ‘a mass killing of members of a civilian population’ (Element 2).

Whilst the Trial Chamber in Krstić held that the crime of extermination requires that a ‘numerically significant’ or ‘substantial’ part of a targeted population be killed,101 most other cases,102 the ILC103 and scholars104 say extermination only involves participation in mass killing or killing a large number. The accused’s role may be remote or indirect.105 It is unnecessary that the victims were discriminated against for political, social or religious reasons or that they share common features.106 The mental element appears to be a combination of that required for murder and the intentional or knowing participation in the killing of, or causing serious bodily harm to, a large number of people, though some case have suggested that acting recklessly or with gross negligence will suffice.107 But what is a large number? The Vasiljević Trial Chamber said it was unaware of any case of

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100 T.L.H. McCormack, above n 2, 191.

101 Prosecutor v Krstić (Judgment), Case No IT-98-33-T (2 August 2001) [503] and [685] (‘Krstić – Trial’), followed by the Special Court of Sierra Leone in Prosecutor v Brima, Karmara and Kamu (Decision on Defence Motion for Judgment of Acquittal Pursuant to Rule 98) Case No SCSL-2004-04-16-T469 (31 March 2006) [73] (‘Brima – Decision’).


105 Vasiljević – Trial, above n 71, [227]; Prosecutor v Ndindabahizi (Judgment and Sentence), Case No ICTR-01-71-1-T (15 July 2004) [479]; Prosecutor v Kamuhanda (Judgment), Case No ICTR-99-54A-T (22 January 2004) [691]-[692].


107 Jokić – Trial, above n 102, [571]-[572]; Vasiljević – Trial, above n 71, [229]; Krstić – Trial, above n 101, [495]; Ntakirumana – Appeal, above n 102, [522]; Semanza – Trial, above n 71, [341]; Prosecutor in Imashimwe (Judgment), Case No ICTR-99-46-T (25 February 2004) [701] (‘Imashimwe – Trial’); contra Bagilishema – Trial, above n 102, [89]; Kayishema – Trial, above n 78, [144], where the mental element was said to include intentional, reckless and grossly negligence acts. In Kayishema – Trial, above n 78, [147], it was said that a single murder if ‘part of a mass killing event’ will suffice. This is probably not the better view if it removes the special mens rea which distinguishes ‘extermination’ from ‘murder’: see G. Mettraux, above n 104, 176-178.
less than 733 persons before 1992. The Jokić Trial Chamber rejected the submission that it must involve deaths in the thousands, saying that to set a minimum number would be 'unhelpful'. Rather, it held the number required ought be assessed on a case-by-case basis. It held the requirement of a mass killing was clearly satisfied in the case of the fall of Srebrenica where over 7000 people were killed. At the other end of the scale, a Special Panel in East Timor declined to hold that involvement in the killing of 47 amounted to the crime of extermination.

4.4 Enslavement

Article 7(2)(e) added a clarification based on the definition in Article 1(1) of the 1926 Slavery Convention, which has also been followed in the ICTY jurisprudence. In response to the particular concern of some delegations, Article 7 (2)(e) makes specific reference to trafficking in persons, in particular women and children. According to the Elements of Crimes, at a footnote to Element 1, the crime 'may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956'. The Nuremberg Judgment and the CCL 10 cases of Milich and Pohl demonstrate that the crime is made out by forced labour, even if the victims are 'well fed and well clothed and comfortably housed'. The Trial Chamber in Kumarac held that factors to consider would include control of a person's movement, environment, psychological control, measures taken to control escape, use of force and abuse (including sexual abuse, duration, assertion of exclusivity), forced labour and the exercise of rights of sale or trade in persons. The Trial Chamber held the crime was made out where the victims were kept at a house by the defendants because they had to obey all orders, had no realistic option to flee the house, were subject to mistreatments and were treated as the personal property of the defendants.

4.5 Deportation or Forcible Transfer of Population

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108 Vasiljević – Trial, above n 71, [227]n 587, though it made it clear it did not suggest this was the threshold.
109 Jokić – Trial, above n 102, [573]; see also Prosecutor v Simba (Judgment and Sentence), Case No ICTR-01-76-T (13 December 2005) [422] (‘Simba – Trial’).
110 Jokić – Trial, above n 102, [573].
111 Ibid, [577]. The deaths in Simba also were in the thousands: Simba – Trial, above n 109, [425].
112 The Public Prosecutor v Da Costa and Punef (Judgment), Special Panel Case No 22/2003 (25 April 2005) 19.
116 United States v Oswald Pohl, 5 CCL 10 Trials 958, 970 (where the quotation is taken); United States v Erhard Milich, 2 CCL 10 Trials 773, 779-790.
117 Kumarac – Trial, above n 114, [543]; Kumarac – Appeal, above n 39, [116]-[124]; Prosecutor v Knrojelac (Judgment), Case No IT-97-25-T (15 March 2002) [350] and [359] (‘Knrojelac – Trial’).
118 Kumarac – Trial, above n 114, [742].
Whilst deportation has precedence in the London and Tokyo Charters and the ICTY and the ICTR Statutes, it is limited to the transfer of persons across international borders.\textsuperscript{119} It involves the involuntary and unlawful evacuation of individuals from the territory in which they reside.\textsuperscript{120} The lower court in \textit{Eichmann} thought the crime was made out even if carried out in a humane manner.\textsuperscript{121} Forcible transfer within state borders only has precedence in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity\textsuperscript{122} and the Apartheid Convention of 1973.\textsuperscript{123} Its status as an existing crime is controversial.\textsuperscript{124} Whilst the Draft Statute included this crime, it was repeatedly opposed by Israel and cited as the reason for that country’s vote against the draft statute at Rome.\textsuperscript{125} Israel’s concern stems from its occasional resort to the expulsion of Palestinians from the occupied territories. To try to win Israel’s support the clarification refers to ‘expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law’. According to McCormack, this requires the expulsion to be unlawful under both domestic and international law.\textsuperscript{126} In the view of Kittichaisaree, once lawful presence occurs, the removal, even if allowed by domestic law, must be permitted by international law.\textsuperscript{127} Israel argued that it might ultimately be judged by international law, particularly given the status of the occupied territories in international law.\textsuperscript{128}

The Elements of Crimes (Element 3) require that ‘The perpetrator was aware of the factual circumstances that established the lawfulness of the presence’. Hence, if the defendant honestly and reasonably believed that the victim was not lawfully present, even if mistaken, the offence cannot be made out.

\textbf{4.6 Imprisonment or Other Severe Deprivation of Liberty}

\textsuperscript{119} See also C.K. Hall, ‘The Different Sub-Paragraphs – (d) Deportation or Forcible Transfer of Population’ in O. Triffterer, \textit{above n 2, 134}; \textit{Krstić – Trial}, \textit{above n 101, 521}.
\textsuperscript{120} \textit{Krstić – Trial}, \textit{above n 101, 521}, see also the case of \textit{Kolk and Kislyiy}, (27 January 2004, Tallinn Court of Appeal, Estonia) discussed in chapter 6, section 3.5.
\textsuperscript{121} \textit{Attorney-General of Government of Israel v Eichmann}, 36 ILR 247-248(D Ct., Israel, 1961) (‘Eichmann’).
\textsuperscript{122} Conventional on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, done in New York, United States of America, opened for signature 16 December 1968, 754 UNTS 73 (entered into force on 11 November 1970): see Chapter 3, section 3.1.
\textsuperscript{125} T.L.H. McCormack, \textit{above n 2, 192}.
\textsuperscript{126} Ibid, 192-193.
\textsuperscript{127} K. Kittichaisaree, \textit{above n 75, 109}.
\textsuperscript{128} T.L.H. McCormack, \textit{above n 2, 192-193}.
The Trial Chamber in Kordić, was the first international court to offer a definition of imprisonment as a crime against humanity\textsuperscript{129} - 'arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population'.\textsuperscript{130} It held there was no 'due process of law' because the matters in Articles 42 and 43 of the Geneva Convention IV were not complied with,\textsuperscript{131} though the Appeals Chamber said a breach of these Articles, which require an international armed conflict, is unnecessary.\textsuperscript{132} In Krnojelac, a wider array of sources was relied upon.\textsuperscript{133} It concluded that arbitrary imprisonment means there is no legal basis which can be invoked to justify the deprivation of liberty - if national law is relied upon as justification, the relevant provisions must not violate international law.\textsuperscript{134}

The Trial Chamber also suggested that 'arbitrariness' may occur after an otherwise lawful imprisonment if administered in disregard of 'fundamental procedural rights' or if 'the initial legal basis ceases to apply'.\textsuperscript{135} The Ntagerura Trial Chamber held that minor infringements of liberty will not suffice; the imprisonment must be of similar gravity to the other listed crimes.\textsuperscript{136}

The phrase 'other severe deprivation of liberty' is a new formulation. The intention appears to have been to ensure that the crime is not limited to prison like incarceration.\textsuperscript{137} Moreover, Article 7(1)(e) requires the crime to be 'in violation of fundamental rules of international law'. According to McCormack the intention of the drafters here was to exclude lawful periods of custody under the domestic criminal justice system.\textsuperscript{138} What is unclear is the meaning to be given to 'fundamental rules of international law'. Many state sanctioned imprisonments have been found by international bodies to be contrary to international human rights law. Examples include Australia's mandatory detention of asylum seekers\textsuperscript{139} and the detention of persons at Guantánamo Bay by the United States.\textsuperscript{140} Reliance on human rights law, which is directed to state responsibility, for the

\textsuperscript{129} The was upheld in Kordić – Appeal, above n 99, [116], although it said 'individual' must be taken to mean 'civilian'.

\textsuperscript{130} Prosecutor v Kordić and Čerkez (Trial Chamber Judgment), Case No IT-95-14/2-T (26 February 2001) ('Kordić – Trial'), [302]-[303]; see also 1996 ILC Report, above n 78, 101.

\textsuperscript{131} Kordić – Trial, above n 130, [307].

\textsuperscript{132} Kordić – Appeal, above n 99, [115].

\textsuperscript{133} Krnojelac – Trial, above n 117, [113]-[115], in particular human rights law.

\textsuperscript{134} Ibid, [112]-[120]; followed in Imanishimwe – Trial, above n 107, [702]; see also Prosecutor v Naletilic and Marinovic (Trial Chamber Judgment), Case No IT-98-34-T (31 March 2003) [642] ('Naletilic – Trial').

\textsuperscript{135} Krnojelac – Trial, above n 117, [114]-[115]; see also Kordić – Trial, above n 130, [303].

\textsuperscript{136} Imanishimwe – Trial, above n 107, [702].

\textsuperscript{137} H. von Hebel and D. Robinson, above n 2, 99.

\textsuperscript{138} T.L.H. McCormack, above n 2, 193.


elements of an international crime is problematic.\textsuperscript{141} Some scholars have debated whether the imprisonment of American nationals of Japanese descent during the Second World War was a crime against humanity. Hwang argues it was,\textsuperscript{142} whilst Bassiouni takes the contrary position saying the incarceration was not motivated by or seeking the 'persecution' of that group so as to amount to a crime against humanity.\textsuperscript{143} A discriminatory motive is now only relevant to the crime of persecution, not imprisonment under Article 7. In \textit{Kroonelac}, the Trial Chamber held there must be an intention to deprive individuals \textit{arbitrarily} of their liberty.\textsuperscript{144} The \textit{Elements of Crimes} (Element 3) requires that 'the perpetrator was aware of the factual circumstances that established the gravity of the conduct in violation of fundamental rules of international law'. According to Professor Clark of the Samoa delegation, this was to avoid a defence of mistake of law.\textsuperscript{145}

But what are the 'factual circumstances'? It was argued above\textsuperscript{146} that the offence of imprisonment, like all offences under Article 7, essentially requires knowledge of 'manifestly unlawful' conduct which, in this context, means an imprisonment so clearly brutal or arbitrary that it can immediately be recognised by all the world as being both criminal according to the penal laws of the community of nations and a breach of international law so as to give rise to individual responsibility. This is a higher standard than merely a detention contrary to international human rights law.\textsuperscript{147}

\textbf{4.7 Torture}

At the Rome Conference it was acknowledged that the definition in the 1984 \textit{Torture Convention} was too limiting.\textsuperscript{148} By the clarification at Article 7(2)(e), torture includes any 'intentional infliction of severe pain or suffering, whether physical or mental, upon a person in custody or under the control of the accused'. Hence, unlike the definition in the \textit{Torture Convention}, torture does not require the involvement of a public official or any particular purpose to the torture. McCormack says this was 'one of the significant advances in international criminal law of Article 7'.\textsuperscript{149} The \textit{ad hoc} Tribunals have held that torture as a crime against humanity does not need any state involvement.\textsuperscript{150} In

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\textsuperscript{142} P. Hwang, above n 2, 475.

\textsuperscript{143} M.C. Bassiouni, \textit{Crimes against Humanity} (1\textsuperscript{st} ed, 1992) 252.

\textsuperscript{144} \textit{Kroonelac} – \textit{Trial}, above n 117, [119]-[122]; followed in \textit{Imanishimwe – Trial}, above n 107, [702].

\textsuperscript{145} K. Kittichaiseree, above n 75, 110.

\textsuperscript{146} See section 4.1 above.

\textsuperscript{147} See, however, James G. Stewart, 'Rethinking Guantánamo' (2006) 4 \textit{Journal Of International Criminal Justice} 12, where the author argues that the detention at Guantánamo constitutes the perpetration of this international offence, basing his argument upon the definition of unlawful confinement discussed in \textit{Čelebicio – Appeal}, above n 99, [378].

\textsuperscript{148} T.L.H. McCormack, above n 2, 194.

\textsuperscript{149} Ibid.

\textsuperscript{150} \textit{Kunarac – Trial}, above n 114, [482], [493] and [497]: the Trial Chamber thought the \textit{Torture Convention} mainly had application to States' obligations and hence, its emphasis on torture
Kroneljčec, the Trial Chamber adopted the jurisprudence of the European Human Rights Court in order to assess the gravity of the act of torture. A Special Panel in East Timor held that whilst the definition of torture does not require any purpose to the torture, if the intention of the perpetrator is to cause death following what otherwise may be torture, then only a charge of murder can apply.

4.8 The Sexual Offences

Article 7(1)(g), for the first time in international law, added the sexual offences of ‘sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity’. At the Rome Conference the Women’s Caucus – an umbrella group of a number of women’s lobby groups – sought an expanded list of sexual offences including ‘forced pregnancy’. Inclusion of this crime was supported by the Bosnian delegation in response to the Serb policy of raping Muslim women and detaining them until delivery in order to change the ethnic composition of the population. When it was raised at the Rome Conference, The Holy See and other Catholic States had problems with the crime. Ireland was concerned that its policy of detaining pregnant wards of the state to prevent them procuring abortions abroad may come within this crime. The result was a clarification at Article 7(2)(f). It attempts to capture the experience in Bosnia and also requires, by its reference to ‘unlawful confinement’, a detention contrary to domestic law.

In the law of the ad hoc Tribunals, one Trial Chamber defined rape as ‘a physical invasion of a sexual nature, committed under circumstances which are coercive’. Later cases have required ‘sexual penetration’. The Kunarac Trial Chamber remarked that coercion, or force, or threat of force was not needed. It was enough if the act was ‘without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances’. It held that the circumstances of the women’s detention were so coercive that the exercise of free will was impossible. This was followed by the Appeals Chamber and other cases. The Trail Chamber in Akayesu said sexual violence, as an

practiced by organs of the State for State purposes of criminal investigation; see also Kunarac – Appeal, above n 39, [148]; Kvočka – Appeal, above n 99, [289].

151 Kroneljčec – Trial, above n 117, [181].
152 The Public Prosecutor v Soares (Judgment), Special Panel Case No 7/2002 (9 December 2003) [222]-[225].
154 T.L.H. McCormack, above n 2, 195.
155 Ibid, 196.
156 Ibid.
157 Ibid.
158 Akayesu – Trial, above n 67, [597]-[598].
159 Prosecutor v Furundžija (Judgment), Case No IT-95-17/1-T (10 December 1998) [185] (‘Furundžija – Trial’); Kunarac – Trial, above n 114, [438]-[460]; Kunarac – Appeal, above n 39, [127]-[128].
160 Kunarac – Trial, above n 114, [438]-[460].
161 Ibid, [460].
162 Kunarac – Trial, above n 114, [438]-[460]; Kunarac – Appeal, above n 39, [127]-[133].
163 Semanza – Trial, above n 71, [344]-[346]; Brima – Decision, above n 101, [107]-[108].
inhumane act, need not involve penetration or even physical conduct and can cover forcing a woman to perform naked in front of a crowd.164

Under the Elements of Crimes (Elements 1 and 2), the actus reus for rape requires penetration, however slight of the body. The separate offence of 'other form of sexual violence' only requires in the Elements of Crimes, 'an act of a sexual nature' of comparable gravity to the other offences in Article 7(1)(g). The Trial Chamber in Kvočka concluded that 'sexual violence is broader than rape and includes such crimes as sexual slavery or molestation'.165 According to the Elements of Crimes for both offences, the act must be committed by force, threat of force or by coercion. This definition includes fear of violence, duress, detention, psychological oppression, abuse of power, taking advantage of a coercive environment or committing the crime against a person incapable of giving consent (due to natural, induced or age-related incapacity).

4.9 Persecution

Article 7(1)(h) expands the specific grounds for persecution and includes the catch-all 'or other grounds that are universally recognized as impermissible under international law'. This was opposed by some states at Rome on the ground of fidelity to existing customary international law.166 The reference to gender, rather than sex, was intended to encompass socially constructed roles that may be ascribed to men and women beyond the physical differences between the two sexes.167 When this was 'emphatically rejected' by Middle Eastern States, Article 7(3) was inserted.168 It cryptically says 'gender' in the ICC Statute refers to 'the two sexes, male and female, within the context of society'. This probably captures the broader notion of gender as commonly understood in international human rights law.169

Persecution is defined as 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'. The conduct must be in connection with any act in Article 7 or other crime in the Statute. The second restriction reflects states’ concerns about the looseness of this crime.170 It appears to reduce the offence to an aggravated form of the other crimes.171 An East Timor Court has held an act of 'abduction', because it involved a 'severe deprivation of liberty', could be charged as persecution.172 The Nuremberg Judgment (and the cases under Control

164 Akayesu – Trial above n 67, [598], [688] and [690].

165 Prosecutor v Kvočka (Trial Chamber Judgement), Case No IT-98-30/1-T (2 November 2001) [180] (‘Kvočka – Trial’); followed in Brima – Decision, above n 101, [111].

166 T.L.H. McCormack, above n 2, 197.

167 See M. Boot, ‘Article 7(3)’ in O. Triffter, above n 2, 171; C. Steains, ‘Gender Issues’ in R.S. Lee, above n 2, 371-375. For example the Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI) says in UN usage: 'Gender refers to the social attributes and opportunities associated with being male and female... These attributes, opportunities and relationships are socially constructed and are learned through socialisation processes... Gender is part of the broader socio-cultural context': Website of OSAGI, <http://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm> viewed 14 January 2006.

168 T.L.H. McCormack, above n 2, 197.

169 This is the view of Michael Boot: see M. Boot, ‘Article 7(3)’ above n 167, 172.

170 D. Robinson, above n 19, 54-55.

171 The special state of mind has been regarded as an aggravating factor: Prosecutor v Todorović (Sentencing Judgment), Case No IT-95-9/1-S (31 July 2001) [32].

172 The Public Prosecutor v Mesquita (Judgment), Special Panel Case No 28/2003 (6 December 2004) [81]-[90].
Council Law 10)\textsuperscript{173} did not limit persecution to the other crimes in the London Charter and included economic and property crimes, such as the imposition of fines and the destruction of property within the concept of crimes against humanity.\textsuperscript{174} The ad hoc Tribunals have rejected the requirement in Article 7(1)(h) that the acts must be in connection with other crimes within the jurisdiction of the ICC Statute, which view has the support of many scholars.\textsuperscript{175} The Tribunals have held that persecution is any act or omission of the same gravity as the other crimes against humanity which:

1. discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*);\textsuperscript{176} and

2. was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).\textsuperscript{177}

The intention to discriminate must be ‘conscious’ – ‘the specific intent to cause injury to a human being because he belongs to a particular group or community’\textsuperscript{178} – not

\textsuperscript{173} See: Chapter 3, section 2; *United States v Flick and others* 6 CCL 10 Trials 3, 327 (‘The Flick Case’); and *United States v von Weizsäcker* 13 CCL 10 Trials 76, 471 and 675-678 (‘The Ministries Case’).

\textsuperscript{174} The Nuremberg Judgment described numerous acts of persecution against the Jews without always making it clear whether they were relied on as war crimes, crimes against humanity or both or just as historical background. For example the judgment referred to the progressively more oppressive treatment of Jews consisting of discriminatory laws limiting the offices and profession open to Jews, restrictions on family life and rights of citizenship, burning and demolishing synagogues, looting businesses, imposing a collective fine, seizing assets, restricting movement, creating ghettos and forcing the wearing of a yellow star: International Military Tribunal (Nuremberg), Judgment and Sentences (1 October 1946) (1947) 41 AJIL 172, 247-249 (hereinafter Nuremberg Judgment). Such accounts were often repeated for individual defendants such that it is fair to conclude that at least the more severe forms of these property or economic offenses were regarded as crimes against humanity by the Nuremberg Tribunal, that being the view in *Kordić – Appeal*, above n 99, [109]; *Tadić – Trial*, above n 72, [704]-[708]; *Kvočka – Trial*, above n 165, [184]-[205]; *Prosecutor v Ruggiu (Judgment and Sentence)*, Case No ICTR-97-21-I (1 June 2000) [21].


\textsuperscript{176} *Blaškić – Appeal*, above n 58, [139].


\textsuperscript{178} *Kordić – Appeal*, above n 99, [111].
recklessness, and mere knowledge of a discriminatory attack will not suffice.\textsuperscript{179} The accused may have other motives but the discriminatory intent must be ‘significant’.\textsuperscript{180} There need not be a persecutory policy or plan.\textsuperscript{181} The acts of persecution are to be evaluated not in isolation but in context, by looking at their cumulative effect.\textsuperscript{182}

The Trial Chamber in \textit{Kupre\v{s}ki\v{c}} held that: the taking of property if it had a severe enough impact – such as burning a domestic home, farm or small business – could be persecution having the same level of gravity as deportation, but perhaps not the stealing of a car or the confiscation of industrial property which was held not to be a crime against humanity in the \textit{Flick} case.\textsuperscript{183} A problem with the \textit{ad hoc} Tribunals’ definition and that contained in Article 7(1)(h) is the vagueness of the notions of ‘fundamental right contrary to international law’ and ‘severe deprivation’ or ‘same gravity’. It is difficult to identify what rights are ‘fundamental’\textsuperscript{184} and then to translate a breach into elements of a criminal offence whilst still respecting the principles of legality. The \textit{ad hoc} Tribunals have either held or stated that the following acts are capable of amounting to persecution in the law of the:

(a) confiscation or wilful destruction or homes, farms, family businesses, religious, cultural or educational institutions;
(b) destruction of personal property, depending on its nature and extent, for example, if wanton and extensive;
(c) the imposition of fines;
(d) destruction of or indiscriminate attack on cities, towns and villages;
(e) serious physical and mental injury, inhuman or cruel treatment including beatings, sexual assaults, harassment, humiliation and psychological abuse;
(f) trench digging in hostile, hazardous and combat conditions and use of hostages as human shields;
(g) discriminatory orders, policies, decisions or other regulations provided that such orders infringe upon a person’s basic rights and the violation reaches the level of gravity of the other crimes against humanity listed in Article 5;
(h) forced labour assignments;
(i) forcible transfers of people;
(j) calling-out of civilians, segregation to camps and unlawful detention (and conditions of detention);
(k) ‘hate speech’; and

\textsuperscript{179} \textit{Krnjelac} – \textit{Trial}, above n 117, [435]; \textit{Vasiljevi\v{c}} – \textit{Trial}, above n 71, [248]; \textit{Kordi\v{c}} – \textit{Trial}, above n 130, [217].
\textsuperscript{180} \textit{Krnjelac} – \textit{Trial}, above n 117, [435].
\textsuperscript{181} \textit{Kordi\v{c}} – \textit{Appeal}, above n 99, [111]; \textit{Krnjelac} – \textit{Appeal}, above n 177, [165].
\textsuperscript{182} \textit{Kupre\v{s}ki\v{c}} – \textit{Trial}, above n 73, [622]; \textit{Prosecutor v Staki\v{c}} (\textit{Trial Chamber Judgment}), Case No IT-97-24-T (31 July 2003) [736] (‘Staki\v{c} – \textit{Trial}’); \textit{Kordi\v{c}} – \textit{Trial}, above n 130, [199]; \textit{Krnjelac} – \textit{Trial}, above n 117, [434].
\textsuperscript{183} \textit{Kupre\v{s}ki\v{c}} – \textit{Trial}, above n 73, [631]; see Chapter 3, section 2.2.1 for a discussion of \textit{Flick} above n 173.
\textsuperscript{184} The Trial Chamber said ‘infringements of the elementary and inalienable rights of man’ are ‘the right to life, liberty and the security of person’, the right not to be ‘held in slavery or servitude’, the right not to ‘be subjected to torture or to cruel, inhuman or degrading treatment or punishment’ and the right not to be ‘subjected to arbitrary arrest, detention or exile’ on discriminatory grounds’: \textit{Blaski\v{c}} – \textit{Trial}, above n 72, [220].
(1) ‘terrorising a civilian population’, meaning using or threatening acts of violence with the intention to cause extreme fear in the population.\textsuperscript{185}

The following acts have been held not to amount to persecution:

(a) encouraging and promoting hatred on discriminatory grounds;
(b) dismissing and removing persons of an ethnic group from their employment or government;
(c) the forcible takeover of the municipality, being the overthrow of an existing government by force;
(d) unlawful arrest, which means to apprehend a person without due process of law, unless taken together with unlawful detention or confinement; and
(e) the interrogation of persons and forcing them to sign false and coerced statements.\textsuperscript{186}

Under the definition in Article 7(1)(h) the acts in the first category will only amount to persecution if such acts can be said to be in connection with ‘inhumane acts’ or certain war crimes which can cover property offences.

4.10 Enforced Disappearances

This is a new crime; though the international community has expressed its concern about the practice in the UN General Assembly’s 1992 Declaration on the Protection of all Persons from Enforced Disappearances.\textsuperscript{187} Some resisted its inclusion, but the view of a number of Latin American countries that such a crime was needed, given their own experiences, prevailed.\textsuperscript{188} The fairly detailed and complicated definition reflects that experience. It is curious that the crime can occur merely with the ‘acquiescence’ of a state or political organisation, when the chapeau requires an actual policy for all crimes against humanity. A Special Panel in East Timor held the crime did not apply where the perpetrators killed and buried a person and then exhumed and hid the body in order to frustrate any investigation.\textsuperscript{189}

4.11 Apartheid

\textsuperscript{185} \textit{Blasi\u0107i\u0161 – Trial, above n 72, [218]-[234]; Blasi\u0107i\u0161 – Appeal, above n 58, [143]-[159]; Kupre\u0107i\u0161 – Trial, above n 73, [628]-[633] (at least where this leads to the destruction of the livelihood of a certain population); Kordi\u0107 – Trial, above n 130, [203]-[207]; Prose\u0142ctor v Deronji\u0107 (Trial Chamber Judgment), Case No IT-02-61-T (30 March 2004) [122]; Kordi\u0107 – Appeal, above n 99, [104]-[108]; Prose\u0142ctor v Simic (Judgment), Case No IT-95-9-T (17 October 2003) [57], [85], [99] (‘Simic – Trial’); Stati\u0107 – Trial, above n 182, [747]-[773]; Kvo\u0161ka – Appeal, above n 99, [323]-[325]; Krst\u0107i\u0161 – Trial, above n 101, [521] and [527]-[532]; Knojelac – Appeal, above n 177, [221]-[222]; – Trial, above n 182,]; Prose\u0142ctor v Deronji\u0107 (Sentencing Judgment), Case No IT-02-61-T (20 July 2005) [119]-[123]; Kvo\u0161ka – Trial, above n 165, [186]-[190]; Naletili\u0107 – Trial, above n 134, [633]-[715]; Prose\u0142ctor v Nahimana (Judgment and Sentence), Case No ICTR-99-52-T (3 December 2003) [1061] (‘Nahimana – Trial’); Joki\u0107 – Trial, above n 102, [589]-[590].

\textsuperscript{186} Kordi\u0107 – Trial, above n 130, [208]-[210]; Simic – Trial, above n 186, [52], [55]-[56], [60] and [69].

\textsuperscript{187} UN GAOR, 47\textsuperscript{th} sess, Supp 49, UN Doc A/47/49 (1992).

\textsuperscript{188} See: H. von Hebel and D. Robinson, in R.S. Lee, above n 2, 102; and T.L.H. McCormack, above n 2, 198.

\textsuperscript{189} \textit{The Public Prosecutor v Maubere (Sentence), Special Panel Case No 23/2003} (5 July 2004) 14-16.
This also is a new crime. It had been referred to as a crime against humanity in The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity\textsuperscript{190} and the Apartheid Convention of 1973.\textsuperscript{191} These Conventions were controversial for Western countries, particularly on the ground of the looseness of the definitions of the crime of apartheid.\textsuperscript{192} African nations sought inclusion of the crime in Article 7 and a consensus definition, different to and more stringent than that in the Apartheid Convention, was arrived at. Apart from the acts having to be ‘committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups, and committed with the intention of maintaining that regime’, they must be ‘of a character similar to those referred to in’ Article 7(1). Such a definition means the crime largely overlaps with the crimes of both persecution and inhumane acts. This raises the question whether a violation of economic or social rights is included. For example, can laws which deprive a racial group of the right to vote, work or live in certain areas be described as ‘inhumane acts of a character similar to those referred to in’ Article 7(1)?

4.12 Inhumane Acts

At Rome, a number of delegations were suspicious about the lack of precision of this ‘catch-all’ crime which had been in all previous instruments on crimes against humanity.\textsuperscript{193} The Appeals Chamber in Kordić held the ‘potentially broad range of the crime of inhumane acts may raise concerns to a possible violation of the nullum crimen principle’.\textsuperscript{194} It has been said that the crime ‘was deliberately designed as a residual category, as it was felt to be undesirable for this category to be exhaustively enumerated’.\textsuperscript{195} In Enigster, the Court said crimes against humanity must 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’ and ‘other inhumane acts’ must ‘comprise an act of the kind specified in the definition of crime against humanity’.\textsuperscript{196} The 1996 ILC Report had a similar definition.\textsuperscript{197} Article 7(1)(k) of the ICC Statute refers to ‘other inhumane acts of a similar character intentionally causing great suffering, serious injury to body or to mental or physical health’. The requirement of ‘similar character’ (also used in the definition of apartheid) suggests the \textit{eiusdem generis} principle applies. This has

\textsuperscript{190} Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 754 UNTS 73, above n 122.

\textsuperscript{191} Apartheid Convention, above n 123.

\textsuperscript{192} See Chapter 3, section 3.1.

\textsuperscript{193} See T.L.H. McCormack, above n 2, 200.

\textsuperscript{194} Kordić – Appeal, above n 99, [117].

\textsuperscript{195} Kupreškić – Trial, above n 73, [563]. See also Akayesu – Trial, above n 67, [585]; Naletilić – Trial, above n 134, [247].

\textsuperscript{196} Attorney-General of the State of Israel v Yehezkel Ben Alish Enigster, Tel Aviv District Court, 4 January 1952, 18 ILR 540 (1951), 541 (‘Enigster’); similarly Eichmann, above n 121, 239 (inhumane acts are those ‘causing serious physical and mental harm’); and \textit{In re Quispel}, 1949 Annual Digest 395 (Netherlands Special Court of Cassation, 1950).

\textsuperscript{197} Other inhumane acts were said to be circumscribed by two requirements: they must ‘similar in gravity to those listed’ and ‘in fact cause injury’ ‘of physical or mental integrity’: 1996 ILC Report, above n 78, 103.
some support in prior cases and some writers emphasise that the notion involves a serious attack on body and health which may mean the concept cannot include property crimes or attacks on political, social and economic rights.

The ad hoc Tribunals have defined ‘other inhumane acts’ in broadly the same way as Article 7(1)(k), but have said the acts must be ‘of similar seriousness’ rather than ‘similar character’ to the other enumerated acts and a ‘serious attack upon human dignity’ is also included. The Appeals Chamber in Kordić held that ‘inhumane acts’ involve the intentional infliction of serious bodily or mental harm upon a victim. The Trial Chamber in Kupreškić rejected resort to the ejusdem generis principle, saying the ‘inhumanity’ of an act can also be gauged by resort to human rights norms, but this may be a controversial approach. The Elements of Crimes in a footnote to Element 2 for both the crime of apathy and inhumane acts says ‘character’ refers to the nature and gravity of the act. This could possibly cover the widespread destruction of homes, businesses and public buildings as being of a similar nature and gravity as the deportation/transfer of people.

It has been held that the assessment of the seriousness of an act or omission is, by its very nature, relative, taking into account the personal circumstances of the victim, and is to be determined on a case-by-case basis. ‘Other inhumane acts’ have been held, or have been stated by courts, to cover:

(a) medical experimentation;
(b) mutilation;
(c) severe bodily harm;
(d) use of detainees for certain forms of labour and as human shields;
(e) beatings;
(f) degrading treatment;
(g) forced undressing and parading of women;
(h) forcing a mother to watch a son be tortured or the murder of a family member (including expelling them from their house and burning it down)
(i) forcing a man to eat his own flesh;
(j) being held in extremely restrictive and degrading conditions of detention; and

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198 Attorney-General of the State of Israel v Ternek, Tel Aviv District Court, 14 December 1951, 18 IJR 520 (1951) 539, 540, where it was said the acts ought resemble ‘in their nature and in their gravity those specified in the definition.

199 Vespassien Pella, above n 175, 346; Jean Graven, above n 175, 548-554; Prosecutor v Jelisić (Judgment), Case No IT-95-10-T (14 December 1999) [52] (‘Jelisić – Trial’) (equating inhumane acts with the war crimes of cruel and inhumane treatment).


201 Kordić – Appeal, above n 99, [117].

202 Kupreškić – Trial, above n 73, [564]-[566].

203 See Stakić – Trial, above n 182, [721], where the risk of relying on human rights to define international crimes was noted.

204 This being the reasoning in Kupreškić – Trial, above n 73, [631] for the crime of persecution.

205 Čelebići – Trial, above n 200, [536]; Jelisić – Trial, above n 199, [57]; Krnojelac – Trial, above n 117, [131]; Kunarac – Trial, above n 114, [501]; Vasiljević – Trial, above n 71, [235]; Musemo – Trial, above n 99, [212] and [232]; Kayishema – Trial, above n 78, [151].
(k) forcible internal displacement.\textsuperscript{206} It remains unclear, on the current case law, if property offences are included.

4.13 Article 7 and Property Crimes

The terms ‘persecutions’ or ‘inhumane acts’ have been drafted in such a way as to make it difficult to encompass property crimes or attacks on political, social and economic rights. One court in East Timor, based on a law modelled upon Article 7, has held that the destruction of property does not amount to either persecution or ‘other inhumane acts’ as a crime against humanity.\textsuperscript{207} In the Nuremberg Judgment and subsequent cases (most recently in the jurisprudence of the ad hoc Tribunals) crimes against humanity have included destruction and plunder of property and discriminatory attacks on peoples’ social and political rights. As Lauterpacht put it ‘Pillage, plunder, and arbitrary destruction of public and private property may, in their effects, be no less cruel and deserving of punishment than acts of personal violence’.\textsuperscript{208} If this sentiment prevails then such conduct may be held to amount to ‘other inhumane acts’ and, in turn, ‘persecution’.

5. CONCLUSION: ARTICLE 7 AND CUSTOMARY LAW\textsuperscript{209}

There is a great temptation to regard Article 7 as settling the meaning to be given to this difficult international crime. Some authors and courts have assumed Article 7 is the most authoritative definition of crimes against humanity in international law.\textsuperscript{210} Hebel and Robinson have argued that states at Rome viewed their task as defining the international crimes in question so as to reflect international customary law.\textsuperscript{211} McCormack, who attended the conference, believes the debate over the underlying crimes suggests some delegations were looking to progressively develop the law as much as codify existing law.\textsuperscript{212} Ratner and Abrams say that Article 7, since the Rome Conference, has largely been viewed as a codification of existing law, rather than the progressive development of the law.\textsuperscript{213} The distinction between the two is not always easy to draw and it may depend upon the issue in question. Cassese contends the additional crimes of forced pregnancy, apartheid, enforced disappearances and the

\textsuperscript{206} United States v Karl Brandt (“The Medical Case”) 2 CCL. 10 Trials 171; Kvočka – Trial, above n 165, [208]; Krstić – Trial, above n 101, [523]; Blaškić – Trial, above n 72, [239]; Naletilić – Trial, above n 134, [245]; Tadić – Trial, above n 72, [730], [736]-[738], [744], [754] and [764]; The Public Prosecutor v Cordosa (Judgment), Special Panel Case No 1/2003 (5 April 2003) [416]-[417](District Court of Dili, East Timor); Kupreškić – Trial, above n 73, [562]-[566], [819]-[822] and [830]-[832]; Akayesu – Trial above n 67, [598], [688] and [690].

\textsuperscript{207} The Public Prosecutor v Fernandes (Judgment), Special Panel Case 25/2003 (8 December 2004).

\textsuperscript{208} H. Lauterpacht, ‘The Law of Nations and the Punishment of War Crimes’ (1944) 21 British Year Book of International Law 58, 79.

\textsuperscript{209} Some preliminary remarks are made here and a fuller discussion is included in Chapter 7.

\textsuperscript{210} See T.L.H. McCormack, above n 2, 201 where the author says Australian courts have followed Article 7 when considering the crimes’ definition for refugee purposes. Aceves and Hoffman say ‘[b]ecause of its recent codification in the ICC Statute, Article 7(1) represents the most authoritative interpretation of crimes against humanity in international law’: William Aceves and Paul Hoffman, ‘Pursuing Crimes against Humanity in the United States’ in Mark Lattimer and Philippe Sands (eds), Justice for Crimes against Humanity (2003) 239, 245.

\textsuperscript{211} H von Hebel and D Robinson, above n 2, 91 and n 40.

\textsuperscript{212} T.L.H. McCormack, above n 2, 181-182.

\textsuperscript{213} Steven R. Ratner and Jason S. Abrams, above n 21, 50.
inclusion of gender and cultural grounds of discrimination are in advance of customary law; the *mens rea* requirement clarifies existing law; and the need for active state or organizational encouragement or involvement (instead of mere toleration), the definition of persecution and the failure to permit members of the armed forces or combatants to be victim of this crime, are all narrower than customary law.214 On the other hand, Cryer says the underlying crimes in Article 7, generally, only give concrete expression to existing law.215 Bassiouni concludes his assessment by saying the expanded crimes 'reflects the progressive evolution of customary international law'.216 The ICTY, like the view of Cassese, has now held that the definition of persecution217 and the requirement for a policy218 in Article 7 are more restrictive than customary law.

Overall, the case for the conclusion that Article 7 represents the codification of customary law is not very strong. Article 7 is directed to the ICC’s jurisdiction. It was not intended by states to be an accurate statement of existing law.219 In the end, a compromise definition of crimes against humanity was reached based upon establishing an international court that states could live with for the future, not one that reflected the crime’s ‘correct’ definition under existing law, a near impossible task at that time in any event. As Kirsch and Holmes put it:

‘Delegations were prepared to consider the inclusion of a broad range of crimes, if the jurisdiction of the court was limited, for example, by requiring State consent on a case-by-case basis or by permitting States to opt in or opt out of certain crimes. Conversely, the possibility of automatic jurisdiction upon ratification of a system close to universal jurisdiction provoked some delegations to argue for a limited range of crimes, narrower definitions and higher thresholds’.220

Like the definitions in the ICTY and the ICTR Statutes (and the definition in the London Charter), Article 7 is a statement of jurisdiction for the tribunal in question from which some of the elements of the international crime can be inferred. Each definition may at the time of enactment be in part broader as well as narrower than the position in customary law.221 The extent to which it may come to reflect customary law must depend on the future and how the definition comes to be received by states.

Nevertheless, Article 7 and the debate at the Rome Conference do carry legal weight, particularly where there is evidence of consensus by many states as to some of the elements of crimes against humanity in international law.222 As the Trial Chamber in *Furundžija* said ‘[d]epending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law’.223 The lack of a discriminatory motive in

214 A. Cassese, above n 60, 91-94.
215 R. Cryer, above n 87, 256-260.
216 M.C. Bassiouni, above n 5, 187.
217 See section 4.9.
218 Kunarac – Appeal, above n 39, [98]; and Blaškić – Appeal, above n 58, [100], [120], [126] and [130].
219 This is Cassese’s conclusion, where the author says the Statute is not intended to codify international customary law: A. Cassese, above n 60, 147.
221 This is again Cassese’s conclusion: A. Cassese, above n 60, 91; see also Kupreškić – Trial, above n 73, [580].
222 T.L.H. McCormack, above n 2, 180 and 186; D. Robinson, above n 19, 47.
223 *Furundžija* – Trial, above n 159, [227].
Article 7 is significant because only France initially regarded it as an element at the Rome Conference. Next, some draw upon Article 7 to support the abandonment of the war nexus in customary law.\textsuperscript{224} Whilst the argument has much force, it may be a little simplistic. A small minority of states with large populations, such as India and China, still argued for the nexus. Those states may argue that until their ratification of the ICC Statute, they remain objectors to the emergence of crimes against humanity without a war nexus under customary international law, at least as a rule of jurisdiction covering their nationals for acts committed in their own territory.\textsuperscript{225} On the other hand, the special definition of 'attack' in Article 7 and its requirement for a state or organisational policy was clearly the result of a political compromise. It is of some significance that no consensus was reached on defining crimes against humanity consistently with the definition now put forward by the \textit{ad hoc} Tribunals.\textsuperscript{226}

Over time, a consensus may emerge that Article 7 ought be regarded as the authoritative definition of this crime (whatever may have been the prior position under customary law). Given the absence of any other treaty definition, this may occur despite the terms of Article 10 of the ICC Statute which says the Statute is not to be used to limit or prejudice existing rules of international law. What is required in order to ascertain the current relationship between Article 7 and customary law is an analysis of state practice since the Rome Conference. Chapter 7 returns to the question of the contours of crimes against humanity as a matter of international customary law.

\textsuperscript{224} For example, McCormack says the abandonment of the war nexus in Article 7 represents 'the affirmation of a new customary international norm': T.L.H. McCormack, above n 2, 185; see also D. Robinson, above n 19, 45-46; H. von Hebel and D. Robinson, above n 2, 92-93; and S.R. Ratner and J.S. Abrams, above n 21, 57.

\textsuperscript{225} The issue of the war nexus is considered further in Chapter 7.

\textsuperscript{226} See n Chapter 4, section 5.
CHAPTER SIX

STATE PRACTICE SINCE THE ROME CONFERENCE

...it is really our certainty that genocide or torture is illegal that allows us to understand state behaviour and to accept or reject its legal message, not state behaviour itself that allows us to understand that these practices are prohibited by law.¹

1. INTRODUCTION

Chapter 5 considered the definition of crimes against humanity in Article 7 of the ICC Statute. It was remarked that it would be too simplistic and premature to regard Article 7 as codifying the crime’s content as a matter of customary international law outside the context of the ICC Statute. This chapter examines developments since the Rome Conference of 1998 with particular attention paid to whether such developments can be regarded as acceptance by states of Article 7 as the most authoritative international definition of crimes against humanity. Consistent with the view that one ought to consider separately the elements of this international crime from the right to try, this chapter also highlights the rules of jurisdiction that have emerged since the Rome Conference with respect to crimes against humanity.

The ICC Statute entered into force on 1 July 2002, but its trial work has not yet begun. It has opened three investigations. The first two (into the Democratic Republic of Congo, announced 23 June 2004, and Uganda, announced 29 July 2004)² followed State Party referrals in respect of atrocities alleged to have occurred in the states’ own territories. This suggests the ICC is being used as an adjunct to a State Party’s domestic criminal system, rather than to combat state impunity where the territorial or national state is unable or unwilling to prosecute the crimes in question. This has generated some controversy as to whether such a use of the ICC is consistent with the original intention of the drafters at Rome.³

The third investigation, the case of Sudan, has followed the more traditional lines of a ‘crime against humanity’ warranting an international response. The Security Council had for some time been concerned about reports of state tolerated atrocities committed by the Janjaweed militia in the Darfur region, and the Secretary-General had threatened UN intervention.⁴ On 31 March 2005, when it was unsatisfied with the response of Sudan, the Security Council referred the situation in Darfur to the Prosecutor of the

² It has also received a State Party referral from the Central African Republic (6 January 2005) but has not announced an investigation: see <http://www.icc-cpi.int/cases.html> viewed 29 June 2006.
⁴ See, for example, SC Res 1556, UN SCOR, 59th sess., 5015th mtg, UN Doc S/Res/1556 (2004); and Report of The Secretary-General pursuant to Paragraphs 6 and 13 to 16 of Security Council Resolution 1556, UN SCOR, 59th sess, UN Doc S/2004/703 (2004).
This is the first time the Security Council has done so. The United States resisted initially but it ultimately abstained from voting in light of paragraph 6 of the Resolution. This purports to decide that persons from a contributing state outside Sudan which is not a party to the ICC Statute shall be subject to the exclusive jurisdiction of that contributing state for all alleged acts or omissions arising out of operations in Sudan. The prosecutor opened an investigation in respect of Darfur on 6 June 2005.

In the absence of any ICC jurisprudence, this chapter considers state practice in two parts. The first part looks at the treatment of crimes against humanity in the law of the so-called hybrid tribunals in Sierra Leone, East Timor, Kosovo and Cambodia. Part two examines the practice of 14 selected states and the incorporation of the offence of ‘crimes against humanity’ into their municipal law. The question of the practice of the Security Council is left to chapter 7 where an analysis is undertaken of the current status of crimes against humanity as a matter of customary international law.

2. CRIMES AGAINST HUMANITY AND THE LAW OF THE HYBRID TRIBUNALS

2.1 Introduction

The hybrid tribunals dealt with in this section are the Special Court for Sierra Leone, the Special Panels for Serious Crimes in the District Court of Dili, East Timor, the Extraordinary Chambers of Cambodia and the UN administered courts in the territory of Kosovo. They are considered ‘hybrid’ tribunals because, on the one hand, they have some ‘international’ aspects to them, such as the use of international judges and jurisdiction over international crimes. On the other hand, they are not ‘purely’ international courts such as the ICC, the ICTY or the ICTR because of either the involvement of a territorial state (in the case or Sierra Leone and Cambodia) or an international administration which is limited to one territory (in the case of East Timor and Kosovo). It is important to analyse correctly the jurisdiction that is being utilised by

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5 The referral extends back to 1 July 20002: See SC Res 1593, UN SCOR, 60th sess, 5158th mtg, UN Doc S/Res/1593 (2005), pursuant to Article 13(6) of the ICC Statute; see also Luigi Condorelli and Annalisa Ciampi, 'Comments on the Security Council Referral of the situation in Darfur to the ICC' (2005) 3 Journal of International Criminal Justice 590.

6 The likely intended effect is to pre-empt any UN member State referring the Darfur situation generally (including for acts of nationals of non-state parties such as the United States) to the ICC because Security Council decisions under Chapter VII are binding on all UN member states even if in conflict with treaty obligations: see Charter of the United Nations, art 103; and Frederic L. Kirgis, UN Commission’s Report on Violations of International Humanitarian Law in Darfur: Security Council Referral to the International Criminal Court (2005) The American Society of International Law <http://www.asil.org/insights/2005/02/insight050204a.html> viewed 22 January 2006.

these Tribunals because it will make a difference in terms of precedential value whether the jurisdiction being utilised is international or domestic or truly a mix of both.

2.2 The Special Court for Sierra Leone

2.2.1 The Statute

Ravaged by a decade of atrocities and civil war, the President of Sierra Leone, by letter dated 12 June 2000, asked the United Nations for assistance in bringing those responsible for 'crimes against the people of Sierra Leone' to justice. Disinclined to establish another Chapter VII ad hoc Tribunal, the Security Council requested the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create a special court in the territory. In 2002, an agreement was concluded between the United Nations and the Government of Sierra Leone which annexed a Statute for the Special Court. The Special Court covers international and domestic crimes committed in Sierra Leone after 30 November 1996. Article 2 on crimes against humanity provides:

The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:

(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;
(h) persecution on political, racial, ethnic, or religious grounds;
(i) other inhumane acts.

Whilst the influence of the ICC Statute can be discerned in the expanded list of sexual offences, it does not include all of the enumerated crimes in Article 7, or their definitions. Further, the chapeau differs from the ICC Statute because it does not include the definition of 'attack' in Article 7(2), which may be taken as a rejection of the view that such definition reflects customary law. It also does not include the special

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9 SC Res 1315, UN SCOR, 55th sess, 4186194 mtg UN Doc S/RES/1315 (2000). The resolution stated that under Article 39 of the UN Charter a threat to international peace had arisen; see D. Shraga, above n 8, 19.


11 Special Court Statute, arts 2-5.

12 See M. Frulli, above n 8, 863-864; S. Linton, above n 7, 234.
mens rea requirement of acting with ‘knowledge of the attack’. The Secretary-General said that the international crimes have the character of customary international law at the time of their alleged commission. The Secretary-General appointed the majority of the judges and Sierra Leone appointed the balance.

2.2.2 The Jurisprudence

(i) The Nullum Crimen Principle

The Appeals Chamber accepts it is bound by the nullum crimen principle. In Norman et al, the accused submitted that the Special Court was, unlike the ICTY or the ICTR, a domestic court created by the Ratification Act and it could not apply the new crimes (Articles 2, 3 and 4) retrospectively because the Constitution of Sierra Leone prohibits the retroactive application of new criminal offences. The Appeals Chamber held it was an international court only bound by international law because it was established by an international treaty. It accepted, without analysis, that Articles 2-4 were existing international crimes. This was followed in Prosecutor v Brima, et al, where the Trial Chamber said Article 2 was an existing crime, relying on the Tadić Jurisdiction Decision and, curiously, Sierra Leone’s signature of the ICC Statute.

(ii) The amnesty of the Lomé Peace Agreement

In 1999 the parties to the conflict in Sierra Leone signed an agreement which granted to potential defendants before the Special Court a wide-ranging pardon for acts committed prior to signing the Agreement. Whilst the Secretary-General’s representative (who signed the Agreement) appended a disclaimer that the amnesty shall not apply to international crimes, the Lomé Agreement was incorporated into municipal law. Article 10 of the Special Court Statute states that any amnesty shall

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14 Special Court Statute, above n 10, art 12.
15 Prosecutor v Norman (Decision on Preliminary Motion on Lack of Jurisdiction – Child Recruitment), Case No SCSL-2004-14-AR72(E) (31 May 2004) (‘Norman – Preliminary Motion’). After a thorough analysis, it concluded (by majority) that recruiting children into armed conflict was at the time an existing international crime. There was a lengthy dissent by Justice Robertson.
17 Ibid.
18 Ibid, [48]-[53]. Orentlicher agrees it is an international court: D.F. Orentlicher, above n 7, 215. This is confirmed by section 11(2) of the Ratification Act which says the Special Court does ‘not form part of the Judiciary of Sierra Leone’.
19 Norman – Constitutionality, above n 16, [80]-[82].
22 See Report of the Secretary-General, above n 13, [23].
not bar a prosecution for international crimes (Articles 2-4). According to the Secretary-General’s Report, this was to deny the amnesty legal effect under international law.\textsuperscript{23} The Appeals Chamber held that the Lomé Agreement could not create obligations at the international level because it was not an international treaty – only the government of Sierra Leone and the Revolutionary United Front, a non-state actor, were parties.\textsuperscript{24} This suggests an international amnesty may have been relevant. The Chamber stated that if the international crime attracts universal jurisdiction (which will not always be the case) a local amnesty cannot bar a foreign court or international court from exercising that universal jurisdiction.\textsuperscript{25} Relying on \textit{In re List et al} and \textit{Eichmann}, it concluded crimes against humanity (and the other crimes in Articles 2-4) are subject to universal jurisdiction and the amnesty will therefore not be binding upon it.\textsuperscript{26} It is curious that in deciding it was not bound by the amnesty, the Court looked to the principle of universal jurisdiction over international crimes rather than the overriding jurisdiction of a court endorsed by the Security Council invoking Chapter VII of the Charter.

(iii) Head of State immunity

Former President of Liberia, Charles Taylor, who was indicted whilst in office, claimed head of state immunity from prosecution.\textsuperscript{27} Article 6(2) of the Special Court’s Statute purports to override any such claim. The Court held the Security Council had the power under Article 41 of the UN Charter to create the Special Court to give effect to its decisions under Article 39 to maintain and restore international peace.\textsuperscript{28} Hence, the Court is ‘truly international’.\textsuperscript{29} After referring to the precedents in the London Charter, the Nuremberg Principles, the ICTY, ICTR and ICC Statutes, and the Arrest Warrant Case of the ICI, it concluded that the sovereign equality of states does not prevent a Head of State being prosecuted by an international criminal court.\textsuperscript{30}

(iv) Other cases

\textsuperscript{23} Ibid, [24].


\textsuperscript{25} Ibid, [67].

\textsuperscript{26} Ibid, [68] and [70]. See \textit{United States v List and others (“The Hostages Case”) 8 Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No 10, 1242 (US Government Printing Office, Washington DC, 1950); and Attorney-General of Government of Israel v Eichmann, 36 ILR 277 (Sup. Ct., Israel, 1962), discussed in chapter 3, section 4.5. The extent to which these cases establish universal jurisdiction over crimes against humanity is addressed in Chapter 8. The issue of the legality of amnesties for crimes against humanity is considered further in Chapters 7 and 8.

\textsuperscript{27} \textit{Prosecutor v Taylor (Decision on Immunity From Jurisdiction)}, Case No SCSL-2003-01-I, (31 May 2004). He stepped down in August 2003 under threat of UN and United States intervention.

\textsuperscript{28} Ibid, [38].

\textsuperscript{29} Ibid.

\textsuperscript{30} Ibid, [45]-[50]. The Court said it was a separate issue whether the Security Council requires other States to co-operate.
The Court is yet to hand down any trial judgments but it has delivered two important interlocutory decisions dealing with the meaning of crimes against humanity.31 One Trial Chamber noted that the definition of crimes against humanity in the Statute for the Special Court differed from that in the ICTY Statute, the ICTR Statute and the ICC Statute and that the jurisprudence of the two Tribunals regarding crimes against humanity are as varied as their Statutes.32 In the end both decisions followed the ICTY Appeals Chamber in the Kunarac case to hold that there are five common elements that make up the offence.33 The two cases also generally followed the other ICTY and ICTR case law as to the meaning to be given to those elements.34 This reinforces the precedential value of the case law of the ad hoc Tribunals. It also strengthens the case for the special mens rea requirement of acting with knowledge of the attack reflecting customary law, as this was not expressly included in the definition under the Statute. Of interest is that both Trial Chambers, in considering the meaning of ‘civilian’ in the term ‘civilian population’, followed the approach of the Trial Chamber in Blaškić, rather than the approach of the Appeals Chamber, which held that victims of crimes against humanity can include:

[T]hose who were members of a resistance movement or former combatants – regardless of whether they wore uniform or not – but who were not longer taking active part in the hostilities because they had left the army or were no longer bearing arms or, ultimately had been placed hors de combat, in particular because of their wounds or their being detained. The specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian.35

This supports the argument that as a matter of customary law the status of the victim of a crime against humanity is irrelevant if he or she is attacked in the context of an overall attack on a civilian population.

2.2.3 Conclusion

It is probably correct to say that the Special Court is an international court, but only just. Its jurisdiction over crimes against humanity is limited to the territory of Sierra Leone and its viability, in substance, is based upon the consent and cooperation of Sierra Leone, the territorial state. The UN’s main role is as financial donor and to lend legal credibility to Sierra Leone’s desire to use the courts rather than amenities to deal with those responsible for the atrocities of the past. Without a Chapter VII mandate the Court has no power over related crimes committed in neighbouring countries or to

32 Brima – Decision, above n 31, [41]
33 Prosecutor v Kunarac (Appeals Chamber Judgment), Case No IT–96–23–A & IT–96–23/1–A (12 June 2002) [83] (‘Kunarac – Appeal’) and see the discussion of these elements in Chapter 4.
34 Norman – Decision, above n 31, [55]-[59]; Brima v Decision, above n 31, [42].
35 Norman – Decision, above n 31, [58] quoting Prosecutor v Blaškić (Trial Chamber Judgment), Case No IT–95–14–T (3 March 2000) [214]; Brima v Decision, above n 31, [42(c)] and see Chapter 4, section 4.3.
require the surrender of suspects in third countries.\textsuperscript{36} For example, Nigeria was not in breach of any Security Council resolution in refusing to hand over Charles Taylor despite service of the Court’s indictment and warrant on 27 November 2003.\textsuperscript{37} Under mounting international pressure Nigeria agreed to arrest him and he was taken into the custody of the Special Court on 29 March 2006.\textsuperscript{38} He made his first appearance on 3 April 2006 to answer charges including crimes against humanity.

2.3 Crimes against Humanity in East Timor

2.3.1 The Statute

In the lead up to and following the August 1999 referendum on independence, widespread violence broke out in East Timor perpetrated by militia widely reported as having the support of the Indonesian authorities and military.\textsuperscript{39} After a peace enforcement operation (with Indonesia’s reluctant consent),\textsuperscript{40} the Security Council acted under Chapter VII to establish a United Nations Administration in East Timor (UNTAET) with legislative authority over the country.\textsuperscript{41} UNTAET Regulation 2000/11 (section 10) created Special Panels for Serious Crimes within the District Court of Dili and international judges have been appointed to the Panels. UNTAET Regulation 2000/15 vested those Panels with universal jurisdiction over genocide, war crimes, crimes against humanity and torture, and territorial jurisdiction over murder and sexual offences and torture when committed between 1 January 1999 and 25 October 1999.\textsuperscript{42} The definition of crimes against humanity follows Article 7 of the ICC Statute exactly but leaves out the controversial definition of ‘attack’ in Article 7(2).\textsuperscript{43} This generally is assumed to have been deliberate, based on the view that the definition of ‘attack’ in Article 7 is narrower than required by customary international law.\textsuperscript{44}

\textsuperscript{37} The right of Nigeria to grant asylum to President Taylor under international law is considered in Chapter 8.
\textsuperscript{39} On 4 September 1999 it was announced that 78.5% of the vote was in favour of independence which sparked further widespread violence: see Report of the International Commission of Inquiry on East Timor to the Secretary-General, UN SCOR, 55\textsuperscript{th} sess, UN Doc S/2000/59 (2000); Report of the Special Rapporteurs, Situation of Human Rights in East Timor, UN GAOR, 54\textsuperscript{th} sess, UN Doc A/54/660 (1999); S. Linton, ‘Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor’ (2001) 25 Melbourne University Law Review 122; C. Romano et al., above n 7, chapters 5 and 6.
\textsuperscript{40} The Security Council authorised the Australia-led operation, known as INTERFET, which entered East Timor on 20 September 1999: SC Res 1264, UN SCOR, 54\textsuperscript{th} sess, 4045\textsuperscript{th} mtg, UN Doc S/RES/1264 (1999).
\textsuperscript{41} SC Res 1272, UN SCOR, 54\textsuperscript{th} sess, 4057\textsuperscript{th} mtg, UN Doc S/RES/1272 (1999).
\textsuperscript{42} Section 2 UNTAET Regulation 2000/15, (entered into force on 6 June 2000); the crimes are at ss4-9.
\textsuperscript{43} Ibid, s 5.1, see Appendix I.
\textsuperscript{44} See Kai Ambos and Steffen Wirth, ‘The Current Law of Crimes of Humanity: An Analysis of UNTAET Regulation 15/2000’ (2002) 13 Criminal Law Forum 1, 3 and 30-34 (who nevertheless argue that there must be some link, at least by mere inaction or tolerance, between the attack and a state or de facto authority); S. Linton, above n 7, 207-208; Bert Swart
2.3.2 The Jurisprudence

(i) Crimes against humanity

Commencing with the conviction of ten in December 2001 in Los Palos, a large number of trials and convictions for crimes against humanity have taken place. In Los Palos, the Panel, following the existing jurisprudence of the ICTY and ICTR, said the attack must result from a policy of a state or de facto power which exercises the highest authority in a territory with control over individuals and all other holders of power. Most subsequent cases have not regarded it as necessary to find a state or organisational policy. Nevertheless, the judgments (including in Los Palos) have generally found there was both widespread and systematic violence against a ‘civilian population’ — namely those civilians linked with political movements for the self-determination of East Timor — carried out by militias and members of the Indonesian armed forces with the acquiescence or active participation of civilian and military authorities. In Martins and Gonzales, the court held that a revenge killing by one militia member of another militia member was not a crime against humanity because it could not be related to the attack against the civilian population.

In dos Santos, the defendant was a member of the Besih Merah Putih militia. In company with other members of the militia and the Indonesian army, and on their orders (including on the orders of a District administrator), the defendant was involved in killing civilians, including the pro-independence activist Carrascalão and persons...

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45 The Public Prosecutor v Marques (Judgment), Special Panel Case No 09/2000 (11 December 2001) (‘Los Palos – Judgment’).
46 Ibid., [639], citing Prosecutor v Blaškić (Trial Chamber Judgment), Case No IT–95–14–T (3 March 2000); Prosecutor v Kupreškić (Trial Chamber Judgment), Case No IT–95–16–T (14 January 2000); Prosecutor v Tadić (Trial Chamber Judgment), Case No IT–94–1–T (7 May 1997); Prosecutor v Bagilishema (Judgment), Case No ICTR-95-1A-T (7 June 2001); Prosecutor v Kayishema and Ruzindana (Judgment), Case No ICTR-95-1-T (21 May 1999). For a discussion of these cases, see Chapter 4.
48 Ibid. This also was the case in Los Palos – Judgment, above n 45, [686]-[691].
50 The Public Prosecutor v dos Santos (Judgment), Court of Appeal Case No 16/2001 (15 July 2003) 8-12 (‘dos Santos – Judgment’).
who had taken refuge in the church at Liquiçá.\textsuperscript{51} The Special Panel convicted the defendant of murder but not crimes against humanity because it was not satisfied he was aware that widespread or systematic attacks against civilian populations were also ‘being carried out throughout East Timor’.\textsuperscript{52} The Court of Appeal, correctly, ruled that the defendant’s awareness did not have to cover the entire territory of East Timor.\textsuperscript{53} The Court said – contrary to much jurisprudence, including that of the ICTY\textsuperscript{54} – that the widespread nature of the attack refers to the defendant’s conduct and the geographic area of his operations.\textsuperscript{55} It said the mens rea requirement was made out because the defendant was aware of the widespread or systematic nature of his conduct in the area in which he was operating.\textsuperscript{56}

The cases have frequently applied the jurisprudence of the ICTY and the ICTR and the Elements of Crimes under the ICC Statute.\textsuperscript{57} In Mesquita, the Panel thought it controversial whether the acts of persecution had to be crimes themselves or whether the persecutory intent converted an otherwise non-inhumane act into an inhumane one.\textsuperscript{58} It noted that whilst the World War Two Tribunals and the ICTY and the ICTR followed the latter approach, section 5.1 of the Regulation – modelled on Article 7 of the ICC Statute, where states wanted to limit the ambit of this crime – requires persecution to be in connection with a crime otherwise within the Panel’s jurisdiction.\textsuperscript{59} In Fernandes, the Panel held that the destruction of property did not amount to either persecution or ‘other inhumane acts’ as defined in section 5.1.\textsuperscript{60} Judgment in the last trial of the Special Panels was handed down on 12 May 2005.\textsuperscript{61}

\textsuperscript{51} Ibid.
\textsuperscript{52} Ibid, 13.
\textsuperscript{53} Ibid, 17. The defendant need not have knowledge of all aspects of the attack or its details and an attack need not cover an entire population or a large geographic area: see Prosecutor v Kunarac (Appeals Chamber Judgment), Case No IT–96–23–A & IT–96–23/1–A (12 June 2002) [90], [103] (Kordić – Appeal), Prosecutor v Tadić (Appeals Chamber Judgment), Case No IT–94–1–A (15 July 1999) [248]; and Prosecutor v Kordić and Čerkez (Appeals Chamber Judgment), Case No IT–95–14/2–A (17 December 2004) [99] (Kunarac – Appeal) and chapter 4, section 4.
\textsuperscript{54} It is only the attack, not the acts of the accused, that must be widespread or systematic and a single act with a single victim could, if part of the overall attack, be a crime against humanity: Kordić – Appeal, above n 53, [94] and Kunarac – Appeal, above n 53, [101]: See Chapter 4, section 4.4.
\textsuperscript{55} dos Santos – Judgment, above n 50, 17.
\textsuperscript{56} Ibid, 18-19.
\textsuperscript{57} See for example, Los Palos – Judgment, above n 45, [634]-[642]. Franca – Judgment above n 47, [92].
\textsuperscript{58} Mesquita – Judgment, above n 47, [69]-[70].
\textsuperscript{59} Ibid, [71]-[80].
\textsuperscript{60} The Public Prosecutor v Fernandes (Judgment), Special Panel Case No 25/2003 (8 December 2004) (‘Fernandes – Judgment’).
\textsuperscript{61} The Deputy Public Prosecutor for Serious Crimes v Barros et al (Judgment), Special Panel Case No 1/2004 (12 May 2005). The defendants were convicted of crimes against humanity for their participation as militia members in reprisal attacks in September 1999 following the referendum against independence supporters at the Suai church, in which 31 were killed. In total the Special Panels have tried 87 defendants in 55 trials, with 84 convicted of crimes against humanity and three acquitted of all charges: see Status Updates, Special Panels for Serious Crimes in East Timor, War Crimes Office, Washington College of Law, <http://www.wcl.american.edu/warcrimes/easttimor_status.cfm> viewed 5 January 2006.
(ii) The Nullum Crimen Principle

In *Franca*, the Special Panel held that since the Nuremberg Judgment the principle, *nullum crimen sine lege*, requires the crime to be an existing one at the time of the conduct.\(^{62}\) It noted this might bar the retroactive application of some of the enumerated crimes against humanity (such as enforced prostitution or forced pregnancy which first appeared in Article 7 of the ICC Statute) if these crimes are considered to travel beyond customary law.\(^{63}\) It did not consider the extent to which the chapeau reflects existing customary law. Citing both Bassiouni and jurisprudence from the European Court of Human Rights, the Panel held there was some room for international criminal law to clarify and apply the law by analogy to different facts as international crimes need not ‘be proscribed in exact and precise terms’.\(^{64}\) It held imprisonment and torture were existing crimes, but perhaps not ‘other severe forms of deprivation of liberty’.\(^{65}\)

The Court of Appeal in *dos Santos* held that Section 31 of the Constitution (prohibiting retroactive criminal prosecutions) did not allow the defendants to be tried for crimes against humanity committed before June 2000 (when UNTAET Regulation 2000/15 came into force).\(^{66}\) The Court held that Portuguese law applied at the time of the offence and substituted the acquittal for crimes against humanity with a conviction for genocide under Portuguese criminal law.\(^{67}\)

The Special Panel in *Mendonca*\(^ {68}\) declined to follow *dos Santos*. In reliance on the principles in Article 15 of the ICCPR and Section 9.1 of the Constitution (which adopts the general or customary principles of international law into the legal system of East Timor), the Panel held that the Constitution permitted a person to be convicted for an act if at the time it ‘was criminal according to general principles of law recognised by the community of nations’.\(^ {69}\) The Panel said:

> ... under customary international law crimes against humanity are criminal under general principles of law recognised by the community of nations, and thus constitute an exception to the principle of retroactivity. In the Čelebići case (par 313) the ICTY held that acts such as murder, torture, rape and inhumane treatment are criminal according to general principles of law recognised by every legal system and those who commit those acts cannot escape prosecution before an international tribunal by hiding behind the principle of retroactivity.\(^ {70}\)

It is interesting that the Panel relied upon the conduct being ‘criminal according to general principles of law recognised by the community of nations’ and the Čelebići case (which was dealing with war crimes) rather than the *Tadić* Jurisdiction Decision

\(^{62}\) *Franca – Judgment*, above n 47, [59]-[66].

\(^{63}\) Ibid, [71].

\(^{64}\) Ibid, [72]-[80].

\(^{65}\) Ibid, [84]-[93]; followed in *The Prosecutor v Ruhi (Judgment)*, Special Panel Case No 4a/2001 (7 December 2002) [78] and [109], which also accepted ‘inhumane acts’ as existing crimes.


\(^{67}\) Ibid, 19-20. But now see Disposition Law No 10/2003, which makes Indonesian Law applicable at the time.

\(^{68}\) *The Public Prosecutor v Sarmento and Mendonca (Decision on the Defence Motion (Domongos Mendonca) for the Court to Order the Public Prosecutor to Amend the Indictment)*, Special Panel Case No 18a/2001 (24 July 2003) (‘Mendonca – Defence Motion’).

\(^{69}\) Ibid, [18].

\(^{70}\) Ibid, [20] and [30].
for the customary law status of crimes against humanity.\textsuperscript{71} The decision in \textit{Mendonca} rather than \textit{dos Santos} has generally been followed by the Special Panels.\textsuperscript{72}

### 2.3.3 Conclusion

The work of the Special Panels resembles that of the tribunals appointed by the Allies under Control Council Law 10 after the Second World War.\textsuperscript{73} Whilst purporting to punish international crimes, the law and the tribunals are essentially local measures for a territory in transition. This has allowed the Panels at times to convict an accused of domestic crimes such as murder or destruction of property when it has not been satisfied about the special requirements for crimes against humanity.\textsuperscript{74} This is not an option in proceedings before the ICC.

Those convicted have generally been minor players, as is reflected in the light sentences handed down, such as seven and eight years for murder as a crime against humanity.\textsuperscript{75} Those indicted who bear the most responsibility for the atrocities in East Timor, such as General Wiranto, have avoided both effective prosecution at home and extradition to East Timor to face the charges laid against them.\textsuperscript{76} Of the 440 persons indicted, 339 could not be proceeded with because they were beyond the jurisdiction.\textsuperscript{77} This has led one commentator to say it would have been better if the Special Panels had only indicted the senior perpetrators in Indonesia for crimes against humanity (which could not proceed without UN support) and applied local law to the minor accomplices left in the territory.\textsuperscript{78} There is talk of pardoning those convicted as part of the process of reconciliation and in recognition of the fact that the major perpetrators have escaped conviction.\textsuperscript{79} At the international level, the Secretary-General’s Commission of Experts

\textsuperscript{71} It did note that the ICTY (without citing any case) held ‘it is beyond dispute that crimes against humanity are international crimes, and prosecutable and punishable as such’: ibid, [31]. The resort to ‘general principles of law’ in this way is supported by the author: see chapter 2, section 6.4.

\textsuperscript{72} See, for example, Cloe – \textit{Judgment}, above n 47, [14], which also cites \textit{Prosecutor v Delalic et al (Judgment)}, Case No IT-96-21-T (16 November 1998) (‘Čelebići – \textit{Trial’}). See both Lao – \textit{Judgment}, above n 47, [3] and Mesquita – \textit{Judgment}, above n 47, 14-16, where the Panel said crimes against humanity has been recognised for more than fifty years and ‘can take different forms’, but that the Regulation must govern its definition before the Panel. See also Martins – \textit{Judgment}, above n 49, 7-11.

\textsuperscript{73} See Chapter 3, section 2.

\textsuperscript{74} See \textit{dos Santos – Judgment}, above n 50; \textit{The Deputy Public Prosecutor v Olivera et al (Judgment)}, Special Panel Case No 12/2002 (23 February 2004); and Fernandes – \textit{Judgment}, above n 60.

\textsuperscript{75} See Nunes - \textit{Judgment}, above n 47, where there was a dissent on sentence by Judge Blunk.

\textsuperscript{76} See Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999, UN SCOR, 60\textsuperscript{th} sess, annex, UN Doc S/2005/458 (2005) (hereinafter Report of Experts on Timor-Leste); Sylvia de Bertodano, ‘East Timor: Trials and Tribulations’ in Cesare Romano, above n 7, 79, 92; and see section 3.8 on Indonesia below.


\textsuperscript{78} S. Bertodano, above n 76, 83.

\textsuperscript{79} See ibid, 92. On 20 May 2005, the President granted a reduction in sentence for some who had been convicted of crimes against humanity: Judicial System Monitoring Program, <www.jsmp.minihub.org/NEWS> viewed 15 January 2006.
has called for an *ad hoc* tribunal in the absence of effective prosecutions in Indonesia.\textsuperscript{80} The UN has so far resisted calls for an international tribunal to prosecute the Indonesian officials most responsible.

### 2.4 The Extraordinary Chambers of Cambodia

Between 1975 and 1979 the Khmer Rouge in Cambodia committed atrocities against the local population on a vast scale.\textsuperscript{81} In the 1990’s the new regime in Cambodia was confronted with the question of what to do with those alleged to have been involved in these acts. It considered putting some of the Khmer Rouge leaders on trial. In 1996, however, a pardon was granted to Ieng Sary, the former Deputy Prime Minister.\textsuperscript{82} In 1997, Cambodia asked the Secretary-General for assistance in bringing to justice those responsible.\textsuperscript{83} There then followed a drawn out process of negotiations as Cambodia rejected the UN’s insistence that international judges be in the majority. On 10 August 2001, Cambodia enacted its own legislation creating the Extraordinary Chambers with jurisdiction over the crimes of the Khmer Rouge.\textsuperscript{84} Following UN General Assembly approval,\textsuperscript{85} on 6 June 2003 an agreement over the Extraordinary Chambers was signed between Cambodia and the UN, which accepts that international judges are to be in the minority but no decision can be reached which does not at least have the support of one of the international judges.\textsuperscript{86}

The Extraordinary Chambers have subject matter jurisdiction over genocide, crimes against humanity, war crimes and the local crimes of homicide, torture and religious persecution when committed between 17 April 1975 and 6 January 1979.\textsuperscript{87} The definition of crimes against humanity under the Law on Extraordinary Chambers,

\textsuperscript{80} Report of Experts on Timor-Leste, above n 76.

\textsuperscript{81} It is estimated that some 2 million people or between one quarter to one third of the population perished: see Craig Etcheson, ‘The Politics of Genocide Justice in Cambodia’ in C. Romano, above n 7, 181, 181.

\textsuperscript{82} D. Shraga, above n 8, 30.

\textsuperscript{83} D.F. Orentlicher, above n 7, 216

\textsuperscript{84} *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, adopted in the 5th Session of the 2nd Legislature (2 January 2001), approved in the 4th Session of the 1st Legislature (15 January 2001). After agreement was reached with the UN (see below n 86), the Law was amended on 27 October 2004 (with these amendments, hereinafter Law on Extraordinary Chambers): see Appendix I.

\textsuperscript{85} GA Res 57/228, UN GAOR, 3\textsuperscript{rd} Comm, 57\textsuperscript{th} sess, 85\textsuperscript{th} plen mtg, Annex, Agenda Item 109(b), UN Doc A/RES/57/228 (2002).

\textsuperscript{86} Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, done at Phnom Penh, Cambodia, on 6 June 2003, art 3 (entry into force 29 April 2005) (hereinafter, the Phnom Penh Agreement). In the result, there is a Trial Chamber with five judges (three are to be Cambodian and two are to be international judges) and an Appeals Chamber with seven judges (four are to be Cambodian and three are to be international judges). In order for there to be a decision there must be a decision of, at least, four and six judges respectively: see article 14 of the Law on Extraordinary Chambers: see S. de Bartodano ‘Problems Arising from the Mixed Composition and Structure of the Cambodian Extraordinary Chambers’ and S. Linton ‘Safeguarding the Independence and Impartiality if the Cambodian Extraordinary Chambers’ both in (2006) 4 Journal of International Criminal Justice 285 and 327 respectively.

\textsuperscript{87} Law on Extraordinary Chambers, above n 84, arts 2-7.
curiously, follows the definition in the ICTR Statute which requires all crimes to be committed on discriminatory grounds. The Agreement on the other hand, refers to crimes against humanity as defined in the ICC Statute. This may mean an amendment to the Law is required to bring it into conformity with the Agreement. The tribunal was officially established on 9 February 2006 but it has yet to commence its work.

Whilst not free from doubt, because the Extraordinary Chambers were created under domestic law before the Agreement with the UN, it would appear that the Chambers are domestic courts governed by domestic law. This in turn would suggest that, unlike the result in Sierra Leone, the amnesty Decree of 1996 is likely binding. Article 11 of the Agreement recognized the amnesty but simply said its ‘scope’ ‘is a matter to be decided by the Extraordinary Chambers’.

Were the crimes of Pol Pot committed between 1975 and 1979 crimes against humanity? It may be accepted that at some time between 1945 and 1998 the nexus between crimes against humanity and aggression or war disappeared – but when? Defendants will no doubt argue it was after 1979. The issue is addressed in chapter 7. This debate highlights another important issue. Crimes against humanity (and other international crimes) were largely developed to justify the exercise of jurisdiction by an international tribunal or a national court in respect of extraterritorial crimes. Why should international crimes – with their high thresholds – be resorted to by a domestic court dealing with local crimes? In the case of Indonesia, discussed in Part Two below, it may be argued that international crimes were invoked in respect of the events in East Timor in order to make convictions more difficult.

2.5 UN Administered Courts in Kosovo

On 24 March 1999, following Yugoslavia’s massive and systematic ‘ethnic cleansing’ of ethnic Albanians in the province of Kosovo, the North Atlantic Treaty Organisation commenced air strikes which lasted 11 weeks. The war was eventually settled and the UN Security Council created the United Nations Mission in Kosovo (UNMIK) to administer the territory. International judges sitting on local courts, applying the existing Yugoslav Penal code, have conducted trials for war crimes and genocide, but not crimes against humanity. This was because crimes against humanity

88 Ibid, art 5.
89 The Phnom Penh Agreement, above n 86, art 9.
91 See D. Shrage, above n 8, 18 and 30-31 where the author, a UN legal officer, says ‘the question of the primacy of the Agreement over the Law has never been conclusively determined’. See S. Linton above n 86, 340 where the author says the Chambers ‘are rooted in Cambodian Law’ with Cambodia retaining sovereignty over the process.
92 Cambodia refused the UN’s initial request that the amnesty not apply to the Extraordinary Chambers. As the Agreement is not directly inconsistent with the amnesty, the Extraordinary Chambers may rule that it is bound to uphold it: See E. Meijer, above n 90, 207, 209-211 and 214-215; Bert Stewart, ‘Internationalized Courts and Substantive Criminal Law’ in C. Romano, above n 7, 291, 313, 313-314.
93 During 1998 over 1500 Kosovar Albanians were killed and approximately 400,000 were expelled: H. Strohmeyer, above n 7, 46.
94 Ibid
were not proscribed by that Penal Code. A new Provisional Criminal Code entered into force in April 2004, which prescribes crimes against humanity (Article 117) as defined by Article 7 of the ICC Statute, including the definitions in Article 7(2). Universal jurisdiction applies to the offences irrespective of presence in the territory.

2.6 Conclusion on the Law of the Hybrid Tribunals

Inflatingly, each definition of 'crimes against humanity' in the four hybrid tribunals is different. Only one follows Article 7 of the ICC statute completely – Kosovo. It alone requires there to be a 'policy' as an element of the offence. Hence, to a certain extent, the law of the hybrid tribunals has rejected the view that the definition of 'attack' in Article 7(2) reflects customary law. Only two of the four tribunals (Kosovo and East Timor) have followed the definitions of the crimes in Article 7. The tribunals in Sierra Leone and East Timor have followed the case-law of the ad hoc Tribunals, including the definition of crimes against humanity set out in Kunarac. This increases the precedential value of these decisions. It is of significance, however, that the Courts in East Timor (like the ICTY) have found that the attacks in question were both widespread and systematic and carried out with the support or acquiescence of the civilian and military authorities. In terms of rules of jurisdiction, two have universal jurisdiction over crimes against humanity (Kosovo and East Timor) and two have only territorial jurisdiction (Sierra Leone and Cambodia).

The hybrid tribunals have one aspect in common – they each involve new administrations dealing with the atrocities of former rulers. Hence, the hybrid tribunals essentially involve 'transitional' or 'post-conflict' justice rather than an exercise in 'international justice' as such. It may not be immediately clear that 'crimes against humanity', as opposed to domestic crimes, ought to apply in such circumstances. The rationale for these hybrid tribunals invoking the international crime of crimes against humanity appears to be twofold: first, to emphasise that there exists an international interest in ending, if not an international duty to end, impunity for previous atrocities; and, secondly, to add legitimacy, and legal efficacy, to the prosecutions of the new administration, particularly where such prosecutions attempt to override international immunities, local amnesties or laws of prescription. These difficult and complex issues are explored further in chapter 8.

3. STATE PRACTICE AFTER THE ROME CONFERENCE

3.1 Introduction

In this part, the legislation (and jurisprudence) dealing with crimes against humanity in 14 countries is considered, covering both the definitions of crimes against humanity adopted by such states and the extraterritorial jurisdiction of the state's courts, if any, over such crimes. The countries have been selected by reason of having some involvement with the concept of crimes against humanity in both the civil law and common law traditions.

97 See United Nations Interim Administration Mission in Kosovo Regulation 2003/25 (6 July 2003) in Cady and Booth, above n 96, 70. The section is reproduced at Appendix I.
98 Provisional Criminal Code, art 100.
3.2 Australia

The *International Criminal Court Act* 2002 introduces the offences of crimes against humanity into domestic law broadly, but not precisely, in terms of Article 7 of the ICC Statute.\(^9^9\) As for the geographical ambit of these crimes, section 15.4 (read with section 268.117) of the Criminal Code Act 1995 applies, which reads:

If a law of the Commonwealth provides that this section applies to a particular offence, the offence applies:

(a) whether or not the conduct constituting the alleged offence occurs in Australia; and
(b) whether or not a result of the conduct constituting the alleged offence occurs in Australia.

Unlike the case for ordinary crimes, which are instituted by independent public prosecutors, proceedings can only be commenced with the Attorney-General’s written consent.\(^1^0^0\) Hence, it remains to be determined the extent to which the theoretical provisions allowing for universal jurisdiction will be utilised.

3.3 Belgium

3.3.1 Legislation

Under an amendment of 1999 to a law passed in 1993, Belgian courts were granted universal jurisdiction over crimes against humanity.\(^1^0^1\) Originally, the definition differed from that in Article 7 of the ICC Statute, but amendments were introduced in August 2003 which reproduced the exact text from the French version of Article 7(1) (omitting, no doubt deliberately, the details of Article 7(2)-(3) and the controversial definition of ‘attack’).\(^1^0^2\)

A striking feature of this law, as originally passed, was that Article 9§3 recognised the right of any person who claims to be the victim (*toute personne qui se prétendra lésée*) of any of the enumerated offences to initiate a criminal investigation. This contrasts with the situation in most other countries where only the prosecutorial authorities or the Government are competent to initiate a prosecution.\(^1^0^3\) Victims of human rights violations from all over the world lodged complaints with the Belgian authorities. As Luc Reydams put it: ‘[h]ardly a month went by without some international outcast being indicted’.\(^1^0^4\) Those indicted included Prime Minister Sharon of Israel, and former US President George H. W. Bush, Vice President Dick Cheney,

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\(^9^9\) See sections 268.8-268.23 of the *Criminal Code Act* 1995 (Cth).

\(^1^0^0\) See Division 267.127 of the *Criminal Code Act* 1995 (Cth).

\(^1^0^1\) *Loi relative à la répression des violations graves du droit international humanitaire*, reprinted at (1999) 38 *ILM* 921. For a commentary, see P. d’Argent, ‘La Loi du 10 février 1999 relative à la répression des violations graves du droit International humanitaire’ (1999) 118 *Journal des Tribunaux* 549. The original law of 16 July 1993 covered only grave breaches of the Geneva Conventions and the Additional Protocols; the supplementary legislation of 10 February 1999 included crimes against humanity and genocide within the scope of the earlier law.

\(^1^0^2\) *Loi du 5 août 2003 relative aux violations graves du droit international humanitaire*.

\(^1^0^3\) Namely Australia, Canada, Germany and New Zealand.

Secretary of State Colin Powell, and retired General Norman Schwartzkopf, for their role concerning the bombing of Baghdad's al-Amiriya shelter in the 1991 Gulf War.\textsuperscript{105}

As political pressure grew, particularly from the United States, the law was revised twice in 2003.\textsuperscript{106} First, the law was amended to require the consent of the public prosecutor and that consent could not be granted if the crimes were within the ICC’s jurisdiction, other states were taking jurisdiction or the crime had no link to Belgium.\textsuperscript{107} Secondly, the law was amended again to require the offender or the victim to be a Belgian national or permanent resident for at least three years at the time of the alleged offence.\textsuperscript{108} The law also allows immunity for any foreign officials visiting Belgium.

3.3.2 Case-law\textsuperscript{109}

An examining magistrate considered a charge of crimes against humanity against former Chilean President Pinochet before the passing of the 1999 law.\textsuperscript{110} The magistrate found crimes against humanity were pre-existing crimes under customary international law that cannot become prescribed,\textsuperscript{111} and that Pinochet had no immunity because the alleged crimes ‘could not possibly be official acts performed in the normal exercise of the functions of a head of state’.\textsuperscript{112} As to jurisdiction, the magistrate said ‘all States and all humankind have a legal interest in the punishment of such crimes . . . For these reasons we find that, as a matter of customary international law, or even more strongly as a matter of \textit{jus cogens}, universal jurisdiction over crimes against humanity exists, authorising national judicial authorities to prosecute and punish the perpetrators in all circumstances’.\textsuperscript{113} ‘The validity of such a view has been questioned\textsuperscript{114} and is discussed further in chapter 8.

Sharon, the Prime Minister of Israel, was also indicted for crimes against humanity by survivors of the massacre of Palestinian refugees committed by Lebanese militia in


\textsuperscript{106} At a June NATO meeting, U.S. Defense Secretary Donald Rumsfeld threatened to move NATO's headquarters out of Brussels unless the Belgian law was rescinded: see, ibid, 148 and George P. Fletcher, ‘Against Universal Jurisdiction’ (2003) 1 \textit{Journal of International Criminal Justice} 580, 584.


\textsuperscript{110} \textit{Aguilar Diaz et al v Pinochet}, Tribunal of first instance of Brussels (examining magistrate), order of 6 November 1998, reprinted in 118 \textit{Journal des Tribunaux} (1999) 308 with critical note by J. Verhoeven (‘Pinochet’); see also summaries in English by Luc Reydams in (1999) 93 \textit{AJIL} 700 (hereinafter Case Note); and L. Reydams, above n 104, 112-116.

\textsuperscript{111} L. Reydams, Case Note, above n 110, 702

\textsuperscript{112} Ibid, 700.

\textsuperscript{113} Ibid, 702-703.

\textsuperscript{114} See L. Reydams, above n 104, 112-116.
the camps of Sabra and Chatila (Lebanon) during Israel’s invasion of Lebanon.\^115 On 12 February 2003, the Cour de Cassation overturned a lower court’s ruling in the Sharon case and held that the presence of the accused on Belgian territory was not necessary for prosecutions to be initiated.\^116 There remained, however, Sharon’s personal immunity as head of state recognised by the ICJ in the Arrest Warrant of 11 April 2000 which is considered in chapter 8.

3.3.3 Conclusion

At the time, the Belgium law of 1999 was at the vanguard. It had the support of many human rights groups. In the end, its original scope was eviscerated by the amendments of 2003 and no trial for crimes against humanity under the 1999 law has in fact taken place.\^117

3.4 Canada

Sections 4(3) and 6(3) of the Crimes Against Humanity and War Crimes Act 2000 – dealing respectively with crimes committed within and outside Canada – define crimes against humanity as acts or omissions which at the time and in the place of their commission are crimes against humanity according to customary international law, conventional international law or by virtue of their being criminal according to the general principles of law recognised by the community of nations.\^118 The legislation does not attempt to define customary international law or general principles of law. Sections 4(4) and 6(4) state that the crimes defined in Article 7 of the ICC Statute are, as of 17 July 1998, crimes according to customary international law, but this does not limit or prejudice in any way the application of existing or developing rules of international law. Section 6(5) provides that crimes against humanity were criminal under either customary international law or the general principles of the law of nations before the 1945 prosecutions of the major Axis war criminals in occupied Germany and Japan.

Extraterritorial jurisdiction over crimes against humanity is laid down in s 8 of the Act by reference to the same criteria as those listed in the Criminal Code pre-Finta.\^119 These are that the accused was at the time, or subsequently became, a Canadian citizen (or was employed by Canada in a civilian or military capacity) or was a citizen of or employed by a state engaged in an armed conflict against Canada or was present in Canada; alternatively, the victim of the crime in question was a citizen of Canada or any state allied to Canada in an armed conflict. Hence, the Act as a minimum requires some link to Canada. No proceedings for an offence under any of ss4–7, 27 and 28 may be commenced without the personal consent in writing of the Attorney General or

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\^115 For a discussion of the case see Antonio Cassese, ‘The Belgium Court of Cassation v The International Court of Justice: The Sharon and others Case’ (2003) 1 Journal of International Criminal Justice 437.
\^119 See Chapter 3, section 4.3.
Deputy Attorney General of Canada, and those proceedings may be conducted only by the Attorney General of Canada or counsel acting on his or her behalf.

3.5 Estonia

3.5.1 Legislation

The USSR invaded Estonia in June 1940, incorporating it into the Soviet Union. Interrupted by the German occupation in 1941-1944, Estonia remained occupied by the Soviet Union until the restoration of independence in 1991. This history provided a special incentive to Estonia to turn to the international offence of crimes against humanity. The Criminal Code (Kriminaalkodeks) in 1994 introduced the following offences:

Article 61-1 § 1

Crimes against humanity, including genocide, as these offences are defined in international law, that is, the intentional commission of acts directed to the full or partial extermination of a national, ethnic, racial or religious group, a group resisting an occupation regime, or other social group, the murder of, or the causing of extremely serious or serious bodily or mental harm to, a member of such group or the torture of him or her, the forcible taking of children, an armed attack, the deportation or expulsion of the native population in the case of occupation or annexation and the deprivation or restriction of economic, political or social human rights, shall be punished by 8 to 15 years' imprisonment or life imprisonment.

The Penal Code (Karistusseadustik), which entered into force on 1 September 2002, applies to acts outside the territory but only if punishable under an international agreement binding on Estonia. Article 89 states:

Systematic or large-scale deprivation or restriction of human rights and freedoms, instigated or directed by a state, organisation or group, or the killing, torture, rape, causing of health damage, forced displacement, expulsion, subjection to prostitution, unfounded deprivation of liberty, or other abuse of civilians, is punishable by 8 to 20 years' imprisonment or life imprisonment.

3.5.2 Case-law

The Criminal Chamber of the Supreme Court (Riigikohus) in its judgment of 21 March 2000 in the Case of Paulov considered convictions for crimes against

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121 The offences were declared to 'be punishable regardless of the time of commission of the crime': Article 6 § 4.

122 Article 8. This may not permit extraterritorial prosecutions for crimes against humanity because no treaty explicitly authorises such a prosecution.
humanity (Article 61-1, Criminal Code). Karl-Leonhard Paulov had been prosecuted for having killed, as an NKVD agent on behalf of the Soviet authorities, three “forest brothers” (persons hiding in the forest and offering armed resistance to the Soviet occupying regime in Estonia) in October 1945 and October 1946. It held:

4. ... In case of a crime against humanity, the offender places himself or herself, for various reasons – first and foremost for religious, national or ideological reasons – outside of the system of values. He or she acts in order to achieve other goals (for example ethnic cleansing) and the attacked values – life, health, physical integrity – are, in a given context, worthless to him or her. Here the attack is not directed against a specific victim; any person can become a victim.

... 7. The appeal proceeds from ... the concept of a crime against humanity and it is submitted that the victims hid in the woods as civilians in order to avoid repression. The occupation authorities, however, decided to deprive them of their right to a fair trial and to murder them. It was found that, therefore, there had been a crime against humanity.

8. The Supreme Court subscribes to the latter position and notes that deprivation of a person of his or her right to life and fair trial may be treated as other inhumane acts referred to in Article 6 (c) of the Charter of the Nuremberg International Military Tribunal.

On 10 October 2003, Kolk and Kisliyiy were convicted of crimes against humanity under Article 61-1 § 1 of the Criminal Code by the Saare County Court (Saare Maakohus). They had in March 1949 participated in the deportation of the civilian population from the occupied Republic of Estonia to remote areas of the Soviet Union. On 27 January 2004 the Tallinn Court of Appeal (Tallinna Ringkonnakohus) upheld the judgment finding that by filling out documents concerning deportation, removing people from their homes and handing them over to a ship assigned for deportation, the applicants had participated in a widespread attack against the civilian population. It noted that Article 7 § 2 of the European Convention on Human Rights did not prevent punishment of a person for an act which, at the time of its commission, had been criminal according to the general principles of law recognised by civilised nations. Relying on Article 6 (c) of the London Charter and Resolution 95(I) of the General Assembly of the United Nations on 11 December 1946, it held that such acts of deportation, even outside the context of war, were recognised as crimes against humanity by civilised nations in 1949 and entailed norms of international customary law.125

3.6 France
3.6.1 Legislation

123 Case no. 3-1-1-31-00; Riigi Teataja (The State Gazette) III 2000, 11, 118 (in Estonian)
124 On 21 April 2004 the Supreme Court refused Kisliyiy’s leave to appeal.
125 This was affirmed by the European Court of Human Rights in Kolk above n123. For a discussion of the correctness of this conclusion see chapter 2, section 6.4; chapter 3, section 5.2 and chapter 7, section 3.4.
Effective from 1 March 1994, the offence of crimes against humanity (article 212-1) was added to the Code pénal as follows:

... deportation, enslavement, or the massive and systematic practice of summary executions, enforced disappearances, torture or inhumane acts inspired by political, philosophical, racial or religious grounds and organised pursuant to a concerted plan against a group of the civilian population.

There is no provision for extraterritorial jurisdiction. Common article 2 of the laws governing the cooperation with the ICTY (adopted on 3 January 1995)\textsuperscript{126} and the ICTR (adopted on 22 May 1996)\textsuperscript{127} provide for retrospective jurisdiction over all offences falling within the competence ratione materiae (including crimes against humanity), loci, and temporis of the ad hoc Tribunals, if the perpetrators are found in France. France’s ICC collaboration law of 2002 merely ratifies the ICC Statute and does not provide for universal jurisdiction over the offences or seek to amend the earlier definition of crimes against humanity.\textsuperscript{128}

3.6.2 Case-law

In Javor,\textsuperscript{129} before the ICTY co-operation law was adopted, the complainants tried to invoke a charge of crimes against humanity relying upon the London Charter and General Assembly Resolution 3074 (XXIV).\textsuperscript{130} The investigating magistrate (Judge Getti) found he had no jurisdiction over crimes against humanity because, following Barbie, Touvier and Baudarel, crimes against humanity under the London Charter only applied to crimes of the Axis powers committed in the context of World War II and General Assembly Resolution 3074 (XXIV) had no binding force.\textsuperscript{131} Contrary to the approach in Belgium, Judge Getti (in his Order of 6 May 1994) held there were no

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\textsuperscript{127} Loi no 96-432 du 22 mai 1996 portant adaptation de la législation française aux disposition de la résolution 955 du Conseil de Sécurité des Nations Unies instituant un tribunal international en vue de juger les personnes présumées responsables de violations graves du droit International humanitaire commises sur le territoire du Rwanda etc, s’agissant des citoyens rwandais, sur le territoire d’États voisins, Journal Officiel de la République Française, 23 May 1996.

\textsuperscript{128} Loi no 2002-268 due 26 février 2002 relative à la coopération avec la Cour pénale internationale, Journal Officiel de la République Française, 27 February 2002.


\textsuperscript{130} GA Res 3074 (XXIV), UN GAOR, 28th Sess., Supp 30, 78, UN Doc. A/9030/Add.1 (1973). The Resolution dealt with the principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity. See also B. Stern, above n 129, 526.

\textsuperscript{131} B. Stern, above n 129, 526.
customary law rules or other international basis for universal jurisdiction.\textsuperscript{132} The Paris Court of Appeal and the \textit{Cour de cassation} confirmed the decision with regard to crimes against humanity.\textsuperscript{133}

In \textit{Munyeshyaka}, complaints were lodged in July 1995 (before adoption of the ICTR co-operation law but after the adoption of Article 212-1) against a Hutu priest who had allegedly been active in the genocide in Rwanda and who was in the south of France.\textsuperscript{134} The public prosecutor sought to invoke Article 212-1 (crimes against humanity).\textsuperscript{135} The magistrate ruled that he was not competent to deal with the charge because Article 212-1 was not in force at the time of the alleged offences.\textsuperscript{136} The \textit{Cour de cassation} upheld the magistrate’s ruling but held that the ICTR co-operation law, which had meanwhile been adopted, could now apply to the case.\textsuperscript{137}

On 26 October 1998, complaints were filed against Pinochet for, amongst another charges, crimes against humanity.\textsuperscript{138} Judge Le Loir refused to indict for crimes against humanity because the alleged crimes were committed before the adoption of Article 212-1 and no relevant self-executing treaty or international customary rule could be relied upon to grant French courts extraterritorial jurisdiction.\textsuperscript{139}

\subsection*{3.6.3 Conclusion}

In the result, the ICTY/ICTR cooperation laws alone provide for universal jurisdiction over crimes against humanity provided the perpetrator is found on French territory. Otherwise, the idiosyncratically defined notion of crimes against humanity in Article 212-1 does not apply extraterritorially because the Penal Code (Article 689 of the \textit{Code pénal}) only allows such jurisdiction when an international treaty gives French courts the right to take cognisance of the offence. This does not apply to crimes against humanity. Hence, despite the valiant attempts of victims in three cases, no extraterritorial prosecution for crimes against humanity before the French courts have occurred.

\subsection*{3.7 Germany}

Germany has enacted a wholly new and separate international criminal code, \textit{Völkerstrafgesetzbuch} ("\textit{VStGB}")\textsuperscript{140} including the offence of crimes against humanity.

\textsuperscript{132} Ibid.

\textsuperscript{133} Ibid, 527. The ICTY co-operation law was not available after its adoption because the perpetrators were ‘not found in France’: L. Reydams, above n 104, 136-137.

\textsuperscript{134} B. Stern, above n 129, 527.

\textsuperscript{135} L. Reydams, above n 104, 138.

\textsuperscript{136} Depauquier et al v Munyeshyaka, Tribunal de Grande Instance de Paris (Examining magistrate), Privas, Order, 9January 1996, B. Stern above n 129, 528.

\textsuperscript{137} In Re Munyeshyaka, 1998 Bull. Crim., No. 2, 3 (French Cour de cassation, Criminal Chamber, 6 January 1998); see B. Stern, above n 129, 528; L. Reydams, above n 104, 138; R. Maison, ‘Les premiers case d’application des dispositions pénales des Conventions de Genève par les juridictions internes’ (1995) 6 \textit{EJIL} 260; and \textit{Code de procédure pénale}, art 689. To date no trial has taken place.


\textsuperscript{140} The Code of Crimes against International Law is part of the Act of 26 June 2002 to Introduce the Code of Crimes against International Law (\textit{Gesetz zur Einführung des}}
The definition of crimes against humanity in the VStGB departs in several respects from Article 7 of the ICC Statute. In the chapeau the VStGB does not require the attack to be "pursuant to or in furtherance of a state or organisational policy to commit such attack".141 Due to a perceived lack of certainty in the ICC wording, the German law provides for different definitions of "sexual slavery", "any other form of sexual violence of comparable gravity",142 "enforced disappearance",143 "apartheid"144 and "other inhumane acts of a similar character".145 In relation to persecution, the VStGB in Article 1§7(1)10 follows the jurisprudence from the ICTY146 by dispensing with the ICC Statute's requirement that acts of persecution be "in connection with ... any crime within the jurisdiction of the Court", and instead merely refers to persecution on any of the grounds mentioned in Article 7(1)(h) of the Statute.

The Code explicitly states that it applies "even when the offence was committed abroad and bears no relation to Germany".147 The explanatory memorandum of the Act says: "Because the federal Supreme Court has so far given a different interpretation to StGB §6, the unambiguous wording of VStGB §1 now makes it very clear that offences under the VStGB, in any event, do not require a special domestic link".148 Even the presence (or anticipated presence) of the offender on German territory is not an essential prerequisite for a prosecution. The jurisdiction of German courts over extraterritorial offences under the VStGB is spelt out in a new §153f in the code of penal procedure (Strafprozeßordnung, or StPO). StPO §153f reads, in part, as follows.

(1) In the cases referred to under §153c subsection (1), numbers 1 and 2, the public prosecution may dispense (kann absehen) with prosecuting an offence punishable pursuant to VStGB §§6 to 14, if the accused is not residing in Germany and such residence is not to be anticipated (wenn sich der Beschuldigte nicht im Inland aufhält und ein solcher Aufenthalt auch nicht zu erwarten ist. [...]"


141 The German Government, in its explanations accompanying the submission of the draft VStGB to the Bundestag, noted that "The individual offences [in Art §7] ... only become crimes against humanity, and thus crimes against international law, if they are committed as part of a "widespread or systematic attack against a civilian population", and thus in a functional connection [sic] with such an attack": Government Draft Code of Crimes against International Law (Federal Ministry of Justice, 2001) (‘Entwurf’) 42 (available online at <http://www.juscrim.mpg.de/forsch/legaltext/VstGBengl>.

142 The term "sexuelle Nötigung" (sexual coercion, VStGB, above n 140, §7(1)6 is used instead because such an offence already exists: StGB, §177.

143 The offence has become deprivation of freedom coupled with a refusal to supply information about the person concerned: VStGB, above n 140, §7(1)7(a), (b).

144 VStGB, above n 125. §7(5); see also Entwurf, above n 141, 49-50.

145 It is defined as ‘severe physical or mental harm, in particular of the type referred to in §226 of the StGB’: VStGB above n 132, §7(1)8; see also Entwurf, above n 141, 47-48.

146 See Chapter 5, section 4.9.

147 VStGB, above n 140, §1.

148 Quoted in L. Reydams, above n 104, 145.
(2) In the cases referred to under §153c subsection (1), numbers 1 and 2, the public prosecution shall dispense (soll absehen) with prosecuting an offence punishable pursuant to VStGB §§6 to 14, if:

1. there is no suspicion of a German having committed such an offence,
2. such offence was not committed against a German,
3. no suspect in respect of such offence is residing in Germany and such residence is not to be anticipated (kein Täverdächtiger sich im Inland aufhält und ein solcher Aufenthalt auch nicht zu erwarten ist), and
4. the offence is being prosecuted before an international court or by a state on whose territory the offence was committed, whose national is suspected of its commission or whose national was harmed by the offence.149

In conclusion, crimes against humanity apply irrespective of the locus delicti or the nationality of the offender (VStGB §1), but the prosecutor has a discretion whether to proceed or not (StPO §153f). Where there is no link to Germany and prosecution is taking place before an international tribunal or a national court with a link to the offence, German courts are not competent, and a general discretion exists not to proceed if the accused is not present in Germany.

3.8 Indonesia
3.8.1 Legislation

Under pressure from the world community – which was moving to establish an international criminal tribunal in the wake of events in East Timor in 1999150 – Indonesia passed Law No 26/2000 in November 2000. The Law establishes Human Rights Courts with jurisdiction over crimes against humanity (not previously known to the local law) in accordance with Article 7 of the ICC Statute.151 An ad hoc Court was also established with jurisdiction limited to the crimes in Law No 26/2000 perpetrated by an Indonesian citizen in three of East Timor’s 13 territories in April and September

149 Ibid (for English translation).

150 For example, the Security Council condemned all acts of violence in East Timor and demanded ‘that those responsible for such [acts] be brought to justice’: SC Res 1264, UN SCOR, 54th sess, 4045th mtg, UN DOC S/RES/1264 (1999). The Security Council also said ‘that persons committing such violations bear individual responsibility’: SC Res 1272, UN SCOR, 54th sess, 4057th mtg, UN DOC S/RES/1272 (1999). There then followed visits by the UN International Commission of Inquiry on East Timor (ICIET) and three UN Special Rapporteurs to East Timor in 1999. Both ICIET and the three UN Special Rapporteurs recommended the establishment of an international tribunal. Postponement of such a step occurred when the Indonesian Foreign Minister promised prosecutions in Indonesia: see Identical Letters Dated 31 January 2001 from the Secretary-General to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights, UN SCOR, 55th sess, Annex, Agenda Item 96, UN Doc S/2000/65 (2000).

1999. Such a limited jurisdiction over the events in East Timor has not escaped criticism.

### 3.8.2 Case-law

An Indonesian report into the violence in East Timor in 1999 publicly named 32 Indonesian suspects (with a longer list of 100 in the full report); but in the end, only 18 defendants, excluding the more senior military officers previously named, were tried. Of the 18 tried, only six were convicted of crimes against humanity and five of these convictions were overturned on appeal. Militia leader, Eurico Guterres, alone had his sentence of ten years for crimes against humanity upheld on appeal by the Supreme Court on 13 March 2006. Many have attributed the low conviction rate to a lack of commitment and competence by the prosecutors, labelling the process a failure. The Secretary-General’s Commission of Experts concluded the prosecutions were ‘manifestly inadequate, primarily due to a lack of commitment on the part of the prosecution as well as lack of expertise, experience, and training in the subject matter, deficient investigations and inadequate presentation of inculpatory material at trial’, and ‘[m]any aspects of the ad hoc judicial process reveal scant respect for or conformity to international standards.’ With opinions generally not published, the rationale of the decisions cannot be assessed. The Secretary-General’s Commission of Experts, which had access to the decisions, found ‘inconsistent verdicts and factual findings of the Ad Hoc Court resulted directly from the application of diverging legal techniques, differing legal interpretations of identical factual subject-matter and the lack of willingness or otherwise to utilize international jurisprudence and practices and proficiency in analytical evaluation of the facts and the law’.

Law No 26/2000 is being applied in the case of allegations of military involvement in human rights abuses in Tanjung Priok in September 1984 and in Aepura in Papua in

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153 Ibid.
154 Such as General Wiranto and Major-General Makarim (both indicted by East Timor): ibid, 25 and 37.
155 Ibid, pp 47-48. Of those convicted, three received only three years, two received five years and one received ten years. This is despite the fact that Law 26/2000 set higher minimum terms. The most senior officer convicted was Major General Adam Damiri who was convicted despite the prosecutor agreeing to an acquittal.
157 This is the conclusion of Amnesty International and the Justice System Monitoring Programme: *Indonesia, Justice for Timor – Leste*, above n 152, 49-50. See also: Open Society Institute and the Coalition for International Justice, *Unfulfilled Promises: Achieving Justice for Crimes against Humanity in East Timor*, November 2004, 21. Concerns about the Indonesian trials have been raised by Niemann (appointed by the UN High Commissioner for Human Rights), the Secretary-General and the UN High Commissioner for Human Rights: *Indonesia, Justice for Timor – Leste*, above n 152, 1 and 51.
158 Report of Experts on Timor-Leste, above n 76, [17].
159 Ibid, [19].
160 Ibid, [18].
December 2000.\textsuperscript{161} This again raises the wisdom of using international crimes in local prosecutions. Abdul Nusantara, head of Indonesia’s National Human Rights Commission, has expressed concern that the ‘widespread or systematic’ test will result in many serious offences going unpunished and ‘such an extraordinary standard should be reviewed, as it is too demanding a requirement to meet’.\textsuperscript{162}

3.9 IRAQ
3.9.1 Legislation

Following the United States invasion of Iraq in March 2003, which led to the overthrow of Saddam Hussein, the US established the Coalition Provisional Authority to rule Iraq. Originally, this Authority specially delegated to the Iraqi Governing Council power to issue the Statute of the Iraqi Special Tribunal, which it did on 10 December 2003.\textsuperscript{163} This was then replaced by an almost identical law of the Transitional National Assembly gazetted on 19 October 2005.\textsuperscript{164} With only a limited role for non-Iraqi nationals,\textsuperscript{165} there have been criticisms of the Statute/Law for failing to afford the defendants the protection of either an independent international court or international judges.\textsuperscript{166} The normal practice of the international community has been to rely firstly upon national courts to deal with crimes within its territory before invoking any extraordinary international criminal jurisdiction.\textsuperscript{167} This is enshrined in the ICC Statute where, under the principle of complementarity, it is only if the relevant state is unable or unwilling to prosecute that the ICC will have jurisdiction.

The Court has jurisdiction over any Iraqi national or resident of Iraq accused of the listed crimes committed between 17 July 1968 and 1 May 2003, in the territory of the Republic of Iraq or elsewhere. The crimes listed are genocide, crimes against humanity, war crimes and violations of certain Iraqi laws listed in Article 14. ‘Crimes against

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\textsuperscript{161} Amnesty and the Judicial System Monitoring Program, Indonesia, Justice for Timor – Leste, above n 152, 49-50.

\textsuperscript{162} M. Moore, ‘Police Chief Faces Court over Papua Jail Beatings’, The Sydney Morning Herald (Sydney), 8-9 May 2004, 18.


\textsuperscript{165} The Iraqi governments, under Law No 10 of 2005, arts 4.3 and 7.2, can appoint non-Iraqi judges if a State is a party in a complaint and the President may appoint non-Iraqi experts to provide assistance to the Court (which has not occurred).


\textsuperscript{167} According to one survey this was also the desire of the Iraqi people: ICTJ Briefing Paper, above n 166, 7.
humanity’, in Article 12 (not previously known in Iraqi law),\(^{168}\) largely follows Article 7 of the ICC Statute, but without the crimes of apartheid, enforced sterilization or the definition of forced pregnancy. The United States’ use of the definition in Article 7, despite its opposition to the ICC Statute, confirms that the US does not oppose this definition, only the jurisdiction of the ICC. The Court’s jurisdiction, whilst having extraterritorial reach, is limited to Iraqi nationals and residents. It thus reflects the US’s position that the ICC’s jurisdiction should be limited to nationals of State Parties.\(^{169}\)

### 3.9.2 Case-law

The Iraqi Special Tribunal has been investigating various well-known atrocities of the prior regime, including the attacks on Kurds in 1988 where chemical weapons were used and the suppression of the Shi’a uprising of 1991.\(^{170}\) The first trial currently underway, however, involves the relatively more modest events at al-Dujail. Saddam Hussein and seven others have been charged with murder, forcible transfers, imprisonment and torture as crimes against humanity.\(^{171}\) Following a failed assassination attempt at al-Dujail on 8 July 1982, it is alleged in the indictment of 15 May 2006 that Hussein ordered reprisals against the village and its inhabitants which immediately led to the killing of nine, the destruction of the village’s homes and orchards and the detention of 399.\(^{172}\) Thereafter, many were tortured, leading to the death in prison of another nine. On the direct orders of Hussein, a Revolutionary Court in one session sentenced 148 to death by hanging which was ratified by Hussein’s presidential decree of 16 June 1984. Finally, by Hussein’s further order of 24 October 1984 the village’s land and farms were confiscated.\(^{173}\) If the charge of crimes against humanity is not made out the Tribunal has power to substitute a domestic crime for the ones charged.\(^{174}\)

### 3.10 THE NETHERLANDS

#### 3.10.1 Legislation

On 19 June 2003, the Netherlands passed the *International Crimes Act*. It largely incorporates Article 7 of the ICC Statute into domestic law\(^{175}\) and provides for extraterritorial jurisdiction if the victim or perpetrator is Dutch or if the perpetrator is found in the Netherlands.\(^{176}\) Prosecution is excluded for incumbent foreign heads of state, heads of government, ministers of foreign affairs and other persons if their immunity is recognised under customary law or an applicable treaty.\(^{177}\)

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\(^{168}\) Ibid.

\(^{169}\) It also of course protects US nationals from prosecution for acts in Iraq, which has not escaped criticism: Ibid, 9.

\(^{170}\) Ibid, 18.

\(^{171}\) Ibid.


\(^{173}\) Ibid.

\(^{174}\) Law No 10 of 2005, art 14.4.

\(^{175}\) *International Crimes Act* 2003, s 4.

\(^{176}\) *International Crimes Act* 2003, s 2.

\(^{177}\) *International Crimes Act* 2003, s 16.
3.10.2 Case-law

The defendant in *Wijngaarde et al v Bouterse* was the leader of Surinam (formerly a colony of the Netherlands).\textsuperscript{178} The case arose out of the events of 8 and 9 December 1982 when 15 prominent opponents of the Bouterse regime were arrested and summarily executed.\textsuperscript{179} The District Court of Amsterdam asked for expert advice on international law from Professor John Dugard.\textsuperscript{180} It accepted the conclusion of the expert that the acts could be considered crimes against humanity under customary international law, in that they were committed in a systematic manner as part of an organised plan by the military authorities, of which Bouterse was commander, against a group of civilians, with the intent to obtain confessions or to intimidate or coerce members of the civilian population.\textsuperscript{181} This would suggest that a very low threshold is involved in the notion of 'a widespread or systematic attack directed against any civilian population'. It also agreed with the expert 'that back in 1982, crimes against humanity (probably) could be committed not only during war or armed conflict, but also in time of peace'.\textsuperscript{182} Further, it found that crimes against humanity are imprescriptible, the subject of universal jurisdiction (even without the presence of the defendant)\textsuperscript{183} and cannot be attributed to the official functions of a head of state so as to attract immunity.\textsuperscript{184} The court concluded, however, that as crimes against humanity had not been incorporated into local law it had no jurisdiction.

3.11 New Zealand

The *International Crimes and International Criminal Court Act 2000* creates the new offences of crimes against humanity (section 10) by direct reference to Article 7 of the ICC Statute. The Act has retrospective operation back to 1 January 1991, when the jurisdiction of the ICTY commenced.\textsuperscript{185} The Act grants universal jurisdiction to the courts of New Zealand over these crimes and irrespective of presence in the jurisdiction.\textsuperscript{186} By s 13(1) of the Act, proceedings for crimes against humanity may not be instituted without the consent of the Attorney General.

3.12 South Africa

\textsuperscript{178} District Court of Amsterdam, Order of 20 November 2000: English translation in (2000) 3 YBIHL 677 (*Bouterse Case*).

\textsuperscript{179} See, for example, the report of Mr S. Amos Wako, UN Special Rapporteur, on summary or arbitrary executions: S. Amos Wako, *Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories: Summary or Arbitrary Executions: Report, 41st sess*, Agenda Item 12, UN Doc E/CN.4/1985/17 (1985).

\textsuperscript{180} For a summary, see L. Reydams, above n 104, 173-178.

\textsuperscript{181} *Bouterse*, above n 178, [5.1].

\textsuperscript{182} Ibid, [5.2]. Professor Dugard had reservations in this respect. His opinion states that 'whether this was the position in 1982 is not entirely free from doubt, particularly in respect of armed conflict': L. Reydams, above n 104, 175.

\textsuperscript{183} This was overturned in respect of the charges of torture: 18 September 2001 (Supreme Court decision): see L. Reydams, above n 104, 173-178.

\textsuperscript{184} *Bouterse*, above n 178, [4.2], [5.1].

\textsuperscript{185} *International Crimes and International Criminal Court Act 2000*, s 8(4)(b).

\textsuperscript{186} *International Crimes and International Criminal Court Act 2000*, s 8(1)(c).
On 18 July 2002, assent was given to Act No 27 of 2002: *Implementation of the Rome Statute of the International Criminal Court Act, 2002*. It incorporates crimes against humanity as provided for in Article 7 of the ICC Statute.\(^{187}\) Such crimes will be deemed to have been committed in South Africa if the perpetrator or victim is a South African citizen or is ordinarily resident in South Africa or the perpetrator is present in South Africa after the commission of the crime.\(^{188}\) No prosecution may be instigated without the consent of the National Director.\(^{189}\) Section 4(2) states that despite any contrary law (including international law), the fact that a person is or was a head of state or government or parliamentary official is not a defence. This may not preclude a claim of state or head of state immunity because that is generally regarded as a purely procedural immunity affecting jurisdiction, rather than a ‘defence’.

### 3.13 Spain

#### 3.13.1 Legislation

Article 607bis of the Spanish Penal Code proscribes crimes against humanity (introduced with effect from 1 October 2004) but without any grant of extraterritorial jurisdiction.\(^{190}\) It requires the nominated offences to be carried out in the context of a widespread or systematic attack against a civilian population or part thereof:

1. By reason of the identity of the victim to a group or collectivity persecuted on racial, national, ethnic, cultural, religious or political grounds or other grounds universally recognised as impermissible under the rules of international law.

2. In the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.

This seems to limit crimes against humanity to the offences of persecution or apartheid.

#### 3.13.2 Case-law

On 25 April 2005, Adolfo Scilingo was found guilty of crimes against humanity under Article 607bis by Spain’s *Audiencia Nacional* for 30 premeditated murders, illegal detention and torture.\(^{191}\) Scilingo was a former navy captain in Argentina who voluntarily appeared before Judge Garzón, leading to his arrest and trial. He was found to have been involved in the ‘death flights’ during Argentina’s military rule from 1976 to 1983, in which those considered to be subversive to the government were thrown out of airplanes.

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190 See *Ley Orgánica 15/2003 (25 November 2004). Article 23(4) of the Judicial Branch Act 1985 (Ley Orgánica del Poder Judicial)* establishes that Spanish courts have jurisdiction over certain crimes committed abroad by Spanish or foreign citizens. The listed crimes do not include crimes against humanity.

The Court said the autonomy of crimes against humanity from situations of war had become progressively established. It relied upon some jurisprudence of the ICTY and held that 'attack against the civilian population' 'at the moment' means in accordance with policies of a state or non-state organisation that exerts 'de facto' political power. This internationalised the offences, the Court thought, because it made internal prosecution extremely difficult or impossible. It found Scilingo's acts were part of a plan devised and executed by the Argentine Armed Forces for the establishment of a certain political and ideological system which included the elimination of that part of the national population which for political, ideological or religious reasons could represent an obstacle to such objectives. Hence, it found the chapeau element in Article 607bis was satisfied.

The Court held crimes against humanity was an existing crime of *jus cogens*, with *erga omnes* obligations on all states, permitting the exercise of universal jurisdiction on behalf of all humanity. This allowed the Court to say Article 607bis applied both retrospectively and to acts committed abroad, despite the absence of any express grant of jurisdiction to this effect. This conclusion has attracted criticism both as a matter of international law and as an application of Spanish domestic law. The Court also relied upon Article 17 of the ICC Statute to hold that jurisdiction could be assumed by Spain given that the amnesties in Argentine law made local jurisdiction ineffective or non-existent. These issues are considered further in chapter 8.

3.14 The United Kingdom

The *International Criminal Court Act 2001*, by section 51, makes crimes against humanity an offence if committed in the UK or if committed outside the UK if the defendant is a British national, resident or a person subject to British service jurisdiction. The offence is defined by reference to Article 7 of the ICC Statute. The offence is only triable with the consent of the Attorney-General. There is no grant of universal jurisdiction, which was explained by the Minister of State in the House of Commons as follows:

We have a long-established practice of taking universal jurisdiction only as part of international law. The problem is that the [ICC] statute does not require universal jurisdiction, so we do not think that we should go it alone and universally say that we will do it all if the court will not do it ... the principle is that we would not stand in the way of extradition to another State ... or of transfer to the ICC, but we cannot set ourselves up as a substitute court and go further than is proposed in the statute.

As Baroness Scotland elaborated in the House of Lords:

192 See Christian Tomuschat, 'Issues of Jurisdiction in the Scilingo Case' (2005) 3 Journal of International Criminal Justice 1074-1081, where the author faults the Court's view that universal jurisdiction over crimes against humanity exists as a matter of customary law. See also Alicia Gil Gil, 'The Flaws in the Scilingo Judgment' (2005) 3 Journal of International Criminal Justice 1082, where the author argues that it offends the *nullum crimen* principle under Spanish law to apply the specific domestic offence retrospectively.

193 The *International Criminal Court (Scotland) Act 2001* is much shorter than its Westminster equivalent but the implementation of the core crimes follows a generally identical pattern.


195 *International Criminal Court (Scotland) Act 2001*, s 53.

However, we remain of the view that where the person has no ties with this country, surrender to the ICC or extradition to another State is the proper and most practical course. That approach is based on a realistic appraisal of what our criminal justice system, with its strong dependency on the principle of territoriality, is organised to deliver. It is also in line with the long-standing policy of this country not to take universal jurisdiction except as required by an international agreement. We do not believe that the UK should unilaterally take on the role of global prosecutor. Where a crime is committed with no clear nexus to the UK, it must be for the countries concerned to prosecute and for the ICC to step in if they fail to do so. That is precisely the reason that we are establishing the International Criminal Court.\textsuperscript{197}

This has been called the 'minimalist position' compared with the way in which other countries, when incorporating the ICC Statute into domestic law, have taken the opportunity to legislate for extraterritorial jurisdiction beyond the acts of their nationals.\textsuperscript{198}

3.15 The United States of America

No criminal proscription for crimes against humanity exists in the United States. Curiously, however, many a foreign official has been pursued in the civil courts for extraterritorial human rights abuses, including crimes against humanity, pursuant to the \textit{Alien Tort Claims Act 1789} (28 USC §1350). This permits a 'civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.\textsuperscript{199} For example, the Bosnian Serb leader Karadžić was alleged to have committed crimes against humanity (as a violation of the law of nations), but the Court of Appeals preferred to uphold the claims as instances of torture and summary execution.\textsuperscript{200} In \textit{Wiwa v Royal Dutch Petroleum Company},\textsuperscript{201} the Federal District Court held, based on Article 7 of the ICC Statute, the \textit{Tadić Jurisdiction Decision} and the \textit{Rutaganda} Trial Judgment, that crimes against humanity violate international law and consists of the commission of one of the crimes in Article 7 where the defendant knows such acts are part of a widespread attack against a civilian population.\textsuperscript{202} On the other hand, one court preferred to rely on the ICTY and ICTR Statutes for the customary law definition of crimes against humanity because the United States had not ratified the ICC


\textsuperscript{200} \textit{Kadić v Karadžić, 70 F. 3d 232, 236-244 (2d Cir., 1995); see also Theodor Posner, 'International Decision: Kadić v Karadžić' (1996) 90 \textit{AJIL} 658. Default judgments and damages for $900 million and $5 billion were entered in 2000 with crimes against humanity as one of the claims: William Aceves and Paul Hoffman, above n 186, 260-261.}

\textsuperscript{201} \textit{Wiwa v. Royal Dutch Petroleum Co.}, 2002 US Dist. LEXIS 3293 (SDNY 2002).

\textsuperscript{202} Why 'systematic' was omitted is not clear.
The Supreme Court in 2004 considered the Alien Tort Claims Act for the first time. The governments of Australia, Switzerland and the United Kingdom in their amicus curiae brief to the Court submitted that no general right of action can be inferred from customary international law as this would give the courts extraordinary power to interfere with other nations’ sovereignty. The United States Department of Justice had already made submissions to this effect in another case. The European Commission submitted to the Supreme Court that the extraterritorial application of the Act should be limited to conduct currently subject to universal criminal jurisdiction and only after all other remedies had been exhausted. The Court held that a short arbitrary detention did not violate the law of nations without elaborating on the type of offences that would. It did suggest, however, that it would be willing to consider appropriate limits on the availability of relief in such cases, including an exhaustion of local remedies requirement.

3.16 Conclusion on Crimes against Humanity in Domestic Law

At the state level, the form of incorporation of Article 7 of the ICC Statute into domestic law has not been consistent. Countries such as Australia, Canada, Indonesia, Iraq, New Zealand, the United Kingdom, the Netherlands and South Africa have broadly adopted the definition in Article 7 (including its requirement for a policy), though often with variations, additions or omissions in respect of the enumerated crimes. This tends to enhance the status of Article 7 as a guide to the crime’s customary law definition. Some countries, such as Germany and Belgium, have taken the deliberate position that Article 7 is, or may be (as in the case of Canada), narrower than customary law. They have enacted laws consistent with the approach of the ad hoc Tribunals as to the crime’s customary law definition. On the other hand, Spain and France still require an attack on discriminatory grounds and countries such as the United States have no domestic offence known as crimes against humanity. In the result, the status of Article 7, as a matter of state practice, remains somewhat confused and unclear.

Generally, when states have incorporated Article 7 into domestic law it has not been made retrospective. Exceptions include Estonia (without limit but only within the

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203 Estate of Cabello v Fernandez-Larios, 157 F. supp. 2d 1345, 1365 (SD Fla, 2001).
204 Mehinović v Vucković, 198 F. supp. 2d 1322, 1353 (ND Ga, 2002).
209 Sosa, above 205, 733 n21.
210 See Chapter 4.
territory), Canada (effective from 17 July 1998), New Zealand (effective from 1 January 1991) and France (where the jurisdiction mirrors that of the ICTY and the ICTR). This provides some support for the view that states regard Article 7 as codifying existing law. No state, however, was prepared to grant their courts extraterritorial jurisdiction over crimes against humanity as defined in Article 7 for conduct prior to 1991. The matter is analysed further in chapter 7.

Whilst the ICC Statute does not require that States Parties provide for extraterritorial jurisdiction over crimes against humanity, particularly over non-nationals, many states have now done just that. Some states do not require any connection between the offence and the prosecuting state (Australia, Germany and New Zealand), whilst others require at least some link to the prosecuting country, such as the presence of the defendant in the jurisdiction (Canada, the Netherlands, South Africa and in the case of France in respect of crimes within the jurisdiction of the ICTY and the ICTR). Countries such as Belgium, Iraq and the United Kingdom have limited their courts’ extraterritorial reach to nationals and residents. In France (other than for crimes within the jurisdiction of the ICTY and the ICTR), Estonia and Spain, along with non-States Parties such as Indonesia, crimes against humanity have been prescribed without any extraterritorial reach. Exceptionally, a few state courts have assumed extraterritorial jurisdiction directly under customary international law without the backing of any local law.211

When it comes to actual trials for crimes against humanity grounded upon universal jurisdiction, they remain rare affairs. Where trials for the international offence are taking place, such as in Iraq and Estonia, they are occurring as part of those countries’ transitions from a totalitarian regime or period of occupation. This mirrors the experience of the hybrid tribunals discussed in section 2. Most judges have readily accepted the international customary law status of crimes against humanity without a war nexus and the right to invoke universal jurisdiction (Javor in France being an exception). The Scilingo case in Spain, however, remains the singular example in the period of an actual trial for crimes against humanity based upon universal jurisdiction. Prior to that, Eichmann stood out alone as possibly the only other precedent. Even the Scilingo case may not serve as a strong precedent as the trial occurred following the defendant’s voluntary presence in Spain to face the charges brought. The right of state courts to invoke universal jurisdiction over crimes against humanity is considered in chapter 8.

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211 See the Belgium decision of Pinochet, section 3.3 above, and the Spanish decision of Scilingo, section 3.13 above.
CHAPTER SEVEN

CRIMES AGAINST HUMANITY AND INTERNATIONAL CUSTOMARY LAW

We wish the law were otherwise but we must administer it as we find it.

1. INTRODUCTION

Weaving its way between the definitions of crimes against humanity in the different international instruments set out in Appendix I there is a definition under international customary law. Discerning the contours of customary law is a notoriously inexact process. Nevertheless, for all the inexactitude involved in the task, it is important. A prosecution for crimes against humanity which was not established in customary law at the time of the offence likely infringes the principles of legality. Further, whilst the International Criminal Court ("ICC") as a treaty court may interpret Article 7 differently from customary law, the position under customary law is likely to serve as a powerful tool in interpreting Article 7.

In this chapter, section 1 summarises the concepts which are relevant to the notion of crimes against humanity. Section 2 considers the practice of the Security Council with respect to purely internal atrocities since 1991. In this period the Council authorised humanitarian interventions under Chapter VII in response to attacks on civilians of sufficient scale and seriousness and irrespective of any link to armed conflict. The legal basis for such interventions involved reinterpreting the concept of "threat to the peace" in Chapter VII. It is argued that it was this state practice, often underestimated in the literature, which brought about the abandonment of the war nexus and reshaped the modern contours of crimes against humanity. Section 3 seeks to discern the meaning of "crimes against humanity" under current international customary law and to compare that with Article 7 of the ICC Statute. Finally, section 4 analyses whether the threshold requirements of crimes against humanity is an element of the offence or a rule of jurisdiction.

2. A REVIEW OF THE RELEVANT CONCEPTS

2.1 Nullum Crimen Sine Lege

International criminal tribunals have generally held that the principle nullum crimen sine lege is part of international criminal law and applicable to prosecutions for crimes against humanity. This is supported by most scholars, and by Article 15 of the ICCPR, Article 7 of the European Convention on Human Rights, Article 9 of the Inter-American Convention on Human Rights, Article 7 of the African Charter of Human and Peoples' Rights, Article 99 of the Third Geneva Convention, Article 67 of

1 United States v von Loeb and others (1948) XI Law Reports of Trials of War Criminals 563.
2 See Chapter 4, section 4 (ICTY and ICTR); Chapter 6, section 2.2 (Special Court for Sierra Leone); Chapter 6, section 2.3 (Special Panels in East Timor).
the Fourth Geneva Convention and Article 22 of the ICC Statute. The liberal view of the Nuremberg Tribunal that it is only a 'principle of justice' has generally not been followed. As discussed in chapter 2, section 6.4, however, a credible argument exists for the view that international law, as reflected in Article 15(2) of the International Covenant on Civil and Political Rights, permits an exception to the *nullum crimen* principle for the crimes prosecuted at Nuremberg as 'crimes against humanity', such as murder, deportation, enslavement, and inhumane treatment (such as rape and torture) because such conduct is 'criminal according to the general principles of law recognised by the community of nations'. Nevertheless, the core prohibition on *ex post facto* criminal punishment is well established. Hence, a prosecution for crimes against humanity, which is not established in customary law at the time of the offence, will infringe this principle of legality. Whilst the principle may not require international offences to be prescribed in precise and exact terms, it is frequently stated that the elements of the offence must be accessible and reasonably foreseeable on the part of the defendant. The Secretary-General, in the case of the ICTY, said the customary law status of the offences within the jurisdiction of the Tribunal ought to be 'beyond doubt'. A defendant is entitled to receive the benefit of any such doubt including, for example, whether crimes against humanity requires a nexus with aggression, war crimes or armed conflict.

In the case of crimes against humanity, moral righteousness has generally provided the justification for the ready acceptance of crimes against humanity into customary law and this creates a continual tension with the prohibition against *ex post*
facto criminal punishment. Whilst the controversy continues, it is difficult to apply normative considerations too readily to the customary law status of crimes against humanity without conflicting with the rights of an accused. As the ICC begins its work, there is also a need to counter the deep suspicion felt by some States, such as the United States, towards international judges and prosecutors and their willingness to brand norms as customary. Overall, the readiness of judges to make law as well as interpret the law is a reflection of the lack of precision in international criminal law. Times have, however, changed. With the greater specificity of the ICC Statute and the work of the ad hoc Tribunals to build on, there is today less legitimacy in judges taking the lead in ‘uncovering’ customary international crimes or their elements.

2.2 Individual Criminal Responsibility

Individual criminal responsibility for crimes against humanity is well established. A distinction exists between international crimes which impose criminal responsibility directly upon individuals and mere ‘treaty crimes’ where the only international obligation is upon the State Parties to take action as stipulated in the treaty, not individual responsibility. Hence, there is a difficulty in relying upon international human rights law, and treaties such as the ICCPR, or even the ICC Statute, to discern the definition of crimes against humanity under customary law. The parties to treaties are states and the duties directly created by them fall upon State Parties, not individuals.

2.3 Crimes against humanity as a peremptory norm

Article 6(c) of the London Charter states that crimes against humanity can be committed ‘whether or not in violation of the domestic law’. Further, Article 8 says obedience to superior orders is no defence. This is an accepted part of the concept of crimes against humanity. That international law can apply directly to individuals in


13 The Nuremberg Tribunal said: ‘Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced’: above n 5, 221. Whilst controversial at the time, individual criminal responsibility was one of the Nuremberg Principles and may be taken, like the definition of crimes against humanity itself, to have been ‘affirmed’ by the General Assembly in Resolution 95(I) (1946): see H. Lauterpacht, International Law and Human Rights (1950) 3, 42-45

14 For example, see B. Broomhall, above n 3, chapter 1.


16 It was Principle 2 of the Nuremberg Principles and may be taken, like the definition of crimes against humanity itself, to have been ‘affirmed’ by the General Assembly in its Declaration of 1946 (Res 95(I)): see Affirmation of the Principles of International Law Recognized by the Charter of The Nürnberg Tribunal, GA Res 95(I), UN GAOR, 1st sess, 2nd
the absence of State consent in the form of a binding treaty and irrespective of conflicting local law (or even treaty law) is very much the exception. The threshold for the establishment of such peremptory or *jus cogens* rules is likely higher than that for other customary rules. Chapter 5 argued that there are sound reasons for confining crimes against humanity, as a peremptory norm of customary international law, to 'manifestly unlawful' conduct as recognised by the principal legal systems of the world. This suggests a high hurdle has to be overcome before a new underlying offence is accorded the status of a crime against humanity.

### 2.3.1 Statute of Limitations

Whilst the London Charter did not expressly overrule any local statute of limitation, it can be assumed that as crimes against humanity apply irrespective of local law, domestic law cannot purport to prescribe crimes against humanity at the international level. This was expressly stated to be the case in Article II(5) of Control Council Law 10, Article 29 of the ICC Statute, section 17 of UNTAET Regulation 2000/15 (East Timor), Articles 4 and 5 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia and in the domestic laws of France and Estonia. The European Court of Human Rights has also held that crimes against humanity cannot be time-barred by local law. Whether states have a duty to prosecute irrespective of the effluxion of time is considered in chapter 8.

### 2.3.2 Local amnesties and the duty to prosecute

Similarly, it can be assumed that local amnesties cannot prevent an international prosecution for crimes against humanity. This was expressly confirmed by Article II(5) of Control Council Law 10 and Article 10 of the Statute of the Special Court for Sierra Leone, as subsequently upheld by the Court. A distinction needs to be made, however, between a local amnesty and one granted at the international level. Any local amnesty, whether the person's role is small or great, in theory can be overridden, but there likely exists a broad discretion as to whether international

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18 See chapter 5, section 4.1.
20 See Chapter 6, section 2.2; and *Prosecutor v Norman*, *Kallon and Kamara (Decision on Constitutionality and Lack of Jurisdiction)*, Case Nos SCSL-2004-14-AR72(E); SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E) (13 March 2004) (hereinafter 'Lomé Accord Amnesty Decision').
21 Domestic amnesties are discussed in Chapter 8, section 3.3.
22 This is the effect of Principle 2 of the Nuremberg Principles, above n 16. In 2000, the Secretary-General said 'the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes': *Report of the Secretary General on the Establishment of a Special Court for Sierra Leone*, UN GAOR, 55th sess, [24], UN Doc S/2000/915 (2000) (hereinafter Report of the Secretary-General).
prosecutors, including at the ICC, choose to prosecute. The ICC Statute is silent with regard to amnesties. According to the Chairman of the Rome Conference, in the absence of a consensus on the issue, the question was deliberately left open. In the end, the Prosecutor has a broad discretion not to proceed ‘in the interests of justice’, which may involve having regard to a local amnesty.

On the other hand, amnesties at the international level for crimes against humanity have frequently been offered and granted. The Treaty of Lausanne after World War One granted to Turkey and its army an amnesty covering the acts of genocide towards the Armenians. After World War II, whilst no formal amnesty was ever granted, the Emperor of Japan was spared prosecution by General MacArthur. This followed the United States agreeing to terms of surrender whereby the Emperor was ambiguously allowed to remain on the throne but under a Supreme Commander (General MacArthur) appointed by the Allied Powers. By the Evian Agreement of 1962, France and Algeria agreed not to try persons who had committed atrocities. After the Bangladesh war of 1971, India and Bangladesh threatened to prosecute 195 captured Pakistani soldiers for genocide and crimes against humanity over the killing of approximately one million in East Pakistan. This threat was abandoned in 1973 in return for Pakistani recognition of Bangladesh. In 1993-94, the Security Council, the US and the Organisation of American States actively promoted an amnesty which was eventually granted to the leaders of Haiti for their crimes in order to avoid military intervention by the US. This led to a chorus of criticism, including from Richard Goldstone, the prosecutor to the ICTY, who said the Haiti amnesty is ‘an example of the wrong way to deal with these [atrocities]. It doesn’t serve justice; it doesn’t serve the victims’. At the Dayton peace talks, the indicted leaders of the Bosnian Serbs were seeking amnesties from prosecution before the ICTY which led Robertson to quip that if you kill one man you are sent to jail, but if you kill 200,000 you are sent to Geneva for peace talks.

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23 This was the view expressed by the Chairman of the Conference; see Leila Nadya Sadat, ‘Universal Jurisdiction, National Amnesties, and Truth Commissions Reconciling the Irreconcilable’ in Stephen Macedo (ed), Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law (2004) 193.
24 ICC Statute, art 53(1)(e).
25 This is supported by many writers such as B. Broomhall, above n 3, 102; and L Sadat above n 23, 203-204.
26 The Treaty of Lausanne included a ‘Declaration of Amnesty’ for all offences committed between 1914 and 1922: Treaty of Peace Between the Allied Powers and Turkey, done in Lausanne, France, opened for signature 24 July 1923, 28 L.N.T.S. 11 (entered into force 24 July 1923); see chapter 1, section 6.
28 Ibid.
29 Michael Scharf, ‘Swapping Amnesty For Peace: Was There a Duty Prosecute International Crimes in Haiti?’ (1996) 31 Texas International Law Journal 1, 2-8. Three days after President Clinton denounced the regime in Haiti as brutal and violent, he announced that an amnesty for the military leaders was a ‘good agreement for the United States and Haiti’: ibid, 2.
In the result, from about the mid-1990’s a sea change occurred in the attitude of the international community to the granting of international amnesties to persons responsible for committing atrocities. In recognition of this change in attitudes, the UN representative appended a disclaimer to the 1999 Lomé Peace Agreement for Sierra Leone that the amnesty provided for in that Agreement shall not apply to international crimes. In 2003, however, the UN entered an agreement with Cambodia which appears to have acknowledged that State’s amnesty for one of the Khmer Rouge leaders accused of committing crimes against humanity. In 2003 the United States suggested that President Hussein of Iraq (currently on trial for crimes against humanity) be offered safe haven in a third country to avoid war. Jack Straw, UK Foreign Secretary, said the offer of amnesty to President Hussein would be a bitter pill to swallow but might be a price worth paying. The United States, with international backing, supported the offer of asylum by Nigeria for President Taylor of Liberia in 2003, then under indictment by the Special Court for Sierra Leone. At the time the United States was threatening military intervention at the UN’s urging and it was felt that President Taylor’s exile would minimise the likely bloodshed consequent upon any such intervention.

In the result, as Scharf argues, there appears little basis for suggesting that there is a rule of international law that prohibits amnesties for crimes against humanity at the international level. The Special Court for Sierra Leone accepted that a peace agreement that settles an international armed conflict will have a different status to a local amnesty. Hence, an amnesty offered by one country to another in return for peace is likely binding, though this may not prevent another country or an international tribunal prosecuting the defendants concerned. Just as the Security Council can establish an international tribunal to prosecute perpetrators of crimes against humanity, it can choose to grant them amnesties in order to restore international peace which may then be binding upon all UN members. Of course the wisdom of doing so may be debated. The delicate balance between restoring peace and ending impunity was highlighted by Security Council Resolution 1638 (2005). On the one hand, the Council expressed its appreciation to Nigeria in providing for the ‘temporary’ stay of Charles Taylor, which it acknowledged was ‘with broad

32 Report of the Secretary-General, above n 22, [23].
33 See Chapter 6, section 2.4.
34 See Chapter 6, section 3.9.
36 Straw backs exile deal for Saddam (2003) British Broadcasting Corporation <http://news.bbc.co.uk/1/hi/uk_politics/2675715.stm> viewed 18 January 2006; see also Prime Minister Blair’s comments in the House of Commons where he supported the offer of amnesty to avoid war: England, Parliamentary Debate, House of Commons, 19 March 2003, vol 401, column 936, Prime Minister Blair.
37 The former Secretary of State Colin Powell agreed that the international community asked Nigeria to take Taylor which Nigeria said was on condition that it would not be asked to hand him to the Court at Sierra Leone: see Martin Luther King, ‘The Heat Is On’ (2005) Africa Today. 28 August 2005 at <C:\Documents and Settings\dad\My Documents\Africa Today Voice of the Continent.htm> viewed 27 June 2006.
38 M. Scharf, above n 29, 34-41.
39 Lomé Accord Amnesty Decision, above n 20, [42].
international support'. On the other hand, it included in the mandate of the UN Mission to Liberia the arrest and transfer of Mr Taylor to the Special Court of Sierra Leone should Mr Taylor return to Liberia. Under growing international pressure and prompted by a request of the newly elected President Johnson Sirleaf of Liberia, Nigeria arrested Taylor on 26 March 2006 and he was handed over to the Special Court of Sierra Leone.

The reason international amnesties are granted is to end conflict and save lives. It was to bring the Second World War to a speedier end that the United States agreed that Emperor Hirohito could remain on the throne. On the other hand, the Allies’ insistence on Germany’s unconditional surrender likely led to many more lives being lost, particularly civilians in Berlin. If international amnesties, even for crimes against humanity, were prohibited, then States would be denied the ability to use them as a means of ending future conflicts.

2.4 Irrespective of the Official Position of Defendants

Article 7 of the London Charter stated that no immunity could be invoked based on the ‘official position of defendants’. This has been restated in Article 6 of the Tokyo Charter, Principle 3 of the Nuremberg Principles, Article 7(2) of the ICTY Statute (as demonstrated by the trial of former President Milosevic), Article 6(2) of the ICTR Statute, Article 27(2) of the ICC Statute, Article 6(2) of the Statute of the Special Court for Sierra Leone (as confirmed by the Court in the case of former President Taylor of Liberia) and by the International Court of Justice in Arrest Warrant Case of 11 April 2000. Again, this is an exceptional matter in international law as it potentially interferes with the principle of the sovereign equality of States and the alleged prohibition on one state sitting in judgment on the acts of another inside its sovereign territory. The expansion of the concept of crimes against

41 Ibid, [1].
43 The Allies at Potsdam called for Japan’s unconditional surrender. After two nuclear bombs were exploded on Japanese cities, the Prime Minister of Japan offered to surrender on one condition – that the Emperor would remain on the throne. Possibly influenced by the fact that Russia had entered the war seven days earlier with two million soldiers crossing into Manchuria, the United States agreed that the Emperor could remain as ruler but under General MacArthur as Supreme Commander. Thereafter the Emperor was exempted from prosecution and remained Emperor until he died on 7 January 1989 in Tokyo, having made an official visit to the US in 1975. The French Judge at the Tokyo trials said that the failure to prosecute the Emperor vitiated the whole proceedings: see, for example, Martin Gilbert, History of the Twentieth Century (2001) 316-317, Geoffrey Robertson, Crimes Against Humanity (2000) 222-226.
44 See Chapter 6, section 2.2; and Prosecutor v Taylor (Decision on Immunity From Jurisdiction), Case No SCSL-2003-01-1 (31 May 2004).
46 See Chapter 8.
humanity therefore has the potential to upset relations between states as demonstrated by the experience of Belgium.47

3. THE INTERNATIONAL CRIMINALISATION OF INTERNAL ATROCITIES AND THE ELIMINATION OF THE WAR NEXUS48

3.1 The Rationale for the Nuremberg Principles

By the Nuremberg Principles, crimes against humanity have exceptional potency. From foot soldier to Head of State and irrespective of local law or superior orders, criminal punishment is threatened. As discussed in chapter 2, the rationale for the Nuremberg Principles was to prevent aggression and threats to international peace.49 By linking crimes against humanity to international security (affirmed by unanimous General Assembly Resolution 95(I)), crimes against humanity became a part of the constitutional order of the international community – a law of the United Nations to be read with its Charter.50 This delayed the application of the concept to purely internal atrocities. Intervention in the domestic jurisdiction of States is only permitted by the Security Council under Chapter VII of the UN Charter in response to ‘any threat to the peace, breach of the peace, or act of aggression’. Prior to 1991, Chapter VII was rarely invoked and the Security Council had not unambiguously invoked its powers in response to purely internal atrocities.51 Things began to change in the post cold war era with President Bush’s so-called ‘new world order’ in the aftermath of the first Gulf War. This, it is argued, truly laid the foundation for the removal of the war nexus from the concept of crimes against humanity in international law.

3.2 Security Council Practice from Iraq to Rwanda

The commonly regarded first step in the process of encompassing internal atrocities within the concept of ‘threats to the peace’ occurred following the cease-fire in the Gulf War, when Resolution 688 (1991) was passed.52 Iraqi troops attacked the Shiites and Marsh Arabs in the south and Kurdish villages in the north, forcing almost a million Kurds to seek safety in Turkey.53 On 5 April 1991, the Council demanded Iraq end the oppression saying ‘the repression of the Iraqi civilian population . . . which led to a massive flow of refugees . . . threatens international peace and security’.54 Nine states referred to the effect of the flow of refugees on neighbouring

47 See Chapter 6, section 3.3.
49 See Chapter 2.
50 See B. Broomhall, above n 3, 21-23 and 44-51.
53 UN SCOR, 46th sess, 2982 ad, mtg, 6, UN Doc S/PV.2982 (1991). This was the submission of the delegation from Turkey. Hereinafter, states’ submissions to the Security Council, as recorded in the Verbatim Records of meetings, will be identified parenthetically.
Three voted against the resolution saying it was an impermissible interference in the domestic jurisdiction of Iraq. Only France said ‘[v]iolations of human rights such as those now being observed become a matter of international interest when they take on such proportions that they assume the dimensions of a crime against humanity’. Thereafter, without further explicit Security Council approval, the Allies established military exclusion zones and 20,000 Allied troops, at their peak, landed in the north.

After the Security Council imposed an arms embargo for the former Yugoslavia in June 1991 when strictly the conflict may have been internal, the President of the Council on 31 January 1992 said:

The absence of war and military conflicts amongst States does not of itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security.

The so-called ‘new world order’ was put to the test when Somalia’s President of 21 years was ousted in January 1991, leading to a viscous clan-based civil war. The Security Council in 1992 stated that ‘the magnitude of the human suffering constitutes a threat to international peace and security’ and authorised the United States to intervene by force to establish a humanitarian relief operation. The Secretary-General said the action was ‘a precedent in the history of the United Nations: it decided for the first time to intervene militarily for strictly humanitarian purposes’. The mandate later included power to arrest, detain and assist in the prosecution of persons responsible for serious violations of international humanitarian law. In 1992 and 1993, the Security Council also determined that the civil wars in

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55 UN SCOR, 46th sess, 2982nd mtg, 22-23, UN Doc S/PV.2982 (1991) (Romania), 36 (Ecuador), 38 (Zaire), 41 (Côte d’Ivoire), 56 (Austria), 58 (US), 61 (U.S.S.R.), 64-65 (UK) and 67 (Belgium).
56 Ibid, 27-31 (Yemen), 31-32 (Zimbabwe) and 43 (Cuba).
57 Ibid, 53 (France).
58 S. Chesterman, above n 51, 131 and 197-199.
62 S. Chesterman, above n 51, 140.
Liberia and Angola were threats to international peace. In 1994, the Council authorised the United States to intervene by force to remove the military dictatorship in Haiti, accused by President Clinton of ‘brutal atrocities’ and ‘a campaign of murder, rape, and mutilation’. Scharf says the atrocities amounted to a crime against humanity.

3.3 Reinterpreting Threats to International Peace, 1991-2005

Between the resolutions on Iraq in 1991 and the resolutions on Rwanda in 1994, a new norm emerged in the international community. This norm held that purely internal humanitarian crises, including gross human rights abuses, could constitute a threat to international peace. Originally, in the cases of Iraq and Yugoslavia, there were attempts to locate the threat in the transboundary effects of the internal strife. This was not referred to in the cases of Somalia, Angola and Liberia, such that by the time of the genocide in Rwanda in 1994 there existed the expectation that the Council ought to intervene.

Can internal atrocities threaten international peace? Many scholars support the view, but others, such as Damrosch, say massive and pervasive human rights violations do not necessarily entail threats to peace and security. The Appeals Chamber in Tadić upheld the Security Council’s action by saying it is now ‘settled practice’ that a ‘threat to the peace’ includes internal armed conflict. The ICTR in Kanyabashi held the Security Council’s ‘wide margin of discretion’ was not justiciable but, in any event, it noted the large refugee flows to neighbouring countries of Rwanda and the potential for the conflict to spread to other countries with similar

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67 SC Res 788, UN SCOR, 47th sess, 3138th mtg, UN Doc S/RES/788 (1992). There was no reference to transboundary refugee flow in the text and only passing reference to it in the discussion: UN SCOR, 47th sess, 3138th mtg, 61, UN Doc S/PV.3138 (1992) (Zimbabwe) and 87 (India).
68 SC Res 864, UN SCOR, 48th sess, 3277th mtg, UN Doc S/RES/864 (1993). The concern of the Council appears singularly to have been directed to the humanitarian crisis rather than any transboundary effects of the civil war: S. Chesterman, above n 51, 137-138
70 See M. Scharf, above n 29, 2.
71 Ibid, 33.
72 The Council’s initial refusal to intervene was condemned by the Organisation of African Unity and aid agencies who accused the Council of applying different standards to Africa compared with Europe: S. Chesterman, above n 51, 145.
76 Prosecutor v Tadić (Defence Motion for Interlocutory Appeal on Jurisdiction), Case No IT-94-1-AR72 (2 October 1995) [30] (‘Tadić – Jurisdiction’), relying on the cases of the Congo in the 1960’s and more recently Somalia and Liberia.
demographic compositions. Hence, neither Tribunal endorsed the proposition that human rights abuses within a State alone can amount to a threat to international peace.

The notion of 'threat to the peace' is inherently nebulous. The drafting process suggests it was deliberately left vague to allow the Council a broad — some have argued unlimited — discretion. The matter can be regarded as having been settled by the UN World Summit Outcomes of September 2005. It was there resolved, and confirmed by General Assembly Resolution, that the international community has a responsibility to protect populations from internal atrocities, including crimes against humanity, stating:

... we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII... should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

In the result, a solid legal foundation exists for regarding purely internal atrocities as constituting a threat to international peace thereby authorising humanitarian interventions by the Security Council. Further, as held by the ad hoc Tribunals and the Special Court of Sierra Leone, the establishment of an international criminal court is likely within the range of measures that can be taken by the Security Council under Article 41 of the Charter.

3.4 The Elimination of the War Nexus

Article 6(c) of the London Charter required crimes against humanity to be connected with war crimes or aggression before the Nuremberg Tribunal could take jurisdiction. Chapter 3 considered the case put forward by many scholars and courts that by 1991 the war nexus for crimes against humanity had 'withered away'. The conclusion reached was that the sources relied upon did not provide convincing evidence in support of the proposition. Recognition of an international criminal jurisdiction covering purely internal atrocities, as a matter of State custom, in reality emerged in the practice of the Security Council sometime between 1991, in the case of Iraq, and 1994, in the case of Rwanda. By broadening the notion of 'threats to international peace' in Chapter VII of the UN Charter, the Council expanded the notion of crimes against humanity as well.

It is of course undeniable that Security Council Resolutions, whilst binding on UN members, cannot create international criminal offences which can be applied retrospectively. But that is not the end of the matter. It is equally undeniable that the

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77 Prosecutor v Kanyabashi (Decision on the Defence Motion on Jurisdiction), Case No ICTR-96-15-T (18 June 1997) [19]-[22] ('Kanyabashi – Jurisdiction').
78 J.L. Holzgrefe, above n 73, 41 and the sources there cited.
79 2005 World Summit Outcome, UN GAOR, 60th sess, 8th plen mtg, Agenda Items 46 and 120, [139], UN Doc A/RES/60/1 (2005).
80 Tadić – Jurisdiction, above n 76, [36]. In Kanyabashi, the ICTR Trial Chamber held that the fact that the atrocities have ended does not mean international peace has been restored as the needs of justice may require the punishment of those responsible before there can be lasting peace: Kanyabashi – Jurisdiction, above n 77, [26]-[27]. Prosecutor v Taylor (Decision on Immunity From Jurisdiction), Case No SCSL-2003-01-1 (31 May 2004) [38]. See further Danesh Sarooshi, The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers (1999) 95-98.
practice of the Security Council in intervening in purely internal humanitarian crises such as in Iraq, Somalia, Liberia, Angola, Haiti and Rwanda and promulgating the ICTY and ICTR Statutes, had an enormous effect on international criminal law. Debate continues as to the extent to which Council practice can actually make international law. What is uncontroversial is that the actions and Resolutions of the Council provides abundant state-to-state discursive interaction which in turn is capable of generating international customary law. At first, Council intervention in Iraq was controversial as the right of the international community to intervene in the internal affairs of a country in response to grave human rights abuses was being tested. By the time it came to Rwanda, there was little state opposition to the creation of the ICTR with jurisdiction, at Article 3 of the ICTR Statute, over crimes against humanity without a nexus to armed conflict. It was this Council practice, accepted by the international community at the time, which confirmed the state custom that crimes against humanity encompasses any large scale on a civilian population, but, as expressed at that time, 'on national, political, ethnic, racial or religious grounds'.

Was Article 3 of the ICTR Statute a new offence under customary law? This is probably too restrictive a view. By the time of the genocide in Rwanda in April 1994 it was already reasonably foreseeable that the international community, through the Security Council, could hold individually accountable those involved in attacks against civilians of sufficient scale and seriousness. The precedent was laid in Somalia where the UN Mission was asked to arrest, detain and assist in the prosecution of persons responsible for serious violations of international humanitarian law.

The legality of prosecuting crimes against humanity in Yugoslavia, with a nexus to internal armed conflict, is more debateable. Drawing upon the precedents of international intervention in the civil wars in Angola and Liberia, the customary law status of this definition was arguable at the time of the resolution in 1993. On the other hand, the resolution was on somewhat shakier grounds when it retrospectively granted the ICTY jurisdiction over ‘crimes against humanity’ in Yugoslavia back to 1 January 1991. This was before the post-Cold War practice of the Council which led to the international criminalisation of internal atrocities.

For the reasons explored in chapter 3, it remains doubtful that the war nexus had disappeared before 1991. This casts doubts on the validity of the prosecutions for crimes against humanity in Estonia for events in 1946, in Cambodia and Spain for events in the 1970’s or in Iraq for events in the 1980’s. The contemplated

83 Cassese argues that these crimes of the Soviet authorities in Estonia were crimes against humanity under Article 6(c) of the London Charter because they were carried out in connection with the Soviet Union’s aggression and illegal occupation which would amount to a crime against the peace. The conviction of von Schirach at Nuremberg (see chapter 2, sections 4 and 5.1) would support this view : see Antonio Cassese, 'Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law: The Kolk and Kislyiy v Estonia Case before the ECHR' (2006) 4 Journal of International Criminal Justice 410. This of course means that Stalin should also have been prosecuted at Nuremberg.
84 See Chapter 6, sections 3.5, 2.4, 3.13 and 3.9 respectively.
prosecution of the Khmer Rouge in Cambodia has reignited the debate. When Schabas suggested the war nexus in 1975 might not yet have ‘withered away’,\(^{85}\) this was promptly criticised by Linton and Stanton.\(^{86}\) Ratner and Abram, who were briefed by the US State Department to report on the question, concluded ‘the issue is certainly open to debate’ but ‘on balance’ such prosecutions ‘would not violate a reasonable reading of the nullum crimen principle’.\(^{87}\) This also was the conclusion of the UN appointed Group of Experts,\(^{88}\) which probably remains the dominant view.\(^{89}\)

It is not entirely surprising that crimes against humanity without the war nexus are today being applied by courts to cover events back to 1946. After the Nuremberg Trial the definition of crimes against humanity was taken as the codification of existing law rather than the creation of new law by the courts which prosecuted Nazi war criminals thereafter.\(^{90}\) The same is happening now with the definition in Article 7 of the ICC Statute. Despite the fact that the offence only came into operation on 1 July 2002, it is being seen by many as the codification of an existing offence that is being applied to events stretching further and further back in time.\(^{91}\)

An alternative approach is simply to prosecute for common crimes, such as murder, torture, rape and inhumane treatment, being conduct which is ‘criminal according to the general principles of law recognised by the community of nations’ as stated in Article 15 (2) of the International Covenant of Civil and Political Rights. Whilst not free from doubt, chapter 2 argued that such prosecutions,\(^{92}\) even in the face of local laws of prescription or other statutory bars, may do less violence to the principle of legality than prosecuting for crimes against humanity without a war nexus for events prior to 1991.

3.5 Recent Practice of the Security Council: The Cases of Liberia, Sierra Leone, the Democratic Republic of the Congo and Sudan.

The United Nations was founded to deal with the scourge of war. Today it is the scourge of civil war in Africa that represents the greatest source of human suffering and misery as can be seen in the cases of Liberia, Sierra Leone, the Democratic Republic of the Congo and Sudan.

Between 1989 and 2003, the civil war in Liberia claimed at least 250,000 lives (at least half of whom were civilians, often deliberately targeted). The war involved


\(^{88}\) *Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, 53rd sess, annex, [71], UN Doc A/53/850 (1999).*


\(^{90}\) See Chapter 3.

\(^{91}\) See Chapter 5, section 5.

\(^{92}\) See Chapter 2, section 6.4.
widespread violence against women, torture, abductions, forced recruitment into the war effort and the displacement of 1.3 million people.93 Those conscripted into the war effort included up to one in every ten Liberian children. Those responsible included the government, government backed militias94 and rebel forces.95 Bassiouni and the UN High Commissioner for Human Rights have labelled the atrocities in Liberia, 'crimes against humanity'.96 On 1 August 2003, the Security Council, acting under Chapter VII, authorised intervention by a multinational force, including the United States, to enforce a peace agreement consequent upon the negotiated departure of President Taylor to Nigeria.97 It demanded that 'all parties cease all human rights violations and atrocities against the Liberian population, and stresses the need to bring to justice those responsible'.98

During the civil war in Sierra Leone (1991-2001), atrocities were committed by the three main armed groups: the Armed Forces Revolutionary Committee (AFRC), the Revolutionary United Front (RUF) and the Civilian Defence Force (CDF).99 The Security Council in 2000, acting under Chapter VII, sent over 13,000 military personnel to support its mission in Sierra Leone.100 It reaffirmed that the international community will exert every effort to bring those responsible to justice and requested that the Secretary-General reach agreement on the creation of a special court with jurisdiction over serious crimes, including crimes against humanity, which led to the UN backed court.101

Since 1991, many armed groups in the Democratic Republic of the Congo have been accused of committing atrocities in that country's civil war, with an estimated death toll of 60,000.102 The Security Council first acted under Chapter VII to

94 This has included the special security units known as the Anti-Terrorist Unit and the Special Operation Division accused of carrying out torture and rape on perceived opponents of the government: see Report of the Independent Expert, above n 93, [41]-[45].
95 Ibid, [38]; Report of the United Nations High Commissioner, above n 93, [35].
96 Report of the United Nations High Commissioner, above n 93, [35]; M.C. Bassiouni, above n 3, 70.
102 Second Special Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, UN SCOR, 58th sess, [10]-[12], UN Doc
authorise humanitarian intervention in 1996, which has continued through to 2005.103 In 2000, it called on ‘all parties to refrain from or cease support to, or association with, those suspected of involvement in the crime of genocide, crimes against humanity or war crimes, and to bring to justice those responsible’.104 The ICC is currently investigating the situation from 1 July 2002.

Sudan has been plagued by civil war for decades, often between the Arab government of the North and the non-Arab population of the South. In 2004, thousands of civilians (generally Christian non-Arabs) were attacked and killed in the Darfur region by forces associated with the government, including the militia known as the Janjaweed.105 The Security Council, acting under Chapter VII, endorsed deployment of forces by the African Union.106 The Council demanded that Sudan disarm the Janjaweed militia and bring to justice the leaders who have carried out ‘international humanitarian law violations and other atrocities’.107 The Secretary-General later reported that ‘impunity continues to prevail’ because the government was unwilling ‘to apprehend and bring to justice Janjaweed leaders’.108 On 25 January 2005, the International Commission of Inquiry on Darfur, chaired by Antonio Cassese, concluded that due to evidence of State complicity, crimes against humanity may have occurred,109 saying ‘the Sudanese judicial system has proved incapable, and the authorities unwilling, of ensuring accountability for the crimes committed in Darfur’.110 On 31 March 2005, the Security Council referred the situation since 1 July 2002 to the ICC. The ICC opened an investigation in July 2005.111

How do these instances of humanitarian intervention by the Security Council inform us about the modern concept of crimes against humanity? First, whilst the conflicts have their roots in ethnic and tribal rivalry, the attacks against civilians have frequently been to terrorise indiscriminately the population, to win territory or simply to commit crimes, such as rape and lootings.112 According to one report, the primary


104 SC Res 1291, UN SCOR, sess, mtg, [15], UN Doc S/RES/1291 (2000); see also SC Res 1592, UN SCOR, 60th sess, 5155th mtg, UN Doc S/RES/1592 (2005).


107 Ibid, [6].

108 Report of the Secretary-General on the Sudan pursuant to paragraphs 6, 13 and 16 of Security Council resolution 1556 (2004), paragraph 15 of resolution 1564 (2004) and paragraph 17 of resolution 1574 (2004), [17], UN Doc S/2005/10 (2005) and see Report of the Secretary-General on the Sudan pursuant to paragraphs 6, 13 and 16 of Security Council resolution 1556 (2004), paragraph 15 of Security Council resolution 1564 (2004), and paragraph 17 of Security Council resolution 1574 (2004), [14], UN Doc S/2004/947 (2004); the Commission relied on the participation of officials and authorities to conclude the killings were conducted in both a widespread and systematic manner; however, the question of a ‘policy’ was not addressed: Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, [293] (Geneva 21 January 2005), <http://www.ohchr.org/Engish/docs/darfurreport.doc>; viewed 27 June 2006.

110 Ibid, [569].


112 For the case of Sudan, see: Report of the Secretary-General on the Sudan pursuant to paragraphs 6, 13 and 16 of Security Council resolution 1556 (2004), paragraph 15 of
purpose of the attacks in Sierra Leone was to spread terror among the civilian population.\textsuperscript{113} For example, former President Taylor has been indicted for crimes against humanity by the Special Court of Sierra Leone for assisting the RUF in generally terrorising the civilian population in Sierra Leone in order to win control of territory and the country’s diamond mines.\textsuperscript{114} The Secretary-General said of the Darfur situation: ‘It is hard to tell where economically motivated attacks end and politically or tribally motivated attacks of militia begin’.\textsuperscript{115} If such attacks can be described as ‘crimes against humanity’ it would suggest that neither a discriminatory motive nor the ‘persecution’ of a ‘population’ (if this means a group whose common features mark them out for persecution) is a necessary element of the crime.

Secondly, the Security Council in its resolutions on Sierra Leone, Liberia, the Democratic Republic of Congo and Darfur has expressly condemned violations of international humanitarian law, including crimes against humanity, committed by non-state parties. This includes parties to civil war with de facto political power, as well as militia groups such as the Janjaweed. This would tend to support the proposition that such organisations can be authors of crimes against humanity.

Thirdly, the need for intervention in Sudan arose largely out of that government’s inability or unwillingness to protect its people from attack by a militia who were suspected of acting in concert with local authorities.

4. \textbf{THE NEW THRESHOLD REQUIREMENTS UNDER CUSTOMARY LAW}

4.1 \textbf{Crimes against Humanity and Threats to International Peace}

The reinterpretation of ‘threats to international peace’ by the Security Council enables the three periods of State practice which have traditionally been associated with the notion of crimes against humanity to be brought together:

(a) the instances of humanitarian interventions prior to the Second World War, which emphasised crimes which shocked the conscience of humanity;\textsuperscript{116}

(b) the Nuremberg Precedent, which required a link to threats to international peace;\textsuperscript{117} and

(c) the practice of the Security Council since 1991, which assumed that purely internal atrocities, such as those which had led to humanitarian interventions by the Council since 1991, could by themselves be a ‘threat to international peace’.

Chapter 3 concluded with the proposition that the concept of crimes against humanity has generally been associated with three different principles:


\textsuperscript{113} Report of High Commissioner, above n 99, [20].

\textsuperscript{114} See \textit{Prosecutor v Taylor (Indictment)}, Case No SCSL-2003-01-1 (7 March 2003).

\textsuperscript{115} See Secretary General’ s Report, above n 112, [2].

\textsuperscript{116} See Chapter 1, section 5.

\textsuperscript{117} See Chapter 2.
(a) threats to international peace and security;
(b) the humanity principle, which emphasises that crimes against humanity must reach a certain level so as to 'shock the conscience of humanity'; and
(c) the impunity principle, which emphasises the impunity enjoyed by the perpetrators from local prosecution.

When the international community accepted that purely internal atrocities could, on their own, amount to a threat to international peace, it meant the first two principles had merged. For example, the preamble to the ICC Statute refers to 'atrocities that deeply shock the conscience of humanity', '[r]ecognizing that such crimes threaten the peace, security and well being of the world'.¹¹⁸ This, of course, is not a new proposition,¹¹⁹ but, prior to the practice of the Security Council in the 1990's, it was not clear that purely internal atrocities could threaten international peace and, hence, be a 'crime against humanity'. For example, the drafters of the London Charter rejected the doctrine of humanitarian intervention as a foundation for the concept of crimes against humanity because of its potential for abuse, a theme which was echoed in the inviolability afforded states under the UN Charter.¹²⁰ Today, the doctrine has re-emerged in the practice of the Security Council acting under Chapter VII and in turn this has allowed the concept of crimes against humanity to escape its prior link to armed conflict.

4.2 Crimes against Humanity and Humanitarian Interventions

Should a link be made between the attacks which have warranted the humanitarian interventions of the Security Council in the past and the threshold requirement of a 'crime against humanity'? Clearly enough they involve different considerations as David Luban remarks:

No doubt political prudence will make outsiders reluctant to intervene against any but large-scale atrocities. But the question of whether crimes against humanity call for a humanitarian military intervention to halt them is both conceptually and practically different from the question of whether to charge someone with crimes against humanity and try him.¹²¹

There are a number of reasons why it is not as simple as this. As explored in chapter 1, the doctrine of humanitarian intervention and the concept of crimes against humanity share a common intellectual heritage. From Plato to St Augustine to Grotius support has been given to the natural law notion that 'abominable' state acts¹²² render the sovereign liable to intervention and punishment by outsiders who may enforce the 'laws of humanity'.¹²³ It was this tradition which was relied upon when attempts were first made to invoke an international criminal jurisdiction over foreign nationals before and at the Nuremberg Trial.¹²⁴ The two concepts are linked in the discourse of

¹¹⁸ ICC Statute, preamble.
¹¹⁹ See chapter 1 and chapter 2, section 5.3.
¹²⁰ See Chapter 2, section 2 and 7.
¹²³ See Chapter 1, sections 2 and 3.
¹²⁴ See Chapter 1 and, in particular, the attempts to try persons responsible for atrocities in Lebanon in 1860 (section 5.1.2) and the genocide of Armenians after World War One (section 6.1). Sir Hartley Shawcross at Nuremberg said 'The fact is that the right of humanitarian intervention by war is not a novelty in international law - can intervention by judicial process
international relations and, in turn, this is why states are suspicious of the concept of crimes against humanity. As de Vabres, the French judge at Nuremberg wrote: 'The theory of 'crimes against humanity' is dangerous: . . . dangerous for the States because it offers a pretext to intervention by a State in the internal affairs of weaker States'. 125 Scholars, commentators 126 and courts 127 have, however, on many occasions since Nuremberg suggested that the instances of humanitarian intervention in the past describe or evidence 'crimes against humanity'. When the Trial Chamber in Tadić attempted to define the crime without a nexus to armed conflict it went back to the statement of the United Nations War Crimes Commission:

Isolated offences did not fall within the notion of crimes against humanity. As a rule systematic mass action, particularly if it was authoritative, was necessary to transform a common crime, punishable only under municipal law, into a crime against humanity, which thus became also the concern of international law. Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims. 128

Widely quoted since Nuremberg, it has come to represent the defining statement of what is a crime against humanity as a matter of customary international law since 1991. 129 Having been adopted by the Trial Chamber in Tadić, which in turn was widely used as a source for the crime’s customary law definition at the Rome Conference, it should inform and guide the interpretation of Article 7 of the ICC Statute. Whilst it may be argued that military intervention is entirely different from trying a suspect, in reality, both are resented by states based upon the same asserted principle of non-intervention. 130 It needs to be recalled that the definitions of crimes

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126 For example, see Q. Wright, 'The Law of the Nuremberg Trials' (1947) 41 AJIL 38, 60-61 Preliminary Reports of the Independent Commission of Experts Established in accordance with Security Council Resolution 935, UN SCOR, 49th sess, annex, [115], UN Doc S/1994/1125 (1994); Brigadier General Taylor, Chief of Counsel for the United States in United States v Flick and others 6 CCL 10, 87-89 referred to prior instances of humanitarian intervention to justify the charges of crimes against humanity.
127 See United States v Altstötter et al 3 CCL 981-982; Attorney-General of Government of Israel v Eichmann, 36 ILR 277, 296 (Sup. Ct., Israel 1962).

129 It should be noted that in chapter 2 it was argued that this statement did not represent the concept of crimes against humanity as understood in the London Charter, but it did quickly represent what many commentators believed ought to have been the meaning of crimes against humanity at the time.

130 See chapter 6, section 3.3 for the case of Belgium and chapter 8.
against humanity in international instruments come with a jurisdiction to try persons irrespective of position, local law or state consent. One cannot doubt the reaction of China or the United States if its leaders were indicted for crimes against humanity by an international tribunal. If, in accordance with the principle of legality, one is searching for a customary law definition of crimes against humanity that is ‘beyond doubt’, regard ought be paid to the expanded number of attacks which have warranted intervention by states or the Security Council in the past. This suggests that examples of ‘crimes against humanity’ in the last 200 years include (without being exhaustive) those listed in table one below.

### TABLE ONE: CRIMES AGAINST HUMANITY AS EVIDENCED BY THE HUMANITARIAN INTERVENTIONS OF THE LAST 200 YEARS

<table>
<thead>
<tr>
<th>Year</th>
<th>Place</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1827</td>
<td>Morea</td>
<td>Genocide and displacement of the Greek population by the Ottoman Empire&lt;sup&gt;131&lt;/sup&gt;</td>
</tr>
<tr>
<td>1860</td>
<td>Lebanon</td>
<td>Attack on Christians by Muslims&lt;sup&gt;132&lt;/sup&gt;</td>
</tr>
<tr>
<td>1898</td>
<td>Cuba</td>
<td>Persecution of the Cuban population by the Spanish&lt;sup&gt;133&lt;/sup&gt;</td>
</tr>
<tr>
<td>1911-1918</td>
<td>Armenia</td>
<td>Genocide of the Armenians by the Turks&lt;sup&gt;134&lt;/sup&gt;</td>
</tr>
<tr>
<td>1933-1945</td>
<td>Europe</td>
<td>Genocide of the Jews and the persecution of others by the Nazis&lt;sup&gt;135&lt;/sup&gt;</td>
</tr>
<tr>
<td>1991</td>
<td>Iraq</td>
<td>Persecution of the Kurds and the Shiites</td>
</tr>
<tr>
<td>1991-1995</td>
<td>Bosnia and Herzegovina</td>
<td>Ethnic cleansing and genocide in Bosnia and Herzegovina&lt;sup&gt;136&lt;/sup&gt;</td>
</tr>
<tr>
<td>1991-1994</td>
<td>Haiti</td>
<td>Persecution of supporters of President Aristide by a military junta</td>
</tr>
<tr>
<td>1991-1992</td>
<td>Somalia</td>
<td>Attacks on civilians during civil war</td>
</tr>
<tr>
<td>1991-2001</td>
<td>Sierra Leone</td>
<td>Attacks on civilians during civil war</td>
</tr>
<tr>
<td>1989-2003</td>
<td>Liberia</td>
<td>Attacks on civilians during civil war</td>
</tr>
<tr>
<td>1991-</td>
<td>Democratic Republic of Congo</td>
<td>Attacks on civilians during civil war</td>
</tr>
<tr>
<td>1994</td>
<td>Rwanda</td>
<td>Genocide of the Tutsi by the Hutu&lt;sup&gt;137&lt;/sup&gt;</td>
</tr>
<tr>
<td>1999</td>
<td>Kosovo</td>
<td>Attacks on ethnic Albanians&lt;sup&gt;138&lt;/sup&gt;</td>
</tr>
</tbody>
</table>

<sup>131</sup> See Chapter 1, section 5.1.1.  
<sup>132</sup> See Chapter 1, section 5.1.2.  
<sup>133</sup> See Chapter 1, section 5.1.3.  
<sup>134</sup> See Chapter 1, section 6.1.  
<sup>135</sup> See Chapter 2.  
<sup>136</sup> See Chapter 4.  
<sup>137</sup> See Chapter 4.  
<sup>138</sup> See Chapter 6, section 2.5.
<table>
<thead>
<tr>
<th>Year</th>
<th>Country</th>
<th>Type of Attack</th>
</tr>
</thead>
<tbody>
<tr>
<td>1999</td>
<td>East Timor</td>
<td>Attacks against supporters of independence</td>
</tr>
<tr>
<td>2003-</td>
<td>Sudan</td>
<td>Attacks on non-Arab Christians and other civilians</td>
</tr>
</tbody>
</table>

If one applies the *ejusdem generis* principle to the attacks listed in table one, the controversial aspects of the crimes’ definition – the need for discriminatory grounds or the persecution of a population, the widespread or systematic threshold, the policy element, and the need for state involvement – can be considered and compared with other sources, *opinio juris* and Article 7 of the ICC Statute.  

4.3 The Humanity Principle: The Meaning Of ‘Attack Against Any Civilian Population’

4.3.1 The Requirement of Scale and Seriousness

Chapter 4 criticised the test of a ‘widespread or systematic attack against any civilian population’, principally on the ground of vagueness. Given the indeterminacy of the term, the label a ‘crime against humanity’ has been used by commentators, but less frequently by states, to describe a vast array of different human rights abuses, including terrorist attacks in the United States on September 11, 2001, Bali in 2002, Madrid in 2004 and the Australian policy of detaining asylum seekers. It has also been applied to attacks on Israelis by Palestinian suicide bombers. If one considers the attacks listed in table one above, they have not just been violent, involving crimes such as murder, rape and serious assaults, but they have all involved the loss of many lives. None have involved less than 1000 deaths,

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139 See Chapter 6, section 2.3.
140 A weaker version of the principle may be to consider the instances where the Security Council has merely determined that there exists a threat to international peace without authorising any military intervention, but such instances have not been considered in this work.
141 See chapter 4, section 5.
143 On 12 October 2002, terrorists exploded bombs in two nightclubs in Bali, killing 202 people. Clarke argues that because it was a planned attack it amounts to a crime against humanity: Ron Clarke, ‘Constitutional Validity of Bali and East Timor Trials’ (2003) 5 Asian Law 1, 20-21.
145 Julian Burnside QC argued this in a speech in 2003, saying ‘a representative of the International Criminal Court has expressed privately the view that asylum seekers as a group can readily be regarded as a civilian population’: see Margo Kingston, ‘Australian Crime against Humanity’, *The Sydney Morning Herald* (Sydney), 8 July 2003.
146 See Human Rights Report quoted in M.C. Bassiouni, above n 3, 71.
and usually a greater number have been affected. There has not been a court
decision which has applied the concept of a crime against humanity in the context of
an attack of lesser scale and seriousness. Even in the case of Argentina in the 1970’s,
where the Spanish court in Scilingo applied the concept of crimes against humanity,
deaths in the thousands occurred. The number of deaths required can evolve and
can now be regarded as confirmed by the practice of the Security Council.

How does this view compare with Article 7 of the ICC Statute and other sources?
Prior to the most recent jurisprudence of the ad hoc Tribunals, many scholars and
court decisions asserted that a crime against humanity required an attack of a
certain scale and seriousness; a view repeated by the Trial Chamber in Kupreškić in
2000. Frequently, this has been based upon the premise that attacks of a certain
scale and seriousness threaten the international community as a whole. This thesis
can now be regarded as confirmed by the practice of the Security Council and the UN
World Summit Outcomes. The reference to a state ‘manifestly failing to protect their
populations from genocide, war crimes, ethnic cleansing and crimes against
humanity’, envisages situations of extreme violence.

On the other hand, the most recent approach of the ad hoc Tribunals, taking its
lead from the ILC, has asserted, as a matter of customary law, that there must be
either a ‘widespread’ or a ‘systematic’ attack against any civilian population,
suggesting that there is no requirement of scale under the second limb.\textsuperscript{156} This has led some commentators to speculate that the assassination of a single political figure, if it is intended to threaten an entire ‘civilian population’, may be a ‘crime against humanity’.\textsuperscript{157}

The difficulty with this literal approach to the ‘widespread or systematic’ test is that it fails to appreciate the need for a link between crimes against humanity and threats to international security which in turn requires some element of scale and seriousness. At the Rome Conference, states did not accept a definition of crimes against humanity without some element of scale and seriousness being required.\textsuperscript{158} A compromise definition was reached in Article 7, where ‘attack against any population’ was defined, in part, to mean ‘a course of conduct involving the multiple commission of acts’. This probably casts more fog than light on the issue. Some have argued that this definition should be interpreted literally so that a ‘systematic’ attack can consist of just two acts.\textsuperscript{159} In order to keep faith with the principle of legality and the need for specificity in criminal,\textsuperscript{160} regard ought be paid to the scale of attacks that have warranted international interventions in the past. In order to consolidate state support for the notion of a ‘widespread or systematic attack against a civilian population’, rather than the war nexus, it may be prudent for courts and prosecutors to await the lead of the Security Council or other state practice before applying the notion of a crime against humanity to an attack of significantly smaller scale or seriousness than those identified in table one above.

The notion of a ‘widespread or systematic attack directed against any civilian population’ can be accommodated within a paradigm which emphasises threats to international peace. Attacks which are perpetrated by state authorities, as opposed to non-state actors, are clearly more likely to threaten international security and require an international response. This is captured by the remark of the UNWCC – ‘particularly if it was authoritative’.\textsuperscript{161} This suggests that an attack which is committed by a state pursuant to an explicit policy to target a group of civilians, may not require the same number of victims than a more spontaneous eruption of violence by non-state actors. This issue and the role of non-state actors as authors of crimes against humanity are considered further below.

Hence, in terms of scale, the September 11, 2001 attacks probably pass the test, but not the Bali bombing of 2002, the Madrid bombing of 2004, the London bombing of 2005 nor Bouterse’s summary execution of 15 political opponents in Surinam.\textsuperscript{162} In terms of seriousness, the Australian policy of detaining asylum seekers, and the American policy of detaining persons of Japanese descent during the Second World War, also do not pass the required threshold. Finally, the attack on the Iraqi village of al-Dujail in 1982, involving the deaths of around 150 and the imprisonment and forcible transfer of around 400, is the subject of the charge of crimes against humanity

\begin{itemize}
  \item \textsuperscript{156} See Chapter 4, section 4.4.
  \item \textsuperscript{157} S.R. Ratner and J.S. Abrams, above n 87, 61.
  \item \textsuperscript{158} See Chapter 5, section 2.
  \item \textsuperscript{159} Luban, above n 121, 107-8.
  \item \textsuperscript{160} For example, Article 22(2) of the ICC Statute says: ‘The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.’
  \item \textsuperscript{161} See n 128.
  \item \textsuperscript{162} See Chapter 6, section 4.12.2.
\end{itemize}
laid against Saddam Hussein. As the crimes were carried out not just by state agents, but explicitly on the orders of the head of state, the attack probably just passes the threshold.163

4.3.2 A Discriminatory Attack or Policy of Persecution of a Population or Group

Whilst many of the ‘attacks’ listed in paragraph (a) above have involved discriminatory motives, this has not universally been so. Some early exceptions include the Spanish attack on the Cuban population in 1898 and the repression of not only Jews, but also any opponents of the Nazis. Chapter 2 argued a discriminatory motive was not a part of the Nuremberg Precedent. It was also clearly rejected by states at the Rome Conference.164 Nevertheless, up to and including the genocide in Rwanda in 1994, a fair shorthand description of a crime against humanity may have been that of a state tolerated murderous persecution of a population (meaning a group sharing some feature(s) marking them out for persecution) and those opposed to the state practising that policy of persecution. This is broadly consistent with the remarks in several cases,165 the Tadić Trial Judgment166 and the view expressed by many states and the Commissions of Experts at the time of the ICTY and ICTR Statutes.167

Since 1994, however, the attacks on the civilian populations in Sierra Leone, Liberia, the Democratic Republic of the Congo and Sudan, which have prompted Security Council intervention, have frequently been indiscriminate. This suggests, consistent with the most recent jurisprudence of the ICTY, that a ‘civilian population’ can be either a group marked out by some shared characteristics or simply the inhabitants of a geographic area.168 Hence, if enough political dissidents are attacked, it may be inferred that this is in order to terrorise, or to deter opposition from, the population as a whole and may constitute a crime against humanity.

4.3.3 The Requirement of a Systematic Attack

Apart from the requirement of scale and seriousness, a common element in the attacks referred to in paragraph (a) above is that the acts relate to each other in such a way that one can discern an ‘attack’ or campaign, not a series of isolated and unconnected acts. To this extent there is a need for systematic conduct as well as a widespread attack. The question of the need for a ‘policy’ is, however, dealt with as part of the impunity principle.

4.4 The Impunity Principle: State Unwillingness or Inability

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163 See Chapter 6, section 3.9.
164 See Chapter 5, section 2.
166 Prosecutor v Tadić (Trial Chamber Judgment), Case No IT–94–1–T (7 May 1997) [644] (‘Tadić – Trial’).
167 See Chapter 4, section 2.
Throughout the history of the concept of crime against humanity there have been attempts to justify the international aspect of the offence by reference to the impunity enjoyed by the perpetrators. Under Article 6 of the London Charter it was a requirement that the defendant be acting in the interests of the Axis countries. Chapter 3 summarised the most common, though widely diverging, expressions of the principle in the case law and the view of writers up to the time of the ICTY Statute.\textsuperscript{169} They generally involved notions of state action, policy or, more loosely, state acquiescence, toleration or even impotency. Some scholars still argue for 'state action or policy'\textsuperscript{170} or acquiescence or toleration by a state as a requirement of crimes against humanity as a matter of customary law.\textsuperscript{171} Whilst the impunity principle did not find expression in the statutes of the ICTY or the ICTR, the early jurisprudence required there be a policy of a state, organisation or group\textsuperscript{172} (reflecting parts of the definition in the ILC 1996 Draft Code and Article 7 of the ICC Statute) or state toleration.\textsuperscript{173} Later, a 'policy' was held by the \textit{ad hoc} Tribunals not to be a requirement at all.\textsuperscript{174} Many states at Rome had difficulty with such a proposition, which led to the controversial compromise definition in Article 7(2).\textsuperscript{175} The approach of the \textit{ad hoc} Tribunals is supported by the definitions of crimes against humanity in the laws of, or dealing with, East Timor, Sierra Leone, Germany and Belgium.\textsuperscript{176} On the other hand, many States, such as Australia, Canada, Indonesia, Iraq, New Zealand, the United Kingdom, the Netherlands and South Africa have incorporated the terms of Article 7 into their domestic law.\textsuperscript{177} Further, the UN in its agreement with Cambodia has adopted Article 7 as its definition of crimes against humanity.\textsuperscript{178}

If one focuses on the actual demands of states or the Security Council at the time of the international interventions referred to in Table One above, the common thread was an allegation of state unwillingness or inability to respond to an attack of sufficient scale and seriousness. Whilst state involvement may have been suspected, the actual diplomatic exchanges did not always accuse the territorial state of active involvement, yet still asserted an international interest. For example, in the cases of the Morea in 1827 and the Lebanon in 1860, the diplomatic demands of the European Powers was that the Ottoman Porte disavow any connection with those involved in the atrocities and ensure the protection of those affected.\textsuperscript{179} The existence of a provable state policy did not appear to be a prerequisite to foreign intervention. In the case of East Timor in 1999, whilst the military's assistance in the activities of the various militias suggested both a state policy and state involvement, the actual resolutions of the Security Council based its international response upon Indonesia's inability to maintain peace and security and protect the East Timorese population.\textsuperscript{180}

\textsuperscript{169} See chapter 3, section 5.3.
\textsuperscript{170} M.C. Bassiouni, above n 7, 273-275; M.C. Bassiouni, above n 3, 69-71.
\textsuperscript{171} A. Cassese, above n 3, 64.
\textsuperscript{172} See \textit{Tadić – Trial}, above n 166, [644].
\textsuperscript{173} \textit{Prosecutor v Kupreškić (Trial Chamber Judgment),} Case No IT–95–16–T (14 January 2000) [555] ("Kupreškić – Trial").
\textsuperscript{174} \textit{Kunarac – Appeal}, above n 168, [98].
\textsuperscript{175} See Chapter 5, section 2 and 3.
\textsuperscript{176} See Chapter 6.
\textsuperscript{177} Ibid.
\textsuperscript{178} See Chapter 6, section 2.4.
\textsuperscript{179} See Chapter 1, section 5.1.
\textsuperscript{180} See SC Res 1262, UN SCOR, 54\textsuperscript{th} sess, 4039\textsuperscript{th} mtg, [3], UN Doc S/RES/1262 (1999); SC Res 1264, UN SCOR, 54\textsuperscript{th} sess, 4045\textsuperscript{th} mtg, [3] and [5], UN Doc S/RES/1264 (1999).
This was even more explicit in the case of Darfur in 2004-2005\textsuperscript{181} and the remarks of the Secretary-General and the International Commission of Inquiry.\textsuperscript{182} The notion of 'manifest state inability or unwillingness to protect its people', \textit{rather than} 'state policy', has become particularly apt in the instances of UN intervention in African countries gripped by civil war. The concept is reflected in the World Summit Outcomes of September 2005 where the former alleged 'right of humanitarian intervention' has become a 'duty to protect populations'.\textsuperscript{183} The duty falls, firstly, upon national authorities, and in the case of manifest failure by such authorities, the duty then falls upon the Security Council, including by force under Chapter VII.

The principle of impunity here stated – that of state 'unwillingness or inability' – is not reflected in the definition in Article 7 of the ICC Statute, but it is, of course, the language of Article 17 of the ICC Statute, known as the principle of complementarity. As the German judge of the ICC, Hans-Peter Kaul has said:

In recent years, detailed theoretical and practical analyses of the Rome Statute have made it increasingly clear that the complementarity principle, as the most important principle for the Court’s functioning, indeed its crucial foundation, amounts to far more than an element in the competence of the Court. It is an organizational principle that shapes the architecture of the international criminal law system as such.\textsuperscript{184}

At a meeting on 12 July 2005 the Security Council debated its role in humanitarian crises. The Secretary-General said that Member States should recognise that if a particular state is unwilling or unable to protect its people from extreme violence, the Security Council must assume its responsibilities.\textsuperscript{185} No better short hand description – ‘manifest state inability or unwillingness to protect its people from extreme violence’ – can be formulated for the modern notion of crimes against humanity under customary law.

4.5 The Role of Non-State Actors and Terrorist Organisations

Acting in the interests of the Axis countries was a requirement under the London Charter. Hence, as Bassiouni point out, 'crimes against humanity' in Article 6(c) of the London Charter did not encompass non-state actors who were not acting in support of state interests.\textsuperscript{186} Today, a modern consensus appears to reject the view that only a state can be the author of a crime against humanity because such a view fails to recognise the proliferation of powerful non-state actors. Many writers, such as Bassiouni,\textsuperscript{187} Cassese,\textsuperscript{188} Rikhof\textsuperscript{189} and Ratner and Abrams,\textsuperscript{190} argue that

\textsuperscript{181} See SC Res 1556, UN SCOR, 59\textsuperscript{th} sess, 5015\textsuperscript{th} mtg, [2], UN Doc S/RES/1556 (2004).
\textsuperscript{182} See text accompanying notes 105-112, 115 above.
\textsuperscript{183} 2005 World Summit Outcome, above n 79, [138]-[139].
\textsuperscript{186} M.C. Bassiouni, above n 3, 70.
\textsuperscript{187} Ibid, 69-71.
\textsuperscript{188} A. Cassese, above n 3, 64.
organisations with de facto control over territories ought to be equated with a state. Non-state actors, as authors of crimes against humanity, are provided for in the ILC 1996 Draft Code, some decisions of the ad hoc Tribunals and Article 7 of the ICC Statute. Most recently in the Seilinga case, the Spanish court referred to crimes against humanity being committed by an organisation with de facto power. The Security Council in its resolutions on Sierra Leone, Liberia, the Democratic Republic of Congo and Darfur has condemned violations of international humanitarian law, including crimes against humanity, committed by non-state parties.

This is consistent with the proposition advanced above that crimes against humanity involve ‘manifest state inability or unwillingness to protect its people from extreme violence’. Whenever a state’s criminal justice system, due to civil war or similar circumstances, cannot effectively reach an organisation because of its power or control over territory, it may be an author of a crime against humanity.

But what of a loosely organised militia that may operate with state support? Frequently, militia or private groups, with only a loose or indirect connection with a state, carry out atrocities. Bassiouni says to be an author of a crime against humanity ‘these non-state actors must have some of the characteristics of state actors, which include the exercise of dominion or control over territory or people, or both, and the ability to carry out a “policy” similar in nature to that of “state action or policy”’.

One needs to consider the question on two levels: first, in relation to international customary law and, secondly, under Article 7 of the ICC Statute. As a matter of international customary law, as argued above, there is no need either to prove an explicit ‘state policy’ to commit an attack or an attack by an organisation which has de facto political power. Rather, the critical enquiry is whether there is ‘state inability or unwillingness to protect its people from extreme violence’. For example, it was Sudan’s toleration of, or ‘unwillingness’ to stop, the Janjaweed’s widespread human rights abuses which created a crime against humanity. It is not necessary, as a matter of customary law, to prove an actual state policy to support the Janjaweed’s crimes or that the militia had reached some vague and largely undefined level of ‘organisation’ or power that equates it with a state.

On the other hand, under Article 7, as discussed in chapter 5, mere state toleration of an attack will not suffice because the definition requires a ‘policy to commit such an attack’. Hence, if a group, such as the Janjaweed, is not an ‘organization’ under

191 See Chapter 3, section 3.3.2(iv).
192 Tadić – Trial, above n 166, [654]-[655]; Kupreškić – Trial, above n 173, [552]; Prosecutor v Kayishema and Ruzindana (Judgment), Case No ICTR-95-1-T (21 May 1999) [126]; Prosecutor v Blažekić (Trial Chamber Judgment), Case No IT–95–14–T (3 March 2000) [205].
193 See Chapter 6, section 3.13.
194 See section 3.5, above.
195 For example, there were Arkan’s Tigers in Bosnia, the Interahamwe in Rwanda, around 23 militias in East Timor, and the Janjaweed in Darfur. All gained support from State agencies at the time.
196 M.C. Bassiouni, above n 3, 71.
197 This is made clear by the Elements of The Crimes: see Chapter 5, section 3.3.
Article 7 and no ‘state policy to commit such an attack’ can be proved, the threshold under Article 7 will not be made out. Alternatively, a broad interpretation of the term ‘organization’ in Article 7 (beyond its customary law meaning) will, ironically, allow the definition to be consonant with the definition under customary law set out above. Such an approach is open to the ICC under Article 7 as the term ‘organization’ is undefined.\textsuperscript{198} Further, because the principle of complementarity governs, the ICC will only have jurisdiction where the crimes of the militia or group in question are not being investigated or prosecuted by the territorial state. Hence, a broad interpretation of the term ‘organization’ in Article 7 will not lead to excessive interference in a state’s ordinary criminal jurisdiction.

What of a terrorist or criminal gang that is not a state-like entity and is not enjoying impunity from states? Today’s ‘war on terror’ has placed focus on whether terrorism can be labelled a crime against humanity. In the aftermath of the September 11 attacks many persons were quick to use the label a ‘crime against humanity’. This included Geoffrey Robertson, now judge of the Special Court of Sierra Leone,\textsuperscript{199} the UN High Commissioner for Human Rights, Mary Robinson,\textsuperscript{200} and French legal academic Alain Pellet.\textsuperscript{201} Human Rights Watch and Amnesty International have consistently used the label for terrorist attacks even on a far smaller scale.\textsuperscript{202} Fry and Martinez both conclude that some acts of terrorism will be crimes against humanity, but their focus was on how to prosecute terrorists effectively before the ICC or by states invoking universal jurisdiction.\textsuperscript{203} On the other hand, Bassiouni writes that groups such as Palestinian suicide bombers and the mafia cannot be the authors of a crime against humanity,\textsuperscript{204} which is also the view of Cassese.\textsuperscript{205} Schabas disputes the proposition that the label ‘crimes against humanity’ can apply to the acts of Al-Qaeda, the Red Brigade, the Baader-Meinhof gang, the IRA, the Ulster Volunteer Force ‘and for that matter – why not? – the Hell’s Angels’.\textsuperscript{206}

The debate to some extent has been taken over by events. There is now no shortage of Security Council resolutions that have determined that terrorism is a threat

\textsuperscript{198} See Chapter 5, section 3.4 for the discussion of the issue at the Rome Conference and Chapter 4, sections 3, 4 and 5 for the case-law of the ad hoc Tribunals.

\textsuperscript{199} Geoffrey Robertson, America Could Settle This Score Without Spilling Blood Across Afghanistan’, Times (UK), 18 September 2001, 18.


\textsuperscript{201} Alain Pellet, ‘Non ce’n’est pas la guerre!’ Le Monde, 21 September 2001, 12 quoted in Schabas, above n200, 923.

\textsuperscript{202} See nn 144, and 146 above.

\textsuperscript{203} L. Martinez, above 142, and J. Fry above n 142.

\textsuperscript{204} M.C. Bassiouni, above n 3, 71.

\textsuperscript{205} A. Cassese, ‘Terrorism is also Disputing Some Crucial Legal Categories of International Law’ (2001) European Journal of International Law 993; and Cassese, above n 3, 64.

\textsuperscript{206} Schabas, above n 200, 929.
to international peace. They have imposed many obligations on states to suppress terrorism and to cooperate in the ‘war on terror’. States generally have not used the label a ‘crime against humanity’ to describe acts of terrorism. It needs to be remembered that the proposal to have terrorism and drug trafficking included as crimes within the jurisdiction of the ICC was rejected. A terrorist attack, such as those committed on September 11, may reach the required scale and level of organisation to satisfy the humanity principle – that of ‘shocking the conscience of humanity’. An attack, as argued above, however, only takes on the character of a crime against humanity when the state is ‘unwilling or unable’ to respond to the attack and bring the perpetrators to justice.

For international terrorism, this is generally not the case. More frequently the terrorist organisation faces fierce resistance by the local state which is doing all that it can to arrest and prosecute the terrorists. Generally, the desire of the countries affected is to see the perpetrators brought to justice in their own territory, not the ICC. By Articles 17 and 18 of the ICC Statute, the ICC will only have jurisdiction if the Court is satisfied that the relevant state is unable or unwilling to prosecute the alleged perpetrators. By this test there is unlikely to be ICC jurisdiction over events such as the attacks of September 11, the Madrid bombing of 2004 or the London bombing of 2005. This, however, will not universally be the case. For example, there may be an allegation that a state is shielding a terrorist by denying requests for extradition and declining to prosecute the suspects before the state’s own courts – such as in the case of Libya who was accused by the United Kingdom of shielding those accused of bombing the Pan Am flight over Lockerbie. In such a situation, if the terrorists’ acts constitute a ‘crime against humanity’ and the acts occurred in the territory of a State Party or the suspect is a citizen of a State Party, then the ICC may have jurisdiction.

It should be noted, however, that a state which tolerates or supports terrorists who reside in the territory or which is allowing its territory to be used as a base for terrorist activities committed abroad. will put that state in breach of the many binding Security Council resolutions on the matter or even give rise to an alleged right of self-defence, as occurred in the United States’ war in Afghanistan. Generally, international terrorism, particularly where the crimes are small in scale and there is no allegation of state toleration or support, will not engage the principles relevant to crimes against humanity. Like the pirate of the Middle Ages, international terrorism is best seen as being sui generis, rather than a type of ‘crime against humanity’.

5. THE NEW THRESHOLD REQUIREMENTS: A RULE OF JURISDICTION OR AN ELEMENT OF THE OFFENCE

5.1 The Justice and Peace Paradox

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207 For example SC Res 1566, UN SCOR, 59th sess, 5053rd mtg, UN Doc S/RES/1566 (2004) has condemned all acts of terrorism, regardless of motivation, as threats to peace and security. SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/RES/1373 (2001), adopted under Chapter VII requires all member states to bring terrorists to justice and to afford one another the greatest measure of assistance in criminal investigations or criminal proceedings related to terrorism.

208 Chapter 5, section 3.4.
As discussed in chapter 3, the moral and legal tensions inherent in the concept of crimes against humanity arise because the considerations of justice pull in the opposite direction to that of global stability and peaceful relations between states. When Hobbes said only God can judge a sovereign, he was not denying that a state may engage in wicked, criminal acts, but only that one state has no right to judge another lest the world descend into chaos. This is the justice and peace paradox—the battle between Kantian ethics and the Westphalian model of state sovereignty.

The dilemma was foremost in the minds of the drafters at the London Conference in 1945 due to the fact that Hitler had invoked considerations of humanity when making demands on Czechoslovakia. The drafters feared that if internal atrocities could be labeled a crime against humanity, this might encourage the concept to be abused in the future. It is no coincidence that NATO’s bombing of Serbia, followed by intervention by the Security Council in setting up the ICTY to prosecute crimes against humanity in the former Yugoslavia. Since the abandonment of the war nexus an ambiguity exists in the concept of crimes against humanity—is its purpose to govern relations between States (the traditional field of international law) or is its purpose to proscribe the conduct of individuals (the traditional field of criminal law)?

The tension between peace and justice is best analysed if, as Meron says, ‘[t]he question of what actions constitute crimes’ are ‘distinguished from the question of jurisdiction to try those crimes.’ One can condemn ‘ethnic cleansing’ in Kosovo, yet debate the wisdom of NATO’s bombing campaign. Similarly, one can condemn crimes against humanity but question the right of Belgium’s courts to indict the leaders of the world without limit.

5.2 The Special Mens Rea Requirement of Crimes against Humanity

The difference between a rule of jurisdiction and an element of a crime becomes important when considering the mens rea requirement. Must the accused, as a matter of customary law, act with the special mens rea requirement of knowing participation in an attack that meets the threshold requirements of a crime against humanity? Under Article 7 of the ICC Statute and the jurisprudence of the ad hoc Tribunals the answer is yes. Before the Rome Conference of 1998, the issue was far from clear.

After the massacres of 1860 in Lebanon, the European Powers successfully negotiated for trials of the perpetrators to take place in Turkey by a special tribunal with some international composition. The actual offences charged were ordinary domestic offences. Chapter 2 argued that under the Nuremberg Precedent crimes against humanity are ‘ordinary crimes’, analogous to war crimes or serious domestic crimes which do not require any special mens rea requirement. As argued by Schwarzenberger, the strongest juridical basis for the crimes in international law rests upon ‘the general principles of law recognized by the community of nations’. Similarly, many post-Second World War decisions either grounded crimes against humanity in ‘the general principles of the penal laws of States’ or otherwise did not

209 T. Hobbes, Leviathan (first published 1651, 1914 ed) II, xxx: ‘...there being no Court of Natural Justice, but in the Conscinclence onely where not Man, but God raigneth’.

210 T. Meron, above n 48, 561.

211 See Chapter 4, section 4.

212 See Chapter 1, section 5.1.2.

213 See Chapter 2, sections 5.2.

require any special *mens rea*. A special *mens rea* was not included in any of the ILC Draft Codes.

The issue was controversial in *Finta* and split the Supreme Court of Canada. The majority accepted the expert view of Professor Bassiouni and held that the defendant must be aware of all the facts or circumstances that bring the acts within the definition of crimes against humanity. The majority ruling was criticised at the time as placing an unnecessary burden on the prosecution. Whilst the Statutes of the ICTY and the ICTR are silent on the matter, *Finta* was followed by the Trial Chamber in *Tadić* without analysis, probably because an alibi defence was raised rather than any question of intent. The special *mens rea* requirement was then incorporated into Article 7 as few States pushed for an offence less onerous than that set out in the *Tadić* Trial Judgment. Robinson, however, remarked that some observers at Rome in 1998 suggested that the special knowledge test ought not be required. In 2002, no special *mens rea* requirement was included in the Statute for the Special Court of Sierra Leone.

Cory J in *Finta* stated that there needed to be a special *mens rea* because: ‘[t]he degree of moral turpitude that attaches to crimes against humanity and war crimes must exceed that of the domestic offences of manslaughter and robbery. It follows that the accused must be aware of the conditions which render his or her actions more blameworthy than the domestic offence’. This rationale has been repeated by Robinson and by the Appeals Chamber in *Tadić*. Similarly, Arendt and Sadat-Wexler argue that to equate wholly the elements of crimes against humanity with domestic crimes ‘banalizes it’, or, as Bassiouni puts it, this would remove from the crime its exceptional international content. It is, in essence, a moral argument to explain why the international community should intervene when otherwise it would not do so for ordinary domestic crimes. The special *mens rea* requirement also acts as a curb on international interference in a state’s criminal justice system.

This view, whilst the standard account for crimes against humanity, is not the universal view. According to de Menthon (French Prosecutor at Nuremberg), Herzog, Aroneau and Garcia-Mora (in the context of extradition law), crimes

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215 See Chapter 3, section 2.
216 See Chapter 3, section 3.3.2.
217 Regina v Finta [1994] 1 SCR 701, 820; see also Chapter 3, section 4.3.
219 Tadić – Trial, above n 166, [658]-[659].
220 See Chapter 5, section 2.2.
223 D. Robinson, above n 221, 52.
224 Prosecutor v Tadić (Appeals Chamber Judgment), Case No IT–94–I–A (15 July 1999) [271].
226 M.C. Bassiouni above n 3, 243.
228 J-B. Herzog, ‘Contribution a l’etude de la definition du crime contre l’humanité’ (1947) 18 Revue International De Droit Pénal 155, 164. It should be pointed out that Herzog came to
against humanity are ‘ordinary crimes’ committed in special circumstances. In dissent, La Forest J in *Finta* stressed that the charges of crimes against humanity were based on Canadian domestic offences. They require the same *mens rea* and have no additional stigma.\(^{231}\) State sanctioned persecution of a group or population was the jurisdictional threshold which allowed Canada to invoke universal jurisdiction, it did not affect the degree of individual culpability.\(^{232}\)

It is not entirely persuasive to argue that the moral culpability of the perpetrator of crimes against humanity is or ought to be greater than that for perpetrators of domestic crimes. If one considers the many diverse defendants that have been charged with crimes against humanity, they have not all been high ranking state officials but have included foot soldiers and poorly educated villagers who have succumbed to the political circumstances of the time when otherwise they may never have turned to ‘crime’. The 17-year-old Nazi recruit or the villager who joins a militia in East Timor does not necessarily act in a more ‘heinous’ manner than the ordinary rapist or murderer. Following a state directive may in fact be a mitigating circumstance. The jurisprudence of the German Supreme Court under Control Council Law 10\(^{233}\) and the Special Panels in East Timor,\(^{234}\) demonstrate that it is not correct to say that a person convicted of, say, murder, as a crime against humanity deserves greater punishment than one convicted of the domestic crime of murder. Until Milosevic fermented a culture of hate, Tadić, the ordinary café owner, may never have taken to torturing his fellow Bosnians. It is the special political circumstances which call for an international reaction, not the heinousness of the acts themselves.

Further, it obviously raises the burden for the prosecution. The ICC risks falling into disrepute if an accused, after trial, is found to have committed say rape or murder, but is acquitted of crimes against humanity and is released. International judges may be tempted to infer knowledge by less than satisfactory evidence to avoid an acquittal. Finally, the argument is somewhat suspect on moral grounds because it suggests that a mere crime of murder is not sufficiently serious to engage international criminal law.

On the other hand, it is valid and mature to accept that a measure of immunity from outside interference ought to be afforded to states from undue interference in a state’s criminal justice system. It is only when these crimes take on a certain scale that the ordinary rules of state sovereignty are overturned. This suggests the threshold requirement of crimes against humanity ought to be regarded as jurisdictional. If one focuses on the practice of the Security Council, it is hard to avoid the obvious overlap between the requirement under Chapter VII – that there be manifest failure by a state to protect its populations from extreme violence – and the existence of a ‘widespread or systematic attack directed against any civilian population’. This supports the rule being jurisdictional. What has happened since the 1990’s is that the former rule of jurisdiction, the war nexus, has been replaced by another – that threats to the peace

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his view on the premise that the world had not yet developed an international penal code: ibid, 170.


\(^{231}\) Regina v *Finta* [1994] 1 SCR 701, 754-755.

\(^{232}\) Ibid.

\(^{233}\) See Chapter 3, section 2 and in particular the authoritative collection of cases in *Justiz und NS-Verbrechen* in respect of the prosecution of Nazi criminals generally.

\(^{234}\) See Chapter 6, section 2.3.
includes a state’s inability or unwillingness to protect its people from extreme violence. What has remained constant from Nuremberg to today are the same underlying ‘ordinary crimes’.

If this is a rule of jurisdiction, it is a rule which is not obviously available to individual states. The Security Council under the UN Charter has a monopoly on the right to intervene in a state’s affairs in the face of a threat to international peace. This suggests that the principles of jurisdiction over crimes against humanity for state courts may be different to that of an international tribunal created under Chapter VII. Such issues are considered further in chapter 8.

6. CONCLUSION

The concept of crimes against humanity under international law has always been associated with both ‘threats to international peace’ and the doctrine of humanitarian intervention in the face of grave human rights abuses. The two, however, can pull in opposite directions. International interventions to prevent human rights abuses can lead to international instability, rather than peaceful relations between States. In the nineteenth century, the doctrine of humanitarian intervention suggested that crimes, which ‘shock the conscience of humanity’, give rise to a right in other states to intervene. Such a doctrine, however, did not survive the UN Charter which prohibits the use of force by nations against each other. Further, Article 6(c) of the London Charter limited the concept of crimes against humanity to situations of international war or aggression, thereby preferring international stability ahead of the need to punish perpetrators of internal atrocities.

From 1991, however, the doctrine of humanitarian intervention was reestablished by the practice of the Security Council. As confirmed by the World Summit Outcomes of September 2005, states have an international duty to protect their populations from extreme violence and, in the case of a manifest failure to do so, the Security Council has the power to intervene by force. The modern notion of crimes against humanity can thus be stated to be ‘manifest state inability or unwillingness to protect its people from extreme violence’. ‘Extreme violence’ in this context means an attack of sufficient scale and seriousness that it has warranted interventions by the Security Council and states in the past. This principle should guide and inform the ICC as to the meaning of the term ‘a widespread or systematic attack directed against any civilian population’. The extent of direct state involvement will be a relevant factor in assessing if the attack is a threat to international peace. Explicit state directed crimes are more likely to threaten the peace than the acts of non-state actors.

Secondly, there is the impunity principle which requires state ‘unwillingness or inability’ to protect its people from such an attack. It is only when the territorial state is unable or unwilling to stop the violence and prosecute the perpetrators that an international jurisdiction arises. Otherwise, there is no need for state involvement or state policy as an element of all crimes against humanity under international customary law. Mere state toleration, acquiescence or even indifference will suffice in the face of acts of extreme violence by non-state actors or groups. In the case of civil war or manifest instability, organisations with state-like de facto power over people or territory can also be the authors of a crime against humanity. Provided the term ‘organization’ under Article 7 of the ICC Statute is given a broad meaning, and one

235 2005 World Summit Outcome, above n 79.
beyond its customary law meaning, then the ICC definition will be compatible with the position under customary law.

Finally, the view was expressed that these principles are best viewed as rules of jurisdiction which enliven either the right of the Security Council to intervene under Chapter VII or the Prosecutor to the ICC under the ICC Statute. This suggests that the requirement under Article 7 of the ICC Statute for a special *mens rea* of knowing involvement in a widespread or systematic attack is not strictly necessary. It also suggests that the rules of jurisdiction for a state court prosecuting extraterritorially the crimes against humanity of another state may be different – a matter which is taken up in the next chapter.
CHAPTER EIGHT

PROSECUTING CRIMES AGAINST HUMANITY IN STATE COURTS

Affirming that the most serious crimes of international concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.

1. INTRODUCTION

The above paragraph of the Preamble to the ICC Statute raises, but does not resolve, the many difficult issues involved when state courts prosecute ‘the most serious crimes of international concern’, such as crimes against humanity. This chapter examines these issues in two parts: first, the alleged right under customary international law to assert universal jurisdiction over crimes against humanity; and, secondly, the duty to prosecute all those reasonably suspected of committing such crimes. Those who claim there exists both such a right and such a duty frequently ground their case on the need to ensure that such crimes ‘must not go unpunished’. As Judges Higgins, Kooijmans and Buergenthal put it ‘the international consensus that the perpetrators of international crimes should not go unpunished is being advanced by a flexible strategy, in which newly established international tribunals, treaty obligations and national courts all have their role to play’.

There exists a paradox in the prosecution of crimes against humanity before state courts. The international crime will frequently arise because of state involvement or acquiescence – hence the need to ensure effective measures are taken by state courts outside the place of the offence. States, however, particularly those who have no link to the perpetrator or victim of the crime, are understandably reluctant to launch an extraterritorial prosecution of a foreign state official because of the tension this may cause in relations between the two countries. The state whose officials are being prosecuted by a foreign court will likely take offence at such an assertion of jurisdiction, alleging it infringes the sovereign equality of states.

It was to address this problem that the ICC was regarded as necessary. Now that the ICC is operating where does that leave State prosecutions? Should they be emboldened or should they leave the work to be done by international institutions? This chapter explores this question in the context of prosecuting perpetrators of crime against humanity in state courts and tribunals.

2. EXTRATERRITORIAL JURISDICTION OVER CRIMES AGAINST HUMANITY

2.1 The Territorial and Other Traditional Principles of Jurisdiction

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1 ICC Statute, preamble.
It has been said that ‘[t]erritoriality is now the fundamental principle of jurisdiction: the right to assert territorial jurisdiction is a right inherent in sovereignty.’\(^4\) As classically stated by Lord Tucker ‘criminal law is alone concerned’ with ‘the preservation of the Queen’s peace, the maintenance of law and order \textit{within the realm};\(^5\) a view shared by Beccaria\(^6\) and Christian Wolff (despite the latter’s hypothesis of a \textit{civitas maxima}).\(^7\) Hence, prosecutions for crimes against humanity by the State within which the crimes took place – such as have occurred, or are occurring, in Cambodia, East Timor, Estonia, France, Germany, Iraq, and the Netherlands\(^8\) – do not involve any controversial issues of jurisdiction. An extension of the principle of territoriality is the ‘protective’ principle, being the assertion of criminal jurisdiction over acts committed outside the territory but which have an actual or potential impact on the security of the state. Again, the assertion of such jurisdiction is uncontroversial provided the link to the actual peace and security of the prosecuting state is reasonable.\(^9\)

Next, there is the jurisdiction based upon ‘active personality’ or nationality – the assertion of jurisdiction by a state over acts of its nationals (or permanent residents, members of its armed forces, etc) for acts committed whilst abroad.\(^10\) Many states assert a right to try their own nationals, even though such prosecutions often lead to a charge of leniency or unjustified acquittals. Indonesian domestic trials for offences in East Timor is an example of this.\(^11\) There is also the notion of ‘passive personality’ jurisdiction. This involves the assertion of extraterritorial jurisdiction by a state in respect of crimes committed against its nationals outside its territory. With the exception of war crimes, this jurisdiction generally remains controversial.\(^12\)

The above accepted forms of jurisdiction need to be distinguished from the principle, based upon \textit{Lotus},\(^13\) that international law imposes virtually no limits on the criminal prescription of extraterritorial conduct provided enforcement of that law only takes place within the state’s territory. This principle is highly controversial with many scholars (and states) arguing that an excessive extraterritorial criminal prescription can intrude upon the affairs of other states and that international law today requires some justifying link between the prescribing state and its criminal law.\(^14\)

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5 \textit{Board of Trade v Owen} (1957) All E.R. 411, 415 (emphasis added).
6 ‘The place of punishment can certainly be no other than that where the crime was committed’: Cesare Beccaria-Boresand, \textit{An Essay on Crimes and Punishments} (first published 1764, 1953 ed) 135-136
8 See Chapters 3 and 6.
9 See Michael Akehurst, ‘Jurisdiction in International Law’ (1972-1973) 46 \textit{British Yearbook of International Law} 145, 157-159.
11 See Chapter 6, section 3.8.
12 It was largely rejected by Judge Moore in \textit{SS Lotus (France v Turkey)} (1927) P.C.I.J. (Ser A) No 10 (‘\textit{Lotus Case}’). It was also rejected by the Harvard Draft Restatement on Jurisdiction in 1935: ‘Harvard Research Draft Convention on Jurisdiction with Respect to Crime’ (1935) 29 \textit{AJIL} Supplement 443, 578-579. However, the passive personality is generally accepted in the case of war crimes: M. Akehurst, above n 9, 160.
13 \textit{Lotus Case}, above n 12.
14 See, for example, Donald Donovan and Anthea Roberts, ‘Notes and Comments: The Emerging Recognition of Universal Civil Jurisdiction’ (2006) 100 \textit{AJIL} 142, 143; R. Cryer, above n 4, 82, 88; Louis Henkin, ‘International Law, Politics, Values and Functions’ (1989)
A number of states in the German legal tradition have granted their courts jurisdiction over serious domestic offences committed by foreigners abroad if the offender is found in the country and if, due to reasons different from the nature and characteristics of the offence, he or she is not extradited to a foreign State. For example, the jurisdiction may be invoked if extradition is dangerous or not practical. This first appeared in the Austrian penal code of 1803. Whilst this was once known as the universality principle it became better known after World War II as the representation principle or vicarious administration of justice (‘stellvertretende Strafrechtspflege’). According to de Vabres the jurisdiction is ‘subsidiary’, as it acknowledges the primary right of the territorial State or the State of the domicile of the accused to prosecute, but in default of any other State being able to act, the custodial state may prosecute in the interests of humanity.

Conduct, which may have amounted to a crime against humanity, has been the subject of extraterritorial prosecutions before State courts pursuant to the representation principle. Domestic offences, however, rather than international crimes, have been charged. For example, in Public Prosecutor v Cvjetkovic in Austria the accused was commander of a Serbian military unit said to be responsible for the ethnic cleansing of the Muslim part of the village of Kucice in April 1992. He was charged with genocide, murder and complicity in murder (for the same killings), and complicity in arson. Djagic also involved the events in the former Yugoslavia ultimately decided by the Supreme Court of Bavaria. The defendant was found not to have the requisite mens rea for genocide, but was nevertheless found guilty of abetting murder and assisting murder. This highlights how the representation principle permits a prosecution for a serious domestic crime, such as murder, when the higher threshold for the international crime cannot be met.

The main difference between this ‘representation principle’ and the principle of universal jurisdiction, discussed below, is that ordinarily ‘double criminality’ (an offence in both jurisdictions) is required. Secondly, according to some court decisions, some ‘legitimate link’ (‘legitimierender Anknüpfungspunkt’) between the prosecuting State and the defendant is required which may be satisfied, for example, by the fact that the victims are nationals of the prosecuting State or simply by the voluntary presence of the accused in the territory. The uncontroversial application of the ‘representation


18 H. Donnedieu de Vabres, Les principes modernes du droit penal international (1928) 135.

19 The case is discussed by Reydams, above n 14, 99-100.

20 See C. Safferling, above n 17.

21 See, for example: the French decision in Re Javor, (Court of Cassation, Criminal Chamber) (26 March 1996), Bull. Crim. 1996 No. 132, 379; the German decision in Public Prosecutor v
principle' by some nations in the last two hundred years provides some support for the argument advanced in chapters 2 and 7 that the underlying acts in the definition of crimes against humanity, or at least many of them, such as murder, torture, rape and inhumane treatment, are criminal according to the 'general principles of law recognised by the community of nations'.

2.2 Universal Jurisdiction for Crimes against Humanity and its Rationale

Universal jurisdiction involves the assertion of jurisdiction irrespective of both the law of the territory or any connection with the defendant. Universal jurisdiction over serious international crimes, such as crimes against humanity, continues to arouse a deal of interest. It has triggered negative reactions in some circles, while inviting acclaim in others, particularly amongst human rights advocates. In response, jurists have formulated the Princeton Principles and the Cairo Principles in an attempt to guide states when relying upon universal jurisdiction.

In the common law tradition there is a tendency to regard the rules of jurisdiction as falling into two simple categories: for domestic crimes the territorial principle applies and for serious international crimes, at least of the scale of crimes against humanity, universal jurisdiction applies. For example, Justice Toohey in Polyukhovich said:

[T]he two questions - whether a crime exists and the scope of jurisdiction to prosecute - are inextricably linked. An international crime is constituted, precisely, where conduct is identified which offends all humanity, not only those in a particular locality; the nature of the conduct creates the need for international

Jorgic, as discussed in Sascha Luder and Greg Schotten 'Correspondence Reports: Germany' (1999) 2 Yearbook of International Humanitarian Law 366; and the Decision of the Spanish Supreme Court concerning the Guatemala Genocide Case (2003) 42 ILM 686 (25 February 2003) ('Guatemala Genocide Case – Supreme Court') which said respect for other State's sovereignty and the principle of non-intervention in the internal affairs of other States required some connection with Spain in the absence of treaty or UN authorisation. This requirement was, however, overturned by the Constitutional Court on 26 September 2005, Judgment No. STC 237/2005 ('Guatemala Genocide Case – Constitutional Court'). For a review of these decisions, see Naomi Roht-Arriaza, Case Report, Guatemala Genocide Case, (2006) 100 AJIL 207.

22 See Statute of the International Court of Justice, art 38(1)(c).
26 See S. Macedo, above n 23, 18-25.
accountability. This is particularly true of crimes against humanity since they comprise, by definition, conduct abhorrent to all the world.\textsuperscript{28}

If such conduct amounted, then, to customary international crimes, their very nature leads to the conclusion that they were the subject of universal jurisdiction.\textsuperscript{29}

Chapter 7 put forward a competing argument — that one ought to separate the elements of the crime from the jurisdiction to try. The scale of the offences (‘the humanity principle’) and the circumstances in which they occurred, including the impunity enjoyed by the perpetrators (‘the impunity principle’), are better thought of as matters of jurisdiction, not elements of the offence itself.

In an oft-quoted passage, the Court in \textit{Eichmann}\textsuperscript{30} held that:

Not only are all the crimes attributed to the Appellant of an international character, but they are crimes whose evil and murderous effects were so widespread as to shake the stability of the international community to its very foundations. The State of Israel, therefore, was entitled, pursuant to the principle of universal jurisdiction and acting in the capacity of guardian of international law and agent for its enforcement, to try the appellant.\textsuperscript{31}

In the famous \textit{Barbie} case the French court held ‘[B]y reason of their nature, the crimes against humanity [of Klaus Barbie] . . . do not simply fall within the scope of French municipal law but are subject of an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign.’\textsuperscript{32}

Hence, universal jurisdiction over crimes against humanity is traditionally based upon the following premises:

(1) By reason of the nature of the acts, their scale and savagery — which is referred to in this work as the ‘humanity principle’ — they are the concern of all humanity and hence, all states;\textsuperscript{33} and


\textsuperscript{29} Ibid.

\textsuperscript{30} Attorney-General v Adolph Eichmann, 36 ILR 5 (District Court of Jerusalem, 1961); see also Attorney-General of Government of Israel v Eichmann, 36 ILR 277 (Sup. Ct., Israel, 1962) (‘Eichmann’). For a thorough commentary, see J.E.S. Fawcett, ‘The Eichmann Case’ (1962) 27 British Yearbook of International Law 181.

\textsuperscript{31} Eichmann, above n 30, 304.


\textsuperscript{33} This was applied in Aguilar Diaz et al v Pinochet, Tribunal of first instance of Brussels (examining magistrate), order of 6 November 1998, reprinted in 118 \textit{Journal des Tribunaux} (1999) 308 with critical note by J. Verhoeven (‘Pinochet’); see also summaries in English by Luc Reydams in Case Note (1999) 93 AJIL 700, 702-3; Demjanjuk v Petrovsky 776 F. 2d 571, 582-583 (6th Cir 1985) and \textit{R v Bow Street Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No 3)} [2000] 1 AC 147 (‘Pinochet No 3’), 274 per Lord Millet. See also Antonio Cassese, ‘When May Senior State Officials Be Prosecuted for International Crimes: Some Comments on the \textit{Congo v Belgium} Case’ (2002) 13 \textit{EJIL} 853, 859, where the author draws an analogy with the protective principle, saying all States have an interest in upholding the international order which is challenged by such crimes; Arthur Watts, ‘The Importance of International Law’, in Michael Byers (ed), \textit{The Role of Law in International Politics} (2000) 5, 7; and R. Cryer, above n 4, 84-85.
(2) National courts, as ‘agents’ for the international community, can enforce such crimes.

This means the exercise of extraterritorial jurisdiction is not ‘subsidiary’, but equal to the jurisdiction of the territorial state and irrespective of any link to the crime. The courts have frequently invoked the need to counter impunity to support their resort to universal jurisdiction.34

The rationale behind universal jurisdiction was understandable at a time when there existed no mechanism for enforcement other than through national courts. It should be recalled that in Eichmann, universal jurisdiction was expressly invoked ‘in the absence of an International Court’.35 Today there exist several international or hybrid tribunals with jurisdiction over crimes against humanity. The question is how should the jurisdiction of state courts fit into this system of international criminal law?

2.3 State Practice before the ICC

Relying upon cases such as those referred to above, it is frequently stated, particularly by writers with a common law background, that universal jurisdiction over crimes against humanity is well established in international customary law.36 Others with experience in the civil law and the German legal tradition tend to be more cautious.37 This section briefly considers this proposition as a matter of state practice from Nuremberg to the Rome Conference for the ICC Statute in 1998.

34 For example, a US military tribunal in the Einsatzgruppen case said: ‘Crimes against humanity ... can only come within the purview of this basic code of humanity because the State involved, owing to indifference, impotency or complicity, has been unable or has refused to halt the crimes and punish the criminals’: United States v Otto Ohlendorf 4 CCL 10 Trials 411, 498 (‘The Einsatzgruppen Case’).

35 Eichmann, above n 30, 292.

36 For example, see: Ian Brownlie, Principles of International Law (6th ed, 2003) 303-305; Andrew Clapham ‘National Actions Challenged: Sovereignty, Immunity and Universal Jurisdiction before the International Court of Justice’ in M. Lattimer and P. Sands (eds), Justice For Crimes against Humanity (2003) 303; Kenneth C. Randall, ‘Universal Jurisdiction under International Law’ (1988) 66 Texan Law Review 785, 800; Bruce Broomhall, International Justice and the International Court (2003) 106-107; Rosalyn Higgins, Problems and Process: International Law and How We Use It (1994) 61; Steven R. Ratner & Jason S. Abrams, Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy (2nd ed, 2001) 164 (although this was based upon the lack of opposition to Canada’s and Belgium’s legislation); M. C. Bassiouni, Crimes against Humanity in International Criminal Law (2nd ed, 1999) 210-217; Lori Fisler Damrosch, Enforcing International Law through Non-Forcible Measures (1997) 269 Recueil des Cours 9, 218; Theodor Meron, ‘International Criminalization of Internal Atrocities’ (1995) 89 AJIL 554, 569; but note the absence of ‘crimes against humanity’ in the Restatement (Third), The Foreign Relations Law of the United States, s 404: ‘A state has jurisdiction to define and prescribe for certain offences recognised by the community of nations as being of universal concern, such as piracy, slave trade, attack on or hijacking of aircraft, genocide, war crimes and perhaps certain acts of terrorism.’

37 See, for example: L. Reydams, above n 14, 220-231; Antonio Cassese, International Criminal Law (2003) 292-298; Iain Cameron, ‘Jurisdiction and Admissibility Issues under the ICC Statute’ in Dominic McGoldrick and Peter Donnelly (eds), The Permanent International Criminal Court (2004) 65, 69; Oppenheim’s International Law, above n 10, 998: ‘While no general rule of positive international law can as yet be asserted which gives to states the right to punish foreign nationals for crimes against humanity in the same way as they are, for instance, entitled to punish acts of piracy, there are clear indications pointing to the gradual evolution of a significant principle of international law to that effect.’
The Nuremberg Tribunal said that the Allies ‘have done together what any one of them might have done singly’.

According to the Secretary-General’s Report of 1949 and some writers, the Nuremberg Tribunal may have regarded the crimes as being subject to universal jurisdiction. The passage as a whole, however, suggests the Tribunal was only accepting the submission of the French Prosecutor that the Allies individually could prosecute for crimes committed in their own occupied territories, which they had ceded by treaty to the Nuremberg Tribunal. In addition, the Tribunal relied upon Germany’s unconditional surrender to ground its jurisdiction to prosecute crimes committed in Germany. In the end, it is somewhat unreal to regard Nuremberg (or Tokyo) as a precedent for the assumption of universal jurisdiction by state courts outside the context of war. More than anything, it was victory in war and Germany’s unconditional surrender which grounded the Allies’ actions at Nuremberg. This is demonstrated by the image of US soldiers guarding the defendants in the courtroom at Nuremberg. Its nearest precedent was probably the imprisonment of Napoleon after Waterloo, not universal jurisdiction over piracy, as the Secretary-General and some writers have suggested.

Reference is frequently made to the decision of the US Military Tribunal in In re List under Control Council Law No 10. It asserted a right to invoke universal jurisdiction over war crimes and crimes against humanity. The Tribunal’s jurisdiction, in fact, was grounded in an occupational enactment of the Allies acting as the ‘Control Council’ pursuant to Germany’s unconditional surrender. The law was expressed to be one ‘in and for Germany’, not an exercise in universal jurisdiction. Similarly, the French trials for crimes against humanity were clearly territorial in nature. The legislation which permitted the Israeli prosecution of Eichmann was limited to offences committed in Nazi controlled areas, not crimes against humanity more widely. Further, Israel in its statements at the time sought primarily to act for the Jewish victims, not humanity as a whole. Taylor, a prosecutor at Nuremberg, took Israel to task for charging Eichmann with ‘crimes against the Jewish people’ not ‘crimes against humanity’. Some have suggested that the prosecution of Eichmann in the victims’ home state, particularly following his abduction from Argentina, makes the case a less

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38 ‘International Military Tribunal (Nuremberg), Judgment and Sentences (1 October 1946)’ (1947) 41 AJIL 172, 216.


40 Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946 (26 July 1946), vol 1, 41ff.

41 ‘The Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognised by the civilized world’: see above n 38, 216.

42 See below n 53 and n 54.

43 United States v List et al 11 CCL 10 Trials 757, 1241-1242 (‘The Hostages Case’).

44 See Chapter 3, section 2.1.

45 See Chapter 3, section 4.4.

46 See Chapter 3, sections 4.5.


than satisfactory precedent. Australia’s legislation limited its extraterritorial prosecutions to acts committed during the Second World War. Canada’s legislation, whilst providing for the broadest of jurisdictions over crimes against humanity before the Rome Conference of 1998, still required either a connection with war or the presence of the accused in the jurisdiction. Its only prosecution has been of a Nazi war criminal.

The instances where universal jurisdiction has been invoked, or even provided for, in the case of crimes against humanity prior to the 1998 Rome Conference have been rare. Despite the laudable remarks of the courts, their jurisdiction in fact has been limited to the Second World War. In a way, this fits in with the remarks of some commentators and courts, that universal jurisdiction for crimes against humanity can be grounded by analogy with piracy. In a very loose sense, the analogy could apply to the Nazi war crime trials. The Second World War had affected many nations and different populations. Nazi Germany and its judicial system had wholly collapsed so that, like the pirate, Nazi war criminals were hostis humanis generis — without any state support and scattered around the globe. Paraphrasing Donnedieu de Vabres, some states, acting in default of any other state being able to act, invoked an extraterritorial jurisdiction to counter, in the interests of humanity, an outrageous impunity. There is a difficulty in attempting to extrapolate from this limited experience with ‘universal jurisdiction’ a rule of customary international law which permits an extraterritorial prosecution for crimes against humanity outside the context of war and where a third state does object.

2.4 The ICJ's Arrest Warrant Case

49 Fawcett says ‘the process in Israel would have served only to weaken the rule of law if it were to be invoked as a precedent for trials where such a combination [of extraordinary events] was not present’: J.E.S. Fawcett, above n 30, 215.
50 See chapter 3, section 4.2.
51 See Chapter 3, section 4.3.
52 R v Finta [1994] 1 SCR 701; see also ibid.
53 Randall links piracy with crimes punished in the post-war period: K. Randall, above n 36, 803-804.
54 For example, in the Almelo Trial, the British Military Court said ‘every independent state has in International Law jurisdiction to punish pirates and war criminals in its custody regardless of the nationality of the victim or the place where the offence was committed’. Moreover, according to the Secretary General in 1949, if the Nuremberg Tribunal thought the crimes were subject to universal jurisdiction, ‘[t]he case of piracy would then be the appropriate parallel’: M.C. Bassiouni, above n 36, 236. See also Arrest Warrant Case, above n 2, 15 (Judge Van Der Wyngaert).
55 Chapter 1, section 3 argued that piracy is best seen as sui generis rather than a precedent for crimes against humanity.
56 In Demjanjuk v Petrovsky 776 F 2d 571, 582 (6th Cir. 1985), the US Court of Appeal, in upholding Israel’s extradition request of a Nazi war criminal suspected of committing crimes against humanity, accepted Israel’s right to invoke universal jurisdiction.
57 H.D. de Vabres, above n 18, 135.
The right of Belgium to assert universal jurisdiction over crimes against humanity was considered, but not ruled upon, by the ICJ in the *Arrest Warrant Case*. Belgium, under the 1999 amendments to its law of 1993, 60 indicted Abdulaye Ndombasi, former Congolese Minister of Foreign Affairs, for, *inter alia*, incitement to commit crimes against humanity for comments directed against ethnic Tutsi in Rwanda in 1998. At the time of the arrest warrant, but not at the time of the acts charged or the hearing of the case, Ndombasi was Foreign Minister. On 14 February 2002, the ICJ held that it is ‘firmly established’ that ‘certain holders of high-ranking office in a state, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other states, both civil and criminal’.

His personal immunity applies whether the acts are ‘official’ or not, but the immunity only lasts whilst in office. 62

Belgium argued – based upon the Nuremberg Precedent and the statutes of subsequent international courts – that no immunity for crimes against humanity can be invoked based on the ‘official position of defendants’. 63 The ICJ held that these instruments do not evidence an exception for prosecutions of crimes against humanity before national courts. 64 This is a significant finding. It means the ICJ rejected the view that Nuremberg or Tokyo are precedents for the view that national courts, as ‘agents’ of the international community, can prosecute defendants for crimes against humanity irrespective of their official capacity. It accepted, as argued in Chapter 7, that the jurisdiction of the *ad hoc* Tribunals of the Security Council, being based upon Chapter VII of the UN Charter, may be different in this regard. 66 Only Judge Van Der Wyngaert, in dissent, accepted that any personal immunity for Foreign Ministers (which she could not find in international customary law) did not apply to a charge of crimes against humanity.

The Court avoided the difficult question of universal jurisdiction, though several judges did comment on the issue. President Guillaume said universal jurisdiction ‘*in absentia*’, as he described the assertion of universal jurisdiction without the presence of the defendant, is unknown to international conventional law. 67 He could not find support for such jurisdiction in domestic legislation or decisions of state courts, with the exception of Israel, ‘which in this field obviously constitutes a very special case’. 68 Belgium sought to rely upon the *Lotus* decision 69 to say universal jurisdiction was not

60 See Chapter 6, section 3.3.
61 *Arrest Warrant Case*, above n 2, [51].
62 Ibid, [54]-[55].
63 Ibid, [56]. For the relevant international instruments, see Chapter 7, section 2.4. It also relied on the House of Lords decision in *Pinochet* and the remarks of Lord Millet who said:

‘[I]nternational law cannot be supposed to have established a crime having the character of *jus cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose*: *Pinochet No 3* above n 33, 278.

64 *Arrest Warrant Case*, above n 2, [58].
65 The Nuremberg Tribunal prosecuted Erich Rader, who was appointed Germany’s named successor Chancellor (head of state) by Hitler, Fritz von Pappen, Vice Chancellor and foreign minister and Hermann Goering, Vice Chancellor. The Tokyo Tribunal prosecuted Kiichiro Hiromma, Prime Minister, and Kaki Hirota, Minister of Foreign Affairs and Ambassador: see M.C. Bassiouni, above n 59, 73.
66 *Arrest Warrant Case*, above n 2, [61].
67 Ibid, Separate Opinion of President Guillaume, [9].
68 Ibid, [12]. This view of State practice needs to be revised in the light of more recent developments: see chapter 6.
69 *Lotus Case*, above n 12.
prohibited under international law. He rejected this saying ‘[t]he adoption of the United Nations Charter proclaiming the sovereign equality of states, and the appearance on the international scene of new States, born of decolonisation, have strengthened the territorial principle’.\textsuperscript{70} In the President’s view, universal jurisdiction for crimes against humanity cannot be supported absent a treaty provision.\textsuperscript{71} He concluded:

\begin{quote}
[A]t no time has it been envisaged that jurisdiction should be conferred upon courts of every State in the world to prosecute such crimes, whoever their authors and victims and irrespective of the place where the offender is to be found. To do this would moreover risk judicial chaos. It would also be to encourage the arbitrary for the benefit of the powerful, purportedly acting as agents for an ill-defined ‘international community’. Contrary to what is advocated by certain publicists, such a development would represent not an advance in the law but a step backward.\textsuperscript{72}
\end{quote}

Judges Rezek, Ranjeva and Bula-Bula appeared to agree, at least in the absence of the presence of the defendant. Judges Higgins, Kooijmans, and Buergenthal, in a joint separate opinion, thought state practice was neutral as to the exercise of universal jurisdiction, particularly \textit{in absentia}. Based on the dictum in \textit{Lotus}, and the concept of \textit{jus cogens}, they concluded that international law leaves states ‘a wide measure of discretion’ with respect to extraterritorial criminal jurisdiction and universal jurisdiction could be invoked for persons accused of crimes against humanity.\textsuperscript{73} Further, ‘there is no rule of international law’ which ‘makes illegal cooperative overt acts designed to secure their presence within a state wishing to exercise jurisdiction’.\textsuperscript{74} Judge Van Der Wyngaert agreed with the joint separate opinion for essentially the same reasons. Judge Koroma, in a separate opinion, also accepted Belgium’s right to assert universal jurisdiction, but his reasons for reaching this conclusion were not articulated.

In the end, the right of a state to exercise universal jurisdiction for crimes against humanity was left open by the court. The uncertainty in the law would appear to be greater where jurisdiction is asserted over a person who is not present in the forum state at the time.

\subsection*{2.5 The Act of State Doctrine}

The \textit{Arrest Warrant} case only dealt with the personal immunity of state officials whilst in office and who travel to a foreign state. By the principle \textit{par in parem non habet imperium}, the orthodox rule of international law is that one state has no jurisdiction over another state.\textsuperscript{75} It is now accepted that the immunity only applies to acts which are manifestations of state sovereignty (\textit{acta jure imperii}), rather than commercial transactions (\textit{jure gestionis}).\textsuperscript{76} This state immunity or act of state doctrine is also a common law domestic rule of comity and a principle enshrined in many

\begin{flushright}
\textsuperscript{70} \textit{Arrest Warrant} Case, above n 2, Separate Opinion of President Guillaume [15].
\textsuperscript{71} Ibid, [16].
\textsuperscript{72} Ibid, [15].
\textsuperscript{73} Ibid, [65].
\textsuperscript{74} Ibid, [58].
\textsuperscript{76} See M.C. Bassiouni, above n 59, 72.
\end{flushright}
domestic statutes. The foreign state's right to immunity cannot be circumvented by suing its servants or agents. The state may claim immunity on behalf of its servants as if sued itself. The doctrine means that, as Lord Steyn in *Pinochet No 1* observed: 'when Hitler ordered the 'final solution' his act must be regarded as an official act deriving from the exercise of his functions as Head of State'. It has been remarked by the courts in recent times that a balance has to be struck 'between the condemnation of . . . an international crime against humanity and the principle that states must treat each other as equals not to be subjected to each other's jurisdiction'.

Article 7 of the London Charter and Article 6 of the Tokyo Charter stated that no immunity could be invoked based on the 'official position' of defendants. The Nuremberg Tribunal prosecuted Erich Rader, who was appointed by Hitler as Germany's successor, Fritz von Pappen, Vice Chancellor and Foreign Minister and Hermann Goering, Vice Chancellor. The Tokyo Tribunal prosecuted Kiichiro Hiranuma, Prime Minister and Koki Hirota, Minister of Foreign Affairs and Ambassador. In *Eichmann*, the Supreme Court of Israel followed Article 7 of the London Charter and rejected the defence of act of state for the charges of crimes against humanity and crimes against the Jewish people. Many other courts prosecuting war criminals have taken this approach, but generally the relevant state has not claimed the immunity.

Many scholars, such as Cassese, Zappalà, Clapham and Bianchi argue that the act of state doctrine cannot be invoked for crimes against humanity because international law holds such conduct to be unlawful, and, hence, such crimes cannot be recognised as 'official' acts. Another argument, which has attracted much support amongst American scholars, relies on the principle of *jus cogens* and is known as the

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77 For example, see the *Diplomatic Privileges Act 1964* (UK), the *State Immunity Act 1978* (UK) and the *Foreign Sovereigns Immunity Act 1976* (US); *Duke of Brunswick v The King of Hanover* (1848) 2 HL Cas 1 and *Underhill v Fernandez* (1897) 169 US 456.

78 In England see *Jones v Ministry of Interior Al-Mamlaka Al-Arabia AS Saudiya (the Kingdom of Saudi Arabia)* [2006] UKHL 26, ('Jones') in Germany, see, *Church of Scientology Case* (1978) 65 ILR 193, 198; in the United States, see, *Herbage v Meese 747 F Supp 60* (1990), 66; in Canada, see, *Jaffe v Miller* (1993) 13 OR (3d) 745, 758-759; in Ireland, see *Schmidt v Home Secretary of the Government of the United Kingdom* (1994) 103 ILR 322, 323-325 and see art 2 (1)(b)(iv) and art 6(2)(b) of the Immunities Convention below n 99. There have been a number of US decisions which have permitted civil claims under the Alien Tort Claims Act against former foreign officials, but in each case the state did not claim the immunity: see the discussion in Jones, ibid., [95]-[99].

79 R. v. *Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte*, [2000] 1 AC 61, 115 ('*Pinochet No. 1*').

80 See Jones above n78, [1]; *Bouzari v Islamic Republic of Iran* (2004) 71 OR (3d) 675, [95].

81 M.C. Bassiouni, above n 59, 73.

82 See *Eichmann*, above n 30; 309-12, see also chapter 3, section 4.5.

83 A. Cassese, above n 37, 362-267; also M. C. Bassiouni, above n 59, 81.

84 A. Cassese, above n 37, 130.


86 Andrew Clapham, 'Nation Action Challenged' in M. Lattimer and P. Sands (eds), above n 36, 317.

hierarchy of norms theory. As the prohibition against crimes against humanity is a peremptory norm (jus cogens) and state or diplomatic immunity is not (because it can be waived), the latter must yield where the rules clash. A state must promote the suppression of international crimes and such a duty is inconsistent with allowing immunity to a defendant. Some courts have applied both arguments for crimes against humanity, such as the Pinochet decision in Belgium, and the District Court of Amsterdam in the Bouterse case, which affirmed universal jurisdiction for crimes against humanity and denied a claim to Head of State immunity. Some of the judges of the House of Lords in Pinochet used these arguments to deny a claim of Head of State immunity for torture, though the provisions of the Torture Convention intruded into the debate. Lord Slynn in dissent in Pinochet No 1 held that Head of State immunity could be invoked for a charge of crimes against humanity except 'in particular situations before international tribunals'.

Since the House of Lords decision in Pinochet, the trend appears to be in favour of permitting the claim to immunity, at least from civil suit. The ICJ in the Arrest Warrant case left the question open. In Al-Adsani the applicant made a claim for compensation in the UK from the State of Kuwait for alleged acts of torture in that country. The English Court upheld the claim to state immunity. The European Court of Human Rights divided 9-8, upholding the grant of state immunity by UK courts at least in the civil area. The minority argued that the jus cogens nature of the offence overrode state immunity both in the civil and the criminal field. The majority decision was followed in similar circumstances by the Court of Appeal of Ontario in Bouzari and the House of Lords in Jones. The foreign state was allowed to claim immunity on behalf of the personal defendants. The House of Lords did not venture into considering whether the immunity applied to criminal proceedings, but Lord Bingham did regard

89 A. Cassese, International Law in a Divided World (1986) 74.
90 Wijngaarde et al v Bouterse (Order of 20 November 2000) (District Court of Amsterdam): English translation in (2000) 3 Yearbook of International Humanitarian Law 677, [4.2], [5.1]. Similarly, the French Cour de Cassation in the Gaddafi case upheld the leader's claim to immunity 'whilst in office' which some have seen as implying support for the immunity ceasing thereafter: see A. Zappalà, above n 80.
91 In Pinochet No. 1, above n 76, Lord Nicholls (at 108-9), with whom Lords Hoffman and Steyn agreed, upheld this argument, whilst Lord Slynn (at 79), with whom Lord Lloyd agreed, said a jus cogens norm does not override state immunity. In R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 3) [2000] 1 A.C. 147 ('Pinochet No. 3'), Lords Browne-Wilkinson (at 204-206), Hutton (at 261-2) and Saville (at 266-7) thought the Torture Convention was decisive in denying the claim to immunity. Lord Hope denied state immunity because the torture amounted to a crime against humanity (at 242-8). Lords Millet (at 278) and Phillips (at 290) thought immunity could not exist for a jus cogens crime. Lord Goff, in dissent, (at 207-224) followed Lord Slynn.
92 See Pinochet No. 1, above n 79, 81.
93 Arrest Warrant Case, above n 2, 22.
95 This was then followed then in Kalogeropoulos v Greece and Germany (App No 50021/00) (unreported) 12 December 2002.
96 Bouzari above n 80.
97 Jones, above n 78.
the Torture Convention as being ‘the mainspring of the decision’ in Pinochet. This suggests that in the case of a prosecution for crimes against humanity, without treaty support, his Lordship would allow a claim to state immunity.98 The House of Lords relied on the recently drafted United Nations Convention on Jurisdictional Immunities of States and Their Properties, which does not permit any exceptions to immunity from civil suit for international crimes.99 On the other hand, the Italian Court of Cassation rejected Germany’s claim to immunity for acts of unlawful deportation and forced labour committed during the war partly in Italy and partly in Germany.100

Caplan points out that there is a flaw in the reasoning that a jus cogens norm ‘overrides’ state immunity because different issues are involved.101 As Fox puts it:

State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a jus cogens norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of State immunity upon which a jus cogens mandate can bite.102

For example, direct interference in the territory of another country is prohibited (such as Israel’s abduction of Eichmann in Argentina), though in theory this can be waived. This first principle, however, cannot be overridden by an allegation of breach of a jus cogens norm. This has been made clear by the International Court of Justice in Democratic Republic of the Congo v Rwanda 103 What is required is an international rule of jurisdiction which permits one state to judge another state’s ‘crimes against humanity’. A more sophisticated version of the argument, put by Bassiouni, is that with a jus cogens crime comes an erga omnes obligation, at least upon the territorial state to prosecute.104 Hence, a claim to state immunity will be made in bad faith, and can be rejected, unless the state offers to investigate and prosecute the matter itself.105 The difficulty still lies in resolving the competing claims about bad faith. A territorial state may say there is no basis for an investigation or prosecution and that the prosecuting state is acting in bad faith. One state’s ‘crimes against humanity’ may be another’s unfounded allegation. For example, Spanish courts took extraterritorial jurisdiction over Pinochet based on a dubious interpretation of the meaning of genocide.106

98 Ibid, [19].
99 Done in New York, opened for signature 17 January 2005, art 10, UN Doc A/RES/59/38 (not yet entered into force), [the Immunities Convention]
101 L Caplan above n 88.
102 Fox, above n75, 525, cited with approval by Lord Bingham in Jones, above n 78, [24].
104 M.C. Bassiouni, above n 59, 701.
105 Judge van den Wyngaert said Congo did come to Court with ‘clean hands’: Arrest Warrant Case, above n 2, 20.
106 See L. Reydams, above n 14, 184-188.
Hence, it is unclear whether there is a crystallised customary rule of international law which permits a state court (assuming it has jurisdiction under international law) to prosecute a former foreign state official, particularly a former Head of State, for crimes against humanity committed in an official capacity if the state claims immunity on his or her behalf.\(^{107}\)

### 2.6 The ICC Statute

Initially, Germany proposed that the ICC have jurisdiction without any need for state consent.\(^{108}\) Then South Korea proposed that the ICC have jurisdiction if a state Party is the territorial state, the state of the nationality of the defendant or the victim, or the state where the suspect is found. The final result was that the ICC only has jurisdiction if the territorial State or the State of the nationality of the suspect is a State Party. Some, such as Sadat and Carden, say the jurisdiction of the ICC is premised ‘[f]irst, and foremost’ on the principle of universality.\(^{109}\) The debate, however, suggests a consensus on universal jurisdiction for serious international crimes did not exist. Rather, delegations felt more confident about their right to assert a criminal jurisdiction over non-nationals if the crimes occurred in the territory of a State Party. This is the view of the Chairman of the Conference,\(^{110}\) and others, such as Orentlicher\(^{111}\) and Fowler.\(^{112}\) Hence, the ICC Statute emphasises the principles of nationality and territoriality rather than universal jurisdiction.\(^{113}\) Further, by the principle of complementarity, the ICC Statute reflects a strong preference for prosecution by national and territorial courts over prosecutions at the ICC.\(^{114}\)

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\(^{107}\) This is the view of L. Caplan, above n 88.


\(^{110}\) Kirsch wrote in response to US objections to the ICC having jurisdiction over US nationals: ‘This does not bind states that are not parties to the Statute. It simply confirms the recognised principle that individuals are subject to the substantive and procedural criminal laws applicable in the territories to which they travel, including laws arising from treaty obligations’: Philippe Kirsch, ‘The Rome Conference on the International Criminal Court: A Comment’ (1998) Nov-Dec *JSIL Newsletter* 1, 8.

\(^{111}\) D. Orentlicher, above n 39, 218.


\(^{113}\) To the extent that the jurisdiction of the ICC can be seen as representing a delegation of a State’s territorial jurisdiction, the Nuremberg Tribunal is a precedent: see text accompanying nn 38-41.

\(^{114}\) The preference for the claims of the territorial state can also be seen in the resolution of the dispute over the Lockerbie bombing. In March 1999 Libya accepted a US and UK proposal to try the Lybian suspects before a Scottish Court, applying Scottish law and largely following Scottish procedures but located in the Netherlands. As part of the arrangement, the court became Scottish territory for the duration of the proceedings, hence reinforcing the territorial principle: D. Orentlicher, above n 39, 226.
2.7 Recent State Practice

Chapter 6 outlined the experience of thirteen countries with respect to crimes against humanity since the 1998 Rome Conference. The ICC Statute has caused something of a revolution in the assertion of universal jurisdiction over crimes against humanity in municipal legislation. Germany, East Timor, Kosovo, New Zealand and Australia, have now invested their courts with universal jurisdiction over crimes against humanity without requiring any link to the forum state.\textsuperscript{115} This trend is confirmed in a number of recent decisions – such as the \textit{Pinochet}\textsuperscript{116} and \textit{Sharon}\textsuperscript{117} cases in Belgium, the Spanish case of \textit{Scilingo}\textsuperscript{118} (for crimes against humanity); the Guatemalan Genocide case of the Spanish Constitutional Court\textsuperscript{119} and the German Supreme Court case of \textit{Sokolovic}\textsuperscript{120} (for treaty crimes such as genocide) – which have all held that voluntary presence in the jurisdiction is not a requirement.

Some scholars, such as Antonio Cassese\textsuperscript{121} and Luc Reydams,\textsuperscript{122} question the right of states to proceed against a defendant who is not present in the jurisdiction. Others are of the view that the requirement of presence has more to do with preventing the possible legal overload that comes with having jurisdiction over all of the world’s perpetrators of crimes against humanity than being a requirement under customary law.\textsuperscript{123} Other countries such as Belgium, Canada, France (in the case of crimes within the jurisdiction of the ICTY and the ICTR), the Netherlands and South Africa have allowed their courts some form of universal jurisdiction over crimes against humanity, at least where the defendant is present or resident in the territory.\textsuperscript{124} The approach of the UK – that the creation of an international criminal court means there is now no need for state courts to assume universal jurisdiction – stands out on its own.\textsuperscript{125} It would seem that the long and consistent view of publicists (and some national decisions) has come to be accepted by many states – that is, states have the right, if not the obligation, to assert universal jurisdiction over crimes against humanity in certain circumstances.

\textsuperscript{115} See Chapter 6. Other countries which have invested their court with universal jurisdiction without requiring the voluntary presence of the defendant in the forum state include Azerbaijan, Belarus, the Czech Republic, Ethiopia, Finland, Hungary and Paraguay: see R. Cryer, above n 4, 90.

\textsuperscript{116} \textit{Pinochet}, above n 33.


\textsuperscript{118} \textit{Sentencia por crímenes contra la humanidad en el caso Adolfo Scilingo}, No16/2005, Audiencia Nacional, <http://www.derechos.org/nizkor/espana/judicial/doc/sentencia.html> at 14 January 2006 (‘Scilingo’) whilst the defendant voluntarily appeared, the court had permitted the investigation to proceed \textit{in absentia}, including against the Argentinean ex-General, Carvallo, who was extradited from Mexico, which accepted the claim to universal jurisdiction and ordered extradition on 11 January 2001. See also R. Cryer, above n 4, 90.

\textsuperscript{119} \textit{Guatemala Genocide Case – Constitutional Court}, above n 21.

\textsuperscript{120} \textit{Sokolovic Case (Judgment)}, BGH, 3 StR 372/00 (21 February 2001).


\textsuperscript{122} L. Reydams, above n 14, 224.

\textsuperscript{123} See R. Cryer, above n 4, 91-94; and the remarks of Judges Higgins, Kooijmans, and Buergenthal in the \textit{Arrest Warrant Case}, above n 2.

\textsuperscript{124} See Chapter 6.

\textsuperscript{125} See Chapter 6, section 3.14. Indonesia and Iraq have also proscribed crimes against humanity without a general grant of extraterritorial jurisdiction.
Nevertheless, the actual instances of trials of defendants charged with crimes against humanity which rely upon universal jurisdiction remain rare. In Australia, Canada and New Zealand, the consent of the Attorney General is required, so it remains to be seen the extent to which the right to assert extraterritorial jurisdiction will be utilised. A possible recent exception is the case of Scilingo which has again ignited debate as to the right to invoke universal jurisdiction under customary international law for crimes against humanity. The Spanish Court held crimes against humanity were crimes of *jus cogens* with *erga omnes* obligations on all states permitting the exercise of universal jurisdiction on behalf of all humanity. This allowed the Court to apply the domestic offence of ‘crimes against humanity’ (Article 607bis) to acts committed abroad (in Argentina), despite the absence of any express grant of jurisdiction to this effect. Christian Tomuschat faults the Court’s view that universal jurisdiction over crimes against humanity exists as a matter of customary law. In reality, the defendant appeared voluntarily to answer the charge, which Tomuschat says justifies the assertion of jurisdiction under international law. The Court also relied upon Article 17 of the ICC Statute to hold that jurisdiction could be assumed by Spain given that the amnesties in Argentinean law made local jurisdiction ineffective or non-existent.

Whilst the conferring of universal jurisdiction over crimes against humanity in recent legislation points in one direction, the frequent and virulent opposition of states to the actual exercise of universal jurisdiction points to a different conclusion. Chile intervened and objected to the assertion of universal jurisdiction by European states and the extradition of Augusto Pinochet from London. Similarly, The Democratic Republic of Congo successfully objected to the assertion of universal jurisdiction by Belgium. On 30 November 2004, the New York-based Centre for Constitutional Rights requested that the German Federal Prosecutor launch a criminal prosecution against Secretary of Defence, Donald Rumsfield and others in respect of allegations of abuse in the Abu Ghraib prison in Iraq. This led to a vitriolic attack by the United States against Germany, with threats of boycotts. On 10 February 2005, the Federal Prosecutor announced his decision not to launch an investigation and relied upon the principle of ‘subsidiarity’. As the states primarily involved have a superior interest and are not ‘unwilling or unable to prosecute’ the claims, the Prosecutor said no investigation would be launched by Germany.

Most significant of all, however, is the case of Belgium itself. According to Israel’s supporters, Belgium’s criminal proceedings against Ariel Sharon, then Prime Minister, was tantamount to an attack upon Israel itself. Following opposition by Israel and the United States, Belgium reversed its legislation such that it went from being at the vanguard to now lagging behind many other states in respect of the assertion of

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127 Ibid.


129 It was reported that the Pentagon warned that such cases could harm US-German relations and Rumsfield warned he would not take part in a planned security conference in Germany in February if the investigation proceeded: ‘Lawsuit against Rumsfield threatens US-German relations’, Deutsche Welle (Munich), 14 December 2004.

130 See International Law in Brief, above n 128.

universal jurisdiction. Its law now requires not only presence, but residency, before a prosecution can be launched.

2.8 Conclusion

Despite the confidence with which many assert that international customary law permits universal jurisdiction over crimes against humanity, international law in the field is still unresolved and in a state of rapid development. For example, there appears to be a blending of the principles of ‘subsidiarity’, as was originally conceived in the representation principle of jurisdiction in the German legal tradition, and the notion of ‘complementarity’, common to human rights bodies and now the ICC Statute. Increasingly, universal jurisdiction is no longer regarded as a primary source of jurisdiction, but one that should only be invoked when the territorial state is unwilling or unable to prosecute. This was the approach of the German Prosecutor and the Spanish courts in Pinochet, Scilingo, Monti, and the lower courts in the Guatemalan Genocide case. This has the support of Antonio Cassese, but others regard the principle as being a sensible rule of practice not law. Residual concerns about state sovereignty, as confirmed by the ICC Statute, have resulted in prosecutions before territorial courts or courts of the nationality of the defendant having greater legitimacy than courts with no links to the prosecuting state. This is reflected in the matters which the Prosecutors in Germany and Belgium are required to take into account before launching an extraterritorial investigation. There are, of course, sound reasons for this. Local courts, all things being equal, are likely to be the most convenient and fitting forum. Further, territorial courts ought be supported because such courts are needed to foster and strengthen the rule of law in the local community.

The case for universal jurisdiction rests upon several separate arguments. First, there is the traditional rationale that relies upon the nature of the offence itself – its scale and heinousness. The reasoning is flawed because it fails to explain how the

133 Pinochet, Audiencia Nacional (criminal division) (5 November 1998) s 2, quoted in Reydam’s, above n 14, 185-186.
134 See n 130.
135 Scilingo, above n 118.
137 This was the approach of the examining judge and the Audiencia Nacional (Appeal No. 115/2000, 13 December 2000) which declined to take jurisdiction because it was not demonstrated that the Guatemalan authorities were not willing and able to take proceedings. The Supreme Court, however, took the view that such an inquiry about the adequacy of another state’s judicial system should not be embarked upon and the Constitutional Court did not require exhaustion of local remedies first: Guatemala Genocide Case – Supreme Court, Constitutional Court, above n 21.
138 A. Cassese, above n 121, 593.
139 R. Cryer, above n 4, 90.
140 See Chapter 6, sections 3.3, 3.7.
nature of the alleged offence justifies the exercise of a criminal jurisdiction which would otherwise be regarded as an interference in the affairs of another state. The heinousness of the offence may give rise to the crimes' status as an international crime or state responsibility for the territorial state or even intervention by the Security Council under the UN Charter, but otherwise, how can it ground a right to override state sovereignty and the principle of non-intervention? 142 Secondly, there is reliance upon the Lotus principle and the assumption that international law allows a state a wide measure of discretion to assert extraterritorial jurisdiction as long as it only enforces its powers in its own territory. 143 This view remains highly controversial, with many maintaining that excessive claims of extraterritorial jurisdiction do violate the principle of non-intervention. 144 There is force in the remarks of President Guillimae that today such a view of the Lotus case is divorced from the reality of the way in which states speak about jurisdiction. States do resent the imposition of another state’s criminal law over the conduct of their nationals in their own country and not just on the grounds of state immunity. Further, at a time when people routinely travel over borders, the execution of a secret arrest warrant on an unsuspecting foreign national may rightly be perceived to be a hostile act, even if execution only takes place abroad. No one can doubt the reaction that would follow if a former, let alone a serving, US or Chinese President were arrested when travelling abroad. Such acts do smack of interference in the affairs of other countries.

Hence, it may be necessary and safer to rely upon a positive rule of customary law for the assertion of universal jurisdiction over crimes against humanity to overcome the territorial principle; but is there sufficient evidence of state practice? 145 To many the statements in support of universal jurisdiction contained in the national decisions discussed above and now the Special Court for Sierra Leone, 146 provide enough evidence. These cases, for the reasons analysed above, cannot be regarded as resolving the matter, at least outside the context of war and state indifference. Neither did the ICC Statute. The strongest evidence of state practice is probably the recent legislation granting state courts extraterritorial jurisdiction over crimes against humanity. Reliance on such laws needs to be tempered by the absence of actual trials based upon universal jurisdiction and the recent virulent opposition of states to such jurisdiction as is well demonstrated in the case of Belgium.

Bassiouni accepts that state practice with respect to universal jurisdiction is like a checkerboard. 147 He prefers to rely upon a third argument – crimes against humanity is a jus cogens norm which gives rise to an erga omnes obligation upon all states which


144 See the references cited above n 14, and Guatemala Genocide Case – Supreme Court above n 21.

145 According to Cryer, ‘State practice is more equivocal, but offers just about sufficient state support to ground a right to do so in state custom’: R. Cryer, above n 4, 87.


grounds the right to exercise universal jurisdiction. The argument has been relied upon in a number of decisions to ground universal jurisdiction over crimes against humanity, such as the Scilingo decision in Spain and the Pinochet decision in Belgium. The reasoning has also been applied for other so-called jus cogens crimes such as torture. The problem with the argument is that it suggests there is an obligation to act, not a permissive right. Whether there is such a duty to act is considered in Part 2. It concludes that it is difficult to find an existing obligation on third states to prosecute all suspects of crimes against humanity. The argument also does not answer a state’s complaint that a foreign court’s prosecution is unjustified or unfair or that the third state is unreasonably failing to defer to a state’s offer to prosecute its own nationals. The complaint is not about the need to prevent impunity, but about the right of one state to judge whether an outrageous impunity has occurred in another state. For example, the Supreme Court in Spain in the Guatemala Genocide case took the view that whilst such an inquiry may be undertaken by an international tribunal, it would be damaging for the relations between states for one state’s courts to judge the adequacy of another state’s judicial or legal system. It is also difficult to see how the jus cogens character of the crime can override the principle of non-intervention or the sovereign equality of states when the ICJ in the Arrest Warrant Case held that such crimes do not override a serving state officials' personal immunity.

The threshold requirement of 'state inability or unwillingness’ to protect a civilian population from a ‘widespread or systematic attack’ is best seen as a jurisdictional threshold developed by the Security Council in the period 1991–1994 to override state sovereignty which in turn formed the background to the definition in Article 7 of the ICC Statute. This international jurisdiction is based either upon the ICC Statute itself, or, upon Chapter VII of the UN Charter and the belief that the collective wisdom of the members of the Council will act as a bulwark against abuse. On the other hand, the unilateral right of individual states to pass judgment on the 'crimes against humanity' of other states has neither treaty support nor inherent safeguards against abuse. The difference between the two types of tribunals has been acknowledged in many decisions. It is sometimes asserted that 'due process' is a requirement under international law, so the fear of abuse should not prevent universal jurisdiction. The problem remains one of enforcement and consent to the court’s extraterritorial jurisdiction. To whom can defendants complain that a state court is biased or is acting

148 M.C. Bassiouni, above n 59, 168, 701.
149 Scilingo, above 118; see also chapter 6, section 3.13.
150 See Pinochet, above n 33, 702-704; see also chapter 6, section 3.3.
151 See Pinochet No. 3, above n 33, 275 (Lord Millett): if the jus cogens crimes are 'so serious and on such a scale that they can justly be regarded as an attack on the international legal order'. See also Prosecutor v Furundžija (Judgment), Case No IT-95-17/1-T (10 December 1998) [156] ('Furundžija – Judgment'). Lord Slynn did not think any jus cogens character of international crimes could override state or head of state immunity or provide a basis for universal jurisdiction: Pinochet No. 1, above n 79, 79.
152 For example, the new democratic regime in Chile said to the House of Lords that it should first be able to try Pinochet, but Lord Hutton said this was not a relevant factor for the Court to take into account: Pinochet No 3, above n 33, 263.
153 Guatemala Genocide case – Supreme Court, above n 21.
154 For example, Arrest Warrant Case, above n 2; and Prosecutor v Taylor (Decision on Immunity from Jurisdiction), Case No SCSL-2003-01-I, (31 May 2004) ('Taylor – Jurisdiction').
155 M. Akehurst, above n 9, 165; R. Cryer, above n 4, 97.
unfairly towards them? True enough, Pinochet and Scilingo (unlike defendants in other countries) may have been able to appeal to the European Court of Human Rights in respect of their rights to a fair trial, but such an appeal probably could not cover a claim that Spanish courts are biased, have misinterpreted the meaning of genocide to cover their conduct and engaged in jurisdictional overreach. Further, neither Chile nor Argentina has consented to such a regional human rights court ruling upon its citizen’s rights in respect of conduct in their own countries and they have none of their judges on the court.

Nevertheless, it is probably going too far to assert, as President Guillaume did, that without treaty authorisation, customary law does not permit the assertion of universal jurisdiction over crimes against humanity without a substantive link to the prosecuting state. It is hard to find a clear statement from a state denying the right to assert universal jurisdiction over crimes against humanity in all circumstances. Even the United States enquired whether Canada was willing to commence a prosecution of Pol Pot.\textsuperscript{156} It has said that it accepts, in principle, that universal jurisdiction may exist for crimes against humanity \textit{in certain circumstances}.\textsuperscript{157} But what are the circumstances?

There is probably just enough evidence of state practice to suggest that a truly permissive jurisdiction over crimes against humanity can be exercised, even without the defendant’s presence in the jurisdiction, \textit{provided} there is at least state indifference. This is a truly last resort, default jurisdiction to vindicate the interests of all humanity where no other state is either interested or willing to prosecute. This could cover a future Nazi war criminal or Pol Pot who has no state support. The right to object to extraterritorial jurisdiction over crimes against humanity should only be exercisable by a state, not the defendant. Hence, Eichmann’s challenge to Israeli jurisdiction was rightly rejected in the absence of support from Germany. Similarly, the House of Lords in \textit{Pinochet No3} thought the question of immunity was a matter to be raised, not by Pinochet, but by Chile which it allowed to intervene.\textsuperscript{158} The Special Court of Sierra Leone, on the other hand, permitted former President Taylor to argue the question of his immunity without state support.\textsuperscript{159}

This default jurisdiction is analogous to the ‘representation principle’ in the German legal tradition which encompasses serious extraterritorial domestic crimes without requiring a ‘widespread or systematic attack on a civilian population’. If the jurisdiction is limited to instances where there is no state opposition, there is no need for the high threshold. The prosecuting state is simply enforcing a natural law common to all nations or, as argued in Chapter 2, conduct which is criminal according to the ‘general principles of law recognised by the community of nations’ and where there is no need to honour local laws, amnesties or time limitations.\textsuperscript{160} The complex issue of the extent to which a foreign state should recognise local amnesties or laws of limitation for crimes against humanity is considered in section 3.

\textsuperscript{158} \textit{Pinochet No 3}, above n 33, 192.
\textsuperscript{159} \textit{Taylor – Jurisdiction}, above n 154.
\textsuperscript{160} Chapter 2, section 6.4.
3. THE DUTY TO PROSECUTE OR EXTRADITE

3.1 Introduction

The maxim, *aut dedere aut judicare* (to extradite or try), is traced by some writers to Covarruvias, the sixteenth-century Spanish writer. Relying on a natural law common to all nations he said all states had a duty either to punish or extradite any dangerous criminal in its custody. Grotius and de Vattel supported the principle, but the accent was on the negative obligation of a state not to grant asylum or shield a fugitive as a duty owed to other states as much as to the ‘international community’. A number of international treaties provide for the duty to extradite or prosecute persons found in a State Party’s territory, but no such treaty exists for crimes against humanity. Many scholars say such a duty exists under international customary law. The duty to prosecute or extradite for crimes against humanity is put in different ways as follows:

1. A duty on all states to prosecute all persons suspected of committing crimes against humanity wherever committed unless the state extradites the suspect;
2. A duty on all states to prosecute or extradite if a request for extradition is made for a person under its control; or
3. A duty on the territorial state to prosecute persons suspected of committing crimes against humanity within its territory.

The alleged duty is best analysed by considering separately the obligations upon a state with no connection to the crime (called the third state) compared with the state where the crime occurs (called the territorial state).

3.2 The Duty to Prosecute and Third States

Without any applicable treaty, reliance is often placed upon the status of crimes against humanity as a *jus cogens* crime, which is said to create a duty *erga omnes* to

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162 See G. Guillaume, above n 161, 27

163 Grotius refers to the duty “*aut dedere ... aut punire*” (“extradite or punish”): Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* (first published 1646, Whewell trans, 1925) II, xxi.


165 Grotius appeared to suggest the duty arose only when another State ‘appealed to it’ in order to avoid giving offence to another sovereign: H. Grotius, above n 163, II, xxi, §IV, 1. See also L. Reydams, above n 14, 36-37; M.C. Bassiouni, above n 59, (2003) 341.

166 See M.C. Bassiouni & E.M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (1995). Of about 281 relevant treaties, less than 100 provide for a duty to extradite or prosecute: M.C. Bassiouni, above n 165, 344.

suppress such crimes and assist in bringing perpetrators to justice by extradition.\textsuperscript{168} Sometimes states (such as Ethiopia,\textsuperscript{169} the Netherlands\textsuperscript{170} and Belgium\textsuperscript{171}) have claimed a 'general duty' to prosecute perpetrators of crimes against humanity, but otherwise, it is generally recognised that there is little evidence of state practice confirming that there exists a duty on third states to prosecute based upon universal jurisdiction.\textsuperscript{172}

The International Court of Justice said the Genocide Convention created obligations \textit{erga omnes} and 'the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention'.\textsuperscript{173} In a well-known dictum, the International Court of Justice in the \textit{Barcelona Traction} case stated that \textit{erga omnes} obligations derive, for example, from 'the principles and rules concerning the basic rights of the human person'.\textsuperscript{174} The content of any 'duty' was left unexplored. It may be regarded as a bit of a stretch to take from these comments of the ICJ that all States must prosecute \textit{all} persons suspected of committing a crime against humanity.\textsuperscript{175}

A \textit{jus cogens} rule will render illegal any act conflicting with it.\textsuperscript{176} It is difficult to see how a third state, by not prosecuting non-nationals suspected of committing crimes against humanity outside the territory, can be said to be doing an act which conflicts with the \textit{jus cogens} norm. There may be state responsibility if the individual is under the control of the state which will generally only cover the territorial or national state.\textsuperscript{177} Article 41 of the ILC rules on state responsibility states: 'States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40'. Crawford's remarks on this article suggest the duty to cooperate relates to political cooperation, not a duty to prosecute unless it receives a formal request for extradition.\textsuperscript{178} Whilst the notion of \textit{jus cogens} has been relied upon to ground a right to

\begin{itemize}
  \item \textsuperscript{168} See Ibid; Theodor Meron, 'On a Hierarchy of International Human Rights' (1986) 80 \textit{AJIL} 1.
  \item \textsuperscript{169} In relation to crimes of its \textit{Derg} regime on its own territory, see: Julie V. Mayfield, 'The Prosecution of War Crimes and Respect for Human Rights: Ethiopia's Balance Act' (1995) 9 \textit{Emory International Law Journal} 553, 570.
  \item \textsuperscript{171} Belgium asserted a 'general obligation' on states under customary international law, but conceded that where such persons were non-nationals, outside of its territory, there was no obligation but rather an available option: See \textit{Arrest Warrant Case}, above n 2, [8] (Separate Opinion of Higgins, Kooijmans and Buergenthal).
  \item \textsuperscript{172} R. Cryer, above n 4, 107-117; M.C. Bassioumi & E.M. Wise, above n 166, 45; this was also the conclusion of Brennan J in \textit{Polyukhovich}, above n 28, 218.
  \item \textsuperscript{174} \textit{Barcelona Traction, Light and Power Company (Belgium v. Spain) (Second Phase)} [1970] I.C.J. Reps 3, 70.
  \item \textsuperscript{175} See Cryer who says 'it must remain the case that the fact that the prohibitions of many international crimes have reached the level of \textit{erga omnes} obligations or \textit{jus cogens} norms does not give rise to a duty to exercise universal jurisdiction': R. Cryer, above n 4, 111.
  \item \textsuperscript{176} Lauri Hannikainen, \textit{Peremptory norms (jus cogens) in international law: Historical development, criteria, present status} (1988) 7.
  \item \textsuperscript{177} See James Crawford, \textit{The International Law Commission's Articles} (2002) 110-113.
  \item \textsuperscript{178} Crawford uses the examples of non-recognition of certain acts of apartheid in South Africa, not prosecutions: ibid, 252.
\end{itemize}
invoke universal jurisdiction by some international judges, they have not suggested it gives rise to an obligation to assert universal jurisdiction.¹⁷⁹

The fact that the prohibition against crimes against humanity is a *jus cogens* norm may provide some basis for a duty on third party states to co-operate with a request for extradition or a duty to prosecute resting on the territorial or national state in certain circumstances (considered further below). The *jus cogens* character of the offence cannot, however, extend to requiring a prosecution by third states.¹⁸⁰

Others¹⁸¹ find evidence for a general duty to prosecute in General Assembly Resolutions 2840 and 3074, passed in 1971 and 1973 respectively.¹⁸² The former stated that refusal to co-operate in the extradition, arrest, trial and punishment of persons suspected of committing crimes against humanity and war crimes is contrary to the purposes of the UN Charter and international law. This probably at best supports a duty to co-operate with a request for extradition. Resolution 3074 said perpetrators of war crimes and crimes against humanity ‘wherever they are committed, shall be subject to investigation and ... shall be subject to tracing, arrest, trial and, if they are found guilty, to punishment.’ ‘Every State has the right to try its own nationals for war crimes and crimes against humanity’. Further, suspects of such crimes ‘shall be subject to trial ... as a general rule in the countries in which they have committed these crimes’ and ‘States shall co-operate on questions of extraditing such persons.’

The use of the term ‘shall be subject to trial’ and the preference for trials by the national and territorial state makes the implication of a duty to exercise universal jurisdiction unclear. Justice Brennan in *Polyukhovich* thought the UN Resolutions evidenced a right, not an obligation, to exercise universal jurisdiction¹⁸³ In any event, there must be doubt as to the legal effect of such resolutions,¹⁸⁴ particularly where

¹⁷⁹ *Furundžija – Judgment*, above n 151, [156]. Judges Higgins, Kooijmans, Buerghenthal in the *Arrest Warrant Case* left the issue open: *Arrest Warrant Case*, above n 2. In Judge Ferrari-Bravo’s Dissent in *Al-Adsani*, he said because torture was contrary to *jus cogens* it follows that every state has a duty to *contribute* to the punishment of torture but this did not cover the United Kingdom where the acts of torture had taken place elsewhere: *Al-Adsani v. United Kingdom*, above n 94.


Resolution 3074 had 29 abstentions. Scharf considers the Resolutions to be merely evidence of an emerging customary rule and Cryer is even more dismissive.

The historical context of the Resolutions was one of expressing disfavor towards countries which harbored Nazi war criminals when it was feared that statutes of limitation in Europe may lead to the crimes becoming time-barred. For example, Bolivia refused France’s request to extradite Klaus Barbie in 1974, but, under growing international pressure, it expelled him in 1983 leading to his arrest in French Guinea. The Resolutions clearly linked crimes against humanity with war crimes. It was likely assumed at the time that crimes against humanity came with a nexus to war.

In the result, the case for there being a general customary law duty on all states to seek out and prosecute perpetrators of crimes against humanity wherever committed is not strong. Bassiouni even concedes that ‘the duty to prosecute or extradite is more inchoate than established’. The evidence discussed above does suggest that current international law may require States to deny a safe haven to perpetrators of crimes against humanity in the face of a bona fide request for extradition.

### 3.3 Amnesties, Statutes Of Limitations and a Territorial State’s Duty to Prosecute

Some suggest there is an emerging customary rule which requires prosecution by the territorial state of perpetrators of crimes against humanity committed in the territory. A common issue for consideration is whether the granting of a domestic amnesty or the passing of a statute of limitation for crimes against humanity will breach a rule of international law and whether a third state can, ought to or must ignore such an amnesty if it exercises universal jurisdiction.

It is difficult to devise rules in the abstract when a failure to prosecute may derive from many different motives and circumstances. For centuries, states at the end of civil upheavals have pardoned the combatants and their leaders. After the English civil war parliament passed ‘Acts of Oblivion’ to immunise both rebel forces and royalists. During the American civil war, President Abraham Lincoln issued amnesty proclamations to encourage defection in confederate ranks. He declared that it would be

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185 There were 94 positive votes and none against.
189 M.C. Bassiouni, above n 59, 170.
'a cruel and astounding breach of faith'\textsuperscript{191} to renege on the promise made, a position upheld by the US Supreme Court.\textsuperscript{192}

Local amnesties after civil strife generally have two aims: to save lives, at least in the short term, by ending the conflict\textsuperscript{193} and to promote reconciliation between the warring factions. In the broad, these aims are valid, though debateable in any particular circumstance. Some national decisions have upheld amnesties granted in the most unmeritorious of circumstances. The Privy Council accepted the legal validity of an amnesty granted to a group of insurgents in Trinidad and Tobago who were holding the prime minister and cabinet ministers hostage, provided the insurgents strictly complied with the conditions of the amnesty.\textsuperscript{194} The principle was applied in Malaysia\textsuperscript{195} and by the Fijian courts.\textsuperscript{196} The Constitutional Court of South Africa approved arrangements for the grant of amnesties to be issued at the discretion of a Commission based on individual circumstances and not as a 'blanket' amnesty.\textsuperscript{197}

It is the second reason – that of national reconciliation – that has grounded some recent amnesties. Such a sentiment is reflected in Article 6(5) of Protocol II to the Geneva Conventions: ‘At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict’.\textsuperscript{198} Many commentators say the preparatory work indicates the intention was not to cover breaches of international humanitarian law.\textsuperscript{199} Amnesties covering such breaches have been granted in the last two decades in the cases of Argentina, Cambodia, Chile, El Salvador, Guatemala, Haiti, Peru, Sierra Leone, South Africa, and Uruguay.\textsuperscript{200} In the cases of El Salvador, South Africa, Haiti and Cambodia, the United Nations pushed for, helped negotiate, or endorsed by agreement, the granting of

\begin{itemize}
\item\textsuperscript{191} Lincoln's third annual message to Congress, 8 December 1863, Program for Reconstruction.
\item\textsuperscript{192} U.S. v Klein (1871), 80 U.S. 13 Wall., 128.
\item\textsuperscript{193} For example, as Alexander Hamilton explained, the United States Constitution allows Presidential pardons because in 'seasons of insurrection and rebellion, there are often critical moments, where a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth; and which, if suffered to Pass unimproved, it may never be possible afterwards to recall': Alexander Hamilton, The Federalist (first published 1778, 1947 ed) 79.
\item\textsuperscript{194} Attorney General of Trinidad \\& Tobago v Lennox Phillip [1995] 1 A.C. 396.
\item\textsuperscript{195} Mustapha v Mohammed [1987] 1 L.R.C.Const \\& Admin. 16 (Malaysian Supreme Court).
\item\textsuperscript{196} State v Nattini (aka George Speight) [2001] FJHC 1.
\item\textsuperscript{197} Azanian Peoples Organisation (AZAPO) and others v President of the Republic of South Africa, 1996 (4) S.A. 671 (CC), 691.
\item\textsuperscript{198} Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), done in Geneva, Switzerland, opened for signature 8 June 1977, 1125 UNTS 3, (entered into force 7 December 1978).
\item\textsuperscript{199} 'The preparatory work for Article 6(5) indicates that the purpose of this precept was to encourage amnesty,... as a type of liberation at the end of hostilities for those who were detained or punished merely for having participated in the hostilities. It does not seek to be an amnesty for those who have violated international humanitarian law': Inter-American Commission of Human Rights (El Salvador) (1999) Report No. 1/99, [116].
\item\textsuperscript{200} See B. Broomhall, above n 34, 94. For the case of Haiti: see Michael Scharf, 'Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?' (1996) 31 Texas International Law Journal 1.
\end{itemize}
amnesties to former regime members. 201 Such amnesties did not exclude for their operation crimes against humanity.

For example, in 2003, the UN entered an agreement with Cambodia which appears to have acknowledged that state's grant of an amnesty for one of the Khmer Rouge leaders accused of committing crimes against humanity.202 In August 2003, the UN supported a peace agreement for Liberia which required the transitional government to consider granting a 'general amnesty'.203 On 9 March 2005, East Timor and Indonesia jointly established a Commission on Truth and Friendship with power to grant amnesties for cooperation.204 East Timor has not supported international criminal prosecutions, has declined to proceed on an indictment prepared by its Special Crimes Unit against General Wiranto205 and is considering pardoning local residents already convicted of crimes against humanity.206

To the above survey of state practice207 can be added the approach of states to amnesties at the Rome Conference for the ICC. Although some states said prosecution was the only appropriate response to international crimes, this was not accepted by all states and the ICC Statute left the issue up to the broad discretion of the Prosecutor. 208

Hence, state practice does not corroborate the view that international law prohibits in all circumstances the grant of an amnesty for crimes against humanity. Michael Scharf asserted in 1996 that any such rule is so divorced from the realities of state practice that it can only be an international aspiration.209 Nevertheless, the Special Court of Sierra Leone in the 2004 Lomé Amnesty decision210 and the International Law Association211 have asserted that such a rule is 'emerging'.

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201 See M. Scharf, 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes' (1996) 59 Law & Contemporary Problems 41; B. Broomhall, above n 36, 94. For the case of Cambodia see Chapter 6, section 2.4

202 See Chapter 6, section 2.4.


206 See Chapter 6, section 2.3.

207 On state practice, see Christine Bell, Peace Agreements and Human Rights (2000) 259-291.


209 M. Scharf, above n 200, 41.

210 Lomé Accord Amnesty Decision, above n 146, [71], which adopted the view of Cassese.

211 International Law Association Committee on International Human Rights Law and Practice (Menno Kamminga), ‘Final Report on the Exercise of Universal Jurisdiction in Relation to
The UN representative appended a disclaimer to the 1999 Lomé Peace Agreement for Sierra Leone stating that the amnesty contained therein shall not apply to international crimes, because 'the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes'. This, however, may merely be an acknowledgement that a local amnesty cannot bar an international prosecution, rather than the view that a state will breach international law if it grants an amnesty for crimes against humanity.

The main impetus for the view that international law prohibits a state from granting amnesties to perpetrators of crimes against humanity comes from the field of human rights law. The Inter-American Court of Human Rights, the African Commission on Human Rights, the Human Rights Committee and the European Court of Human Rights have said a State Party to the applicable human rights treaty, as part of its duty to provide an 'effective remedy', has a duty to carry out an effective official investigation into allegations of criminal conduct by the state or its officials, including a duty to prosecute if warranted, even if an award of compensation has been made. Blanket amnesties in Argentina, Chile, El Salvador, Peru, Mauritania and Uruguay have been held incompatible with the state's human rights obligations. The Supreme Court in Argentina in 2005, following the Barrios Altos Case, held that its amnesty laws were unconstitutional because they were passed after entry into the American Convention on Human Rights. That Convention was made applicable by the Constitution. It further held that forced disappearance was a crime against humanity and, as a jus cogens norm, any limitation period was prohibited by international law. The Commission on Human Rights in 2005, after a report from Professor Bassiouni, resolved that for 'crimes under international law, states have the duty to investigate and, if there is sufficient evidence,
the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.220

Some commentators argue it is going too far to say there is an absolute duty to prosecute and that the relevant human rights bodies have misinterpreted the duty to provide an effective remedy by requiring a criminal prosecution.221 In practice all states prosecute crimes selectively — issues such as limited resources, the gravity of the offence, the health of the accused, the effluxion of time and witness immunity, all lead to a prosecutorial discretion whether or not to proceed. The Human Rights Committee has said that a ‘blanket amnesty’ for torture is ‘generally incompatible’ with a state’s obligations under international human rights law which may leave room for the exercise of a bona fide discretion not to prosecute taking into account all the particular circumstances.222 As Cryer says:

... it is extremely unlikely that any duty could be deduced that required prosecution of every single international crime, but the precise principles upon which decisions on who should be prosecuted and for what are very unclear. This militates against any quick conclusion that there is as yet such a duty to prosecute in positive law.223

Justice Robertson at the Special Court of Sierra Leone concluded that customary law ‘invalidates amnesties offered under any circumstances to persons most responsible for crimes against humanity’ but perhaps not if offered to those who bear lesser responsibility.224 In the absence of either state support or an express treaty provision, even this statement remains doubtful as a blanket rule. There probably is not yet a rule.

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220 The Commission on Human Rights, Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law, Human Rights Resolution 2005/35; see also African Commission on Human Rights, Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or degrading Treatment or Punishment in Africa, 14 February 2002 – Guideline 16 details the duty of states to ensure that there is no immunity from prosecution for nationals suspected of torture.

221 This is the conclusion of Michael Scharf, above n 200. The scope of the international legal obligations to prosecute human rights crimes is discussed in M.C. Bassiouni and M.H. Morris (eds), 'Accountability for International Crimes and Serious Violations of Fundamental Human Rights' (1996) 41 Law and Contemporary Problems 48; see also Michael Scharf, 'The Amnesty exception to the Jurisdiction of the International Criminal Court' (1999) 32 Cornell Journal of International Law 514. It is also the conclusion of Broomhall, who says ‘...there may be room for principled flexibility as long as the need for reparation and the dignity of victims is also recognised. It is possible that adequate acknowledgment, compensation and bona fide efforts at institutional reform might render acceptable a partial and non-discriminatory failure to punish individuals through the criminal justice system’: B. Broomhall, above n 14, 99-100. See also R. Cryer, above n 4, 104-105.

222 This is the language used by the Human Rights Committee in its interpretive comment on the duty to prevent torture in Art. 7 of the ICCPR: United Nations Human Rights Committee, General Comment No 20(44) (Art 7), [15], UN Doc. CCPR/C/21/Rev 1/Add 3 (1992). Similarly, thirty leading jurists and legal experts drafted The Princeton Principles on Universal Jurisdiction (see above n 26), where at Principle 7(1) it says amnesties are ‘generally inconsistent’ with international law in respect of serious crimes; see also Juan E. Méndez, ‘The Right to Truth’ in C.C. Joyner (ed), Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference 17-21 September 1998 (1998) 225, 261.

223 R. Cryer, above n 4, 109.

of customary law which prohibits a successor regime, acting in good faith in order to end a conflict or promote national reconciliation, from granting an amnesty for the 'crimes against humanity' of the member of a previous regime or former combatants. This is the view of Cassese.225 Similarly, whilst the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity226 remains poorly supported by states,227 it is also difficult to discern a rule of international law which prohibits a state from applying its statutes of limitation to offences which may be crimes against humanity at the international level.228

It can be assumed that a state will breach international law if, as a matter of state policy, it practices, encourages, condones or acquiesces in the commission of a crime against humanity, including by failing to prosecute those responsible.229 This may cover what has been termed 'self-amnesty' laws designed to benefit those passing the law, such as occurred in Argentina. Unwillingness to prosecute whilst such crimes are taking place may ground intervention by the Security Council, including referral to the ICC as occurred in the case of Sudan.230 Whilst international law may not prohibit some state amnesties and local statutes of limitation for crimes against humanity, it does not accord them any lawful status. Such a law will not bar a prosecution at the international level.231 As for third states exercising universal jurisdiction, the theory is that they exercise an international jurisdiction as agent for the international community. Hence, as stated by ICTY in Furundžija,232 the Special Court of Sierra Leone in the Lomé Amnesty decision233 and various scholars,234 no amnesty in the territorial state can bar

225 A. Cassese, above n 34, 315.
228 The proposition proved controversial at the time the Convention was debated in the General Assembly, including the proposition that existing international law rendered crimes against humanity imprescriptible: see R.H. Miller, 'The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity' (1971) 65 AJIL 476 and chapter 3, section 3.1, chapter 7, section 2.3.1.
229 See, for example: Restatement (Third) Of The Foreign Relations Law Of The United States (1987), s 702: 'a state violates customary international law if, as a matter of state policy, it practises, encourages or condones genocide, slavery or slave trade, the murder or causing the disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination or a consistent pattern of gross violations of internationally recognised human rights'.
230 See Chapter 6, section 1.
231 See Chapter 7, section 2.3.
232 Furundžija – Judgment, above n 151, [153].
233 Lomé Accord Amnesty Decision, above n 146, [71] which adopted the view of Cassese.
234 For example, see A. Cassese, above n 37, 315; Dianne F. Orentlicher, 'Universal Jurisdiction, National Amnesties, and Truth Commissions: Reconciling the Irreconcilable' in S. Macedo, above n 23, 214.
a prosecution in a third state. Nevertheless, the third state, like the ICC Prosecutor, probably has a broad discretion whether to proceed or not.\textsuperscript{235} Further, a state may:

(1) reverse its own amnesty law or statute of limitation (even after the time period has lapsed) for crimes against humanity; and

(2) apply retrospectively a local law prescribing crimes against humanity if the local definition is consistent with the international offence at the time of the conduct,

without infringing international law or the \textit{nullum crimen} principle.\textsuperscript{236} On the argument put in Chapter 2, this principle may cover not only crimes against humanity but many serious crimes or grave breaches of human rights such as murder, rape, torture and inhumane treatment.

4. Conclusion

International criminal law, including crimes against humanity, has expanded greatly in the last twenty years and the alleged right to assert universal jurisdiction or the alleged duty to prosecute has expanded with it. This has placed the asserted principles at something of a crossroad. It risks, as in the case of Belgium, retreating rather than progressing under the weight of its own new found ubiquity. For example, a Pinochet style prosecution of Henry Kissinger or Donald Rumsfeld in Spain or Germany may be very fascinating for western lawyers but it is unlikely to do much for the advancement of human rights in the future where it is needed the most, such as in Africa where some countries are caught in endless civil wars. Such a prosecution may also weaken, not strengthen, the future direction of the law in the field.

The starting point must be to accept that state courts are not well equipped to prosecute extraterritorially all the perpetrators of crimes against humanity, particularly when faced with state opposition to such prosecutions. The impracticality of relying upon state courts was the reason for the creation of international and hybrid tribunals. The mere existence of international rules about universal jurisdiction or a duty to prosecute will not change state practice. As Hermann von Hebel explains: 'The apparent contradiction between the norms and non-observances of these norms shows the need for better methods of enforcement.'\textsuperscript{237} Schwarzenberger once argued that the United Kingdom was able to achieve a great deal in outlawing the slave trade in the nineteenth century, through a variety of measures, without ever suggesting that existing


\textsuperscript{236} See Article 15 of the ICCPR. This was the conclusion of the French \textit{Cour de Cassation in Touvier:} see chapter 3, section 4.4; and the Argentinean Supreme Court in \textit{Case of Julio Hector Simon,} above n 219. It is also the view of the European Court of Human Rights which has upheld as being consistent with the European Convention on Human Rights both the retroactive application of crimes against humanity and the principle that crimes against humanity cannot be time-barred: see \textit{Papon v. France (no. 2) (dec.),} no. 54210/00, ECHR 2001-XII and \textit{Touvier v. France,} no. 29420/95, Commission decision of 13 January 1997, Decisions and Reports 88-B, p. 161 and \textit{Kolk And Kisylyy v. Estonia,} (Application no.'s 23052/04 and 24018/04), Eur Court of HR (17 January 2006).

international law actually prohibited the practice.238 The international community should consider new and flexible mechanisms or rules to actually encourage future prosecutions of perpetrators of crimes against humanity before state courts. Some further thoughts on this question are put forward in chapter 9.

CHAPTER 9
WHAT IS IN A NAME? A THEORY OF CRIMES AGAINST HUMANITY

The term "crimes against humanity" packs an enormous rhetorical wallop, and it does so not because lawyers treat it as a technical term, but rather because all of us know that "humanity" means something universal and immensely important.¹

1. INTRODUCTION

Having surveyed the landscape of the concept of crimes against humanity from classical times to the present, recurring themes emerge. Some are definitonal, involving questions about the content and scope of crimes against humanity; and some are conceptional, involving fundamental doctrinal issues about the interaction between crimes against humanity and the principles of non-intervention and state sovereignty.

A history of the evolution of the idea cannot, however, be reduced just to a topic of international law. There is a yearning to uncover the essence of the idea, to state why it is that ‘crimes against humanity’ are important and what the concept aims to protect. There is the belief that it is something more than just the sum of the definitions in treaties such as Article 6(c) of the London Charter or Article 7 of the ICC Statute. But is there some overarching theory of crimes against humanity? What is distinctive about crimes against humanity and how is it different from other kinds of evil conduct – such as ordinary domestic crimes or human rights abuses?

This chapter explores some of the most popular theories of crimes against humanity and finds them wanting. Nearly all attempt to define a crime against humanity, like other crimes, solely by reference to its elements – though differing elements are offered. The idea offered in this chapter is that crimes against humanity are best thought of as involving two aspects. The first is the commission of one or more of the various underlying offences that collectively make up a crime against humanity. The other is a rule of jurisdiction which allows certain tribunals (those created by the Security Council acting under Chapter VII of the UN Charter and the ICC) to try persons irrespective of their position, local law or opposition from the state of the nationality of the suspect. This rule of jurisdiction requires situations of extreme violence combined with a manifest state failure to protect the people from such an attack. After putting forward this view, the final section of the chapter returns to consider the role of state courts in prosecuting suspects of crimes against humanity. The suggestion is made that regional or further hybrid tribunals alongside the ICC, rather than single state courts, offer the best hope for the future.

2. THE HUMANITY PRINCIPLE

There are various theories about the concept of crimes against humanity which focus on there being an attack against ‘humanity’. This has been termed the ‘humanity principle’ in this work. In fact a number of competing ideas are involved which can be grouped into three schools of thought. First, there is the view that the essence of the crime is that the victim’s humanity has been affronted, meaning that quality which we all share and which makes us human. The offence’s defining feature is the value they

injure, namely humaneness. It is an international crime because this universal value is attacked. De Menton, the French prosecutor at Nuremberg, supported this view, saying the offences are ‘crimes against the human status’. Egon Schwellb’s influential early account of Nuremberg also thought humanity was likely being used as a synonym for ‘humaneness’.

Apart from the obvious problem of vagueness, the core problem with this account is that it ‘seems at once too weak and too undiscriminating’. It would cover, for example, any and all cases of murder, rape or serious assault. Sometimes, the focus is not just on the victim’s humanity, but on the need for an ‘added dimension of cruelty and barbarism’ to be displayed by the perpetrator which therefore requires a more severe punishment than an ordinary robbery or manslaughter. This leads to difficult issues of proof for the prosecution as occurred in Finta, which adopted this test and was heavily criticised at the time for that reason. It is still too undiscriminating because such a notion could just as easily cover cruel treatment of animals or child abuse.

To counter the unwieldy breadth of this theory of crimes against humanity, there is a second school of thought which suggests that the essence of the offence is that the victim is selected by virtue of belonging to a ‘persecuted group’. The defining feature of the offence is that the crimes take place pursuant to a policy of persecution. Hence, isolated or random acts are excluded. According to Hannah Arendt, the value which is being protected is that of human diversity without which the very words ‘mankind’ or ‘humanity’ would be devoid of meaning. An attack upon the Jews in Europe is a crime against humanity because ‘mankind in its entirety’ is ‘grievously hurt and endangered’. If left unpunished then ‘no people on earth’ can feel sure of their continued existence. This reasoning may not be entirely convincing. Those affiliated with a majority group in one country may feel confident enough in their position to be indifferent about the plight of minorities in other countries. But the main problem with this second theory of crimes against humanity is that it is now too discriminating and too limiting. It does not address any attack on ‘humanity’, but only those motivated by racial or other prejudices. Why is an attack on Jews because they are Jews more reprehensible than a tyrant’s indiscriminate attack against persons in order to spread terror? It would not cover, for example, the more or less indiscriminate attacks on civilians in the civil wars in Sierra Leone, Liberia, the Democratic Republic of Congo or Sudan.

The concept of crimes against humanity has waxed and waned on the need for a

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3 Egon Schwellb, ‘Crimes Against Humanity’ (1946) 23 *British Year Book of International Law* 178, 195, though he also refers to humanity as meaning the whole of mankind.
5 See chapter 3, section 4.3.
6 See Vernon, above n 4, 237 where the author makes this point.
7 Arendt, above n 2, 268-9. See Vernon, above n 4, 240 where the author addresses this view.
discriminatory motive. Today, it is on the wane, leading to a revised version of this second school of thought. This has involved an expansion of the notion of a 'persecuted group'. According to David Luban, the crime’s defining aspect is that victims are targeted by a ‘political organization’ based on their membership of a group or ‘population’ rather than any individual characteristic. ¹⁰ Here, population simply means any collection of people who may inhabit some geographic area under the control of a political organisation. Therefore, ‘crimes against humanity assault one particular aspect of human being, namely our character as political animals’. ¹¹ We have a universal need to live socially, but because we cannot live without politics, we exist under the permanent threat that ‘politics will turn cancerous’. ¹² The essence of the offence, based on this theory, is that there is an organised or systematic attack by one ‘group’ on another ‘group’. Luban argues that if the attack is ‘directed’ against such a body, rather than the personal attributes of the individuals, there is no need for a large body of victims, or indeed, more than one victim. His view, more or less, matches the approach of the ad hoc Tribunals when considering the meaning of ‘a civilian population’ under the ICTY and ICTR Statutes.

Luban’s reasoning, however, comes across as too subtle and does not convincingly explain our instinctive reaction to the evil that accompanies a ‘crime against humanity’. When rebel forces in 1999 attacked Freetown in Sierra Leone leading to the indiscriminate abduction of thousands of children so that they could become child soldiers or sex slaves, it just does not capture the essence of the atrocity to say that it was an attack against ‘our character as political animals’. The somewhat strained and technical meaning of ‘population’ introduces subtle distinctions that are out of place as an element of a crime. How do we know if the victims of the attack at Freetown were chosen because of their membership of a ‘population’ not because of their individual characteristics? Why should this matter? It certainly does not matter to the victims and it is not a principle known to human rights law. This distinction between being chosen because of some group identity rather than because of an individual characteristic often breaks down when considering a defendant’s actual motives. The courts have held, and quite rightly, that if defendants are acting purely out of personal motivations directed towards the individual victim and unrelated to furthering the attack in question they can still be guilty of a crime against humanity provided they are aware that their acts form part of the attack against a group or population. But how does one judge whether an ‘attack’, not the acts of any individual, is directed against a population as such, rather than being directed towards different individuals for different reasons? Guénaël Mettraux argues that a tyrant’s attack against selected dissidents because of their individual characteristics cannot be a crime against humanity. ¹³ It seems a little odd to say that a deliberate decision by a Head of State to kill, say, 50 dissidents selected by reason of their unique leadership qualities is not a crime against humanity because they do not form a ‘population’, but a totally indiscriminate attack on a small village for purposes unrelated to the

¹⁰ Luban, above n 1,103-4. This is also the view of Richard Vernon who states: ‘It relates on the one hand to the necessary institutional prerequisites of an organised project, and on the other to damage suffered by individuals only by virtue of belonging to a group’: Vernon, above n 4, 245.

¹¹ Luban above n 1, 90.

¹² Ibid.

inhabitants' individual characteristics and which also leaves 50 dead is a crime against humanity.

This then leads to the third theory or school of thought which puts forward a different defining aspect of the crime – that of scale. A crime against humanity 'shocks the conscience of humanity' primarily because of its magnitude. It is set apart from ordinary inhumanities by its grossness. An attack of sufficient ferocity, seriousness and scale means the domestic legal order is left behind and it is the international community as a whole which is being threatened. A single murder may be a domestic crime but those who knowingly engage in an attack involving a thousand murders are guilty of this more serious international crime. This is the theory put forward in a number of cases such as Eichmann and the Justice Case.

Under Article 7 of the ICC Statute, the requirement of scale is carried forward to a requirement for a special mens rea of knowing involvement in a 'widespread or systematic attack'. This locates the essence of the crime in the added level of heinousness involved in participating in such an attack, as opposed to an ordinary criminal act. Chapter 7 criticised the view that the defining feature of the crime should be regarded as the additional element of evil displayed by the perpetrators over ordinary criminals. As Richard Vernon puts it: 'We cannot suppose that the most inhumane results (however measured) reflect the most subjectively measured inhumanity. There is no reason why a middle-level administrator of genocide must be more “inhumane” than, say, a serial rapist, or even a sadistic teacher.'\(^{14}\) In addition, it sets a higher threshold for the prosecution than for ordinary crimes or human rights abuses. It means a defendant stands a better chance of being acquitted and set free by an international tribunal, such as the ICC, than if charged simply with murder by a domestic tribunal.

If the focus is on the extent of the harm done to victims, not the level of wrongdoing displayed by the perpetrator, then the concept of scale in this third school of thought begins to have some traction. The preamble to the ICC Statute speaks of the need to respond to 'unimaginable' atrocities. It is impossible to think that the authors did not have in mind large-scale crimes as judged by their effect on victims. Many commentators, however, reject the notion that there must be a minimum number of victims before an international interest is warranted. Luban mounts a stinging attack on this view:

To assert that only large-scale horrors warrant international interest reverts to the very fetishism of state sovereignty that the Nuremberg Charter rightly rejected. The assertion implies that small-scale, government-inflicted atrocities remain the business of national sovereigns – that a government whose agents, attacking a small community as a matter of deliberate policy, forcibly impregnate only one woman, or compel only one father to witness the torture of his child, retains its right to be left alone. These are profoundly cynical conclusions, and it will do no credit to the Rome Statute if the ICC accedes to them by interpreting the requirement of multiple acts to mean many acts. Fortunately, "multiple" might be read to mean as few as two, in which case the damage the multiple act requirement inflicts need not be severe. . . . Any body-count requirement threatens to debase the idea of international human rights and draw us into what I once called "charnel house casuistry" – legalistic arguments about how many victims it takes to make a "population".\(^{15}\)

\(^{14}\) Vernon, above n 4, 238.

\(^{15}\) Luban, above n 1, 107-108.
This ‘literalist’ approach, based upon the words in Article 7 of the ICC Statute, is popular with human rights organizations such as Amnesty International and Human Rights Watch which argue that if any ‘organization’, pursuant to a policy, commits two or more acts directed against a ‘population’ (and not because of their individual characteristics), it is a crime against humanity. Once again this makes the principle too undemanding and too indiscriminating. It also makes it difficult to understand why this particular, and rather peculiar and subtle, international crime exists. Why exclude large-scale crimes committed against persons because they do not form a ‘population’ but include a single act of, say, imprisonment (or two acts under the ICC definition) if the imprisonment is directed against a ‘population’ rather than the person’s individual characteristics? How are the courts to make this subtle but all-important distinction? For example, is the house arrest of Aung San Suu Kyi by the Burmese military a crime against humanity?

At the end of the day, it remains intuitive that scale does somehow matter when it comes to the concept of crimes against humanity. There is an answer to Luban’s complaint that a requirement of scale debases the idea of international human rights. This is to reply, as argued in chapter 7, that the requirement of scale is an international rule of jurisdiction, not an element of the offence at all. It is only if scale is seen as a necessary element of the crime itself that one reaches, as Simon Chesterman has written, ‘the gruesome calculus of establishing a minimum number of victims necessary to make an attack ‘widespread’’.\(^\text{16}\) The threshold requirement of the crime is best viewed as a rule of jurisdiction.

Today there are two rules of jurisdiction applicable to the notion of crimes against humanity. There is the threshold requirement under chapter VII of the UN Charter before the Security Council may intervene. The second is the test of a ‘widespread or systematic attack directed against any civilian population’ which must be met before the ICC Prosecutor can intervene. In both cases it remains instinctively persuasive to say that there must be an atrocity or ‘attack’ of sufficient violence, scale or seriousness before the jurisdictional threshold for intervention is met. The threshold of scale exists, not to condone a small-scale attack as being in any way outside the purview of international human rights law or even international criminal law, but as a rule of political prudence to afford suspects, including Heads of State, some measure of protection from an excessive (and potentially biased or abusive) international jurisdiction being invoked by the Tribunal in question. International tribunals, including their judges, like all international institutions, are creatures of diplomacy and statecraft, not of humanity. It is naïve to think they will be above politicking or will not have agendas and biases. Slobodan Milosevic’s accusation that the ICTY proceedings against him were political is not absurd.\(^\text{17}\) It is basically true. Nearly all international trials are political affairs.\(^\text{18}\) The decision by the ICTY Prosecutor not to

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\(^{17}\) He said that the ‘trial’s aim is to produce false justification for the war crimes of NATO committed in Yugoslavia’: Prosecutor v Milosevic, Case No. IT-98-37, Transcript at 2 (1998) quoted in Michael Mandel, ‘Politics and Human Rights in International Criminal Law: our case against NATO and the Lessons to be Learned from it’ (2001) 25 Fordham International Law Journal 95, 97.

\(^{18}\) See, for example, Robert Cryer, Prosecuting International Crimes: Selectivity and the International Criminal Law Regime (Cambridge University Press, Cambridge, 2005) where the author comes to this conclusion. In particular, the author points out that international
prosecute NATO leaders for their role in certain bombing raids in Serbia strikes one as another political decision. One cannot assume merely because a body is international that it will be fair and impartial. Similarly, one cannot assume simply because the ICC Statute 'guarantees' defendants a right to a fair trial that either the prosecutor or the judges may not 'stretch' the bounds of existing international law to pursue what affected states may regard as selective, politically motivated prosecutions or charges. It was the USSR, with its history of show trials, that favoured the United States' desire for a trial of Nazi leaders. It was Churchill who feared that such a trial would inevitably become a political affair. It is ironic that America today fears that the ICC's jurisdiction over its nationals may result in politicized prosecutions. But that fear is real and valid. For example, politicians and state officials from the United States, whilst subject to the rule of law and prosecution before independent courts, are familiar with their own processes and the powers of prosecutors to indict government leaders. On the other hand, international tribunals will have to prove their ability to rise above politics. Until then, states and their nationals are entitled to have some skepticism about such matters.

The high threshold test in the definition of a crime against humanity, including the requirement of scale, exists to answer such skepticism. It is intended to make it more difficult for there to be political, biased or simply misguided prosecutions against the government officials of countries who may be out of favour with some in the international community – such as the United States or Israel. There is another reason for a threshold of scale and seriousness being required. If an atrocity in question is both manifest and widespread, then the potential harm that may be caused to suspects, or peaceful relations between states, is outweighed by the far greater evil that may occur if no attempt is made to stop and prosecute those involved in such atrocities.

The requirement of scale put forward here, as a rule of jurisdiction, is not merely a body count. It includes considerations about the seriousness of the abuse and the involvement of the state. It is a requirement which can and will vary with the tribunal in question and over time with changing views as to the more nebulous notion of 'threats to international peace' which is explained in the next section.

Even so, it is wrong to regard scale alone as being the defining element of a crime against humanity. When a serial murderer kills a number of people it is not condemned as a crime against humanity. Two other principles which have been identified in this work – threats to international peace and the impunity principle – have application as well.

3. THREATS TO INTERNATIONAL PEACE

The link between crimes against humanity and acts which 'threaten the peace, security and well-being of the world' is time-honoured. It was made at Nuremberg, it has been made in the case of the right to engage in humanitarian interventions and it is referred to in the third clause of the preamble to the ICC Statute. It is an aspect of the crime which sets it apart from any ordinary crime or human rights violation. But

criminal law is characterised by its selective enforcement. It remains essentially an exercise in 'victors' justice': ibid, chapter 4 and its conclusion at 230-231.

19 In May 1999 a group of lawyers filed a war crimes complaint against 68 leaders of NATO including all the Heads of Government. Amnesty International in its report concluded that NATO had been guilty of war crimes but the ICTY Prosecutor, Carla Del Ponte in June 2000 announced that NATO was not guilty of war crimes and declined to open an investigation: Mandel, above n 17, 95-96.
what does it mean to say that certain criminal conduct ‘threatens world peace’? Essentially the notion can be made to apply to all manner of different conduct depending upon one’s view of state behaviour. Those views can have different levels of persuasiveness. At Nuremberg, it was the alleged nexus between the Holocaust and the Second World War which meant that the internal atrocities in Germany threatened world peace. Myres McDougal, who was an adviser at Nuremberg, linked human rights abuses with war by arguing that Nazi atrocities in Germany were only the prelude to an onslaught on the whole of Europe.20 Hence, crimes against humanity are those crimes committed as part of a plan to engage in aggression. This view of state behaviour is particularly unpersuasive because not ‘every persecution is a prelude to war, and not every war is preceded by persecutions’.21 Nevertheless, it was endorsed by unanimous General Assembly resolution in 1946 which led to a narrow view of both crimes against humanity and the notion of threats to world peace.

Another view is that atrocities of a sufficient scale or seriousness will ‘shock the conscience’ of other nations and tempt them to intervene militarily. Brendan F Brown, who was involved in the Tokyo trials, argued that genocide poses a threat to world peace, in a way that a simple murder will not, because members of the persecuted group may have relatives elsewhere, especially in powerful countries.22 He used the US as an example, because of the great racial and cultural diversity of its population. He concluded ‘it is impossible for any group to suffer injustice in any part of the world without immediate repercussions here’.23 Hence, it is only natural that there should be some international tribunal with powers to prosecute state leaders to forestall countries taking matters into their own hands. This view of state behaviour is not implausible. The NATO countries when intervening in Kosovo in 1999 expressed the view that they were obliged by the sentiments of humanity to prevent a genocide taking place when the Security Council was not prepared to act.24 President Theodore Roosevelt in his famous State of the Union address in 1904 said:

... there are occasional crimes committed on so vast a scale and of such particular horror as to make us doubt whether it is not our manifest duty to endeavour at least to show our disapproval of the deed and our sympathy with those who have suffered by it ... in extreme cases action may be justifiable and proper.25

Some commentators are dissatisfied with this reasoning because the moral foundation for the international crime is too consequentialist.26 It suggests that only attacks on minorities with friends in powerful countries merit an international reaction.

The President of the Security Council put forward a third broader view on 31 January 1992 when he said that instability in the economic, social, humanitarian and

21 Vernon above n 4, 239.
23 Ibid.
24 See, for example, Simon Chesterman, Just Peace or Just War? (Oxford University Press, Oxford, 2000) chapter 5, section 4.2.
25 State of the Union Message, 6 December 1904 in John Basset Moore, A Digest of International Law (1906) vol 6, 596.
26 See, for example, Vernon above n 4, 239
ecological fields can become threats to peace and security.\textsuperscript{27} This can convert any unremedied breach of human rights into a threat to peace. No international consensus exists as yet on this broad proposition. Similarly, there is the view that stable, functioning democracies do not go to war against each other.\textsuperscript{28} Hence, all non-democratic regimes are a threat to peace – a view which appears to be shaping United States foreign policy in the Middle East. Again, no consensus exists on this view of state behaviour.

Between 1991 and 2005 an international consensus emerged that an internal atrocity of sufficient scale or seriousness will amount to a threat to international peace under Chapter VII of the UN Charter. At the World Summit of 2005 it was accepted that the failure of a state to protect its populations from genocide, war crimes, ethnic cleansing or crimes against humanity is a threat to international peace allowing the Security Council to intervene. This intuitively suggests situations of extreme violence, not single or small-scale crimes. The threshold for a ‘crime against humanity’ is also the threshold for permitting international intervention (including military intervention) in the internal affairs of an otherwise sovereign state. As has been remarked by many authors, the concept of crimes against humanity is not just about describing evil conduct, it is equally about unlocking the key to state sovereignty.\textsuperscript{29}

With this background, one can return to see how scale and seriousness do count when it comes to a crime against humanity. Consider Richard Vernon’s nuanced approach to the issue:

intuitions tend, awkwardly, in different directions. On the one hand, we can hardly close our minds to questions of scale altogether. Legally, a crime against humanity (unlike a war crime, which may be a single act) is a concerted persecuting effort, or a component of one; but even outside a legal context the greatness of the evil owes something to its extent. So from this point of view numbers seem to count. It is very unclear whether numbers are absolute (a body-count) or relative (a proportion of the target population) or time-sensitive (numbers killed per day), but they would certainly seem to count in somehow. On the other hand, of course, moral sense rebels at the thought that numbers count in this way: that the Holocaust would have been \textit{less of a crime} if only (say) three million had been killed, or that we might tell whether the Holocaust or Stalin’s reign of terror was worse by simply counting bodies, or whether \textit{enough} Kosovars were killed to make NATO’s action against Serbia justifiable - inviting the cruel and absurd question, how many would have been enough?\textsuperscript{30}

How is scale to be measured? First, there is no ‘body count’, fixed for all time like an element of the crime itself. There is only a rule of jurisdiction of far greater subtlety. Under the UN Charter, a consensus exists that a purely internal atrocity of \textit{sufficient} scale and seriousness both ‘shocks the conscience of humanity’ and also ‘threatens the peace, security and well being of the world’. Now both concepts are essentially vacuous. They could mean a single crime or a thousand deaths or it could mean something entirely different. It can mean different things at different times and

\textsuperscript{27} Note by the President of the Security Council, UN SCOR, 47\textsuperscript{th} sess, 3046\textsuperscript{th} mtg. 3, UN Doc. S/23500 (1992); see Stefan Talmon, ‘The Security Council as World Legislature’ (2005) 99 AJIL 175 at 180-181.

\textsuperscript{28} Chesterman, above n 24, chapters 3 and 4, in particular at 158.

\textsuperscript{29} Geoffrey Robertson, for example, says crimes against humanity involves ‘the key to unlock the closed door of state sovereignty, and to hold the political leaders responsible for the great evils they inflict upon humanity’ Geoffrey Robertson, \textit{Crimes Against Humanity} (Allen Lane, London, 1999) 375.

\textsuperscript{30} Vernon, above n 4, 245-246.
it can vary with the tribunal in question. At present, the consensus of the international
community is that both tests are only satisfied where there is manifest state failure to
protect its populations (meaning simply 'people') from an attack involving extreme
violence. 'Extreme violence' can only be judged by considering those purely internal
atrocities which have warranted international intervention in the past. Generally, an
attack against a small number of persons or purely non-violent acts against several
persons (such as imprisonment in humane conditions) are not situations of 'extreme
violence'. They do not meet the current consensus as to what 'shocks the conscience
of humanity' and 'threatens the peace, security and well being of the world'.

4. THE IMPUNITY PRINCIPLE

The impunity principle says that one of the defining aspects of a crime against
humanity is that it takes place in a jurisdictional vacuum. The perpetrators enjoy de
facto or de jure immunity. Typically they are state actors or those shielded by the
state. This, beyond doubt, has been a constant in the concept of a crime against
humanity since the antiquities. St Augustine, basing himself upon the practice of
plebeian resistance to senatorial decrees, suggested there was a right of humanity to
respond to 'abominable' state acts.\(^{31}\) It is worth considering why state action or
complicity is important. Ordinarily, the status or identity of the perpetrator does not
govern criminal liability. It certainly is not a principle of international human rights
law. It is, however, a principle of state responsibility. When crimes are allowed to be
committed by states we naturally want to create a mechanism for trying the
perpetrators. This can only occur by creating a court outside the state concerned and
investing it with extraterritorial or international jurisdiction. This is necessary not
because state backed criminal conduct is more reprehensible than a large-scale
'ordinary' domestic crime but because the latter takes place in a jurisdictional
vacuum. This suggests that the requirement of state complicity or impotence is a rule
of jurisdiction which governs the right to impose an outside legal order on an
otherwise sovereign state.

Nevertheless, it is not state action or policy alone which permits the international
jurisdiction to be invoked. The imprisonment of a single political figure, such as Aung
San Suu Kyi by the Burmese military, is not, at least on current state practice, a crime
against humanity. It is a combination of an attack of sufficient scale and seriousness
and state complicity or impotence which makes up a crime against humanity.

5. AN INTERNATIONAL PENAL CODE OR AN INTERNATIONAL
JURISDICTITON?

As one delegate said in the International Law Commission proceedings of 1951,
the war nexus was necessary to ensure crimes against humanity were limited to
threats to the peace rather than becoming some Utopian international penal code.\(^{32}\)
Since the abandonment of the war nexus an ambiguity and tension exists in the new
concept of crimes against humanity because it is unclear if its purpose is still to
protect the interests of states in international peace or the interests of individuals.

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\(^{31}\) St Augustine, *The City of God* (Penguin, Harmondsworth, 1972) (David Knowles, trans)
180.

\(^{32}\) Summary Records of the 3\(^{rd}\) Sess., 91\(^{st}\) mtg reprinted in [1951] 1 Year Book of the
International Law Commission 71, 76.
Does it principally govern relations between states (the traditional field of international law) or does it principally concern protecting individuals from any serious and arbitrary attack on their lives, well-being and liberty (the traditional field of criminal law)? There is a conflict between those who see crimes against humanity as an international penal code protecting individuals from the state and those who seek to maintain a link between crimes against humanity and threats to international peace so as to prevent too great an interference in the internal affairs of states by outsiders. The inherently vague notion of a 'widespread or systematic attack against any civilian population' in Article 7 of the ICC Statute represents a compromise between the two camps.

Since the Second World War and the advancement of international human rights law, many argue that the protection of individuals ought be the ultimate concern of international law, not the interests of states in peaceful relations. The conception that international law is the province of states, not individuals, has been termed by one scholar as the 'billiard ball' theory of international relations. States collide as opaque balls and no state may view or feign to view what occurs within another state's domestic jurisdiction. This may be regarded by some as immoral and by others as necessary to ensure global peace and security. The conflict between the two is known as the justice and peace paradox.

There is a trend towards favouring the moral claims of individuals, including their right to be protected from any serious and arbitrary attack on their lives, liberty or well-being, over the claims of states to be immune from international interference in their domestic affairs. As the Appeals Chamber of the ICTY stated in the Tadić Jurisdiction Decision:

> a State sovereignty-orientated approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *honinum causa omne jus constitutium* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value so far as human beings are concerned. Why protect civilians from belligerent violence, or from rape, torture or the wanton destruction of hospitals, churches, museums or private property ... when two sovereign states are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted 'only' within the territory of a sovereign State.

At a moral or normative level, it is understandable that one should regard conduct which amounts to a war crime in international armed conflict as being equally worthy of international condemnation when committed in non-international armed conflict. What is clearly wrong, however, is to reason from this normative statement that one can conclude that the rules of jurisdiction concerning the right to try those suspected of committing international war crimes can also now be applied to the same conduct when committed in non-international armed conflict. This would sweep aside as irrelevant the very existence of sovereign states. In other words, it may be legitimate to expand the area of international human rights law to reach the individual in his or

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34 *Prosecutor v Tadić (Defence Motion for Interlocutory Appeal on Jurisdiction)*, Case No IT-94-1-AR72 (2 October 1995) [96]–[97].
her relations with the state, but it remains an entirely different issue whether either a foreign state or the international community, through the Security Council, may enforce such a breach.

There is a tendency to expand the boundaries of traditional international crimes as part of the 'human-being-orientated' approach. Genocide has been applied to situations which may perhaps be more akin to traditional notions of crimes against humanity.\(^\text{35}\) Torture, as an alleged international crime under customary law, has been interpreted to apply to cases beyond its treaty definition so that it more resembles any intentionally inflicted serious assault.\(^\text{36}\) Similarly, there is a call by some commentators to downplay the threshold requirements of crimes against humanity in order to expand the protection of individuals from the excesses of the state. Consideration of a 'human-being-orientated' approach would lead to the removal of this threshold completely so that most serious domestic crimes would also be international crimes. This fails to recognise that the threshold requirements of crimes against humanity are in substance rules of jurisdiction.

Part of the difficulty is that international criminal law, outside the core crimes of war crimes, genocide and crimes against humanity, remains an uncertain field of international law. Whilst the definition of an international crime can be easily stated – that is, individual criminal responsibility directly imposed by international law and regardless of any contrary national law – the principles applicable in respect of discerning a crime's existence, content and character remain uncertain. Theodor Meron writes:

\[\ldots\text{whether international law creates individual criminal responsibility depends on such consideration as whether the prohibiting norm in question, which may be conventional or customary, is directed to individuals, whether the prohibition is unequivocal in character, the gravity of the act, and the}\]

\(^35\) For example, the notion of genocide was applied by Spanish courts to former Chilean President Pinochet’s crimes which could hardly be viewed as with intent to destroy, in whole or part, a national, ethnic, racial or religious group: see Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press, Oxford, 2003) at 184-8. Genocide has also been used to describe the atrocities of Pol Pot in Cambodia even though most of the victims were of the same national, ethnic, racial or religious group as the attackers: see William A. Schabas, ‘Should Khmer Rouge Leaders Be Prosecuted for Genocide or Crimes Against Humanity?’ *Searching for the truth. Number 22. October 2001. Magazine of Documentation Center of Cambodia* (Khmer version); Gregory H. Stanton, ‘The Khmer Rouge Did Commit Genocide’, *Searching for the truth. Number 23. November 2001: Magazine of Documentation Center of Cambodia (Khmer version); Suzannah Linton, ‘Thoughts On Schabas-Stanton-Johansen’, *Searching for the truth. Number 25. January 2002, Magazine of Documentation Center of Cambodia (Khmer version), <http://www.dccam.org/Tribunal/Analysis/Debate_Genocide.htm> viewed 24 April 2006. In *Prosecutor v Krstić (Judgment)*, Case No. IT-98-33-A (19 April 2004), the Appeals Chamber upheld that the killings of 7,000 to 8,000 boys and men in Srebrenica qualified as genocide, being the destruction of a ‘part of the ethnic group of Bosnian Muslims.

\(^36\) *Prosecutor v Kunarac (Trial Chamber Judgment)*, Case No IT-96–23–T & IT-96–23/1–T (22 February 2001) [482],[493] and [497] (the Trial Chamber thought the Torture Convention mainly had application to states’ obligations and hence, its emphasis on torture practiced by organs of the state for state purposes of criminal investigation); *Prosecutor v Kvočka et al (Appeals Chamber Judgment)*, Case No IT-98-30/1-A (28 February 2005) [289].
interests of the international community. Those factors are all relevant for
determining the criminality of various acts.

the legal criteria for judging criminality in this area are still far from clear, as
shown by the lack of clarity as to whether violations of environmental
treaties, the use of land mines, or the use of blinding laser weapons, for
example, involve individual criminal responsibility.37

Such a list of legal criteria is inherently subjective. How does one discern the
interests of the international community? or judge whether a breach of a norm is
'grave', 'unequivocal' or 'directed at individuals'? Bassiouni, from the very wide
discourse of conventions which call upon States Parties to suppress certain conduct,
identifies what he calls 'jus cogens crimes'. According to Bassiouni, jus cogens
international crimes, in order of their emergence, are: piracy, slavery and slave-
related practices, war crimes, aggression, crimes against humanity, genocide and
torture.38 Even this list is controversial as scholars such as Cassese dispute that piracy
can be regarded as an international crime.39 According to Bassiouni crimes rise to the
level of jus cogens because:
certain crimes affect the interests of the world community as a whole because
they threaten the peace and security of human kind and because they shock the
conscience of humanity. If both elements are present in a given crime, it can
be concluded that the crime is part of jus cogens. The argument is less
compelling, though still strong enough, if only one of these two elements is
present. Implicit in the first, and sometimes the second element, is the fact that
the conduct in question is the product of state action or a state-favouring
policy. Thus, a jus cogens crime is characterised, explicitly or implicitly, by
state policy or conduct, irrespective of whether it is manifested by commission
or omission. This is one of the distinctions between jus cogens and other
international crimes, which are not the product of a state action or a state
favouring policy.40

Broomhall similarly says 'shocking the conscience of humankind', disrupting
international peace and security' and 'state action or policy' are 'key factors upon
which international criminalisation rests'.41

At the other end of the spectrum, some scholars argue that certain ordinary crimes,
such as murder (often called extra-judicial killings), the taking of hostages, rape or
degrading treatment, are international crimes without the need for any other factors
such as armed conflict, a threat to international peace, state-action or a state-favouring
policy.42 Courts in the United States under the Alien Tort Claims Act of 1789 (28 USC

are war crimes, crimes against humanity, genocide, torture, aggression and some extreme
forms of terrorism (serious acts of State-sponsored or -tolerated international terrorism): id.
40 M C Bassiouni, above n 38, 173.
42 See Theodor Meron, 'International Criminalization of Internal Atrocities' (1995) 89 AJIL
554, 566-568.
§1350) have held that murder (including summary executions), extermination, enslavement, deportation or forcible transfer, prolonged (but not short term) arbitrary detention, torture, rape, persecution and enforced disappearances amount to conduct ‘committed in violation of the law of nations’. The Trial Chamber of the ICTY in Vasiliyevic said murder was ‘a well-defined crime under customary international law’ because:
(i) during the Second World War persons were convicted of the offence as a war crime and a crime against humanity,
(ii) every domestic legal system provides for its criminalisation, punishment and definition;
(iii) the jurisprudence of the ICTY and ICTR supports the proposition.

When discussing in chapter 2 the status of crimes against humanity in international law in 1945, it was suggested that the strongest juridical foundation for this category of international crimes may be the ‘general principles’ source of international law or the tradition of natural law, but that one cannot reason from this source any rule of jurisdiction or right to try in the face of state opposition. This view is controversial because some scholars argue that customary law alone, not ‘general principles’, can be a source of international crimes. This leads to a debate as to whether grave violations of human rights, such as murder, rape, torture or inhumane treatment, can evidence a crime under customary law.

The extent to which any grave breach of human rights is an international crime remains controversial. Hence, human rights commentators seek to make crimes against humanity do the work of an international penal code or bill of rights. The approach taken in this work has been twofold. First, the underlying offences of crimes against humanity, or at least some of the more traditional and serious ones, such as murder, torture, rape, enslavement or inhumane treatment, represent conduct which is ‘criminal according to the general principles of law recognised by the community of nations’, at least as an exception to the prohibition against retroactive criminal punishment. Secondly, the various threshold requirements of crimes against humanity are best viewed as ad hoc statements of jurisdiction for the Tribunals in question. When no issue of jurisdiction is involved, the prosecutor can prosecute for the domestic offence under the lex delicti. In the event of there existing some local amnesty or bar to such a prosecution, this can be overturned without infringing the nullum crimen principle, provided the conduct (such as murder or torture) is ‘criminal according to the general principles of law recognised by the community of nations’. It may be better to think of the underlying offences in Article 7 as already being

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43 See William Aceves and Paul Hoffman, ‘Pursuing Crimes Against Humanity in the United States: The Need for a comprehensive Liability Regime’ in Mark Lattimer and Philippe Sands (eds), Justice For Crimes Against Humanity (2003) 239 at 263-264, though the Supreme Court has recently held that great caution ought be shown before finding the existence of a violation of the law of nations: Sosa v Alavazo-Machain 542 US (2004). See also the debate in Case of Strelitz, Kessler and Kven v Germany, applications nos 34044/96, 35532/97 and 44801/98 Eur Court HR (22 March 2001) as to whether intentional homicide pursuant to the shoot to kill policy towards persons of the German Democratic Republic attempting to cross the border into the Federal Republic of Germany amounted to an international offence: [94], [104]. In the concurring opinions of Judges Loucaides and Levits, they preferred to hold that the shoot to kill policy amounted to ‘crimes against humanity’, where individual criminal responsibility was clearly recognised.

44 Prosecutor v Vasiliyevic (Judgment), Case No IT-98-32-T (29 November 2002) [205].
international crimes in their own right. The high threshold for crimes against humanity are special rules of jurisdiction which govern the right of international tribunals to try suspects for crimes against humanity irrespective of position, local law or state opposition. As they are rules of jurisdiction, which do not involve elements of the offences as such, they should not be readily downplayed.

6. PROSECUTING CRIMES AGAINST HUMANITY BEFORE STATE COURTS: A ROLE FOR REGIONAL CRIMINAL TRIBUNALS

If one assumes that the threshold requirement in Article 7 of the ICC Statute is an element of the offence, rather than a rule of jurisdiction, this can lead to a confused approach by state courts in certain contexts. First, there is the resort to charges of 'crimes against humanity' by state courts where no jurisdictional issues are involved. Recent examples include the Extraordinary Chambers in Cambodia and the Iraqi Special Tribunal. Both are domestic courts with undoubted jurisdiction to try the former leaders of the countries concerned. Nevertheless, both states have felt the need to charge such persons with 'crimes against humanity'. This sets up an entirely false threshold that may inappropriately shield the very persons that are being prosecuted. It would be better simply to have Saddam Hussein or the leaders of the Khmer Rouge convicted as 'mass murderers' and the concept of crimes against humanity kept for international prosecutions. If need be, any local bar or amnesty to the domestic charges can be overturned without infringing the nullum crimen principle.

Further, because some view any large-scale crimes – such as the attack in New York on September 11 – as a 'crime against humanity' they argue that the perpetrators of any such crimes ought to be the subject of international prosecution rather than a domestic prosecution. In this regard, the author agrees with the remarks of Raymond Johansen:

1 believe that I speak for the vast majority of New Yorkers when I insist that the only proper legal venue for the ring leaders of this criminal enterprise will be New York, where they will be prosecuted for 5,000+ counts of plain, old-fashioned murder.

What role should state courts play in respect of the 'crimes against humanity' committed outside its borders? The United Kingdom, when declining to invest its courts with universal jurisdiction over the crimes covered by the ICC Statute, argued that states could now withdraw from the field because of the role that will be played by the ICC. The ICC, however, will not necessarily play the pre-eminent role in the prosecution of crimes against humanity into the future. Whilst there are currently 100 State Parties to the ICC Statute, the eight most populous countries which have not ratified the ICC Statute encompass more than half of the world's population (3.4


47 See Chapter 6, section 2.14.

48 As at 25 November 2005.
billion out of over 6 billion), and include China, India, Indonesia, Japan, Pakistan, Russia and the United States. France and the United Kingdom are the only permanent members of the Security Council which have ratified the treaty. The fact that many states are likely not to become State Parties will limit the work the ICC can do. The increase in the number of states which now have extraterritorial jurisdiction over crimes against humanity points towards such states playing an important role in the future.

Nevertheless, there is no escaping the potential for abuse or biased prosecutions if universal jurisdiction becomes as ubiquitous as some human rights commentators would wish. As Judge Rezek in the Arrest Warrant case says: ‘It is not without reason that the Parties before the Court have discussed the question how certain European countries would react if a judge from The Congo had indicted their officials for crimes supposedly committed on their orders in Africa’. Judge Bula-Bula (the Democratic Republic of the Congo's representative on the Court) goes much further. He castigates Belgium for posing ‘as prosecutor for all mankind, in other words, to claim the right to redeem human suffering across national borders and over generations.’ He accuses Belgium of mounting a blatantly politically motivated prosecution reminding Belgium that as former colonial ruler it had inflicted crimes against the Congolese people for decades and that during the civil war after colonial rule Belgium committed its own ‘crime against humanity’ by being involved in the assassination of nationalist Prime Minister Patrice Lumumba. Bula-Bula suggests Belgium is up to her old tricks because Yerodia, the defendant, was a Lumumbist in the government of fellow Lumumbist Laurent Kabila and Yerodia was forced out of Kabila’s government because of Belgium’s interference on behalf of the Congolese opposition. He disputes Belgium’s good faith in issuing a warrant only for Yerodia, rather than a number of other world leaders, such as Sharon, who were being prosecuted in Belgium courts as well. Judge Bula-Bula says Belgium should prosecute the companies engaged in illegal exploitation of natural resources in the Democratic Republic of the Congo or those responsible for the deaths of millions of Congolese caused by Rwanda and Uganda’s illegal intervention – an African international war largely ignored by the West – rather than intervening in the politics of its former colony.

Whatever one may think about the alleged crimes committed by Yerodia, there is no real credible answer to this lengthy charge made against Belgium even if it is not

49 Luban above n 1, 131.
51 Ibid, Separate Opinion of Judge ad hoc Bula-Bula, [81].

52 Ibid.
53 Ibid, [8]-[11].
54 Ibid, [14].
55 Ibid, [23].
56 Ibid, [80].
57 Ibid, [13].
59 Arrest Warrant Case above n 50, Separate opinion of Judge ad hoc Bula-Bula, [72], [82].
all true. The immediate impression left is that any country but Belgium should be prosecuting Yerodia. Even Luban, a supporter of universal jurisdiction writes:

For human rights lawyers applauding Belgium's excellent adventure in universal jurisdiction and taking for granted the purity of Belgian motives, these accusations - not to mention the bitter invective of Bula-Bula's opinion - should serve as an important caution.60

The fact remains that universal jurisdiction is generally invoked by developed western countries and is directed to developing countries. It may be resented as a new form of judicial imperialism over the developing world. One has to counteract the allegation of bias or the simple suggestion that a country such as Belgium is too far removed from the socio-political setting of Africa to be able fairly and impartially to judge the crimes of that continent. When there were calls for Australia61 and Canada62 to prosecute President Robert Mugabe over Zimbabwe's slum clearance policy and other atrocities committed, labelled a crime against humanity,63 John Howard, the Prime Minister of Australia, called upon neighbouring African States to do more to pressure Mugabe to stop abuses occurring in the country.64 This suggests recognition of the sensitivity involved in developed non-African countries making complaints about crimes against humanity in Africa.

Whenever the international community or the United Nations has become involved in state courts or hybrid tribunals exercising jurisdiction over international crimes, it has generally required international judges and international prosecutors appointed by the Secretary-General. This can be seen as an expression of concern at the legitimacy of a national court, staffed by nationals from one state, following purely domestic law, exercising an international jurisdiction. To increase the legitimacy of national courts exercising universal jurisdiction over serious international crimes, states should consider 'internationalising' their courts as much as possible. Steps could include the appointment of ad hoc international judges, ad hoc international prosecutors, perhaps upon the recommendation of the Secretary-General.

60 Luban, above n 1, 149.


63 It is reported that the government's controversial operation to "Drive Out the Filth" destroyed the homes or jobs of 700 000 people and the lives of 2.4 million others: see, for example, Human Rights Watch Report, Zimbabwe: Evicted and Forsaken Internally displaced persons in the aftermath of Operation Murambatsvina, December 2005, Vol. 17, No. 16(A).

and with the agreement of the Security Council, and the primary application of international law, not local law.

Further, as in the case of any alleged unilateral right of humanitarian intervention, the potential for abuse may be regarded as less if the prosecution has the backing of several states. This was the rationale given by Ohrentlichter before the Special Court of Sierra Leone as to why international courts could override Head of State immunity but a state court could not. This would tend to suggest that regional criminal courts, rather than single state courts, would have greater legitimacy in enforcing international crimes, such as crimes against humanity. When the Security Council was debating whether to refer the Sudan situation to the ICC, the United States, whose opposition to the ICC is well known, proposed creating a new regional criminal court to sit at the site of the ICTR at Arusha, Tanzania, to be administered jointly by the African Union and the UN. In the end, other members of the Security Council did not agree and the matter was referred to the ICC with the United States abstaining.

The Security Council, in its desire to uphold the pre-eminent role of the new ICC, may have been too hasty in rejecting a regional criminal court for Africa when it had the support of the United States. When one is speaking of the 'crimes against humanity' of today, one is speaking essentially about the current strife and violence in Africa. All of the ICC's current investigations involve events in Africa, though the Court is still to have in custody its first suspect. The crimes against humanity of today require new solutions based upon the humanitarian crises of today. The model of universal jurisdiction over crimes against humanity, as classically stated by the Court in Eichmann, may have been appropriate when dealing with Nazi war criminals, but is no longer the most appropriate model for dealing with the crimes against humanity that are currently ongoing in Africa. As Paul Kahn has remarked:

An international community that allows massive violations of human rights as long as a regime is in power, but then threatens to prosecute offenders once they are out of power – and even then only if they happen accidentally to fall within a state's jurisdictional grasp – is not a regime of law's rule.

What is needed is a new way of thinking. In general, there is a need for international criminal tribunals which can sit between the lofty heights of the ICC and the narrowness of single state court prosecutions. If an opportunity arises in the future for regional criminal courts backed by the Security Council, it ought to receive serious consideration. Whilst it may be viewed by some as a cynical move which frees the permanent members of the Security Council from scrutiny, the best hope for the future may lie in the Security Council coming to an agreement with the African Union to create a permanent international criminal tribunal for Africa, along the lines of the Special Court for Sierra Leone – but one staffed by Africans, with African judges who can rule upon the crimes of Africa.

7. CONCLUSION

To summarise then, a crime against humanity involves four elements:

1. it is conduct which is criminal according to the general principles of law.

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65 Prosecutor v Taylor (Decision on Immunity From Jurisdiction), Case No SCSL-2003-01-I, (31 May 2004) [51].
67 Quoted in Luban, above n 1, 130.
recognized by the community of nations, being, in the main, a serious and arbitrary attack upon a person’s life, liberty and well being or the means necessary to enjoy life, liberty and happiness;

(2) it occurs in the course of an attack which ‘shocks the conscience of humanity’ (the humanity principle);

(3) it threatens the peace, security and well being of the world (which combined with the humanity principle generally means an attack of sufficient scale or seriousness that it has warranted international interventions in the past in the case of purely internal atrocities); and

(4) it occurs in circumstances of a jurisdictional vacuum (called the impunity principle which involves manifest State failure to protect its people from such an attack and prosecute those responsible).

The first element alone gives rise to the elements of an ‘offence’ as such. The remaining elements are rules of jurisdiction enabling international tribunals (those created by the Security Council under Chapter VII of the UN Charter or the ICC) to try suspects irrespective of their position, local law or state opposition, or State Party opposition in the case of the ICC.

This of course leaves a jurisdictional gap for parts of the world in the face of Security Council indifference. Further and constant work is needed to make effective the closing of this gap. Urging all states to prosecute all suspects, when in reality only a handful will do so and only when the state official is no longer in office, is not the answer. As important as it is to understand what a crime against humanity is, more important is the search for a solution to ensure that no such crime ever occurs again.

The twentieth century was an age of extremes and extreme violence. It was an age of ‘crimes against humanity’. The aim must be to make the twenty first century the age when, like polio or small pox, ‘crimes against humanity’ can also be a thing of the past.
APPENDIX ONE

DEFINITIONS OF CRIMES AGAINST HUMANITY

1. INTERNATIONAL INSTRUMENTS

1.1 London Charter, 1945, article 6(c) – see chapter 2

Article 6

The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

... (c) 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.

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 persons in execution of such plan.

1.2 Tokyo Charter, 1946, article 5(c) – see chapter 2

Article 5: Jurisdiction Over Persons and Offenses

The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

...
(c) Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed [against any civilian population,]¹ 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. 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 person in execution of such plan.

1.3 Allied Control Council Law No 10, 1946, article II (1)(c) – see chapter 3

Article II

1. Each of the following acts is recognized as a crime:

...  

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

1.4 Statute of the ICTY, 1993, article 5 – see chapter 4

Article 5: Crimes against Humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts.

¹ The words in the square brackets were included in the original proclamation of General Macarthur on 19 January 1946, but were subsequently deleted by a further proclamation of Major General Marshall on the command of General Macarthur on 26 April 1946.
1.5 Statute of the ICTR, 1994, article 3 – see chapter 4

Article 3: Crimes against Humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

(a) murder;  
(b) extermination;  
(c) enslavement;  
(d) deportation;  
(e) imprisonment;  
(f) torture;  
(g) rape;  
(h) persecutions on political, racial and religious grounds;  
(i) other inhumane acts.

1.6 Statute of the ICC, 1998, article 7 – see chapter 5

Article 7: Crimes against Humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;  
(b) Extermination;  
(c) Enslavement;  
(d) Deportation or forcible transfer of population;  
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;  
(f) Torture;  
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;  
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

1. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "Extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

2. INSTRUMENTS OF THE HYBRID TRIBUNALS

2.1 Statute of the SCSL, 2002, article 2 – see chapter 6

*Article 2: Crimes against Humanity*

The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation;
(e) Imprisonment;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;
(h) Persecution on political, racial, ethnic or religious grounds;
(i) Other inhumane acts.

2.2 UNTAET Regulation 2000/15 creating the SPSC, section 5.1 – see chapter 6

*Section 5: Crimes against Humanity*

5.1 For the purposes of the present regulation, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack:

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

5.2 For the purpose of paragraph 1:

(a) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(b) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(c) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(d) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(e) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(f) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
"The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

"Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

2.3 The Law on the Extraordinary Chambers in Cambodia, 2003, article 5 – see chapter 6

**Article 5**

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed crimes against humanity during the period 17 April 1975 to 6 January 1979.

Crimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack against any civilian population, on national, political, ethnical, racial or religious grounds, such as:

a) murder;
b) extermination;
c) enslavement;
d) deportation;
e) imprisonment;
f) torture;
g) rape;
h) persecutions on political, racial, and religious grounds;
i) other inhuman acts.

2.4 Provisional Criminal Code for Kosovo, 2004, article 117 – see chapter 6

**Article 117: Crimes against Humanity**

(1) Whoever commits one or more of the following offences knowing that they are a part of a widespread or systematic attack directed against any civilian population:

1) Murder;
2) Extermination;
3) Enslavement;
4) Deportation or forcible transfer of population;

5) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

6) Torture;

7) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity;

8) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law, in connection with the offences provided for in the present article and Articles 116, 118 - 121;

9) Enforced disappearance of persons;

10) The crime of apartheid; or

11) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health

shall be punished by imprisonment of at least five years or by long-term imprisonment.

(2) For the purposes of the present article,

1) The term “attack directed against any civilian population” means a course of conduct involving the multiple commission of offences provided for in paragraph 1 of the present article against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack.

2) The term “extermination” includes the intentional infliction of conditions of life, inter alia, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.

3) The term “enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.

4) The term “deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.

5) The term “torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under
the control of the perpetrator; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.

6) The term “forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.

7) The term “persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.

8) The term “crime of apartheid” means inhumane acts of a character similar to those provided for in paragraph 1 of the present article, committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.

9) The term “enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a state or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

10) The term “gender” refers to the two sexes, male and female, within the context of society.
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