What's in a Name? A Theory of Crimes Against Humanity

ROBERT DUBLER*

Abstract

This article considers a theory of crimes against humanity – that is, it attempts to explain the crime's core purpose. The idea offered is that a 'crime against humanity' is a course of conduct which the international community accepts is not only 'criminal', but also threatens world peace. This enlivens the right of international tribunals, such as those created by the Security Council acting under Chapter VII of the UN Charter or the ICC, to try persons irrespective of whether the defendant is a head of state or other state official, any local law or opposition from any state. To keep faith with this core rationale and to permit the crime to keep its special place, a crime against humanity should be limited to flash points of extreme violence which can be linked, either directly or by indirect encouragement, to a state or de facto power.

Introduction

Kate Reynolds MP on 5 December 2003 in respect of Australia's policy of mandatory detention of asylum seekers stated that 'Our government is engaged in a continuing crime against humanity'.[1] One may think that this is just another example of the label 'crime against humanity' being used as a rhetorical figure of speech and outside its strict or technical meaning in international law. Julian Burnside QC, barrister and refugee advocate, has argued, however, that the Australian Government's policy is *in fact* a 'crime against humanity' as defined in Article 7 of the Rome Statute of the International Criminal Court ('ICC Statute') and that the members of the Government, including former Prime Minister, John Howard, are liable to prosecution before the International Criminal Court ('ICC').[2] By parity of reasoning, President George Bush has also likely committed crimes against humanity by the United States' detention of persons at Guantánamo Bay.

---

* Dr Robert Dubler SC, Barrister, BEc LLB (*Syd*), LLM (*Cantab*), PhD (*Syd*).

1 Kate Reynolds MLC, 'News Release: Democrats – The Lone Voice for Refugees' (2003) *Australian Democrats*. <http://sa.democrats.org.au/Media/2003/1205_a%20democrats%20only%20voice%20for%20refugees.htm> accessed 21 August 2008.

2 See Margo Kingston, 'Australian Crime against Humanity' *Sydney Morning Herald* (8 July 2003).

Given the indeterminacy of the term, the label, a 'crime against humanity', has been used by commentators, but less frequently by states, to describe a vast array of different human rights abuses, including terrorist attacks, policies of assimilation and the destruction of the social safety net.[3] It appears the term can be used to describe anything which outrages us.

Part of the difficulty is that 'crimes against humanity' as defined in Article 7 (ICC Statute) contains loose concepts, such as a 'widespread or systematic attack directed against any civilian population' and a 'State or organizational policy to commit such attack'. The meaning of these terms is far from clear in international law. Whilst the *ad hoc* Tribunals created by the Security Council (the International Criminal Tribunal for the former Yugoslavia ['ICTY'] and the International Criminal Tribunal for Rwanda ['ICTR']) have recently pronounced upon the crime's meaning in the context of their own statutory definitions and factual situations, there is no authoritative case law of the ICC assigning the offence a clear technical meaning. The various statutes defining it — the Nuremberg Charter, the Tokyo Charter, Allied Control Council Law No. 10, the ICTY Statute, the ICTR Statute, the ICC Statute, the Statutes of the hybrid Tribunals of Sierra Leone, East Timor, Kosovo and Cambodia, along with the International Law Commission, all define it differently. Hence, the term's 'correct meaning' under international law remains elusive.

The concept of 'crimes against humanity' cannot be reduced just to a topic of international law. There is a yearning to uncover the essence of the idea, to state why it is that 'crimes against humanity' are important and what the concept aims to protect. There is the belief that it is something more than just the sum of the definitions in treaties, such as Article 7 of the ICC Statute. But is there some overarching theory of crimes against humanity? What is distinctive about crimes against humanity and how are they different from other kinds of evil conduct — such as ordinary domestic crimes or human rights abuses? This article considers these questions.

The first part of the article divides the history of the concept of crimes against humanity into four periods, commencing with the antiquities and ending with the definition in Article 7 of the ICC Statute. Every definition of the phrase, a 'crime against humanity', is a product of its own historical setting. Even though at Nuremberg the crime first entered positive international law in the Nuremberg Charter, the roots of the concept can be traced back over the centuries. The second part of this article examines some of the attempts to arrive at an overarching theory for this international crime.

The idea offered in this article is that the notion of a 'crime against humanity' involves two aspects. The first is the commission of one or more of the various underlying offences that collectively make up a crime against humanity. The other is a threshold requirement of an 'attack' of a certain type. This threshold requirement is best thought of as describing when, as a matter of international custom and practice, it is accepted that a purely internal 'atrocity', without more, threatens the peace, security and wellbeing of the world. It is this feature which both sets the crime apart from others and gives rise to a responsibility on the part of the international community to respond to such attacks.

3 Richard Vernon, 'What Is a Crime Against Humanity?' (2002) 10 *Journal of Political Philosophy* 231 at 249.

1. The Four Phases of the Concept of a Crime Against Humanity

The defining, though not exclusive, aspect of the concept of crimes against humanity, in its loose or non-technical sense, is the notion that certain conduct is unlawful and liable to punishment, even when committed by a state towards its own people under the colour of local law or state authority. It is suggested that this loose concept of crimes against humanity has gone through four historical phases.

A. Phase One — The Natural Law Phase

It is often stated that the notion of crimes against humanity is based upon natural law concepts. As will be explained, this is only partially correct. The tradition of natural law as superior to the written laws of any state can be traced to writers such as Aristotle (384-322 BCE) and Cicero (106-43 BCE). The doctrine remained dominant for centuries. Hugo Grotius (1585-1645), one of the founders of the law of nations, asserted that kings have the right of requiring punishment for acts beyond their borders if they 'enormously violate the laws of nature and nations'.[4]

The doctrine set some precedents for the notion of a crime against humanity in its loose sense. For example, in 390, St Ambrose (c 339–397), the Bishop of Milan, forced Emperor Theodocius to do public penance in the cathedral of Milan following the slaughter of thousands of civilians by Roman soldiers at Thessalonica. In 1474 in Breisach, Peter von Hagenbach, the town's former Governor, was accused of having 'trampled under foot the laws of God and man'[5] and was tried before a tribunal of 28 judges from allied states of the Holy Roman Empire.[6] In 1649, at the trial of Charles I in England, the Solicitor General John Cooke relied on natural law and the works of Bracton to say that a king always remains under God and the law.

Natural law notions have retained a place in international law as can be seen in the source known as 'general principles of law recognized by the community of nations' and the phrase 'criminal according the general principles of law recognized by civilized nations' in Article 15(2) of the International Covenant on Civil and Political Rights. Some scholars believe this source was the strongest foundation for crimes against humanity at Nuremberg.[7] 'General principles', as a source for crimes against humanity, featured in Justice Jackson's paper before the 1945 London Conference, which drafted the Nuremberg Charter,[8] in the Indictment at Nuremberg and in the addresses of de Menthon[9] at Nuremberg.

---

4 Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* (Whewell trans, 1925 ed) II.xx.§40.

5 See M Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (2nd rev ed, 1999) at 463.

6 See George Schwarzenberger, *International Law as Applied by International Courts and Tribunals* (1968) Vol II at 462–466.

7 Id at 23–27; Gerhard Werle, *Principles of International Criminal Law* (2005) 10; Christian Tomuschat, 'The Legacy of Nuremberg' (2006) 4 *Journal of International Criminal Justice* 830 at 834–835; Theodor Meron, 'Revival of Customary Humanitarian Law' (2005) 99 *AJIL* 817 at 830.

8 Department of State, *Report of Robert H Jackson, United States Representative to the International Conference on Military Trials: London, 1945* (1949) at 42–54.

9 *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946* (26 July 1946) Vol V at 340–1.

The difficulty with relying on this precedent on its own is working out how one distinguishes between a 'crime against humanity' and any serious domestic crime.

B. *Phase Two — The Rise of Sovereign Immunity and the Doctrine of Humanitarian Intervention*

Following revolutions in America and France in the eighteenth century, an avalanche of criticism fell upon the notion of natural rights.[10] Positivism began to dominate as legal theory over natural law. At the same time, writers on the 'law of nations' came to support the principles of territoriality, sovereign immunity and non-interference in a foreign nation's affairs. An exception developed in the case of manifest atrocities pursuant to the doctrine of humanitarian interventions. The European Powers invoked this principle in the nineteenth and early twentieth centuries, particularly in their disputes with the Ottoman Empire. For example, in 1826–7 in Greece and again in 1860 in Lebanon, the European Powers intervened in response to reports of slaughter of Christians.[11] President Theodore Roosevelt in his famous State of the Union address in 1904 said:

> ... there are occasional crimes committed on so vast a scale and of such particular horror as to make us doubt whether it is not our manifest duty to endeavour at least to show our disapproval of the deed and our sympathy with those who have suffered by it .... [I]n extreme cases action may be justifiable and proper.[12]

The link between the doctrine of humanitarian intervention and crimes against humanity was made by Sir Hartley Shawcross,[13] United States ('US') prosecutors[14] and military tribunals[15] at Nuremberg to explain the juridical foundation of crimes against humanity in international law. As Shawcross put it: 'The fact is that the right of humanitarian intervention by war is not a novelty in international law — can intervention by judicial process then be illegal?'[16]

The difficulty is that there still remains something of a leap of faith to take from such interventions evidence of an international crime. There were no international trials in the period and the doctrine of humanitarian intervention was at best a permissive rule for the use of force by Powers in a position to use such force, not any rule for trying foreign nationals as such, let alone a foreign head of state. It does, however, suggest that a crime against humanity under international law not only requires some 'universal crime' under natural law principles but an atrocity of such scale and severity that it 'shocks the

10 See, for example, Edmund Burke, *Reflections on the French Revolution* (1910) at 56; Jeremy Bentham, 'Anarchical Fallacies', in John Bowring (ed), *The Works of Jeremy Bentham* (Vol II, 1843) at 491.

11 See John Merriam, 'Kosovo and the Law of Humanitarian Intervention' (2001) 33 *Case Western Reserve Journal of International Law* 111 at 119, n44.

12 See John Bassett Moore, *A Digest of International Law* (Vol 6, 1906) at 596.

13 See *Speeches of the Chief Prosecutors at the Close of the Case Against the Individual Defendants* (HM Stationery Office, 26–27 July 1946) (Command Papers 6964).

14 See the address of Brigadier General Taylor, Chief of Counsel for the United States, *United States v Flick and others,* 6 Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No 10 (CCL 10 Trials) at 87–89.

15 See *United States v Altstötter et al* 3 (CCL 10 Trials) at 981–982.

16 *United States v Altstötter*, above n15.

conscience of humanity'. Also, to justify 'humanitarian intervention' by foreign states, the atrocity has to be attributable to either an explicit state policy or state toleration.

C. *Phase Three — The Nuremberg Definition*

During the Second World War the US representative on the United Nations War Crimes Commission ('UNWCC') suggested that the offences to be prosecuted ought to include offences called 'crimes against humanity', being those committed against any persons because of their race or religion.[17] Britain objected, claiming that 'the prosecution of [such] offenders by enemy authorities would give rise to serious difficulties of practice and principle'.[18] It is not hard to surmise that the United Kingdom ('UK') had in mind Hitler's reliance upon the doctrine of humanitarian intervention at the commencement of the Second World War when intervening in Czechoslovakia.[19] The UK feared that the concept of crimes against humanity could be misused to justify similar interventions in the future.

At the London Conference which drafted the Nuremberg Charter, Justice Jackson, the United States representative, agreed, saying:

> [O]rdinarily we do not consider that the acts of a government towards its own citizens warrant our interference. We have some regrettable circumstances at times in our country in which minorities are unfairly treated. We think 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. We see no other basis on which we are justified in reaching the atrocities which were committed inside Germany, under German law, or even in violation of German law, by authorities of the German state.[20]

The final Article 6 of the Nuremberg Charter had three defined categories of crimes: 'crimes against peace' (Article 6(a)); 'war crimes' (Article 6(b)); and 'crimes against humanity' (Article 6(c)). The last category was defined as:

> CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds *in execution of or in connection with any crime within the jurisdiction of the International Tribunal*, whether or not in violation of the domestic law of the country where perpetrated. [emphasis added]

The words underlined became known as the 'war nexus'. It would seem that the Allies did not want to establish a precedent by which some power in the future may seek to

17 United Nations War Crimes Commission, *History of The United Nations War Commission* (1948) at 175.

18 R S Clark, 'Crimes against Humanity at Nuremberg' in George Ginsburgs & VN Kudriavtsev (eds), *The Nuremberg Trial and International Law* (1990) at 180.

19 See EL Woodward & Rohan Butler (eds), *Documents on British Foreign Policy 1919–1939* (1951) Third Series, Volume IV, 1939, no 257 and 259 at 256–257.

20 *Trial of the Major War Criminals*, above n9 at 333.

hold leaders in the United States (or other states) accountable for 'crimes against humanity' committed in their own territories in times of peace unless connected with a plan of aggression. For the Allies their primary objective in having an international trial was to firmly establish a new crime, being 'crimes against peace', not an existing crime, based upon the laws of humanity or the doctrine of humanitarian intervention.[21] Hence, as evil as 'crimes against humanity' were, they could not be given too great a prominence on their own, lest they be used in the future as a pretext for aggression.

The Nuremberg Tribunal in turn held 'that revolting and horrible as many of these crimes [against humanity] were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime'.[22] Hence, only acts committed during the war (or occupation in Austria) were dealt with as crimes against humanity. For example, Streicher who was accused of 'speaking, writing, and preaching hatred of the Jews' for 25 years was convicted of crimes against humanity based only upon his wartime conduct.[23] Nevertheless, he received the death sentence and, as has been said, no matter how heinous a crime may be, you can only hang a man once.

Thus, the Nuremberg Judgment ended with a whimper so far as crimes against humanity were concerned. The impression left was that crimes against humanity were only a minor extension on war crimes.[24] This impression was not an accident. Biddle, the American judge on the Tribunal, dealt with the suggestion that the Nuremberg Judgment had reduced 'the meaning of crimes against humanity to a point where they became practically synonymous with war crimes', by saying: 'I agree. And I believe that this inelastic construction is justified by the language of the Charter and by the consideration that such a rigid interpretation is highly desirable in this stage of the development of international law'.[25]

There is a tendency to think there was some orderly linear progression in the development of the concept of crimes against humanity in the period from 1945 to 1993. Nothing could be further from the truth. In reality, prosecutions for crimes against humanity in this period after Nuremberg were limited to an ever-dwindling supply of former Nazis. There were no trials of defendants outside the context of war or even the Second World War. The definition used at Nuremberg dominated but this limited its application to times of war. Core aspects of its definition otherwise were clouded by doubts and the whole notion of an international criminal law in 1992 appeared to be falling into desuetude. Material relating to Nuremberg was being excised from standard textbooks.[26] Brownlie in 1990 said 'the likelihood of setting up an international court is very remote'.[27]

---

21 See Bassiouni, above n5 at 17.

22 International Military Tribunal (Nuremberg), Judgment and Sentences (1 October 1946) (1947) 41 *AJIL* 172 at 249.

23 Id at 294.

24 See Egon Schwelb, 'Crimes against Humanity' (1946) 23 *British Year Book of International Law* 178.

25 Francis Biddle, 'The Nürnberg Trial' (1947) 33 *Virginia Law Review* 679 at 695. See also D de Vabres, 'Le Jugement de Nuremberg et le principe de légalité des délits et des peines' (1946–47) 27 *Revue de droit pénal et de criminology* 811 at 826–827.

26 Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005) at 51.

This is not to suggest that after the Second World War the actual incidences of 'crimes against humanity', in its non-technical sense, were dwindling — far from it. There was no shortage of dictators accused of committing atrocities, but the Security Council, paralysed by Cold War politics, rarely intervened. For example, in 1971, India's Prime Minister appealed for UN intervention in response to Pakistani atrocities committed by the Army in East Pakistan (modern day Bangladesh) as 'the general and systematic nature of [the] inhuman treatment inflicted on the Bangladesh population was evidence of a crime against humanity'.[28] Such a call fell on deaf ears. A similar history was repeated in the case of Cambodia, despite atrocities of the Khmer Rouge between 1975 and 1979 being committed on a vast scale. When Vietnam intervened and toppled the regime in 1979, many members of the Security Council received this with open hostility. The General Assembly, out of alleged respect for the Charter, continued to accept the credentials of the Pol Pot delegate.[29]

As a result, far from the Nuremberg precedent ushering in a new era of international law and order, impunity and a lack of Security Council response was the result for former dictators accused of committing human rights abuses after the Second World War. This should not be seen as an accident. Some see Nuremberg as a bold step towards penetrating state sovereignty in favour of individual human rights. In reality, the requirement that crimes against humanity must be linked to war meant that such crimes after Nuremberg were no longer based upon the laws of humanity or natural law, its true antecedents, but upon the need to preserve international peace. When the General Assembly, on 11 December 1946, unanimously affirmed the Nuremberg Charter and Judgment,[30] the Nuremberg definition, with its link to international peace, became a part of the constitutional order of the new United Nations. Indeed, whilst there are references to fundamental human rights in the United Nations Charter,[31] they are not of themselves capable of overriding other express principles set out in the Charter. The Security Council under Chapter VII could only act in response to a threat to international peace, not, so it seemed, whenever a state mistreated its own nationals. This placed a break upon both Security Council intervention in the case of human rights abuses within a nation's borders and the concept of crimes against humanity in times of peace.

The Nuremberg definition of crimes against humanity and the UN Charter's support for human rights, both with their radical potential to penetrate statehood, only justify crimes against humanity and human rights respectively, as a state value, not as a human value; they override state sovereignty only when their perpetration or breach threatens the peace and security between states. Crimes against humanity are grounded in international peace and also the security of relations between states, not the right of individuals to be protected *from* states. Perhaps because we now wish to, we tend to

27 Ian Brownlie, *Principles of International Law* (4th rev ed, 1990) at 563–564.

28 Quoted in Simon Chesterman, *Just War or Just Peace?: Humanitarian Intervention and International Law* (2001) at 73.

29 Id at 79–81.

30 *Affirmation of the Principles of International Law Recognized by the Charter of The Nürnberg Tribunal*, GA Resolution 95(I) (1946).

31 *Charter of the United Nations*, arts 1, 13, 16, 55–57, 62, 68, 73 and 76.

exaggerate what Nuremberg did for the concept of crimes against humanity.[32] As Luban concludes, its legacy is at best equivocal and at worst immoral.[33]

Sadly, it took the shock of Europe experiencing a further episode of a 'crime against humanity' before the end of the century to advance matters in any meaningful way. With the former Yugoslavia disintegrating in 1991 there were reports of 'ethnic cleansing'. On 16 May 1991, Mirko Klarin captured the mood of the time when he published an article in the Belgrade newspaper *Borba* entitled 'Nuremberg Now!'[34] Two years later the Security Council finally answered the call and created the International Criminal Tribunal for the former Yugoslavia.

D. Phase Four — 1991-1998, The Modern Definition of Crimes Against Humanity

Prior to 1991, the Security Council had not unambiguously invoked its Chapter VII powers in response to purely internal atrocities.[35] The commonly regarded first step in the process of encompassing internal atrocities within the concept of 'threats to the peace' under Chapter VII occurred following the cease-fire in the Gulf War, when the Council intervened in response to attacks by Iraqi troops against Shiites and Marsh Arabs in the south and Kurdish villages in the north.[36] The President of the Council issued a statement on 31 January 1992 in which it was noted that 'non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security'.[37] In the period 1992–1993, the Security Council intervened militarily under Chapter VII in response to atrocities in Somalia, Liberia, Haiti and Angola.

Then, in response to reports of 'ethnic cleansing' in the former Yugoslavia, the Security Council on 25 May 1993 took the novel step of establishing the ICTY based upon Chapter VII.[38] Article 5 of the ICTY Statute defined crimes against humanity as follows:

> … the following crimes when committed in armed conflicts, whether international or internal in character, and directed against any civilian population:
>
> a) murder;
> b) extermination;
> c) enslavement;
> d) deportation;
> e) imprisonment;
> f) torture;
> g) rape;
> h) persecution on political, racial and religious grounds;
> i) other inhumane acts.

32 Louis Henkin, 'International law: Politics, Values and Functions' (1989–IV) 216 *Recueil des cours* 13 at 216.
33 David Luban, *Legal Modernism* (1994) at 336ff.
34 Quoted in William Schabas, *The Law of the Ad hoc Tribunals* (2006) at 13.
35 See Chesterman, above n28 at Chapter 4.
36 SC Res 688 (1991).
37 See Stefan Talmon, 'The Security Council as World Legislature' (2005) 99 *AJIL* 175 at 180–181.
38 SC Res 827 (1993).

The Article draws heavily upon Article 6(c) of the Nuremberg Charter, thereby implying that international criminal law had not progressed greatly since that time. According to Schabas, '[w]ithout much doubt, it can be stated that the drafters of the ICTY Statute believed that such a limitation [the link to armed conflict] was imposed by customary international law and that to prosecute crimes against humanity in the absence of armed conflict would violate the maxim *nullum crimen sine lege*.'[39]

Following a campaign of orchestrated violence by the Hutu militia with the support of the interim Rwandan government against the Tutsi population, on 8 November 1994, the Security Council, acting under Chapter VII of the Charter, adopted the ICTR Statute.[40] Because it was not altogether clear that there was any situation of armed conflict, Article 3 defined crimes against humanity as follows:

> The [ICTR] shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:
>
> a) murder;
> b) extermination;
> c) enslavement;
> d) deportation;
> e) imprisonment;
> f) torture;
> g) rape;
> h) persecutions on political, racial and religious grounds;
> i) other inhumane acts.

The definition is vastly different to Article 5 of the ICTY Statute. According to the Secretary-General, the Security Council elected to take a more expansive approach to the subject matter jurisdiction of the Rwanda Tribunal, regardless of whether the crimes were considered part of customary international law.[41]

Tadić in the ICTY argued that customary international law only conferred jurisdiction over crimes against humanity in connection with an international, not purely internal, armed conflict. The Appeals Chamber in 1995 held that whilst the Nuremberg Charter was affirmed by the General Assembly, 'there is no logical or legal basis for this requirement [the war nexus] and it has been abandoned in subsequent state practice'.[42] As Lord Slynn remarked in *Pinochet,* 'until *Prosecutor v Tadić,* after years of discussion and perhaps even later, there was a feeling that crimes against humanity were committed only in connection with armed conflict, even if that did not have to be international armed

39 Schabas, above n34 at 87.

40 SC Res 955 (1994).

41 *Special Report of the Secretary-General of the United Nations on the United Nations Assistance Mission for Rwanda*, UN GAOR, 49th sess, [12], UN Doc S/1994/470 (1994).

42 *Prosecutor v Tadić (Defence Motion for Interlocutory Appeal on Jurisdiction)*, Case No IT–94–1–AR72 (2 October 1995) at [140].

conflict'.[43] According to William Schabas, the *Tadić* ruling that crimes against humanity can take place during peacetime without a nexus to war or aggression 'moved the law forward dramatically'.[44]

The Trial Chamber, in its Judgment of 7 May 1997, rendered the first decision of a truly international court on the meaning of crimes against humanity. The Chamber, probably influenced by the definition in the ICTR Statute, stated:

> [T]he 'population' element is intended to imply crimes of a collective nature and thus exclude single or isolated acts . . .. Thus the emphasis is not on the individual victim but rather on the collective, the individual being victimized not because of his individual attributes but rather because of his membership of a targeted civilian population. This has been interpreted to mean, as elaborated below, that the acts must occur on a widespread or systematic basis, that there must be some form of a governmental, organisational or group policy to commit these acts and that the perpetrator must know of the context within which his actions are taken, as well as the requirement…that the actions must be taken on discriminatory grounds.[45]

From 15 June to 17 July 1998 a total of 160 states, 33 international organisations and 236 non-governmental organisations participated in the Rome Conference for the drafting of the ICC Statute. Heavily influenced by the *Tadić* decisions, Article 7 defined a crime against humanity in its 'chapeau' elements as follows:

> 1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
> 2. …
> 2. For the purpose of paragraph 1:
> (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

The Rome Conference can be regarded, as a matter of customary law, as 'crystallising' the emerging modern definition of crimes against humanity in times of peace as set out in the *Tadić* decisions. It seems that the 'rules laid down by judges have generated custom, rather than custom [which has] generated the rules'.[46] The definition in Article 7, however, removed the need for an attack on discriminatory grounds.

If one examines the central test of crimes against humanity — a 'widespread or systematic attack directed against any civilian population' — a number of criticisms of the test can be made. The requirement is subjective and vague.[47] It is largely

43 *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte*, [2000] 1 AC 61 at 81.

44 Schabas, above n34 at 23.

45 *Prosecutor v Tadić (Trial Chamber Judgment)*, Case No IT–94–1–T (7 May 1997) at [644].

46 John Chipman Gray, *The Nature and Sources of the Law* (1931) at 297.

47 Bassiouni, above n5 at 244.

indeterminate. It contains an unarticulated premise of both scale and seriousness. But against what *objective* criteria is it to be measured? The principle *nullum crimen sine lege* requires that a crime be sufficiently certain so as to be reasonably accessible and foreseeable for an accused. The 'widespread or systematic attack' requirement does not easily meet this test. There is also the problem as to what is meant by 'pursuant to or in furtherance of a State or organizational policy to commit such attack'. Also there is the recent jurisprudence of the ICTY which has held that as a matter of customary law there is no requirement for a 'policy' at all.[48] What is missing is some underlying principle or theory to guide the interpretation of these loose terms. Part Two considers the main theories about this international crime.

2. Theories of Crimes Against Humanity

A. Crimes Against Humanity and the New Doctrine of Humanitarian Intervention

The moral and legal tensions involved in the concept of crimes against humanity are best analysed by recognising that two distinct issues are involved. The first involves the commission of some 'universal crime' such as murder. The second involves the threshold requirement of an 'attack' of a certain type. The threshold exists out of deference to the concept of non-interference in the internal affairs of states. From the moment Grotius in the seventeenth century, asserted a right of foreign states to prosecute for crimes against the law of nations, objection has been made against the concept of crimes against humanity on the ground that it may lead to pretextual and unjustified interference in the affairs of other states. By the Nuremberg precedent, crimes against humanity have incredible potency. Trials are necessarily associated with both foreign intervention and the leaders of the losing state being in the dock. As de Vabres, the French judge at Nuremberg wrote: 'The theory of 'crimes against humanity' is dangerous: … dangerous for the States because it offers a pretext to intervention by a State in the internal affairs of weaker States'.[49] Hence, the Allies drafted the war nexus which linked the crime with aggression and threats to international peace and security. This retarded both the concept of crimes against humanity and the role of the Security Council.

After 1991, there was a reinterpretation of the notion of 'threats to international peace' by the Security Council so that it could encompass a purely internal atrocity. As part of this process, in 1994, the Security Council adopted the test of a 'widespread or systematic attack against any civilian population' for a crime against humanity in times of peace. Viewed in its historical context, this test was intended to describe *both* the international crime *and* the nature of the internal atrocity to which the Security Council felt compelled and entitled to respond under Chapter VII. Whilst the definition and the Security Council's intervention were controversial at the time under existing customary international law, by 1998 both were confirmed by the terms of the ICC Statute. The Preamble states that 'unimaginable atrocities that deeply shock the conscience of humanity' (being language reminiscent of the doctrine of humanitarian intervention), do

48 *Prosecutor v Kunarac (Appeals Chamber Judgment)*, Case No IT–96–23–A & IT–96–23/1–A (12 June 2002) at [98].

49 D de Vabres, above n25 at 833.

'threaten the peace, security and well-being of the world'. This was also confirmed at the World Summit of 2005 where under the 'responsibility to protect' principle (being the new term for an old doctrine) it was accepted that the Security Council under Chapter VII can intervene whenever a state is failing to protect a population from crimes against humanity. Hence, the new threshold requirement of a crime against humanity is all about describing the modern consensus for when criminal conduct within a state's borders will 'threaten the peace, security and well-being of the world', thereby enabling intervention by either the Security Council or the ICC Prosecutor. The 'widespread or systematic attack' test operates in substance, though not expressly, as a jurisdictional threshold which has to be met to permit or justify intervention in a state's affairs by these international bodies. To better understand just what this threshold means one can turn to consider some of the most popular theories of crimes against humanity.

B. Theories Based Solely on the Laws of Humanity

There are various theories about the concept of crimes against humanity which focus on there being an attack against 'humanity'. A number of competing ideas are involved which can be grouped into four schools of thought. First, there is the view that the essence of the crime is that there has been an affront to the victim's humanity, meaning that quality which we all share and which makes us human. The offence's defining feature is the value they injure, namely humaneness. It is an international crime because this universal value is attacked. De Menton, the French prosecutor at Nuremberg, supported this view, saying the offences are 'crimes against the human status'.[50] Egon Schwelb's influential early account of Nuremberg also thought humanity was likely being used as a synonym for 'humaneness'.[51] This theory is grounded in natural law notions of universal right and wrong. Apart from the obvious problem of vagueness, the core problem with this account is that it 'seems at once too weak and too undiscriminating'.[52] It would cover, for example, any and all cases of murder, rape or serious assault.

To counter the unwieldy breadth of this theory of crimes against humanity, there is a second school of thought which suggests that the essence of the offence is that the victim is selected by virtue of belonging to a 'persecuted group'. The defining feature of the offence is that the crimes take place pursuant to a policy of persecution. Hence, isolated or random acts are excluded. According to Hannah Arendt, the value which is being protected is that of human diversity, without which the very words 'mankind' or 'humanity' would be devoid of meaning.[53] An attack upon the Jews in Europe is a crime against humanity because 'mankind in its entirety' is 'grievously hurt and endangered'.[54] If left unpunished then 'no people on earth' can feel sure of their continued existence.[55] The main problem with this second theory of crimes against humanity is that it is now

50 Quoted in Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (rev ed, 1965) at 257.

51 Schwelb, above n24 at 178 and 195, though he also refers to humanity as meaning the whole of mankind.

52 Vernon, above n3 at 237.

53 Arendt, above n50 at 268–9. See Vernon, above n3 at 240 where the author addresses this view.

54 Vernon, above n3 at 262–3, 273 and 276.

55 Ibid. See also Hannah Arendt, *The Human Condition* (1958) at 1–3 and 50–1.

too discriminating and too limiting. It does not address any attack on 'humanity', but only those motivated by racial or other prejudices.

The concept of crimes against humanity has waxed and waned on the need for a discriminatory motive. Today, it is on the wane, leading to a revised version of this second school of thought. This has involved an expansion of the notion of a 'persecuted group'. According to David Luban, the crime's defining aspect is that victims are targeted by a 'political organization' based on their membership of a group or 'population' rather than any individual characteristic.[56] Here, 'population', as confirmed in the case law of the *ad hoc* Tribunals,[57] simply means *either* a group whose features mark it out for persecution *or* simply any collection of people who may inhabit some geographic area under the control of a political organisation. Therefore, 'crimes against humanity assault one particular aspect of human being, namely our character as political animals'.[58] We have a universal need to live socially, but because we cannot live without politics, we exist under the permanent threat that 'politics will turn cancerous'.[59] The essence of the offence, based on this theory, is that there is an organised or systematic attack by one 'group' on another 'group'. Luban argues that if the attack is 'directed' against such a body, rather than the personal attributes of the individuals, there is no need for a large body of victims, or indeed, more than one victim.

Luban's reasoning, however, comes across as too subtle and does not convincingly explain our instinctive reaction to the evil that accompanies a 'crime against humanity'. When rebel forces in 1999 attacked Freetown in Sierra Leone leading to the indiscriminate abduction of thousands of children so that they could become child soldiers or sex slaves,[60] it just does not capture the essence of the atrocity to say that it was an attack against 'our character as political animals'.

Luban's theory fails to explain in a convincing way why this subtle and rather peculiar crime exists. Everything hinges on the important finding that a 'population', *as such*, was the target of criminal behaviour rather than 'individuals'. How is this important distinction to be made? For example, if suspected terrorists or asylum seekers can form a 'population', then President Bush and former Prime Minister Howard are guilty of committing crimes against humanity. Consider, also, the imprisonment of a single political figure, such as Aung San Suu Kyi by the Burmese military. If directed against the whole population, this may also be a crime against humanity. Ratner and Abrams speculate that the assassination of a single political figure, such as the killing of Hungarian leader Imre Nagy in 1956 by the Soviet authorities, may have sufficed as a crime against humanity if it was intended to threaten the entire 'civilian population'.[61]

---

56 David Luban, 'A Theory of Crimes Against Humanity' (2004) 29 *Yale Journal of International Law* 85 at 103–4. This is also the view of Richard Vernon who states: 'It relates on the one hand to the necessary institutional prerequisites of an organised project, and on the other to damage suffered by individuals only by virtue of belonging to a group': Vernon, above n3 at 245.

57 See Guénaël Mettraux, 'Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals For The Former Yugoslavia and For Rwanda' (2002) 43 *Harvard International Law Journal* at 237–316.

58 David Luban, above n56 at 90.

59 Ibid.

60 See *Prosecutor v Brima, Kamara and Kanu*, Case No.SCAL–04–16–T, Judgment (20 June 2007) Trial Chamber II at [253].

On the other hand, Guénaël Mettraux argues that a tyrant's attack against selected dissidents because of their individual characteristics cannot be a crime against humanity.[62] The Trial Chamber in *Limaj* held that attacks on selected Serbian figures of authority and their supporters by the Kosovo Liberation Army (KLA) was not an attack on a population, *as such*.[63] It seems a little odd to say that a deliberate decision by a head of state to kill, say, 100 dissidents selected by reason of their unique leadership qualities is not a crime against humanity because they do not form a 'population', but a totally indiscriminate attack on a small village for purposes unrelated to the inhabitants' individual characteristics and which also leaves 100 dead *is* a crime against humanity.

This then leads to the third school of thought which focuses not just on the victim's humanity, but on the need for an 'added dimension of cruelty and barbarism' to be displayed by the perpetrator. This locates the essence of the crime in the added level of heinousness involved in participating in such an attack, as opposed to an ordinary criminal act. This leads to difficult issues of proof for the prosecution, as occurred in the Canadian case of *Finta*, which adopted this test and was heavily criticised at the time for that reason.[64] Such a theory is still too undiscriminating because such a notion could just as easily cover cruel treatment of animals or child abuse.[65]

Under Article 7 of the ICC Statute, there is the special *mens rea* of knowing involvement in a 'widespread or systematic attack'. Sources up to the Rome Conference of 1998 were far from clear on the issue.[66] Whilst the Statutes of the ICTY and the ICTR are silent on the matter, *Finta* was followed by the Trial Chamber in *Tadić* without analysis, probably because an alibi defence was raised rather than any question of intent.[67] The special *mens rea* requirement was then incorporated into Article 7 as few States pushed for an offence less onerous than that set out in the *Tadić* Trial Judgment. Justice Cory in *Finta* stated that there needed to be a special *mens rea* because: '[t]he degree of moral turpitude that attaches to crimes against humanity and war crimes must exceed that of the domestic offences of manslaughter and robbery. It follows that the accused must be aware of the conditions which render his or her actions more blameworthy than the domestic offence'.[68] This rationale has been repeated by Robinson (who was part of the Canadian delegation at the Rome Conference),[69] other scholars[70] and by the Appeals Chamber in *Tadić*.[71]

---

61 Steven R Ratner & Jason S Abrams, *Accountability for Human Rights Atrocities in International Law* (2nd rev ed, 2001) at 61.

62 Mettraux, above n57 at 255.

63 *Prosecutor v Limaj (Trial Chamber Judgment)*, Case No IT–03–66–T (30 November 2005) at [211]–[225] and, in particular, at [211] and [215].

64 Judith Hippler Bello & Irwin Cotler, 'Regina v Finta' (1996) 90 *AJIL* 460.

65 See Vernon, above n3 at 237 where the author makes this point.

66 Many post-Second World War decisions did not require or deal with any special *mens rea*.

67 *Prosecutor v Tadić – Trial*, above n45 at [658]–[659].

68 *Regina v Finta* [1994] 1 SCR 701 at 820.

69 Daryl Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference' (1999) 93 *AJIL* 43 at 52.

70 Bassiouni above n5 at 243; Arendt, above n50 at 272; Leila Sadat-Wexler, 'The Interpretation of the Nuremberg Principles by the French Court of Correction: From Touvier to Barbie and Back Again' (1994) 32 *Columbia Journal of Transnational Law* 289 at 358.

71 *Prosecutor v Tadić (Appeals Chamber Judgment)*, Case No IT–94–1–A (15 July 1999) at [271].

It is not entirely persuasive to argue that the moral culpability of the perpetrator of crimes against humanity is, or ought to be, greater than that for perpetrators of domestic crimes. If one considers the many diverse defendants that have been charged with crimes against humanity, they have not all been high ranking state officials. The 17-year-old Nazi recruit or the villager who joins a militia in East Timor does not necessarily act in a more 'heinous' manner than the ordinary rapist or murderer. It is not correct to say that a person convicted of, say, murder, as a crime against humanity deserves greater punishment than one convicted of the domestic crime of murder. As Richard Vernon puts it:

> We cannot suppose that the most inhumane results (however measured) reflect the most subjectively measured inhumanity. There is no reason why a middle-level administrator of genocide must be more "inhumane" than, say, a serial rapist, or even a sadistic teacher.'[72]

It is the special *political* circumstances which bring forth crimes against humanity, not the heinousness of the acts themselves. For example, until Milosevic fermented a culture of hate, Tadić, the ordinary café owner, may never have taken to torturing his fellow Bosnians. It is the author's view that the requirement ought not to have been incorporated into Article 7, but few others have taken up this position[73] and it is today undeniably an element of the offence. It is more convincing to regard the threshold test as existing out of concern for an international criminal law which covers all serious domestic crimes rather than merely describing a special type of evil conduct as displayed by the perpetrator.

This then leads to the fourth theory or school of thought under this rubric. This puts forward as the defining aspect of the crime that of scale and seriousness. A crime against humanity must 'shock the conscience of humanity' which, as understood in the doctrine of humanitarian intervention, primarily does so because of its magnitude and gravity. It is set apart from ordinary inhumanities by its grossness. An attack of sufficient ferocity, seriousness and scale means the domestic legal order is left behind and it is the international community as a whole which is being threatened. A single murder may be a domestic crime but when there is an attack involving a thousand murders an 'international' crime arises. This is the theory put forward in a number of cases such as *Eichmann*[74] and the *Justice Case.*[75] If the focus is on the extent of the harm done to victims, not the level of wrongdoing displayed by the perpetrator, then the concept of scale in this fourth school of thought begins to have some traction. The Preamble to the ICC Statute speaks of the need to respond to 'unimaginable' atrocities. It is impossible to think that the authors did not have in mind large-scale crimes as judged by their effect on victims. Many commentators, however, reject the notion that there must be a

72 Vernon, above n3 at 238.

73 Some observers at Rome in 1998 suggested that the special knowledge test ought not be required: Darryl Robinson, above n73 at 51. It was not included in the subsequently drafted Statute for Sierra Leone but the Court has included it as an element of the offence under customary law: see above n 60 at [221]–[222].

74 *Attorney-General of Government of Israel v Adolph Eichmann*, 36 *ILR* 277 (Sup Ct, Israel, 1962) 304.

75 U*nited States v Altstötter*, above n14 at 982.

minimum number of victims before an international interest is warranted. Luban, for example, mounts a stinging attack on this view:

> To assert that only large-scale horrors warrant international interest reverts to the very fetishism of state sovereignty that the Nuremberg Charter rightly rejected. The assertion implies that small-scale, government-inflicted atrocities remain the business of national sovereigns — that a government whose agents, attacking a small community as a matter of deliberate policy, forcibly impregnate only one woman, or compel only one father to witness the torture of his child, retains its right to be left alone. These are profoundly cynical conclusions, and it will do no credit to the Rome Statute if the ICC accedes to them by interpreting the requirement of multiple acts to mean many acts. Fortunately, "multiple" might be read to mean as few as two, in which case the damage the multiple act requirement inflicts need not be severe …. Any body-count requirement threatens to debase the idea of international human rights and draw us into what I once called "charnel house casuistry" — legalistic arguments about how many victims it takes to make a "population".[76]

This 'literalist' approach, based upon the words in Article 7 of the ICC Statute, is popular with human rights organizations such as Amnesty International and Human Rights Watch which argue that if any 'organization', pursuant to a policy, commits two or more acts directed against a 'population' it is a crime against humanity. Once again this makes the principle too undemanding and too undiscriminating. It would extend the notion of a crime against humanity not only to the acts of Al-Qaeda, the Red Brigade, the Baader-Meinhof gang, the IRA, the Ulster Volunteer Force but also to any two crimes of say the Ku Klux Klan, the Mafia 'and for that matter — why not? — the Hell's Angels'.[77]

At the end of the day, it remains intuitive that scale and seriousness does somehow matter when it comes to the concept of crimes against humanity. There is an answer to Luban's complaint that a requirement of scale debases the idea of international human rights. This is to reply, as argued here, that the requirement of scale serves a purpose beyond merely describing an element of the offence. It is only if scale is seen as no more than an element of the crime itself that one reaches, as Simon Chesterman has written, 'the gruesome calculus of establishing a minimum number of victims necessary to make an attack "widespread"'.[78]

The notion of a 'widespread or systematic attack directed against any civilian population' describes the current consensus as to when an 'attack' threatens the peace and stability of the world. If met, then any plea based upon the principle of non-interference in the internal affairs of a state can be swept aside, including by force under Chapter VII if necessary. The threshold, read as a whole, does import notions of scale and seriousness, not to condone a small-scale attack as being in any way outside the purview of international human rights law or even international criminal law, but as a rule

76 David Luban,above n56 at 107–108.

77 William Schabas 'Punishment of Non-State Actors in Non-International Armed Conflict' (2003) 26 *Fordham International Law Journal* 907 at 929.

78 Simon Chesterman, 'An Altogether Different Order: Defining the Elements of Crimes Against Humanity' (2000) 20 *Duke Journal of Comparative and International Law* 307 at 315.

of political prudence to afford suspects, including heads of state, some measure of protection from an excessive (and potentially biased or abusive) international jurisdiction being invoked by the ICC or the Security Council.

The Security Council and the ICC, like all international institutions, are creatures of diplomacy and statecraft, not of humanity. It is naïve to think they will be above politicking or will not have agendas and biases. Slobodan Milosevic's accusation that the 'trial's aim is to produce false justification for the war crimes of North Atlantic Treaty Organization ('NATO') committed in Yugoslavia' are not absurd.[79] Nearly all international trials are political affairs, the most recent example of which is the trial and hanging of Saddam Hussein. As Schwarzenberger put it, Nuremberg's legacy is that 'still tighter ropes' can be 'drawn in advance round the necks of the losers of any other world war'.[80] The decision by the ICTY Prosecutor not to prosecute NATO leaders for their role in certain bombing raids in Serbia strikes one as another political decision.[81] One cannot assume merely because a body is international that it will be fair and impartial. Similarly, one cannot assume simply because the ICC Statute 'guarantees' defendants a right to a fair trial that either the prosecutor or the judges may not 'stretch' the bounds of existing international law to pursue what some states may regard as selective, politically motivated prosecutions or charges. It was the Union of Soviet Socialist Republics ('USSR'), with its history of show trials, that favoured the United States' desire for a trial of Nazi leaders. It was Churchill who opposed such a course because he feared that such a trial would inevitably become a political affair. It is ironic that America today fears that the ICC's jurisdiction over its nationals may result in politicized prosecutions. But that fear is real and valid.

The high threshold test in the definition of a crime against humanity, including the requirement of scale or seriousness, exists to answer such skepticism. It is intended to make it more difficult for there to be political, biased or simply misguided prosecutions against government officials or military interventions by the Security Council. If an atrocity in question is both manifest and widespread, then the potential harm that may be caused to suspects, or peaceful relations between states, is outweighed by the far greater evil that may occur if no attempt is made to stop and prosecute those involved.

As will be explained below, the requirement of scale and seriousness put forward here is not merely a body count. Also, scale and seriousness *alone* does not make a crime against humanity. When a serial murderer kills a number of people (even if targeted on discriminatory grounds) it is not condemned as a crime against humanity. Something more is needed.

---

79 *Prosecutor v Milosevic*, Case No IT–98–37, Transcript at 2 (1998) quoted in Michael Mandel, 'Politics and Human Rights in International Criminal Law: our case against NATO and the Lessons to be Learned from it' (2001) 25 *Fordham International Law Journal* 95 at 97.

80 Georg Schwarzenberger, 'The Problem of an International Criminal Law' in Gerard OW Mueller & Edward M Wise (eds), *International Criminal Law* (1965) 3 at 31.

81 In May 1999 a group of lawyers filed a war crimes complaint against 68 leaders of NATO including all the Heads of Government. Amnesty International in its report concluded that NATO had been guilty of war crimes but the ICTY Prosecutor, Carla Del Ponte in June 2000 announced that NATO was not guilty of war crimes and declined to open an investigation: Mandel, above n79 at 95–96.

C. *Theories Based upon there being a Threat to International Peace*

The link between crimes against humanity and acts which 'threaten the peace, security and well-being of the world' is time-honoured. It was made at Nuremberg. It has been made in the case of the right to engage in humanitarian interventions and it is referred to in the third clause of the Preamble to the ICC Statute. It is an aspect of the crime which sets it apart from any ordinary crime or human rights violation. But what does it mean to say that certain criminal conduct 'threatens world peace'? Essentially the notion can be made to apply to all manner of different conduct depending upon one's view of state behaviour. Those views can have different levels of persuasiveness. Without further elaboration, the requirement that a crime must also 'threaten international peace' is a vacuous statement.

At Nuremberg, it was the alleged nexus between the Holocaust and the Second World War which meant that the internal atrocities in Germany threatened world peace. Myres McDougal, who was an adviser at Nuremberg, linked human rights abuses with war by arguing that Nazi atrocities in Germany were only the prelude to an onslaught on the whole of Europe.[82] This view of state behaviour is particularly unpersuasive because not 'every persecution is a prelude to war, and not every war is preceded by persecutions'.[83] Another view is that atrocities of a sufficient scale or seriousness will 'shock the conscience' of other nations and tempt them to intervene militarily. Brendan F Brown, who was involved in the Tokyo trials, argued that genocide poses a threat to world peace, in a way that a simple murder will not, because members of the persecuted group may have relatives elsewhere, especially in powerful countries.[84] He used the US as an example, because of the great racial and cultural diversity of its population. He concluded 'it is impossible for any group to suffer injustice in any part of the world without immediate repercussions here'.[85] Hence, it is only natural that there should be some international tribunal with powers to prosecute state leaders to forestall countries taking matters into their own hands. This view of state behaviour is not implausible. The NATO countries when intervening in Kosovo in 1999 expressed the view that they were obliged by the sentiments of humanity to prevent a genocide taking place when the Security Council was not prepared to act.[86] President Theodore Roosevelt in his famous State of the Union address in 1904 echoed similar sentiments.[87]

Some commentators are dissatisfied with this reasoning because the moral foundation for the international crime is too consequentialist.[88] It suggests that only attacks on minorities with friends in powerful countries merit an international reaction.

82 Myres S McDougal, *Studies in World Public Order* (1960) at 335–403 and 987–1019 quoted in Vernon, above n4 at 238.

83 Vernon, above n3 at 239.

84 Joseph Berry Keenan & Brendan F Brown, *Crimes Against International Law* (1950) at 163 quoted in Vernon, above n3 at 239.

85 Ibid.

86 See, for example, Chesterman, above n28 at Chapter 5, section 4.2.

87 Moore, above n12.

88 See, for example, Vernon above n3 at 239.

The President of the Security Council put forward a third broader view on 31 January 1992 when he said that instability in the economic, social, humanitarian and ecological fields can become a threat to peace and security.[89] This can convert any unremedied breach of human rights into a threat to peace. No international consensus exists as yet on this broad proposition. Similarly, there is the view that stable, functioning democracies do not go to war against each other.[90] Hence, all non-democratic regimes are a threat to peace. Again, no consensus exists on this view of state behaviour.

Between 1991 and 1998 an international consensus emerged that an internal atrocity of 'sufficient' scale or seriousness and 'quality' will amount to a threat to international peace under Chapter VII of the UN Charter. Such a notion is difficult to describe in the abstract and, hence, the loose language in Article 7 of the ICC Statute. With this background, one can return again to see how scale and seriousness do count when it comes to a crime against humanity. Consider Richard Vernon's nuanced approach to the issue:

> … intuitions tend, awkwardly, in different directions. On the one hand, we can hardly close our minds to questions of scale altogether. Legally, a crime against humanity (unlike a war crime, which may be a single act) is a concerted persecuting effort, or a component of one; but even outside a legal context the greatness of the evil owes something to its extent. So from this point of view numbers seem to count. It is very unclear whether numbers are absolute (a body-count) or relative (a proportion of the target population) or time-sensitive (numbers killed per day), but they would certainly seem to count in somehow. On the other hand, of course, moral sense rebels at the thought that numbers count in this way: that the Holocaust would have been *less of a crime* if only (say) three million had been killed, or that we might tell whether the Holocaust or Stalin's reign of terror was worse by simply counting bodies, or whether *enough* Kosovars were killed to make NATO's action against Serbia justifiable — inviting the cruel and absurd question, how many would have been enough?[91]

How is scale to be measured? There is no 'body count', fixed for all time like an element of the crime itself. There is only a rule of international comity and practice and, hence, a rule of far greater subtlety. It is grounded in the current consensus of when an 'attack' amounts to a threat to international peace. In other words it is based in empiricism not theory. When it comes to such practice, the Security Council's humanitarian interventions under Chapter VII avowedly in response to crimes against humanity, such as in the cases of the former Yogoslavia, Rwanda, Timor Leste, Kosovo and Sudan, will have a role to play in evidencing what amounts to a crime against humanity under customary law. By and large the Security Council has only invoked its Chapter VII powers in the case of an internal atrocity where there has been a flash point of extreme violence usually involving a large number of deaths (usually in the hundreds). Secondly, the decisions of international tribunals or state courts also play a key role in forming international custom. Whilst the ad hoc Tribunals have suggested that no element of

89 Above n37.

90 Chesterman, above n28 at Chapters 3 and 4, in particular at 158.

91 Vernon, above n3 at 245–246.

scale is strictly necessary under a purely 'systematic attack', if one turns to the actual trials for crime against humanity, no conviction has occurred for an attack that has not been both systematic and involving deaths in the hundreds. The conviction of Saddam Hussein for crimes against humanity involved one of the most 'modest' attacks, being against a small village. Nevertheless, the attack still involved deaths of around 150 and the detention and forcible transfer of around 400. But it is not just scale, under the current consensus, which converts a criminal enterprise into a threat to world peace. A further factor has traditionally been required — state involvement or acquiescence.

D. Theories Based upon 'State Policy'

After Nuremberg, all of the main scholars writing at the time wrote that the defining aspect of a crime against humanity is that the perpetrators enjoy de facto or de jure immunity because their acts are linked to the policy of a bandit state which promotes or tolerates such crimes. This, beyond doubt, has been a constant in the concept of a crime against humanity since the antiquities. St Augustine, basing himself upon the practice of plebeian resistance to senatorial decrees, suggested there was a right of humanity to respond to 'abominable' state acts.[92] It was also inherent in the doctrine of humanitarian intervention. US Military Tribunal in *Einsatzgruppen* declared that:

> Crimes against humanity…can only come within the purview of this basic code of humanity because the state involved, owing to indifference, impotency or complicity, has been unable or has refused to halt the crimes and punish the criminals.[93]

This 'policy element', in the case law, has been broad enough to include state toleration or acquiescence towards the crimes of non-state actors.[94] Whenever there is a manifest failure by a state to deal with large-scale crimes we naturally want to create an alternative mechanism for trying the perpetrators. This can only occur by creating a court outside the state concerned and investing it with extraterritorial or international jurisdiction. This is necessary not because state backed criminal conduct is more reprehensible than a large-scale 'ordinary' domestic crime but because the latter takes place in a jurisdictional vacuum. State complicity or indifference towards an atrocity threatens world peace because the perpetrators enjoy or are likely to enjoy impunity. It is this 'policy element' rather than some technical notion of an attack on a 'population' which converts a large-scale criminal enterprise into both a crime against humanity and a threat to international peace.

With this in mind we can return to Hussein's attack on the small village of Al-Dujail. It was carried out on the express orders of the head of state. The state's military, with helicopter gunships, attacked a defenceless village. Such gross misuse of state power strikes at the core of the crime's rationale. This is captured by the remark of the UNWCC that an attack is a crime against humanity '*particularly* if it was authoritative'.[95] This

92 St Augustine, *The City of God* (David Knowles trans, 1972 ed) at 180.

93 *United States v Otto Ohlendorf* 4 CCL 10 Trials 411 at 498.

94 *United States v Flick and others* 6 CCL 10 Trials 3 at 1201–1202; *Weller*, German Supreme Court for the British zone, Judgment (21 December 1948).

95 UNWCC, above n17 at 179.

suggests that an attack which is committed directly by a state pursuant to an explicit policy to target a group of civilians may not require the same number of victims than a more spontaneous eruption of violence by non-state actors which is met by state indifference.[96] This provides a tool for construing the difficult notion of a 'widespread *or* systematic attack'.[97]

Today, a modern consensus rejects the view that only a state, as such, can be the author or sponsor of a crime against humanity because such a view fails to recognise the proliferation of powerful non-state actors. Many writers argue that organisations with de facto control over territories or people ought to be equated with a state.[98] Bassiouni writes that 'these non-state actors must have some of the characteristics of state actors, which include the exercise of dominion or control over territory or people, or both, and the ability to carry out a "policy" similar in nature to that of "state action or policy"'.[99] This has been followed to some extent in the jurisprudence of the ICTY.[100] The Trial Chamber in *Limaj* in the case of Kosovo Liberation Army held:

> Special issues arise, however, in considering whether a sub-state unit or armed opposition group, whether insurrectionist or trans-boundary in nature, evinces a policy to direct an attack. One requirement such an organisational unit must demonstrate in order to have sufficient competence to formulate a policy is a level of *de facto* control over territory.[101]

The Armed Forces Revolutionary Council ('AFRC'), whilst acting as a rebel force in Sierra Leone, was held by the Special Court to have committed crimes against humanity during a period of civil war.[102]

But can an 'organisation' under Article 7 be a unit of less significance than a 'de facto' power? This can only be answered by considering the 'policy' requirement itself. For example, militia groups such as the 'Jokers' or Arkan's Tigers in Bosnia, the Interahamwe in Rwanda or around 23 different militia in East Timor in 1999 have been held to be authors of crimes against humanity because all gained support from state agencies and their acts were linked to a state or de facto power's policy, in a loose sense. If one gives a broad meaning to 'policy' to include wilful toleration or acquiescence, then there is no need to consider whether these groups are 'organisations' within the meaning of Article 7.

---

96 See Rodney Dixon, 'Article 7 Crimes Against Humanity: Para 1 "Chapeau"' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (1999) 117 at 123.

97 This follows the result in *Limaj,* above n63. The Trial Chamber held that a few killings or disappearances, along with abductions of around 140 civilians committed by the KLA did not amount to a 'widespread attack' (at [209]–[210]).

98 Antonio Cassese, *International Criminal Law* (2003) at 64; Joseph Rikhof, 'Crimes against Humanity, Customary International Law and the International Tribunals for Bosnia and Rwanda' (1996) 6 *National Journal of Constitutional Law* 232 at 254–261; Ratner & Abrams, above n61 at 68–69.

99 Bassiouni, above n5 at 71.

100 *Prosecutor v Tadić – Trial*, above n45 at [654]–[655]; *Prosecutor v Kupreškić (Trial Chamber Judgment)*, Case No IT–95–16–T (14 January 2000) at [552]; *Prosecutor v Kayishema and Ruzindana (Judgment)*, Case No ICTR–95–1–T (21 May 1999) at [126]; *Prosecutor v Blaškić (Trial Chamber Judgment)*, Case No IT–95–14–T (3 March 2000) at [205].

101 *Limaj,* above n63 at [213].

102 *Prosecutor v Brima, Kamara and Kanu,* above n60.

What remains controversial is the need for some 'policy element' at all and whether a non-state organisation, like a terrorist group, which has *no* state support can commit a crime against humanity. In the broad, there are two schools of thought. First, there is the school of thought, which holds that as a matter of customary law some 'policy element' or 'action' by a state or state like entity[103] or acquiescence or toleration by a state or state like entity is a requirement of all crimes against humanity.[104] The second school of thought, supported by the case law of the *ad hoc* Tribunal, holds that as long as the 'group' is capable of committing a 'widespread or systematic attack' it can be an author of a crime against humanity and there is no need for a 'policy'.[105] To date, however, there has been no conviction by an international tribunal for crimes against humanity other than where the attack was linked to a state or some de facto power.

Today's 'war on terror' has placed focus on whether terrorism can be labelled a crime against humanity. In the aftermath of the September 11 2001 attacks many persons (but not states) were quick to use the label a 'crime against humanity'.[106] Other scholars such as Bassiouni[107] and Cassese[108]did not agree with this conclusion. The debate has to some extent been taken over by events. There is now no shortage of Security Council resolutions that have determined that terrorism, on its own, is a threat to international peace.[109] States generally have not used the label a 'crime against humanity' to describe acts of terrorism. Generally the practice of the international community has been to treat international terrorism as a *sui generis* international crime rather than a 'crime against humanity'. This practice tends to support the proposition advanced here that some 'policy element' or link, in a broad sense, to a state or de facto power is required before a crime against humanity arises.

It should be pointed out, however, that the existence of this policy element alone will not make out a crime against humanity. The imprisonment of a single political figure, such as Aung San Suu Kyi by the Burmese military, is not, at least on current state practice, a crime against humanity.

Conclusion

A 'crime against humanity' is a chameleon like creature. We all have a sense of what it is but find it hard to be specific about its elements. Through the ages it has taken its colour from the times which have called forth the tribunals created to convict persons of the crime. It requires firstly a serious universal crime based upon the notion that there exist universal principles of criminal law shared by all humanity. Secondly, it requires an attack

103 Bassiouni, above n5 at 273–275.

104 Cassese, above n98 at 64.

105 See Gerhard Werle, *Principles of International Criminal Law* (2005) at 228–229.

106 Geoffrey Robertson, 'America Could Settle This Score Without Spilling Blood Across Afghanistan' *Times* (UK (18 September 2001) at 18; Alian Pellet, 'Non ce'n'est pas la guerre!' *Le Monde* (21 September 2001) at 12 quoted in Schabas, above n77 at 923.

107 M Cherif Bassiouni, *Introduction to International Criminal Law* (2003) at 71.

108 Antonio Cassese, 'Terrorism is also Disputing Some Crucial Legal Categories of International Law' (2001) *European Journal of International Law* 993.

109 For example, SC Res 1373 and SC Res 1566.

of a certain type. Since the abandonment of the war nexus there are those who wish to downplay the threshold requirement of a crime against humanity because they see in this category of crimes an international penal code protecting individuals from the state. Unlike the definitions of other international crimes like slavery or genocide or torture, which can cover an isolated crime, crimes against humanity require a course of conduct. This is intended to describe attacks which both 'shock the conscience of humanity' and 'threaten the peace, security and well-being of the world'. It thereby describes an atrocity which permits, and perhaps requires, an international response to *each and every* 'crime against humanity' by either the Security Council or the ICC's Prosecutor. It is this unique feature which sets a 'crime against humanity' apart from domestic crimes or ordinary human rights violations. It also gives to the concept its unique potency in international discourse. If the threshold requirement is downplayed so that the crime resembles other serious human rights violations it will loose this potency and encourage the international community to be indifferent to yet another claim that a 'crime against humanity' has taken place whether by a state, a terrorist organization or some criminal gang. The concept should remain within the parameters of widely accepted state practice as to what the crime involves particularly whilst the international community is only just embarking upon mechanisms of enforcement. Current state practice would suggest that what is still needed is a flash point of extreme violence which can be linked to a state or de facto power. The extent of this threshold of 'extreme violence' may vary to some extent depending upon whether the attack is 'authoritative' and 'systematic', in the sense of being pursuant to an explicit policy of a state or de facto power, or merely 'widespread', in the sense of being a large scale attack by non-state actors who gain encouragement, but not explicit support, from a state or de facto power.

The twentieth century was an age of extremes, extreme violence included. The aim must be to make the twenty first century the age when, like polio or small pox, 'crimes against humanity' can also be a thing of the past.