PEPPERDINE UNIVERSITY

Global Tides

Volume 18 Article 5

April 2024

# The Development of International Law in Relation to Crimes against Humanity

Nikki Redelijk
*Pepperdine University*, nikki.redelijk@pepperdine.edu

# The Development of International Law in Relation to Crimes against Humanity

## Introduction

Throughout history, international law has contended with the intersection of positivist and naturalist legal philosophies. While naturalism contends that international law has to serve the common good of humankind and is already inherent, positivism suggests that law is whatever states decide it is. Concerning these two philosophies, one legal term in particular offers a compelling juxtaposition: crimes against humanity. First juridically applied at Nuremberg, there is no specific convention relating to crimes against humanity, thus resulting in varying definitions. However, as stated in the Preamble of the Rome Statute, there are certain "atrocities that deeply shock the conscience of humanity."[1] Thus, if crimes against humanity can "deeply shock the conscience of humanity," how can one discern if there is a collective naturalist conception of humanity's conscience, or if what constitutes as "shocking" is in the eye of the beholder in power? Hence, this paper will examine the development of international law in relation to crimes against humanity. Starting at Nuremberg and delving into positivist and naturalist interpretations of the definition, this paper will use backward induction to clarify the concept's origins and potential juxtapositions within it.

## Debut of Crimes against Humanity into Jurisprudence

Although actions that constitute crimes against humanity can arguably date back to acts committed before the term's inception, its applicability has remained hindered due to the Westphalian notion of the absolute sovereignty of states.[2] In a consent-based system, the idea that certain crimes allowed for erasing territorial jurisdiction directly contradicted the basis of autonomous rule within prescribed boundaries.[3] Nevertheless, the magnitude of atrocities committed by Nazi Germany during World War II, and the ensuing collaboration between the Great Powers, allowed for the proper debut of issues like crimes against humanity into jurisprudence.

The first introduction of crimes against humanity into the Nuremberg sphere dates to the working relationship between American lawyer Robert Jackson and Zolkiew native-turned-scholar Hersch Lauterpacht. Zolkiew is now a town in western Ukraine, but at the time, it was part of the Austro-Hungarian empire and brewing with World War II tensions. Before becoming chief US prosecutor at Nuremberg, Jackson was attorney general under President Franklin Roosevelt. In this capacity, he first met Lauterpacht, who believed in the power of protecting individual rights from state purview.[4] Mistrusting American international lawyers due to potential isolationist biases, Jackson welcomed Lauterpacht's views on dismissing antiquated notions of preserving neutrality at all costs.[5] While this initial meeting was fleeting, this marked the beginning of further collaborations between the two on issues relating to combating "international lawlessness" in the wake of Nazism.[6]

---

[1] "Rome Statute of the International Criminal Court," opened for signature July 17, 1998, entered into force July 1, 2002, A/CONF. 183/9, *United Nations Treaty Series*, vol. 2187, no. 38544, Preamble. https://legal.un.org/icc/statute/99_corr/cstatute.htm. [hereinafter Rome Statute]

[2] Norman Geras, *Crimes Against Humanity: Birth of a Concept* (Manchester University Press, 2011), 3, http://www.jstor.org/stable/j.ctt155j74v.

[3] Geras, 3.

[4] Phillipe Sands, *East West Street: On the Origins of Genocide and Crimes against Humanity* (Alfred A. Knopf, 2016), 95.

[5] Sands, 95-96.

[6] Sands, 102.

Following the Pearl Harbor attack and the subsequent German declaration of war on America, there was an inter-allied meeting on June 12, 1941, at St. James Palace in London among various Allied governments who believed that German war crimes must be punished.[7] The St. James Agreement was formed soon after, which importantly formulated a committee that would later make up the United Nations War Crimes Commission.[8]Once Roosevelt, Churchill, and Stalin met at Yalta and the UN Charter was formulated, Jackson and Lauterpacht would meet again to brainstorm what would constitute the London Charter and subsequent International Military Tribunal (IMT). [9]

Creating the London Charter and IMT had its fair share of challenges. Although there was agreement among the Allied victors on having the tribunal exercise jurisdiction over individuals rather than states, the prominent points of contention mostly revolved around the wording of draft Article 6.[10] To avoid the French and the Soviet Union possibly overpowering the wishes of the United States through a newly elected and "sympathetic" British Labour Party, Jackson again sought out Lauterpacht's expertise.[11] In this meeting, Lauterpacht suggested introducing titles into the text as a form of compromise and, while doing so, proposed a specific title that addressed cruelty against civilians: crimes against humanity.[12] At the time, there was a substantial gap in the laws and customs of war that did not address atrocities in which "the victims and perpetrators possessed either the same nationality, or the respective nationalities of two or more states that were not belligerents, or if the victims were stateless."[13] Much of the legal gap regarding the prosecution of civilian atrocities is attributable to the doctrine of absolute sovereignty (and the pursuit of not violating it.) However, when arguing for the introduction of crimes against humanity, Robert Jackson linked the German atrocities to the lack of existing protections for civilians:

> It has been a general principle of foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business; that is to say, the way Germany treats its inhabitants... is not our affair any more than it is the affair of some other government to interpose itself in our problems. The reason that this program of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was part of a plan for making an illegal war. Unless we have a war connection as a basis for reaching them, I would think we have no basis for dealing with atrocities. They were a part of the preparation for war or for the conduct of the war in so far as they occurred inside of Germany and that makes them our concern.[14]

While Jackson acknowledges the validity of maintaining sovereignty, he also asserts that the fact that these atrocities were committed in the context of World War II opens an internal issue to

[7] Sands, 101.
[8] Sands, 104.
[9] Sands, 112.
[10] Sands, 112.
[11] Sands, 113.
[12] Sands, 113.
[13] Payam Akhavan, "Reconciling Crimes against Humanity with the Laws of War: Human Rights, Armed Conflict, and the Limits of Progressive Jurisprudence." *Journal of International Criminal Justice* 6, no. 1 (March 1, 2008): 23. https://doi.org/10.1093/jicj/mqn001.
[14] Beth Van Schaack, "The Definition of Crimes against Humanity: Resolving the Incoherence," *Columbia Journal of Transnational Law 37*, no. 3 (1999): 799, https://heinonline-org.lib.pepperdine.edu/HOL/P?h=hein.journals/cjtl37&i=796.

external purview. Thus, seeing the logic in combatting barbarity against individuals committed within state borders, Jackson introduced the phrase into a draft of the Statute, and soon enough, crimes against humanity were listed in Article 6(c) of the London Charter as

> 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.[15]

Hence, the formulation of Article 6(c) as part of the London Charter was a remarkable assault on positivist notions of state sovereignty. Essentially, the introduction of "crimes against humanity" held national leaders legally liable for the treatment of their subjects within their territorial boundaries, even if the acts were commonly considered legal under the ascribed municipal law.[16]

**Positivism and Naturalism at Nuremberg**

Much of the furor regarding the definition of crimes against humanity within the London Charter revolved around the war nexus: a limiting principle for the Nuremberg Tribunal that asserts that its jurisdiction over crimes against humanity consists of acts "committed 'before or during the war' and 'in execution of or in connection with any crime within the jurisdiction of the Tribunal'."[17] Essentially, the war nexus effectively contends that the criminal act in question must have occurred in the context of armed conflict. This war nexus is attributable to the insertion of a semicolon in the English and French versions of the London Charter but not the Russian version.[18] The initial English and French versions had a semicolon after the word "war," whereas the Russian version had a comma.[19] The semicolons were later replaced with commas, which implied that crimes against humanity committed before the war were outside Tribunal jurisdiction.[20] Thus, crimes against humanity committed prior to the declaration of war could not fall under Tribunal jurisdiction, since regardless of "how revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crimes."[21]

Nevertheless, there has been contention on whether or not crimes against humanity already existed in customary international law or if the London Charter was undertaking a legislative act retroactively.[22] The German defense took up the latter, postulating that the IMT's application of *ex post facto* law was an instance of undue judicial discretion and thereby violated the legality principle, known as *nullum crimen, nulla poena sine lege*.[23] The Universal Declaration of Human Rights outlines the legality principle: “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time it was committed."[24] Essentially, while *nullum crimen*

---

[15] London Charter, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6(c), 82 U.N.T.S. 279 (1945).
[16] Van Schaack, “The Definition of Crimes against Humanity,” 846-847.
[17] Van Schaack, 791.
[18] Sands, *East West Street*, 116.
[19] Geras, *Crimes Against Humanity*, 14.
[20] Sands, *East West Street*, 116.
[21] Van Schaack, “The Definition of Crimes against Humanity,” 804.
[22] Geras, *Crimes Against Humanity*, 18.
[23] Guido Acquaviva, “At the Origins of Crimes against Humanity: Clues to a Proper Understanding of the Nullum Crimen Principle in the Nuremberg Judgment,” *Journal of International Criminal Justice* 9, no. 4 (April 29, 2011): 882-883, https://doi.org/10.1093/jicj/mqr010.
[24] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (December 10, 1948).

*sine lege* stipulates that there can be no crime without existing law, *nulla poena sine lege* outlines that there should be no punishment without existing law.[25] Hence, German defense Jahreiss took up the argument that since no law prohibited the defendants' acts when they were committed, the prosecution of these acts was a direct violation of state sovereignty and had no legal status.[26] Thus, although the war nexus offered a way for crimes committed within state borders to be subject to prosecution, it also gave the German defense counsel a strategy to compound the separation of legality from morality with the aim of seeking Nazi acquittal.[27]

Amplifying that line of reasoning, although the London Charter explicitly outlines that "the official position of defendants… shall not be considered as… mitigating punishment," the German defense contended that individual acts of state authorized by a government fall under the doctrine of absolute sovereignty.[28] If someone acts beyond the powers bestowed to them by their government, then they are personally liable, but if not, they are merely acting in an official capacity.[29] Applying this argument to Nuremberg, Jahreiss asserted that the acts of respective Nazi defendants were within the purview of powers delegated to them by the State, making them acts of the state and thus bestowing the defendant's legal immunity.[30] From this logic, Jahreiss asserted that the IMT's process of prosecuting these crimes violated the doctrine of absolute sovereignty and thereby limited what was once considered unlimited: the power of states to exercise law within their territory.[31] Therefore, the German defense took a positivist stance that aimed to deny the justifications for creating the IMT.

Although the Nuremberg Trials were, by submission, considerably positivist due to the formulation of the IMT itself, naturalism was still greatly evident due to the foundation of the Allied Powers' argument. Essentially, the Allies responded to the German claims of the IMT being illegitimate by arguing that the London Charter and subsequent IMT were additional sanctions to preexisting customary law.[32] In the absence of firm treaty law, international law is significantly shaped by the foundation of the practices and customs of states themselves. Thus, if there were to be a strict adherence to the illegality of *ex post facto* law, customary law would never be able to bridge gaps and evolve.[33] On the matter of progressivism at Nuremberg, Robert Jackson asserted:

> International law… is an outgrowth of treaties and agreements between nations and of accepted customs. Yet every custom has its origin in some single act, and every agreement has to be initiated by the action of some state. Unless we are prepared to abandon every principle of growth for international law, we cannot deny that our own day has the right to institute customs and to conclude agreements that will themselves become sources of newer and strengthened international law.[34]

Hence, from the Allied powers' naturalistic point of view, the application of *nullum crimen nulla poena sin lege* was unfounded because not only were crimes against humanity upheld in custom,

[25] Geras, *Crimes Against Humanity*, 18.
[26] Stanley L. Paulson "Classical Legal Positivism at Nuremberg," *Philosophy & Public Affairs* 4, no. 2 (1975): 154, http://www.jstor.org/stable/2265160
[27] Van Schaack, "The Definition of Crimes against Humanity," 846-847.
[28] Paulson, "Classical Legal Positivism," 140-141.
[29] Paulson, 141.
[30] Paulson, 143.
[31] Paulson, 143.
[32] Paulson, 155.
[33] Geras, *Crimes Against Humanity*, 19.
[34] Geras, 19-20.

but the German actions violated a moral law of the universe so much that it would be inconceivable not to prosecute them.[35] Hence, despite arguments of *ex post facto* law and retroactivity, the Allies effectively reasoned that the creation of the IMT was legitimate.

Furthermore, even though international law lacked the purview to address the German atrocities before they were committed, that is not to say that municipal law lacked the same thing. Although nuances exist, most acts considered criminal under municipal law can be treated as crimes against humanity when applied to an international law perspective.[36] Many of the offenses listed in Article 6(c) of the London Charter are emulated in municipal law's configuration of *mala in se* crimes, which are crimes that are inherently wrong within themselves.[37] The connection of a crime being *mallum in se* can be best described by a straightforward phrase by Robert Jackson himself: "Does it surprise these men that murder is a crime?"[38] Therefore, the German defense was argued as hypocritical: although the doctrine of absolute sovereignty was essential to uphold when arguing that the Nazi actions were acts of state, that very same doctrine and its implications were readily dismissed through the Nazi actions themselves. [39] In his closing statement at Nuremberg, and with help from Hersch Lauterpacht, UK chief prosecutor Hartley Shawcross offered a poignant naturalist perspective on the matter of jurisdiction when prosecuting London Charter crimes:

> Normally international law concedes that it is for the state to decide how to treat its own nationals; it is a matter of domestic jurisdiction… Yet international law has in the past made some claim that there is a limit to the omnipotence of the State and that the individual human being, the ultimate unit of all law, is not disentitled to the protection of mankind when the state tramples upon his rights in a manner which outrages the conscience of mankind… The fact is that the right of humanitarian intervention by war is not a novelty in international law- can intervention by judicial process then be illegal? [40]

Hence, the German acts disturbed the "conscience of mankind" to such an extreme that the primacy of the doctrine of absolute sovereignty was to be expectedly lowered to allow for their prosecution. The novelty of this ideal is what underlined the revolutionary importance of the London Charter itself; as Shawcross asserts, " [The charter] gives warning for the future to dictators and tyrants… that if… they debase the sanctity of man in their own country they act at their peril, for they affront the international law of mankind."[41] The "international law of mankind" was thus set above what existed under positivist law, offering a stark introductory instance of a reverence towards protecting individual human rights.

**Understanding of "Humanity" Itself**

The frequent reference to "humanity" can be traced back to the "laws of humanity" used in the Martens Clause.[42] Outlined in the Preamble of the 1899 Hague Convention, the Martens Clause stipulates the following:

---

[35] Ellis Washington, "The Nuremberg Trials: The Death of the Rule of Law (in International Law)," Loyola Law Review 49, no. 3 (Fall 2003): 508. https://heinonline-org.lib.pepperdine.edu/HOL/P?h=hein.journals/loyolr49&i=481.
[36] Geras, *Crimes Against Humanity*, 79.
[37] Geras, 80.
[38] Washington, "The Nuremberg Trials," 510.
[39] Washington, 510.
[40] Van Schaack, "The Definition of Crimes against Humanity," 846-847.
[41] Geras, *Crimes Against Humanity*, 80.
[42] Vladimir Tochilovsky, "Crimes against 'Humaneness'?" *Journal of International Criminal Justice* 16, no. 5 (November 19, 2018): 1012. https://doi.org/10.1093/jicj/mqy059.

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.[43]

While there is a slightly different definition in the 1907 version due to some substitutions in terminology, both have clear naturalist connotations that aim to protect those residing in occupied territories.[44] Since its formulation, the Clause has garnered a broad interpretation encompassing the scope of international humanitarian law.[45] The generality of the Clause allows for its usage to oftentimes nullify an *argumentum a contrario*.[46] Thus, the Clause typically "lies dormant" until state actors try to find a loophole in existing law, so actions considered "abhorrent to standards of humanity and public conscience" can be legitimized as state acts.[47] In the case of Nuremberg, the Clause aimed to block the German defense of retroactive criminalization and *ex post facto* law, allowing the Clause itself to rise to the level of an independent norm that, when violated, constituted an international crime.[48] Hence, invoking the Martens Clause at Nuremberg through reference to "humanity" rooted the Allies' prosecution of German atrocities in naturalistic themes.

However, the meaning of "humanity" itself and what it comprises is understandably muddled by the fact that the London Charter and Nuremberg Judgment have different linguistic versions. Within the London Charter stood an articulation that "all official documents shall be produced, and all court proceedings conducted, in English, French, and Russian and in the language of the Defendant."[49] Moreover, the Nuremberg Judgment delivered during the final court hearings was produced in English, French, and Russian, thereby rendering the three differing versions of the Judgment official.[50] The German judgment was consequently not considered official because it was merely translated from each of the three aforementioned languages.[51] Nevertheless, although the French and English versions see the term "humanity" as referencing "humankind," the German and Russian versions of the London Charter see humanity as being an abstract "sentiment." [52] For example, the German version of article 6(c) of the London Charter initially listed the term "humanity" as *menschlichkeit*, which translates into "the moral sentiment or ensemble of values" rather than *menscheit*, meaning "humankind."[53] In a similar fashion, the Russian interpretation of crimes against humanity was *prestupleniya protiv*

---

[43] Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403. Quoted in Theodor Meron, "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience." *The Development and Principles of International Humanitarian Law*, July 5, 2017, 79. https://doi.org/10.4324/9781315086767-14.

[44] Meron, 49.

[45] Meron, 49.

[46] Mitchell Stapleton-Coory, "The Enduring Legacy of the Martens Clause: Resolving the Conflict of Morality in International Humanitarian Law," *Adelaide Law Review* 40, no. 2 (2019): 476, https://heinonline-org.lib.pepperdine.edu/HOL/P?h=hein.journals/adelrev40&i=479.

[47] Stapleton-Coory, 476.

[48] Stapleton-Coory, 482.

[49] Acquaviva, "At the Origins of Crimes against Humanity," 886.

[50] Acquaviva, 886-887.

[51] Acquaviva, 887.

[52] Tochilovsky, "Crimes against 'Humaneness," 1017.

[53] Geras, *Crimes Against Humanity*, 40.

*chelovechnosti*, meaning "crimes against humaneness."[54] These differing interpretations of what constitutes "humanity" are of importance since, as Hannah Arendt noted, for the Nazi acts to be listed as merely "inhumane" would be "certainly the understatement of the century… as though the Nazis had simply been lacking in human kindness."[55] On the other hand, if crimes against humanity take on the meaning of crimes committed against "humankind," then humanity can be seen as the sovereignty being offended.[56] This idea of "humankind-as-sovereign" is seemingly evidenced throughout the Allies' logic at Nuremberg.[57] Furthermore, although the war nexus requirement helped prosecute the Germans at Nuremberg, the introduction of it concurrently complicated the understanding of what constitutes "humanity" due to limiting the prosecution of acts committed during the war. Thus, paradoxically, both the punctuation anomalies seen within Article 6(c) and the war nexus limitation inadvertently lessens the naturalistic scope of what came out of Nuremberg.[58]

**Post-Nuremberg Progress of Codifying Crimes against Humanity**

Nevertheless, not long after the conclusion of the Nuremberg Trials, the newly formed International Law Commission (ILC) created the Nuremberg Principles, which aimed to marry the London Charter and Nuremberg Judgments under the purview of the ILC.[59] Principle VI(c) of the Nuremberg Principles is much like Article 6(c) of the London Charter apart from omitting the phrase "before or during the war;" the ILC believed that the phrase only referred to World War II.[60] The ILC's attempts at workshopping crimes against humanity is noticable throughout the 1954, 1991, and 1996 renditions of the Draft Code of Crimes against the Peace and Security of Mankind.[61] However, these respective adaptations contained some departures from the London Charter and Nuremberg Principles. For example, the 1954 Draft Code departed from Nuremberg Principle VI(c) by linking "inhumane acts" with a "requirement that they be committed on social, political, racial, and religious grounds."[62] Furthermore, the 1991 Draft Code was criticized for conflating individual and state responsibility and blurring jurisdictional delineations between conduct entirely within national purview, and conduct that constitutes universal jurisdiction.[63] Lastly, the 1996 Draft Code instituted a "systematic manner or on a large scale" requirement. [64] While the "systematic manner" portion established a policy element that aimed to distinguish between national and universal jurisdiction, the "large scale" requirement sought to rule out acts taken by an individual on their own accord.[65] Although the various iterations of the Draft Codes were never fully adopted, they laid the groundwork for the formulation of the Rome Statute and subsequent International Criminal Court (ICC). [66]

---

[54] Tochilovsky, "Crimes against 'Humaneness," 1017.
[55] Geras, *Crimes Against Humanity*, 40.
[56] Geras, *Crimes Against Humanity*, 45 (see chap. 2)
[57] Geras, *Crimes Against Humanity*, 45.
[58] Geras, *Crimes Against Humanity*, 81.
[59] Mohamed E. Badar, "From the Nuremberg Charter to the Rome Statute: Defining Elements of Crimes against Humanity," *San Diego International Law Journal* 5, no. 1 (2004): 83, https://digital.sandiego.edu/ilj/vol5/iss1/4.
[60] "The Nuremberg Principles on War Criminals." *Peace Research* 29, no. 1 (1997): 73. http://www.jstor.org/stable/23607364. Quoted in Badar, 83–84.
[61] Badar, 84.
[62] Badar, 85.
[63] Badar, 85.
[64] Badar, 86.
[65] Badar, 86.
[66] Leila Nadya Sadat. "Crimes against Humanity in the Modern Age." *American Journal of International Law* 107, no. 2 (April 2013): 338, https://doi.org/10.5305/amerjintelaw.107.2.0334.

Moreover, the London Charter and the Nuremberg Tribunal set a precedent that influenced the creation of similar tribunals in Yugoslavia and Rwanda in the 1990s, where crimes against humanity were again thoroughly prosecuted.[67] For example, the International Criminal Tribunal for Yugoslavia (ICTY) built on Article 6(c) by including imprisonment, rape, and torture in the list of acts that constitute crimes against humanity.[68] The ICTY also established that the war nexus requirement was unnecessary for crimes against humanity prosecutions under customary international law.[69] Moreover, the creation of the International Criminal Tribunal for Rwanda (ICTR) further ushered crimes against humanity into the limelight. Regarded as a "crimes against humanity court," the ICTR brought 282 counts of crimes against humanity onto ninety defendants, with fifty-seven defendants found guilty on seventy-four counts.[70] While differences exist between the two tribunals, their respective definitions of crimes against humanity led to the creation of numerous UN Committees that eventually formulated the Rome Statute.[71]

The Rome Statute signifies the first instance where the definition of crimes against humanity was not to be imposed by victors, like at Nuremberg, or by the Security Council, as seen at the ICTY and ICTR.[72] The creation of the ICC as a permanent court aimed to institute a preventative function against crimes against humanity that could not be replicated in previous tribunals made retroactively. Understandably, the timeline to adopting the Rome Statute involved extensive negotiations among states, with many states considerably involved in shaping potential treaty obligations.[73] The importance of creating a clear definition was compounded by the fact that the Rome Statute can apply to nonparty states through the vested power of the Security Council.[74] Expectedly, to tame concerns of prosecutorial overreach, the Rome Statute contains various procedural devices that ensure the ICC upholds state sovereignty.[75] Fortunately, after negotiations ensued, Paragraph 1 of Article 7 came to define crimes against humanity as acts that are "committed as a part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[76] Most elements within Paragraph 1 contain antecedents already outlined in either case law or statutes delivered by national courts or international criminal tribunals.[77] Furthermore, if there are gaps in the application of the Statute itself and the Elements of Crimes, Article 21 of the Rome Statute allows the ICC to apply customary international law derived from the work of previous ad hoc tribunals.[78]

Notable absences within the Rome Statute include the war nexus requirement, the discriminatory motive requirement, the element of *mens rea*, and the "widespread or systematic attack" criteria.[79] Certain states wanted a conjunctive "and" version of the "widespread or systematic" disjunction, but making this clause conjunctive could arguably lead crimes against

[67] Sadat, 341.
[68] Sadat, 342.
[69] Sadat, 345.
[70] Sadat, 347.
[71] Badar. "From the Nuremberg Charter," 89–90.
[72] Darryl Robinson. "Defining 'Crimes Against Humanity' at the Rome Conference." *The American Journal of International Law* 93, no. 1 (1999): 43, https://doi.org/10.2307/2997955.
[73] Robinson, 43.
[74] Sadat. "Crimes against Humanity in the Modern Age," 351.
[75] Sadat, 377.
[76] Rome Statute, art. 7(1).
[77] Sadat. "Crimes against Humanity in the Modern Age," 351.
[78] Sadat, 375.
[79] Robinson. "Defining 'Crimes Against Humanity' at the Rome Conference," 45.

humanity to be overinclusive.[80] Thus, to appease the group that wanted "and" instead of "or", subparagraph 2(a) of Article 7 defines an "attack directed against any civilian population" as "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 party to commit such act."[81] This addition introduces an element of planning or direction required to establish crimes against humanity, which is traceable to the Nuremberg Charter and IMT citing the "common plan" of the Nazis; namely their "policy of terror" and "policy of persecution, repression, and murder of civilians."[82]

Nevertheless, the fundamental question remains: what constitutes humanity? Within Article 7 lies the assertion that crimes against humanity involve "other inhumane acts of a similar character causing great suffering, or serious injury to body or to mental or physical health."[83] Likewise, within Footnote 30 of the ICC Elements of Crimes, for an act to be inhumane, it must reach a "comparable threshold in gravity" and be "somewhat similar in nature in comparison" to the enumerated crimes listed in Paragraph 1.[84] However, if the concept of inhumanity is restricted to what the framers of the Rome Statute listed, it does not aptly answer why it is considered inhumane in the first place.[85] The same dilemma lies within the Preamble of the Rome Statute's assertion that there are certain "atrocities that deeply shock the conscience of humanity."[86] Hence, how can one truly discern what is "inhumane" or "shocks the conscience of humanity"? The entirety of the question is, in effect, a causality dilemma between naturalism and positivism. There is the stance that there is a collective naturalist conception of what constitutes crimes against humanity, and there is another stance that contends that crimes against humanity are merely crimes instituted by those who have the power to do so. However, the dualistic conception of the term, rooted in semantics and abstraction, leads one to conclude that crimes against humanity are "neither crimes against humaneness nor crimes against humankind, but both."[87] Hence, there is no concrete answer to what discerns either a collective naturalist conception of what constitutes "inhumane" and humanity's "conscience" or if what constitutes as "shocking" is merely derived from those that frame law. Rather, "the atrocities and humiliations that count as crimes against humanity are, in effect, the ones that turn our stomachs, and no principle exists to explain what turns our stomachs."[88] For this reason, there will always be a normative aspect to positivist law relating to crimes against humanity.

**Conclusion**

In summation, while its existence in customary international law can be traced much further back, the official introduction of crimes against humanity into jurisprudence occurred at Nuremberg. The atrocities committed by the Nazi regime were so severe that the Allies believed that limitations on state sovereignty were necessary in order to protect individuals from excessive state purview. The various tribunals since Nuremberg served their respective purposes

[80] Robinson, 47.
[81] Rome Statute, art. 7(2)(a).
[82] Robinson, 48.
[83] Rome Statute, art. 7(1)(k).
[84] Bernard Kuschnik, "Humaneness, Humankind and Crimes against Humanity," *Goettingen Journal of International Law* 2, no. 2 (2010): 504, https://www.gojil.eu/issues/22/22_article_kuschnik.pdf.
[85] Kuschnik, 505.
[86] Rome Statute, Preamble.
[87] Kuschnik, "Humaneness, Humankind," 514.
[88] David Luban, "A Theory of Crimes Against Humanity," *Georgetown Law Faculty Publications and Other Works*, (January 1, 2004): 101, https://scholarship.law.georgetown.edu/facpub/146.

with great importance. However, many laud the Rome Statute as the crowning touch by establishing the ICC, which has jurisdiction in prosecuting crimes against humanity. Over the decades, the naturalistic tones conceived at Nuremberg have lost some significance due to the varying definitions of crimes against humanity. However, the continuing inclusion of the term "humanity" throughout the timeline of the definition implies that a reverence to some naturalistic moral ideal of what constitutes humanity will forever be relevant. Hence, it remains that "humanity" was not merely a technical term invoked on a whim; instead, it carries a sense of gravity and underscores a reverence of morality upheld in a universalistic notion of collectivity.[89]

Thus, there is no clear way to discern whether there is a collective naturalist conception of humanity's conscience, or if what constitutes as "shocking" is in the eye of the beholder in power. The surface-level argument of the Allied Powers at Nuremberg was naturalistic; they appealed to a moral high ground that set the sacredness of individual human rights above the purview of state power. Despite assertions of victor's justice, the Allied Powers were able to prosecute the Germans accordingly. The Nuremberg IMT, therefore, set a precedent for the institution of tribunals to prosecute crimes against humanity, amongst other war crimes. However, this does not take away from the German argument that the creation of the Nuremberg Tribunal was an exercise of *ex post facto* law and a repudiation of the doctrine of absolute sovereignty. Furthermore, the culmination of punctuation anomalies, the war nexus requirement, and the differing linguistic renditions seen within Article 6(c) and the Nuremberg Judgment compound the issue of interpreting "humanity" from a naturalistic or positivist perspective. Further disconcerting is the knowledge that although crimes against humanity are now embedded in various international law mechanisms, a specific international convention on the matter is still absent.

However, not all hope is lost; there are ongoing efforts underway to draft a Convention on Crimes against Humanity. In 2019, the International Law Commission published draft articles for a convention on the matter, outlining various mechanisms that will aim to assist states' endeavors in interpreting crimes against humanity within their respective municipal laws.[90] Currently, the work continues to lie within the Sixth Committee of the UN General Assembly to further negotiation discussions in aims of making these draft articles into a codified convention. Thus, while this process may span years to come, it provides hope that there will someday be a Convention on Crimes against Humanity.

Despite the upside of these recent codification efforts, crimes against humanity have remained evident throughout the last sixty years. Examples include the attacks on civilians by Israel and Hamas, ethnic cleansing in the former Yugoslavia, the Cambodian killing fields, and South African apartheid, to name a few.[91] Thus, those in charge of further codifying the term are comparable to "mathematicians in the early stages of a new field," with the materials they are working with being the "intuitions about what conceptual work the definition was supposed to do."[92] Hence, the development of international law in relation to crimes against humanity is still a work in progress. As seen throughout its timeline, the definition of crimes against humanity continues to gradually progress and include more individual human rights protections. However, judging from the gravity of ongoing conflicts throughout the world, there is still substantial work to be done in order to bring the term to its full potential.

[89] Luban, 161.
[90] Tochilovsky, "Crimes against 'Humaneness," 1011.
[91] Sadat. "Crimes against Humanity in the Modern Age," 351.
[92] Luban, 161.

# Bibliography

Acquaviva, Guido. "At the Origins of Crimes against Humanity: Clues to a Proper Understanding of the Nullum Crimen Principle in the Nuremberg Judgment." *Journal of International Criminal Justice* 9, no. 4 (April 29, 2011): 881–903. https://doi.org/10.1093/jicj/mqr010.

"Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ('London Agreement')." United Nations, August 8, 1945. https://www.refworld.org/docid/47fdfb34d.html.

Akhavan, Payam. "Reconciling Crimes against Humanity with the Laws of War: Human Rights, Armed Conflict, and the Limits of Progressive Jurisprudence." *Journal of International Criminal Justice* 6, no. 1 (March 1, 2008): 21–37. https://doi.org/10.1093/jicj/mqn001.

Badar, Mohamed E. "From the Nuremberg Charter to the Rome Statute: Defining Elements of Crimes against Humanity," *San Diego International Law Journal* 5, no. 1 (2004): 73–144. https://digital.sandiego.edu/ilj/vol5/iss1/4.

Geras, Norman. *Crimes Against Humanity: Birth of a Concept*. Manchester University Press, 2011. http://www.jstor.org/stable/j.ctt155j74v.

Kuschnik, Bernard. "Humaneness, Humankind and Crimes against Humanity," *Goettingen Journal of International Law* 2, no. 2 (2010): 501–530. https://www.gojil.eu/issues/22/22_article_kuschnik.pdf

"Laws of War: Laws and Customs of War on Land (Hague II); July 29, 1899." The Avalon Project. Accessed November 20, 2023. https://avalon.law.yale.edu/19th_century/hague02.asp.

Luban, David. "A Theory of Crimes Against Humanity," *Georgetown Law Faculty Publications and Other Works*, (January 1, 2004): 85–167. https://scholarship.law.georgetown.edu/facpub/146.

Meron, Theodor. "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience." *The American Journal of International Law* 94, no. 1 (2000): 78–89. https://doi.org/10.2307/2555232.

Paulson, Stanley L. "Classical Legal Positivism at Nuremberg." *Philosophy & Public Affairs* 4, no. 2 (1975): 132–58. http://www.jstor.org/stable/2265160.

Robinson, Darryl. "Defining 'Crimes Against Humanity' at the Rome Conference." *The American Journal of International Law* 93, no. 1 (1999): 43–57. https://doi.org/10.2307/2997955.

Sadat, Leila Nadya. “Crimes against Humanity in the Modern Age.” *American Journal of International Law* 107, no. 2 (April 2013): 334–377. https://doi.org/10.5305/amerjintelaw.107.2.0334.

Sands, Philippe. *East West Street: On the Origins of "Genocide" and "Crimes against Humanity"*. Firsted. New York: Alfred A. Knopf, 2016.

Stapleton-Coory, Mitchell. "The Enduring Legacy of the Martens Clause: Resolving the Conflict of Morality in International Humanitarian Law," *Adelaide Law Review* 40, no. 2 (2019): 471–484. https://heinonline-org.lib.pepperdine.edu/HOL/P?h=hein.journals/adelrev40&i=479

“The Nuremberg Principles on War Criminals.” *Peace Research* 29, no. 1 (1997): 72–73. http://www.jstor.org/stable/23607364.

Tochilovsky, Vladimir. “Crimes against ‘Humaneness’?” *Journal of International Criminal Justice* 16, no. 5 (November 19, 2018): 1011–19. https://doi.org/10.1093/jicj/mqy059.

Washington, Ellis. “The Nuremberg Trials: The Death of the Rule of Law (in International Law)," Loyola Law Review 49, no. 3 (Fall 2003): 471–518. https://heinonline-org.lib.pepperdine.edu/HOL/P?h=hein.journals/loyolr49&i=481.

UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, July 17, 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html. [accessed November 21, 2023]

United Nations, *Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement")*, August 8, 1945, 82 U.N.T.C. 280, available at: https://www.refworld.org/docid/47fdfb34d.html. [accessed November 21, 2023]

Van Schaack, Beth. “The Definition of Crimes against Humanity: Resolving the Incoherence.” *Columbia Journal of Transnational Law* 37, no. 3 (January 1998): 787–850. https://heinonline-org.lib.pepperdine.edu/HOL/P?h=hein.journals/cjtl37&i=796.