

LEGAL MEMORANDUM

CRIMES AGAINST HUMANITY: CONNECTION TO WAR

**Patrick L. Ruiz
56 Forbes Street, #3
Jamaica Plain, MA 02130**

Upper Class Writing Requirement

YUGOSLAVIA WAR CRIMES PROJECT

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. ISSUE: What nexus to combat is required by the Statute of the Yugoslavia War Crimes Tribunal for a conviction for crimes against humanity?

B. INTRODUCTION

The world has attempted to deal with atrocities in the former Yugoslavia via the creation of an ad hoc tribunal by the United Nations Security Council. The law this tribunal may apply is codified in the Statute of the Tribunal which was drafted by the United Nations Secretary-General and approved by the Security Council. The interpretation of Article 5 of the Statute of the International Tribunal defining “crimes against humanity” is the issue here. That article places a limit on such crimes by including the qualifier: “...when committed in armed conflict...” The issue addressed in this memorandum is how close in time and geographical distance the atrocities must be to the armed conflict. In other words, does the tribunal have jurisdiction over atrocities committed during war, even though the atrocities are somewhat attenuated temporally and/or geographically from the conflict? The nexus issue will be addressed in this memorandum by exploring the historic development of the concept of crimes against humanity, and the legislative history of the definition of such crimes contained in the Yugoslavia Tribunal’s Statute.

C. SUMMARY OF CONCLUSIONS

It is by now a well-settled rule of customary international law that crimes against humanity do not require a connection or “nexus” to international armed conflict. The armed conflict requirement of the Tribunal’s Statute Article 5 is related to the competence of the Security Council, which cannot act in the absence of a threat to international peace and security. As such, the requirement may be interpreted broadly to permit prosecution of crimes against humanity committed anywhere in the former Yugoslavia during the period of the conflict (1991 - 1995).

II. BACKGROUND

A. HISTORY OF THE PROSECUTION OF CRIMES AGAINST HUMANITY

The London Agreement, which was signed by the Four Major Allies -- France, the United Kingdom, the United States, the U.S.S.R. -- and 19 other nations, was a statement of intent, and later an assertion of an international effort to try war criminals.¹ The legal definition for war crime atrocities and individual accountability was finally written on August 8, 1945, by an Annex to the London Agreement called The Charter of the International Military Tribunal for the Trial of the Major War Criminals (“Charter” and “IMT,” respectfully).² Charter Article 6 specified the crime categories by which major war criminals would be tried by the Allies: “Crimes Against Peace,” “War Crimes,” and “Crimes Against Humanity.”³ In the Charter, Article 6(c) category, “Crimes Against Humanity,” was defined as:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or

¹ See M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* at 2 (1992).

² *Id.* at 1.

³ *Id.*

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.⁴

Charter Article 6(c) was the first time international criminal law used the terms “crimes against humanity” and also the first time that this category was defined.⁵ By virtue of the phrase, “in execution or in connection with any crime within the jurisdiction of the Tribunal,” the Nuremberg Charter, the law applied at the Nuremberg Tribunal, was interpreted as requiring crimes against humanity to have a nexus to armed conflict.⁶

Two other definitions of “crimes against humanity” developed thereafter: Article 5(c) of the Tokyo Charter and Article II(c) of the Allied Control Council Law No. 10 (CCL 10).⁷ These two subsequent laws differed slightly from the Nuremberg Charter Article 6(c). Article 5(c) of the Tokyo Charter states that crimes against humanity are “[n]amely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”⁸

Both the London and Tokyo Charters provided only for the prosecution of what the Allies considered to be major war criminals in the two separate arenas of military operations.⁹ The London Charter established the International Military Tribunal at Nuremberg.¹⁰ With regard to trial judgments, only regarding groups or organizations

⁴ *Id.*

⁵ *Id.* at 1-2.

⁶ *Id.* at 3.

⁷ *Id.* at 1.

⁸ *Id.* at 607, The Tokyo Charter, Article 5.

⁹ *Id.* at 3.

¹⁰ *Id.*

declared criminal by the Nuremberg Tribunal was the Nuremberg Judgment to have limited effects of *res judicata*.¹¹ In such cases, the national authorities of any Party to the London Agreement were authorized to bring individuals to trial for membership before national, military, or occupational courts.¹² If the Nuremberg Tribunal had declared any such organization to be criminal, in such trials the criminal nature of the group or organization was considered to have been irrebuttably proved.¹³

The Tokyo Charter established the International Military Tribunal for the Far East at Tokyo.¹⁴ Unlike the London Charter, the Tokyo Charter was not a part of a treaty or agreement between the Allies, but was established by a Special Proclamation of General MacArthur as Supreme Commander in the Far East for the Allied Powers.¹⁵ The Tokyo Tribunal did, however, rest on a consensual basis, as General MacArthur acted on authority delegated to him by four of the Allied Powers at war with Japan: the United States, the Soviet Union, the United Kingdom, and China.¹⁶ The Tokyo Charter was substantially the same as the London Charter, save for some exceptions.¹⁷ A major exception was the exclusion of Emperor Hirohito's personal responsibility.¹⁸ Another difference is that the Tokyo Charter does not make "persecution" subject to "religious"

¹¹ See Georg Swarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. II at 476-477, (1968).

¹² *Id.* at 477.

¹³ *Id.*

¹⁴ See M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* at 3 (1992).

¹⁵ See Georg Swarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. II at 467 (1968).

¹⁶ *Id.*

¹⁷ See M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* at 33 (1992).

¹⁸ *Id.*

grounds, due to the fact that the Nazi crimes against Jews did not have a counterpart in the Asian conflict.¹⁹

Another major difference between the two Charters was that whereas the decision of the IMT was absolutely final and not subject to any review, Article 17 of the *Charter of the International Military Tribunal for the Far East* authorized the Supreme Commander for the Allied Powers to “reduce or otherwise alter the sentence except to increase its severity,” but he did not exercise this power.²⁰

Under the Nuremberg Tribunal’s Charter, crimes against humanity covered inhumane acts committed against the civilian populations, provided that two requisites were sufficed.²¹ First, such acts had to be committed in the execution of, or in connection with, war crimes in the strict sense or crimes against peace.²² Secondly, while crimes against humanity might overlap with war crimes in the strict sense and crimes against peace, they were intended to constitute an auxiliary category.²³ So long as the required connection between crimes against humanity and the other two types of war crime under the Charter existed, the Tribunal’s jurisdiction regarding crimes against humanity extended to crimes committed in time of peace and against German nationals or Stateless persons.²⁴ Whether such acts were lawful under any particular local law was irrelevant.²⁵

¹⁹ *Id.* at 34.

²⁰ See Howard S. Levie, *Terrorism in War--The Law of War Crimes, A Volume in Terrorism: Documents of International & Local Control*, Third Volume, Second Series at 142 (1993).

²¹ See Georg Swarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. II at 497 (1968).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

The object of this category of crimes against humanity was to make more readily amenable to the Tribunal's jurisdiction acts of persecution and extermination of who groups of civilians.²⁶ The Nuremberg Tribunal singled out inhuman action against particular groups: political opponents of the Nazi regime, aged, insane and incurable people, and ethnical minorities such as the Jewish population in countries under the sway of the Axis Powers.²⁷

The Tokyo Tribunal followed the Nuremberg Tribunal also in its treatment of crimes against humanity, yet it put even less emphasis on this category of crime.²⁸ When General MacArthur confirmed the decision and sentence of the Military Commission, he said

It is not easy for me to pass penal judgment upon a defeated adversary in a major military campaign. I have reviewed the proceedings in vain search for some mitigating circumstances on his behalf. I can find none.

No new or retroactive principles of law, either national or international, are involved. The case is founded upon basic fundamentals and practices as immutable and as standardized as the most matured and irrefragable of social codes.

The proceedings were guided by that primary rationale of all judicial purpose -- to ascertain the full truth unshackled by any artificialities or narrow method of technical arbitrariness. The results are beyond challenge.²⁹

As stated before, the trials in Nuremberg and Tokyo were primarily for "major" war criminals. CCL 10 developed in response to the need to try war criminals of a somewhat different nature.³⁰ There were still thousands of individuals who were known or believed to have been guilty of war crimes, many of whom were actually of almost the same official stature as those of the major war criminals and whose

²⁶ *Id.* at 498.

²⁷ *Id.*

²⁸ *Id.*

²⁹ See Howard S. Levie, *Terrorism in War--The Law of War Crimes, A Volume in Terrorism: Documents of International & Local Control*, Third Volume, Second Series at 160 (1993).

³⁰ *Id.* at 71.

offenses were often as atrocious as those committed by the persons tried and, if convicted, punished for their offenses. In addition, there was a vast number of “minor” war criminals, individuals who were alleged to have committed “conventional war crimes,” such as crimes against prisoners of war, crimes against the civilians in occupied territory, crimes against concentration camp internees, etc. As the decision would undoubtedly be reached that there would be no further trials conducted by the [IMT], or by a successor to that Tribunal, this left the task to the trial of the accused and the punishment of the convicted to each Occupying Power.

There were four Occupying Powers, each with its own Zone, each with its own sets of courts, and each with its own system of law. In order to establish a common basis for the trials to be conducted in the four Zones, . . . the Allied Control Council for Germany, consisting of the commanders of the four Zones, or their representatives, acting as a legislative body for all of Germany, enacted CCL 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*. It was then the responsibility of each Zone Commander to implement CCL 10 in his Zone.³¹

Therefore, due to the extensive number of war criminals to be tried in these Zones, the language in CCL 10 varied from the London and Tokyo Charters. CCL 10 defines “crimes against humanity” as

[a]trocities and offences, 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.³²

With regard to Article II, section 1(c), CCL 10 was much broader than the London or Tokyo Charters.³³

“Crimes against Humanity,” was generally similar to Article 6(c) of the London Charter with two notable differences: it did not include the provision that the offenses could have been committed “before or during the war”; and it did not include the limiting phrase “in connection with any crime within the jurisdiction of the Tribunal.”³⁴

³¹

³² *Id* at 591, Allied Control Council Law No. 10.

³³ See Howard S. Levie, *Terrorism in War--The Law of War Crimes, A Volume in Terrorism: Documents of International & Local Control*, Third Volume, Second Series at 72 (1993).

³⁴ *Id.*

1. THE NUREMBERG REQUIREMENTS

The first trials for crimes against humanity took place following the Second World War. The Nuremberg Charter recognized two categories of crimes against humanity: inhumane acts (“crimes of the murder type”) and “persecutions” on the specified grounds listed in Article 6(c).³⁵ Initially only the second category of persecution crimes had to be committed in connection with a crime within the jurisdiction of the Nuremberg Tribunal, namely a crime against peace or a war crime.³⁶ As a result of the Berlin Protocol, the requisite connection was extended to the first category of inhumane act crimes which greatly restricted the reference to such crimes committed before the war, but this requirement, as mentioned previously, was not included in the definition of crimes against humanity contained in CCL 10 which was adopted after the Nuremberg Charter and the Berlin Protocol.³⁷

2. THE NUREMBERG TRIALS

The prosecution argued that crimes against humanity were not limited to occurrence during war, but the Military Tribunal held that the language of the London Charter limited the court’s jurisdiction to crimes that were committed in the course of or in connection with aggressive war.³⁸ In the post-Nuremberg Trials under CCL 10, none of the judgments clearly adjudicated whether mass atrocities committed by or with the approval of a government against a racial or religious group of its own inhabitants in

³⁵ See Virginia Morris and Michael P. Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia*, Volume I at 73 (1995).

³⁶ *Id.* at 74.

³⁷ *Id.* at 75.

³⁸ See *International Criminal Law Cases and Materials* at 1032 (1996).

peacetime constitutes crimes under international law.³⁹ Therefore, the court was saying that crimes against humanity must have a nexus to armed conflict. Even though the language of CCL 10 severed the connection to war and in that sense was different from the comparable definition in the London Charter, the *Flick* and *Ministries* tribunals followed the decision of the IMT and declined to take jurisdiction.⁴⁰

In *Flick*, the court stated that

[t]here is no contention that the defendants in any way participated in the Nazi persecution of Jews other than in taking advantage of the so-called Aryanization program by seeking and using State economic pressure to obtain...properties.... These transactions were completed prior to the war...[and] the IMT...declined to take jurisdiction of crimes against humanity occurring before 1 September 1939, basing its ruling on the modifying phrase ‘in execution of or in connection with any crime within the jurisdiction of the Tribunal’ found in Article 6(a) of the Charter attached to the London Agreement of 8 August 1945. It is argued that the omission of this phrase from Control Council Law No. 10 evidences an intent to broaden the jurisdiction of this Tribunal to include such crimes. We find no support for the argument in express language of Law No. 10.⁴¹

In the *Ministries* case, a number of defendants were charged with responsibility for the discriminatory laws and abuses which resulted in atrocities under which German Jews suffered.⁴² As stated above, the *Ministries* Tribunal held similarly to the *Flick* Tribunal.⁴³

Contrary to this jurisprudence, however, were two other Nuremberg trials under CCL 10 where it was determined that crimes against humanity could be committed

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Volume VI, “The Flick Case,” at 1212 (1952).

⁴² See International Criminal Law Cases and Materials at 1032 (1996).

⁴³ *Id.*

during peacetime.⁴⁴ In the *Einsatzgruppen* trial, crimes against humanity were not limited to atrocities committed during war.⁴⁵ The Tribunal stated that

an evaluation of international right and wrong, which heretofore existed only in the heart of mankind, has now been written into the books of men as the law of humanity. This law is not restricted to events of war. It envisages the protection of humanity at all times. (Emphasis added). The crimes against which this law is directed are not unique. They have unfortunately been occurring since the world began, but not until now were they listed as international offenses. The first count of the indictment in this case charges the defendants with crimes against humanity. Not crimes against any specified country, but against humanity....

At the 8th Conference for the Unification of Penal Law held on 11 July 1947, the Counselor of the Vatican defined crimes against humanity in the following language:

‘The essential and inalienable rights of man cannot vary in time and space. (Emphasis added). They cannot be interpreted and limited by the social conscience of a people or a particular epoch for they are essentially immutable and eternal. (Emphasis added). Any injury . . . done with the intention of extermination, mutilation, or enslavement, against the life, freedom of opinion . . . the moral or physical integrity of the family . . . or the dignity of the human being, by reason of his opinion, his race, caste, family or profession, is a crime against humanity.’

The International Military Tribunal, operating under the London Charter, declared that the Charter’s provisions limited the Tribunal to consider only those crimes against humanity which were committed in the execution of or in connection with crimes against peace and war crimes. The Allied Control Council, in its Law No. 10, removed this limitation so that the present Tribunal has jurisdiction to try all crimes against humanity as long known and understood under the general principles of criminal law. (Emphasis added). As this law is not limited to offenses committed during war, it is also not restricted as to nationality of the accused or of the victim, or to the place where committed. (Emphasis added).⁴⁶

The *Justice* trial had the same holding and similar rationale.⁴⁷ The Court stated:

C.C. Law 10 is not limited to the punishment of persons guilty of violating the laws and customs of war in the narrow sense; furthermore, it can no longer be said that violations of the laws and customs of war are the only offenses recognized by common international law. (Emphasis added). The force of circumstance, the grim fact of world-wide interdependence, and the moral

⁴⁴ *Id.*

⁴⁵ See Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Volume IV, “The Einsatzgruppen Case,” at 497 (1952).

⁴⁶ *Id.* at 498-499.

⁴⁷ See International Criminal Law Cases and Materials at 1033 (1996).

pressure of public opinion have resulted in international recognition that certain crimes against humanity committed by Nazi authority against German nationals constituted violations not alone of statute but also of common international law.... This Tribunal, ...is sitting by virtue of international authority and can carry with it only the broad principles of justice and fair play which underlie all civilized concepts of law and procedure.⁴⁸

The tribunals were divided in their interpretations of CCL 10, as noted in the four cases above. The tribunals never definitively resolved whether CCL 10 should be interpreted to mean that crimes against humanity could be committed during peacetime or whether they had to be committed during armed conflict. Therefore, since the tribunals were split in their holdings, the determination as to when crimes against humanity can be applied must be studied in the post-Nuremberg context.

3. POST-NUREMBERG LEGAL DEVELOPMENTS

One might argue that in the historical context, international tribunals were split on whether crimes against humanity should be limited to war or whether they could be committed during peacetime. But as seen in the post-Nuremberg developments, customary international law now extends to atrocities committed during peacetime.⁴⁹ Additionally, and as previously noted, the connection to war was not included in the definition of crimes against humanity contained in Control Council Law No.10, which was adopted after the Nuremberg Charter to provide a uniform basis for the trial of German war criminals other than the major war criminals tried by the Nuremberg Tribunal.⁵⁰ Furthermore, the U.N. War Crimes Commission (UNWCC) had previously

⁴⁸ See Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Volume III, "The Justice Case," at 979, 984 (1951).

⁴⁹ See Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 Tex. Int'l L.J. 30 (1996).

⁵⁰ See Bassiouni, *supra* note 13, at 177.

concluded in 1948 that international law could sanction individuals for crimes against humanity committed not only during war but also during peacetime.⁵¹ In its contribution to the evolution of “crimes against humanity,” the UNWCC stated that the category in the London and Tokyo Charters, “was not meant to be limited to war crimes in the ‘traditional and narrow sense, that is violations of the laws and customs of war, perpetrated on Allied territory or against Allied citizens, but that atrocities committed on Axis territory and against persons of other than Allied nationality should also be punished.’”⁵² Furthermore, the UNWCC held that “international law may sanction individuals for ‘crimes against humanity’ committed not only during war but also during peace.”⁵³ In an excerpt from its “Development of the Laws of War,” the UNWCC stated,

The notion of crimes against humanity, as it evolved in the [UNWCC], was based upon the opinion that many offences [*sic*] committed by the enemy could not technically be regarded as war crimes *stricto sensu* on account of one or several elements, which were of a different nature. In this respect the victims’ nationality played a prominent role, as was exemplified in the case of German and Austrian Jews, as well as of Jews of other Axis satellite countries, such as Hungary and Roumania. The victims were subjected to the same treatment as Allied nationals in occupied territories; they were deported and interned under inhuman conditions in concentration camps, systematically ill-treated or exterminated. It was felt that, but for the fact that the victims were technically enemy nationals, such persecutions were otherwise in every respect similar to war crimes.

As a consequence, the rule stressed during the first days of the [UNWCC]’s activities, that narrow legalisms were to be disregarded and the field of the violations of laws of war extended so as to meet the requirements of justice, was applied in respect to [crimes against humanity].

The development of the subject in the [UNWCC] took, technically speaking, the course of extending the concept of war crimes to a wider notion than that hitherto restricting it to the laws and customs of war. Accordingly, along with the notion of war crimes *stricto sensu*, there evolved the concept of war crimes in a wider, non-technical sense, as a common denominator devised so as to include crimes against humanity,

⁵¹ *Id.* at 180.

⁵² *Id.*

⁵³ *Id.*

It was therefore suggested that the [UNWCC] should include within its competence crimes other than those technically designated as war crimes *stricto sensu*. These were described as crimes committed ‘in violation of the criminal laws of the countries invaded or otherwise affected, of the laws and customs of war, of the general principles of criminal law as recognized by civilized nations, or of the laws of humanity and the dictates of the public conscience as provided in the Hague Preamble.’ This formula was then applied to crimes against humanity, which, as distinct from war crimes proper, were defined as ‘crimes committed against any person without regard to nationality, stateless persons included, because of race, nationality, religious or political belief, irrespective of where they have been committed.’ (Emphasis added).⁵⁴

The 1950 Principles of the Nuremberg Charter and Judgment formulated by the International Law Commission of the United Nations (5 U.N. GAOR, Supp. 12, at 11-14, para. 99, U.N. doc A/1316, 1950) attached the following phrase to the paragraph on crimes against humanity: “when such acts are done or such persecutions are carried out in execution of or in connection with any act of aggression or any war crime.”⁵⁵

Approximately eighteen years later, the U.N. General Assembly adopted the Convention on the Nonapplicability of Statutory Limitations to War Crimes and Crimes Against Humanity by resolution, article 1(b) which states: “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, Nuremberg, of August 8, 1945, and confirmed by resolution 3(I) of February 13, 1946 and 95(I) of December 11, 1946, of the General Assembly of the United Nations....” (G.A. Res 2391 (XXIII), 23 U.N. GAOR, Supp. (No. 18) 40, U.N. Doc. A/7218 (1968)).⁵⁶ Thus it seems that the phrase added in the 1950

⁵⁴ *Id.* at 180, 565-566 (excerpts of the History of the United Nations War Crimes Commission and the Development of the Laws of War compiled by the United Nations War Crimes Commission, 1948).

⁵⁵ See International Criminal Law Cases and Materials at 1034 (1996).

⁵⁶ *Id.*

Principles was dropped. Additionally, the 1968 resolution contained the broad phrase “committed in time of war or peace.”⁵⁷

B. THE INTERNATIONAL TRIBUNAL FOR FORMER YUGOSLAVIA

1. THE LEGAL BASIS FOR ESTABLISHING THE TRIBUNAL

“The [United Nations] Security Council had an adequate legal basis under Chapter VII of the United Nations Charter to establish an International Tribunal to prosecute war crimes committed in [the] territory [of the former Yugoslavia].”⁵⁸ Chapter VII empowered the Security Council with the authority to respond to the violations of international humanitarian law which were determined to constitute a threat to international peace and security.⁵⁹ Because of the context in which the Tribunal was created, the Statute limited its jurisdiction over crimes against humanity to those committed “in armed conflict.”⁶⁰ The Secretary-General’s Report stresses, however, that this limitation was not required by customary international law, which no longer required a link between crimes against humanity and war.⁶¹ It has been postulated that the Statute’s requirement that the crimes be committed in armed conflict should be understood as merely a jurisdictional limitation of the Tribunal and not as a codification of crimes against humanity.⁶² This interpretation is arguably consistent with the fact that

⁵⁷ *Id.*

⁵⁸ See Report on the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia, submitted by A Special Task Force of the ABA Section of International Law and Practice at 9 (1993).

⁵⁹ See Virginia Morris and Michael P. Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia*, Volume I at 83 (1995).

⁶⁰ *Id.* at 82-84.

⁶¹ *Id.* at 81.

⁶² See Diane Orentlicher, *Yugoslavia War Crimes Tribunal*, *ASIL Newsl.*, June-Aug. 1993, at 1,3 (ASIL Focus insert).

the Tribunal was established as an enforcement action under Chapter VII of the U.N. Charter.⁶³

Additionally, from a historical perspective, the Genocide Convention which followed the Nuremberg Judgment, recognized the application of international criminal law in time of peace as well as war and that crimes against humanity existed independently from connection with other crimes.⁶⁴ “The Genocide Convention, adopted after the Nuremberg Judgment, recognized the application of international criminal law in time of peace as well as war and the existence of crimes against humanity independently of any connection with other crimes.”⁶⁵ “Thus, such a connection, which the Nuremberg Charter initially required only for persecution crimes and later extended by the Berlin Protocol to inhumane act crimes, is not required for either category of crimes against humanity as defined in Articles 4 and 5 of the Statute.”⁶⁶

2. THE DEFINITION OF CRIMES AGAINST HUMANITY, PURSUANT TO THE STATUTE OF THE INTERNATIONAL TRIBUNAL

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 81-82. Also, see Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, Volume I at 81 n.261, which states: Article I states as follows: “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.” Furthermore, the 1968 Convention on the Non-Applicability of Statutory Limitations to Certain War Crimes and Crimes against Humanity provides in Article I that such limitations do not apply to “Crimes against humanity whether committed in time of war or in time of peace.” 754 U.N.T.S. 73. The ICRC made the following observations in its Preliminary Remarks, at 7: “Whether war crimes or crimes against humanity, both categories of breaches fall under international penal law. The latter are not considered to be war crimes simply because, unlike the former, they can be committed independently of an armed conflict and, even when committed during a conflict, are not necessarily related to it.” See also Taylor, *Nuremberg Trials: War Crimes and International Law*, International Conciliation, No. 450, April 1949, 241 at 343-344, with respect to the subsequent Nuremberg trials which recognized that crimes against humanity were not limited to time of war.

⁶⁶ *Id.* at 82.

The Statute's Article 5, entitled "Crimes Against Humanity," reads in part: "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..."⁶⁷

The phrase, "when committed in armed conflict" in Article 5 presents a question of legal interpretation where the model London and Tokyo Charters used the words, "committed before or during the war...in connection with any crime within the jurisdiction of the Tribunal."⁶⁸ The Nuremberg Tribunal, which considered itself bound by the Nuremberg Charter, was unable to make a general rule that acts committed before the war began in 1939 constituted crimes against humanity because of this required connection.⁶⁹ Furthermore, if one considers the language in CCL 10, crimes against humanity are not confined temporally or geographically to a connection with war, as CCL 10 deleted the jurisdictional nexus between war crimes and crimes against peace.⁷⁰ The CCL10 Tribunal, however, did not resolve the question of whether "crimes against humanity" extended to peacetime.⁷¹ A thorough analysis must be done, therefore, to compare the various interpretations of crimes against humanity in the context of international law.

III. ANALYSIS

A. HOW SHOULD THE TERMS "CONDUCT IMMEDIATELY RELATED TO COMBAT" BE INTERPRETED?

⁶⁷ See Statute of the International Tribunal.

⁶⁸ See Statute of the International Tribunal, the London Charter, and the Tokyo Charter.

⁶⁹ See Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, Volume I at 76 (1995).

⁷⁰ See *supra*, footnote 11.

⁷¹ See Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, Volume I at 75-76 (1995).

1. THE INTERNATIONAL TRIBUNAL

The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (hereinafter “Appeals Chamber”) used three basic methods to interpret the Statute of International Tribunal: the “literal,” “teleological,” and the “logical and systematic” interpretations.⁷² The Appeals Chamber proceeded with a literal interpretation of the Statute and applied the other methods secondarily only in order to better ascertain the meaning and scope of relevant provisions.⁷³ The Appeals Chamber determined the intent of the Security Council’s enactment of the Statute through a teleological interpretation by reliance on the Security Council’s statements when it established the International Tribunal.⁷⁴ The Security Council’s statements therefore are analogous to a sovereign legislating body and the sovereign legislature’s intent when it creates law. When interpreting law, legislative intent is important in circumstances where the law is ambiguously written and the law is being applied. Since the intent behind the Statute was critical to its application, it was also interpreted by the “systematic construction” which accounted for the “context of the Statute as a whole,” including reference to the Report of the Secretary-General, as well as a “general perspective” of the specific provisions in their historical context in terms of general international law.⁷⁵

2. THE SECRETARY-GENERAL’S REPORT

⁷² See *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, at 4-5 (April 10, 1996).

⁷³ *Id.* at 5.

⁷⁴ *Id.* at 5.

⁷⁵ *Id.* at 5-6.

The Secretary-General's report recognized that under international law, crimes against humanity are prohibited, regardless if committed in the context of an armed conflict or in time of peace.⁷⁶ Therefore, no strict connection or nexus between crimes against humanity and armed conflict should be required for the category of crimes listed in Statute Article 5.

The interpretation of the Statute is different from sovereign legislative intent and interpretation in at least one critical aspect: One sovereign nation did not create the Statute. The Statute came forth from a global effort (as discussed below) and hence, all aspects of interpretation must be considered, as civilization stands to progressively evolve only when we can embrace the consensus of international perspective. It would appear from its actions that the International Tribunal is employing as many ways that it possibly can to interpret the Statute.

The methods of Statute interpretation for the International Tribunal should correspond to the general rule of interpretation of international and customary law, with regard to crimes against humanity in connection to armed conflict. The general rule, although never internationally codified, can be seen through an historical timeline: In 1915, the Turkish massacre of its Armenian minority was denounced as a "crime against humanity" for which the responsible officials would be held accountable.⁷⁷ The 1919 recommendation of the Allied Commission that those who had violated "laws of humanity" by World War I atrocities should be punished, but it was not until the end of

⁷⁶ See Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, Volume I at 81 (1995).

⁷⁷ See Benjamin B. Ferencz, *1 Encyclopedia of Public International Law 870*, (Peter Macalister-Smith ed., 1992).

World War II, however, that the recommendations were implemented.⁷⁸ In 1945, the IMT was formed for the trial of defeated German leaders, pursuant to the Charter which set forth the applicable law, and the IMT interpreted the Charter to mean that crimes against humanity were punishable only if connected with crimes against peace or war crimes; persecution before the war was not covered.⁷⁹ The restriction was lifted in December 1945 with the enactment of CCL 10, which deleted the qualifying clauses, and the subsequent twelve Nuremberg trials held that crimes against humanity could be punishable even if unrelated to war.⁸⁰ The United Nations General Assembly Resolution 96 (I) has confirmed and expanded the scope of crimes against humanity where genocide -- a denial of the right of existence of entire human groups -- was declared an international offense.⁸¹ A 1948 Convention of the United Nations General Assembly widely ratified the prevention and punishment of crimes against humanity in Resolution 260 (III).⁸²

The International Law Commission (ILC) drafted a Code of Offences against the Peace and Security of Mankind, but work was suspended in 1954 when States could not agree upon a definition of aggression or upon the creation of an international criminal court. The willingness of States to expand individual protection was manifested in a host of declarations, covenants and conventions on human rights and by the establishment of the European Court of Human Rights and the Inter-American Court of Human Rights. Numerous UN resolutions condemned racial discrimination and apartheid as crimes against humanity. Traffic in Persons, terrorism and torture were also denounced as international crimes and, after aggression was defined by consensus in 1974, world attention returned to drafting the suspended international code of offences against mankind. . . . The ILC was requested to consider all views as it renewed its efforts in 1983 to redraft the Code of Offences against the Peace and Security of Mankind.⁸³

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 870-871.

⁸² *Id.* at 871.

⁸³ *Id.*

In the past, courts of international and humanitarian law have all supported the focus that the “special character” of international jurisprudence is the “collective enforcement” of humanitarian and human rights.⁸⁴ Interpreting the Statute in light of its humanitarian object and purpose would in no way contravene the *nullum crimen sine lege* principle.

3. THE DEFINITION OF “ARMED CONFLICT” WITHIN THE TEMPORAL NEXUS TO “WAR.”

a. ARTICLE 5 WORDING, “...WHEN COMMITTED IN ARMED CONFLICT.”

Where crimes against humanity are committed, the Tribunal shall have jurisdiction per Statute, Article 5, where the Statute provides: “The International Tribunal shall have the power to prosecute persons responsible for the following crimes [enumerated under Article 5] when committed in armed conflict, whether international or internal in character, and directed against any civilian population.”⁸⁵ As stated previously, for lack of a sovereign legislature, international perspectives in the form of the Security Council came together to for proposal of the Statute.⁸⁶ After the Council established the International Tribunal, it deliberated the scope of the required nexus of armed conflict where the “[f]our Member States of France, the United States, the United Kingdom, and Russia declared that under Article 5 it [was] sufficient simply that the

⁸⁴ See The Prosecutor v. Dusko Tadic, Case No. IT-94-1-T, Prosecutor’s Pre-Trial Brief, at 7 (April 10, 1996).

⁸⁵ See Statute of the International Tribunal.

⁸⁶ See The Prosecutor v. Dusko Tadic, Case No. IT-94-1-T, Prosecutor’s Pre-Trial Brief, at 8-9 (April 10, 1996).

crimes be committed ‘during a period of armed conflict’ or ‘in time of armed conflict.’⁸⁷ To establish the nexus, it must be shown that the crimes were committed in the course or duration of an armed conflict, even if not committed in direct relation to, or part of, the hostile conduct, occupation, or other integral aspects of the armed conflict. In its decision, the Appeals Chamber had already determined that the requisite nexus of armed conflict was present in the conflicts that occurred in the former Yugoslavia, when those offenses were committed, and in violation of Article 5.⁸⁸ This determination is the similar to information disseminated from the Secretary-General’s Expert Commission report to the Security Council, and the Security Council’s decision to create the Tribunal, as previously mentioned.⁸⁹

b. Temporal limitation versus jurisdictional limitation

The history of the IMT may bring understanding as to why there is doubt whether the phrase “in armed conflict” is actually a temporal limitation. The London Charter’s objective for the category “crimes against humanity” was to try Germans for crimes against other Germans.⁹⁰ This category however, was interpreted very narrowly as it was applied only to acts committed during the war, and it was limited to acts committed in connection with some other crime within the jurisdiction of the Tribunal (i.e. crimes against peace or war crimes).⁹¹ Therefore, since these other crimes were limited temporally to the war years, the Tribunal foreclosed any liability for acts before

⁸⁷ *Id.* at 11.

⁸⁸ *Id.* at 11-12.

⁸⁹ *See supra*, footnote 28.

⁹⁰ *See International Criminal Law Cases and Materials* at 1045 (1996).

⁹¹ *Id.*

September 1939.⁹² The charge was limited because there was no consensus on the issue: The notion that members of a national government could be held criminally liable on the international plane for atrocities committed against their own nationals was not generally agreed upon at the end of World War II.⁹³

4. INTERNATIONAL PERSPECTIVES AND PROPOSALS FOR THE STATUTE

In the French report to the Secretary-General, it was stated that, “Among the crimes that the Tribunal would be responsible for trying are crimes against humanity, to which statutory limitations do not apply. The first question, therefore, is whether the Tribunal should be given competence in regard to such crimes, irrespective of when they were committed.”⁹⁴ France took the view that “it would not be reasonable to extend the competence of the Tribunal to crimes predating the dissolution of the former Yugoslavia and the outbreak of the current conflicts...[but that it] appears appropriate to attribute competence to the Tribunal only in respect of crimes committed during the period beginning with the dissolution of the former Yugoslavia.”⁹⁵

Italy’s proposal for the Statute considered “the reference to ‘crimes against mankind’ in the wording of the Nuremberg Tribunal Statute [to be] obsolete, in that it envisaged a link with a war crime, thus largely restricting the scope of action of the Court to be set up.”⁹⁶

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See Virginia Morris and Michael P. Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia*, Volume II at 342 (1995).

⁹⁵ *Id.*

⁹⁶ See Virginia Morris and Michael P. Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia*, Volume II at 381 (1996). UN Doc. S/25300 (Feb. 17, 1993).

As another source of legislative history, the statements made by the United States and the United Kingdom at time of voting on the Statute suggest that the words “in armed conflict” can be understood as meaning “during armed conflict,” regardless of a substantive link with either another crime within the jurisdiction of the Tribunal or the state of war. The U.S. Representative, Mrs. Madeline Albright stated: “[I]t is understood that Article 5 applies to all acts listed in that article, when committed contrary to law during a period of armed conflict in the territory of the former Yugoslavia, as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, gender, or religious grounds.” Sir David Hannay stated: “Article 5 covers acts committed in time of armed conflict.”⁹⁷

Additionally, the American Bar Association Task Force stated that, “[w]hile the Statute follows the Nuremberg precedent in asserting jurisdiction over crimes against humanity that are ‘committed in armed conflict,’ the Task Force recognizes that, as a general principle, there are compelling reasons to punish crimes against humanity having no nexus to armed conflict.”⁹⁸

The International Committee of the Red Cross, in its suggestions to the United Nations concerning the Statute, asserted that, “unlike [war crimes], [crimes against humanity] can be committed independently of an armed conflict and, even when committed during a conflict, are not necessarily related to it.”⁹⁹

⁹⁷ See Virginia Morris and Michael P. Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia*, Volume II at 188, 190 (1996) (citing UN Doc. S/PV .3217, May 25, 1993).

⁹⁸ See Report on the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia, submitted by A Special Task Force of the ABA Section of International Law and Practice at 15 (1993).

⁹⁹ See Virginia Morris and Michael P. Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia*, Volume II at 395 (1996). Some Preliminary Remarks by the International Committee of the Red Cross on the Setting-up of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the

Even when considering the Security Council's statements and statements of other organizations, there is no indication that the Security Council intended to establish a tribunal to prosecute persons for crimes against humanity committed before the outbreak of any hostilities.¹⁰⁰ The temporal limitation in Article 5, as indicated by the phrase, "when committed in armed conflict" refers to the sovereign conflict as a whole, not to individual armed skirmishes.¹⁰¹ Therefore, the temporal limitation was not meant to limit the Statute's substance; the phrase, "when committed" does not require any connection with a war crime or any substantive connection to an armed conflict¹⁰² and this phrase should be interpreted in the broadest sense.

**5. SHOULD ILLEGAL METHODS AND MEANS OF WAGING
WARFARE QUALIFY AS CRIMES AGAINST HUMANITY,
WHERE THE METHODS ARE NOT JUSTIFIED BY
MILITARY NECESSITY?**

The terms "crimes against humanity" and "war crimes," as defined in the London and Tokyo Charters and CCL 10, and the concepts of those terms, are juxtaposed and inter-related to the extent that while all acts enumerated under the heading "war crimes" are also "crimes against humanity," the reverse is not necessarily true.¹⁰³ Acts committed on enemy occupied territory may be war crimes as well as crimes against humanity, whereas acts committed either when a state of war does not exist, or against citizens of neutral states, are crimes against humanity, but are not violations of the laws and customs

Former Yugoslavia (United Nations Security Council Resolution 808 (1993) Adopted on 22 February 1993) DDM/JUR/422b, 25 March 1993.

¹⁰⁰ See Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, Volume I at 83 (1996).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* at 566 (1992).

of war, and hence not war crimes.¹⁰⁴ Therefore, logically speaking, crimes against humanity should not be limited to commission only in armed conflict.

Moreover, the reality of dealing with this semantic issue was confirmed during Allied declarations between 1942-44, where it was a consensus that many Nazi atrocities constituted “crimes against humanity” under “general principles of law,” and that these crimes were punishable on the basis of the same rationale as war crimes.¹⁰⁵ Despite the broad and deep history of the concept of crimes against humanity and well-documented definitions in the World War II era, there have been certain recent definitions that might needlessly restrict coverage and accountability.¹⁰⁶

The Statute’s Article 5 changes the Nuremberg phrase “committed against” to “directed against,” a phrase that may require a slightly higher threshold of *mens rea*.¹⁰⁷ This definitional orientation was adopted despite the fact that such crimes were recognized in the Nuremberg Charter and CCL 10 and that the law which has beyond doubt become part of international customary law is embodied in the Nuremberg Charter.¹⁰⁸

The Tribunal should be guided by these customary definitions for it is possible to consider that these definitions have been, without extra limitations not found in customary international law, incorporated by reference when Article 5 refers to “crimes against humanity.”¹⁰⁹ When the article adds that the Tribunal “shall have the power to

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 182.

¹⁰⁶ See International Criminal Law Cases and Materials at 1075 (1996).

¹⁰⁷ *Id.* at 1075-1076.

¹⁰⁸ *Id.* at 1076.

¹⁰⁹ *Id.*

prosecute” when acts are “directed against any civilian population,” it may be that such language was not meant to be exclusive or to demonstrate when the Tribunal “shall only” have power to prosecute crimes against humanity.¹¹⁰ Customary international law was meant to be the guiding force, a necessary background, the only delimiting criterion, and what the Tribunal is required to apply.¹¹¹

“If so, it should not be possible for an accused to escape accountability for criminal persecutions on the ground that they were not ‘directed against’ a ‘civilian population’ as such or any other way.”¹¹² The primary reason is that neither persecution-types of crimes against humanity, nor genocide under customary international law have such a limiting phrase.¹¹³ Another reason is that, as the U.N. War Crimes Commission reported in 1948, even when the phrase is applicable, the words appear to indicate acts against civilians as opposed to a population as such, the Commission also speculating that single or isolated acts against an individual may be considered to fall outside the phrase.¹¹⁴ Thus, it is the act committed against civilians that is covered and not merely the intentional targeting of civilians.¹¹⁵ With respect to single acts, the commission of one act injuring one victim fits the definition if there is an intent to act against or to target other civilians (*e.g.*, as in the case of an inhumane act against an instrumental target with the object of producing fear or anxiety in a primary target involving other civilians).¹¹⁶

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

Therefore, incidences such as the shelling of Sarajevo civilian areas such as community marketplaces and civilian dwellings should not be justified by military necessity.

Moreover, in the U.N. Secretary-General's Report, it stated that

crimes against humanity are 'inhumane' and 'very serious,' but such labels do not appear in Article 5 of the Statute . . . nor are they general elements of the offense or limiting criteria for all types of crimes against humanity. Thus, the Tribunal need not entertain defense claims that some acts were not really 'inhumane' or 'very serious'.

Similarly, the Report noted that some such crimes were part of a 'widespread' or 'systematic' attack, but these words were not considered to be required elements of the crime that prosecutors must prove and they do not appear in Article 5 . . . Clearly also, the words 'serious,' 'widespread,' and 'systematic' appear in none of the Charters or formulations noted above . . . [S]uch expressions should not be confused with required elements of the general crime under customary international law. To stress the point, it should not be a defense that an individual's acts were not 'systematic' or 'widespread'.¹¹⁷

As an example, in *Matter of Barbie*, sometimes as few as three victims comprised the number of persons covered.¹¹⁸ The French Supreme Court in 1986 held that acts against a woman, her husband, and son "could all constitute crimes against humanity."¹¹⁹ As such, bombings of civilian homes and marketplaces should not be justifiable by military necessity because even if the victims and casualties are small in numbers, they are nonetheless crimes against humanity. Moreover, destruction of dwellings and marketplaces are deprivation of the basic human necessities of shelter and food. An intentional deprivation of these necessities should be seen as crimes against humanity.

B. SUMMARY AND CONCLUSION

¹¹⁷ *Id.* at 1077.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

The nexus requirement between crimes against humanity and the waging of war has been a clouded issue. A codification of the Nuremberg Principles adopted by the United Nations General Assembly in 1950 preserved a nexus requirement, but the principles were intended to be a restatement of Charter/IMT law rather than of potentially broader international law.¹²⁰ The Draft Code of Offenses Against the Peace and Security of Mankind, prepared by the International Law Commission (ILC), omitted a war nexus element from the definition of crimes against humanity set forth in this draft international criminal code.¹²¹ The Commission's Special Rapporteur asserted that the autonomy of crimes against humanity from war crimes "has now become absolute. Today, crimes against humanity can be committed not only within the context of an armed conflict, but also independently of any such conflict."¹²² In a recent ILC Report, the Rapporteur stated that

[t]he definition of crimes against humanity contained in [Article 5] does not include the requirement that an act was committed in time of war or in connection with crimes against peace or war crimes as in the Nurnberg Charter. The autonomy of crimes against humanity was recognized in subsequent legal instruments which did not include this requirement. The Genocide Convention did not include any such requirement with respect to the second category of crimes against humanity. . . . Similarly, the definitions of the first category of crimes against humanity contained in the legal instruments adopted since Nurnberg do not include any requirement of a substantive connection to other crimes relating to a state of war, namely, [CCL 10] adopted shortly after the Berlin Protocol as well as the more recent Statutes of the [ILC's] for the former Yugoslavia (article 5) and Rwanda (article 3). The absence of any requirement of an international armed conflict as a prerequisite for crimes against humanity was also confirmed by the Yugoslavia Tribunal: 'It is by now a settled rule of

¹²⁰ Sharon A Healey, *Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia*, 21 Brook. J. Int'l L. 327, 354 (1995).

¹²¹ *Id.*

¹²² *Id.*

customary international law that crimes against humanity do not require a connection to international armed conflict.¹²³

Although the draft code has not been adopted, international criminal law experts such as Cherif Bassiouni¹²⁴ have taken the position in support of the premise that subsequent international instruments to the Charter of the International Military Tribunal have affirmed that crimes against humanity need not be linked to actual combat.

¹²³ *International Law Commission Report* (visited May 2, 1997) <<http://www.un.org/plweb-cgi/idoc.pl?36+un...%26security%26and%26mankind%26and%26draft>>

¹²⁴ M. Cherif Bassiouni is a professor of law at DePaul University and President of DePaul's International Human Rights Law Institute. He was a member and Rapporteur of the Commission of Experts Established Pursuant to Sec. Coun. Res. 780 (1992) to Investigate Violations of International Law in the Former Yugoslavia, and served as its chairman in 1993-1994.