

(c) Case Analysis

Crimes Against Humanity After Tadić

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Abstract: Crimes against humanity were first defined, for the purposes of the Nuremberg Trial, in 1945. Since then, numerous international legal texts have incorporated the concept, the latest being the Rome Statute of the ICC, 1998. The different texts offer diverse definitions of crimes against humanity, which are traced in the article. Although the precise outlines of the crimes change from one definition to another, it is clear that the core has crystallized as an integral part of customary international law. In the *Tadić* case, the ICTY had to address several crucial issues relating to crimes against humanity. The judgments on appeal will serve as precedents for the removal of the linkage between crimes against humanity and armed conflict, the exclusion of isolated attacks against civilians and the irrelevance of the personal motives of the defendant.

When the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia ("ICTY") rendered final judgment on appeal in the *Tadić* case, on 15 July 1999, it concluded a cycle of judicial decisions delivered in an important trial which had raised numerous legal issues pertaining to crimes against humanity. In this trial the ICTY has made an invaluable contribution to the development of international legal norms governing crimes against humanity. For sure, some issues are still open and others may stir controversy in the future. But, as a result of the new jurisprudence, it can safely be stated that crimes against humanity have come of age. It is the purpose of the present essay to adumbrate the contours of the crimes as they stand today.

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1. THE ORIGIN OF CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW

The template definition of crimes against humanity appears in Article 6(c) of the 1945 Charter of the International Military Tribunal, annexed to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (initially adopted by the four Big Powers – the United States, the Soviet Union, the United Kingdom and France – later joined by many other allied nations which acceded to the instrument). This provision reads (with the punctuation as subsequently amended [see *infra*, paragraph 3]):

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.¹

Article 6(c) of the London Charter of 1945 constitutes a veritable landmark. Although there were earlier usages of the term “crimes against humanity” in non-binding declarations and statements (let alone literary and journalistic writings), Article 6(c) represents the “first technical use” and definition of the specific phrase in a legally binding international treaty.² In the 1946 Judgment of the International Military Tribunal (“IMT”), rendered at *Nuremberg*, the theme of crimes against humanity was somewhat deemphasized, as compared to crimes against peace or ordinary war crimes.³ Nevertheless, what is of singular import is that two of the defendants – Streicher and Von Schirach – were convicted exclusively of crimes against humanity (having been found not guilty on other counts),⁴ and, indeed, the former was sentenced to death.⁵

1. Charter of the International Military Tribunal, Annexed to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 1945, in D. Schindler & J. Toman (Eds.), *The Laws of Armed Conflict: A Collection of Conventions, Resolutions and Other Documents* 913, 914 (1988).
2. See International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, Prosecutor v. Tadić, Merits, Case No. IT-94-I-T, Trial Chamber, 7 May 1997, 36 International Legal Materials 908, 935 (1997).
3. See R.S. Clark, *Crimes against Humanity at Nuremberg*, in G. Ginsburgs & V.N. Kudriavtsev (Eds.) *The Nuremberg Trial and International Law* 177, at 194-198 (1990).
4. Trial of Major War Criminals before the International Military Tribunal, Judgment (*Nuremberg*, 1946), in L. Friedman (Ed.), *2 The Law of War: A Documentary History* 922, 990, 1004 (1972).
5. *Id.*, at 1025.

Article 6(c) of the London Charter served as the model for two other texts pertaining to crimes against humanity perpetrated in the course of, or in connection with, World War II. The first is Article II(1)(c) of the 1945 Control Council Law No. 10 for the prosecution and punishment of the lower-echelon Nazi war criminals, which stipulates:

(c) *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 persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.⁶

This version differs from Article 6(c) of the London Charter in that (i) it relates to “[a]trocities and offences” in general, and the list of punishable acts is deliberately not exhaustive (instead of “namely”, we encounter “including but not limited to”);⁷ (ii) the reference to time-frames (“before or during the war”) is deleted, as is the linkage to “any crime within the jurisdiction of the Tribunal”; (iii) there is a specific addition of “imprisonment, torture, rape” to the catalogue of crimes against humanity.

The second text spawned by Article 6(c) of the London Charter is Article 5(c) of the Charter of the International Military Tribunal for the Far East, established in 1946 by Special Proclamation of General D. MacArthur, in his capacity as Supreme Commander for the Allied Powers in Tokyo.⁸ The formulation here follows the original in every detail, except that the persecutions referred to here are only “on political or racial grounds”,⁹ whereas in Article 6(c) religious grounds are incorporated as well.

2. THE EVOLUTION OF CRIMES AGAINST HUMANITY

Considering the novelty of the international legal concept of crimes against humanity in the immediate post-World War II period – and insofar as these crimes transcend the ambit of ordinary war crimes (see *infra*, section 4) – it is arguable that Article 6(c) of the London Charter was not declaratory of customary international law at the time of its adoption.¹⁰ However, in 1948, an American Mili-

6. Control Council Law No. 10, 1945, in L. Friedman (Ed.), 1 *The Law of War: A Documentary History* 908, 909 (1972).

7. It must be taken into account that the list of crimes enumerated in Article 6(c) is not truly exhaustive either, in light of the phrase “and other inhumane acts”. See E. Schwelb, *Crimes Against Humanity*, 23 *British Year Book of International Law* 178, at 217 (1946).

8. Charter of the International Military Tribunal for the Far East, 1946, in Friedman, *supra* note 6, at 894, 897.

9. *Id.*

10. See G. Schwarzenberger, *The Law of Armed Conflict* 498 (1968).

tary Tribunal (part of the “Subsequent Proceedings” at Nuremberg) held in the *Einsatzgruppen* case:

Although the Nuremberg trials represent the first time that international tribunals have adjudicated crimes against humanity as an international offense, this does not [...] mean that a new offense has been added to the list of transgressions of man.¹¹

Whatever the legal position was in the 1940s, it is virtually indisputable that – in the half-century that has elapsed since then – crimes against humanity have gained almost universal acknowledgment as an integral part of customary international law.¹² In 1995, in the *Tadić* case, the Trial Chamber of the ICTY opined that “[t]here is no question but that crimes against humanity form part of customary international law”.¹³ In 1997, the same Chamber reiterated:

since the Nürnberg Charter, the customary status of the prohibition against crimes against humanity and the attribution of individual criminal responsibility for their commission have not been seriously questioned.¹⁴

A survey of the relevant international legal texts firmly corroborates this conclusion. The International Law Commission (“ILC”) first dealt with crimes against humanity in 1950, when – pursuant to instructions by the UN General Assembly – it formulated the Principles of International Law Recognized in the London Charter and in the Nuremberg Judgment. The “Nürnberg Principles”, as presented by the ILC, include Principle VI(c) reading:

c. *Crimes against Humanity:*

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.¹⁵

The text essentially reiterates the language of Article 6(c) of the London Charter, except that the phrase “before or during the war” is omitted. The ILC explained that the omission was due to the fact that “this phrase referred to a particular war, the war of 1939”.¹⁶

11. *In re Ohlendorf and Others* (Einsatzgruppen Trial), United States Military Tribunal 1948, 15 *International Law Reports* 656, at 665 (1948).

12. See H.S. Levie, *Violations of Human Rights in Time of War as War Crimes*, 24 *Israel Yearbook on Human Rights* 119, at 121 (1994).

13. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, *Prosecutor v. Tadić*, Jurisdiction, Case No. IT-94-I-T, Trial Chamber, 10 August 1995, 30 (mimeographed).

14. *Prosecutor v. Tadić*, *supra* note 2, at 937.

15. Report of the International Law Commission, 2nd Session, II *Yearbook of the International Law Commission* 364, at 377 (1950).

16. *Id.*

In 1954, in its Draft Code of Offences against the Peace and Security of Mankind, the ILC adopted Article 2(11):

Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.¹⁷

Earlier, the ILC explicitly stated that the original version of this Paragraph (then numbered 2(10)) “corresponds substantially” to the definition of crimes against humanity in Article 6(c) of the London Charter.¹⁸ In 1954, however, the ILC decided “to enlarge the scope of the paragraph”.¹⁹ Thus, it is underscored in the new definition that it also covers inhuman acts other than the ones specifically enumerated; it includes persecutions on social and cultural grounds; it is no longer linked to crimes against peace or war crimes; and it restricts the circumstances in which the crimes can be committed by private individuals to the framework of governmental instigation or toleration.

When the ILC returned to the Draft Code after a long interval, Special Rapporteur D. Thiam in 1989 criticized the failure of Article 2 of the 1954 text to employ the words “crimes against humanity”, taking the position that “it seems useful to give them their rightful place” and devoting Article 14 of his proposal to the subject.²⁰ By contrast, when the ILC provisionally adopted a Draft Code of Crimes against the Peace and Security of Mankind, in 1991, it moved in an opposite direction. The relevant clause, Article 21, was entitled “[s]ystematic or mass violations of human rights”.²¹ While it encompassed murder, enslavement, deportations and persecutions – as well as torture – there was no longer any reference to crimes against humanity.²² This attempt to weave crimes against humanity within the fabric of the law of human rights was artificial. After all, human rights and crimes against humanity have so far pursued decidedly different paths.²³ In 1996, when the ILC revised the formulation of the Draft Code, it went

17. Report of the International Law Commission, 6th Session, II Yearbook of the International Law Commission 140, at 150 (1954).

18. Report of the International Law Commission, 3rd Session, II Yearbook of the International Law Commission 123, at 136 (1951).

19. Report of the International Law Commission, *supra* note 17, at 150.

20. D. Thiam, *Seventh Report on the Draft Code of Crimes against the Peace and Security of Mankind*, II(1) Yearbook of the International Law Commission 81, at 85-86 (1989).

21. Report of the International Law Commission, 43rd Session, II(2) Yearbook of the International Law Commission 103 (1991).

22. *Id.*

23. See E. Zoller, *La Définition des Crimes contre l'Humanité?*, 120 Journal du Droit International 549, at 556-557 (1993).

back – in Article 18 – to the traditional designation of “[c]rimes against humanity”²⁴ (the full text is reproduced below).

The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted by the UN General Assembly in 1968, basically refers in Article I to crimes against humanity “as they are defined in the Charter of the International Military Tribunal” (adding, however, genocide, inhuman acts resulting from the policy of apartheid and eviction by armed attack or occupation).²⁵

The Statute of the ICTY – proposed by the UN Secretary-General²⁶ and approved by the Security Council²⁷ in 1993 – prescribes in 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.²⁸

This provision in essence reverts to the mould of Article 6(c) of the London Charter, with some notable divergences. First, whereas the crimes must be committed in armed conflict,²⁹ that conflict can be either international or internal in nature. Secondly, following the lead of Article II(1)(c) of Control Council Law No. 10, the list of inhumane acts (which is not exhaustive) specifically includes – in addition to murder, extermination, enslavement and deportation – also imprisonment, torture and rape.

In 1994, the Security Council decided to establish another International Tribunal for Rwanda (“ICTR”).³⁰ Article 3 of the Statute of the ICTR includes the

24. Report of the International Law Commission, 48th Session, UN Doc. A/51/10 (mimeographed), at 93-94 (1996).

25. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, United Nations Juridical Yearbook 160, 161 (1968).

26. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 32 International Legal Materials 1163, at 1192 (1993).

27. Security Council Resolution 827, 32 International Legal Materials 1203, at 1204 (1993).

28. *Id.*, at 1193-1194.

29. “In the Yugoslav context, it was considered unnecessary to refer to the period ‘before the war’.” D. Shrager & R. Zacklin, *The International Criminal Tribunal for the Former Yugoslavia*, 5 European Journal of International Law 360, at 367 (1994).

30. Security Council Resolution 955, 33 International Legal Materials 1598, at 1601 (1994).

same enumeration of crimes (a) through (i) embodied in the 1993 ICTY Statute, but it substitutes the *chapeau* of the provision with:

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.³¹

Thus, the linkage to armed conflict of whatever nature is replaced by a reference to widespread or systematic attacks against any civilian population on national, political, ethnic, racial or religious grounds. Interestingly, the new formula is derived word-for-word from the 1993 Report of the Secretary-General where, however, it was used in the commentary and not in the text of the Article itself.³²

Article 18 of the 1996 text of the ILC's Draft Code of Crimes against the Peace and Security of Mankind lays down:

Crimes against humanity

A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a government or by any organization or group:

- (a) murder;
- (b) extermination;
- (c) torture;
- (d) enslavement;
- (e) persecution on political, racial, religious or ethnic grounds;
- (f) institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;
- (g) arbitrary deportation or forcible transfer of population;
- (h) arbitrary imprisonment;
- (i) forced disappearance of persons;
- (j) rape, enforced prostitution and other forms of sexual abuse;
- (k) other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.³³

The most striking aspect of Article 18 is that it quite inexplicably omits the requirement that the prohibited acts be committed against a civilian population.³⁴ The list of specific acts brought by Article 18 under the umbrella of crimes against humanity is most extensive. Patently, the crimes can be committed at any time, irrespective of war. When compared with the 1993 Statute of the

31. *Id.*, at 1603.

32. Report of the Secretary-General, *supra* note 26, at 1173. See quotation, *infra* note 99.

33. Report of the International Law Commission, *supra* note 24, at 93-94.

34. See J. Allain & J.R.W.D. Jones, *A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind*, 8 *European Journal of International Law* 100, at 112 (1997).

ICTY, it stands out that the 1996 definition of crimes against humanity incorporates forced disappearance of persons. This is an innovation³⁵ derived from the unfortunate experience of several Latin American countries and related to an affirmation in the Preamble to the 1994 Belém Convention on the Forced Disappearance of Persons (adopted by the Organization of American States) that “the systematic practice of the forced disappearance of persons constitutes a crime against humanity”.³⁶ Moreover, the 1996 Draft Code – in contradistinction to the 1993 Statute – enumerates institutionalized discrimination (not amounting to persecution, which is catalogued separately) as a crime against humanity. Here is a follow-up to two UN Conventions which brand *apartheid* as a crime against humanity: the above-mentioned 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity,³⁷ and the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*.³⁸ The ILC itself commented that institutionalized discrimination means “in fact the crime of apartheid under a more general denomination”.³⁹ Additionally, Article 18 supplements rape with enforced prostitution as well as other forms of sexual abuse, and itemizes ethnic independently of racial grounds in the context of persecution. On the other hand, Article 18 limits the scope of the criminalized categories of deportation and imprisonment by employing the adjective “arbitrary” (so as to exclude acts committed for legitimate reasons and in accordance with due process of law⁴⁰), and restricts the application of the comprehensive expression “other inhumane acts” to severely damaging acts such as mutilation. It also insists on the commission of the acts in a systematic manner or on a large scale, and on their being instigated or directed by a government, an organization or a group.

Article 7 of the 1998 Rome Statute of the International Criminal Court is, by far, the lengthiest and most detailed text:

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;

35. “It marks a step by the Commission beyond the codification of existing customary law”. See R. Rosenstock, *The Forty-Eighth Session of the International Law Commission*, 91 *American Journal of International Law* 365, at 368 (1997).

36. *Inter-American Convention on the Forced Disappearance of Persons*, 1994, 33 *International Legal Materials* 1529, at 1530 (1994).

37. *Convention on the Non-Applicability of Statutory Limitations*, *supra* note 25, at 161.

38. *International Convention on the Suppression and Punishment of the Crime of Apartheid*, *United Nations Juridical Yearbook* 70, at 71 (1973), Article I.

39. *Report of the International Law Commission*, *supra* note 24, at 99.

40. *Id.*, at 100-101.

- (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.

2. 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.

3. For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above".⁴¹

Paragraph 1 of Article 7 generally follows the text of the 1996 Draft Code, but there are several modifications. The time-honoured reference to the civilian population as the target of crimes against humanity is restored. The *chapeau* has been somewhat changed: the word "attack" has been added; "widespread" is the expression preferred to "large scale"; and the reference to State or organizational policy has been relegated to the explanatory note in Paragraph 2. In the list of crimes, the adjective "arbitrary" is deleted altogether in the context of deportations, and it is replaced in the setting of imprisonment (to which other severe deprivation of physical liberty is added) by violation of fundamental rules of international law. The reference to sexual offences has been expanded, as have the grounds of illicit persecution. *Apartheid* is now addressed by name. The specific mention of mutilation has been dropped.

The most singular aspect of Article 7 of the Rome Statute is Paragraph 2, which introduces elaborate ancillary definitions interpreting the terminology of Paragraph 1.⁴² Some of the strictures assign a completely different meaning to the phrase construed. Thus, the word "attack" in the *chapeau*, on the one hand, becomes a course of conduct involving the multiple commission of other illicit acts, and, on the other, is made contingent on a State or organizational policy. The scope of torture is considerably wider than that prescribed in Article 1(1) of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁴³ Contrarily, *apartheid* obtains a narrower ambit compared with Article II of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid.⁴⁴

What plainly emerges from tracing the numerous – and disparate – definitions of crimes against humanity from 1945 to 1998 is that their precise outlines are by no means engraved in stone: they seem to change with the *Zeitgeist*. Given the constant modifications, it is doubtful that any particular definition of crimes against humanity has necessarily "acquired the status of customary law".⁴⁵ Nonetheless, the core of the crimes – consisting, in particular, of murder,

41. Rome Statute of the International Criminal Court, 1998, 37 *International Legal Materials* 999, at 1004-1005 (1998).

42. It is noteworthy that this technique is employed in the Rome Statute only where crimes against humanity are concerned. No similar explanatory notes accompany the other crimes defined in the Statute, *id.*, at 1004-1009.

43. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, *United Nations Juridical Yearbook* 135 (1984).

44. *Apartheid* Convention, *supra* note 38, at 71-72.

45. C. Tomuschat, *International Criminal Prosecution: The Precedent of Nuremberg Confirmed*, 5 *Criminal Law Forum* 237, at 242 (1994).

extermination, enslavement and similar inhumane acts perpetrated against the civilian population – has certainly crystallized by now as generally accepted custom.

3. THE LINKAGE BETWEEN CRIMES AGAINST HUMANITY AND ARMED CONFLICT

As indicated by the ILC in formulating the “Nürnberg Principles”, Article 6(c) of the London Charter distinguishes between two categories of crimes against humanity: murder, extermination, etc., on the one hand, and persecutions, on the other.⁴⁶ In the original English version of Article 6(c) a semicolon interposed between the two categories. It therefore appeared as if only the second category (persecutions) – but not the first (murder, extermination, etc.) – is subject to the caveat of a connection with crimes “within the jurisdiction of the Tribunal”. But in a special Protocol, done in Berlin in 1945, Paragraph (c) was amended in replacing the semicolon by a comma.⁴⁷ The thrust of the amendment is that crimes against humanity of both categories must be connected with crimes within the jurisdiction of the IMT. These crimes, as spelt out in the balance of Article 6 of the London Charter, are crimes against peace and war crimes.⁴⁸

By firmly establishing that crimes against humanity can only be committed in connection with crimes against peace or war crimes – hence with war – the framers of Article 6(c) introduced a critical rider on the proposition that crimes against humanity may be committed not only during but also before war (that is to say, in peacetime).⁴⁹ Not surprisingly, the IMT at *Nuremberg* arrived at the conclusion that the Nazi persecutions of Jews (as well as political opponents) inside Germany – prior to the outbreak of World War II in September 1939 – could not be deemed crimes against humanity, inasmuch as they had not been connected with crimes against peace or war crimes.⁵⁰ It is true that in some special instances the IMT admitted a linkage between concrete acts performed before September 1939 and crimes against peace or war crimes,⁵¹ but as a rule it curtailed the applicability of crimes against humanity to the duration of the war.⁵² Consequently, although at a cursory glance it seems not to matter – under Article 6(c) – whether crimes against humanity are committed before or during

46. Report of the International Law Commission, *supra* note 15, at 377.

47. Office of US Chief of Counsel for Prosecution of Axis Criminality, International Military Tribunal, I Nazi Conspiracy and Aggression 11-12 (1946).

48. Charter of the International Military Tribunal, *supra* note 1, at 914.

49. See Schwelb, *supra* note 7, at 188, 193-195, 204.

50. Trial of Major War Criminals, *supra* note 4, at 961.

51. See A. Goldstein, *Crimes against Humanity: Some Jewish Aspects*, Jewish Yearbook of International Law 206, at 221 (1948).

52. Trial of Major War Criminals, *supra* note 4, at 961.

war, in principle the Nuremberg precedent irrefutably requires that these crimes be committed in wartime.⁵³

As mentioned, the “Nürnberg Principles”, formulated by the ILC, omit the phrase “before or during the war”. The ILC stressed, however, that crimes against humanity may take place before war only “in connexion with crimes against peace”.⁵⁴ This is the correct interpretation of the London Charter (as amended) and the *Nuremberg* Judgment: pursuant to the Charter and the Judgment, crimes against humanity can be perpetrated before or during war; but if the former, there must exist a nexus between the punishable acts and the subsequent war. The Tokyo Charter of the International Military Tribunal for the Far East toes the line of the London Charter.⁵⁵

In stark contrast, Article II(1)(c) of Control Council Law No. 10 for the prosecution of the lesser Nazi war criminals deleted both the words “before or during the war” and the linkage to “any crime within the jurisdiction of the Tribunal”.⁵⁶ As a result, in the *Einsatzgruppen* case of 1948, an American Military Tribunal held:

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.⁵⁷

No wonder that B.V.A. Röling (who served as a Judge in the *Tokyo* trial) maintained that the *Nuremberg* and *Tokyo* mandatory connection with crimes against peace or ordinary war crimes did not narrow the range of crimes against humanity as such: the qualification applied only to the jurisdictional outreach of the International Military Tribunals.⁵⁸ In other words, the Tribunals operating at *Nuremberg* and *Tokyo* were not empowered to sit in judgment over crimes against humanity unless committed during or in connection with war. Yet, the incidence of war is not a prerequisite lying at the root of crimes against humanity. Other tribunals not similarly hampered (such as those acting in conformity with Control Council Law No. 10) can exercise jurisdiction.

Over the years since the adoption of the seminal text of Article 6(c) of the London Charter, the term of art “crimes against humanity” has gradually ac-

53. See Schwelb, *supra* note 7, at 204.

54. Report of the International Law Commission, *supra* note 15, at 377.

55. Charter of the International Military Tribunal for the Far East, *supra* note 8, at 897.

56. On the significance of this striking difference in language between Article II(1)(c) and Article 6(c), see Schwelb, *supra* note 7, at 218.

57. *In re Ohlendorf and Others*, *supra* note 11, at 664.

58. B.V.A. Röling, *The Tokyo Trial and Beyond*, A. Cassese (Ed.), 56 (1993).

quired a standing less dependent on war. The ILC itself, already in its 1950s Draft Code of Offences against the Peace and Security of Mankind, decided to eliminate initially the linkage to crimes against peace or war crimes,⁵⁹ and then the connection to any other crimes.⁶⁰ In 1989, the ILC's Special Rapporteur, Thiam, had this to say:

First linked to a state of belligerency [...] the concept of crimes against humanity gradually came to be viewed as autonomous and is today quite separate from that of war crimes.⁶¹

Furthermore, Article I of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, while referring to crimes against humanity as they are defined in the London Charter, adds the words: "whether committed in time of war or in time of peace".⁶²

In the latest edition of Oppenheim (edited by R. Jennings and A. Watts), it is suggested:

While crimes against humanity are now generally regarded as a self-contained category, without the need for any formal link with war crimes, in practice those two categories are often treated together.⁶³

Support for the "self-contained" status of crimes against humanity has been articulated by others in the legal literature, like T. Meron⁶⁴ and D.F. Orentlicher.⁶⁵ Yet, several commentators have expressed doubts whether a new customary international law has really consolidated.⁶⁶

A glaring illustration of the "self-contained" nature of crimes against humanity, as perceived in an international treaty, is Article I of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, proclaiming that "*apartheid* is a crime against humanity".⁶⁷ Under Article II, the crime of *apartheid* pertains to inhuman acts such as murder of members of a racial group and various acts of persecution as practised in southern Africa at the time of the adoption of the Convention.⁶⁸ No connection to war was posited as a condition to criminalization of these acts, although it is stated in Article

59. Report of the International Law Commission, *supra* note 18, at 136.

60. Report of the International Law Commission, *supra* note 17, at 150.

61. Thiam, *supra* note 20, at 86.

62. Convention on the Non-Applicability of Statutory Limitations, *supra* note 25, at 161.

63. R. Jennings & A. Watts, (Eds.), *Oppenheim's International Law*, Vol. 1(2), 996 (1992).

64. T. Meron, *The Normative Impact on International Law of the International Tribunal for Former Yugoslavia*, 24 *Israel Yearbook on Human Rights* 163, at 174-175 (1994).

65. D.F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *Yale Law Journal* 2537, at 2590 (1990-1991).

66. See, e.g., D. Shrager & R. Zacklin, *The International Criminal Tribunal for Rwanda*, 7 *European Journal of International Law* 501, at 509 (1996).

67. *Apartheid Convention*, *supra* note 38, at 71.

68. *Id.*, at 71-72.

I that the crimes constitute “a serious threat to international peace and security”.⁶⁹

The Statute of the ICTY takes a compromise position in retaining the linkage between crimes against humanity and armed conflict, while clarifying that the character of the conflict – international or internal – is immaterial.⁷⁰ For its part, the Statute of the ICTR unties crimes against humanity from armed conflict and shifts the emphasis to widespread or systematic attacks against any civilian population on national, political, ethnic, racial or religious grounds.⁷¹ The reasons for the marked dissimilarity in approach between two texts emanating from the same source within a short interval (1993 and 1994, respectively) cannot be easily grasped, even when the different factual dimensions of the Yugoslav and Rwandan situations – to which the formulations are tailored – are factored in.⁷²

In the case law, the ICTY contributed to the trend cutting the umbilical cord of crimes against humanity to armed conflict, despite the fact that in its own proceedings (given the language of the 1993 Statute) it could not sever the bond to armed conflict altogether. In the *Tadić* case of 1995, the Trial Chamber enunciated:

The nexus in the Nuremberg Charter between crimes against humanity and the two other categories, crimes against peace and war crimes, was peculiar to the context of the Nuremberg Tribunal established specifically ‘for the just and prompt trial and punishment of the major war criminals of the European Axis countries’[...]

That no nexus is required in customary international law between crimes against humanity and crimes against peace or war crimes is strongly evidenced by subsequent case law.⁷³

The Trial Chamber relied on the *Einsatzgruppen* case, the Special Rapporteur of the ILC (Thiam) and the latest edition of Oppenheim.⁷⁴

The Appeals Chamber in the *Tadić* case held in 1995:

It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes

69. *Id.*, at 71.

70. Curiously enough, the Secretary-General commentary says: “Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character”. Report of the Secretary-General, *supra* note 26, at 1173. In light of the text of Article 5, which establishes that crimes against humanity must be “committed in armed conflict, whether international or internal in character” (*supra*, paragraph 2), this is a grossly misleading statement. See C. Tomuschat, *Crimes against the Peace and Security of Mankind and the Recalcitrant Third State*, 24 *Israel Yearbook on Human Rights* 41, at 48-49 (1994).

71. Security Council Resolution 955, *supra* notes 30-32 and related text.

72. See M.C. Bassiouni, *Crimes against Humanity in International Criminal Law* 193-198 (1999).

73. Prosecutor v. *Tadić*, *supra* note 13, at 30-31.

74. *Id.*

against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law.⁷⁵

Having concluded that in this case there existed an armed conflict, the Appeals Chamber did not hesitate in rejecting a challenge to its jurisdiction.⁷⁶ In 1999, the Appeals Chamber referred to the 1995 decision and added unequivocally: “under customary international law these crimes [crimes against humanity] may also be committed in times of peace”.⁷⁷

Another Trial Chamber of the ICTY – in the *Nikolić* case (also in 1995) – citing the *Tadić* decision on appeal as to the customary concept of crimes against humanity, pronounced:

Since the judgment at Nuremberg, the concept has taken on a certain autonomy as there is no longer any need to determine a link with a crime against the peace or a war crime.⁷⁸

The removal of any nexus between crimes against humanity and armed conflict was effected by the ILC in the 1996 Draft Code. In its commentary, the ILC observed:

The definition of crimes against humanity contained in the present articles 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 Nürnberg Charter. The autonomy of crimes against humanity was recognized in subsequent legal instruments which did not include this requirement.⁷⁹

Article 7 of the Rome Statute clearly follows in the footsteps of the ILC. Curiously, in dealing with persecution, Paragraph 1(h) reverts to the formula “in connection with [...] or any crime within the jurisdiction of the Court”. These crimes are genocide, war crimes and the crime of aggression.⁸⁰ Yet, two comments are called for. First, genocide can be committed in peacetime, and even

75. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, *Prosecutor v. Tadić*, Jurisdiction, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995, 35 *International Legal Materials* 32, at 72 (1996).

76. *Id.*

77. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, 15 July 1999, at 113 (mimeographed).

78. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, *Prosecutor v. Nikolić*, Review of Indictment Pursuant to Rule 61, Case No. IT-94-2-R61, Trial Chamber, 20 October 1995, at 14 (mimeographed).

79. Report of the International Law Commission, *supra* note 24, at 96.

80. See Art. 5 Rome Statute, *supra* note 41, at 1003-1004.

war crimes, as defined in the Statute, include acts committed in the course of non-international armed conflicts.⁸¹ Secondly, the significance of the reference to other crimes within the jurisdiction of the Court is vitiated by the alternative of “any act referred to in this paragraph” preceding the word “or”. Since some acts referred to in Paragraph 1 (e.g., *apartheid*) transcend the bounds of armed conflict – international or otherwise – persecution is prosecutable even when perpetrated in peacetime.

4. THE VICTIMS AND THE PERPETRATORS OF CRIMES AGAINST HUMANITY

The definition of crimes against humanity in Article 6(c) of the London Charter and subsequent instruments – other than the 1996 Draft Code – makes it clear that the gist of these crimes is that they are directed against “any civilian population”. The term “civilian” need not raise too many questions (notwithstanding some posed by the ICTY Trial Chamber, in 1997, in the *Tadić* case⁸²), inasmuch as it has traditionally and consistently been regarded as the antonym of combatants. The basic dichotomy of civilians versus combatants is articulated in Article 48 of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I).⁸³ It is obvious, however, that – as stated by the ICTY Trial Chamber – the presence of some non-civilians in the midst of a targeted population, which is of a predominantly civilian nature, does not change the overall civilian character of the population.⁸⁴

The Trial Chamber also (and rightly) emphasized that the use of the term “population” does not mean that the entire population of a given State or territory must be victimized: the expression simply denotes that crimes against humanity must be “crimes of a collective nature and thus exclude single or isolated acts”.⁸⁵ In other words, crimes against humanity do not merely strike at individuals in grave circumstances, which shock the collective conscience of humanity.⁸⁶ The central dimension of crimes against humanity is that they are directed against the civilian population as such, rather than against individual ci-

81. See Art. 8(2)(c)-(f), *id.*, 1008-1009.

82. Prosecutor v. Tadić, *supra* note 2, at 939-941.

83. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, in *The Laws of Armed Conflict*, *supra* note 1, at 621, 650.

84. Prosecutor v. Tadić, *supra* note 2, at 939.

85. *Id.*, at 941.

86. This seems to be the erroneous view of the ICTY Trial Chamber in the *Erdemović* case of 1996. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, Prosecutor v. Erdemović, Sentencing Judgment, Case No. IT-96-22-T, Trial Chamber, 29 November 1996, at 14-15 (mimeographed).

vilians in isolation.⁸⁷ In J.C. O'Brien's words, "crimes against humanity must be systematic or organized, not simply episodic and/or scattered attacks on individuals"⁸⁸.

The ILC, in its 1996 commentary on the Draft Code, set two general conditions for acts to qualify as crimes against humanity:

The first condition consists of two alternative requirements. The first alternative requires that the inhumane acts be *committed in a systematic manner* meaning pursuant to a preconceived plan or policy. [...] The thrust of this requirement is to exclude a random act which was not committed as part of a broader plan or policy. [...] The second alternative requires that the inhumane acts be *committed on a large scale* meaning that the acts are directed against a multiplicity of victims. This requirement excludes an isolated inhumane act committed by a perpetrator acting on his own initiative and directed against a single victim.

The second condition requires that the act was 'instigated or directed by a Government or by any organization or group'. [...] [This condition] is intended to exclude the situation in which an individual commits an inhumane act while acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group or organization.⁸⁹

The two cumulative conditions articulated by the ILC as the hallmarks of crimes against humanity relate, respectively, to the victims and to the perpetrators of crimes against humanity. Crimes against humanity cannot be one-on-one isolated crimes. The targeted victims must be multiple in numbers, although the inhumane acts to which they are subjected can be either systematic or large scale (and not necessarily both⁹⁰). For their part, the perpetrators must operate within the framework of an overall policy directed by a State or at least by a group or organization. While non-systematic large scale inhumane acts "can be the spontaneous consequence of a given conflict",⁹¹ it is obvious that the instigation or direction by a Government, an organization or a group preclude the classification of fortuitous events as crimes against humanity.

Au fond, the ILC's approach was endorsed in Article 7 of the Rome Statute. As noted, in the *chapeau* of Paragraph 1, the framers admittedly preferred the idiom "widespread" (borrowed from the ICTR Statute) to "large scale". In the explanatory note in Paragraph 2(a), the reference is to "State or organizational policy" pursuant to – or in furtherance of – which the acts are committed. A

87. See *In re Altstötter and Others* (Justice Trial), United States Military Tribunal 1947, 14 International Law Reports 278, at 284 (1947).

88. See J.C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 American Journal of International Law 639, at 648 (1993).

89. Report of the International Law Commission, *supra* note 24, at 94-95.

90. See A. Zimmermann, *The Creation of a Permanent International Criminal Court*, 2 Max Planck Yearbook of United Nations Law 169, at 175 (1998).

91. M.C. Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 Transnational Law & Contemporary Problems 199, at 210 (1998).

group is not mentioned as such, but surely the adjective “organizational” is broad enough. The explanatory note also insists on the “multiple commission of acts”, thereby eliminating altogether single acts. Arguably, any number exceeding one (such as two) may be regarded as meeting the condition of “multiple”,⁹² but the need to establish a systematic – even if not widespread – course of conduct seems to indicate that the mere occurrence of a couple of reprehensible acts would not suffice: a clear pattern of behavior must emerge.

In the *Nikolić* case of 1995, the Trial Chamber of the ICTY identified “three distinct components” in the concept of crimes against humanity:

First, the crimes must be directed at a civilian population, specifically identified as a group by the perpetrators of those acts. Secondly, the crimes must, to a certain extent, be organised and systematic. Although they need not be related to a policy established at State level, in the conventional sense of the term, they cannot be the work of isolated individuals alone. Lastly, the crimes, considered as a whole, must be of a certain scale and gravity.⁹³

In the *Tadić* case, another Trial Chamber of the ICTY set forth in 1995:

The very nature of the criminal acts in respect of which competence is conferred upon the International Tribunal by Article 5, that they be ‘directed against any civilian population’, ensures that what is to be alleged will not be one particular act but, instead, a course of conduct.⁹⁴

In 1997, the same Chamber had this to say:

Thus the emphasis is not on the individual victim but rather on the collective, the individual being victimised not because of his individual attributes but because of his membership of a targeted civilian population. This has been interpreted to mean [...] that the acts must occur on a widespread or systematic basis, that there must be some form of a governmental, organizational or group policy to commit these acts and that the perpetrator must know of the context within which his actions are taken.⁹⁵

The Chamber went on to opine that, whereas random acts are not included in the definition of crimes against humanity, a single act by an individual perpetrator against a single victim can still qualify if committed as part of a widespread or

92. See P. Hwang, *Defining Crimes against Humanity in the Rome Statute of the International Criminal Court*, 22 *Fordham International Law Journal* 457, at 502 (1998-1999).

93. *Prosecutor v. Nikolić*, *supra* note 78, at 14.

94. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, *Prosecutor v. Tadić*, Form of the Indictment, Case No. IT-94-I-T, Trial Chamber, 14 November 1995, at 4 (mimeographed).

95. *Prosecutor v. Tadić*, *supra* note 2, at 941.

systematic attack against the civilian population.⁹⁶ The individual's act thus has to fit in the context of a collective course of conduct (*i.e.* multiple acts).

Two controversial questions arose in the 1997 decision of the Trial Chamber in the *Tadić* case. The first was whether "some form of discriminatory intent is inherent in the notion of crimes against humanity" in general (including murder etc., as distinct from persecution on political, racial or religious grounds).⁹⁷ The Trial Chamber conceded that the requirement of discrimination is not contained in any of the texts defining crimes against humanity, except the ICTR Statute.⁹⁸ All the same, relying on the Secretary-General's Commentary on the ICTY Statute⁹⁹ (which, as indicated, served as the source for the pertinent provision of ICTR Statute; see *supra*, section 2), it adopted the requirement of discriminatory intent for all crimes against humanity.¹⁰⁰ On appeal, this decision was overruled in 1999. The Appeals Chamber preferred to follow the literal interpretation of the plain text, and pronounced that the Secretary-General's Report must give way to the language of the Statute.¹⁰¹ Moreover, it found support in customary international law for the rejection of the condition of discriminatory intent for all crimes against humanity.¹⁰² The decision on appeal is corroborated by the 1998 Rome Statute, wherein "a discriminatory motive is not an element required for all crimes against humanity".¹⁰³

The second question related to the personal motives of the accused. The Trial Chamber held that a crime against humanity cannot be carried out by the perpetrator for "purely personal reasons unrelated to the armed conflict".¹⁰⁴ The Appeals Chamber disagreed. It promulgated that, under customary international law, the "purely personal motives" of the accused were irrelevant, as long as the accused knew that the crimes were related to an attack on a civilian population.¹⁰⁵ The Judges on appeal relied chiefly on the so-called denunciation cases in post-World War II Germany.¹⁰⁶ In these trials, private individuals were convicted in domestic proceedings of crimes against humanity, having denounced other persons to the Nazi authorities (e.g., for listening to a foreign broadcasting station) out of strictly personal motives, following family feuds, tensions be-

96. *Id.*, at 943.

97. *Id.*

98. *Id.*, at 944.

99. "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". Report of the Secretary-General, *supra* note 26, at 1173.

100. Prosecutor v. Tadić, *supra* note 2, at 944.

101. Prosecutor v. Tadić, *supra* note 77, at 126-127, 131-132.

102. *Id.*, at 128-130.

103. D. Robinson, *Defining 'Crimes against Humanity' at the Rome Conference*, 93 *American Journal of International Law* 43, at 46 (1999).

104. Prosecutor v. Tadić, *supra* note 2, at 946.

105. Prosecutor v. Tadić, *supra* note 77, at 121.

106. *Id.*, at 115-118.

tween landlord and tenant, etc.¹⁰⁷ The denouncer was fully aware of the dire consequences bound to ensue for the victim owing to the Nazi policy, and the act of denunciation was therefore deemed by the courts an indispensable link in the chain of measures devised by the Nazi regime to persecute large segments of the civilian population.¹⁰⁸ It follows that the key is the context – or the attendant circumstances – in which the act occurs.¹⁰⁹

While crimes against humanity have to be directed at the civilian population, they can target “any” such population. It is desirable to compare the definition of crimes against humanity in Paragraph (c) of Article 6 of the London Charter with the definition of war crimes incorporated in Paragraph (b):

(b) *War crimes*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.¹¹⁰

Conspicuously, murder and deportation of civilian population are specified in both Paragraphs (b) and (c) of Article 6. Yet, whereas Paragraph (c) relates to any civilian population, Paragraph (b) applies only to the civilian population in occupied territories. The outcome is that murder or deportation of the civilian population in occupied territories is both a war crime and a crime against humanity, while murder or deportation of any other civilian population in connection with an armed conflict (e.g., Jews in Germany during World War II) is solely a crime against humanity. As elucidated by the *Tadić* Trial Chamber in 1997:

The inclusion of the word ‘any’ makes it clear that crimes against humanity can be committed against civilians of the same nationality as the perpetrator or those who are stateless, as well as those of a different nationality.¹¹¹

The bifurcation into the two branches of crimes against humanity and war crimes has been considerably altered by the latest, and much broader, definition of war crimes in Article 8 of the 1998 Rome Statute.¹¹² Article 8 no longer confines war crimes, when perpetrated against civilians, to occupied territories: these crimes now include the direction of attacks against the civilian population as such or individual civilians anywhere, and indeed even offenses against ci-

107. *Id.*, at 116-117.

108. *Id.*, at 117.

109. See B. Van Schaack, *The Definition of Crimes against Humanity: Resolving the Incoherence*, 37 *Columbia Journal of Transnational Law* 787, at 835 (1999).

110. Charter of the International Military Tribunal, *supra* note 1, at 914.

111. *Prosecutor v. Tadić*, *supra* note 2, at 939.

112. Rome Statute, *supra* note 41, at 1006-1009.

vilians in the course of a non-international armed conflict. Some offences (like rape) are simply duplicated in both definitions of war crimes and crimes against humanity, and at one point (forced pregnancy) there is a cross-reference from one definition to another. One can therefore anticipate a dramatic increase in the number of instances in which the same set of circumstances will be categorized simultaneously as a war crime and a crime against humanity. Still, it must be borne in mind that –

- 1) Crimes against humanity are strictly confined to acts hostile to the civilian population.¹¹³ This is in contradistinction to war crimes, which can be – and usually are – directed against combatants (by way of illustration, prisoners of war) no less than civilians.
- 2) Crimes against humanity, unlike war crimes, postulate widespread or systematic criminal action. “The killing of a single prisoner of war or of an inhabitant of occupied territory would constitute a war crime. The killing of a single civilian in isolation would not constitute a crime against humanity”.¹¹⁴

5. CONCLUSION

After many years of an almost purely theoretical appeal to scholars, crimes against humanity are now increasingly acquiring recognition as a grave and topical problem which deserves a prominent place on the international agenda. The ICTY has already come to grips with the need to determine the range of these crimes, and there is reason to believe that recent experiences – not only in the Balkans – will intensify public interest in the subject-matter.

While crimes against humanity are clearly enshrined today in customary international law, their exact definition is not free of doubt. In theory, the intrinsic nexus to armed conflicts has weakened over the years, and it may disappear altogether. But in practice, actual convictions of perpetrators have been confined thus far to crimes against humanity committed in the course of either international or internal armed conflicts. The simultaneous broadening of the spectrums of crimes against humanity and war crimes raises a question as to the current distinction between them when the civilian population is victimized. Patently, the process of evolution of crimes against humanity is not over yet.

113. See Schwelb, *supra* note 7, at 190.

114. W.J. Fenrick, *Should Crimes against Humanity Replace War Crimes?*, 37 *Columbia Journal of Transnational Law* 767, at 773 (1999).