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The Evolution of Persecution as a Crime Against Humanity

Helen Brady* and Ryan Liss**

12.1. Introduction

The story behind the recognition of persecution as a crime of international concern is a key chapter in the development of international criminal law. In short, acceptance by policy, legislative and judicial actors that widespread or systematic discrimination should be the concern of the international community – not simply the territorial state – was instrumental in defining the parameters of the contemporary international criminal law framework. Ongoing international efforts by these actors to repress persecutory conduct were a primary impetus – if not the primary impetus – behind the delineation of the category of crimes against humanity, of which the crime of persecution is a part. It was, ultimately, by proscribing this category of international crimes that international actors pushed the focus of international accountability beyond the regulation of war alone.¹

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¹ Though, as discussed below, an association with war was initially required for an act of persecution to be prosecutable as an international crime as states searched for an appropriate means to distinguish between acts of persecution of international concern, and acts of discrimination that were of purely domestic concern.

Moreover, beyond pointing to its functional role in defining the parameters of international criminal law, examining the codification and adjudication of persecution as a crime against humanity over the past century also highlights important normative insights concerning the field of international criminal law as a whole. Throughout this history, persecution has played a fascinating dual role, viewed at once as a quintessential international crime and a crime on the very precipice between the national and the international.

In the common form of the offence, a perpetrator harms or encroaches upon the fundamental human rights of a person because of that person's membership, affiliation or identification with a group. On the one hand, persecution seems to be an emblematic international crime by some definitions. Those engaged in persecution have as their aim, as one judgment has described it, "the removal of [members of the targeted group] from the society in which they live alongside the perpetrators, or eventually even from humanity itself".² To this extent, persecutory acts attack what David Luban has argued are the two fundamental aspects of being human: one's individuality (as persecution reduces an individual to his or her membership within a group), and one's ability to associate and identify with others (as persecution attacks the group itself).³ It is the fact that crimes against humanity attack these characteristics, Luban asserts, which justifies a humanity-wide concern with such crimes. While Luban's comment is intended to explain international concern with crimes against humanity as a whole, arguably the crime of persecution attacks these core aspects of 'humanness' more directly than any other crime against humanity.

On the other hand, drafters, tribunals, courts, prosecutors and defendants alike have emphasised that persecution as a crime against humanity is situated on the cusp between matters of international and domestic concern. The history of persecution highlights efforts of these actors to parse out the two domains – seeking to delineate the boundary be-

² International Criminal Tribunal for the former Yugoslavia ('ICTY'), *Prosecutor v. Kupreškić et al.*, Trial Judgment, IT-95-16-T, 14 January 2000, para. 634 ('Kupreškić case') (<https://www.legal-tools.org/doc/5c6a53/>). See also ICTY, *Prosecutor v. Kordić and Čerkez*, Trial Judgment, IT-95-14/2-T, 26 February 2001, para. 214 (<https://www.legal-tools.org/doc/d4fedd/>).

³ David Luban, "A Theory of Crimes Against Humanity", in *Yale Journal of International Law*, 2004, vol. 29, pp. 116–17.

tween discriminatory conduct of exclusively domestic concern and that rising to the level of persecution as an international crime, and thus of international concern. In doing so, these actors have proposed a variety of different criteria by which to distinguish what is of concern only on a domestic level from that which is of international concern, for example, the act's association with armed conflict; the severity of the act; its association with a systematic or widespread attack; its association with a government or organisational policy; and its association with other categories of international crimes,⁴ each of which provides some insight into what it means to define an act as an 'international crime'.

This chapter sets out the history of persecution as a crime against humanity from its pre-Nuremberg roots to its contemporary iterations. In doing so, the chapter endeavours to emphasise that, throughout this history, persecution has been a site of contestation and affirmation – both structural and normative – of the parameters of international criminal law as a whole. Further, as this history shows, many of these issues concerning the limits of international criminality were first considered by the drafters of international legal instruments, and the tribunals and courts hearing cases in the immediate aftermath of the Second World War. The answers they proposed have, ultimately, been extremely influential on efforts to resolve the same tensions today.

In making this argument, this chapter begins in section 12.2. with an examination of the historical origins of persecution as an international crime. We survey the various antecedents of the crime in the international community's long-standing concern with persecutory conduct by a state against its own citizens as evidenced through such phenomena as: humanitarian intervention; the practice of making state recognition contingent on promises of minority protection; and the recognition of the "laws of humanity" as a residual domain of international regulation. We then turn to the efforts to adopt a juridical response to persecutory conduct in the wake of First World War, and to the League of Nations' peacetime minor-

⁴ The majority of these criteria have been invoked as limitations on crimes against humanity as a whole. However, attempts to determine the boundaries of persecution as an international crime specifically have brought many of these to the fore. For instance, as discussed below, the particularities of persecution caused drafters of the Rome Statute of the International Criminal Court ('ICC Statute') to provide jurisdiction to the International Criminal Court only over those acts of persecution connected to another crime under the Statute, while an equivalent requirement was ultimately rejected for all other crimes against humanity.

ity rights regime that followed soon after. Subsequently, we examine efforts to establish a framework of international criminal law in the aftermath of the Second World War and the role that the concern with persecution played at both the United Nations War Crimes Commission ('UN-WCC') and the London Conference in expanding international jurisdiction beyond the regulation of war proper. The analysis then moves to the post-Second World War jurisprudence that emerged as tribunals and national courts sought to give shape to the offence of 'persecution as a crime against humanity', grappling with the aforementioned tensions throughout this process. Finally, we conclude section 12.2. with a brief review of the subsequent developments prior to the re-emergence of international criminal law as a matter of primary international concern in the early 1990s, examining the Cold War era jurisprudence of national courts and the rise of international human rights law.

In section 12.3., we turn to the treatment of persecution as a crime against humanity in the contemporary jurisprudence, with a particular focus on the influence of the post-Second World War decisions on the modern case law. In doing so, this section will examine the jurisprudence of the International Criminal Tribunal for the former Yugoslavia ('ICTY'), the International Criminal Tribunal for Rwanda ('ICTR') and the Extraordinary Chambers in the Courts of Cambodia ('ECCC'), reviewing these institutions' legal instruments and their efforts to flesh out the terms of persecution under customary international law. We then move to the International Criminal Court ('ICC'), assessing the treatment of persecution as an international crime in the Court's legal instruments (namely the ICC Statute and the Elements of Crimes), and the approach to the offence in the Court's initial jurisprudence.

Ultimately, in light of the crucial but under-examined role of persecution in the development of the field, we argue that tracing the history of persecution as an international crime provides useful insight both for the contemporary adjudication of persecution as a crime against humanity, and for a nuanced understanding of the field of international criminal law more broadly.

12.2. The Origins of Persecution in International Criminal Law

The acceptance by state delegates, judges and others that persecution constitutes a matter of international concern has had a significant impact on the framework of international criminal law. However, the impact of historic responses to persecution on the development of international criminal law was neither immediate nor preordained. Rather, the influence of international concern with persecution has evolved over time – throughout which persecution has been the subject of both contestation and affirmation as a proper subject matter of international criminal jurisdiction.

In this section, we examine this history from the roots of international concern with persecutory conduct to the codification and adjudication of the offence of persecution in the wake of the Second World War. In doing so, we examine various threads of the origin of persecution as a matter of international concern, before turning to the first multilateral efforts to respond to such conduct in the wake of the First World War (through attempts to criminalise such conduct) and the interwar period (through the institution of the League of Nations' minority rights regimes). Allied efforts at criminalisation at this stage fell short, however, unable in many ways to overcome the view that such matters were an issue of solely domestic concern. League efforts to institute a minority rights framework likewise fell short; the League's project was not applied universally (Western European states, including Germany, were excluded) and its channels of enforcement were lacking. The failure of the League's efforts were, ultimately, evidenced in the rise of the mass persecution of groups on, *inter alia*, racial, religious and political grounds in the lead-up to and throughout the Second World War.

The Second World War spurred a return to international efforts to criminalise mass persecution. The view that such conduct should be the subject of international criminal jurisdiction pushed various state delegations (most notably the United States) to expand the focus of international criminal law beyond the regulation of war proper. This position, however, was by no means universally embraced. Moreover, despite eventual agreement that such conduct should be addressed by international law, the precise boundary between when such conduct was an issue of domestic concern and when it rose to the level of an international crime remained a matter of deep contestation. Even the United States, whose delegates argued strongly for international jurisdiction over persecutory conduct,

viewed such acts undertaken in peacetime to be a matter for the territorial state alone to address.

The parameters of the offence set out in the post-war legal instruments and jurisprudence were ultimately the result of debates concerning the very limits of sovereignty and the relationship between the state and international law. We conclude this section by noting that efforts to proscribe international criminal jurisdiction faded to an extent as a result of Cold War tensions in the decades following the Second World War; however, the interests which the criminalisation of persecution (and the category of crimes against humanity as a whole) sought to recognise found something of a legacy in the development of international human rights law.

12.2.1. “An Ever-Increasing Tide”: The Origins of Persecution as a Matter of International Concern

The concept of persecution as an international crime crystallised in the wake of the Second World War. However, the roots of persecution as a matter of international concern run deeper. Justice James Brand⁵ observed as much in 1949, after the immediate post-war prosecutions were largely complete. In his words:

The manifestations of international concern over racial, religious, and political persecutions by governments of their own nationals constitute an ever-increasing tide which reached the full only in connection with the atrocities committed by the Nazis in the Second World War.⁶

The recognition of persecution as a crime against humanity, Brand asserted, was just the culmination of this long-standing international concern. This section briefly traces the pre-Nuremberg history of the development of mass discrimination as a concern of the international community to provide context for the eventual rise of persecution as an international crime.

⁵ Justice Brand served on the US Nuremberg Military Tribunals.

⁶ James T. Brand, “Crimes Against Humanity and the Nurnberg Trials”, in *Oregon Law Review*, 1949, vol. 28, no. 2, p. 111.

12.2.1.1. Early Antecedents: Humanitarian Intervention, Recognition and the “Laws of Humanity”

The character of persecution as a long-standing matter of international concern is most evident in the centuries-long history of humanitarian intervention prior to the drafting of the United Nations (‘UN’) Charter.⁷ Throughout this period, states referred to “fundamental notions of humanity [...] governing the conduct of states”, which they invoked, *inter alia*, to justify “intervention to assist minorities persecuted by their own government”.⁸ The connection was not lost on those engaged in the effort to establish juridical expression of the prohibition on persecution in the wake of the Second World War. Harley Shawcross, the chief British prosecutor at Nuremberg, for instance, emphasised the link in his opening statement:

The right of humanitarian intervention on behalf of the rights of man trampled upon by a State in a manner shocking the sense of mankind has long been considered to form part of the law of nations.⁹

⁷ On the long history of humanitarian intervention dating back as far as the sixteenth century see Brendan Simms and D.J.B. Trim (eds.), *Humanitarian Intervention: A History*, Cambridge University Press, Cambridge, 2011. Notably, the legal status of humanitarian interventions since the adoption of the UN Charter is much more controversial: see Oona A. Hathaway, Julia Brower, Ryan Liss, Tina Thomas and Jacob Victor, “Consent-Based Humanitarian Intervention: Giving Sovereign Responsibility Back to the Sovereign”, in *Cornell International Law Journal*, 2013, vol. 46, p. 499. The concept of humanitarian intervention was (and is) admittedly open to abuse, as demonstrated, for instance, by Adolph Hitler’s reliance on the principle to justify the invasion of Czechoslovakia to prevent persecution against “racial Germans”. The connection between this conduct and the criminalization of persecution was in fact noted by US Nuremberg Military Tribunal III in the *Justice* case: see Nuremberg Military Tribunal (‘NMT’), *United States of America v. Josef Altstoetter et al.*, Judgment, December 1947, in *Trials of War Criminals Before the Nuernberg Military Tribunals*, vol. III, 1951, p. 982 (‘Justice case’) (<https://www.legal-tools.org/doc/04cdaf/>). To an extent, the prosecution of perpetrators of crimes against humanity can be seen as a judicial substitute for such military interventions.

⁸ Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Clarendon Press, Oxford, 1997, p. 45. See also Brand, 1949, pp. 108–9, *supra* note 6, noting specific instances of humanitarian intervention dating back to 1827, and analogising these examples to “international concern over the commission of crimes against humanity”.

⁹ International Military Tribunal (‘IMT’), *Trial of the Major War Criminals*, Transcript, 4 December 1945, in *Trial of the Major War Criminals Before the International Military Tribunal*, 1947, vol. III, p. 92 (‘IMT Transcript’). See also Brand, 1949, p. 109, *supra* note 6 (discussing the quote).

Thus, as Shawcross went on to observe, in setting out individual criminal responsibility for acts of persecution and other crimes against humanity, “the [London] Charter merely develops a pre-existing principle”.¹⁰

The modern origins of humanitarian intervention were initially grounded in the protection of religious kin who constituted a minority in a foreign state.¹¹ Yet, while religious affinity remained a common basis for such intervention, over time the concept developed a broader association with protecting minorities against inhumane treatment more generally. Increasingly, those invoking the concept pointed to “the suffering [of individuals as] human beings, rather than only as suffering co-religionists”.¹²

Notably, the form of such intervention was not exclusively by military force. In the nineteenth century, for instance, major powers increasingly made their recognition of newly emergent states contingent on guarantees of rights for religious minorities.¹³ Often, but not exclusively, based on a conception of religious kinship between the state granting recognition and the relevant minority population, the practice points to the increasing recognition of the protection of minority populations as a matter of international (or at least transnational) concern.

As Ruti Teitel has noted, over time the concept of ‘humanity’ evidenced in intervention’s shift from protecting co-religionists to protecting any suffering minority, spread throughout various aspects of the law of nations.¹⁴ The invocation of the concept, however, was far from unproblematic; it was, for instance, often relied upon not to protect oppressed peoples but to justify imperial dispersion of European norms and as a ba-

¹⁰ *Ibid.*, IMT Transcript, p. 92.

¹¹ See D.J.B. Trim, “‘If a prince use tyrannie towards his people’: Intervention on Behalf of Foreign Populations in Early Modern Europe”, in Simms and Trim, 2011, p. 29, *supra* note 7, discussing the origins of the practice in sixteenth- and seventeenth-century Europe along “confessional lines” in the wake of the Reformation, and *id.*, pp. 30–31, noting that while some similar practices can be discerned in classic antiquity or the Middle Ages, “there are so many fundamental differences” between these periods that the analogy is of limited value.

¹² *Ibid.*, p. 38.

¹³ Mark Mazower, “Minorities and the League of Nations in Interwar Europe”, in *Daedalus*, 1997, vol. 126, no. 2, p. 51.

¹⁴ See Ruti G. Teitel, *Humanity’s Law*, Oxford University Press, Oxford, 2011, pp. 19–33.

sis for colonisation more directly.¹⁵ Teitel, nevertheless, points to the increasing proliferation of a degree of “humanity’s law” over the past century and a half, incorporating concern for the individual into the framework of international law, as a positive development.

Several scholars have located the conceptual antecedents of crimes against humanity (including persecution) in part in the laws of war and a residual body of regulation giving one instantiation to the dispersion of the “laws of humanity” identified by Teitel.¹⁶ The Martens Clause in the preamble to the Hague Conventions of 1899 and 1907 is often considered as the first broad conventional recognition of such a body of law in international law. The 1899 articulation of the principle provided that, in situations not specifically addressed by the Hague Conventions and their accompanying regulations,

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 public conscience.¹⁷

In subsequent decades, statesmen, scholars and international lawyers alike would draw on the notion of the existence of a residual scope of international regulation requiring some baseline protection for civilians to address the plight of persecuted peoples through the framework of international law.

¹⁵ *Ibid.*, pp. 23–25; Luke Glanville, “The antecedents of ‘sovereignty as responsibility’”, in *European Journal of International Relations*, 2011, vol. 17, pp. 243–47, discussing the related role of the standard of “civilisation”. Relatedly, see *infra* fn. 20–22 and accompanying text.

¹⁶ See, for example, Egon Schwelb, “Crimes Against Humanity”, in *British Yearbook of International Law*, 1946, vol. 23, pp. 179–80; M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application*, Cambridge University Press, Cambridge, 2011, pp. 87–88; Roger S. Clark, “Crimes Against Humanity at Nuremberg”, in George Ginsburgs and Vladimir Nikolaevich Kudriavtsev (eds.), *The Nuremberg Trial and International Law*, Martinus Nijhoff Publishers, Dordrecht, 1990, p. 178; Darryl Robinson, “Defining ‘Crimes Against Humanity’ at the Rome Conference”, in *American Journal of International Law*, 1999, vol. 93, no. 1, p. 44.

¹⁷ Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land, 29 July 1899, 32 Stat. 1803, Preamble. See also Hague Convention (IV) Laws and Customs of War on Land, 18 October 1907, 36 Stat. 2277, Preamble.

12.2.1.2. A First Articulation: First World War

This phenomenon – invoking the “laws of humanity” as a basis to prohibit a spectrum of mistreatment of civilians – is seen most clearly in the efforts to hold individuals responsible for atrocities perpetrated during the First World War. In a pattern that would be repeated in the following decades, evidence of extensive persecution of a population by its own government (in the form of mass discriminatory killings and deportations) was a primary driving force behind the decision to pursue international accountability. In 1915, as the Great War was underway, Turkish officials oversaw a relapse of long-standing discrimination against the country’s Armenian population.¹⁸ In May 1915, in response to mounting evidence of discrimination against and massacres of the Armenian population,¹⁹ France, Russia and the United Kingdom called for the responsible individuals to be held accountable. In a joint declaration, the Allies asserted that,

[i]n view of these *crimes of Turkey against humanity and civilization*, the Allied governments announce publicly to the Sublime Porte that they will hold personally responsible [for] these crimes all members of the Ottoman Government and those of their agents who are implicated in such massacres.²⁰

Various moments, sources and ideas have been identified as the origin of the concept and phrase ‘crimes against humanity’.²¹ Ultimately,

¹⁸ See, for example, Vahakn N. Dadrian, *The History of the Armenian Genocide: Ethnic Conflict from the Balkans to Anatolia to the Caucasus*, Berghahn Books, New York, 2003, p. xviii; Samantha Power, *A Problem from Hell: America and the Age of Genocide*, Basic Books, New York, 2013, ch. 1.

¹⁹ By the time of the Declaration, the persecutory campaign had already resulted in approximately 200,000 deaths and would leave an approximately one million dead by the end of the war.

²⁰ Quoted in Timothy L.H. McCormack, “Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law”, in *Albany Law Review*, 1997, vol. 60, no. 3, p. 700, fn. 102 (emphasis added).

²¹ See, for example, Patrick Weil, “The Politics of Memory: Bans and Commemorations”, in Ivan Hare and James Weinstein (eds.), *Extreme Speech and Democracy*, Oxford University Press, Oxford, 2009, pp. 566–67; Geoffrey Robertson, *Crimes Against Humanity*, 4th ed., New Press, New York, 2013, p. 21, citing Theodore Roosevelt’s 1904 State of the Union address, in which he referred to: “there are occasional crimes committed on so vast a scale and of such peculiar horror as to make us doubt whether it is not our manifest duty to endeavor at least to show our disapproval of the deed and our sympathy with those who have suffered by it [...] in extreme cases action may be justifiable and proper”.

however, the 1915 Allied Declaration seems by all accounts to be the most direct link to the contemporary usage.²²

Several scholars have pointed to the Declaration as the origin, not only of crimes against humanity generally but the concept of persecution as an international crime specifically.²³ Roger Clark, for instance, emphasises the discriminatory component driving the Allies to identify the impugned conduct as a matter of international concern. In his words, “th[e] idea of crimes against humanity and civilization”, for the three states issuing the Declaration, “included killings of a minority ethnic group in a country by the group in political power”.²⁴ As Clark goes on to note, while the Declaration’s authors seem to source “their intellectual antecedents [...] in the laws of war”, the offence they identified was, nonetheless, “distinct from war crimes”.²⁵ More explicitly, ICTY Judge Fausto Pocar points to the Declaration and the contemporaneous international attention given to the Armenian massacres as the moment when “[p]ersecution was first identified as a crime against humanity”.²⁶

As Ken Roberts has noted, efforts to recognise “persecutory acts” as violations of the laws of humanity are also evident in the work of the post-war Allied Commission on the Responsibility of Authors of the War and on Enforcement of Penalties (‘Commission’).²⁷ The Commission en-

²² See United Nations War Crimes Commission, *History of United Nations War Crimes Commission and the Development of the Laws of War*, His Majesty’s Stationery Office, London, 1948, p. 189 (‘UNWCC Report’). Notably, the phrase “crimes [...] against humanity and civilization” was arrived at after the British delegate expressed concern that the initial draft referring to “crimes committed by Turkey against Christianity and civilization” would “strike an anti-Muslim note”; in response, the Russian foreign minister “substituted ‘humanity’, which won unanimous approval”. Robertson, 2013, *ibid.*, p. 25.

²³ Others have also identified it as a point of origin for international concern with genocide specifically. See, for example, Ken Roberts, “Striving for Definition: The Law of Persecution from its Origins to the ICTY”, in Hrad Abathi and Gideon Boas (eds.), *The Dynamics of International Criminal Justice: Essays in Honour of Sir Richard May*, Martinus Nijhoff, Leiden, 2006, p. 258. As discussed below, the origin of these two concepts is tightly intertwined.

²⁴ Clark, 1990, p. 178, see *supra* note 16. But see Roberts, 2006, p. 258, *supra* note 23, citing Clark as an example of a scholar “labelling” this conduct as genocide.

²⁵ Clark, 1990, p. 178, see *supra* note 16. Clark suggests that the Declaration’s authors sourced their idea in the Martens Clause.

²⁶ Fautso Pocar, “Persecution as a Crime Under International Criminal Law”, in *Journal of National Security Law and Policy*, 2008, vol. 2, p. 356.

²⁷ Roberts, 2006, pp. 258–59, see *supra* note 23. See Commission on the Responsibility of the Authors of War, “Report of Commission on the Responsibility of the Authors of the

deavoured to assess the terms, basis and means of post-war accountability that should be pursued for the actions of the Central Powers and their allies. In its final report, the Commission proposed that the individuals responsible be held personally liable by way of criminal proceedings for violations both of the “laws and customs of wars” and the “laws of humanity”.²⁸ While a formal definition of laws of humanity was not included in the Commission’s report, Egon Schwelb observes that an indication of what the drafters intended to capture can be gleaned from the annex accompanying the report. The annex sets out examples the Commission noted of the wartime violations of the laws and customs of war and the laws of humanity. While “the overwhelming majority” of the incidents could “be classified as charges of war crimes in the narrower sense” a number of crimes seemed to go beyond this scope.²⁹ In Schwelb’s words, “[t]hese charges refer mainly to the massacres of Armenians by the Turks and the massacre, persecutions, and expulsions of the Greek-speaking population of Turkey both European and Asiatic”.³⁰

While a majority of the Commission supported trials for violations of the laws of humanity, there was not unanimity. The two American delegates set out a series of reservations to the final report in which they noted that, *inter alia*, the Commission’s invocation of “the laws of humanity” prevented their delegation from “consenting” to the report’s recommendations.³¹ The Americans argued that the reference to violations of the laws

War and on Enforcement of Penalties”, in *American Journal of International Law*, 1920, vol 14, p. 94 (‘Report of Commission on Responsibility’).

²⁸ Report of Commission on Responsibility, 1920, pp. 116–18, 121–22, see *supra* note 27, while asserting that “[e]very belligerent has, according to international law, the power and authority to try the individuals alleged to be guilty of [such] crimes”, the Commission recommended setting up a “high tribunal” staffed by members of the Allied nations for certain cases. See also Schwelb, 1946, pp. 180–81, *supra* note 16, discussing the report; Roberts, 2006, pp. 258–59, *supra* note 23, the same; Bassiouni, 2011, pp. 89–90, *supra* note 16 the same.

²⁹ Schwelb, 1946, p. 181, see *supra* note 16.

³⁰ *Ibid.* See Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Violations of the Laws and Customs of War Reports of and Dissenting Reports of American and Japanese of the Commission of Responsibilities, Conference of Paris, 1919, p. 30 (‘Full Report of Commission on Responsibility with Annex’). See also Ratner and Abrams, 1997, pp. 45–46, *supra* note 8, noting that in the Commission’s discussions, “[t]he Turkish massacre of Armenians received prominent attention”; Roberts, 2006, p. 259, see *supra* note 23, discussing Schwelb’s quote.

³¹ Report of Commission on Responsibility, 1920, p. 144, see *supra* note 27.

of humanity went “beyond the terms of the [Commission’s] mandate” which only called for consideration of violations of the laws and customs of war.³² In any event, the delegation noted:

The law and principles of humanity vary with the individual, which, if for no other reason, should exclude them from consideration in a court of justice, especially one charged with the administration of criminal law.³³

The United States maintained this position as the debate moved from the Commission to the Peace Conference itself. Ultimately, the final penalty provisions in the Treaty of Versailles (and the parallel peace treaties entered into with the other Central Powers) tracked the American vision for individual accountability. Among other things, the “phrase ‘the laws of humanity’ [did] not appear” in the final treaties.³⁴

The one exception was the Treaty of Sèvres, signed with Turkey. The particularly egregious instances of persecution of Turkey’s minority populations³⁵ received special attention from the Allies. While a reference to the “laws of humanity” was absent from the Treaty of Sèvres (as it was from the other peace treaties), its penalty provisions included an obligation for the Turkish government to surrender individuals “responsible for the massacre committed during the continuance of the state of war on the territory which formed part of the Turkish Empire”.³⁶ However, despite initial domestic trials in Turkey for individuals involved in the massacre of Armenians and several arrests by British officials of individuals suspected of involvement in the massacres, domestic public pressure and pro-

³² *Ibid.*, p. 134.

³³ *Ibid.*, and p. 144, noting: “As pointed out by the American representative on more than one occasion, war was and is by its very nature inhuman, but acts consistent with the laws and customs of war, although these acts are inhuman, are nevertheless not the object of punishment by a court of justice”. See also Ratner and Abrams, 1997, p. 46, *supra* note 8, discussing the reservation; Schwelb, 1946, pp. 181–82, *supra* note 16, the same.

³⁴ See Schwelb, 1946, p. 182, *supra* note 16, noting the result of the negotiations in the Treaties of Versailles, Saint-Germain-en-Laye, Trianon and Neuilly-sur-Seine. Mohamed M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice*, Martinus Nijhoff, Leiden, 2008, pp. 16–26, discussing the drafting of these treaties.

³⁵ As Schwelb discusses, the persecution concerned both those “of Armenian or Greek race” on Turkish territory. Schwelb, 1946, p. 182, see *supra* note 16. Also see Full Report of Commission on Responsibility with Annex, 1919, p. 30, *supra* note 30.

³⁶ Treaty of Peace with Turkey signed at Sèvres, 10 August 1920, Cmd. 964, Treaty Series No. 11, His Majesty’s Stationery Office, London, 1920, Article 230, <http://treaties.fco.gov.uk/docs/pdf/1920/TS0011.pdf>, last accessed 8 September 2015.

test in Turkey defeated subsequent efforts.³⁷ The Allies' insistence on such trials pursuant to the 1915 Declaration, led by the United Kingdom, eventually faded. In 1923 the Treaty of Sèvres was replaced by the Treaty of Lausanne, which substituted the demand for trials with a grant of amnesty.³⁸

It is unlikely that these developments rise established a customary international law precedent for the eventual post-Second World War prosecutions.³⁹ However, it is nevertheless clear that whether or not establishing a criminal prohibition, these post-First World War events demonstrate the existence of conceptual antecedents of persecution as a matter of international concern.

12.2.1.3. The Interwar Period and Persecution as an Issue of International Concern

12.2.1.3.1. The League of Nations Minority Protections Regime

In the wake of the First World War the treatment of minority populations emerged as a central issue of international concern. With the experience of the Armenian massacre, rising tensions between government and minority groups in countries such as Poland and the proliferation of potentially vulnerable minority populations in other newly independent states of Eastern and Central Europe, there was a sense that something needed to be done. Consequently, throughout the interwar period the League of Nations strove – albeit with limited success⁴⁰ – to reconceptualise the relationship between minorities and the state as a matter that concerned international society at large. Embracing the interwar enthusiasm for interna-

³⁷ Power, 2013, pp. 14–15, see *supra* note 18; Ron Slye and Beth Van Schaack, *International Criminal Law: Essentials*, Wolters Kluwer Law & Business, New York, 2009, p. 25; El Zeidy, 2008, pp. 22–26, see *supra* note 34.

³⁸ Treaty of Peace with Turkey, and other instruments, signed at Lausanne, 24 July 1923, Cmd. 1929, Treaty Series No. 16, His Majesty's Stationery Office, London, 1923, Articles 138, 140, referring to the declaration of amnesty, <http://treaties.fco.gov.uk/docs/pdf/1923/TS0016-1.pdf>, last accessed 8 September 2015. Notably, the prior penalties provisions were absent in the Treaty of Lausanne. See also El Zeidy, 2008, p. 25, *supra* note 34, discussing these events.

³⁹ See, for example, Robinson, 1999, p. 44, *supra* note 16, commenting on whether these developments provide a precedent for the category of crimes against humanity more generally.

⁴⁰ See, for example, Mazower, 1997, pp. 51–52, 54, *supra* note 13.

tionalism and consistent with the League's somewhat paternalistic self-image, the League demanded that the states of Eastern Europe ratify treaties establishing minimum standards for the treatment of minority populations. To ensure these standards were met, the League regime also created a forum for claims of abuse.⁴¹

However, Western European states – Germany included – absented themselves from the League's minority rights framework, imposing no analogous treaty obligations. In 1943, Quincy Wright noted that whatever the shortcomings of the League regime as it existed, in the absence of a specific treaty it provided no protection for Germany's minorities. As he observed, "there was no formal ground on which the League of Nations could protest against the beginning of the persecutions in Germany". In Wright's view there remained "a general principle that a State was free to persecute its own nations in its own territory as it saw fit".⁴² Moreover, though Germany was not bound by the League's minority rights regime, at the core of the Nazi legal ideology was a direct rejection of the League's effort to embed minority rights in international law. As Mark Mazower observes, "Nazi legal theorists attacked Geneva's 'juridification' of international relations and its pathetic belief in a 'common rule of law' applicable to peoples of differing racial worth".⁴³

In many ways, the League's effort to protect minority populations against discriminatory treatment by their own state through the intervention of international law was revolutionary. However, as the "beginning of the persecutions" of Jews and others referred to by Wright intensified in Germany and expanded beyond that country's borders, the result of the League's partial⁴⁴ and half-hearted implementation⁴⁵ of its vision was brought into full relief.

⁴¹ *Ibid.*, pp. 50–51, 54, stating that the standards imposed, and the channels for lodging complaints, but for a few successful instances, were largely impotent.

⁴² *Ibid.*, p. 56, quoting Quincy Wright in World Citizens Association, *World's Destiny and the United States*, Citizens Association, Chicago, 1941, pp. 102–5.

⁴³ *Ibid.*, p. 55, citing John H. Herz, "The National Socialist Doctrine of International Law and the Problems of International Organization", in *Political Science Quarterly*, 1939, vol. 54, no. 4, pp. 536–54.

⁴⁴ That is, only applying to a select group of states and not establishing a universal standard.

⁴⁵ Mazower, 1997, pp. 50–55, see *supra* note 13.

12.2.1.3.2. Informal Developments Concerning the Protection of Minorities

While the development of the League's minority rights regime was underway, others – through less formal channels – sought to continue the immediate post-war endeavour to criminalise mass discriminatory conduct. Among the best-known efforts are those of a young Polish prosecutor, Raphael Lemkin. Though better known for his post-Second World War contributions to the codification of genocide as an international crime, Lemkin's efforts began years prior. Famously, Lemkin sought to present a draft convention proposing “universal repression”, through criminalisation, of the destruction of the “physical and cultural existence of groups” to a conference of international lawyers in 1933.⁴⁶ In the text, he defined physical destruction as “barbarity”, and cultural destruction as “vandalism”.

The Polish government – seeking to curry favour with a rising Adolf Hitler – prevented Lemkin from attending the conference. However, his proposal was presented in his absence, and he subsequently advocated the underlying idea across Europe as the conditions in Nazi Germany worsened.⁴⁷ There was little immediate response to Lemkin's efforts; nevertheless, his work was central in maintaining a discussion concerning the possibility of criminalising mass discrimination. He would later become influential in post-Second World War efforts to proscribe the relevant offence under international law – delineating, as discussed below, the (closely related) alternative to the idea of persecution in the offence of ‘genocide’.⁴⁸

12.2.2. “These Crimes Shall Not Escape Retribution”: International Responses to Persecution in the Drafting of the Post-Second World War International Criminal Law Instruments

Faced with mounting evidence of mass persecution of, and atrocities aimed at Jewish, Polish and other identified racial, political or religious populations at the hands of the Nazi regime, diplomats, scholars and lead-

⁴⁶ Power, 2013, pp. 19–22, see *supra* note 18.

⁴⁷ *Ibid.*

⁴⁸ See, for example, *infra* section 12.2.2.3.

ers turned their attention back to the possibility of international criminal law and away from the League's minority protection regimes.

As Schwelb observes, declarations early in the war demonstrate that the Allies intended to pursue a regime of individual accountability for those responsible for these acts. This involved promises of retribution for the broader category of atrocity offences rejected in the wake of the First World War, and not simply for war crimes "in the narrower sense, i.e. violations of the laws and customs of war, perpetrated on Allied territory, or against Allied citizens".⁴⁹ For example, he points to the 17 December 1942 declaration issued by 13 Allied states and exiled governments⁵⁰ in response to what he describes as the "barbarous and inhuman treatment to which the Jews were subjected in German-occupied Europe". The declaration noted reports that

the German authorities not content with denying to persons of Jewish race in all the territories over which their barbarous rule has been extended, the most elementary human rights, are now carrying into effect Hitler's oft-repeated intention to exterminate the Jewish people in Europe.

And it went on to affirm that

[t]he above-mentioned Governments and the French National Committee condemn in the strongest possible terms this bestial policy of cold-blooded extermination. [...] They reaffirm their solemn resolution that those responsible for these crimes shall not escape retribution and to press on with the necessary practical measures to this end.⁵¹

In the years that followed, such declarations would guide states, as they sought to ensure their actions met the standards they had set out in their words.

⁴⁹ Schwelb, 1946, p. 183, see *supra* note 16.

⁵⁰ The declaration was authored by Belgium, Czechoslovakia, Greece, Luxembourg, the Netherlands, Norway, Poland, the United States, the United Kingdom, the Soviet Union, Yugoslavia and the French National Committee.

⁵¹ Declaration excerpted in Robert H. Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*, United States of America Department of State, London, 1949, pp. 9–10. See also Schwelb, 1946, pp. 183–84, *supra* note 16, discussing the declaration; Roberts, 2006, pp. 260–61, see *supra* note 23, discussing this declaration as set out in Schwelb's article. It is worth noting that Schwelb suggests that this declaration was carefully worded to specifically apply to occupied territory and not to crimes committed on German territory itself; however, this reading is not certain on the language of the declaration.

12.2.2.1. The Issue of Persecution at the UN War Crimes Commission

As one such measure taken to actualise their declared commitment to retribution and accountability through the “organised channels of justice”,⁵² the states of the newly christened United Nations established the UNWCC in October 1943.⁵³

The issue of whether the UNWCC’s remit should be limited to ‘war crimes’ in the strict sense, or whether it should embrace other atrocities, arose early in the life of the institution.⁵⁴ Among the primary drivers of this effort to extend the UNWCC’s jurisdiction was a desire to respond to the pervasive persecutory treatment of groups by the Nazi regime. As the American representative asserted at a March 1944 meeting of the Legal Committee, the UNWCC’s mandate included the need to consider “atrocities which were committed by the Nazis against German Jews and Catholics, as well as other offences perpetrated on religious or racial grounds in pursuance of Nazi ideology”.⁵⁵ To this end the American delegate introduced a resolution categorising such acts as “crimes against humanity”; it read in full:

It is clearly understood that the words ‘crimes against humanity’ refer, among others, to crimes committed against stateless persons or against any person because of their race

⁵² See, for example, UNWCC Report, 1948, pp. 89–90, 109, *supra* note 22, quoting Punishment for War Crimes, the Inter Allied Declaration Signed at St James’s Palace on 13th January and Relative Documents (1942), Declaration of St. James’ Palace, 13 January 1942.

⁵³ The UNWCC did not include any representatives of the Soviet Union, as the Soviets protested against the rejection of their demand that each Soviet Republic receive individual membership in the UNWCC. Notably, the UNWCC is broadly believed to have been created largely to divert attention from the alliance’s failure to respond to ongoing violations of the laws of war. See, for example, Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Law Regime*, Cambridge University Press, Cambridge, 2005, pp. 37–38. See also Ann Tusa and John Tusa, *The Nuremberg Trial*, Macmillan, 1983, p. 62, discussing the role of the creation of the UNWCC in domestic British politics.

⁵⁴ UNWCC Report, 1948, p. 174, see *supra* note 22: “[T]he rule was stressed during the first days of the Commission’s activities, that narrow legalisms were to be disregarded and the field of the violations of the laws of war extended so as to meet the requirements of justice, was applied in respect of this class of crimes”. See Clark, 1990, pp. 179–80, *supra* note 16.

⁵⁵ UNWCC Report, 1948, *ibid.* See also Roberts, 2006, p. 261, *supra* note 23, discussing this comment.

or religion; such crimes are judicable by the United Nations or their agencies as war crimes.⁵⁶

Such crimes, the delegate argued, were “crimes against the foundation of civilisation, irrespective of place and time, and irrespective of the question as to whether they did or did not represent violations of the laws and customs of war”.⁵⁷ For the American delegate, a persecutory element was at the core of the proposed concept of crimes against humanity.⁵⁸ This desire to ground a prohibition on persecutory acts – defined by a discriminatory intent – in international law would persist in the debate that followed. Ultimately, it would remain a primary motivation for the very recognition of the category of crimes against humanity.

The proposal, however, met with disagreement over whether addressing such acts fell within the mandate of the UNWCC; states questioned whether a UNWCC tasked to investigate ‘war crimes’ had jurisdiction to consider the proposed category of offences.⁵⁹ Following debate within the Legal Committee, the delegates concluded that the jurisdiction of the UNWCC should be interpreted in a manner consistent with the various collective and individual declarations of the Allies. These declarations, the Legal Committee concluded, evidenced an intention to pursue accountability for acts beyond war crimes strictly defined.⁶⁰

However, members of the Legal Committee recognised the need to establish some limits on which offences in this broader category the UNWCC should address. The Czechoslovakian representative, for instance, observed that the Allies’ prior declarations should not be read to capture

⁵⁶ UNWCC, Committee II [*sic*], Resolution moved by Mr. Pell on 16th March 1944, III/I, 18 March 1944 (<https://www.legal-tools.org/doc/2aa8b6>).

⁵⁷ UNWCC Report, 1948, p. 175, see *supra* note 22.

⁵⁸ See Roberts, 2006, p. 262, *supra* note 23.

⁵⁹ See, for example, UNWCC Report, 1948, p. 175, *supra* note 22. Note that Roberts suggests that the critiques turned on whether international law should intervene into the internal affairs of the German state; however, the UNWCC report indicates that the reticence – at least in the forum of the UNWCC – was based on the terms of its mandate. See Roberts, 2006, p. 262, *supra* note 23.

⁶⁰ See UNWCC Report, 1948, pp. 175–76, *supra* note 22. See also UNWCC, Committee III, Scope of the Retributive Action of the United Nations According to their Official Declarations. (The Problem of “War Crimes” in connection with the Second World War. Explanatory and Additional Note by Dr. Ecer to his Report (Doc. III/4), III/4(a), 12 May 1944, pp. 12–13, reviewing some of the declarations to this effect (‘UNWCC, Ecer Memo’) (<https://www.legal-tools.org/doc/6335bd/>); Roberts, 2006, p. 262, see *supra* note 23, discussing these developments.

“mere crimes” but only those “which have some connection with the war”.⁶¹ Crimes against humanity “committed because of race, religion and nationality” were so connected because they were in a sense “the real cause of all other crimes, as the source of the war”.⁶² This effort to distinguish crimes against humanity from “mere crimes” would continue to surface throughout the drafting and jurisprudential debate that followed. The focus on crimes against humanity “connected with the war” would remain a common, but controversial, approach as theories of jurisdiction over the offence developed. Likewise, this effort to distinguish crimes against humanity in general, and persecution specifically, from “mere crimes” would remain a primary challenge for contemporary efforts to delineate international criminal jurisdiction, as discussed below.⁶³

With agreement within the Legal Committee on the need for jurisdiction beyond war crimes, the Committee proposed a resolution to be considered by the UNWCC as a whole articulating the terms of its jurisdiction. The resolution proposed four categories of crimes that would compose the scope of the UNWCC’s concern: crimes committed for the purpose of launching war; crimes committed in Allied countries or against either members of the armed forces or civilians of Allied nations; crimes committed to prevent restoration of peace; and finally,

crimes committed against any person without regard to nationality, stateless persons included, because of race, nationality, religious or political belief, irrespective of where they have been committed.⁶⁴

Notably, in the proposed resolution, this final category of crimes was not categorised formally as ‘crimes against humanity’.⁶⁵ Nevertheless, it was concerned with the same subject matter addressed in the earlier American definition of crimes against humanity: confirming jurisdiction beyond the traditional confines of war crimes to ensure a response to

⁶¹ UNWCC, Ecer Memo, 1944, p. 7, see *supra* note 60, reviewing some of the declarations to this effect; Roberts, 2006, p. 262, see *supra* note 23, discussing these developments.

⁶² UNWCC, Ecer Memo, *ibid.*

⁶³ See, for example, *infra* section 12.3.2.1. and section 12.3.3.1.

⁶⁴ UNWCC, Scope of the Retributive Action of the United Nations, Resolution Proposed by Committee III, C.20, 16 May 1944 (<https://www.legal-tools.org/doc/23d4bd/>).

⁶⁵ *Ibid.* Nor were any of the other crimes formally categorised in the proposal. But see Roberts, 2006, p. 262, *supra* note 23, suggesting that this category of crimes was classified as ‘crimes against humanity’ in the proposal.

persecutory conduct. That is, the proposed category extended jurisdiction beyond cases concerning mistreatment of Allied citizens (whether combatants or civilians) to cases concerning mistreatment of persons regardless of their nationality, where the crime evidenced a discriminatory intent on the basis of race, nationality, religion or political belief.⁶⁶

Nevertheless, in August and November 1944, British officials stressed that – while not desiring to “place any unnecessary restriction” on the UNWCC’s work and noting the importance of responding to atrocities committed on discriminatory grounds – the UNWCC should be concerned with ‘war crimes’ in the proper sense. Thus, they argued, its jurisdiction should be restricted to crimes that concerned Allied nationals.⁶⁷ Further discussion on the issue of persecution (and crimes against humanity generally) was subsequently placed on hold within the confines of the UNWCC.⁶⁸

12.2.2.2. The Issue of Persecution at the London Conference

Outside of the UNWCC, the four major Allied powers – the United States, the United Kingdom, the Soviet Union and France – held their own bilateral and multilateral meetings to consider the issues that would arise in post-war Germany, including the need for accountability. Despite initial British reluctance on the issue,⁶⁹ the four powers agreed to meet in London in June 1945 to discuss what role an international tribunal would play in such plans.⁷⁰ Notwithstanding the debate that had already transpired within the UNWCC, the discussion concerning the response to the persecutory acts of the Axis effectively returned to first principles at the London Conference. Nevertheless, ensuring that persecution was recognised as a crime remained central to the debate in London. Again, seeking a response to such acts was a primary driving force behind the effort to

⁶⁶ See Roberts, 2006, p. 262, *supra* note 23: “This preliminary definition seemed to suggest that a racial, national, religious or political intent was a requisite element in the commission of all types of crimes against humanity, not simply persecution”.

⁶⁷ UNWCC, Correspondence between the War Crimes Commission and H.M. Government in London Regarding the Punishment of Crimes Committed on Religious, Racial or Political grounds, C.78, 13 February 1945, pp. 2–6 (<https://www.legal-tools.org/doc/d2523e/>); UNWCC Report, 1948, p. 176, see *supra* note 22. See also Clark, 1990, p. 180, *supra* note 16, discussing the British position, and quoting the British statement.

⁶⁸ See UNWCC Report, 1948, p. 176, *supra* note 22; Clark, 1990, p. 180, see *supra* note 16.

⁶⁹ Tusa and Tusa, 1983, p. 71, see *supra* note 53.

⁷⁰ *Ibid.*, p. 75.

establish⁷¹ international criminal accountability beyond the regulation of war.

In the lead up to the London Conference, Justice Robert Jackson (the lead American negotiator and later lead American prosecutor) submitted a report to the President of the United States.⁷² The report, which was adopted as the official American position, highlighted the fact that responding to persecution and oppression remained a principal concern of the United States. As Jackson asserted in his report:

Our people were outraged by the oppressions, the cruelest forms of torture, the large scale murder, and the wholesale confiscation of property which initiated the Nazi regime within Germany. They witnessed persecution of the greatest enormity on religious, political and racial grounds, the breakdown of trade unions, and the liquidation of all religious and moral influences. This was not the legitimate activity of a state within its own boundaries, but was preparatory to the launching of an international course of aggression and was with the evil intention, openly expressed by the Nazis, of capturing the form of the German state as an instrumentality for spreading their rule to other countries. Our people felt that these were the deepest offenses against that International Law described in the Fourth Hague Convention of 1907 as including the “laws of humanity and the dictates of the public conscience”.⁷³

⁷¹ While it seems the debate was guided in part by an effort to recognise or codify existing international criminal prohibitions (see, for example, the discussion among delegates in Jackson, 1949, pp. 334–35, *supra* note 51), as Jackson himself acknowledged in the course of Conference meetings, they also took on a role “settling” the law the tribunal was to apply in various instances in light of the “disputed state of the law of nations”. See *idem.*, p. 329.

⁷² Earlier in the year, prior to the agreement to meet in London, the Americans had set out a preliminary proposal for trials. Crimes with a persecutory intent were not captured in this initial American proposal for trials of those engaged in the Axis war effort. However, in setting out the crimes of concern, the draft left residual space to “charge and try defendants under [the] Agreement for violations of law other than those recited above, including but not limited to atrocities and crimes committed in violation of the domestic law of any Axis Power or satellite or any of the United Nations”. *Ibid.*, p. 24, citing San Francisco Proposal of April 1945. Notably, the offence conceived of was – unlike the other offences set out in the proposal – not sourced in international law, but domestic law of the Axis or UN states. Clark, 1990, p. 182, see *supra* note 16.

⁷³ Jackson, 1949, p. 49, see *supra* note 51 (emphasis added). He also went on to “restate in more technical lawyer’s terms the legal charges against the top Nazi leaders”, which in-

Jackson's statement on this point is notable for several reasons. For one, as with efforts in the wake of the First World War, Jackson sought to ground the legal prohibition on persecutory conduct and other atrocities in the Martens Clause's standard of the "laws of humanity". In addition, reflecting an issue that had already arisen in the UNWCC and would continue to guide the debate in London, Jackson pointed to why such conduct rose to the level of international concern: because it was "preparatory to the launching of an international course of aggression".

Some aspects of these views were evident in the initial American proposal prepared for the London Conference, yet there were some notable differences. The 14 June proposal proscribed "[a]trocities and offenses, including atrocities and persecutions on racial or religious grounds, committed since 1 January 1933 in violation of any applicable provision of the domestic law of the country in which committed".⁷⁴ Notably, despite the earlier view of such conduct as "the deepest offenses against [...] *International Law*", the June proposal envisaged the prosecution of persecution and other atrocity offences under domestic criminal law. In addition, the need for a connection to the war suggested by Jackson's earlier report was not evident. This distinction was highlighted by the fact that jurisdiction over this category of offences (in contrast to other categories in the proposal) explicitly extended to conduct dating back to January 1933 – that is, when Hitler first came to power in Germany, six years before the onset of war.⁷⁵ Finally, as would be a pattern in the drafts circulated at the Conference, the grounds of relevant discrimination enumerated had varied, as "political grounds" mentioned in Jackson's report were absent from the proposal.

Within days of the opening of the London Conference, the British delegation proposed a series of amendments to the American proposal. As noted above, the American proposal located the prohibition on persecution and atrocity (beyond those in violation of the traditional laws of

cluded "b) Atrocities and offenses, including atrocities and persecutions on racial and religious grounds, committed since 1933. This is only to recognize the principles of criminal law as they are generally observed in civilized states. These principles have been assimilated as a part of International Law at least since 1907". *Idem.*, p. 50.

⁷⁴ *Ibid.*, p. 57. Notably, "atrocities and offenses [...] constituting violations of international law, including the laws, rules and customs of land and naval warfare"; however, persecutions were not mentioned explicitly in the international law provision. See also Clark, 1990, p. 182, *supra* note 16, discussing this proposal.

⁷⁵ See Clark, 1990, p. 182, *supra* note 16, discussing this proposal.

war⁷⁶) in the domestic criminal law of the country where the offence was committed. In contrast, the British proposal located the relevant prohibitions squarely in international law as “criminal violations of international laws”. However, the British proposal contained an alternative restriction: the British draft only provided jurisdiction over conduct that was undertaken in “pursuance of a common plan or enterprise aimed at aggression against, or domination over, other nations”.⁷⁷ The provision provided in full that the tribunal’s jurisdiction would include

[a]trocities and persecutions and deportations on political, racial or religious grounds, in pursuance of the common plan or enterprise referred to in sub-paragraph (d) hereof [(i.e. aimed at aggression or domination)] whether or not in violation of the domestic law of the country where perpetrated.⁷⁸

Interestingly, not only did the British proposal frame the relevant acts as violations of international law in complete opposition to American proposal, it also asserted that such violations were criminal in spite of their status under domestic law.⁷⁹ In addition, the British proposal extended the requirement of a discriminatory element not only to persecutions proper but to “atrocities” and “deportations” as well. In short, once again the proposal to extend the scope of international criminal law beyond war crimes was animated at its core by an effort to recognise the Nazis’ persecutory acts (broadly defined) as criminal under international law.

Over the subsequent weeks of the London Conference, the delegations continued to exchange proposals. A French proposal suggested holding responsible those who “directed [...] the policy of atrocities and persecutions against civilian populations”.⁸⁰ The proposal – in particular its treatment of aggression – was viewed as too broad.⁸¹ A British proposal submitted a few days after referred to the tribunal’s jurisdiction over “systematic atrocities against or systematic terrorism or ill-treatment or murder of civilians”.⁸² Notably, while a reference to persecution was absent

⁷⁶ That is, traditional violations of the laws of war concerning acts aimed at the opposing belligerent’s combatants or civilians, rather than one’s own nationals or others.

⁷⁷ Jackson, 1949, pp. 86–87, Article 12(d) and (e), see *supra* note 51.

⁷⁸ *Ibid.*, Article 12(e).

⁷⁹ Clark, 1990, p. 183, see *supra* note 16.

⁸⁰ Jackson, 1949, p. 293, see *supra* note 51.

⁸¹ *Ibid.*, pp. 299–300.

⁸² *Ibid.*, p. 312.

from this proposal, the prior British requirement that the acts be associated with a common plan had now been substituted with an alternative limiting device, which would later re-emerge in the American Control Council Law No. 10 jurisprudence: the requirement that the relevant atrocities be *systematic* in nature. A requirement that the relevant conduct be systematic (or in the alternative widespread) would ultimately be recognised as a requisite contextual element of crimes against humanity under customary international law. As such, it would eventually be incorporated in all contemporary codifications of the offence including those set out in the Statutes of the ICTR and the ICC Statute.⁸³

A Soviet proposal submitted shortly after the British draft also lacked a direct reference to persecution. It provided jurisdiction over “[a]trocities against the civilian population including murder and ill-treatment of civilians, the deportation of civilians to slave labour and other violations of the laws and customs of warfare”. Significantly, in categorising these offences as “violations of the laws and customs of warfare”, the Soviet proposal, in short, restricted the tribunal’s jurisdiction to war crimes as traditionally conceived.⁸⁴

At a conference session on the day the Soviet proposal was circulated, Jackson asserted that the proposal “does not reach all that we want to reach and reaches a good deal we would not want to reach”.⁸⁵ In particular, the American delegation specifically sought to capture the persecutory acts undertaken by the Axis, including the actions of Germany against its own citizens.⁸⁶ Despite this aim, Jackson stressed that “it has been a general principle of the foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business”. Bringing to the fore the primary tension that would persist throughout international efforts to criminalise persecution in the next half-century,⁸⁷ Jackson sought to parse out the distinction between discriminatory conduct that rose to the level of an international offence, and that which should be the concern of domestic processes alone. It was not per-

⁸³ See *infra* section 12.3.2.1. and section 12.3.3.1.

⁸⁴ Jackson, 1949, p. 327, see *supra* note 51. See also Clark, 1990, pp. 184–86, *supra* note 16, discussing how the Soviet definition of atrocities effectively amounted to traditional war crimes.

⁸⁵ Jackson, 1949, pp. 330–31, see *supra* note 51.

⁸⁶ Later in his comments he refers to jurisdiction over such acts as allowing “prosecution of those things which I agree [...] are absolutely necessary in this case”. *Ibid.*, p. 333.

⁸⁷ See, for example, *infra* section 12.3.2.1. and section 12.3.3.1.

secutory acts in the abstract that justified international intervention; rather, he noted – consistent with the earlier British proposal and the comments in Jackson’s own report to President Harry Truman – such intervention was only justified due to the connection between the offences and the waging of the war. As he stated:

[T]he way Germany treats its inhabitants, or any other country 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 the destruction of the rights of minorities becomes an international concern is this: it is a part of a plan for making an illegal war.* Unless we have a war connection as a basis for reaching them, I would think we have no basis for dealing with atrocities. They were a part of the preparation of war for or for the conduct of the war in so far as they occurred inside of Germany and that makes them our concern.⁸⁸

Interestingly, Jackson acknowledged the relevant pressing domestic considerations for the American delegation when addressing the provision on “atrocities, persecutions, and deportations on political, racial, or religious grounds”. In his words: “We have some regrettable circumstances at times in our own country in which minorities are unfairly treated”. While he felt the need to bring the Nazi’s persecutory conduct before the international tribunal, he stressed that “it is justifiable that we interfere or attempt to bring retribution to individuals or to states only because the concentration camps and the deportations were in pursuance of a common plan or enterprise of making an unjust or illegal war in which we became involved”.⁸⁹ Significantly, as noted below, this would not be the only time when concerns about setting precedents that could reach racially discriminatory laws or other aspects of racial inequality in the United States were acknowledged as a relevant factor by American representatives engaged in pursuing international justice in the wake of the Second World War.

That evening, the British circulated a new draft of the crimes provision, based on the Soviet proposal. The sub-paragraph on jurisdiction over atrocities beyond war crimes effectively merged the language of the earli-

⁸⁸ Jackson, 1949, pp. 330–31, see *supra* note 51 (emphasis added). See also Clark, 1990, pp. 185–86, see *supra* note 16, discussing this statement.

⁸⁹ Jackson, 1949, p. 333, see *supra* note 51.

er British drafts with that proposed by the Soviets. While the first half referred to the discrete acts set out in the Soviet proposal (“including (inter alia) murder and ill-treatment of civilians and deportation of civilians to slave labour”), it went on to add “and persecutions on racial or religious grounds” as per the British drafts. However, as with the earlier British drafts, jurisdiction only extended to persecutions “where such persecutions were inflicted in pursuance of the aggression or domination”.⁹⁰ It is notable, on the one hand, that the Soviet requirement that such offences be violations of the laws of war was now absent – indicating a broader category of offences was conceived – and, on the other hand, that the British limitation (of acts connected to aggression) only applied to acts of persecution. Only acts of persecution were seen as requiring some jurisdictional limitation at this point; other non-war crime ‘atrocities’ did not require such a constraint. The two categories, which persisted in the final version of the provision, would soon after be described by the UNWCC as setting out “murder-type” crimes against humanity, and “persecution-type” crimes against humanity.⁹¹

In the final week of negotiations that followed, several drafts were circulated as the delegates responded to the pressure to reach consensus. While the draft provision on atrocities was subject to a series of further revisions, it remained substantially consistent in form, combining a prohibition on both “murder-type” and “persecution-type” conduct. Among the changes that took place, the limited focus on acts “in pursuance” of aggression or domination was temporarily replaced with a requirement that the acts be “in pursuance of the common plan or conspiracy”, consistent with an American proposal.⁹² Subsequently, in the penultimate draft circulated by the American delegation, this limitation was replaced once again with the broader standard of “in furtherance of or in connection with any crime within the jurisdiction of the International Tribunal”.⁹³ In addition, the language that initially clearly confined the nexus clause to acts of persecution in the British proposal (and not “murder-type” conduct) was revised somewhat ambiguously, seeming to apply a cabining

⁹⁰ *Ibid.*, p. 359, Article 6(b).

⁹¹ UNWCC Report, 1948, p. 178, see *supra* note 22. Ratner and Abrams, 1997, p. 17, see *supra* note 8; Roberts, 2006, p. 263, see *supra* note 23.

⁹² See Jackson, 1949, pp. 374 and 390, *supra* note 51.

⁹³ *Ibid.*, p. 395.

standard to the whole provision.⁹⁴ Further, the reference to such acts falling within the jurisdiction of the tribunal “whether or not in violation of the domestic law of the country where perpetrated”, which was earlier considered by the London Conference, was reincorporated by the American delegation.⁹⁵ And, in the penultimate draft, the American delegation added a title “Crimes Against Humanity” to the category of offences.⁹⁶ While the same title had been proposed by the American delegate to the UNWCC more than a year prior, Jackson attributed the suggestion to use titles to “an eminent scholar of international law”⁹⁷ – believed by some to be Hersch Lauterpacht.⁹⁸

The only significant change between the penultimate American draft and the provision in Article 6(c) of the English-language version of the Charter of the International Military Tribunal (‘IMT Charter’) signed just over a week later on 8 August 1945 was the inclusion of a semi-colon between the description of “murder-type” and “persecution-type” conduct. The final provision read in full,

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.⁹⁹

This controversial semi-colon suggested the requirement that the offence be related to another crime within the tribunal’s jurisdiction and the declaration that the offence was a crime before the tribunal, notwithstand-

⁹⁴ See, for example, this change first made at *ibid.*, p. 390: “These include but are not limited to murder and ill-treatment of civilians and deportations of civilians to slave labour and persecutions on political, racial or religious grounds committed in pursuance of the common plan or conspiracy referred to in paragraph (d) below”.

⁹⁵ *Ibid.*, p. 395.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*, p. 416.

⁹⁸ See Martti Koskeniemi, “Hersch Lauterpacht and the Development of International Criminal Law”, in *Journal of International Criminal Justice*, 2004, vol. 2, no. 3, p. 811; Clark, 1990, pp. 189–90, see *supra* note 16.

⁹⁹ Charter of the International Military Tribunal (‘IMT Charter’), in Jackson, 1949, p. 423, see *supra* note 51, setting out the content of the Nuremberg Charter prior to its amendment by the Berlin Protocol (emphasis added) (<https://www.legal-tools.org/doc/64ffdd/>).

ing the content of domestic law, only applied to persecution, and not the other acts falling within the category of crimes against humanity.¹⁰⁰ The semi-colon was ultimately removed by way of the Berlin Protocol signed by the four chief prosecutors two months later, with the suggestion that its last-minute inclusion was an error.¹⁰¹

In the result, the final version of the provision restricted jurisdiction over all crimes against humanity (and not simply persecution) to those carried out in connection with another crime within the IMT's jurisdiction.¹⁰² However, contrary to the initial proposals concerning crimes against humanity at the London Conference and within the UNWCC, the requirement that discrimination be demonstrated on one of the three enumerated grounds was limited to the offence of persecution and was not extended to "murder-type" crimes against humanity.

As discussed below, debate as to the appropriate application of these constraints has persisted over the subsequent half-century. While various contemporary tribunals have held that the nexus requirement no longer remains necessary under customary international law, the ICC Statute retains an attenuated form of the requirement with regard to persecution specifically while excluding it for crimes against humanity generally.¹⁰³ Likewise, while proof of discrimination has generally only been required in establishing charges of persecution in contemporary legal instruments and jurisprudence, the ICTR Statute includes a general requirement of discrimination in the *chapeau* elements applicable to all crimes against humanity.¹⁰⁴

More immediately, however, in the months following the London Conference the drafters of various other post-Second World War legal instruments endeavoured to engage with the appropriate application of these constraints, and in doing so sought to locate the threshold between

¹⁰⁰ Clark, 1990, p. 190, see *supra* note 16.

¹⁰¹ Berlin Protocol in Jackson, 1949, p. 429, see *supra* note 51. Clark, 1990, pp. 190–92, see *supra* note 16. However, as Roberts notes, "the removal of the semi-colon was never interpreted as extending the requisite political, racial or religious motivate to all forms of crimes against humanity in conformity with previous drafts". Roberts, 2006, p. 263, see *supra* note 23.

¹⁰² While the intention of the chief prosecutors was to extend the limitation to all crimes against humanity, even in the absence of the semi-colon the plain text of the provision could still have been read to apply the relevant constraints to persecution alone.

¹⁰³ See *infra* section 12.3.3.1.

¹⁰⁴ See, for example, *infra* section 12.3.2.1.3.

crimes of international concern and crimes of strictly domestic concern. These post-war efforts are discussed in the following subsection.

12.2.2.3. Approaches to Persecution Beyond London

Several related efforts to delineate persecution as a crime under international law followed shortly after the London Conference. While they tracked a substantially similar formula, some distinctions are worth noting.

Control Council Law No. 10 ('CCL No. 10') was signed in December 1945 by the four occupying powers in Germany within five months of the London Conference, and exactly one month after opening statements began before the International Military Tribunal ('IMT') at Nuremberg. The law was intended, *inter alia*, to "establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal".¹⁰⁵ The provision concerning crimes against humanity was modelled closely after Article 6 of the IMT Charter. However, most notably, it did not require a connection with another crime as a threshold requirement for jurisdiction. The provision read in full:

Crimes against Humanity. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, *or persecutions on political, racial or religious grounds* whether or not in violation of the domestic laws of the country where perpetrated.¹⁰⁶

While the absence of the nexus requirement is the only major distinction¹⁰⁷ between the provision and its IMT Charter equivalent, this difference was quite significant and would inform fundamental distinctions

¹⁰⁵ Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, 3 Official Gazette Control Council for Germany 50–55, 1946, Preamble ('CCL No. 10') (<https://www.legal-tools.org/doc/ffda62/>).

¹⁰⁶ *Ibid.*, Article II(1)(a) (emphasis added).

¹⁰⁷ The text of CCL No. 10 also dropped the IMT Charter's reference to acts "before the war". However, in the text's statute of limitations provision, the drafters of CCL No. 10 indicated an intent to provide jurisdiction to the zonal tribunals that covered January 1933 to July 1945. *Ibid.*, Article II(5).

in the resulting jurisprudence that remain evident in the contemporary interpretation of the offence.

Within a few weeks of the CCL No. 10's entry into force, the focus of post-war justice efforts expanded beyond the European arena to the Pacific. The United States and specifically the Supreme Commander of the Allied Powers in the East, General Douglas MacArthur, moved swiftly to replicate the Nuremberg model.¹⁰⁸ As noted above, the IMT Charter and Tribunal had been an intensely collaborative effort of the four major European powers. In contrast, the creation of the International Military Tribunal for the Far East ('IMTFE' or 'Tokyo Tribunal') was the result of a unilateral proclamation by MacArthur in January 1946, though the terms of its Charter set out by the United States did incorporate minor subsequent amendments proposed by the other Allies engaged in the Pacific forum, as well as the Philippines and India.¹⁰⁹ Again, the definition of crimes against humanity found at Article 5(c) of the IMTFE Charter, including the reference to persecution, was derived largely from the IMT Charter. The provision provided jurisdiction over:

Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.¹¹⁰

There are, however, two noteworthy differences from its Nuremberg predecessor: (1) "religion" was excluded as a possible ground of persecutory conduct; (2) and "it [was] not expressly stated that 'crimes against humanity' are committed 'against any civilian population'".¹¹¹

¹⁰⁸ Solis Horwitz, "The Tokyo Trial", in *International Conciliation*, 1950, vol. 28, pp. 480–82.

¹⁰⁹ *Ibid.*, pp. 482–83.

¹¹⁰ Charter of the International Military Tribunal for the Far East ('IMTFE Charter'), 19 January 1946, Article 5(c) (<https://www.legal-tools.org/doc/a3c41c/>).

¹¹¹ Also of note is the promulgation of the Pacific Regulations for the US Military Commissions in the region, see UNWCC Report, 1948, p. 215, *supra* note 22.

12.2.3. Persecution on Trial: International Responses to Persecution in Post-Second World War Jurisprudence

Notably, for all the debate involved in their drafting (or perhaps because of it) the provisions proscribing persecution as a crime against humanity in the various post-war legal instruments provided little substance to guide the adjudication of the offence. Consequently, the various tribunals, commissions and courts tasked with interpreting the provision started largely from first principles. The resulting decisions established parameters for the offence that, over the last 20 years, have been instrumental in guiding the adjudication of persecution as a crime against humanity before the contemporary international criminal courts and tribunals.¹¹²

However, the post-war jurisprudence also leaves much wanting. The Judgment of the IMT at Nuremberg ('Nuremberg Judgment') provided no explicit definition of persecution. Moreover, there is some inconsistency in the IMT's use of the term throughout: while characterising certain acts as "persecution" in convicting some defendants, the IMT failed to clearly invoke the term with regard to the conduct of others which seemed to meet the same standard (while still finding them guilty of crimes against humanity generally).¹¹³ In addition, the discussion of each defendant's guilt for war crimes is seldom distinguished from their guilt for crimes against humanity; as Roger Clark observes, "[t]he discussion of the two offenses is indeed quite jumbled up".¹¹⁴

Turning to the jurisprudence of the other post-war tribunals, though persecution was included within the definition of crimes against humanity in the IMTFE Charter, the Indictment did not allege any instances of per-

¹¹² See generally *infra* section 12.3.

¹¹³ See, for example, the failure of the IMT to characterise Kaltenbrunner's, Frick's and Rosenberg's conduct explicitly as "persecution" while it seemed to meet the threshold the Tribunal set elsewhere. IMT, *International Military Tribunal v. Martin Borman et al.*, Judgment, 1 October 1946, in *Trial of the Major War Criminals Before the International Military Tribunal*, 1947, vol. I, pp. 291–93, regarding Kaltenbrunner; pp. 295–96, regarding Rosenberg; pp. 300–1, regarding Frick ('IMT Judgment') (<https://www.legal-tools.org/doc/45f18e/>). Notably, subsequent jurisprudence and scholars have nevertheless treated the findings of guilt concerning some of these individuals as a precedent for persecution. See, for example, ICTY, *Prosecutor v. Duško Tadić et al.*, Opinion and Judgment, IT-94-I-T, 7 May 1997, para. 706 ('Tadić case') (<https://www.legal-tools.org/doc/0a90ae/>).

¹¹⁴ Clark, 1990, p. 194, see *supra* note 16.

secution.¹¹⁵ Unsurprisingly, the Judgment of the IMTFE does not provide any guidance on the interpretation of the offence.¹¹⁶ The various judgments of the US military zonal tribunals sitting in Nuremberg ('Nuremberg Military Tribunals' or 'NMT') under CCL No. 10, and of the various national tribunals, courts and commissions in the immediate wake of the war provide some further guidance.¹¹⁷ There is nevertheless a degree of disagreement in the interpretation of the concepts of persecution and crimes against humanity generally among these decisions that is not always acknowledged, and questions concerning the interpretation of the offence that were not addressed.

Despite these shortcomings, the roots of the contemporary approach to persecution as a crime against humanity can be seen in the immediate post-war jurisprudence. This section reviews some of decisions setting out these foundational principles, as the parameters of the international crime of persecution – a term with a long conceptual history but shorter doctrinal one – began to take shape. At its core, the post-war tribunals characterised as persecution varying sorts of underlying conduct (ranging from other enumerated crimes against humanity to conduct that was not independently criminal) when undertaken in a manner that intentionally discriminated against a group on enumerated grounds.

Like the drafters before them, the post-war tribunals wrestled with how to limit the parameters of persecution, to distinguish conduct of in-

¹¹⁵ See IMTFE, Indictment, No. 1, 1946 ('IMTFE Indictment') (<https://www.legal-tools.org/doc/59771d/>).

¹¹⁶ See Yuma Totani, "The Case against the Accused", in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds.), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited*, Martinus Nijhoff, Leiden, 2010, p. 154. Notably, while not charging persecution, the Indictment does charge crimes against humanity; however, the IMTFE Judgment also refrained from assessing guilt for crimes against humanity and rather focused on crimes against peace and war crimes. See IMTFE Indictment, see *supra* note 115.

¹¹⁷ This analysis excludes, *inter alia*, the decisions of British courts. These courts grounded their jurisdiction in the Royal Warrant, which provided jurisdiction only over war crimes and not crimes against humanity. War Office, Special Army Order, Royal Warrant 0160/2498 A.O. 81/1945, Regulations for the Trial of War Criminals, 18 June 1945 (<https://www.legal-tools.org/doc/386f77/>). See also British Military Court, Luneburg, *United Kingdom v. Joseph Kramer et al.*, 17 September 1945–17 November 1945 in UN-WCC, *Law Reports of Trials of War Criminals*, vol. II, London, 1947, pp. 1, 150–51; the British Military Court hearing the case concerning the Belsen concentration camp noted that all parties recognised that jurisdiction was grounded in the Royal Warrant which differed from the IMT Charter, *inter alia*, insofar as the former "is limited to the trial of war crimes proper and excludes crimes against humanity".

ternational concern from that of solely domestic concern. While the IMT required that the persecutory conduct be connected to the armed conflict in some respect through the connection to another offence within the Tribunal's jurisdiction, this requirement was a matter of disagreement among the NMTs. In addition, several NMTs incorporated a new requirement for crimes against humanity generally (including persecution) not explicitly set out in CCL No. 10: that the conduct be widespread, systematic and pursuant to government policy or acquiescence.

In surveying the post-war jurisprudence this section begins by discussing the *actus reus* of the crime (including the question of what underlying acts were considered persecutory, and the issue of a nexus to other crimes), then turns to the *mens rea* of the offence, and finally provides a brief comment on the relationship between the crimes of genocide and persecution as a crime against humanity. Notably, what follows is not an exhaustive review of the post-war decisions; rather it endeavours to trace the development of the offence in the leading cases. In doing, the analysis seeks to highlight, in particular, efforts to establish parameters of the offence that distinguished the international crime of persecution from what the drafters had referred to as "mere crimes" of domestic concern. This phenomenon is most clearly evident in the discussion of the "nexus requirement" below; however, its influence can be discerned throughout the other areas of the jurisprudence addressed as well.

12.2.3.1. The *Actus Reus* of Persecution

12.2.3.1.1. The Underlying Persecutory Acts or Omissions

As noted above, neither the legal instruments governing the post-war tribunals nor the jurisprudence these tribunals produced set out a comprehensive definition of persecution as a crime against humanity. Moreover, the IMT was particularly inconsistent in its use of the term, complicating the task of drawing robust precedential standards on this point from its Judgment.¹¹⁸

¹¹⁸ In the analysis of the IMT Judgment that follows, we rely on instances where the IMT explicitly classified an act as persecution and not simply as a crime against humanity (despite the presence of circumstances that suggested that a specific persecution conviction could be supported). As discussed above, some courts and scholars have taken an alternative position relying on the IMT Judgment as providing precedent for the contemporary in-

Nevertheless, some observations can be made concerning the character of the underlying acts or omissions relied upon by the tribunals for a persecution conviction. Among other things, the tribunals often portrayed persecution as a cumulative or contextualised crime – situating a given impugned act in a broad series of persecutory acts. In addition, while the tribunals did not set out explicit standards concerning underlying conduct, they tended to rely on underlying acts or omissions of varying character for persecution convictions. Such acts included conduct that independently met the definition of a crime against humanity or a war crime, acts that were themselves criminal but were neither crimes against humanity nor war crimes, and finally conduct that in the absence of a discriminatory element would not otherwise have qualified as criminal acts. Finally, while controversial, some scholars as well as modern international criminal courts and tribunals have derived a minimum threshold from the post-war jurisprudence of acts of a similar severity to other crimes against humanity. Much of the jurisprudence examining these factors – though at times only selective aspects of it – would be influential on the jurisprudence of the contemporary international criminal tribunals and courts, as these institutions engaged with the same fundamental question of what conduct constitutes the *actus reus* of persecution.¹¹⁹

12.2.3.1.1.1. Cumulative Approach

Perhaps unsurprisingly, given the nature of the charges before them, the post-war tribunals seldom considered a single act of persecution in isolation; rather, they often situated the persecutory conduct of a defendant within an ongoing series of discriminatory events. Before addressing the guilt of individuals and organisations for persecution, for instance, the IMT set out the relevant context in a background section entitled “Persecution of the Jews”. The IMT observed that “[t]he persecution of the Jews at the hands of the Nazi Government has been proved in the greatest detail before the Tribunal. It is a record of consistent and systematic inhumanity on the greatest scale”.¹²⁰ In an oft-quoted excerpt, the IMT went on to state:

terpretation of persecution even where the IMT failed to explicitly invoke the term. See *supra* note 113 and accompanying text.

¹¹⁹ See, for example, *infra* section 12.3.2.1. and 12.3.3.1.

¹²⁰ IMT Judgment, p. 247, see *supra* note 113.

With the seizure of power, the persecution of the Jews was intensified. A series of discriminatory laws was passed, which limited the offices and professions permitted to Jews; and restrictions were placed on their family life and their rights of citizenship. By the autumn of 1938, the Nazi policy towards the Jews had reached the stage where it was directed towards the complete exclusion of Jews from German life. Pogroms were organised, which included the burning and demolishing of synagogues, the looting of Jewish businesses, and the arrest of prominent Jewish businessmen. A collective fine of 1 billion marks was imposed on the Jews, the seizure of Jewish assets was authorised, the movement of the Jews was restricted by regulations to certain specified districts and hours. The creation of the ghettos was carried out on an extensive scale, and by an order of the Security Police Jews were compelled to wear a yellow star to be worn on the breast and back.¹²¹

This discriminatory treatment, the IMT recounted, developed further into a practice of deportation, human experimentation, extermination, slave labour and other similar acts once the war had begun.¹²² Notably, as discussed further below, the IMT subsequently found that the majority of the acts set out in the above excerpt did not to fall within its jurisdiction over persecution as a crime against humanity insofar as – having occurred before the invasion of Poland in 1939 and the onset of the war – they were unrelated to another crime within the IMT Charter. Nevertheless, the IMT seemed compelled to include an account of these acts in the Judgment, establishing the sequence of persecutory conduct within which the acts it subsequently considered fell.

Similarly, in the *Ministries* case, the US NMT approached wartime persecution as a cumulative series of events. As the Tribunal noted, “[t]he persecution of the Jews went on steadily from step to step and finally to death in foul form”. The Tribunal went on to further describe the “steps” comprising the persecutory conduct stating:

The Jews of Germany were first deprived of the rights of citizenship. They were then deprived of the right to teach, to practice professions, to obtain education, to engage in business enterprises; they were forbidden to marry except among

¹²¹ *Ibid.*, pp. 248–49.

¹²² *Ibid.*, pp. 249–53.

themselves and those of their own religion; they were subject to arrest and confinement in concentration camps, to beatings, to mutilation and torture; their property was confiscated; they were herded into ghettos; they were forced to emigrate and to buy leave to do so; they were deported to the East, where they worked to exhaustion and death; they became slave labourers; and finally over six million were murdered.¹²³

In the *Justice* case the US NMT emphasised why such a cumulative or contextual approach was necessary. Noting that the events could not be understood in isolation the Tribunal observed, “[t]he record contains innumerable acts of persecution of individual Poles and Jews, but to consider these cases as isolated and unrelated instances of perversion of justice would be to overlook the very essence of the offence charged in the indictment”.¹²⁴ As the Tribunal observed, “it is alleged that they participated in carrying out a governmental plan and program for the persecution and extermination of Jews and Poles, a plan which transcended territorial boundaries as well as the bounds of human decency”.¹²⁵

12.2.3.1.1.2. Threshold Gravity of Underlying Acts

There remains the question, however, of what acts or omissions – whether as part of a series of persecutory acts or in isolation – the tribunals viewed as appropriately constituting the underlying acts for a conviction of persecution as a crime against humanity. The Nuremberg Judgment is silent on this point, not directly addressing the severity or gravity of acts that would support a conviction.

¹²³ NMT, *United States of America v. Ernst von Weizsaecker et al.*, Judgment, 11–13 April 1949, in *Trials of War Criminals Before the Nuernberg Military Tribunals*, vol. XIV, 1951, p. 471 (‘Ministries case’) (<https://www.legal-tools.org/doc/eb20f6/>).

¹²⁴ Justice case, vol. III, p. 1063, see *supra* note 7.

¹²⁵ *Ibid.* See further the UNWCC’s commentary on the case: UNWCC, *Law Reports of Trials of War Criminals*, vol. VI, London, 1948, pp. 82–83. It is worth noting, however, that as the Tribunal observed, part of the reason why the cumulative nature of the events was relevant in the case before it was the nature of the charges: setting out participation in a “governmental plan and program for [...] persecution”. This suggests that the cumulative approach to assessing persecution may not always be applicable, but may be more or less relevant depending on the particular nature of the events. The issue of the NMT’s development of the contextual elements of crimes against humanity (including the relevance of a plan or policy) is discussed further below.

In contrast, a number of the US NMTs addressed the threshold gravity an underlying act must reach to support a conviction for persecution. As contemporary scholars and jurisprudence have noted, the most direct articulation of such a threshold can be found in the *Flick* case's rejection of discriminatory "compulsory taking of industrial property" as a basis for conviction of persecution as a crime against humanity.¹²⁶ After noting that the Nuremberg Judgment did not expressly support treating such acts as crimes against humanity,¹²⁷ the US NMT held that

[n]ot even under a proper construction of the section of [Control Council] Law No. 10 relating to crimes against humanity, do the facts warrant conviction. The "atrocities and offenses" listed therein "murder, extermination," etc., are all offenses against the person. Property is not mentioned. Under the doctrine of *ejusdem generis* the catch-all words "other persecutions" must be deemed to include only such as affect the life and liberty of the oppressed peoples. Compulsory taking of industrial property, however reprehensible, is not in that category.¹²⁸

Chambers of the contemporary international criminal courts and tribunals have subsequently relied upon this statement to conclude that "at a minimum, acts of persecution must be of an equal gravity or severity to the other acts enumerated under [the definition of crimes against humanity]".¹²⁹ As Kevin Jon Heller has noted, however, the reasoning in the *Flick* case is problematic insofar as, *inter alia*, it depends "on a significant misstatement of Article II(1)(c) [of CCL No. 10]".¹³⁰ The articulation of the "murder-type" crimes against humanity in the provision is not followed by a reference to "other persecutions" but rather to "persecutions".

¹²⁶ See, for example, Kupreškić case, Trial Judgment, para. 619, *supra* note 2; Extraordinary Chambers in the Courts of Cambodia ('ECCC'), *Prosecutor v. Kaing Guek Eav alias Duch*, Appeal Judgement, 001/18-707-2007-ECCC/SC, 3 February 2012, paras. 254–55 ('Duch case') (<https://www.legal-tools.org/doc/681bad/>).

¹²⁷ NMT, *United States of America v. Friedrich Flick et al.*, Judgment, 22 December 1947, in *Trials of War Criminals Before the Nuernberg Military Tribunals*, 1951, vol. VI, p. 1215 ('Flick case') (<https://www.legal-tools.org/doc/861416/>).

¹²⁸ *Ibid.* This reasoning was subsequently adopted in the *IG Farben* case. NMT, *United States of America v. Carl Krauch et al.*, Judgment, in *Trials of War Criminals Before the Nuernberg Military Tribunals*, vol. VIII, 1951, pp. 1129–1130 ('Farben case').

¹²⁹ See, for example, Kupreškić case, Trial Judgment, para. 619, *supra* note 2.

¹³⁰ Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, Oxford University Press, Oxford, 2011, pp. 247–48.

In Heller's words, "[t]he difference was critical: although the expression 'other persecutions' might have implied that Article II(1)(c) intended to criminalize persecutions 'of the same kind' as the atrocities and offenses, the more generic term 'persecutions' gives rise to no such impression".¹³¹

As discussed below, the specific application of the *Flick* holding to compulsory takings as a sufficient underlying act for persecution was challenged in other cases before the US NMT. Moreover, while *Flick*'s threshold analysis appears to have been based on a misreading of the text of CCL No. 10, the contemporary interpretation of the *Flick* holding as requiring that underlying acts amount to "gross or blatant denials of fundamental human rights"¹³² seems to be supported, *inter alia*, by the drafting history of the relevant post-Second World War legal instruments. As noted above, in London, Jackson (the most adamant proponent of the inclusion of persecution in the definition of crimes against humanity) stressed that the American delegation sought to address, in particular, the "destruction of the rights of minorities".¹³³

12.2.3.1.1.3. War Crimes and Crimes Against Humanity as Underlying Acts

Though the post-Second World War jurisprudence does not include an extensive consideration of the precise gravity threshold that underlying acts or omission must meet, some indication can be gleaned from a review of the types of acts that the tribunals relied upon to support persecution convictions. Namely, they relied upon both underlying acts that amounted

¹³¹ *Ibid.*, p. 248.

¹³² See, for example, Kupreškić case, Trial Judgment, para. 619, *supra* note 2; Duch case, Appeal Judgement, paras. 254–55, see *supra* note 126.

¹³³ Jackson, 1949, pp. 330–31, see *supra* note 51. While one may be reticent to place too much weight on this statement, the reference to "destruction of rights" does indicate that something more severe than mere discriminatory treatment was intended to be captured. Moreover, this statement is a helpful indication of the intended content of persecution as a free-standing offence, as other comments focused substantially on the extermination and deportation of minorities with discriminatory intent. It should be noted, however, that the excerpted comment from Jackson should not be read as excluding jurisdiction over compulsory takings of property. First, Jackson also indicated that such takings fell within the scope of concern. See *id.*, p. 49, noting in his initial report to Truman that among the acts which were of concern was the "wholesale confiscation of property which initiated the Nazi regime within Germany". Second, the right to property is among those considered as "fundamental" within American conceptions of rights; see, for example, Constitution of the United States of America, Fifth Amendment, 15 December 1791; Constitution of the United States of America, Fourteenth Amendment, 9 July 1868.

to crimes against humanity and war crimes, as well as conduct not meeting this standard. This section surveys some of the decisions falling into the first category; the section that follows surveys decisions in which conduct not amounting to crimes against humanity and war crimes was invoked to support a conviction for persecution.

The notion discussed here (that is, whether a crime against humanity or a war crime *could* be relied upon as the underlying act or omission for a persecution charge) should be distinguished from another matter discussed below, that is the issue of whether a nexus between persecution and other such crimes was *required* for the tribunal to assert jurisdiction. It is also worth emphasising that the proposals put forward during the drafting negotiations requiring discriminatory intent for all crimes against humanity were ultimately not adopted. Thus, while “murder-type” crimes against humanity were relied upon as the underlying acts for persecution charges, a persecutory intent was not required to substantiate a conviction for a “murder-type” crime against humanity.

Examples of reliance on other war crimes and crimes against humanity (namely, deportation, slave labour and extermination) as the underlying acts or omissions grounding persecution convictions against organisations¹³⁴ and individuals alike can be found throughout the Nuremberg Judgment.¹³⁵ In its discussion of the criminal responsibility of the Gestapo and Sicherheitsdienst (‘SD’) or secret service, the IMT noted the involvement of these organisations in “anti-Semitic persecution”, which included “emigration and evacuation” of Jews from Germany, and in measures “bringing about a complete solution to the Jewish problem in German-dominated Europe”, involving deportation of Jews to the East and “the wholesale massacre of Jews” behind the lines of the Eastern front.¹³⁶ Likewise, in finding the SS criminally responsible for, *inter alia*,

¹³⁴ Pursuant to the IMT Charter, the IMT had jurisdiction over both individuals and organisations. See IMT Charter in *Trial of the Major War Criminals Before the International Military Tribunal*, vol. I, 1947, p. 10, Articles 6 and 9–10 (<https://www.legal-tools.org/doc/64ffdd/>).

¹³⁵ As noted above, it is sometimes difficult to discern the precise basis for the IMT’s reasoning in the Judgment due to the degree to which its discussion of war crimes and crimes against humanity overlap. However, the following notes those instances where the Judgment refers specifically to “persecution” in its reasoning, and attempts to parse out those acts discussed in connection with this observation or those concerning which the Judgment notes a particular discriminatory nature.

¹³⁶ IMT Judgment, pp. 265–66, see *supra* note 113.

crimes against humanity, the IMT pointed to that organisation's "particularly significant role in the persecution of Jews". This role, the IMT noted, included involvement in the "evacuation of Jews from occupied territories" and overseeing the "massacre of the Jews" generally, and in the Warsaw Ghetto in particular.¹³⁷ In addressing the guilt of the Nazi leadership for persecution, the IMT observed that the leadership corps was used to minimise resistance back home concerning deportation and extermination happening in the East. In doing so, the IMT noted in its Judgment, "the machinery of the Leadership Corps [was used] to keep German public opinion from rebelling at a program which was started to involve condemning the Jews of Europe to a lifetime of slavery".¹³⁸

The same is evident in the IMT's discussion of the guilt of individual defendants. Baldur von Schirach – a Nazi official in occupied Vienna – was not found guilty of conspiracy to wage war, and was not charged with war crimes nor crimes against peace. However, the IMT concluded he was guilty of crimes against humanity including persecution on the basis of his involvement, *inter alia*, in the deportation of the Jewish population of Vienna to the East with awareness of the conditions there.¹³⁹ The IMT likewise noted Arthur Seyss-Inquart "advocated persecution of Jews" and was involved, *inter alia*, with overseeing the mass deportation to Auschwitz of the Jewish population of the Netherlands where he held a leadership position.¹⁴⁰ Finally in concluding that Martin Bormann, a central figure in the Nazi leadership, "was extremely active in the persecution of the Jews" the IMT pointed, among other things, to his involvement in planning for the deportation of Jews from Vienna and in promoting the use of "ruthless force" to secure "the permanent elimination of Jews in Greater German territory".¹⁴¹

In setting out the basis for the conviction of individual defendants, the IMT often relied upon conduct constituting crimes against humanity or war crimes in addition to other categories of conduct discussed below,

¹³⁷ *Ibid.*, p. 271.

¹³⁸ *Ibid.*, pp. 259, 261.

¹³⁹ *Ibid.*, p. 319. The IMT's reference to both murder-type and persecution-type crimes against humanity in establishing its jurisdictional basis for his conviction at the top of page 319 suggests that they viewed his guilt as including persecution.

¹⁴⁰ *Ibid.*, p. 329. Notably, the IMT's explicit reference to persecution in the discussion of Seyss-Inquart's conduct is in relation to his actions in Poland. The IMT does not invoke the term explicitly in relation to his acts in the Netherlands.

¹⁴¹ *Ibid.*, pp. 339–20.

together amounting to a series of persecutory measures. In its discussion of Hans Frank's guilt for the persecution of Jews in Poland, for instance, the IMT emphasised his involvement in overseeing a programme under which "[t]hey were forced into ghettos, subjected to discriminatory laws, deprived of goods necessary to avoid starvation, and finally systematically and brutally exterminated".¹⁴²

The jurisprudence of the US NMTs demonstrates a similar reliance on war crimes and crimes against humanity as the underlying acts behind persecution convictions. For instance, in its discussion of persecution in the *Ministries* case, the NMT noted a series of events which involved both: (1) acts which independently amounted to crimes against humanity or war crimes (as the NMT ended its description of the events by noting "[the Jewish population of Germany] [was] deported to the East, where they worked to exhaustion and death; they became slave labourers; and finally over six million were murdered"¹⁴³); and (2) acts which did not. In the *RuSHA* case, the NMT based its findings of guilt under the count of "Persecution and Extermination" of the Jewish and Polish population on, *inter alia*, its earlier discussion of mass deportation.¹⁴⁴ Likewise in the *Pohl* case, the NMT found the defendant Baier guilty for persecution on the basis of his involvement in the exploitation of slave labour of Jewish prisoners.¹⁴⁵

A review of the post-Second World War cases before national courts demonstrates a similar approach, relying on conduct constituting war crimes or crimes against humanity as the underlying acts of persecution convictions. In the case concerning, Artur Greiser, for instance, the Supreme National Tribunal of Poland entered a conviction on the basis of

¹⁴² *Ibid.*, pp. 297–98.

¹⁴³ *Ministries* case, vol. XIV, p. 471, see *supra* note 123. It is worth noting however, that these acts were discussed in the general contextual section, and not with regard to the specific conviction of particular defendants.

¹⁴⁴ NMT, *United States of America v. Ulrich Greifelt et al.*, Judgment, in *Trials of War Criminals Before the Nuernberg Military Tribunals*, vol. V, 1950, p. 152 ('RuSHA case') (<https://www.legal-tools.org/doc/2bc719/>).

¹⁴⁵ NMT, *United States of America v. Oswald Pohl et al.*, Judgment, in *Trials of War Criminals Before the Nuernberg Military Tribunals*, vol. V, 1950, pp. 1046–47 ('Pohl Case') (<https://www.legal-tools.org/doc/84ae05/>). The NMT noted that Baier did not himself physically manhandle Jews, or other detainees of the Reich; however, it was through his exploitation of the existing regime of slave labour that Baier perpetuated persecution of the Jews.

all the charges set out in the indictment, which included, *inter alia*, persecution of Jewish and Polish populations through deportation to concentration camps.¹⁴⁶

12.2.3.1.1.4. Non-Enumerated Conduct as Underlying Acts

While often relying on conduct amounting to crimes against humanity or war crimes as the underlying acts or omission underpinning a persecution conviction, the post-war tribunals did not *require* that the underlying conduct met this threshold. In various instances, the tribunals based convictions for persecution as a crime against humanity on: (1) underlying acts that – while not falling within the enumerated conduct constituting crimes against humanity or war crimes in the relevant post-war legal instrument – were nevertheless criminal in nature;¹⁴⁷ and (2) underlying acts that were not independently criminal in the absence of a discriminatory intent.

Turning again to the IMT's initial articulation of the policy of persecution set out in its Judgment (as excerpted earlier), it noted a number of non-criminal acts such as “a boycott of Jewish enterprises”, the passage of discriminatory laws resulting in restrictions on Jewish involvement in German political and economic life and leading eventually to the deprivation of citizenship, as well as restrictions on movement, ghettoisation and the imposition of a requirement to wear identifying marks.¹⁴⁸ A similar

¹⁴⁶ Supreme National Tribunal of Poland, *Trial of Gauleiter Artur Greiser*, 21 June 1946–7 July 1946, in UNWCC, *Law Reports of Trials of War Criminals*, vol. XIII, London, 1949, pp. 70, 72, setting out the charges against the accused, and pp. 104–5, confirming the charges as set out, with the exception of personally murdering and committing grievous bodily harm, noting: “In respect of this group of charges which were related to crimes committed against the life, health and property of Poles and Jews, and against the freedom of worship, culture and language of the Polish population, said to have been directed by the accused, the Tribunal stated that the documents laid before it and the evidence of the witnesses have proved in their entirety the charges put forward in that part of the Indictment”. Notably, the Tribunal's judgment must be taken in context to the extent that, as Mark Drumbl notes, “[t]he substantive law applied by the Tribunal took the form of a hodge-podge of special decrees, pre-existing municipal law, and the London Agreement”. Mark A. Drumbl, “‘Germans are the Lords and Poles are the Servants’: The Trial of Arthur Greiser in Poland, 1946”, in Kevin Jon Heller and Gerry Simpson (eds.), *The Hidden Histories of War Crimes Trials*, Oxford University Press, Oxford, 2013, p. 417.

¹⁴⁷ That is, acts which would be criminalised under most if not all criminal codes of the world – such as murder, theft, assault, and similar acts.

¹⁴⁸ IMT Judgment, p. 180–81, see *supra* note 113. It is worth noting again, however, that – while characterising such acts as “persecution” – it concluded it did not have jurisdiction over the majority of such conduct as it took place prior to the onset of that war (leading to an absence of the requisite nexus discussed below).

spectrum of conduct can be seen in the excerpt above from the NMT's *Ministries* case setting out the overall scope of the persecution. The NMT pointed to, *inter alia*, the exclusion of Jews from professions and from education, restrictions on their rights to marry, confiscation of property and other economic deprivations, discriminatory arrests, as well as the passing of discriminatory laws and the discriminatory application of existing laws.¹⁴⁹

This is likewise evident in the post-war tribunals' assessment of the guilt of individual defendants. The IMT at Nuremberg emphasised the involvement of several defendants in creating a regime of economic and legal discrimination against the Jewish population.¹⁵⁰ For instance, in discussing Hermann Wilhelm Göring's guilt for, *inter alia*, persecution of the Jewish population, the IMT pointed to his imposition of a collective "billion-mark fine" on all German Jews and imposition of a range of discriminatory laws.¹⁵¹ In its Judgment, the IMT emphasised the economic nature of the measures Göring imposed on the Jewish population, noting such conduct was tied to the question of "how to get their property and how to force them out of the economic life of Europe".¹⁵²

¹⁴⁹ Ministries case, vol. XIV, p. 471, see *supra* note 123. See also Justice case, vol. III, pp. 1063–64, *supra* note 7, setting out a similar series of acts the NMT viewed as persecutory.

¹⁵⁰ While not using the term persecution explicitly, in the IMT's analysis concerning Walter Funk's guilt for war crimes and crimes against humanity the Tribunal notes his involvement in the Nazi programme of economic discrimination against Jews, and the fact that he advocated the elimination of Jews from economic life in Germany. IMT Judgment, pp. 305–306, see *supra* note 113. Though we have sought to only rely on instances where the IMT explicitly invoked the term persecution in its analysis, it is worth noting that these acts would not be relevant in establishing guilt under war crimes and crimes against humanity but for its potential contribution to a finding of persecution. Likewise, in discussing Arthur Seyss-Inquart's guilt for war crimes and crimes against humanity, the Tribunal points to, *inter alia*, his imposition of "a series of laws imposing economic discrimination against the Jews" as Reich Commissioner for the Netherlands. IMT Judgment, p. 329, see *supra* note 113. While referring to persecution in relation to Seyss-Inquart's conduct in Poland, the Tribunal does not invoke the term in its discussion of his conduct in the Netherlands. Similarly, Wilhelm Frick was found guilty for war crimes and crimes against humanity on the basis, *inter alia*, of his role in "draft[ing], sign[ing], and administer[ing] many laws designed to eliminate Jews from German life and economy, including prohibiting the Jewish population from various professions, confiscating their property, and placing them outside the existing legal system", IMT Judgment, p. 300, see *supra* note 113.

¹⁵¹ IMT Judgment, p. 282, see *supra* note 113, noting also that "he was [...] the creator of an oppressive program against the Jews and other races at home and abroad".

¹⁵² *Ibid.*

Recognition of economic discrimination as a basis for persecution convictions is also evident in the jurisprudence of the US NMT. Notably, this jurisprudence is divided on whether expropriation of industrial property in particular amounted to an underlying act for the purpose of a persecution conviction. As noted in the excerpt from the *Flick* case quoted above, the Tribunal viewed expropriation of industrial property as insufficient to qualify as an underlying act of persecution on the basis, *inter alia*, of the principle of *ejusdem generis*.¹⁵³ This holding was subsequently adopted in the *Farben* case.¹⁵⁴ However, as Kevin Jon Heller has noted, other Tribunals at Nuremberg reached different conclusions on this point. In the *Ministries* case, for instance, Richard Darré, the Minister of Food and Agriculture, was convicted for, *inter alia*, his involvement in the extensive programme of expropriation of Jewish agricultural property.¹⁵⁵ The Tribunal described the intent of the programme as “not only to bar Jews from agriculture, but also to rob them of a large part of the value of their property”.¹⁵⁶

Despite the conflicting jurisprudence on the question of expropriation of industrial property, the NMTs widely accepted that theft or takings of personal property could constitute an underlying act for the crime of persecution.¹⁵⁷ The *Flick* case noted that “[a] distinction could be made

¹⁵³ *Flick* case, vol. VI, p. 1215, see *supra* note 127.

¹⁵⁴ *Farben* case, vol. VIII, pp. 1129–30, *supra* note 128.

¹⁵⁵ *Ministries Case*, vol. XIV, pp. 556–7, see *supra* note 123. See also Heller, 2011, p. 248, see *supra* note 130, discussing the *Ministries* case holding on this point. Admittedly, the classification of agricultural property in the first half of the twentieth century as industrial rather than personal property may not be such a clean distinction in light of the character of farming at the time.

¹⁵⁶ *Ibid.* While the Tribunal does not refer to this act as persecution specifically, a number of factors support its characterisation as such. First, the impugned conduct involved acts on German territory against German Jews (and thus beyond the Tribunal’s characterisation of war crimes of pillaging, etc.). Second, the Tribunal stressed that “[u]nquestionably the proceeds of the Aryanization of farms and other Jewish property were in aid of and utilized in the program of rearmament and subsequent aggression”. The effort to connect the conduct with German aggression more broadly suggests that the Tribunal viewed itself as convicting under crimes against humanity rather than war crimes, and thus needed to establish the presence of a nexus to another crime under the Tribunal’s jurisdiction (as per the *Ministries* Tribunal’s view of the nexus requirement discussed below). Finally, in its analysis the Tribunal emphasised the discrimination against Jews involved in the conduct, suggesting that it was endeavouring to set out the requirements of a persecution conviction.

¹⁵⁷ Heller, 2011, p. 248, see *supra* note 130, discussing the *Pohl*, *RuSHA* and *Ministries* cases on this point.

between industrial property and the dwellings, household furnishings, and food supplies of a persecuted people”.¹⁵⁸

The *Justice* case examined the nature of such “lesser forms of racial persecution” based on underlying acts or omissions falling short of extermination, deportation and other international crimes. The Tribunal noted that, along with the programme of “actual extermination of Jews and Poles”, “lesser forms of racial persecution were universally practiced by governmental authority and constituted an integral part in the general policy of the Reich”.¹⁵⁹ The Tribunal convicted members of the judiciary of persecution for their “discriminatory application of the law” against Jewish and Polish individuals.¹⁶⁰ Similarly in the *Ministries* case, the Tribunal recognised Lammer’s culpability for “judicial persecution” through his role in the perversion of the judicial system to undermine the “ordinary and commonly recognized rights to fair trial” for “Jews and other enemies and opponents of national socialism”.¹⁶¹ The *Justice* Tribunal noted that discriminatory acts which were not criminal in themselves – such as “the denial to Jews of the right to proceed in civil litigation without advancement of costs” – may appear “to be a small matter compared to the extermination of Jews by the millions under other procedures”.¹⁶² Nevertheless, the Tribunal observed, such acts are “a part of the government-organized plan for the persecution of the Jews, not only by murder and imprisonment but by depriving them of the means of livelihood and of equal rights in the courts of law”.¹⁶³

The post-Second World War tribunals also grounded persecution convictions in acts of incitement, treating the actions of individuals who, through their words drove others to engage in persecution, as constituting persecution as a crime against humanity itself. For instance, the IMT, in its discussion of the guilt of Julius Streicher, the publisher of “an anti-Semitic weekly newspaper” and radio personality, for crimes against humanity, stressed his role in “incit[ing] the German people to active perse-

¹⁵⁸ Flick case, vol. VI, p. 1214, see *supra* note 127.

¹⁵⁹ Justice Case, vol. III, pp. 1063–64, see *supra* note 7.

¹⁶⁰ See Roberts, 2006, p. 266, *supra* note 23, discussing the case. See, for example, Justice case, vol. III, p. 1156, see *supra* note 7, concerning the conviction of the defendant Rothaug.

¹⁶¹ Ministries Case, vol. XIV, pp. 602–5, see *supra* note 123.

¹⁶² Justice Case, vol. III, p. 1114, see *supra* note 7.

¹⁶³ *Ibid.*

cution”.¹⁶⁴ Notably, the IMT held that, despite Streicher’s involvement with the Nazi party, “[t]here is no evidence to show that he was ever within Hitler’s inner circle of advisers”;¹⁶⁵ his guilt was not based on his contribution to the party in an official capacity, but rather through his consistent and public dissemination of anti-Semitic rhetoric and support for extermination as “Jew-Baiter Number One”.¹⁶⁶ On this basis, in one of its most explicit statements of guilt for persecution,¹⁶⁷ the IMT concluded:

Streicher’s incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with War Crimes, as defined by the Charter, and constitutes Crimes against Humanity.¹⁶⁸

A case alleging persecution through speech acts was also brought against Hans Fritzsche for his conduct as head of the German Home Press Division and later head of the Radio Division of the Propaganda Ministry during the war.¹⁶⁹ As discussed below, the IMT ultimately found Fritzsche not guilty; however, its conclusion seems to be based more on the absence of specific intent than the insufficiency of the *actus reus* underlying the charges.¹⁷⁰

A similar basis for a persecution conviction can be seen in the *Ministries* case’s reasoning concerning the guilt of Otto Dietrich. Dietrich, as Reich press chief, had substantial control over the content of the popular media throughout the war. The Tribunal noted that the directives he is-

¹⁶⁴ IMT Judgment, p. 302, see *supra* note 113. See also Gregory S. Gordon, “Hate Speech and Persecution: A Contextual Approach”, in *Vanderbilt Journal of Transnational Law*, 2013, vol. 46, no. 2, p. 303, discussing the post-Second World War persecution speech cases.

¹⁶⁵ IMT Judgment, p. 302, see *supra* note 113.

¹⁶⁶ *Ibid.*, pp. 302–4.

¹⁶⁷ As noted earlier, in other instances it is hard to parse out the IMT’s analysis concerning persecution specifically and other acts of crimes against humanity and war crimes generally.

¹⁶⁸ IMT Judgment, p. 304, see *supra* note 113.

¹⁶⁹ *Ibid.*, pp. 336–38.

¹⁷⁰ See *infra* section 12.2.3.2. The IMT implicitly relied upon speech acts, among other conduct, in the finding the Nazi leadership guilty of persecution. As noted above, the IMT emphasised the role of the leadership in minimising resistance at home – “to keep German public opinion from rebelling” – in response to deportation and extermination happening in the East. However, such conduct is arguably best viewed as finding guilt on the basis of party liability (whether through aiding and abetting or another means) for persecution through deportation and extermination itself. See *ibid.*, pp. 259, 261.

sued to the press and periodicals concerning the inclusion of anti-Semitic content and exclusion of Jewish writers “were not mere political polemics, they were not aimless expressions of anti-Semitism, and they were not designed only to unite the German people in the war effort”. Rather, the Tribunal found, “[t]heir clear and expressed purpose was to enrage Germans against the Jews, to justify the measures taken and to be taken against them, and to subdue any doubts which might arise as to the justice of measures of racial persecution to which Jews were to be subjected”. On this basis, the Tribunal convicted Dietrich of crimes against humanity.¹⁷¹ The decisions of these tribunals on the relationship between persecution, speech and incitement would subsequently be influential in the development of a line of contemporary jurisprudence at the ICTR on these same themes.¹⁷²

It is worth noting that despite the present effort to delineate the forms of conduct upon which the post-Second World War tribunals relied in reaching convictions for persecution, it is hard to discern which conduct was treated as *per se* sufficient to ground a conviction. As noted above, the jurisprudence tends to rely on a cumulative series of persecutory acts, thereby complicating any effort to identify a given act as independently sufficient. For example, in discussing Frank’s involvement in the persecution of Jews through his role as Governor General of occupied Poland, the IMT pointed to the fact that the Jewish population was “forced into ghettos, subjected to discriminatory laws, [and] deprived of the food necessary to avoid starvation”.¹⁷³ As noted above, the IMT went on to note how this progressive regime of persecutory acts eventually escalated to “extermination”. In short, Frank’s guilt for persecution was established on the basis of discriminatory but non-criminal acts, as well as acts which themselves rose to the level of war crimes and crimes against humanity.

¹⁷¹ Ministries Case, vol. XIV, pp. 575–76, see *supra* note 123; as the Tribunal observed, “[b]y [providing such justifications] Dietrich consciously implemented, and by furnishing excuses and justifications, participated in, the crimes against humanity regarding Jews”. See also Gregory S. Gordon, “The Forgotten Nuremberg Hate Speech Case: Otto Dietrich and the Future of Persecution Law”, in *Ohio State Law Journal*, 2014, vol. 75, no. 3, pp. 585–88, discussing the basis for Dietrich’s conviction.

¹⁷² See *infra* section 12.3.2.1.1.

¹⁷³ IMT Judgment, pp. 297–98, see *supra* note 113.

Similar patterns can be seen in the conviction of Hans Albin Rauter before the Netherlands Special Court in The Hague. The Court found Rauter, the second in command of occupied Netherlands, guilty of persecution against the Jews on the basis of a wide range of discriminatory non-criminal acts. These included orders that Jews

wear a Star of David in public, and were forbidden to take part in public gatherings, to make use of public places for amusement, recreation or information, to visit public parks, cafes and restaurants, to use dining and sleeping cars, to visit theatres, cabarets, variety shows, cinemas, sports clubs, including swimming baths, to remain in or make use of public libraries, reading rooms and museums. A special curfew was introduced for all Jews between the hours of 8 p.m. and 6 a.m. Later orders banned them from railway yards and the use of any public or private means of transport.¹⁷⁴

However, the court noted in particular that these measures “subjected [the Jewish population] to discriminatory treatment and gradually segregated [them] from the rest of the population, which facilitated their being detected and apprehended at a later date for slave labour and eventual extermination”.¹⁷⁵ It is ultimately unclear to what extent the discriminatory, but non-criminal underlying acts, were sufficient to substantiate a persecution conviction in the absence of their relation to the eventual deportation, slave labour and extermination of members of the targeted group.

12.2.3.1.2. Persecution and a Nexus to Other Crimes within the Court’s Jurisdiction

The question of whether a conviction for persecution requires that a nexus be established between an alleged act of persecution and another international crime remains one of the most controversial elements of the post-Second World War jurisprudence. As discussed above, the issue of a nexus was broadly debated in the negotiations in London, with the four Allied powers ultimately determining that the IMT’s jurisdiction would be limited to crimes against humanity that took place “in execution of or in con-

¹⁷⁴ Netherlands Special Court in The Hague, *Trial of Hans Albin Rauter*, 4 May 1948, in UNWCC, *Law Reports of Trials of War Criminals*, vol. XIV, London, 1949, pp. 89, 93. As the UNWCC notes, the trial was undertaken pursuant to a mix of substantive law that included Dutch law and international law as defined in the Nuremberg Charter. *Id.*, p. 111.

¹⁷⁵ *Ibid.*, pp. 89, 93.

nection with any crime within the jurisdiction of the Tribunal”. The semi-colon that appeared in the final draft of the crimes against humanity provision suggested that this requirement only extended to the offence of persecution; however, as noted earlier, the Berlin Protocol passed months later removed the semi-colon, arguably extending the nexus requirement to the crimes against humanity provision as a whole.¹⁷⁶

In contrast, an explicit nexus requirement was not included in the terms of CCL No. 10. While the drafting history is not as well documented as the London Conference, there are some indications that the exclusion was intentional, with evidence of internal discussion among American officials supporting the position that the jurisdiction of the zonal tribunals should not be limited to crimes against humanity with a nexus to war crimes or crimes against peace.¹⁷⁷ In light of the deletion of the semi-colon in the Nuremberg Charter and the absence of a relevant differentiation between “murder-type” and “persecution-type” crimes against humanity in CCL No. 10, the discussion of the nexus requirement for persecution is effectively a discussion of a nexus requirement for crimes against humanity as whole. Thus, despite this Chapter’s focus on persecution, this section will review the jurisprudence addressing the nexus requirement more generally.

The jurisprudence suggests – consistent with the drafting history – that the nexus requirement was substantially driven by three related considerations. First, as we have emphasised throughout this Chapter, the debate concerning the nexus requirement represents the process by which state officials, legal actors and scholars assessed and recognised the nature of the contemporary relationship between international law and sovereignty. The jurisprudence often demonstrates tension concerning the question of whether there remained a need to protect the state’s jurisdiction over internal matters from international law, such that intervention could only be justified by the need to regulate truly inter-state matters (that is international armed conflict). Second, and closely related to the first point, the various tribunals invoked the nexus requirement as a means to ensure respect for the legality principle: as the argument went, while internation-

¹⁷⁶ See *supra* notes 99–101 and accompanying text.

¹⁷⁷ See Heller, 2011, p. 240, *supra* note 130 (discussing exchanges among American officials during the drafting process, including a favourable response to a draft provision which provided jurisdiction over crimes against humanity dating back to 1933 “whether or not connected with the crimes set out in (a) or (b) [on crimes against peace and war crimes]”).

al law had previously set standards that governed conduct in war despite domestic standards to the contrary, it had not done so with regard to peacetime conduct. Hence, whatever the merits of establishing international criminal standards for such future conduct, post-war prosecutions should be limited to conduct related in some manner to the war itself. Finally, the nexus requirement also provided some parameters to limit the otherwise potentially broad reach of the concept of crimes against humanity and the criminalisation of persecution. The significance of this final role for the nexus requirement is emphasised by the attempt of those tribunals that rejected it to find a substitute limitation. As further considered in the subsequent section, these considerations (in particular the first and the third) would arise again in the context of the contemporary international criminal courts and tribunals. Then, as now, persecution was at the crux of these debates – in many ways on the threshold between the domestic and international – through which state delegates, judges, lawyers and scholars wrestled with the question of what makes an international crime ‘international’.

Despite the explicit nexus requirement in the IMT Charter,¹⁷⁸ the Nuremberg Judgment acknowledged a degree of flexibility as to what was meant by the requirement of “in execution of or in connection with” any crime within the jurisdiction of the Tribunal. This evident, for instance, in IMT’s examination of the nexus requirement in its preliminary discussion of the “The Law Relating to War Crimes and Crimes against Humanity”. While noting that that a “policy of persecution, repression, and murder of civilians in Germany *before the war of 1939*” and the “persecution of Jews” by Germany during this period was “established beyond all doubt”, the IMT refused to make findings of guilt based upon this conduct. As it observed:

To constitute Crimes against Humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore

¹⁷⁸ Interestingly, in its Judgment, the IMT quoted the text of the pre-Berlin Protocol version of the crimes against humanity provision in which the semi-colon remained. See IMT Judgment, p. 253, see *supra* note 113. However, in the Tribunal’s reasoning it extended the nexus requirement to the provision as a whole. *Id.*, p. 254.

cannot make a general declaration that the acts before 1939 were Crimes against Humanity within the meaning of the Charter.¹⁷⁹

It is important to note that the IMT's reasoning suggests that its comments should perhaps be understood as interpreting a jurisdictional limitation set out by the IMT Charter rather than directed at the substantive requirements necessary to prove a crime against humanity generally.¹⁸⁰

Whether it was a substantive or jurisdictional standard, the IMT provided some indication of what the nexus requirement demanded in its reasoning concerning the guilt of specific defendants. Its conclusions effectively restricted crimes against humanity to a by-product of war – consistent with Jackson's expressed view during the drafting process as to what made the offence one of international concern.¹⁸¹ In short, such conduct was only a matter of international concern because of its association with an armed conflict. However, in finding both the defendants Streicher and von Schirach guilty of persecution despite their acquittal on charges of conspiracy to wage war, and the absence of war crimes or crimes against peace charges brought against them, the IMT indicated that the nexus did not require that the defendants have committed the related crimes personally.

Notably, Streicher's impugned conduct took place on German territory and the IMT found that he was not directly involved in the war effort. However, the IMT concluded that Streicher's incitement to discriminate against and exterminate Jews was sufficiently related to a war crime because it took place while "Jews in the East were being killed under the most horrible conditions".¹⁸² Interestingly, the relevant acts in the East effectively played a dual role as a war crime (killing of civilians in occu-

¹⁷⁹ *Ibid.*, p. 254 (emphasis added).

¹⁸⁰ The IMT noted shortly before that it "is of course bound by the Charter". *Ibid.*, p. 253. In noting that it could not declare the pre-war acts to be crimes against humanity "within the meaning of the Charter", the Judgment on this point implies that it was arguably noting what acts it could assert jurisdiction over pursuant to its constituting statute, not a comment concerning crimes against humanity more broadly. See also Clark, 1990, pp. 195–96, *supra* note 16, discussing this point.

¹⁸¹ See *supra* note 88 and accompanying text.

¹⁸² IMT Judgment, p. 304, see *supra* note 113. Notably, the IMT's specific reference to "Jews in the East" (that is, in occupied territory) established the connection to the war crime of killing civilians in the course of an occupation or armed conflict.

pied territory) fulfilling the nexus requirement, as well as persecutory crimes against humanity as incited by Streicher's statements.

In a more straightforward connection, the IMT found von Schirach's persecutory conduct in Austria (including overseeing deportation of Jews) to be sufficiently related to another crime within the Charter, as "Austria was occupied pursuant to a common plan of aggression". As the IMT observed, "[i]ts occupation is, therefore, a 'crime within the jurisdiction of the Tribunal', as that term is used in Article 6(c) of the Charter [setting out the nexus requirement]".¹⁸³ Thus, Schirach's conduct, having taken place in his role as a member of the occupying government in Austria, was by necessity related to another crime in the IMT Charter.

While the absence of a nexus requirement in CCL No. 10 has been noted in contemporary jurisprudence,¹⁸⁴ the treatment of the matter by the NMTs was not as simple as it is often portrayed. As Heller notes, despite the absence of a requirement in the text, American officials were reticent to pursue cases concerning pre-war crimes against humanity, in part out of concern for what such a precedent would mean in light of ongoing discrimination against various groups in the United States. As Telford Taylor, the US Chief Counsel throughout the CCL No. 10 cases at Nuremberg, wrote in internal correspondence (echoing the above quoted concerns of Jackson¹⁸⁵), "departures from democratic systems as may exist in some countries and discrimination, even quite aggravated systems as may exist against negroes in certain countries, should not[,] even[] in these enlightened times, constitute crimes at international law".¹⁸⁶ Nevertheless, the American prosecutors before the US NMT did put forward charges of pre-war crimes against humanity in two cases,¹⁸⁷ and the issue was ultimately addressed by the Tribunals in five cases.¹⁸⁸

Despite its absence in CCL No. 10, three tribunals found a nexus to the war was required to ground their jurisdiction over crimes against hu-

¹⁸³ *Ibid.*, pp. 318–19.

¹⁸⁴ See, for example, Kupreškić case, Trial Judgment, para. 577, *supra* note 2.

¹⁸⁵ See *supra* note 89 and accompanying text.

¹⁸⁶ See Heller, 2011, p. 235, *supra* note 130. As Heller notes, the State Department subsequently articulated a similar view, instructing Taylor that (while accepting the legality) "as a matter of policy" the US should not prosecute crimes against humanity that did not meet the nexus standard.

¹⁸⁷ Flick case, vol. VI, pp. 21–23, see *supra* note 127; Ministries case, vol. XII, pp. 38–43, see *supra* note 123. See also Heller, 2011, p. 235, *supra* note 130.

¹⁸⁸ Heller, 2011, p. 236, see *supra* note 130.

manity, including the tribunals which heard the only two cases where pre-war acts were charged. The NMT in *Flick*, in which the prosecution had charged pre-war crimes against humanity, was not convinced that CCL No. 10's silence on the matter was dispositive. In the Tribunal's view, the absence of the IMT's nexus language was insufficient in itself to grant jurisdiction over a peacetime offence. Moreover, the Tribunal pointed to the reference in Article 1 of CCL No. 10 which stated that the IMT Charter was to be made an "integral part" of the law set out in CCL No. 10. On this basis, the *Flick* Tribunal concluded that where CCL No. 10 was silent, the Charter's approach (nexus and all) should be presumed.¹⁸⁹

In the *Ministries* case, in which peacetime crimes against humanity were also charged, the Tribunal granted a defence motion to dismiss the charges concerning pre-war acts. In finding that it did not have jurisdiction over such acts, the Tribunal focused, *inter alia*, on the presumption that, in drafting CCL No. 10, the occupying powers did not intend to offend the principle of legality by establishing any new criminal offences; rather, their intent, the Tribunal concluded, must be presumed to codify offences already established under international law.¹⁹⁰ The Tribunal went on to state that "there can be no question but that the relationship between human rights and a just and lasting peace is very close and interlocking [and that] [...] if a nation's domestic policy is characterized by aggression at home, its foreign policy will probably also be characterized by aggression". However, it concluded, "the foregoing arguments and observations do not, however, establish that crimes against humanity perpetrated by a government against its own nationals, are of themselves crimes against international law".¹⁹¹ While calling for the drafting of treaties that established such a standard, the Tribunal concluded that establishing this standard was not its role and dismissed charges relating to pre-1939 crimes against humanity as failing to have a sufficient connection to crimes against peace or war crimes.¹⁹² However, as Heller observes, "the

¹⁸⁹ *Flick* case, vol. VI, pp. 1212–13, see *supra* note 127.

¹⁹⁰ The Ministries NMT quoted the statement of the IMT to this effect: "The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal as will be shown, it is the expression of international law existing at the time of its creation". It observed that this statement "clearly appl[ied] with equal persuasiveness to the question of this Tribunal's jurisdiction under Control Council Law No. 10". Ministries case, vol. XIII, p. 116, see *supra* note 123.

¹⁹¹ *Ibid.*, p. 117.

¹⁹² *Ibid.*

Ministries tribunal was willing to criminalize peacetime atrocities and persecutions that *did* satisfy the nexus requirement”.¹⁹³ It refrained from dismissing charges related to, and ultimately convicted the defendant Dar-ré for, theft of Jewish property that took place months before the onset of war. It reasoned that “the proceeds of the Aryanization of farms and other Jewish property were in aid of and utilized in the program of rearmament and subsequent aggression”.¹⁹⁴

While no pre-Second World War charges were brought before the US NMT in the *Pohl* case, in *obiter dicta* it nonetheless raised some of the same concerns previously raised by Jackson and Taylor relating to the extension of international accountability to the peacetime domain. It concluded, ultimately, that a nexus was required so as not to infringe upon German sovereignty. In the view of the Tribunal, there existed no basis for international law to intervene into the peacetime domestic affairs of a state, no matter how severe its treatment of its own citizens. However, this changed with the initiation of international conflict, justifying the nexus requirement: “when attempt is made to make the provisions [of an abusive] decree extra-territorial in their effect and to apply their totalitarian and autocratic police measures to non-Germans and in non-German territory, they thereby invaded the domain of international law”.¹⁹⁵

In contrast, the Tribunals hearing the *Justice* and *Einsatzgruppen* cases explicitly rejected the nexus requirement in *obiter dicta*, despite the fact that there were no relevant charges before them.¹⁹⁶ The Tribunal in the *Justice* case relied upon a textual approach, emphasising that

it must be noted that Control Council Law No. 10 differs materially from the Charter. The latter defines crimes against humanity as inhumane acts, etc. committed, “in execution of, or in connection with, any crime within the jurisdiction of the tribunal”, whereas in C.C. Law 10 the words last quoted are deliberately omitted from the definition.¹⁹⁷

The analysis by the Tribunal in the *Einsatzgruppen* case went beyond the terms of CCL No. 10 itself. It emphasised that, “humanity [...]

¹⁹³ Heller, 2011, p. 242, see *supra* note 130.

¹⁹⁴ *Ministries* case, vol. XIV, p. 557, see *supra* note 123. Heller, 2011, p. 242, see *supra* note 130.

¹⁹⁵ *Pohl* case, vol. V, pp. 991–92, see *supra* note 145.

¹⁹⁶ See Heller, 2011, p. 236, *supra* note 130, discussing these cases.

¹⁹⁷ *Justice* case, vol. III, p. 974, see *supra* note 7.

has no political boundaries and no geographical limitations”, and pursuant to the “laws of humanity”, the Tribunal “has jurisdiction to try all crimes against humanity as long known and understood under the general principles of criminal law”.¹⁹⁸

Significantly, having dismissed the nexus requirement, the Tribunals in the *Justice* and *Einsatzgruppen* cases proposed an alternative cabining principle to constrain the potentially broad category of crimes against humanity, and to therefore distinguish conduct of domestic concern from that rising to the level of an international crime. They set out contextual elements requiring that – to be considered a crime against humanity – the relevant conduct must be widespread and systematic and take place pursuant to a policy established by the government.¹⁹⁹ In dismissing the nexus requirement, the Tribunal in the *Einsatzgruppen* case set out what, in its view, set crimes against humanity apart. It was not their connection to war, but rather the fact that

[c]rimes against humanity are acts committed in the course of wholesale and systematic violations of life and liberty. It is to be observed that insofar as international jurisdiction is concerned, the concept of crimes against humanity does not apply to offenses for which the criminal code of any well-ordered state makes adequate provision. They can only come within the purview of this basic code of humanity because the state involved, owing to indifference, impotency or complicity, has been unable or has refused to halt the crimes and punish the criminals.²⁰⁰

Similarly, before observing that crimes against humanity under CCL No. 10 were not restricted to those connected to war, the Tribunal in the *Justice* case emphasised that there were, nonetheless, limitations on what constitutes such an offence. As the Tribunal observed:

¹⁹⁸ NMT, *United States of America v. Otto Ohlendorf et al.*, Judgment, in *Trials of War Criminals Before the Nuernberg Military Tribunals*, vol. IV, 1951, pp. 497–99 (‘Einsatzgruppen case’) (<https://www.legal-tools.org/doc/ca2575/>).

¹⁹⁹ While not making this connection concerning an alternative cabining principle, Heller provides a helpful analysis of the discussion of the contextual elements in these cases. Heller, 2011, pp. 242–45, see *supra* note 130. Heller also noted that while contextual elements were not dealt with explicitly in the IMT Judgment, it does suggest that crimes against humanity are distinguished from war crimes on the basis that the former are “committed on a vast scale”. See IMT Judgment, p. 254, see *supra* note 113; Heller, 2011, p. 242, see *supra* note 130.

²⁰⁰ *Einsatzgruppen* case, vol. IV, p. 498, see *supra* note 198.

Our jurisdiction to try persons charged with crimes against humanity is limited in scope, both by definition and illustration, as appears from C. C. Law 10. It is not the isolated crime by a private German individual which is condemned, nor is it the isolated crime perpetrated by the German Reich through its officers against a private individual. It is significant that the enactment employs the words “against any civilian population” instead of “against any civilian individual.” The provision is directed against offenses and inhumane acts and persecutions on political, racial, or religious grounds systematically organized and conducted by or with the approval of the government.²⁰¹

In short, having rejected the nexus to war crimes and crimes against peace as a cabining principle, the two tribunals set out alternative constraints delineating the parameters of this category of crimes.²⁰² These alternative constraints would ultimately be adopted in the ICC Statute and in contemporary jurisprudence, with the ICTY and ICTR requiring as an element of crimes against humanity under customary international law that the relevant acts be part of a widespread or systematic attack against a civilian population.²⁰³

As the views of the post-Second World War tribunals on the nexus requirement were closely connected to their respective views on the question of legality, a brief word is appropriate regarding the varying approaches to the issue of legality of charges of persecution as a crime against humanity. While the IMT addressed the issue of *nullum crimen* in the context of the charges of crimes against the peace,²⁰⁴ it was silent on the issue of whether crimes against humanity generally and persecution specifically challenged the principle of legality.²⁰⁵ However, the matter was considered by several of the US NMTs.

²⁰¹ Justice case, vol. III, p. 973, see *supra* note 7.

²⁰² Similar ideas concerning the need for such contextual requirements are evident, though not as robustly developed, in other cases before the NMTs, including: Ministries case, vol. XIV, p. 522, see *supra* note 123; NMT, *United States of America v. Karl Brandt et al.*, Judgment, in *Trials of War Criminals Before the Nuernberg Military Tribunals*, 1949, vol. II, p. 181 (‘Medical case’) (<https://www.legal-tools.org/doc/c18557/>). See also Heller, 2011, pp. 243–44, *supra* note 130, discussing the relevant principles in these and other cases.

²⁰³ See, for example, *infra* section 12.3.2.1.2. and section 12.3.3.1.1.

²⁰⁴ IMT Judgment, p. 219, see *supra* note 113.

²⁰⁵ But see *supra* notes 9–10 and accompanying text, discussing Shawcross’s submissions on this point before the IMT.

As noted above, the Tribunal in the *Ministries* case found that it did not have jurisdiction over charges of peacetime crimes against humanity on the basis of a presumption that the drafters of CCL No. 10 did not intend to offend the principle of legality.²⁰⁶ While international regulation of wartime offences had been long recognised, the intervention of international law into the domain of peacetime crimes, the Tribunal concluded, was without sufficient precedent. In contrast, the Tribunal in the *Justice* case rejected the application of the *nullum crimen* principle to international criminal fora, adopting the reasoning of the IMT at Nuremberg in its approach to crimes against peace. It asserted, however, that even if some obligation of fair notice of the intent to punish existed, this had been met by the international community through, *inter alia*, the various wartime declarations made by the Allies.²⁰⁷

Perhaps most interestingly, however, the *Einsatzgruppen* Tribunal's legality analysis focused on the crime of persecution specifically, endeavouring to establish the issue as a long-standing matter of international concern. On this point the Tribunal observed:

Can it be said that international conventions and the law of nations gave no warning to these accused that their attacks against ethnic, national, religious, and political groups infringed the rights of mankind? We do not refer to localised outbursts of hatred nor petty discrimination which unfortunately occur in the most civilised of states. When persecution reach the scale of nationwide campaigns designed to make life intolerable for, or to exterminate large groups of people, law dare not remain silent [...]. The Control Council simply reasserts existing law when naming persecutions as an international offense.²⁰⁸

The Tribunal considered that fair notice had been given to the defendants by way of progressive international measures endeavouring to respond to persecution. Admittedly, the appropriateness of relying on these prior actions as a basis for fair notice of criminal charges is debatable. Nevertheless, it is interesting to note that the Tribunal saw itself as engaged in a long-standing international effort to respond to the phenome-

²⁰⁶ *Ministries* case, vol. XIII, p. 116, see *supra* note 123.

²⁰⁷ *Justice* case, vol. III, pp. 977–978, see *supra* note 7.

²⁰⁸ *Einsatzgruppen* case, vol. IV, p. 49, see *supra* note 198.

non of persecution. For the Tribunal, the origins of international criminal law extended beyond precedents of prior criminalisation and prosecutions.

12.2.3.1.3. Enumerated Grounds and “Discrimination in Fact”

The IMT Charter and CCL No. 10 both provided jurisdiction over acts of persecution committed on political, racial or religious grounds. In contrast, while no charges of persecution were ultimately brought before the IMTFE, its Charter limited jurisdiction to acts of persecution committed on political or racial grounds, excluding persecution on religious grounds, which was less prevalent in the Pacific arena.

The Nuremberg Judgment involves little direct consideration of the grounds on which persecution can occur. The IMT focused its discussion of persecution on that directed toward the Jewish population – in particular the treatment of Jews in occupied territory. While the Judgment’s analysis of the grounds upon which this persecution took place is sparse, some guidance can be gleaned from the discussion of the defendant Streicher’s guilt. In explaining how Streicher’s actions constituted persecution as a crime against humanity,²⁰⁹ the Tribunal noted that in light of the connection between Streicher’s actions and the extermination of Jews taking place in the East, his conduct “clearly constitutes persecution on *political* and *racial* grounds”.²¹⁰ While there is no further analysis of this point, it can be presumed that the IMT considered other acts of persecution of the Jewish population to have taken place on the same two grounds.

Persecution of a variety of other groups (spanning religious, racial and political grounds) was also noted in the Indictment of the major war criminals before the IMT. Included in the Indictment were references to persecution by the Nazis of church officials²¹¹ and pacifists²¹² (in the de-

²⁰⁹ That is, despite the fact that he was not convicted of war crimes or crimes against peace.

²¹⁰ IMT Judgment, p. 304, see *supra* note 113 (emphasis added).

²¹¹ IMT, *Trial of the Major War Criminals*, Indictment, 7 June 1946, in *Trial of the Major War Criminals Before the International Military Tribunal*, 1947, vol. I, p. 33, setting out allegations in the description of the common plan involving “persecution of priests, clergy, and members of monastic orders whom they deemed opposed to their purposes” (‘IMT Indictment’).

²¹² *Ibid.*, setting out allegations in the description of the common plan concerning persecution against “pacifist groups, including religious movements dedicated to pacifism”, which the Indictment referred to as “particularly relentless and cruel”.

scription of the common plan), and other political opponents²¹³ (in setting out the charges of crimes against humanity). However, none of these other groups was addressed by the Tribunal in its analysis of the guilt of individual defendants for persecution as a crime against humanity.²¹⁴ There are two principal exceptions to this lacuna in the Judgment. The first is a general reference in the contextual section of the Judgment to “[t]he policy of persecution, repression, and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government”²¹⁵ – presumably a reference to persecution on political grounds. The second is a reference in the discussion of Martin Bormann’s guilt for crimes against the peace to the fact that “[h]e devoted much of his time to the persecution of the churches and of the Jews within Germany”.²¹⁶ However, in the subsequent discussion of Bormann’s guilt for persecution as a crime against humanity, the IMT referred exclusively to persecution directed toward the Jewish population.

While the primary focus of the instances of persecution addressed by the US NMTs was again the treatment of the Jewish population, the tribunals’ judgments also contain a broader recognition of groups towards whom the persecution was directed. The Tribunal in the *Justice* case, for instance, convicted defendants for their contribution to “racial persecutions” directed toward both Jews and Poles.²¹⁷ The *Ministries* case convicted defendants for persecution against various groups, including against members of the church on the basis of religion and politics.²¹⁸ Significantly, in the *Ministries* case, while only formally recognising acts of persecution on the grounds enumerated in CCL No. 10, the Tribunal acknowledged that persecution was not restricted to these bases. In its discussion of the evolution of the persecution of the Jews in Germany, the Tribunal noted in *obiter dicta*:

²¹³ *Ibid.*, p. 66, noting in the counts under crimes against humanity, “these persecutions were [...] also directed against persons whose political belief or spiritual aspirations were deemed to be in conflict with the aims of the Nazis”.

²¹⁴ It is worth noting again, however, that some instances of discriminatory conduct were discussed in these sections without the Tribunal invoking the term ‘persecution’.

²¹⁵ IMT Judgment, p. 254, see *supra* note 113. Notably, as discussed above, the IMT found it did not have jurisdiction over these acts as they took place prior to the onset of war. There is no further discussion of such political persecution after 1939.

²¹⁶ *Ibid.*, p. 339.

²¹⁷ *Justice* case, vol. III, p. 1063, see *supra* note 7.

²¹⁸ *Ministries* case, vol. XIV, pp. 520–27, see *supra* note 123.

It makes little difference whether the subject of mass hate be a *political party, race, religion, class, or another nation*. The technique is the same, the results are identical, and the hate thus engendered inevitably brings on resistance and in the end ruin upon those who start and participate in it.²¹⁹

In recognising the breadth of the potential targets of “mass hate”, the Tribunal foreshadowed the eventual expansion of the grounds of persecution set out in the ICC Statute.²²⁰

While requiring that discrimination take place on an enumerated ground, from our review of the post-war jurisprudence, the issue of whether or not “discrimination in fact” must be established – as per the later ongoing debate on this issue in ICTY case law²²¹ – does not seem to have arisen. The fact that the individual affected was part of the group toward which the discriminatory treatment was directed seems to have been presumed throughout the cases at issue.

12.2.3.2. The Mens Rea of Persecution

The post-Second World War tribunals did not explicitly address what *mens rea* was necessary to support a conviction of persecution as a crime against humanity. Nevertheless, the tribunals often emphasised the presence of a discriminatory intent towards the targeted group, and as the reasoning in relation to acquitted defendants suggests, the absence of such a discriminatory intent was a key factor in decisions to acquit.

As the IMT at Nuremberg suggested in its general discussion of the practice of persecution against the Jewish population, from 1938 onwards, “Nazi policy towards the Jews had reached the stage where it was directed towards the complete exclusion of Jews from German life”.²²² As the IMT further noted, each measure of the official policy of persecution was specifically targeted: they were aimed at the Jewish population as a group, with the intention of that group’s economic and social exclusion, and eventual extermination. Similarly, in the IMT’s analysis of Hans Frank’s guilt for persecution of the Jews, for instance, it alluded to the significance of the discriminatory intent behind his conduct. The IMT began by discussing his involvement in forcing the Jewish population into ghettos,

²¹⁹ *Ibid.*, p. 470.

²²⁰ See *infra* section 12.3.3.1.2.

²²¹ See *infra* section 12.3.2.1.3.

²²² IMT Judgment, p. 248, see *supra* note 113.

subjecting them to discriminatory laws and depriving them of food, and his role in overseeing a systematic regime of extermination. The Judgment went on to quote one of Frank's statements affirming his discriminatory intent; as the IMT noted, the defendant told the cabinet of the occupation government of Poland of which he was in charge: "We must annihilate the Jews, wherever we find them and wherever it is possible, in order to maintain there the structure of the Reich as a whole".²²³

The IMT's analysis on the *mens rea* of the various defendants is not sufficiently thorough or explicit to make definitive conclusions concerning what it relied upon to support a conviction in each instance. However, guidance can be gleaned from those instances where it entered an acquittal. In its Judgment, the IMT concluded that Hans Fritzsche, a high-ranking official within the Reich Propaganda Ministry, should be found not guilty of persecution as a crime against humanity. In doing so, the IMT emphasised, *inter alia*, the absence of a discriminatory intent behind his actions. The IMT found that Fritzsche did make several anti-Semitic comments in his speeches, including broadcasting the statements "that the war had been caused by Jews" and said their fate had turned out "as unpleasant as the Führer predicted". Nevertheless, the IMT noted when acquitting the defendant that it was "not prepared to hold that [Fritzsche's comments] were intended to incite the German people to commit atrocities on conquered peoples [...]. His aim was rather to arouse popular sentiment in support of Hitler and the German war effort".²²⁴ Significantly, the IMT did not simply find that Fritzsche had an alternative motive (that is, to arouse popular sentiment), but that he lacked discriminatory intent (that is, did not intend to incite atrocities against a conquered peoples).

Similarly, as the US NMT found in the *Justice* case, a conviction for persecution could not be grounded in a defendant's involvement in passing facially non-discriminatory wartime criminal laws²²⁵ that severely increased the penalties imposed simply because such laws "could be and

²²³ *Ibid.*, p. 298.

²²⁴ *Ibid.*, p. 338.

²²⁵ In particular laws concerning "habitual criminals", "cases of looting in the devastated areas of Germany", "crimes against the war economy" and "crimes [...] undermining [...] the defensive strength of the nation" (that is, limitations on free speech); *Justice* case, vol. III, p. 1025, see *supra* note 7.

were applied in a discriminatory manner”.²²⁶ Rather, a discriminatory intent was necessary behind the impugned actions themselves. To this end, the defendant Franz Schlegelberger was convicted of persecution for his role in implementing procedures that transformed the Ministry of Justice and the judicial system into a channel of discriminatory application of the laws.²²⁷ Notably, the Court found that Schlegelberger was not using his position in the Ministry of Justice to impose these discriminatory measures because of a particular animus held by the defendant himself; rather he acted in this manner in order to “maintain the Ministry of Justice in the good graces of Hitler and prevent its utter defeat by Himmler’s police”. This, however, did not undermine his guilt. It was not necessary to establish that Schlegelberger agreed with the policy to impose discriminatory legislation, as long as he intended the legislation to discriminate.²²⁸

12.2.3.3. Genocide and Persecution

The relationship between the international crimes of genocide and persecution as a crime against humanity is an interesting and complicated one – with some scholars suggesting that any distinction has effectively disappeared.²²⁹ In some ways, however, they offer two different but related visions of the same harm: in short, a crime against the individual as a member of a group (persecution) or a crime against the group itself (genocide). The latter category was not explicitly included in the IMT Charter. How-

²²⁶ *Ibid.*, p. 1027: “All of the laws to which we have referred could be and were applied in a discriminatory manner and in the case of many, the Ministry of Justice and the courts enforced them by arbitrary and brutal means, shocking to the conscience of mankind and punishable here. We merely hold that under the particular facts of this case we cannot convict any defendant merely because of the fact, without more, that laws of the first four types were passed or enforced.”

²²⁷ *Ibid.*, p. 1086, noting that he used “Ministry of Justice as a means for exterminating the Jewish and Polish populations, terrorizing the inhabitants of occupied countries, and wiping out political opposition at home”. See also *id.*, p. 1066, noting his involvement in proposing legislation creating discriminatory penal standards for Jewish and Polish populations.

²²⁸ *Ibid.*, p. 1087, finding him guilty despite observing that, “We believe that he loathed the evil that he did, but he sold that intellect and that scholarship to Hitler for a mess of political pottage and for the vain hope of personal security”.

²²⁹ Caroline Fournet and Clotilde Pegorier, “‘Only One Step Away from Genocide’: The Crime of Persecution in International Criminal Law”, in *International Criminal Law Review*, 2010, vol. 10, no. 5, p. 713.

ever, Raphael Lemkin, who had coined the term ‘genocide’²³⁰ – renaming his earlier concept of ‘barbarity’ – secured a position as an adviser to the US War Department through which he successfully lobbied for the concept’s inclusion in the Nuremberg Indictment as a subset of crimes against humanity.²³¹

While the term was not invoked in the Nuremberg Judgment, it was ultimately recognised as an international crime (specifically a crime against humanity) by the US NMT in the *Justice* case.²³² The Tribunal described genocide as “illustrative” of crimes against humanity that had been “described as racial persecutions” in the indictment.²³³ Moreover, the Tribunal pointed to the offence as an example of conduct, which due to its character constitutes an international crime even lacking a connection to other international crimes, and notwithstanding the content of domestic law of the state where the act was committed.²³⁴

Subsequently, as noted below, genocide would – unlike the category of crimes against humanity as a whole – receive conventional codification in the 1948 Genocide Convention. Consistent with the suggestion of the *Justice* case, on the basis of the “magnitude and its international repercussions” the drafters of the Convention would recognise genocide as a crime “under international law” even in the absence of a connection to war (or to war crimes and crimes against peace).²³⁵

²³⁰ Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Carnegie Endowment for International Peace, Washington, DC, 1944, ch. 9. See also Power, 2013, pp. 40–45, see *supra* note 18.

²³¹ Ana Filipa Vrdoljak, “Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law”, in *European Journal of International Law*, 2010, vol. 20, no. 4, p. 1191; IMT Indictment, p. 47, see *supra* note 211.

²³² *Justice Case*, vol. III, pp. 963, 983, 1128, 1156, see *supra* note 7. See Heller, 2011, pp. 249–50, *supra* note 130, discussing the varying treatments of genocide in the indictments and judgments of the US Nuremberg Military Tribunals cases.

²³³ *Justice Case*, vol. III, p. 963, see *supra* note 7.

²³⁴ *Ibid.*, p. 983. See Heller, 2011, p. 250, *supra* note 130, as the Tribunal stated: “As the prime illustration of a crime against humanity under C. C. Law 10, which by reason of its magnitude and its international repercussions has been recognized as a violation of common international law, we cite ‘genocide’”.

²³⁵ See Convention on the Prevention and Punishment of the Crime of Genocide, 12 January 1951 (‘Genocide Convention’) (<https://www.legal-tools.org/doc/498c38/>).

12.2.4. Subsequent Developments: Persecution in International and National Law

In the immediate wake of the Second World War there were several other noteworthy developments relevant to the proscription of persecution as an international crime. Most significant was the codification of the crime of genocide in resolutions of the General Assembly and the Genocide Convention. The latter, notably, recognised an additional basis of prohibited discriminatory treatment beyond the other post-war legal instruments: measures against an “ethnic” group.²³⁶ Moreover, as discussed above, the Genocide Convention – consistent with the holding in the *Justice* case – recognised genocide as an international crime even in the absence of a connection to other international crimes.

The General Assembly affirmed the Principles of the Nuremberg Charter,²³⁷ and the International Law Commission (‘ILC’) adopted the Principles of the IMT Charter and Nuremberg Judgment, affirming the offence of persecution as set out in the Charter.²³⁸ And finally, the ILC’s Draft Code of Offences against the Peace and Security of Mankind (‘Draft Code’) codified persecution as an international crime, removing the nexus requirement, and incorporating in part the contextual elements adopted by the US NMT in the *Justice* and *Einsatzgruppen* cases (specifically requiring state involvement or acquiescence). The Draft Code also recognised two further grounds (social and cultural) of possible discriminatory treatment.²³⁹ Nevertheless, as has been noted often, the development of international criminal law generally, and with it persecution as an international crime, slowed down as the Cold War tempered the international appetite for such an undertaking.

However, several significant developments continued to take place over the intervening decades, particularly before national courts and

²³⁶ *Ibid.* See Fournet and Pegorier, 2010, p. 713, see *supra* note 229, offering a view on the close connection between genocide and persecution, including a discussion of the origin of the former.

²³⁷ UN General Assembly, Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, GA res. 95 (I), UN doc. A/236 (1946).

²³⁸ International Law Commission, “Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal”, in *Yearbook of the International Law Commission*, 1950, vol. II, pp. 374–77.

²³⁹ International Law Commission, “Draft Code of Offences against the Peace and Security of Mankind”, in *Yearbook of the International Law Commission*, 1954, vol. II, p. 150, Article 2(11).

through the growth of international human rights law. This section briefly surveys some of these developments.

12.2.4.1. Persecution in Subsequent National Cases

The most notable national decision concerning persecution in the intervening years was the 1961 conviction of Adolf Eichmann, a high-level Reich official, under a 1950 Israeli law providing Israeli courts with jurisdiction over international crimes committed during the Second World War. In the Judgment issued by the District Court of Jerusalem, and upheld by the Supreme Court of Israel, Eichmann was convicted of a range of war crimes, crimes against humanity (including murder, extermination, enslavement, starvation and deportation), the crime of being a member of an organisation declared to be criminal by the IMT, and an additional category set out in the Israeli law: “crimes against the Jewish people”, effectively an articulation of the offence of genocide when directed specifically against the Jewish population. The District Court also found Eichmann guilty of persecution on the basis that, in carrying out all the aforementioned crimes against humanity and crimes against the Jewish people, “he persecuted Jews on national, racial, religious and political grounds”.²⁴⁰

The Judgment is significant for a variety of reasons. First, the District Court’s Judgment confirmed that (1) crimes against humanity and, notably, acts of genocide could amount to underlying acts supporting a conviction for persecution; and (2) in such instances, a defendant could be convicted of both the underlying act as a self-standing offence and for persecution in carrying out those acts.²⁴¹ Notably, the Judgment also recognised Eichmann’s acts of persecution as amounting to war crimes – in addition to crimes against humanity – where they took place on occupied territory.²⁴² Second, the Israeli law under which the *Eichmann* case proceeded, as confirmed by the Judgment, recognised an additional ground of discrimination beyond those set out in the post-Second World War legal

²⁴⁰ District Court of Jerusalem, *Attorney-General of Israel v. Eichmann*, Judgment, 12 December 1961, in *International Law Reports*, 1962, vol. 36, pp. 273–75 (‘Eichmann District Court Judgment’). See also Supreme Court of Israel, *Attorney-General of Israel v. Eichmann*, Judgment, 29 May 1962, in *International Law Reports*, 1962, vol. 36, p. 277, confirming the decision.

²⁴¹ *Eichmann* District Court Judgment, pp. 273–75, see *supra* note 240.

²⁴² *Ibid.*, p. 275.

instruments: discrimination on national grounds.²⁴³ This precedent, along with the similar recognition of additional grounds in the Genocide Convention and the ILC's Draft Code, would ultimately be reflected in the ICC Statute's expanded definition of persecution as discussed below.²⁴⁴

In addition to the immediate post-Second World War cases and a few notable cases throughout the 1950s and 1960s such as *Eichmann*, there was a 'third wave' of renewed interest in prosecuting crimes committed in the Second World War in domestic courts in the 1980s.²⁴⁵ Several such judgments were rendered convicting defendants of persecution among other crimes. Perhaps most famous among these is the conviction of the German national Klaus Barbie, *inter alia*, for his involvement in the persecution of Jews in Vichy France. In affirming the indictment against him for persecution as a crime against humanity, the French Court of Cassation in a 1985 decision described his involvement as "persecution against innocent Jews carried out for racial and religious motives with a view to their extermination, in furtherance of the 'final solution'".²⁴⁶ Notably, where the IMT at Nuremberg had described Streicher's persecution of Jews as taking place on racial and political grounds, the Court of Cassation viewed Barbie's conduct as taking place on racial and religious grounds, highlighting that persecution of one group by multiple actors (even as part of the same overarching plan or policy) may be considered as having taken place on several different grounds.

Consistent with the standard established by the US NMT in *Justice and Einsatzgruppen*, the Court of Cassation in *Barbie* also held that establishing a charge of crimes against humanity (including persecution) requires demonstrating that the conduct was carried out in a systematic manner and in association with a state policy.²⁴⁷ However, the Court went

²⁴³ *Ibid.*

²⁴⁴ See *infra* section 12.3.3.1.2.

²⁴⁵ See Mark A. Drumbl, *Atrocity, Punishment and International Law*, Cambridge University Press, Cambridge, 2007, p. 111.

²⁴⁶ Court of Cassation (France), *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie*, Judgment, 20 December 1985, in *International Law Reports*, 1985, vol. 78, pp. 124, 139 ('Barbie Judgment'). As the Court of Cassation noted, no appeal was lodged against Barbie's conviction on these grounds. Barbie was subsequently convicted on the terms of the indictment. *Id.*, p. 148.

²⁴⁷ *Ibid.*, pp. 124, 139: "Such crimes were constituted by inhumane acts and persecution committed in a systematic manner in the name of a State practising a policy of ideological supremacy, not only against persons by reason of their membership of a racial or religious

beyond the NMT precedents, and required that the state policy be one of “ideological supremacy” against a racial or religious community or opponents of the policy itself. In effect, the Court required that, *not only incidents of persecution* but the *underlying policy itself* must contain a discriminatory element. The Court of Cassation affirmed this approach seven years later in an appeal concerning the indictment against Paul Touvier. Touvier, a French national, had been in charge of intelligence in the area surrounding Lyon for the Vichy-era military police. In confirming crimes against humanity charges in the indictment against Touvier relating to his involvement in the murder of six Jews in 1944, the Court noted what separated such offences from “common law crimes”:

[C]rimes against humanity must form part of the execution of a concerted plan, and be accomplished in the name of a State systematically practicing a policy of ideological hegemony; the crime must also be committed against people because they belong to a particular racial or religious group or because they belong to a group that opposes this policy of ideological hegemony.²⁴⁸

The drafters of the ICTR Statute subsequently adopted a similar approach, requiring proof of discrimination for all crimes against humanity and not simply for persecution. However, as discussed below, in practice the *ad hoc* tribunals have not required proof of discrimination for crimes

community, but also against the opponents of that policy, whatever the form of their opposition”.

²⁴⁸ Court of Cassation (France), *France v. Touvier*, Judgment, 27 November 1992, as translated in Michael E. Tigar, Susan C. Casey, Isabelle Giordiani and Sivakumaren Mardeemootoo, “Paul Touvier and the Crime Against Humanity”, in *Texas International Law Journal*, 1995, vol. 30, pp. 285, 298. Notably, at the time of the *Barbie* case, the Court was relying on a 1964 version of the French Penal Code, which established the definition of crimes against humanity by direct reference to the IMT Charter. While the prosecution against Touvier was initiated (in 1973) under this prior Code, by the time his case reached the Court of Cassation a new 1992 Penal Code was in place. While the text of the provision is somewhat ambiguous, the definition of crimes against humanity contained in the new Code seems to require that any crime against humanity be “inspired by political, philosophical, racial or religious reasons, and organized according to a concerted plan against a group within the civilian population”. See *id.*, pp. 293–94, describing the change in the law and including an excerpt from the 1992 Penal Code. See also Leila Nadya Sadat, “The French Experience”, in M. Cherif Bassiouni (ed.), *International Criminal Law: International Enforcement*, vol. 3, Koninklijke Brill NV, Leiden, 2008, pp. 329, 331, providing an excerpt of the 1964 provision.

against humanity other than persecution, and such a requirement has not been incorporated in the ICC Statute.²⁴⁹

The case of Andrija Artuković before the Zagreb District Court in 1986 for his conduct in the Second World War is also notable, if for no other reason than it was subsequently invoked by the ICTY in its effort to assess the parameters of persecution as a crime against humanity.²⁵⁰ Artuković, who had been part of the Croatian independence movement in the course of the war, was convicted, *inter alia*, “for persecutions, concentration camps and mass killings of Serbs, Jews, Gypsies, as well as Croats who did not accept the [independence] ideology”.²⁵¹ His conviction for persecution was based, *inter alia*, on passing laws that were discriminatory based on racial identity, deporting individuals to internment camps.²⁵² Significantly, the *Artuković* case also affirms the principle that both acts which themselves constitute self-standing international crimes (that is, deportation), and those which are not independently criminal (that is, passing discriminatory laws) can be considered as underlying acts for a persecution conviction. As with the immediate post-war jurisprudence, these acts were considered cumulatively thereby complicating any effort to discern a distinct threshold of what conduct is independently sufficient to support a persecution conviction. The *Artuković* case is notable among cases addressing Second World War acts for its recognition of the wide array of groups – spanning racial, religious, political and (significantly) national affiliation – that were the target of persecutory conduct.

12.2.4.2. Persecution and the Rise of International Human Rights

Another significant development over this period that subsequently influenced the contemporary interpretation of the crime of persecution was the rise of the international human rights regime. In many ways crimes against humanity – persecution specifically – and the broader human rights movement that developed in earnest in the wake of the Second World War, have been mutually reinforcing. The crystallisation of the

²⁴⁹ See *infra* section 12.3.2.1.

²⁵⁰ See Kupreškić case, Trial Judgment, paras. 602, 613, *supra* note 2.

²⁵¹ *Andrija Artuković*, Zagreb District Court, Doc. No. K-1/84-61, 14 May 1986, Translation, p. 23, as quoted and translated in Kupreškić, Trial Judgement, para. 602, see *supra* note 2. See also US District Court for the Central District of California, Matter of Extradition of Artuković, 628 F. Supp. 1370, 6 February 1986, addressing the extradition of Artuković from the United States to the former Yugoslavia.

²⁵² *Ibid.*, p. 16 in Kupreškić case, Trial Judgment, para. 613, see *supra* note 2.

principle that international law's protection of the individual extends to treatment within a state – not shielded by the veil of state sovereignty – was driven in part by the post-war acceptance of the concept of crimes against humanity. The underlying tension between traditional conceptions of sovereign discretion and the intervention of international law into domestic affairs is, as discussed above, quite evident in the drafting history of the relevant post-war instruments and in the post-war tribunals' jurisprudence. In many ways, the post-Second World War human rights movement nascent at the same time carried the legacy of this principle forward. In place of the stalled efforts to establish robust international criminal law proscription throughout the Cold War, interest shifted to the protection of the individual through internationally guaranteed human rights (though, admittedly the development of this domain was significantly affected in its own right by the Cold War).²⁵³ The international recognition of such rights was codified in, *inter alia*, the Universal Declaration of Human Rights,²⁵⁴ the International Covenant on Civil and Political Rights ('ICCPR')²⁵⁵ and the International Covenant on Economic Social and Cultural Rights ('ICESCR')²⁵⁶ among other instruments.²⁵⁷

²⁵³ Admittedly, the common narrative of the post-war rise of international human rights is not without challenge. See, for example, Samuel Moyn, *The Last Utopia: Human Rights in History*, Harvard University Press, Cambridge, MA, 2012, ch. 5. However, in describing a rise of internationally recognised human rights, we observe that, at the very least, the post-Second World War period saw the proliferation of codifications of human rights instruments at both the international and regional level, as well as institutions tasked with the enforcement of rights articulated in those instruments. Moreover, this area is admittedly a complex field with a robust, emerging historiography of its own. What is offered here is simply a cursory description of the developments in the field of human rights for context.

²⁵⁴ UN General Assembly, Universal Declaration of Human Rights, GA res. 217A (III), UN doc. A/810 at 71, 1948 (<https://www.legal-tools.org/doc/de5d83/>).

²⁵⁵ International Covenant on Civil and Political Rights, 16 December 1966 (<https://www.legal-tools.org/doc/2838f3/>).

²⁵⁶ International Covenant on Economic, Social and Cultural Rights, 16 December 1966 (<https://www.legal-tools.org/doc/06b87e/>).

²⁵⁷ International concern with the protection of individuals from persecution is also embodied in the international refugee framework that developed in the aftermath of the Second World War. See, for example, Convention Relating to the Status of Refugees, 28 July 1951 (<https://www.legal-tools.org/doc/9b8e7a/>); Protocol Relating to the Status of Refugees, 13 January 1967, 606 UNTS 267. On the development of the principle of non-refoulement in the wake of the Second World War, see Ryan Liss, "A Right to Belong: Legal Protection of Sociological Membership in the Application of Article 12(4) of the ICCPR", in *New York University Journal of International Law and Politics*, 2014, vol. 46, no. 3, pp. 1117–18.

The growth of human rights standards throughout this period was in turn influential on the development of international criminal law generally and on the offence of persecution specifically – both as it developed throughout the Cold War,²⁵⁸ and when the field of international criminal law re-emerged in earnest as a matter of central international concern in the 1990s. This influence is evident, for instance, in the report of the ILC on its 1996 Draft Code of Offences. The Draft Code set out a provision delineating persecution as an international offence, which included an expanded list of the recognised grounds of discrimination beyond those set out in the post-Second World War instruments (namely prohibiting discrimination on the basis of political, racial, religious and ethnic groups). In its commentary, the ILC noted that what was intended to be captured by the offence was broad, and deeply informed by the human rights protections codified in, *inter alia*, the UN Charter and the ICCPR's provision on non-discrimination.²⁵⁹ As the ILC noted: "The inhumane act of persecution may take many forms with its common characteristic being the denial of the human rights and fundamental freedoms to which every individual is entitled without distinction as recognized in the Charter of the United Nations (Arts. 1 and 55) and the International Covenant on Civil and Political Rights (Art. 2)".²⁶⁰

The notion that the crime of persecution may be used as a means to protect fundamental human rights was ultimately further realised in the re-emergence of the crime of persecution as the offence at the core of the

²⁵⁸ See, for example, International Convention on the Suppression and Punishment of the Crime of Apartheid, 18 July 1976 (<https://www.legal-tools.org/doc/d9644f/>), Preamble and Art. II, recognising the criminalisation as inspired by the primary human rights instruments, and setting out deprivations constituting the crime of apartheid in a manner consistent with fundamental rights as recognised in the primary international human rights treaties; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984 (<https://www.legal-tools.org/doc/326294/>), Preamble, recognising the criminalisation of torture as inspired by the primary international human rights treaties.

²⁵⁹ International Law Commission, Report of ILC, 48th Sess., 6 May–26 July 1996, UN doc. A/51/10, p. 49.

²⁶⁰ ILC, 1996, p. 49, see *supra* note 259. Article 2 of the ICCPR provides at paragraph 1 that "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." International Covenant on Civil and Political Rights, Article 2(1), see *supra* note 255.

ICTY's jurisprudence, and through its codification in the ICC Statute.²⁶¹ The reinvigorated development of persecution as a crime against humanity over the past two decades has been animated by the same principles underpinning the long-standing international concern with the crime. This contemporary expression of the international effort to protect individuals from mass discrimination through the criminalisation of persecutory conduct is the focus of the subsequent section.

12.3. Persecution and the Modern International Criminal Courts and Tribunals

12.3.1. The Re-emergence of the Crime of Persecution in the 1990s

Some 50 years after the IMT and IMTFE Charters first proscribed the crime of persecution as a crime against humanity, the crime went through a kind of renaissance at the two *ad hoc* tribunals, the ICTY and the ICTR. Like the IMT and IMTFE Charters, and CCL No. 10, Article 5(h) of the ICTY Statute and Article 3(g) of the ICTR Statute criminalise persecution as a crime against humanity. However, the contemporary iterations differ from their post-Second World War predecessors by not requiring a nexus with another crime within the Court's jurisdiction, and for the ICTR, by not requiring a nexus to an armed conflict. Both tribunals, in particular the ICTY, have adjudicated the crime of persecution in many cases, thereby contributing greatly to its jurisprudential development.

As the preceding analysis has shown, though the IMT at Nuremberg and the courts established pursuant to CCL No. 10 convicted a number of individuals for persecution as a crime against humanity, the elements of the crime were often not clearly defined. This changed dramatically at the ICTY and ICTR. Not only have these courts rendered a large number of convictions for persecution but they have also developed a rich body of jurisprudence in their adjudication of trials and appeals. Indeed for the ICTY, persecution could be considered the 'flagship crime' – the crime which has best reflected the nature and scope of the ethnic cleansing in

²⁶¹ It is important to note, as observed by the ICTY Trial Chamber in *Kupreškić*, that the human rights law is not itself the law upon which a conviction for persecution is based. See *Kupreškić* case, Trial Judgment, para. 589, *supra* note 2. Rather international criminal law under customary international law (and eventually as codified in the ICC Statute) itself developed in a manner consistent with the terms of the fundamental rights recognised under international human rights law and international refugee law.

the former Yugoslavia in the early 1990s, and which has been the most represented in terms of numbers of charges brought and convictions rendered. As noted by William Fenrick: “Just as genocide has become the offence which represents what happened in Rwanda during 1994, so the crime against humanity of persecution has come to typify what happened in the territory of the former Yugoslavia”.²⁶² Of the 110 accused persons charged and tried by the ICTY, 71 were charged with persecution.²⁶³ To date 58 defendants have been convicted of persecution following trial and appeal.²⁶⁴ At the ICTR, where the ‘defining’ crime has been genocide, the number of persecution charges and convictions has not been as high. Nevertheless, there have been some notable cases: of the 76 accused persons charged and tried by the ICTR,²⁶⁵ 19 were charged with persecution, and to date 14 defendants have been convicted of this crime after trial and appeal.²⁶⁶

Persecution has no ‘counterpart’ in the category of war crimes and is largely unknown as a domestic crime in national criminal justice systems (save where the ICC Statute’s crimes have been domestically incorporated). For this reason, one of the tremendous contributions of the IC-

²⁶² William J. Fenrick, “The Crime Against Humanity of Persecution in the Jurisprudence of the ICTY”, in *Netherlands Yearbook of International Law*, 2001, vol. 32, p. 89.

²⁶³ These figures do not include contempt cases, nor charges against persons who died before being transferred to the ICTY (Bobetko, Drljaca, Alilović, Ražnatović, J. Janjić, Miljković, Borovnica, Gagović and N. Janjić), persons who died before their trial proceedings started (Đukić, Talić, Alagić), or persons who died before their trials had concluded (Kovačević, Dokmanović, Milošević). Nor do they include proceedings against persons who were transferred to national courts and hence not tried by the ICTY (Ademi and Norac, Trbić, Kovačević, Ljubičić, Mejakić *et al.*, Stanković and Janković, Todović and Rašević).

²⁶⁴ The following cases are still on appeal at the time of writing: Stanišić and Župljanin; Stanišić and Simatović; Tolimir; and Prlić *et al.* A Trial Judgment is pending against Šešelj and Karadžić. Trial proceedings are still underway against Mladić and Hadžić.

²⁶⁵ These figures do not include contempt cases, nor charges against persons who died before their trial commenced (Musabyimana), persons who died before their trial had concluded (Nzitorera) or persons whose cases were transferred to national authorities (Kayishela, Munyagishari, Munyarugarama, Munyeshyaha, Ndimbati, Ntaganzwa, Ryandikayo, Sikuburabo and Uwinkinde). The figures also do not include one accused who was tried, *inter alia*, on a charge of persecution but where the prosecution withdrew the charge in its closing submissions (Kamuhanda).

²⁶⁶ An Appeal Judgment is still pending in Nyiramasushuko *et al.* (Kanyabashi, Ndayambaje, Nsabimana, Ntahobali and Nyiramasushuko). Three fugitives remain at large and if arrested will be tried by the ICTR’s successor institution, the UN Mechanism for International Criminal Tribunals (Bizimana, Kabuga, Mpiranya).

TY and the ICTR to international criminal law has been the development of the substantive content of this crime.

The definition of persecution in the ICC's Statute and Elements of Crimes owes its genesis both to precedents from the post-Second World War period and jurisprudence of the ICTY and ICTR. The ECCC has also contributed to the crime's evolution through the definition of the crime in Article 5 of the Law on the Establishment of the ECCC ('ECCC Special Law') and Article 9 of the Agreement between the UN and the Royal Government of Cambodia ('ECCC Agreement'), and the court's case law. While Article 2(h) of the Statute of the Special Court for Sierra Leone ('SCSL Statute') proscribes persecution, due to the nature of the conflict and crimes committed therein, no charges were brought for this offence at the SCSL.

In section 12.3.2., we examine the most important developments concerning the crime of persecution before the modern *ad hoc* and hybrid international criminal courts and tribunals. In the subsequent section 12.3.3. we review the crime of persecution in the ICC Statute and emerging case law from the ICC. This analysis is approached with a focus on the historical origins of the crime discussed above, and with a view to track the core tensions inherent in the offence's development as a crime at the cusp of the national and international.

12.3.2. The Renaissance of Persecution as a Crime Against Humanity: The *Ad Hoc* and Hybrid International Courts and Tribunals

Persecution as a crime against humanity was addressed by the ICTY in *Tadić*, its first case. In the Trial Judgment issued in 1997, the Trial Chamber described persecution as "[t]he violation of the right to equality in some serious fashion that infringes on the enjoyment of a basic or fundamental right [...], although the discrimination must be on one of the listed grounds to constitute persecution under the Statute".²⁶⁷ It required two elements for the crime: the occurrence of a persecutory act or omission, and a discriminatory intent for that act or omission on one of the listed grounds, specifically race, religion, or politics.²⁶⁸

²⁶⁷ *Tadić* case, Trial Judgment, para. 697, see *supra* note 113.

²⁶⁸ *Ibid.*, para. 715.

The ICTY explored the crime in greater depth in *Kupreškić*. In that case, six accused were charged with persecution based on the allegation that, over a six-month period, they had persecuted Bosnian Muslim inhabitants of the Ahmići-Šantići region of Bosnia and Herzegovina through the systematic killing of Bosnian Muslim civilians, destruction of their homes and property, and their detention and expulsion from the region.²⁶⁹ In its judgment rendered in 2000, the Trial Chamber carefully analysed the historical evolution of persecution, from which it sourced a comprehensive definition of the crime. In short, the *Kupreškić* Trial Chamber concluded that the *actus reus* of persecution was “the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5 [crimes against humanity]”.²⁷⁰ The Trial Chamber did not try to exhaustively identify which rights constituted ‘fundamental rights’ upon which a charge of persecution could be based; rather, consistent with the historic precedents, the Trial Chamber recognised that discriminatory acts could involve conduct such as murder, extermination and other serious acts against a person as already enumerated in Article 5, as well as a variety of other discriminatory acts involving attacks on political, social and economic rights. It found that the charged acts of killings, detention and expulsion, and the comprehensive destruction of homes and property amounted to persecution²⁷¹ and convicted the five accused accordingly.²⁷²

²⁶⁹ *Kupreškić* case, Trial Judgment, para. 33, see *supra* note 2.

²⁷⁰ *Ibid.*, paras. 586–620, 621. The Trial Chamber referred to, *inter alia*, the IMT Charter and Control Council Law No.10; international cases such as the Nuremberg Judgment (including the convictions of Streicher and von Schirach) and the *Justice, Flick, Einsatzgruppen, Ministries* and *RuSHA* cases; national cases such as *Eichmann* and *Artuković*; and the ILC Draft Code. See *supra* section 12.2.3.1.

²⁷¹ *Kupreškić* case, Trial Judgment, paras. 628–31, see *supra* note 2. In finding that certain property or economic rights can be considered so fundamental that their denial is capable of constituting persecution, the Trial Chamber noted the Nuremberg Judgment where several defendants such as Göring, Funk and Seyss-Inquart were charged and/or convicted of economic discrimination; see para. 630. See *supra* section 12.2.3.1.4.

²⁷² *Ibid.*, paras. 784, 791, 804, 816, 829. The convictions against three of the accused (Zoran, Mirjan and Vlatko Kupreškić) for persecution and other crimes were later overturned by the Appeals Chamber and no retrial was ordered, on the basis that the persecution charge had been insufficiently pleaded, and because of an insufficiency of evidence. See ICTY, *Prosecutor v. Kupreškić et al.*, Appeal Judgment, IT-95-16-A, 23 October 2001, paras. 246, 304, 397 (‘*Kupreškić* case’) (<https://www.legal-tools.org/doc/c6a5d1/>).

This definition was also adopted in the ICTR's first cases on persecution, *Ruggiu* in 2000 and *Nahimana* in 2003.²⁷³ In *Ruggiu*, the prosecution charged the accused, a journalist and broadcaster at *Radio-Télévision Libre des Milles Collines* ('RTL'), with persecution for propagating "the Hutu extremist ideology, by systematically inciting ethnic hatred and violence against the entire Tutsi minority".²⁷⁴ As discussed further below, in convicting Ruggiu for persecution as a crime against humanity (and other crimes) following his guilty plea, the Trial Chamber compared the gravity of his crimes to that of Streicher before the IMT at Nuremberg. The Chamber stated that, like Streicher, Ruggiu had "infected people's minds with ethnic hatred and persecution".²⁷⁵

From these early ICTY and ICTR cases, the skeletal framework of persecution as a crime against humanity started to form. The *actus reus* required an act or omission that (1) discriminated in fact; (2) denied or infringed upon a fundamental right laid down in customary international law or treaty law; and (3) where not specified as a crime under the relevant provision on crimes against humanity, the cumulative effect of the underlying acts of persecution reached a level of gravity equivalent to that for other crimes against humanity. The *mens rea* required that the underlying act or omission was (1) carried out deliberately/intentionally and (2) with the intention to discriminate on political, racial, or religious grounds. As further discussed below, these essential requirements can each be sourced in the post-Second World War cases and precedents,²⁷⁶ and have been applied at the ICTY and ICTR since they were first articulated.²⁷⁷

²⁷³ ICTR, *Prosecutor v. Georges Ruggiu*, Trial Judgment, ICTR-97-32-I, 1 June 2000, para. 21 ('Ruggiu case') (<https://www.legal-tools.org/doc/486d43/>); ICTR, *Prosecutor v. Ferdinand Nahimana et al.*, Trial Judgment, ICTR-99-52-T, 3 December 2003, para. 1072 ('Nahimana case') (<https://www.legal-tools.org/doc/45b8b6/>). Another early case at the ICTR involving persecution charges was *Prosecutor v. Laurent Semanza*, Trial Judgment, ICTR-97-20-T, 15 May 2003, paras. 467–72 ('Semanza case') (<https://www.legal-tools.org/doc/7e668a/>). However the Trial Chamber did not find persecution proven in that case.

²⁷⁴ Ruggiu case, Indictment, paras. 4, 9 and 5, see *supra* note 273.

²⁷⁵ *Ibid.*, Trial Judgment, para. 19. See *supra* section 12.2.3.1.1.4.

²⁷⁶ See generally *supra* section 12.2.3.

²⁷⁷ See for example, ICTY, *Prosecutor v. M. Stanišić and Župljanin*, Trial Judgment, IT-08-91-T, 27 March 2013, para. 66 ('Stanišić and Župljanin case') (<https://www.legal-tools.org/doc/2ed57f/>); ICTY, *Prosecutor v. Zdravko Tolimir*, Trial Judgment, IT-05-88/2-T, 12 December 2012, paras. 846, 848 ('Tolimir case') (<https://www.legal->

The following sections examine both the source and the development of these essential elements, which later also resurfaced (although with a different articulation in some respects) in the definition of persecution adopted by the ICC and the hybrid courts – the SCSL and ECCC.

12.3.2.1. The *Actus Reus* of Persecution under Customary International Law

12.3.2.1.1. The Gravity Threshold of Underlying Persecutory Acts or Omissions and the Forms of Underlying Acts

In *Tadić*, the Trial Chamber considered the Nuremberg Judgment (specifically, the convictions against Bormann, Frank, Funk, Seyss-Inquart, Frick and Göring), US NMT jurisprudence such as the *Flick*, *Einsatzgruppen*, *Pohl* and *Justice* cases, and national cases such as *Eichmann*, to conclude that persecution encompasses a variety of acts, including those of a physical, economic or judicial nature, that violate an individual's equal enjoyment of his basic rights.²⁷⁸ Case law from the ICTY and ICTR over the next 18 years have affirmed that the acts or omissions amounting to persecution can take a variety of forms.

12.3.2.1.1.1. Gravity Threshold

The definition of persecution was further refined in the *Kupreškić*, *Krnjelac* and *Kvočka* cases at the ICTY. The *Kupreškić* Trial Chamber held that a persecutory act is a gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as other acts prohibited in Article 5.²⁷⁹ It emphasised that there is no list of established fundamental rights, and that the question must be resolved on a case-by-case basis. It noted:

Although the realm of human rights is dynamic and expansive, not every denial of a human right may constitute a crime against humanity.

[...]

tools.org/doc/445e4e/); ICTY, *Prosecutor v. Popović et al.*, Trial Judgment, IT-05-88-T, 10 June 2010, para. 964 ('Popović case') (<https://www.legal-tools.org/doc/481867/>).

²⁷⁸ *Tadić* case, Trial Judgment, para. 710, see *supra* note 113. See *supra* section 12.2.3.1.1 and section 12.2.4.1.

²⁷⁹ *Kupreškić* case, Trial Judgment, para. 621, see *supra* note 2.

Accordingly, it can be said that at a minimum, acts of persecution must be of equal gravity or severity to the other acts enumerated under Article 5.²⁸⁰

The Trial Chamber noted that this legal criterion had been set out in *Flick*, in the US NMT's rejection of expropriation of industrial property as insufficient to support a persecution conviction.²⁸¹ As discussed above – while not noted by the Trial Chamber in *Kupreškić* – the reasoning in *Flick* was based on a misreading of the text of CCL No. 10, and its application of the gravity threshold to the appropriation of industrial property was challenged in other post-Second World War cases. Nevertheless, the crux of the gravity threshold arguably captured a principle intended by the drafters of the post-war instruments.²⁸²

Subsequent to *Kupreškić*, ICTY and ICTR Trial Chambers have continued to apply the equal gravity test.²⁸³ For example, the *Kordić* Trial Chamber held that persecution required that the act denying a fundamental right (1) be gross and blatant, and (2) reach the same level of seriousness as other acts under Article 5.²⁸⁴ It acknowledged that the test could exclude some acts from the “realm of criminal persecution”, and called this a “wholly valid result”.²⁸⁵ The *Krnojelac* Trial Judgment did not concur that there was a separate requirement that the denial of the fundamental right be “gross and blatant”,²⁸⁶ but rather saw the *Kupreškić* definition as establishing a test of seriousness: only gross or blatant denials of fun-

²⁸⁰ *Ibid.*, paras. 618–19.

²⁸¹ *Ibid.*, fn. 897, citing *Flick* case, vol. VI, p. 1215, see *supra* note 127. See also *supra* note 128 and accompanying text, setting out the relevant excerpt from *Flick*, and section 12.2.3.1.1.2., discussing the excerpt and the post-Second World War gravity standard.

²⁸² See *supra* section 12.2.3.1.1.2.

²⁸³ ICTY, *Prosecutor v. Milomir Stakić*, Trial Judgment, IT-97-24-T, 31 July 2003, para. 736 (‘*Stakić* case’) (<https://www.legal-tools.org/doc/32ecfb/>); ICTY, *Prosecutor v. Naletilić and Martinović*, Trial Judgment, IT-98-34-T, 31 March 2003, para. 635 (‘*Naletilić and Martinović* case’) (<https://www.legal-tools.org/doc/f2cfeb/>); *Prosecutor v. Milorad Krnojelac*, Trial Judgment, IT-97-25-T, 15 March 2002, para. 434 (‘*Krnojelac* case’) (<https://www.legal-tools.org/doc/1a994b/>); *Prosecutor v. Kordić and Čerkez*, Trial Judgment, IT-95-14/2-T, 26 February 2001, para. 195 (‘*Kordić and Čerkez* case’) (<https://www.legal-tools.org/doc/d4fedd/>); *Nahimana* case, Trial Judgment, para. 1072, see *supra* note 273; *Semanza* case, Trial Judgment, para. 347, see *supra* note 273; *Ruggiu* case, Trial Judgment, para. 21, see *supra* note 273.

²⁸⁴ *Kordić and Čerkez* case, Trial Judgment, para. 195, see *supra* note 283.

²⁸⁵ *Ibid.*, para. 196.

²⁸⁶ *Kupreškić* case, Trial Judgment, para. 434, fn. 1303, see *supra* note 2.

damental rights would have the requisite gravity for the crime of persecution.

The ICTY Appeals Chamber subsequently endorsed the equal gravity requirement. The *Krnojelac* Appeal Judgment affirmed that “[t]he acts underlying the crime of persecution, whether considered in isolation or in conjunction with other acts, must constitute a crime of persecution of gravity equal to the crimes listed under Article 5 of the Statute”.²⁸⁷ Despite the potential ambiguity in this wording, the gravity assessment in *Krnojelac* and in cases following has concerned the underlying *acts* rather than the crime of persecution as a whole.²⁸⁸

While not every denial or infringement of a right will be sufficient to qualify as persecution as a crime against humanity, the ICTY and ICTR have produced a rich body of case law illustrating a broad range of acts and omissions that, individually or cumulatively, have amounted to persecution. Conscious that a fixed definition of fundamental rights would not serve the interests of justice, and indeed would be immaterial,²⁸⁹ these Tribunals instead have recognised a wide variety of rights.

These rights have included rights to life, physical and mental integrity, security and liberty, as well as property, economic and judicial rights. For instance, persecution has been constituted by: deportation, forcible transfer and displacement;²⁹⁰ wanton destruction and plundering;²⁹¹ de-

²⁸⁷ ICTY, *Prosecutor v. Milorad Krnojelac*, Appeal Judgment, IT-97-25-A, 17 September 2003, para. 199 (‘*Krnojelac* case’) (<https://www.legal-tools.org/doc/46d2e5/>). See also ICTY, *Prosecutor v. Tihomir Blaškić*, Appeal Judgment, IT-95-14-A, 29 July 2004, para. 135 (‘*Blaškić* case’) (<https://www.legal-tools.org/doc/88d8e6/>); ICTY, *Prosecutor v. Kordić and Čerkez*, Appeal Judgment, IT-95-14/2-A, 17 December 2004, para. 102 (‘*Kordić and Čerkez* case’) (<https://www.legal-tools.org/doc/738211/>); ICTY, *Prosecutor v. Milan Lukić and Sredoje Lukić*, IT-98-32/1-T, Trial Judgment, 20 July 2009, para. 993 (‘*Lukić and Lukić* case’) (<https://www.legal-tools.org/doc/af5ad0/>).

²⁸⁸ *Krnojelac* case, Appeal Judgment, para. 199, see *supra* note 287.

²⁸⁹ *Kupreškić* case, Trial Judgment, para. 623, see *supra* note 2; *Stakić* case, Trial Judgment, para. 773, see *supra* note 283.

²⁹⁰ *Blaškić* case, Appeal Judgment, para. 153, see *supra* note 287; ICTY, *Prosecutor v. Radoslav Brđanin*, Trial Judgment, IT-99-36-T, 1 September 2004, para. 1025 (‘*Brđanin* case’) (<https://www.legal-tools.org/doc/4c3228/>); *Stakić* case, Trial Judgment, para. 769, see *supra* note 283; ICTY, *Prosecutor v. Kvočka et al.*, Trial Judgment, IT-98-30/1-T, 2 November 2001, para. 186 (‘*Kvočka* case’) (<https://www.legal-tools.org/doc/34428a/>); ICTY, *Prosecutor v. Milan Martić*, Trial Judgment, IT-95-11-T, 12 June 2008, paras. 427, 430, 432 (‘*Martić* case’) (<https://www.legal-tools.org/doc/06634c/>); ICTY, *Prosecutor v. Blagojević and Jokić*, Trial Judgment, IT-02-60-T, 17 January 2005, paras. 602, 616–18, 621 (‘*Blagojević and Jokić* case’) (<https://www.legal-tools.org/doc/7483f2/>); ICTY, *Prosecutor v. Radislav Krstić*, Trial Judgment, IT-98-33, 2 August 2001, para. 537 (‘*Krstić*

struction of property including cultural and religious buildings;²⁹² unlawful arrest, detention and confinement of civilians;²⁹³ murder of civilians;²⁹⁴ detention of civilians, and their being killed, beaten, used as human shields, subjected to overcrowding, physical or psychological abuse and intimidation, inhumane treatment and deprivation of adequate food and water;²⁹⁵ torture, cruel, inhuman, humiliating or degrading treatment;²⁹⁶ rape and sexual abuse;²⁹⁷ slavery and servitude;²⁹⁸ terrorising the

case') (<https://www.legal-tools.org/doc/440d3a/>); *Prosecutor v. Stanišić and Simatović*, IT-03-69-T, Trial Judgment, 30 May 2013, para. 1243 ('Stanišić and Simatović case') (<https://www.legal-tools.org/doc/066e67/>); Popović case, Trial Judgment, para. 989, see *supra* note 277.

²⁹¹ ICTY, *Prosecutor v. Tihomir Blaškić*, Trial Judgment, IT-95-14, 3 March 2000, para. 227, ('Blaškić case') (<https://www.legal-tools.org/doc/e1ae55/>); Kordić and Čerkez case, Trial Judgment, para. 205, see *supra* note 283; Naletilić and Martinović case, Trial Judgment, para. 701, see *supra* note 283; Martić case, Trial Judgment, paras. 363, 378, 399, see *supra* note 290; Stakić case, Trial Judgment, paras. 809–10, see *supra* note 283; Krstić case, Trial Judgment, paras. 537, 653, see *supra* note 290; Popović case, Trial Judgment, para. 987, see *supra* note 277.

²⁹² Blaškić case, Trial Judgment, para. 227, see *supra* note 291; Brđanin case, Trial Judgment, para. 1023, see *supra* note 290; Stakić case, Trial Judgment, paras. 764, 813, see *supra* note 283; Kvočka case, Trial Judgment, para. 186, see *supra* note 290; Kordić and Čerkez case, Trial Judgment, para. 205, see *supra* note 283; Kupreškić case, Trial Judgment, para. 631, see *supra* note 2; Tadić case, Trial Judgment, para. 707, see *supra* note 113; Lukić and Lukić case, Trial Judgment, para. 996, see *supra* note 287; Stanišić and Župljanin case, Trial Judgment, paras. 88–89, see *supra* note 277.

²⁹³ Naletilić and Martinović case, Trial Judgment, para. 642, see *supra* note 283; Krnojelac case, Trial Judgment, para. 438, see *supra* note 283; Kvočka case, Trial Judgment, paras. 186, 189, see *supra* note 290; Kordić and Čerkez case, Trial Judgment, para. 302, see *supra* note 283; Blaškić case, Trial Judgment, para. 220, see *supra* note 291; Kupreškić case, para. 629, see *supra* note 2; ICTY, *Prosecutor v. Blagoje Simić et al.*, Trial Judgment, 17 October 2003, IT-95-9-T, paras. 62–63 ('Simić case') (<https://www.legal-tools.org/doc/aa9b81/>); Martić case, Trial Judgment, paras. 411, 416, see *supra* note 290; Lukić and Lukić case, Trial Judgment, para. 996, see *supra* note 287.

²⁹⁴ Martić case, Trial Judgment, paras. 358, 363, 370, 377, 383, 403, see *supra* note 290; Krstić case, Trial Judgment, para. 537, see *supra* note 290; Stanišić and Simatović case, Trial Judgment, para. 1241, see *supra* note 290; ICTR, *Prosecutor v. Pauline Nyiramasuhuko et al.*, Trial Judgment, ICTR-98-42-T, 24 June 2011, paras. 6099, 6101, 6103, 6106, 6108 ('Nyiramasuhuko case') (<https://www.legal-tools.org/doc/e2c881/>).

²⁹⁵ Blaškić case, Appeal Judgment, para. 155, see *supra* note 287; Brđanin case, Trial Judgment, para. 1005, see *supra* note 290; Martić case, Trial Judgment, paras. 427, 432, see *supra* note 290; Stakić case, Trial Judgment, paras. 786–90, see *supra* note 283.

²⁹⁶ Brđanin case, Trial Judgment, paras. 1014–20, see *supra* note 290; Blaškić case, Trial Judgment, para. 220, see *supra* note 291; Martić case, Trial Judgment, para. 411, see *supra* note 290; Lukić and Lukić case, Trial Judgment, para. 996, see *supra* note 287; Popović case, Trial Judgment, para. 975, see *supra* note 277.

civilian population;²⁹⁹ denial of employment, freedom of movement, proper judicial process and proper medical care;³⁰⁰ arbitrary searches of homes and the denial of equal access to public services;³⁰¹ and forced labour assignments requiring civilians to take part in military operations or exposing them to dangerous or humiliating conditions amounting to cruel and inhumane treatment.³⁰²

12.3.2.1.1.2. Enumerated Crimes as Underlying Acts

In many persecution cases at the ICTY and ICTR, the underlying persecutory acts have themselves amounted to crimes under the relevant Statute. In other words, accused persons at these tribunals have very often faced charges of persecution based on conduct which independently constituted the crimes against humanity of murder, torture, rape, enslavement and other inhumane acts. Charged in this manner, persecution essentially captures an aggravated form of the underlying crime: for example, murder as persecution is murder committed on a discriminatory basis, torture as persecution is torture committed on a discriminatory basis and so on.³⁰³

²⁹⁷ Brđanin case, Trial Judgment, paras. 1012–13, see *supra* note 290; Stakić case, Trial Judgment, paras. 791–806, see *supra* note 283; Kvočka case, Trial Judgment, para. 183, see *supra* note 290; ICTY, *Prosecutor v. Dragan Nikolić*, Sentencing Judgment, IT-94-2-T, 18 December 2003, para. 111 (‘Nikolić case’) (<https://www.legal-tools.org/doc/f8722c/>).

²⁹⁸ Blaškić case, Trial Judgment, para. 220, see *supra* note 291.

²⁹⁹ Blagojević and Jokić case, Trial Judgment, paras. 589, 614, 621, see *supra* note 290; Krstić case, Trial Judgment, paras. 537, 653, see *supra* note 290. See also Tolimir case, Trial Judgment, para. 857, *supra* note 277; Popović case, Trial Judgment, para. 981, *supra* note 277.

³⁰⁰ Brđanin case, Trial Judgment, paras. 1031, 1049, see *supra* note 290; Stakić case, Trial Judgment, paras. 770, 772, see *supra* note 283; Stanišić and Župljanin case, paras. 91–92, see *supra* note 277.

³⁰¹ ICTY, *Prosecutor v. Momcilo Krajišnik*, Trial Judgment, IT-00-39-T, 27 September 2006, paras. 736–41 (‘Krajišnik case’) (<https://www.legal-tools.org/doc/62a710/>), discussing the Nuremberg Judgment and decisions under Control Council Law No. 10 regarding crimes against humanity for various acts committed against Jews including the denial of equal access to public services and the invasion of privacy through arbitrary searches of homes; Stanišić and Župljanin case, para. 92, see *supra* note 277.

³⁰² Simić case, Trial Judgment, paras. 85, 1022, see *supra* note 293; Krnojelac case, Appeal Judgment, paras. 201–3, see *supra* note 287.

³⁰³ See also Kai Ambos and Steffen Wirth, ‘The Current Law of Crimes against Humanity: An Analysis of UNTAET Regulation 15/2000’, in *Criminal Law Forum*, 2002, vol. 13, p. 72.

Initially, in *Tadić*, the Trial Chamber found that acts already listed under other sub-headings of Article 5 (crimes against humanity) could not also amount to an act underlying a charge of persecution.³⁰⁴ It reached this conclusion based on its (ultimately incorrect) view – later overturned on appeal – that all crimes against humanity required discriminatory intent.³⁰⁵ However, the Trial Chamber found that persecution could encompass acts enumerated elsewhere in the Statute (that is, as war crimes or genocide).³⁰⁶

The issue next came up in *Kupreškić*. The accused argued, consistent with *Tadić*, that the other listed crimes against humanity could not constitute an underlying act of persecution. The Trial Chamber found, however, that post-Second World War precedents including the Nuremberg Judgment, judgments delivered pursuant to CCL No. 10 (such as the *Ministries* case and the *RuSHA* case),³⁰⁷ and national cases (such as *Eichmann*, *Barbie* and others),³⁰⁸ contradicted the *Tadić* holding.³⁰⁹ Accordingly, it held that acts enumerated under other sub-headings of Article 5 could support a persecution conviction.³¹⁰ Like *Tadić*, it also found that persecution could encompass crimes covered in other parts of the Statute (that is, war crimes and genocide).³¹¹

12.3.2.1.1.3. Conduct Other Than Enumerated Crimes as Underlying Acts

A more interesting question addressed by ICTY and ICTR cases has been whether acts which are *not* in and of themselves crimes within the Court's jurisdiction could also be underlying persecutory acts. The *Tadić* Trial

³⁰⁴ *Tadić* case, Trial Judgment, para. 702, see *supra* note 113.

³⁰⁵ ICTY, *Prosecutor v. Duško Tadić*, IT-94-1-A, Appeal Judgment, 15 July 1999, para. 305 ('*Tadić* case') (<https://www.legal-tools.org/doc/8efc3a/>). Notably, as discussed above, this was consistent with the approach of French courts in the late 1980s and 1990s, see *supra* section 12.2.4.1.

³⁰⁶ *Tadić* case, Trial Judgment, para. 700, see *supra* note 113.

³⁰⁷ See *supra* section 12.2.3.1.1.3.

³⁰⁸ See *supra* section 12.2.4.1.

³⁰⁹ *Kupreškić* case, Trial Judgment, paras. 593–607, see *supra* note 2.

³¹⁰ *Ibid.*, para. 605.

³¹¹ *Ibid.*, para. 571. See also *Kvočka* case, Trial Judgment, para. 185, see *supra* note 290; *Krnojelac* case, Trial Judgment, para. 433, see *supra* note 283; *Stakić* case, Trial Judgment, para. 735, see *supra* note 283.

Judgment relied on, *inter alia*, the ILC 1991 Report, the ILC 1996 Draft Code, the Nuremburg Judgment, the *Justice* case and the *Eichmann* case to identify acts that could possibly be considered as persecutory.³¹² Rather than providing a definitive list of persecutory acts, the Trial Chamber noted that “[p]ersecution can take numerous forms, so long as the common element of discrimination in regard to the enjoyment of a basic or fundamental right is present”. It also noted that “persecution does not necessarily require a physical element”.³¹³ While the Chamber recognised there is a limit to the acts which could constitute persecution as a crime against humanity, other than referring to post-Second World War cases which specified particular acts that did not qualify as persecution (such as *Flick*, where the Court determined that offences against industrial property would not constitute persecution),³¹⁴ it did not provide express parameters.³¹⁵

However, in a stance restricting the prior position in *Tadić*, the *Blaškić* Appeals Chamber subsequently held that the acts underlying the crime of persecutions must at the time they were committed have constituted a crime against humanity under customary international law, to satisfy the *nullum crimen sine lege* requirement.³¹⁶ The Appeals Chamber in *Kordić* followed suit.³¹⁷ Their approach implied that to fall within the rubric of persecution the underlying acts themselves must have been crimes against humanity.

The point was clarified by the Trial and Appeals Chambers in *Kvočka*. The case arose from the mistreatment of Bosnian men and women in the Omarska detention camp in northern Bosnia. The underlying acts charged as persecution against the five accused were harassment, humiliation and psychological abuse. The Trial Chamber, referring to post-Second World War cases where acts such as denying bank accounts, educational or employment opportunities, or choice of spouse to Jews on

³¹² *Tadić* case, Trial Judgment, paras. 703–10, see *supra* note 113. See *supra* section 12.2.3.1.1.4 and section 12.2.4.1.

³¹³ *Tadić* case, Trial Judgment, para. 707, see *supra* note 113.

³¹⁴ As noted above, but not addressed by the *Tadić* Trial Chamber, other post-Second World War tribunals disagreed with the *Flick* approach to industrial property. See *supra* section 12.2.3.1.1.2 and section 12.2.3.1.1.4.

³¹⁵ *Tadić* case, Trial Judgment, para. 707, see *supra* note 113.

³¹⁶ *Blaškić* case, Appeal Judgment, paras. 139, 141–42, see *supra* note 287.

³¹⁷ *Kordić and Čerkez* case, Appeals Judgment, para. 103, see *supra* note 287. See also *Kordić and Čerkez* case, Trial Judgment, paras. 192, 209–10, *supra* note 283.

the basis of their religion amounted to persecution, held that “acts that are not inherently criminal may nonetheless become criminal and persecutory if committed with discriminatory intent”.³¹⁸ It read the *Kordić* Trial Judgment’s statement that “in order for the principle of legality not to be violated, acts in respect of which the accused are indicted under the heading of persecution must be found to constitute crimes under international law at the time of their commission”³¹⁹ to mean that “[j]ointly or severally, the acts alleged in the Amended Indictment must amount to persecution, not that each discriminatory act alleged must individually be regarded as a violation of international law”.³²⁰

The Appeals Chamber in *Kvočka* agreed that the underlying acts of persecution need *not* be criminal in and of themselves. It noted that acts of harassment, humiliation and psychological abuse were not explicitly listed under Article 5 or as offences under other articles of the Statute but could be compared to violations of Common Article 3 of the Geneva Conventions and Article 75 of Additional Protocol I.³²¹ The Appeals Chamber recalled that “acts underlying persecution under Article 5(h) of the Statute need not be considered a crime in international law”.³²²

The Appeals Chamber in *Kvočka* did not explicitly say that it was departing from prior jurisprudence, or provide any authority for its conclusion. But its approach accords with Judge Shahabuddeen’s earlier views in his separate opinion in the *Krnjelac* Appeal Judgment. He had explained that the *nullum crimen* principle is respected even when each underlying act of persecution was not independently a free-standing crime. Citing the *Ministries* case and the *Kvočka* Trial Judgment, Judge Shahabuddeen concluded:

Under paragraph (h) of [article 5 of the Statute], the relevant supporting crime is “persecution”, the underlying act or acts being only evidence of the persecution. It is the “persecution” which must have the same gravity as that of enumerated crimes. The underlying act does not have to be a crime listed in article 5 of the Statute. It does not have to be a

³¹⁸ *Kvočka* case, Trial Judgment, para. 186, see *supra* note 290.

³¹⁹ *Kordić and Čerkez* case, Trial Judgment, para. 192, see *supra* note 283.

³²⁰ *Kvočka* case, Trial Judgment, para. 186, see *supra* note 290.

³²¹ ICTY, *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Appeals Judgment, 28 February 2005, para. 323 (‘*Kvočka* case’) (<https://www.legal-tools.org/doc/006011/>).

³²² *Ibid.*

crime specified elsewhere in the Statute. Indeed, by itself it does not have to be a crime specified anywhere in international criminal law: it may be a non-crime. [...] But the act, taken separately or cumulatively with other acts, can give rise to the crime of persecution. [...] [T]he Statute is concerned only with cases in which the level of the gravity of the proven persecution matches the level of the gravity of an enumerated crime.³²³

This position is now settled ICTY law and has been followed in later cases. In *Lukić and Lukić*, the Trial Chamber affirmed that there is no comprehensive list of what may constitute the underlying acts of persecution, but they may be crimes listed under Article 5 or other articles of the Statute, or be acts which are not listed in the Statute.³²⁴ Likewise in *Simić*, the Trial Chamber opined that “persecutory act(s) or omission(s) may encompass physical and mental harm, infringements upon individual freedom, as well as acts which appear less serious, such as those targeting property, provided that the victimised persons were specially selected or discriminated on political, racial or religious grounds”.³²⁵ In *Brđanin*, the Appeals Chamber held that the denial of the rights to employment, freedom of movement and proper judicial process could constitute underlying acts of persecution (so long as they met the gravity requirement), despite such acts and omissions not being themselves criminalised.³²⁶

Similarly, the Trial Chamber in *Naletilić and Martinović* found that “[p]lunder of personal belongings may rise to the level of persecution if the impact of such deprivation is serious enough. This is so if the property is indispensable and a vital asset to the owners”.³²⁷ As a corollary, in *Blagojević and Jokić*, the Trial Chamber found that the destruction of “non-indispensable” personal belongings such as clothes and wallets did not have a severe enough impact on the victims to reach the threshold of equal gravity as those listed in Article 5 so as to constitute persecution.³²⁸ The Trial Judgment in *Lukić and Lukić* provides another example of

³²³ ICTY, *Prosecutor v. Milorad Krnojelac*, Appeal Judgment, IT-97-25-A, 17 September 2003, Separate Opinion of Judge Shahabuddeen, paras. 6–7 (<https://www.legal-tools.org/doc/7a9f1c/>).

³²⁴ *Lukić and Lukić* case, Trial Judgment, para. 993, see *supra* note 287.

³²⁵ *Simić* case, Trial Judgment, para. 50, see *supra* note 293.

³²⁶ ICTY, *Prosecutor v. Radoslave Brđanin*, Appeal Judgment, IT-99-36-A, 3 April 2007, paras. 296–97 (‘Brđanin case’) (<https://www.legal-tools.org/doc/782cef/>).

³²⁷ *Naletilić and Martinović* case, Trial Judgment, para. 699, see *supra* note 283.

³²⁸ *Blagojević and Jokić* case, Trial Judgment, para. 620, see *supra* note 290.

drawing a line at *de minimis* acts required to support a persecution conviction. There, the Trial Chamber was satisfied that the burning down of a Bosnian Muslim civilian's house was of equal gravity to other crimes in Article 3 and 5 of the Statute, but that the accused Milan Lukić's act of stealing a gold necklace from one of the victims was not of sufficient gravity to constitute an underlying act of persecution.³²⁹ The Trial Chamber in *Popović et al.* likewise concluded that the burning of the victims' identity cards and passports did not have a severe enough impact on the victims to reach the threshold of equal gravity to the acts listed in Article 5.³³⁰

At the ICTR, the Trial Chamber in *Nyiramasuhuko* was unable to conclude that the arrest and transport of Tutsis to a certain location was of equal gravity to other crimes in Article 3 so as to amount to persecution.³³¹ Notably, in light of the obligation to consider persecutory acts in context – discussed immediately below – this seems a problematic result given that from this location most of the victims were transported to the sites where they were ultimately killed.

The ECCC has followed suit with the *ad hoc* tribunals, holding that non-enumerated conduct may support a charge of persecution if the persecutory acts or omissions are of equal gravity to other crimes against humanity. In the second case before the ECCC, that against Khieu Samphan and Nuon Chea for the Khmer Rouge's displacement of the population from Phnom Penh in April 1975 and certain executions which followed, the Trial Chamber held that persecutory acts may include other underlying offences for crimes against humanity as well as other acts which rise to the same level of gravity or seriousness, including acts which are not necessarily crimes in and of themselves.³³² The Chamber was satisfied that the arrests and murders of former Khmer Rouge officials, and the forcible transfer and enforced disappearance of the "city people", were committed with intent to discriminate on political grounds and were discriminatory in fact, and thus amounted to persecution.³³³

³²⁹ Lukić and Lukić case, Trial Judgment, paras. 1021–21, see *supra* note 287.

³³⁰ Popović case, Trial Judgment, paras. 1000–1, see *supra* note 277.

³³¹ Nyiramasuhuko case, Trial Judgment, para. 6113, see *supra* note 294.

³³² ECCC, *Prosecutor v. Khieu Samphan and Nuon Chea*, Trial Judgment, 002/19-09-2007/ECCC/TC, 7 August 2012, para. 433 ('Khieu and Nuon case') (<https://www.legal-tools.org/doc/4888de/>).

³³³ *Ibid.*, paras. 571–74, 657.

One particularly interesting form that persecution may take is that based on hate speech. In *Nahimana* (the ‘Media case’), the ICTR Appeals Chamber rejected the *Kordić* Trial Chamber’s holding³³⁴ that hate speech could only amount to persecution if it reached the level of criminal incitement.³³⁵ It held that hate speech could constitute an act of persecution, without itself being criminalised, holding that “this is not a breach of the legality principle, since the crime of persecution as such is sufficiently defined in international law”.³³⁶

In *Nahimana* three accused were charged with persecution (and other crimes) for having used media outlets (RTL and the *Kangura* newspaper) to disseminate ‘hate speech’. That speech included anti-Tutsi propaganda, the promotion of extremist Hutu political ideology and calling out the names and whereabouts of individual victims and demanding their extermination. In addition to persecution, the accused were charged with direct and public incitement to commit genocide based on the broadcasts and publications.

In the Trial Judgment, the Trial Chamber found that hate speech reached the requisite level of gravity for persecution:

[H]ate speech targeting a population on the basis of ethnicity, or other discriminatory grounds, reaches this level of gravity and constitutes persecution under Article 3(h) of its Statute. [...] Hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under at-

³³⁴ *Kordić and Čerkez* case, Trial Judgment, para. 209, see *supra* note 283. The Trial Chamber in fn. 272 found that it would violate the principle of legality to convict for persecution based on speech alone, noting there was little support for the criminalisation of speech acts falling short of incitement in international and national jurisprudence. It pointed to the *Streicher* case (IMT Judgment, pp. 302–4, see *supra* note 113) where the IMT convicted the accused of persecution because he “incited the German people to active persecution”. It noted that the IMT found that his acts (publishing a virulently anti-Semitic journal) “amounted to incitement to murder and extermination” (emphasis in original). It also referred to the *Akayesu* Judgment where the accused was found guilty of direct and public incitement to commit genocide and noted that the only speech act explicitly criminalised under the Statutes of the IMT, Control Council Law No. 10, the ICTY and the ICTR was the direct and public incitement to commit genocide.

³³⁵ ICTR, *Prosecutor v. Ferdinand Nahimana et al.*, Appeal Judgment, ICTR-99-52-A, 28 November 2007, fn. 2264 (‘*Nahimana* case’) (<https://www.legal-tools.org/doc/4ad5eb/>). The Appeals Chamber found the *Kordić and Čerkez* Trial Chamber’s reasoning to be “inconsistent with the established case law of the Appeals Chamber, which does not require that the underlying acts of persecution be ‘enumerated as a crime elsewhere in the International Tribunal Statute’ [...] or regarded as crimes under customary international law”.

³³⁶ *Ibid.*, para. 985 and fn. 2255, 2264.

tack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm.³³⁷

The Trial Chamber emphasised that unlike incitement, persecution need not be “a provocation to cause harm. It is itself the harm. Accordingly, there need not be a call to action in communications that constitute persecution. For the same reason, there need be no link between persecution and acts of violence”.³³⁸ It drew an analogy with Streicher, who it asserted was convicted by the IMT at Nuremberg of persecution as a crime against humanity for anti-Semitic writings that significantly predated the extermination of Jews in the 1940s.³³⁹

On appeal, the accused argued that hate speech could not be an act of persecution because it was not criminalised under customary international law. The Appeals Chamber (by a four to one majority) dismissed this argument, relying on the Appeal Judgments in *Kvočka* and *Brđanin*.³⁴⁰ The majority focused on whether hate speech violated fundamental rights and whether the gravity threshold was met.³⁴¹ It found that hate speech *per se* violates the right to human dignity, and hate speech “inciting to violence” violates the right to security (the Chamber also noted that hate speech on its own could not violate rights to life or physical integrity as it would require intermediate actors to cause the harm necessary to amount to a violation of these rights).³⁴² As for the gravity requirement, the majority found that it did not need to determine whether “mere hate speeches not inciting violence” could rise to the requisite level of gravity, because a cumulative approach had to be taken (as further dis-

³³⁷ Nahimana case, Trial Judgment, para. 1072, see *supra* note 273.

³³⁸ *Ibid.*, para. 1073. See *supra* section 12.2.3.1.1.4.

³³⁹ *Ibid.* However, it is worth noting that the IMT, in fact, placed significant emphasis on the temporal connection between Streicher’s comments and the extermination of Jews in its final conclusions regarding his guilt. See *supra* section 12.2.3.1.2.

³⁴⁰ Nahimana case, Appeal Judgment, para. 985 and fn. 2255, see *supra* note 335, relying on Brđanin case, Appeal Judgment, para. 296, see *supra* note 326 and Kvočka case, Appeal Judgment, para. 323, see *supra* note 321.

³⁴¹ Nahimana case, Appeal Judgment, paras. 986–87, see *supra* note 335.

³⁴² *Ibid.*, para. 986.

cussed below), taking into account all relevant broadcasts. To this end, it noted that the hate speech in the case

[was] accompanied by calls for genocide against the Tutsi group and [that] all these speeches took place in the context of a massive campaign of persecution directed at the Tutsi population of Rwanda, this campaign being also characterized by acts of violence (killings, torture and ill-treatment, rapes ...) and of destruction of property.³⁴³

Accordingly, it concluded that the speech taking place in this context meet the gravity threshold.³⁴⁴

In *Bikindi*, the Trial Chamber also held that hate speech could amount to a persecutory act. Simon Bikindi, a musician and songwriter, was charged with aiding and abetting persecution and direct and public incitement to commit genocide for the dissemination of his songs which advocated the elimination of the Tutsis over the radio. The Chamber was satisfied that “hate speech may in certain circumstances constitute a violation of fundamental rights, namely a violation of the right to respect for dignity when that speech incites to hate and discrimination, or a violation of the right to security when it incites to violence”.³⁴⁵ The Trial Chamber addressed the question of whether hate speech in isolation could be considered of equal gravity to other crimes in Article 3 of the ICTR Statute. It noted that, since the hate speech would have occurred in the context of a widespread or systematic attack against a civilian population on national, political, ethnic, racial or religious grounds, the facts establishing the existence of the attack could also support a finding of many other underlying acts of persecution. It concluded that “depending on the message conveyed and the context, the Chamber does not exclude the possibility that songs may constitute persecution as a crime against humanity”.³⁴⁶

The Trial Chamber, however, while convicting Bikindi of direct and public incitement to genocide, failed to convict him for aiding and abetting the persecution of Tutsis. The Chamber concluded that the prose-

³⁴³ *Ibid.*, para. 988.

³⁴⁴ The Appeals Chamber specifically noted that the speeches broadcast by Nahimana’s subordinates, “considered as a whole and in their context”, were of equal gravity to other crimes against humanity, and found that Nahimana was criminally responsible for those acts. *Ibid.*

³⁴⁵ ICTR, *Prosecutor v. Simon Bikindi*, Trial Judgment, ICTR-01-72, 2 December 2008, para. 392 (‘Bikindi case’) (<https://www.legal-tools.org/doc/a7213b/>).

³⁴⁶ *Ibid.*, paras. 394–95.

cution had failed to prove that the accused's alleged acquiescence in having his songs played on the radio in the months in which the genocide took place amounted to tacit approval or encouragement which had a substantial effect on the perpetration of the alleged crime.³⁴⁷

Ultimately, future cases concerning the crime of persecution based on speech will turn on whether the gravity requirement is substantiated. The historical cases of *Streicher* and *Dietrich* and the ICTR cases of *Nahimana* and *Bikindi* illustrate that a Trial Chamber's factual determination will depend on *which* acts it considers cumulatively to calculate gravity, and how it considers the background and context of the hate speech. These approaches have paved the way for a possible conviction for persecution based, *inter alia*, on hate speech in the pending case of *Šešelj* before the ICTY.³⁴⁸

12.3.2.1.1.4. The Cumulative Assessment of Persecutory Acts

As noted above, in making the gravity assessment, the *ad hoc* tribunals have confirmed that underlying persecutory acts should not be considered in isolation; rather they should be examined in context and considered for their cumulative effect.³⁴⁹ For instance, the *Brđanin* Trial Judgment found that:

³⁴⁷ *Ibid.*, paras. 439–40.

³⁴⁸ Šešelj has been charged with: “Direct and public denigration through ‘hate speech’ of the Croat, Muslim and other non-Serb populations in Vukovar, Zvornik and Hrtkovci on the basis of their ethnicities”. ICTY, *Prosecutor v. Vojislav Šešelj*, Third Amended Indictment, IT-03-67, 7 December 2007, para. 17(k) (<https://www.legal-tools.org/doc/f427f1/>). At the time of writing, the evidence phase of his trial had finished and the Trial Chamber was deliberating.

³⁴⁹ Kupreškić case Trial Judgment, paras. 615, 622, see *supra* note 2. In reaching this conclusion, the Chamber referred to the *Justice* case, which held that “the record contains innumerable acts of persecution of individual Poles and Jews, but to consider these cases as isolated and unrelated instances of perversion of justice would be to overlook the very essence of the offence charged in the indictment”. *Justice* Case, vol. III, p. 1063, see *supra* note 7. It also referred to *Artuković* before the Zagreb District Court, which found that “the obligation of wearing a sign to signify Jewish origin [...] was not only inhuman behavior [with regard] to the whole people, but also a revealing foreboding of death”. It is not each individual act, but rather their cumulative effect that matters. *Krnjelac* case, Trial Judgment, para. 434, see *supra* note 283; *Stakić* case, Trial Judgment, para. 736, see *supra* note 283; *Lukić and Lukić* case, Trial Judgment, para. 993, see *supra* note 287. See *supra* section 12.2.3.1.1.1.

[I]t is in the context of the individual acts and the necessity that the acts as well as the violations occasioned by them be examined collectively that determines the gravity of the acts as a whole, and that it is this gravity which determines whether or not the rights violated are therefore ‘fundamental’ for the purposes of the crime of persecution.³⁵⁰

The ICTY Chambers have sourced such conclusions in post-Second World War jurisprudence, such as the Nuremberg Judgment, the *Ministries* case and the *Justice* case.³⁵¹

The *Krnjelac* case provides an illustrative example of the importance of taking a cumulative approach to assess whether acts are of ‘equal gravity’ to other crimes against humanity. When considering acts of forced labour charged as persecution, the Appeals Chamber found that they “must be considered as part of a series of acts comprising unlawful detention and beatings whose cumulative effect is of sufficient gravity to amount to a crime of persecution”.³⁵² It found that the acts of forced labour, unlawful detention and beatings all formed part of the “discriminatory environment” at the Kazneni-Popravni Dom prison where the crimes took place. On this basis, it concluded that persecution based on those acts was as grave as crimes expressly laid down in Article 5 of the Statute.³⁵³ Accordingly, the Appeals Chamber overturned the Trial Chamber’s finding that some of the detainees forced to work had not suffered persecution.³⁵⁴

The *Kordić* case provides an example of an ICTY Trial Chamber failing to consider acts cumulatively and in context. In that case the Trial Chamber rejected the encouragement and promotion of hatred on political grounds, and the dismissal of Bosnian Muslims from their jobs, as amounting to persecution. It found that the acts were not as serious as other crimes in Article 5. In so finding, the Trial Chamber failed to consider these acts together or with other acts charged as persecution to see if they met the seriousness requirement.³⁵⁵ By way of contrast, the Trial Chamber in *Brđanin* emphasised that the termination of employment of Bosnian Croats and Muslims occurred concurrently with the plan to eth-

³⁵⁰ Brđanin case, Trial Judgment, fn. 2585, see *supra* note 290.

³⁵¹ See *supra* section 12.2.3.1.1.1.

³⁵² Krnjelac case, Appeal Judgment, para. 199, see *supra* note 287.

³⁵³ *Ibid.*, para. 199.

³⁵⁴ *Ibid.*, para. 202. Duch case, Appeal Judgment, para. 259, see *supra* note 126.

³⁵⁵ Kordić and Čerkez case, Trial Judgment, paras. 209–10, see *supra* note 283.

nically cleanse the territory claimed by the Bosnian Serbs. Considered together with the other denials of their rights to freedom of movement, proper judicial process and proper medical care, the charged acts were found to amount to persecution.³⁵⁶

The ECCC has also adopted a cumulative approach to its gravity assessments. The ECCC Supreme Court Chamber in *Duch* exhaustively reviewed post-Second World War precedents to find that:

[T]he crux of the analysis lies not in determining whether a specific persecutory act or omission *itself* breaches a human right that is fundamental in nature. Rather, it lies in determining whether or not the persecutory acts or omissions, when considered cumulatively and in context, result in a gross or blatant breach of fundamental rights such that it is *equal in gravity or severity to other underlying crimes against humanity*.³⁵⁷

12.3.2.1.2. The Jettisoning of the Nexus Requirement

The IMT and IMTFE Charters both required that crimes against humanity (including persecution) must be committed in execution of, or in connection with, another crime within the jurisdiction of the Tribunal (that is war crimes or crimes against peace).³⁵⁸ While CCL No. 10 did not have a nexus requirement, the US NMTs nevertheless required such a nexus in several cases, namely in *Flick*, *Pohl* and the *Ministries* case.³⁵⁹ However, from its earliest cases on crimes against humanity generally and persecution specifically, the ICTY has rejected a nexus requirement, holding that it is not required under customary international law.

In *Kupreškić*, the Trial Chamber stated that there was no requirement in customary international law that the crime of persecution be linked to another crime in the Statute.³⁶⁰ The Trial Chamber noted that when this nexus requirement first appeared in the IMT Charter, it related to *all* crimes against humanity and was a jurisdictional requirement link-

³⁵⁶ Brđanin case, Trial Judgment, paras. 1039, 1041–49, see *supra* note 290.

³⁵⁷ Duch case, Appeal Judgment, para. 257, see *supra* note 126.

³⁵⁸ See *supra* section 12.2.2.2 and section 12.2.3.1.1.1.

³⁵⁹ See *supra* section 12.2.3.1.1.1.

³⁶⁰ Kupreškić case, Trial Judgment, para. 581, see *supra* note 2.

ing crimes against humanity to the armed conflict.³⁶¹ However, after an extensive review of the post-Second World War case law, the Chamber noted that the IMT at Nuremberg exercised jurisdiction over defendants who were convicted of only crimes against humanity (that is, *von Schirach* and *Streicher*) even “when there was only a *tenuous* link to war crimes or crimes against the peace”.³⁶² More dispositive, the Chamber found that as customary international law had developed since 1945, the link between crimes against humanity and war crimes was no longer required.³⁶³ Thus, as it was not required by the Statute or customary international law, the Chamber rejected any requirement of a link between the crime against humanity of persecution and crimes found elsewhere in the Statute.³⁶⁴ In subsequent cases, Chambers of the ICTY have consistently rejected a nexus requirement for persecution under customary international law.³⁶⁵ Article 2(h) of the SCSL Statute followed suit: the crime of persecution does not require any nexus or connection with other acts or crimes in the Statute.

The ICTY and ICTR’s abandonment of a nexus requirement for crimes against humanity generally and persecution specifically must be considered in light of the addition of a *chapeau* requirement for crimes against humanity that the crimes were committed as part of a widespread or systematic attack directed against any civilian population.³⁶⁶ This standard – rejecting a nexus to war crimes or other crimes within the court’s jurisdiction, but requiring contextual standards concerning the background in which the crimes took place – reflects the approach adopted by the US NMTs in the *Justice* and *Einsatzgruppen* cases. As noted above, both cases rejected the need to prove a nexus to war or war crimes; instead, they each insisted on proof that the conduct was widespread or systematic, and took place pursuant to a government policy. For the NMTs deciding those cases, the contextual element was seen as the true distinguishing feature of crimes against humanity, while also providing parameters to limit this potentially broad category of crimes. The ICTY

³⁶¹ *Ibid.*, paras. 573–76.

³⁶² *Ibid.*, para. 576. See *supra* section 12.2.2.2 section 12.2.3.1.1.1.

³⁶³ *Ibid.*, para. 577.

³⁶⁴ *Ibid.*, para. 581.

³⁶⁵ Kordić and Čerkez case, Trial Judgment, para. 193, see *supra* note 283.

³⁶⁶ Tadić case, Appeal Judgment, para. 248, see *supra* note 305; ICTY, *Prosecutor v. Kunarac et al.*, Appeal Judgment, IT-96-23/1-A, 12 June 2002, paras. 85, 90, 93 (‘Kunarac case’) (<https://www.legal-tools.org/doc/029a09/>).

and ICTR's abandonment of a nexus requirement for persecution specifically can also be further attributed to the adoption of the 'equal gravity' test as key to determining if certain discriminatory conduct is serious enough to warrant the label of persecution.

The ECCC Supreme Court Chamber in *Duch* likewise held that by 1975 a nexus was not required under customary international law. Notably, the Supreme Court Chamber reached this conclusion despite the statement in Article 9 of the UN-Cambodia Agreement that the ECCC's jurisdiction included crimes against humanity "as defined in the 1998 Rome Statute".³⁶⁷ (The ICC Statute, as discussed below, contains an attenuated form of the nexus requirement.) The Trial Chamber in the case against *Khieu Samphan and Nuon Chea* took the same position.³⁶⁸

In addition to the absence of a nexus requirement, the ICTY has held that customary international law does not require that an act of persecution be committed as part of a *discriminatory* policy or widespread *discriminatory* practice. The cases are also clear that while persecution usually describes a series of acts and not a single act, a single act may nevertheless constitute persecution.³⁶⁹ Notably, under customary international law, crimes against humanity must be committed as part of a widespread or systematic attack against a civilian population (and at the ICTR this attack must have been carried out on discriminatory grounds to meet the requirements of Article 3 of the Statute). Thus, in practice the persecutory acts underlying a persecution charge will often have been committed against the backdrop of a discriminatory widespread or systematic attack against a particular civilian group defined by their membership on one or more of the identified grounds for discrimination; however, this is not a legal requirement.³⁷⁰

As discussed below, for persecution specifically (but not for crimes against humanity generally), the ICC Statute has reverted to a version of

³⁶⁷ *Duch* case, Appeal Judgment, para. 261, see *supra* note 126.

³⁶⁸ *Khieu and Nuon* case, Trial Judgment, para. 432, see *supra* note 332.

³⁶⁹ *Kupreškić* case, Trial Judgment, para. 624, see *supra* note 2; ICTY, *Prosecutor v. Mitar Vasiljević*, Trial Judgment, IT-98-32-T, 29 November 2002, para. 246 ('*Vasiljević* case') (<https://www.legal-tools.org/doc/8035f9/>). See also ICTY, *Prosecutor v. Mitar Vasiljević*, Appeal Judgment, IT-98-32-A, 25 February 2004, para. 113 (<https://www.legal-tools.org/doc/e35d81/>); *Blaškić* case, Appeal Judgment, para. 135, see *supra* note 287; *Kordić and Čerkez* case, Appeal Judgment, para. 102, see *supra* note 287.

³⁷⁰ *Kupreškić* case, Trial Judgment, para. 615, see *supra* note 2.

the nexus requirement adopted in the Nuremberg Judgment and the CCL No. 10 cases of *Flick*, *Pohl* and *Ministries*: while it does not require a nexus to war crimes, it does require that the crime of persecution be carried out “in connection with any act referred to in this paragraph [(enumerating crimes against humanity)] or any crime within the jurisdiction of the Court”.³⁷¹

12.3.2.1.3. Recognised Grounds of Discrimination and the Element of “Discrimination in Fact”

One key aspect of persecution as a crime against humanity under customary international law is that the persecutory conduct must have been committed on discriminatory grounds.³⁷² At the ICTY and ICTR, the grounds for discrimination are limited to three: political, racial and religious grounds,³⁷³ the same grounds which were proscribed in the IMT Charter, and CCL No. 10.³⁷⁴

Early on, the *Tadić* Trial Judgment confirmed that even though Article 5 of the Statute referred to “persecutions on political, racial *and* religious grounds”, it is necessary only to prove one (rather than all) discriminatory bases to support a conviction for persecution;³⁷⁵ each of the listed grounds is independently sufficient.³⁷⁶ Notably, the wording of the ICTY and ICTR Statutes on this point differs from the post-war instruments; while the *ad hoc* tribunals’ Statutes set out a conjunctive list of discrimi-

³⁷¹ Rome Statute of the International Criminal Court, Entered into Force 1 July 2002, Article 7(1)(h) (‘ICC Statute’).

³⁷² Article 3 of the ICTR Statute also requires for crimes against humanity that the attack directed against the civilian population be committed on discriminatory grounds. United Nations Security Council, Resolution 955 91994, Adopted on 8 November 1994, UN doc. S/RES/955 (1994) (‘ICTR Statute’). ICTR Courts have read this as a jurisdictional requirement only and not something required as a substantive element under customary international law: ICTR, *Prosecutor v. Jean Paul Akayesu*, Appeal Judgment, ICTR-96-4-A, 1 June 2001, paras. 461–69 (‘Akayesu case’) (<https://www.legal-tools.org/doc/c62d06/>).

³⁷³ United Nations Security Council resolution 808 (1993), Adopted on 22 February 1993, UN doc. S/RES/808 (1993), Article 5(h) (‘ICTY Statute’); ICTR Statute, Article 3(g), see *supra* note 372.

³⁷⁴ See *supra* section 12.2.2.2 and section 12.2.2.3.

³⁷⁵ *Tadić* case, Trial Judgment, para. 713, see *supra* note 113.

³⁷⁶ *Naletilić and Martinović* case, Trial Judgment, para. 638, see *supra* note 283; *Stakić* case, Trial Judgment, para. 732, see *supra* note 283; *Simić* case, Trial Judgment, para. 52, see *supra* note 293.

natory grounds, the list in the IMT Charter and CCL No. 10 was disjunctive.³⁷⁷

Significantly, both ICTY and ICTR have recognised ethnicity as a prohibited ground of discrimination despite its exclusion from the enumerated list. The *Brđanin* Trial Chamber concluded that the concept of ‘race’ includes ethnicity.³⁷⁸ The Trial Chamber in *Nahimana* reached the same conclusion, but using somewhat different reasoning. Specifically, the Chamber held:

As the evidence indicates, in Rwanda the targets of attack were the Tutsi ethnic group and the so-called moderate Hutu political opponents who supported the Tutsi ethnic group. The Chamber considers that the group against which discriminatory attacks were perpetrated can be defined by its political component as well as its ethnic component. At times the political component predominated [...] RTLM, Kangura and CRD [...] essentially merged political and ethnic identity, defining their political target on the basis of ethnicity and political positions relating to ethnicity. [...] In these circumstances the Chamber considers that the discriminatory intent of the Accused falls within the scope of the crime against humanity of persecution on political grounds of an ethnic character.³⁷⁹

This reasoning – equating political and ethnic grounds of discrimination – seems somewhat legally problematic; nonetheless, it appears to

³⁷⁷ The IMT Charter and Control Council Law No. 10 required that persecutions take place on political, racial *or* religious grounds. See *supra* section 12.2.2.2 and section 12.2.2.3.

³⁷⁸ *Brđanin* case, Trial Judgment, para. 992, fn. 2484, see *supra* note 290. See also: *Kordić and Čerkez* case, Appeal Judgment, para. 111, see *supra* note 287; *Kvočka* case, Appeal Judgment, paras. 366, 455, see *supra* note 321; ICTY, *Prosecutor v. Šainović et al.*, IT-05-87-T, Trial Judgment, 26 February 2009, vol. I, para. 176: “In practice, discrimination on the basis of ethnicity has been accepted as a ground upon which the requirement is satisfied” (‘*Šainović* case’) (<https://www.legal-tools.org/doc/9eb7c3/>); *Stanišić and Župljanin* case, Trial Judgment, para. 68, see *supra* note 277.

³⁷⁹ *Nahimana* case, Trial Judgment, para. 1071, see *supra* note 273; ICTR, *Prosecutor v. Théoneste Bagosora et al.*, Trial Judgment, ICTR-98-41, 18 December 2008, para. 2209. (‘Military I’) (<https://www.legal-tools.org/doc/6d9b0a/>). Cf. *Semanza* case, Trial Judgment, para. 471, see *supra* note 273: the Trial Chamber took a restrictive approach to the three listed grounds, and found that the prosecution had not proved that the killings were committed on political grounds.

be animated by the broader trend leading to the expanded recognition of grounds of discrimination in the ICC Statute, as discussed below.³⁸⁰

Similarly consistent with this trend, Article 2(h) of the SCSL Statute included ethnicity in addition to the three grounds of race, religion or politics. Article 5 of the ECCC Law, in contrast, adopted only the three traditional discriminatory grounds of race, religion and politics. While Article 9 of the UN-Cambodia Agreement – referring to the ECCC’s jurisdiction over crimes against humanity as defined in the ICC Statute – may suggest that the list of discriminatory grounds at the ECCC includes the additional grounds articulated in Article 7 of the ICC Statute, the ECCC Supreme Court Chamber in *Duch* read the provision more narrowly. It noted that, while crimes against humanity may be committed on a variety of discriminatory grounds other than those enumerated, such as physical or mental disability, age or infirmity or sexual preference, the ECCC’s jurisdiction is circumscribed by the discriminatory grounds expressly included under Article 5 of the ECCC Law namely, “persecutions on political, racial or religious ones”.³⁸¹

The group-orientated nature of the offence is reflected in the requirement that the act or omission underlying a charge of persecution must “discriminate in fact” – meaning that the result either has a discriminatory impact upon individuals actually belonging to the group targeted or the result otherwise discriminates in a manner that corresponds with the perpetrator’s intent. ICTY and ICTR Chambers have considered a variety of factors to make this determination, including the discriminatory context of the attack against the civilian population,³⁸² and the discriminatory circumstances surrounding the commission of the acts.³⁸³

Different approaches have emerged over the years at the ICTY on the requirement that the *actus reus* discriminate in fact. Chambers have sought to determine whether this element: (1) simply demands that the act be carried out on discriminatory grounds; or alternatively (2) whether it also requires that the victim of the discriminatory treatment actually belong to the group targeted on an enumerated ground. This ambiguity arose because the Statute does not expressly state that an act amounting to per-

³⁸⁰ See *infra* section 12.3.3.2.

³⁸¹ *Duch* case, Appeal Judgment, para. 237, see *supra* note 126. See *supra* section 12.2.3.3.

³⁸² *Knojelac* case, Appeal Judgment, paras. 184–85, see *supra* note 287.

³⁸³ *Ibid.*, para. 202; *Military I*, Trial Judgment, para. 3208, see *supra* note 379.

secution must take place against a member of the listed group.³⁸⁴ Rather, Article 5(h) only requires that the conduct take place on discriminatory grounds. Due the silence in the Statute, and the absence of post-Second World War jurisprudence directly addressing the issue,³⁸⁵ ICTY Chambers were forced to assess the issue from first principles.

In *Kvočka*, in apparent contradiction with the definitions of persecution adopted in *Tadić*, *Kupreškić* and *Kordić*,³⁸⁶ the Trial Chamber found that discrimination occurred when a person was the target of discriminatory treatment on the basis of the accused's *suspicion* that the victim belonged to a targeted group. The *Kvočka* Chamber held that it was irrelevant whether such suspicion turned out to be inaccurate.³⁸⁷ In reaching this conclusion the Trial Chamber held that "discriminatory grounds form the requisite criteria, not membership in a particular group".³⁸⁸ As one commentator, Ken Roberts, has noted, on this test the prosecution need not show that the act in fact harmed a member of the targeted group to find persecution.³⁸⁹

However, the *Krnjelac* Trial Chamber, the next to address the crime of persecution, rejected the *Kvočka* approach. The Chamber limited its consideration to discriminatory acts that had in fact taken place against Muslims and non-Serbs. In dismissing charges of persecution based on an accused's mistaken belief of a victim's membership in a targeted group, the Chamber held that

³⁸⁴ This is to be contrasted with the crime of genocide, which expressly requires that the genocidal act be committed against members of one of the listed groups: see ICTY Statute, Article 4, *supra* note 373, ICTR Statute, Article 2, *supra* note 372. Furthermore, unlike a group targeted for genocide, a group targeted for persecution may be defined in terms of positive or negative criteria: *Kvočka* case, Trial Judgment, para. 19, see *supra* note 290; *Kvočka* case, Appeal Judgment, para. 366, see *supra* note 321. See also Roberts, 2006, p. 275, *supra* note 23: "[I]t is not at all clear why genocide would necessitate a result corresponding to the intent, while persecution would not. Logically, it would appear that both offences should be applied in the same manner".

³⁸⁵ See *supra* section 12.2.3.1.3.

³⁸⁶ *Tadić* case, Trial Judgment, para. 715, see *supra* note 113; *Kupreškić* case, Trial Judgment, para. 621, see *supra* note 2; *Kordić* and *Čerkez* case, Trial Judgment, paras. 189, 203, see *supra* note 283.

³⁸⁷ *Kvočka* case, Trial Judgment, para. 195, see *supra* note 290.

³⁸⁸ *Ibid.*, para. 197.

³⁸⁹ Roberts, 2006, p. 273, see *supra* note 23.

the existence of a mistaken belief that the intended victim will be discriminated against, together with an intention to discriminate against that person because of that mistaken belief, may amount to the inchoate offence of *attempted* persecution, but no such crime falls within the jurisdiction of this Tribunal.³⁹⁰

The Trial Chamber noted that the prior jurisprudence had required a discriminatory element as part of the *actus reus*, that is, the act or omission must in fact have had discriminatory consequences rather than merely having been undertaken with discriminatory intention. It opined that the *Kvočka* approach could lead to the illogical result that an accused could be convicted of persecution without anyone actually having been persecuted.³⁹¹ Further, the Trial Chamber stressed that, while the Statute did not expressly require that the discrimination take place against a member of the targeted group, such a standard was the necessary implication of a requirement that an act or omission occur on a discriminatory basis.³⁹² It observed that, ultimately, the *Kvočka* approach – finding that discriminatory grounds even without discriminatory effect fulfilled the requisite criteria – failed to account for the interests intended to be protected by the crime.³⁹³ Finally, it also noted that the *Kvočka* approach would blur the distinction between persecution and other crimes against humanity (such as murder, torture and so on), which have as their object the protection of all civilians regardless of their group association.³⁹⁴

The *Naletilić and Martinović* Trial Chamber returned to the issue with a new perspective. While it too required proof of discrimination in fact, unlike *Krnojelac* (which required that the persecutory act take place against a member of the targeted group on an objective basis), the *Naletilić and Martinović* Trial Chamber allowed the perpetrator's own belief to define who constituted a member of the targeted group.

³⁹⁰ *Krnojelac* case, Trial Judgment, para. 432 and fn. 1292, see *supra* note 283 (emphasis in original). For a discussion of this discrepancy in approach, see Daryl Mundis, "Current Developments at the *Ad Hoc* International Criminal Tribunals", in *Journal of International Criminal Justice*, 2003, vol. 1, no. 3, p. 203.

³⁹¹ *Krnojelac* case, Trial Judgment, para. 432, see *supra* note 283

³⁹² *Ibid.*

³⁹³ *Ibid.*, para. 432 and fn. 1294.

³⁹⁴ *Ibid.*, para. 432 and fn. 1293. This was followed in *Vasiljević* case, Trial Judgment, paras. 245, 251, see *supra* note 369.

The *Naletilić and Martinović* Trial Chamber disagreed with the “overly narrow interpretation” of the term “targeted group” in *Krnjelac*.³⁹⁵ Following the *Kvočka* Trial Judgment, it held that the targeted group should not be viewed as consisting solely of persons who *personally* carry the racial, religious or political criteria of the group. Rather, the parameters of the targeted group must be interpreted broadly, and may include persons who are “*defined by the perpetrator as belonging to the victim group due to their close affiliations or sympathies for the victim group*”.³⁹⁶ This was consistent with the principle behind the offence “as it is the perpetrator who defines the victim group while the targeted victims have no influence on their status”.³⁹⁷ In such cases, a factual discrimination occurs as “the victims are *discriminated in fact* for who or what they are on the basis of the perception of the perpetrator”.³⁹⁸ As Roberts has noted, on the *Naletilić* definition, once the specific intent to discriminate against a certain person is established, it will be impossible for the *actus reus* to be qualified as anything but discriminatory in fact.³⁹⁹

The issue was finally resolved at the ICTY by the Appeals Chamber in *Krnjelac*. While the Appeals Chamber confirmed the Trial Chamber’s definition of persecution, it disagreed with the Trial Chamber’s holding that the targeted group must be defined objectively rather than from the perpetrator’s perspective. Countering the Trial Chamber’s example,⁴⁰⁰ the Appeals Chamber opined that if a Serb deliberately murdered a Serb on the basis of a misplaced belief that the victim was Muslim, the Serb victim may still be the victim of the crime of persecution. The Chamber concluded that “the act committed against [the victim in this instance constitutes] discrimination in fact, *vis-à-vis* the other Serbs who were not subject to such acts, effected [by] the will to discriminate against a group on grounds of ethnicity”.⁴⁰¹ The definition of persecution in the *Krnjelac*

³⁹⁵ *Naletilić and Martinović* case, Trial Judgment, para. 1572, see *supra* note 283.

³⁹⁶ *Ibid.*, para. 636 (emphasis in original).

³⁹⁷ *Ibid.*

³⁹⁸ *Ibid.* This approach was followed in *Stakić* case, Trial Judgment, para. 734, see *supra* note 283.

³⁹⁹ Roberts, 2006, p. 280, see *supra* note 23.

⁴⁰⁰ *Krnjelac* case, Trial Judgment, para. 432, fn. 1293, see *supra* note 283.

⁴⁰¹ *Krnjelac* case, Appeal Judgment, para. 185, see *supra* note 287. Roberts criticises this approach as falling victim to a definitional trap: that is, on this definition, once the discriminatory intent *vis-à-vis* a certain victim is proven, so too will the discriminatory consequences, regardless of whether the victim is objectively part of the targeted group. He al-

Trial Judgment, as clarified and adopted in the *Krnjelac* Appeal Judgment, has subsequently been followed in by the ICTY Trial Chambers⁴⁰² and Appeals Chamber.⁴⁰³

The ECCC Supreme Court Chamber in *Duch* likewise concluded that “discrimination in fact”, or the demonstration of actual discriminatory consequences, was a necessary element of the *actus reus* of persecution.⁴⁰⁴ It agreed with the *Duch* Trial Chamber that an act or omission is discriminatory in fact when “a victim is targeted because of the victim’s membership in a group *defined by the perpetrator* on specific grounds, namely on political, racial or religious basis”.⁴⁰⁵ Accordingly it affirmed the Trial Chamber’s finding that the targeted group in that case included “all real or perceived political opponents [to the CPK] including their close relatives or affiliates”.⁴⁰⁶

However, the Supreme Court Chamber stressed that the requirement of “discriminatory in fact” must be connected to the requirement that the victim *actually* belong to a sufficiently identifiable political, racial or religious group. In doing so, it expressly favoured the *Krnjelac* Trial Judgment over the *Krnjelac* Appeals Judgment (and subsequent ICTY cases). Accordingly, it disagreed with the *Duch* Trial Chamber’s conclusion that persecution would be established even when the perpetrator was objectively mistaken as to the victim’s membership in the targeted

so argues that by its approach, the Appeals Chamber must have “clearly rejected” the notion that the crime’s object is the protection of members of targeted political, racial and religious groups, but without saying what the purpose of the crime is. Roberts, 2006, pp. 281–82, see *supra* note 23.

⁴⁰² See, for example, Brđanin case, Trial Judgment, paras. 992–93, *supra* note 290; Blagojević and Jokić case, Trial Judgment, paras. 579, 583, see *supra* note 290; Martić case, Trial Judgment, paras. 117–18, see *supra* note 290; Šainović case, Trial Judgment, para. 177, see *supra* note 378.

⁴⁰³ See, for example, Vasiljević case, Appeal Judgment, para. 113, *supra* note 369; Blaškić case, Appeal Judgment, para. 131, *supra* note 387; Kordić and Čerkez case, Appeal Judgment, para. 101, *supra* note 287; ICTY, *Prosecutor v. Lukić (Milan) and Lukić (Sredoje)*, Appeal Judgment, IT-98-32/1-A, 4 December 2012, para. 455 (‘Lukić and Lukić case’) (<https://www.legal-tools.org/doc/da785e/>).

⁴⁰⁴ *Duch* case, Appeal Judgment, paras. 267, 271, see *supra* note 126.

⁴⁰⁵ *Duch* case, Appeal Judgment, para. 272, see *supra* note 126 (emphasis in original), quoting ECCC, *Prosecutor v. Kaing Guek Eav alias Duch*, 001/18-07-2007/ECCC/TC, Trial Judgment, 26 July 2010, para. 377 (‘*Duch* case’) (<https://www.legal-tools.org/doc/dbdb62/>).

⁴⁰⁶ *Ibid.*, para. 273, quoting the *Duch* Trial Judgment, para. 390, see *supra* note 405.

group.⁴⁰⁷ While agreeing that the perpetrator determines the criteria for targeting on political grounds, it opined that persecutory intent by itself does not establish persecution unless the victim was a member of a “discernible targeted group”.⁴⁰⁸ The relevant persecutory consequences must, effectively, be experienced by the group, in that denying the individual victim’s fundamental rights has a discriminatory impact on the group as a whole. Where the act or omission done with persecutory intent is committed against an individual who does not belong to the targeted group, the consequence of the act may be real for the victim in the sense of the denial of a fundamental right, but not discriminatory in fact as required for persecution.⁴⁰⁹

Thus, for the ECCC Supreme Court Chamber, there can be no “discrimination in fact” when the perpetrator mistakenly believes that a victim actually belongs to the defined target group, or when the perpetrator targets victims irrespective of whether they meet the discriminatory criterion, that is, when the targeting is indiscriminate.⁴¹⁰ Applying this approach, the Supreme Court Chamber overturned the Trial Chamber’s conviction of Duch for persecution as a crime against humanity in relation to those individuals who had been detained, interrogated, enslaved and executed at S-21 prison as a result of indiscriminate targeting by the accused rather than discrimination on political grounds. It substituted convictions against the accused for extermination, enslavement, imprisonment, torture and other inhumane acts as crimes against humanity for his involvement in the relevant conduct.⁴¹¹

12.3.2.1.4. Pleading Persecution and Fair Notice to the Accused

The crime of persecution also raises important issues concerning pleading. While persecution is an ‘umbrella crime’, which may encompass a variety of types of persecutory conduct, an indictment for persecution must plead all the underlying acts of persecution relied upon for the

⁴⁰⁷ *Ibid.*, para. 275, see *supra* note 126, disagreeing with the Duch Trial Judgment, para. 377, see *supra* note 405.

⁴⁰⁸ *Ibid.*

⁴⁰⁹ *Ibid.*, para. 276.

⁴¹⁰ *Ibid.*, para. 277.

⁴¹¹ *Ibid.*, para. 284.

charge. As the Trial Chamber in *Stanišić and Zupljanin* recently emphasised:

While the crime of persecution may be considered as an “umbrella” crime, the principle of legality requires that the Prosecution nonetheless charge particular acts or omissions amounting to persecution, rather than persecution in general. Persecution cannot, because of its nebulous character, be used as a catch-all charge, and it is not sufficient for an indictment to charge a crime in generic terms.⁴¹²

Accordingly, the prosecution cannot simply rely on a general charge of persecution in an indictment – this would be inconsistent with the principle of legality and would not give the accused sufficient notice.⁴¹³ Rather, particular acts must be charged as persecution in sufficient detail to notify the accused as to what they are charged with and to enable them to prepare their defence. Indeed in *Kupreškić et al.*, the Appeals Chamber reversed the convictions of two accused for persecution on the basis that the charge had been insufficiently pleaded in the indictment.⁴¹⁴ Each underlying persecutory acts need not be contained in a separate charge; rather such acts can be, and usually are, included within the one charge.⁴¹⁵

12.3.2.2. The Mens Rea of Persecution under Customary International Law

Another hallmark of persecution under customary international law is that it requires proof of discriminatory intent. In addition to proving the *mens rea* for the *chapeau* elements of crimes against humanity⁴¹⁶ and the under-

⁴¹² *Stanišić and Župljanin* case, Trial Judgment, para. 67, see *supra* note 277.

⁴¹³ *Kupreškić* case, Trial Judgment, para. 626, see *supra* note 2; *Vasiljević* case, Trial Judgment, para. 246, see *supra* note 369; *Stakić* case, Trial Judgment, para. 735, see *supra* note 283; *Simić* case, Trial Judgment, para. 50, see *supra* note 293; *Kordić and Čerkez* case, Appeal Judgment, paras. 132–36, see *supra* note 287.

⁴¹⁴ *Kupreškić* case, Appeal Judgment, paras. 98, 124–25, see *supra* note 272; *Blagojević and Jokić* case, Trial Judgment, para. 581, see *supra* note 290.

⁴¹⁵ *Ibid.*, *Kupreškić* case, Appeal Judgment.

⁴¹⁶ Since persecution is a crime against humanity, the acts of the physical perpetrators must form part of a widespread or systematic attack directed against any civilian population. The corresponding *mens rea* requirement is knowledge that there is an attack against the civilian population and knowledge, or taking the risk, that the acts form part of this attack: see *Šainović* case, Trial Judgment, vol. I, paras. 143, 153, 162, *supra* note 378.

lying act of persecution,⁴¹⁷ the prosecution must prove that the acts were done with the specific intent to discriminate on one or more of the listed grounds, that is race, religion or politics.⁴¹⁸

Persecution is the only crime against humanity in the ICTY Statute to require a discriminatory intent.⁴¹⁹ As discussed above, much of the impetus for the recognition of crimes against humanity as a distinct category of international crime can be historically traced to concerns to repress and punish persecutory conduct. To this extent, early proposed definitions of crimes against humanity were effectively a definition of persecutory conduct.⁴²⁰ However, in the final text of the IMT Charter – and subsequent post-war legal instruments – discrimination was only required for “persecution-type” crimes against humanity, but not for “murder-type” crimes against humanity.⁴²¹

⁴¹⁷ At the ICTY and ICTR, this includes both direct and indirect intent (awareness of a high degree/substantial likelihood of risk that the crime will occur). See, for example, *Krajišnik* case, Trial Judgment, para. 782, *supra* note 301, in relation to destruction of cultural property as an underlying act of persecution; and *Šainović* case, Trial Judgment, vol. I. para. 206, see *supra* note 378, in relation to wanton destruction or damage to religious sites and cultural monuments as an underlying acts of persecution.

⁴¹⁸ *Kordić and Čerkez* case, Trial Judgment, para. 212, see *supra* note 283; *Blaškić* case, Trial Judgment, para. 235, see *supra* note 291. ICTY and ICTR cases also recognise ethnic grounds. The crime of genocide also requires a *dolus specialis*, namely an intent to destroy a national, racial, ethnical or religious group, as such. While in both cases the perpetrator singles out the victim because of their membership (or perceived membership) of a particular group, in the case of persecution the perpetrator does not necessarily seek to destroy the group as such. However, what starts as persecution may evolve into genocide.

⁴¹⁹ However, at the ICTY some crimes against humanity can be carried out on a discriminatory basis. For example, one of the prohibited purposes of torture as a crime against humanity under customary international law may be an intention to discriminate against the victim on any grounds. However discrimination is not always required to prove torture under customary international law; torture may also be carried out to obtain information, to intimidate or to punish: see *Kunarac* case, Appeal Judgment, paras. 142, 144, *supra* note 366; ICTY, *Prosecutor v. Anto Furundžija*, Trial Judgment, IT-95-17/1-T, 21 July 2000, para. 162 (<https://www.legal-tools.org/doc/e6081b/>). Note that the ICC’s definition of torture as a crime against humanity did not include the requirement that torture be carried out for a prohibited purpose, but kept this requirement for torture as a war crime. Compare ICC Statute, Article 7(2)(e) (torture as a crime against humanity) with Article 8(2)(a)(ii)-1 and Article 8(2)(c)(i)-4 (torture as a war crime in international and non-international armed conflicts), see *supra* note 371.

⁴²⁰ See *supra* section 12.2.2.1 and section 12.2.2.2.

⁴²¹ See *supra* section 12.2.2.2.

Notably, however, at the ICTR the distinction between persecution and other crimes against humanity is somewhat less clear. Under the ICTR Statute discriminatory intent forms part of the *chapeau* requirements of the attack directed against the civilian population that must be established for *all* crimes against humanity. Specifically, Article 3 of the Statute provides that the enumerated crimes must have been part of a widespread or systematic attack against a civilian population on national, political, ethnic, racial or religious grounds. It should be noted that, at the ICTR, the discriminatory aspect refers only to the attack as a whole and that each of the crimes against humanity – except for persecution – need not have been undertaken with discriminatory intent.

Discriminatory intent exists when a person targets someone on the basis of his or her membership (or believed membership) in a specific group. As explained by the *Naletilić* Trial Chamber, “a discriminatory basis exists where a person is targeted on the basis of religious, political or racial considerations, i.e. for his or her membership in a certain victim group that is targeted by the perpetrator group”.⁴²² The *Simić* Trial Chamber further explained, “the victimised persons [...] [are] specifically selected or discriminated on political, racial or religious grounds”.⁴²³

12.3.2.2.1. The Meaning of Specific Intent to Discriminate

In contrast to the Nuremberg Judgment and cases decided under CCL No. 10,⁴²⁴ ICTY and ICTR cases have examined the *mens rea* element for persecution in detail. In *Krnojelac*, the Trial Chamber described the intent for persecution as carrying out the persecutory act deliberately “with the intention to discriminate on one of the listed grounds, specifically race, religion or politics”.⁴²⁵ Such intent has been characterised as “discriminatory intent” in the jurisprudence,⁴²⁶ the *Stakić* Trial Chamber has described it as a form of *dolus specialis*.⁴²⁷ Significantly, the prosecution must prove the discriminatory intent for each of the acts or omissions underlying the

⁴²² Naletilić and Martinović case, Trial Judgment, para. 636, see *supra* note 283.

⁴²³ Simić case, Trial Judgment, para. 50, see *supra* note 293.

⁴²⁴ See *supra* section 12.2.3.2.

⁴²⁵ Krnojelac case, Trial Judgment, para. 431, see *supra* note 283. See also Vasiljević case, Trial Judgment, para. 248, *supra* note 369; Naletilić and Martinović case, Trial Judgment, para. 638, *supra* note 283.

⁴²⁶ Kvočka case, Appeal Judgment, para. 346, see *supra* note 321.

⁴²⁷ Stakić case, Trial Judgment, para. 737, see *supra* note 283.

charge of persecution.⁴²⁸ In other words, the intent relates to the specific acts charged as persecution rather than the attack in general, even though the latter may also have a discriminatory aspect.⁴²⁹

The Trial Chambers in *Vasiljević* and *Simić* held that the perpetrator must intend to discriminate; it is not sufficient that he or she is aware that his or her conduct is discriminatory – the perpetrator must consciously intend to discriminate.⁴³⁰ In *Blaškić*, the Appeals Chamber held that a conviction for persecution requires proof of the specific intent to cause injury to a human being because he or she belongs to a particular community or group.⁴³¹ The Appeals Chamber also confirmed that it is not necessary to establish that the perpetrator possessed a *persecutory* intent over and above a discriminatory intent. In other words, he or she need not have formulated or implemented a particular discriminatory plan or policy such as the removal of targeted persons from society or humanity.⁴³² The *Blaškić* holding on this point is analogous to the decision of the US NMT in the *Justice* case convicting Schlegelberger for persecution. As discussed above, while Schlegelberger intended to act discriminatorily, he

⁴²⁸ Popović case, Trial Judgment, para. 969, see *supra* note 277, citing Blagojević and Jokić case, Trial Judgment, para. 584, see *supra* note 290; Simić case, Trial Judgment, para. 51, see *supra* note 293; Vasiljević case, Trial Judgment, para. 249, see *supra* note 369. See also Blaškić case, Appeal Judgment, para. 164, *supra* note 287: “the *mens rea* of the perpetrator carrying out the underlying physical acts of persecutions” requires evidence of discriminatory intent; Krnojelac case, Appeals Judgment, para. 184, *supra* note 287, stating that the prosecution must prove the “relevant acts were committed with the requisite discriminatory intent”.

⁴²⁹ Krnojelac case, Trial Judgment, para. 436, see *supra* note 283.

⁴³⁰ Vasiljević case, Trial Judgment, para. 248, see *supra* note 369; Simić case, Trial Judgment, para. 51, see *supra* note 293; Lukić and Lukić case, Trial Judgment, para. 994, see *supra* note 287. In Krnojelac case, Trial Judgment, para. 435, see *supra* note 283, the Trial Chamber stated: “while the intent to discriminate need not be the primary intent with respect to the act, it must be a significant one”. See also Kvočka case, Trial Judgment, paras. 194–98, see *supra* note 290.

⁴³¹ Blaškić case, Appeal Judgment, para. 165, see *supra* note 287; Kupreškić case, Trial Judgment, para. 607, see *supra* note 2; Semanza case, Trial Judgment, para. 350, see *supra* note 273; Nahimana case, Trial Judgment, para. 1071, see *supra* note 273.

⁴³² Blaškić case, Appeal Judgment, para. 165, see *supra* note 287. See also Kupreškić case, Trial Judgment, paras. 610–14, *supra* note 2; Vasiljević case, Trial Judgment, para. 248, *supra* note 369; Krnojelac case, Trial Judgment, para. 435, *supra* note 283; Stakić case, Trial Judgment, para. 739, *supra* note 283; Simić case, Trial Judgment, para. 51, *supra* note 293; Lukić and Lukić case, Trial Judgment, para. 994, *supra* note 287; Stanišić and Župljanin case, Trial Judgment, para. 69, see *supra* note 277.

did so based on non-discriminatory motives, that is, for professional advancement.⁴³³

ICTY and ICTR cases have clarified that personal motives such as settling old scores or seeking personal gain do not necessarily exclude discriminatory intent.⁴³⁴ So long as the discriminatory intent is established, crimes against humanity can be committed for purely personal reasons. The Appeals Chamber in *Dorđević* has highlighted this point in relation to rape and sexual violence crimes charged as persecution:

[P]ersonal motive does not preclude a perpetrator from also having the requisite specific intent. The Appeals Chamber emphasizes that the same applies to sexual crimes, which [...] must not be treated differently from other violent acts simply because of their sexual component.⁴³⁵

There are obvious similarities between the crimes of persecution and genocide, their respective *mens rea* standards being one. As the ICTY Trial Chamber observed, “when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide”.⁴³⁶ Likewise the Trial Chamber in *Tolimir* noted that the crime of persecution as a crime against humanity belongs to the same *genus* as the crime of genocide, as both encompass targeting of persons belonging to a particular group. However, it distinguished the *mens rea* for persecutions from that required for genocide on the basis the former is not accompanied by the intention to destroy the targeted group.⁴³⁷

In *Duch*, the ECCC Supreme Court Chamber upheld the Trial Chamber’s definition of the *mens rea* of persecution as requiring the deliberate perpetration of an act or omission with the specific intent to per-

⁴³³ See *supra* section 12.2.3.2.

⁴³⁴ Kvočka case, Appeal Judgment, para. 463, see *supra* note 321.

⁴³⁵ ICTY, *Prosecutor v. Vlastimir Dorđević*, Appeal Judgment, IT-05-87/1-A, 27 January 2014, para. 887 (‘Dorđević case’) (<https://www.legal-tools.org/doc/e6fa92/>), citing Kvočka case, Appeal Judgment, para. 370, see *supra* note 321: the Appeals Chamber determined that the Trial Chamber reasonably held that Radić acted with the required discriminatory intent when he committed rape and sexual violence against the non-Serb women notwithstanding his personal motives for committing these acts; and Kunarac case, Appeal Judgment, para. 153, see *supra* note 366: the Appeals Chamber held that even if a perpetrator’s motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture.

⁴³⁶ Kupreškić case, Trial Judgment, para. 636, see *supra* note 2.

⁴³⁷ Tolimir case, Trial Judgment, para. 849, see *supra* note 277.

secute on racial, religious or political grounds, finding that this was supported by post-Second World War jurisprudence.⁴³⁸ It upheld the Trial Chamber's conclusion that the accused "shared the intent motivating the CPK policy to eliminate all political enemies as identified by the Party Centre, and to imprison, torture, execute or otherwise mistreat S-21 detainees on political grounds".⁴³⁹ In conformity with the *Blaškić* Appeals Judgment, the Supreme Court Chamber held that whether the accused "internalised the goals of the CPK behind the persecution policy or only wanted to prove himself as a loyal and efficient member of the Party" was immaterial to the finding that he possessed the requisite intent.⁴⁴⁰ This conclusion is, again, consistent with US NMT's conclusions in the *Justice* case regarding Schlengberger.⁴⁴¹

12.3.2.2.2. Proving Discriminatory Intent

The main issue relating to the *mens rea* element for persecution concerns its proof. While in some cases direct evidence may prove an accused's *mens rea* – for example, an accused's derogatory statements⁴⁴² – in most cases discriminatory intent is inferred from the surrounding circumstances. In early cases such as *Tadić*, *Kvočka* and *Krstić*, the Trial Chambers were quite liberal in inferring discriminatory intent from the surrounding context of the attack in which the acts were committed.⁴⁴³

However, in *Krnojelac* the Trial Chamber rejected the notion that it is sufficient to look at the attack to prove that each individual act charged amounts to persecution. Instead the Chamber required evidence of the discriminatory nature of each persecutory act, from which it could infer discriminatory intent.⁴⁴⁴ The *Vasiljević* Trial Chamber followed suit,

⁴³⁸ Duch case, Appeal Judgment, paras. 236, 240, see *supra* note 126, confirming the Duch Trial Judgment, para. 380, see *supra* note 405. See, for example, *supra* section 12.2.3.2.

⁴³⁹ Duch case, Appeal Judgment, para. 240, see *supra* note 126, quoting the Duch Trial Judgment, para. 392, see *supra* note 405.

⁴⁴⁰ Duch case, Appeal Judgment, para. 240, see *supra* note 126, confirming the Duch Trial Judgment, para. 396, see *supra* note 405.

⁴⁴¹ See *supra* section 12.2.3.2.

⁴⁴² Brđanin case, Trial Judgment, para. 1001, see *supra* note 290; Lukić and Lukić case, Trial Judgment, para. 1025, see *supra* note 287.

⁴⁴³ Tadić case, Trial Judgment, para. 652, see *supra* note 113; Krstić case, Trial Judgment, paras. 536–38, see *supra* note 290; Kvočka case, Trial Judgment, para. 195, see *supra* note 290; Military I case, Trial Judgment, para. 2208, see *supra* note 379.

⁴⁴⁴ Krnojelac case, Trial Judgment, para. 436, see *supra* note 283.

agreeing that it was not sufficient to infer specific intent for acts carried out within a discriminatory attack from the attack alone:

This approach may lead to the correct conclusion with respect to most of the acts carried out within the context of a discriminatory attack, but there may be acts committed within the context that were committed either on discriminatory grounds not listed in the Statute, or for purely personal reasons. Accordingly, this approach does not necessarily allow for an accurate inference regarding intent to be drawn with respect to all acts that occur within that context.⁴⁴⁵

Notably, the approach initially adopted in *Tadić*, *Kvočka* and *Krstić* had the potential for over-inclusiveness, as it may treat all acts within a discriminatory context as persecutory. In contrast, however, the approach subsequently adopted in *Krnjelac* and *Vasiljević* was potentially too narrow, and could result in excluding acts for lack of direct evidence even though they took place within an overall discriminatory context.

In *Stakić*, the Trial Chamber tried to resolve the two approaches by focusing on the role of the accused within the context of the attack. The Chamber noted that in *Krnjelac* and *Vasiljević* the accused were closely related to the commission of the crimes: the former, as the warden of the prison where the persecutory acts of torture and beatings had occurred, and the latter, as a direct participant in the underlying acts. The *Stakić* Trial Chamber agreed that in such cases, proof would be required to establish that the direct perpetrator acted with discriminatory intent in relation to the specific act.⁴⁴⁶ However, where, as in *Stakić*, the accused was in the position of a superior:

[T]o require proof of the discriminatory intent of both the accused and the acting individuals in relation to all the single acts committed would lead to an unjustifiable protection of superiors [...] [Accordingly,] proof of a discriminatory attack against a civilian population is a sufficient basis to infer the discriminatory intent of an accused for the acts carried out as part of the attack in which he participated as a (co-) perpetrator.⁴⁴⁷

Indeed, in cases of indirect perpetration, the *Stakić* Trial Chamber opined, there was no need to prove that the direct perpetrator acted with a

⁴⁴⁵ Vasiljević case, Trial Judgment, para. 249, see *supra* note 369.

⁴⁴⁶ Stakić case, Trial Judgment, para. 741, see *supra* note 283.

⁴⁴⁷ *Ibid.*, para. 742.

discriminatory intent; all that had to be proven was that there was a discriminatory attack against the non-Serb population.⁴⁴⁸

The *Krnojelac* Appeals Judgment provided a sounder (and safer) approach to inferring discriminatory intent from a surrounding attack:

The Appeals Chamber may not hold that the discriminatory nature of the beatings can be inferred directly from the general discriminatory nature of an attack characterized as a crime against humanity. [...] Even so, the Appeals Chamber takes the view that discriminatory intent may be inferred from such a context as long as, in view of the facts of the case, circumstances surrounding the commission of the alleged acts substantiate the existence of such intent. Circumstances which may be taken into consideration include the operation of the prison (in particular the systematic nature of the crimes committed against a racial or religious group) and the general attitude of the offence's alleged perpetrator as seen through his behaviour.⁴⁴⁹

In *Krnojelac*, the Appeals Chamber inferred the accused's discriminatory intent from the Trial Chamber's finding that "the detention of the non-Serbs in the KP Dom [prison], and the acts and omissions which took place therein, were clearly related to the widespread and systematic attack against the non-Serb civilian population in the Foca municipality".⁴⁵⁰ Further, it found that the only reasonable conclusion was that the beatings and acts of forced labour were inflicted upon the non-Serb detainees because of their political or religious affiliations and were therefore committed with the requisite discriminatory intent.⁴⁵¹

The *Blaškić* and *Kordić* Appeal Judgments both subsequently adopted this approach. They agreed that discriminatory intent cannot automatically be inferred from the general discriminatory nature of the surrounding attack,⁴⁵² but that such a context *may* provide evidence of the discriminatory intent of an accused.⁴⁵³ Discriminatory intent may only be

⁴⁴⁸ *Ibid.*, para. 746.

⁴⁴⁹ *Krnojelac* case, Appeal Judgment, para. 184, see *supra* note 287. See also *Tolimir* case, Trial Judgment, para. 850, *supra* note 277.

⁴⁵⁰ *Ibid.*, *Krnojelac* case, Appeal Judgment, para. 186.

⁴⁵¹ *Ibid.*, paras. 186 and 202.

⁴⁵² *Ibid.*, para. 110; *Blaškić* case, Appeal Judgment, para. 164, see *supra* note 287. See also *Brđanin* case, Trial Judgment, para. 997, *supra* note 290.

⁴⁵³ *Krnojelac* case, Appeal Judgment, para. 184, see *supra* note 287.

inferred from the context if the circumstances surrounding the commission of the alleged acts substantiate the existence of such intent.⁴⁵⁴ The systematic nature of the crimes committed against a particular racial or religious group, and the perpetrator's general attitude as demonstrated by his or her behaviour, may also be considered.⁴⁵⁵

The need to take a cumulative approach to the evidence becomes particularly evident when considering rape and sexual violence as the underlying acts of persecution. The Trial Chambers in *Dorđević* and *Šainović* failed to find that acts of rape and sexual violence committed by Serb perpetrators against Kosovar Albanian women and girls amounted to persecution.⁴⁵⁶ While the respective Trial Chambers had found that killings, forcible transfer of civilians and property crimes committed in the course of the forcible expulsion of Kosovar Albanians from Kosovo were done on a discriminatory basis, they failed to infer that the rapes and acts of sexual violence committed were persecutory from the surrounding circumstances. On appeal, the Appeals Chamber in *Šainović* overturned the Trial Chamber's finding. The Appeals Chamber, relying on *Blaškić* and *Krnojelac*, found that the Trial Chamber had failed to draw the proper inferences from the context and circumstances surrounding the commission of the crimes.⁴⁵⁷ It found that the only reasonable inference to be drawn from the totality of the evidence was that the rapes were committed with discriminatory intent, and amounted to persecution.⁴⁵⁸

Similarly in *Dorđević*, the Appeals Chamber found that the Trial Chamber had failed to properly evaluate the circumstances surrounding the sexual assault of Kosovar Albanian women and the broader context in which the crimes had occurred. Specifically, it held that the Trial Cham-

⁴⁵⁴ *Ibid.*, para.110.

⁴⁵⁵ Kvočka case, Appeal Judgment, para. 460, see *supra* note 321.

⁴⁵⁶ Šainović case, Trial Judgment, vol. 2, para. 1245, see *supra* note 378; ICTY, *Prosecutor v. Vlastimir Dorđević*, Trial Judgment, IT-05-87/1-T, 23 February 2011, paras. 1796–97 ('Dorđević case') (<https://www.legal-tools.org/doc/653651/>).

⁴⁵⁷ ICTY, *Prosecutor v. Šainović et al.*, Appeal Judgment, IT-05-89-A, 23 January 2014, paras. 579–80 ('Šainović case') (<https://www.legal-tools.org/doc/81ac8c/>).

⁴⁵⁸ *Ibid.*, paras. 584, 586, 591, 593, 595, 597, 599. The Appeals Chamber also found that persecution through sexual assaults was foreseeable to the three accused and that they willingly accepted the risk, and thus by their participation in a joint criminal enterprise were responsible for committing persecution based on rapes and sexual assaults: at paras. 1581, 1582, 1591, 1592, 1602. However, in the circumstances of the case, the Appeals Chamber declined to enter new convictions against the accused on appeal in relation to the rapes and sexual assaults as persecution: para. 1604.

ber had failed to properly consider that the relevant acts had taken place in the course of the forced displacement of the Kosovar Albanian population by Serbian forces pursuant to a joint criminal enterprise, which had been implemented by a systematic campaign of terror and violence aimed at forcing the Kosovar Albanians to leave Kosovo.⁴⁵⁹ The Appeals Chamber examined the surrounding context, in particular the fact that the crimes of rape and sexual assault had occurred while the victims were, on discriminatory grounds, being deported or detained prior to deportation. On this basis the Appeals Chamber concluded that such crimes were carried out with discriminatory intent and as such amounted to persecution.⁴⁶⁰

12.3.3. The Crime of Persecution in the ICC: Regression and Expansion

Article 7(1)(h) of the ICC Statute proscribes the crime of persecution as follows:

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 recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.

Article 7(2)(g) of the ICC Statute further elaborates that “persecution means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”.

Following the Rome Conference in 1998 during which the ICC Statute was drafted, a Preparatory Commission was established; it met from 1999 to 2002 to draft several important legal instruments relating to the ICC framework, including, from 1999 to 2000, the Elements of Crimes, one of the primary sources of law for the ICC. The Elements define the elements of persecution in detail as follows:

⁴⁵⁹ Đorđević case, Appeal Judgment, para. 877, see *supra* note 435.

⁴⁶⁰ *Ibid.*, paras. 886, 898, 90. Having found that the possibility that sexual assault with discriminatory intent might be committed was sufficiently substantial as to be foreseeable to Đorđević, and that he willingly took the risk when he participated in the joint criminal enterprise (‘JCE’), the Appeals Chamber (by a four to one majority) found Đorđević responsible pursuant to JCE for persecution through sexual assaults, and entered a new conviction against him on appeal: paras. 926–29.

1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights;
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such;
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognised as impermissible under international law;
4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court;
5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

As the final two elements concerning persecution are general features of all crimes against humanity (indeed features distinguishing crimes against humanity from ordinary domestic crimes), they will not be discussed in detail.⁴⁶¹ The states establishing the ICC took the *chapeau* elements for crimes against humanity a step further, adding in Article 7(2)(a) of the ICC Statute the requirement that the attack directed against a civilian population be “pursuant to or in furtherance of a State or organisation-

⁴⁶¹ Such general elements reflect the customary international law standard, articulated by the ICTY, ICTR, SCSL and ECCC, that a conviction for crimes against humanity requires establishing that all enumerated crimes – including persecution – have been committed as part of a widespread or systematic attack against a civilian population, and that the perpetrator intended or knew that his conduct was part of that attack. Tadić case, Trial Judgment, para. 648, see *supra* note 113. Only the attack, and not the accused’s individual acts, need be widespread or systematic: see Kunarac case, Appeal Judgment, para. 96, *supra* note 366, referring to ICTY, *Prosecutor v. Kunarac et al.*, Trial Judgment, IT-96-23/1-T, 22 February 2001, para. 431 (<https://www.legal-tools.org/doc/fd881d/>). Widespread denotes scale and number of victims: see ICTR, *Prosecutor v. Jean Paul Akayesu*, Trial Judgment, ICTR-96-4-T, 2 September 1998, para. 580 (<https://www.legal-tools.org/doc/b8d7bd/>). Systematic denotes “the organised nature of the acts of violence and the improbability of their random occurrence”: see Stakić case, Trial Judgment, para. 625, *supra* note 283; Kunarac case, Appeal Judgment, para. 95, *supra* note 366.

al policy to commit such attack”.⁴⁶² The inclusion of a state or organisational policy, in addition to a widespread or systematic attack against a civilian population, is similar to the standard adopted by the *Einsatzgruppen* and *Justice* cases to constrain the potentially broad category of crimes against humanity – including persecution – in lieu of a nexus to war crimes or crimes against peace.⁴⁶³

Persecution as a crime against humanity did not feature in the first few cases before the ICC – *Lubanga*, *Katanga and Ngudjolo* and *Bemba*. As a result no trial judgments have yet been rendered on the crime and the case law is rather sparse. However, this is likely to change in the future. Persecution has been charged against 13 persons in several pending cases, including two accused currently in trial (*Ruto and Sang*) and three accused committed to stand trial (*Gbagbo*, *Blé Goudé* and *Ntaganda*). The following analysis focuses on the elements of persecution as a crime against humanity at the ICC, against the backdrop of the evolution of these elements in the historical and modern courts and tribunals.

12.3.3.1. The *Actus Reus* Elements of Persecution in the ICC

12.3.3.1.1. An Attenuated Nexus Requirement and the Dropping of an Equal Gravity Requirement

Article 7(1)(h) and Element 4 of Article 7(1)(h) in the Elements of Crimes expressly require that the denial of fundamental rights occur in connection with any act underlying crimes against humanity or with any other crime within the jurisdiction of the ICC.⁴⁶⁴ To an extent, this nexus requirement

⁴⁶² ICC Statute, Article 7(2)(a), see *supra* note 371. See ICC, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, 23 January 2012, para. 163 (‘Ruto and Sang case’) (<https://www.legal-tools.org/doc/96c3c2/>).

⁴⁶³ See *supra* section 12.2.3.1.2.

⁴⁶⁴ The ‘nexus’ requirement is a purely objective one: footnote 22 to the Elements of Crimes clarifies that “no additional mental element is necessary for this element [4] other than that inherent in element 6 [the perpetrator knew that the conduct was part of or intended to be part of a widespread or systematic attack directed against a civilian population]”. Accordingly, the perpetrator need only know of the overall context of the attack directed against the civilian population in which he carried out his (persecutory) acts or omissions. He or she need not also have to be aware of any specific ‘connected’ acts. For a similar reading of the nexus requirement, see Ambos and Wirth, 2002, pp. 72–74, *supra* note 303. See also Georg Witschel and Wiebke Rückert, “Article 7(1)(h) – Crime against Humanity of Perse-

reflects a version of the requirement contained in the IMT and IMTFE Charters and insisted upon in various CCL No. 10 judgments, such as *Flick*, *Pohl* and the *Ministries*. As noted above, however, such a nexus was neither required by the express terms of CCL No. 10, and was explicitly rejected in two cases decided under CCL law No. 10, namely the *Einsatzgruppen* and *Justice* cases. In contemporary jurisprudence, the ICJ, ICTY, ICTR and ECCC have dismissed the need for a nexus requirement.⁴⁶⁵

However, the ICC Statute nexus requirement differs in two significant ways from the Nuremberg variant. First, while in the IMT Charter and Judgment and some CCL No. 10 cases *all* crimes against humanity had a nexus requirement, under the ICC Statute the requirement only applies to the crime of persecution. In addition, while in these historical instruments and cases the nexus was essentially one to war – by way of a connection to war crime or crimes against peace – in the ICC the nexus also extends to any act underlying the enumerated crimes against humanity and genocide, in addition to war crimes, and potentially the crime of aggression.

Effectively, such requirements render unnecessary any requirement for ‘equal gravity’ with other acts amounting to crimes against humanity or other crimes within the ICC Statute. First, the persecutory conduct must occur in connection with acts amounting to another crime against humanity, war crime or act of genocide within the Court’s jurisdiction. And further, since persecution is a crime against humanity, the persecutory conduct must have occurred as part of a widespread or systematic attack against a civilian population committed pursuant to or in furtherance of a state or organisational policy.⁴⁶⁶ In other words, the ICC’s definition

cution”, in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Ardsley: Transnational Publishers, 2001, p. 97.

⁴⁶⁵ See *supra* section 12.2.3.1.2., discussing the treatment of the nexus requirement in the Second World War jurisprudence, and section 12.3.2.1.2., discussing the treatment of the nexus requirement in contemporary jurisprudence.

⁴⁶⁶ Paragraph 2 to the Introduction to Crimes against Humanity in the Elements of Crimes provides:

The last two elements for each crime against humanity describe the context in which the conduct must take place. These elements clarify the requisite participation in and knowledge of a widespread or systematic attacks against a civilian population. However, the last elements should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organisation.

of persecution represents an amalgam of *all* the cabining requirements articulated in the post-Second World War instruments and cases save for a rigid nexus to war.

The adoption of a nexus requirement can be attributed to the concern expressed by some delegations to the Rome Conference that the term ‘persecution’ was too vague and elastic and in need of additional limitations.⁴⁶⁷ Several countries were concerned that any discriminatory practices could be labelled ‘persecution’ and prosecuted by the Court. The inclusion of a requirement of a nexus to other acts in Article 7 or other crimes in the ICC Statute was intended to ensure that criminal conduct properly classified was captured by the definition.⁴⁶⁸ For concerned states, the nexus requirement was a way to restrict the ICC from intervening into certain laws, policies or practices that could potentially be labelled discriminatory, but which did not occur in the context of war crimes or crimes against humanity. Parallels can be seen between such discussions and those that took place in the discussions and drafting of the IMT Charter.⁴⁶⁹

Due to the inclusion of the nexus requirement, the crime of persecution at the ICC could arguably be seen as an ‘ancillary’ crime, whereas at the ICTY and ICTR it is very much a separate and distinct crime in its own right. However, as Robert Cryer *et al.* observe, “the requirement should not pose a significant obstacle for legitimate prosecutions of persecution, since it is satisfied by a linkage to even one other recognised act (a killing or other inhumane act), which one would expect to find in a situation warranting international prosecution”.⁴⁷⁰ Herman von Hebel and Darryl Robinson, two delegates heavily involved in the negotiations on crimes against humanity, note that the act connected to the persecution need not have been committed as part of a widespread or systematic attack and conclude that “the possibility of connection to any inhumane act

⁴⁶⁷ Robinson, 1999, p. 54, see *supra* note 16. See also Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmschurst, *An Introduction to International Criminal Law and Procedure*, 2nd ed., Cambridge University Press, Cambridge, 2010, p. 260.

⁴⁶⁸ See Witschel and Rückert, 2001, p. 95, see *supra* note 264.

⁴⁶⁹ See *supra* section 12.2.3.1.2.

⁴⁷⁰ Cryer *et al.*, 2010, p. 260, see *supra* note 467.

ensures that persecution will not be a mere auxiliary offence or aggravating factor”.⁴⁷¹

In a similar vein, Kai Ambos and Steffen Wirth note that

the persecutory conduct must only be connected to a (single) murder and not to a murder which is part of a widespread or systematic attack consisting of other enumerated inhumane acts [...]. In other words, the multiplicity of grave human rights violations (which are not, as such, enumerated among the inhumane acts), e.g. severe attacks on personal property, can be transformed into the crime of persecution by a single connected murder.⁴⁷²

They argue that if a murder is committed with discriminatory intent, that persecutory murder need not be connected to another murder or crime since the connection requirement would be met by the identity of the persecutory act (murder) and the connected act (murder).⁴⁷³

12.3.3.1.2. The Fundamental Rights Protected and the Standard to Assess their Deprivation

Similar to the definition under customary international law, the crime of persecution at the ICC requires an intentional and severe deprivation of fundamental rights (akin to the “gross and blatant denial of fundamental rights” standard required by the ICTY and ICTR).

What is the meaning of “fundamental rights” in Article 7(2)(g) of the ICC Statute? The lack of definition in the Statute led to much debate in the Preparatory Commission negotiations on the Elements of Crimes. Some delegates wanted to ensure that persons would not be held criminally liable at the ICC for failing to observe values or norms recognised in some states but not others. They wanted to clarify the term, stating “such fundamental rights should be those which are recognised and accepted on a universal level, that is to say, those rules applicable *vis-à-vis* the State, either because they constitute international custom as a source of international law or because the State has accepted them through its conventional

⁴⁷¹ Herman von Hebel and Darryl Robinson, “Crimes within the Jurisdiction of the Court”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, Kluwer Law International, The Hague, 1999, pp. 101–2.

⁴⁷² Ambos and Wirth, 2002, pp. 71–72, see *supra* note 303.

⁴⁷³ *Ibid.*, p. 72.

obligations”.⁴⁷⁴ After much debate, delegations agreed, however, to include a reference to “universally recognised as impermissible under international law” only in relation to any new grounds of persecution not enumerated in Article 7(1)(h), but not specifically in relation to the concept of fundamental rights in Element 1 of Article 7(1)(h). The concept of universal recognition was also incorporated into the first paragraph of the Elements of Crimes’ Introduction to Crimes against Humanity – but not as a specific requirement for persecution.⁴⁷⁵

As for the standard to be applied when assessing the deprivation of fundamental rights, Machteld Boot has proposed, in line with case law from the *ad hoc* tribunals, that the word “severe” should not be interpreted to refer to the character of an act of persecution as such, but rather to the character of the deprivation of rights.⁴⁷⁶ Element 1 of Article 7(1)(h) of the Elements of Crimes and Article 7(2)(g) of the ICC Statute further requires that such severe deprivation of fundamental rights be “contrary to international law”. The debate at the Preparatory Commission on whether to include this phrase was resolved by adding footnote 21 to Element 1, stating that “this requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes”. The latter provides that “the requirement of ‘unlawfulness’ found in the Statute or in other parts

⁴⁷⁴ Summary of Statements made in Plenary in Connection with the Adoption of the Report of the Working Group on the Rules of Procedure and Evidence and the Report of the Working Group on Elements of Crime, Preparatory Commission document PCNICC/2000/INF/4, 13 July 2000, p. 3.

⁴⁷⁵ See Preparatory Commission document PCNICC/2000/L.1/Rev.1/Add.2. Paragraph 1 of the Introduction to Crimes against Humanity provides:

Since article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.

⁴⁷⁶ Machteld Boot, “Genocide, Crimes against Humanity, War Crimes, Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court”, in *School of Human Rights Research Series*, 2002, vol. 12, p. 519, referring to Krstić case, Trial Judgment, para. 535, see *supra* note 290 and Kupreškić case, Trial Judgment, para. 622, see *supra* note 2.

of international law, in particular international humanitarian law, is generally not specified in the Elements of Crimes”.⁴⁷⁷

The ICC will need to determine which rights are “fundamental” – and thereby protected by the crime of persecution – on a case-by-case basis. In addition to those recognised by the *ad hoc* tribunals,⁴⁷⁸ fundamental rights could also potentially include the right to have or choose a religion; the right to adequate food, housing and health; and the right to obtain education. The Court may gain inspiration from instruments such as the 1948 Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights among others.⁴⁷⁹

To date the prosecution’s charging of persecution at the ICC has been based on acts that are arguably more ‘traditional’ violations of fundamental rights, namely, the right to life, the right to physical and mental integrity, the right to remain in one’s own home and community and the right to property (manifest as acts of murder, deportation and forcible transfer, rape and sexual violence, inhumane acts, destruction or pillaging of property) and which are also in and of themselves criminal under the ICC Statute. This appears to reflect an effort to (uncontroversially) meet both the nexus requirement and the requirement that the deprivation of the fundamental rights be severe. For example, in the case of *Ruto and Sang*, presently in trial, charges were confirmed against the present Deputy President of Kenya and a radio broadcaster for persecution against persons perceived to be supporters of the Party of National Unity (‘PNU’), a political party.⁴⁸⁰ The persecution alleged is based on killing and forcibly displacing PNU supporters in several locations in Kenya during the post-election violence in 2007–2008.

Charges of persecution were also brought in the *Kenya Situation* against Uhuru Kenyatta, Francis Muthaura and Mohammed Ali, based on murder, rape and other forms of sexual violence, other inhumane acts and deportation or forced transfer. While charges against Ali (including persecution) were dismissed, charges (including persecution) against Muthaura, a senior member of government, and Kenyatta, the current President of

⁴⁷⁷ Witschel and Rückert, 2001, p. 96, see *supra* note 264.

⁴⁷⁸ See *supra* section 12.3.2.1.

⁴⁷⁹ See *supra* section 12.2.4.2.

⁴⁸⁰ *Ruto and Sang* case, Decision on the Confirmation of Charges, paras. 271–74, 347, see *supra* note 462.

Kenya, were confirmed.⁴⁸¹ The Pre-Trial Chamber found substantial grounds to believe that intentional and discriminatory targeting of civilians based on political grounds had occurred, the victims having been targeted by reason of their identity as perceived Orange Democratic Movement supporters.⁴⁸²

Charges including persecution were confirmed against the former President of Côte d'Ivoire, Laurent Gbagbo, in June 2014.⁴⁸³ In the *Gbagbo* Confirmation Decision, the Pre-Trial Chamber confirmed charges for persecution based on killings, rapes and injuries inflicted by pro-Gbagbo forces in several incidents in and around Abidjan, the victims having been targeted by reason of their identity as perceived political supporters of the then leader of the opposition (and now President) Alassane Ouattara.⁴⁸⁴ The former Minister for Youth, Charles Blé Goudé, has likewise been committed for trial on persecution charges,⁴⁸⁵ and an arrest warrant containing persecution charges is presently outstanding against Simone Gbagbo, Laurent Gbagbo's wife, and member of his inner circle.⁴⁸⁶ In all three cases, the alleged underlying acts of persecution are murder, rape and other acts of sexual violence and inhumane acts, with the victims allegedly being discriminated against on political grounds.

In *Ntaganda*, persecution charges (among others) have been confirmed against the accused.⁴⁸⁷ These persecution charges are based on the

⁴⁸¹ ICC, *Prosecutor v. Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, 23 January 2012 (<https://www.legal-tools.org/doc/4972c0/>).

⁴⁸² *Ibid.*, paras. 281–83, 416. Following recantation of witnesses' evidence, the prosecution dropped its case against Muthaura. In 2014, following further recantation by witnesses and a lack of co-operation by Kenya, the prosecution withdrew the charges against Kenyatta.

⁴⁸³ ICC, *Prosecutor v. Laurent Gbagbo*, Decision on the Confirmation of Charges against Laurent Gbagbo, ICC-02/11-01/11-656-Red, 12 June 2014 ('Gbagbo case') (<https://www.legal-tools.org/doc/5b41bc/>).

⁴⁸⁴ *Ibid.*, paras. 204–6.

⁴⁸⁵ ICC, *Prosecutor v. Charles Blé Goudé*, Decision on the confirmation of charges against Charles Blé Goudé, ICC-02/11-02/11-186, 11 December 2014, paras. 122–23 (<https://www.legal-tools.org/doc/0536d5/>).

⁴⁸⁶ ICC, *Prosecutor v. Simone Gbagbo*, Warrant of Arrest for Simone Gbagbo, ICC-02/11-02-01/12, 29 February 2012 (<https://www.legal-tools.org/doc/1ac0b4/>).

⁴⁸⁷ ICC, *Prosecutor v. Bosco Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06, 9 June 2014, paras. 36, 97, 142, 146, 156, 159, 165 (<https://www.legal-tools.org/doc/a9897d/>).

underlying crimes of murder, attempted murder, attacks on civilians, rape, sexual slavery, forcible transfer, attacking protected objects, pillaging and destroying enemy property which occurred during two attacks perpetrated on ethnic grounds against the non-Hema population in towns and villages in Ituri in 2002–2003. In its Confirmation Decision, the Chamber considered that all of the charged acts constituted severe deprivation of fundamental rights, namely, the right to life, the right not to be subjected to torture or cruel, inhumane or degrading treatment and the right to private property.⁴⁸⁸

In *Mbarushimana*, arising from the Situation in the Democratic Republic of the Congo, the suspect was charged with war crimes and crimes against humanity, including persecution, in the North and South Kivu regions of the country. The prosecution alleged in the document containing the charges that perpetrators targeted women and men perceived as affiliated with the Forces Armées de la République Démocratique du Congo based on their political affiliation, through torture, rape, inhumane acts and inhuman treatment.⁴⁸⁹ However, none of the charges against Mbarushimana (including those concerning persecution) were confirmed. The Pre-Trial Chamber was not satisfied that the prosecution had established a culpable link between the crimes on the ground and the suspect. Furthermore, since it was not satisfied that there was a state or organisational policy to commit an attack against the civilian population (to satisfy the *chapeau* elements of crimes against humanity), the Pre-Trial Chamber found it unnecessary to make any findings as to the underlying crimes against humanity including persecution.⁴⁹⁰

In the Situation in Libya, Saif Gaddafi and Abdullah al-Senussi have also been charged with crimes against humanity including persecution. In confirming their arrest warrants, the Pre-Trial Chamber found reasonable grounds to believe that acts of persecution based on political grounds were committed in several locations in Libya (based on the victims' political opposition, whether actual or perceived, to Muammar Gad-

⁴⁸⁸ *Ibid.*, para. 58.

⁴⁸⁹ ICC, *Prosecutor v. Callixte Mbarushimana*, Prosecution's Document Containing the Charges and List of Evidence submitted pursuant to Article 61(3) and Rule 121(3), ICC-01/04-01/10, 3 August 2011, para. 96 and count 13 (<https://www.legal-tools.org/doc/9d5b62/>).

⁴⁹⁰ ICC, *Prosecutor v. Calixte Mbarushimana*, Decision on the Confirmation of Charges, ICC-01/04-01/10-465 Red, 16 December 2011, paras. 105, 267 ('Mbarushimana case') (<https://www.legal-tools.org/doc/63028f/>).

dafi and his regime).⁴⁹¹ The alleged persecution was perpetrated through killings, inhumane acts and imprisonment.⁴⁹²

Charges of persecution have also been included in the arrest warrants currently outstanding against Ahmad Harun,⁴⁹³ Ali Kushayb⁴⁹⁴ and Abdel Hussein,⁴⁹⁵ for crimes committed in Darfur, Sudan. These persecution charges against the Sudanese Minister of State for Humanitarian Affairs, a senior Militia/Janjaweed leader, and the Sudanese Minister of Defence and former Minister of the Interior, consist primarily of acts against the Fur group in Darfur, including murder, attacks on the civilian population, destruction of property, forcible transfer, rape, outrages against personal dignity, pillaging and inhumane acts.

12.3.3.1.3. The Targets of the Crime

The potential targets of the crime of persecution under the ICC Statute are set out in Articles 7(1)(h) and 7(2)(g), which refer to persecution against any identifiable “group or collectivity”. In addition, when defining persecution in the Elements of Crimes, the drafters recognised in Element 2 that the target of the crime could be either individual members of a group or the group itself. While the terms “group” and “collectivity” appear interchangeable, when a number of groups are attacked, the sum of these groups could appropriately be referred to as a collectivity.

Element 2 requires that the reason why a person, group, or collectivity was targeted is because of the identity of the group or collectivity as such. It provides that “the perpetrator targeted such person or persons by

⁴⁹¹ ICC, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the “Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah AlSenussi”, ICC-01/11-01/11, 27 June 2011 (<https://www.legal-tools.org/doc/094165/>).

⁴⁹² Following an unsuccessful admissibility challenge, Libya has been ordered to transfer Gaddafi to the Court. In relation to al-Senussi, the Pre-Trial Chamber found that in light of ongoing criminal proceedings in Libya, the case against him is inadmissible in the ICC and has closed the case.

⁴⁹³ ICC, *Prosecutor v. Ahmad Harun*, Pre-Trial Chamber I, Warrant of Arrest for Ahmad Harun, ICC-02/05-01/07, 27 April 2007 (<https://www.legal-tools.org/doc/7276ad/>).

⁴⁹⁴ ICC, *Prosecutor v. Ali Kuyshab*, Pre-Trial Chamber I, Warrant of Arrest for Ali Kushayb, ICC-02/05-01/07, 27 April 2007 (<https://www.legal-tools.org/doc/cfa830/>).

⁴⁹⁵ ICC, *Prosecutor v. Abdel Raheem Muhammad Hussein*, Pre-Trial Chamber I, Warrant of Arrest for Abdel Raheem Muhammad Hussein, ICC-02/05-01/12, 1 March 2012 (<https://www.legal-tools.org/doc/ab0d6e/>).

reason of the identity of a group or collectivity or targeted the group or collectivity as such”.⁴⁹⁶ In future cases, the ICC will need to resolve the exact relationship between the person targeted and the group. At the Preparatory Commission, various proposals were discussed including requiring a relationship based on membership in a group, support for a group or identification with a group. As consensus could not be reached, the element was drafted to reflect Article 7(2)(g)’s wording as closely as possible, leaving future case law to address any ambiguities.⁴⁹⁷

The wording of Element 2 of Article 7(1)(h) and Article 7(2)(g) – “by reason of the identity of a group or collectivity” – may suggest that the discrimination must take place against a person who is *in fact* a member of one of the listed groups. However, it remains to be seen whether such wording will quell the type of debate at the ICC that ensued at the ICTY and ECCC as to whether a person who is targeted by a perpetrator in the mistaken belief that he or she is a member of the group can form part of the victim group of the persecutory conduct. Since the ICC allows for the possibility of attempted crimes (unlike at the *ad hoc* tribunals), such a person could in any event be considered the victim of attempted persecution.

The ICC’s jurisdiction covers a *significantly* expanded list of “discriminatory grounds” to that in the other modern international courts and tribunals and the post-Second World War tribunals. As Article 7(1)(h) and Element 3 of the Elements of Crimes provide, the targeting must be based on “political, national, ethnic, cultural, religious, gender [...] or other grounds universally recognised as impermissible under international law”. This broad list can no doubt be attributed to the rise of the international human rights movement beginning in the 1940s, which led to the drafting of several human rights treaties and conventions with expansive non-discrimination provisions such as the ICCPR.⁴⁹⁸

The inclusion of gender as a ground of persecution was a significant achievement of the Rome Conference.⁴⁹⁹ Although the prosecution has

⁴⁹⁶ Witschel and Rückert, 2001, pp. 96–97, see *supra* note 264. See also Preparatory Commission documents: PCNICC/1999/WGEC/DP.36, PCNICC/1999/WGEC/DP.39 and PCNICC/1999/DP.4/Add.1.

⁴⁹⁷ Witschel and Rückert, 2001, p. 97, see *supra* note 264.

⁴⁹⁸ See *supra* section 12.2.4.2. As discussed above this connection was made directly in the ILC Report on its 1996 Code.

⁴⁹⁹ The inclusion was not entirely new in the international arena: the UN High Commissioner for Refugees (‘UNHCR’) had approved in 1991 the idea that a person could claim refugee

not yet charged persecution on the grounds of gender,⁵⁰⁰ it has stated in its recently adopted *Policy Paper on Sexual and Gender-Based Crimes* that “[t]he crime against humanity of persecution is an important recognition within the Statute that will help confront the issue of impunity for systematic persecutions on the basis of gender or ‘other grounds’ that are universally impermissible under international law”.⁵⁰¹

One particularly contentious issue at the Rome Conference was whether “gender” could be interpreted to include sexual orientation or identity. Some delegations favoured a broad approach to the term, while others feared a broad interpretation.⁵⁰² The debate grew so heated that “gender” became the only ground of discrimination to be defined in the Statute: Article 7(3) provides 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”. Whether this definition could include persecution on the grounds of sexual orientation is something upon which opinions diverge,⁵⁰³ and may be something for the Court to decide in future cases.

status on the basis of gender persecution: See UNHCR, Guidelines on the Protection of Refugee Women, UN doc. EC/SCP/67, 1991, discussed in Valerie Oosterveld, “Gender, Persecution, and the International Criminal Court: Refugee Law’s Relevance to the Crime against Humanity of Gender-Based Persecution”, in *Duke Journal of Comparative & International Law*, 2006, vol. 17, pp. 50–56, 62–89.

⁵⁰⁰ But see ICC, *Prosecutor v. Callixte Mbarushimana*, Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana, ICC-01/04-01/10-1, 28 September 2010, p. 10 (<https://www.legal-tools.org/doc/04d4fa/>) confirming charges against the accused for, *inter alia*, the crime against humanity of persecution “by intentionally and in a discriminatory manner targeting women and men seen to be affiliated to the FARDC on the basis of their gender, through torture, rape, inhumane acts and inhuman treatment in various locations in North and South Kivu Provinces of the DRC”. The persecution charge was subsequently incorporated into the document containing the charges as persecution based on political grounds, and confirmed on that basis: see ICC, *Prosecutor v. Callixte Mbarushimana*, Prosecution’s Document Containing the Charges and List of Evidence submitted pursuant to Article 61(3) and Rule 121(3), ICC-01/04-01/10, 3 August 2011, para. 96 and count 13 (<https://www.legal-tools.org/doc/9d5b62/>), and Mbarushimana case, Decision on the Confirmation of Charges, paras. 105, 267, see *supra* note 490.

⁵⁰¹ Office of the Prosecutor of the International Criminal Court, *Policy Paper on Sexual and Gender-Based Crimes*, International Criminal Court, 2014, para. 33.

⁵⁰² For a description of the debate and its outcome, see Cate Steains, “Gender Issues”, in Lee 1999, pp. 371–75, see *supra* note 471.

⁵⁰³ Boot, 2002, p. 522, see *supra* note 476; Oosterveld, 2006, pp. 56–62, 79–81, see *supra* note 499.

Another open question is the scope of “other grounds universally recognised as impermissible under international law”. Debate at the Preparatory Commission on whether to include the phrase “universally recognised” for this element was resolved with the adoption of the phrase “universally recognised as impermissible under international law”.⁵⁰⁴ Commentators have observed that “universally recognised” should be interpreted simply as “widely recognised”, and does not require that all states in the world recognise the particular ground for it to be impermissible.⁵⁰⁵ The ICC will need to determine in future cases the exact scope of this potentially broad mandate. For example, will the crime of persecution embrace discriminatory grounds such as language, opinion, colour, social origin, property, birth, mental or physical disability, economic or age related grounds? As these grounds are included in the Universal Declaration of Human Rights, the ICCPR and the ICESCR, they could be said to be established in international law, and as such could potentially amount grounds “universally recognised as impermissible under international law”.⁵⁰⁶

12.3.3.2. The *Mens Rea* Elements of Persecution at the ICC

Article 7(1)(h) and Elements 2 and 3 of the definition of persecution in the Elements of Crimes provide that the perpetrator *targeted* persons by reason of the identity of a group or collectivity, or *targeted* the group or collectivity as such, and that such targeting *was based on* one or more of the enumerated discriminatory grounds. This wording articulates a higher standard of criminal intent, akin to *dolus specialis* or intent in the narrow sense of ‘purpose’ or ‘aim’.

Accordingly, in addition to proving the *mens rea* for the underlying offence and for the *chapeau* elements of crimes against humanity, the prosecution must prove a discriminatory intent. For example, in the *Gbagbo* Confirmation Decision the Pre-Trial Chamber found substantial grounds to believe that the accused intended the discriminatory use of violence against known or perceived supporters of his political opponent

⁵⁰⁴ See Preparatory Commission document PCNICC/2000/L.1/Rev.1/Add.2.

⁵⁰⁵ Witschel and Rückert, 2001, p. 96, see *supra* note 264. See also Machteld Boot and Christopher Keith Hall, “Persecution”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Baden-Baden, Nomos, 1999, p. 150.

⁵⁰⁶ See *supra* section 12.2.4.2.

Ouattara.⁵⁰⁷ Likewise, in the *Ntaganda* Confirmation Decision, the Pre-Trial Chamber was satisfied that the evidence showed there were substantial grounds to believe that the perpetrators carried out the crimes against the non-Hema civilian population by reason of their ethnic origin,⁵⁰⁸ and that the accused acted with discriminatory intent in relation to the two attacks.⁵⁰⁹ The discussion is rather scant, but it appears that, similar to the ICTY and ICTR case law, the Chamber was prepared to draw the necessary inferences regarding Ntaganda's discriminatory intent from the nature of the attacks.

12.4. Conclusion

Persecution could be considered the quintessential international crime on some definitions, or at the very least the quintessential crime against humanity. In the most common form of the offence, a perpetrator severely harms or encroaches upon the fundamental human rights of a person because of that person's membership, affiliation or identification with a group. The targeted person and their group may be defined by criteria that are chosen by the victim (for example, politics, religion) or criteria that are more immutable or stable (for example, race, ethnicity, gender). Whatever the grounds upon which the individual is targeted, the harm of the offence goes, in essence, to the heart of what it is to be human – that is, the combination of a person's very individuality and his or her ability to associate and identify with others; the crime of persecution simultaneously reduces a person to their identification with or membership in a group, and attacks the group itself.⁵¹⁰ The crime of persecution as a crime against humanity is really aimed at protecting these fundamental features of humankind, of 'humanness'.

While cognizant of the significance of persecution as crime against humanity, in endeavouring to define the offence, states, drafters, courts, prosecutors and defendants alike have at the same time been sensitive to locating the proper boundary between discriminatory conduct which

⁵⁰⁷ Gbagbo case, Decision on the Confirmation of Charges, para. 236, see *supra* note 483.

⁵⁰⁸ ICC, *Prosecutor v. Bosco Ntaganda*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06, 9 June 2014, para. 58 (<https://www.legal-tools.org/doc/5686c6/>).

⁵⁰⁹ *Ibid.*, para. 126.

⁵¹⁰ See Luban, 2004, pp. 116–17, see *supra* note 3.

should be a matter for domestic concern, and that which should be addressed and sanctioned by the international community as an international crime. The tension between the recognition of the importance of the values protected by persecution, and the demarcation of the domains of domestic and international concern, has been a constant theme throughout the history of this crime.

Interestingly, as the above review has shown, the search by states for an appropriate way to address the persecution of minorities by their own governments after the First World War and in the interwar years was one of the key conceptual forces that led to the birth of crimes against humanity in general. By the time the IMT Charter was concluded, crimes against humanity had expanded beyond the notion of discriminatory acts alone to include a wider set of offences than merely persecutory-type conduct. Nevertheless, the roots of crimes against humanity and those of the crime against humanity of persecution specifically remained firmly intertwined.

In the effort to establish boundaries between the national and international, drafters and judges have over time embraced a variety of threshold criteria. In the post-Second World War efforts to proscribe crimes against humanity (including persecution) as an international crime and to adjudicate individual criminal responsibility for these crimes, both the IMT and several CCL No. 10 Tribunals required that a nexus to war or war crimes be shown for both crimes against humanity generally, and persecution specifically. Eventually the *ad hoc* tribunals established in the 1990s would conclude that such a nexus was not required under customary international law for all crimes against humanity, including persecution. At the same time, the ICTY and ICTR borrowed alternative standards from the CCL No. 10 case law that had abandoned the nexus requirement for crimes against humanity, and insisted instead that the underlying acts of crimes against humanity be committed in the context of a widespread or systematic attack directed against a civilian population. Drawing from the historical precedents, the *ad hoc* tribunals also insisted that the underlying persecutory acts involve a gross or blatant denial or infringement of fundamental rights, be equally grave as the other enumerated crimes against humanity, and be done with discriminatory intent on discriminatory grounds.

The drafters of the ICC Statute further delineated the definition of persecution (and crimes against humanity in general). Not only did they follow the *chapeau* requirement for crimes against humanity of a wide-

spread or systematic attack against a civilian population, but they also required that such an attack be pursuant to a state or organisational policy. Further cabining the potentially broad scope of the crime of persecution, the drafters reintroduced an (attenuated) nexus element for the crime of persecution, requiring that the persecutory conduct be committed in connection with another act falling under the definition of crimes against humanity or another crime in the ICC Statute. In addition, the Statute's drafters included in the definition the requirement that the relevant conduct involve an intentional and severe denial or infringement of the fundamental rights of an individual based on his or her membership in a group, done with discriminatory intent. At the same time the drafters took a more expansive view of the reasons why a person or group may be targeted through the inclusion of a non-exhaustive list of discriminatory grounds. This was no doubt a reflection of the rise of human rights in general over the past century.

In the effort by states and courts to properly define crimes against humanity and persecution, these various cabining devices have been used to endeavour to capture conduct that is best labelled persecution as a crime against humanity while they have, at the same time, been used to distinguish criminal conduct of international concern from discriminatory practices perceived to be best left to the purview of the state concerned. The question of where to draw that line has not always been straightforward or without controversy. Nevertheless, as we have argued, the evolution of persecution throughout the past century – and likely its development going forward – provides insights into the evolving parameters of the domain of international criminal law itself.

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