

ON THE DEFINITION OF CRIMES AGAINST HUMANITY AND OTHER
WIDESPREAD OR SYSTEMATIC HUMAN RIGHTS VIOLATIONS

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INTRODUCTION

As Felstiner, Abel and Sarat observed 35 years ago, the first step in the process of creating a legal dispute—which is also to say, the first step in potentially claiming a right—is in managing to name the category of harm in question.¹ Despite substantial developments in human rights law and international criminal law over the twentieth and twenty-first centuries, however, our ability to consistently, universally and adequately name large-scale rights violations according to a clear set of criteria remains a matter of dispute. This is not only the case in some of the more dramatic and apparent instances of widespread and systematic integrity rights violations, but also, and in a potentially more troubling way, relative to many more mundane and constitutive components of the legal and practical environments in which we all live.

This paper attempts to make progress towards the coherent naming of such large scale and serious situations of violation. In doing so, it turns to the notion of crimes against humanity. This will, to those familiar with the term, likely be surprising. As Norman Geras puts it at the beginning of his book on crimes against humanity

What is a crime against humanity? In the literature about this, which has accumulated during more than half a century, it has become commonplace that the content and boundaries of the idea have been imprecise. They were so from the very beginning. Hannah Arendt was reflecting a common view when she wrote that the judges at Nuremberg had left the new crime in a ‘tantalizing state

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¹ William Felstiner, Richard Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...*, 15 LAW AND SOC. REV. 631, 635 (1981).

of ambiguity'. Its subsequent evolution, too, 'has not been orderly', as is not altogether surprising for what began life as a concept in customary law. There is a wide scholarly consensus about the resulting state of affairs. 'While crimes against humanity are clearly enshrined today in customary international law,' one commentator has said, 'their precise definition is not free of doubt'. 'The scope of crimes against humanity', writes another, 'is difficult to determine precisely'. Yet others speak of the term as 'shrouded in ambiguity', its definition as 'notoriously elusive', a situation of 'chronic definitional confusion'.²

"Crimes against humanity," in other words, is about as problematic a concept as possible from which to launch an attempt to clarify the legal classification of situations of mass violation. The first source of confusion lies in the double nature of the test required by the term. In the first place, the existence of a situation of crimes against humanity must be shown; once that has been established, individual liability for crimes may be pursued. Even when this is understood, however, contestation over exactly how to understand situations of crimes against humanity, together with uncertainty over the extent of harm necessary in order for a factual situation to rise to such a level, further complicate the area. The caution in the manner in which the term is employed that is engendered by such uncertainty is further magnified by the term's link to the criminal context, in which defendants are rightly protected from overly quick condemnation, as well as by its link to the International Criminal Court (ICC), which combines unique authority on such matters with structural grounds for caution. Thus, it is no surprise that statements referring to situations of crimes against humanity employ tentative language almost as a matter of course, as illustrated for instance by a recent report by the United Nations (UN) on Eritrea, which stated that violations there "may constitute crimes against humanity"³—despite the fact that, on any plausible reading of the term, it is abundantly clear that they do.

There are three reasons why this paper nonetheless begins with the term crimes against humanity in its efforts to develop a clarified classificatory schema. In the first place, "crimes against humanity" is simply the existing generalizable⁴ terminology applicable to at least a particular subset of the worst instances of mass rights violation. Given the importance of maintaining a unified set

² NORMAN GERAS, *CRIMES AGAINST HUMANITY: BIRTH OF A CONCEPT* vii (2011) (citing Darryl Robinson, *Defining 'Crimes Against Humanity' at the Rome Conference*, 93 AM. J. INT'L L. 43, 44 (1999), Yoram Dinstein, *Crimes Against Humanity*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI* 891, 896 (Jerzy Makarczyk ed., 1996), Phyllis Hwang, *Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court*, 22 FORDHAM INT'L L. J. 457, 487 (1998), Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2585 (1991), Margaret deGuzman, *The Road from Rome: The Developing Law of Crimes Against Humanity*, 22 HUM. RTS. Q. 335, 336 (2000), and Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT'L L. 787, 790-91 (1999)). A variety of overlapping factors—including the term's contingent development, its history of ties to war crimes, the link to criminality, a history of major world powers imposing one-sided justice on the defeated and the potential necessity of international jurisdiction—could all be cited as factors that have contributed to the convoluted and unclear nature and uneven application of the term.

³ Rep. of the Comm'n of Inquiry on Human Rights in Eritrea, Human Rights Council, Twenty-Ninth Session, ¶ 66, U.N. Doc A/HRC/29/42 (June 4, 2015) (emphasis added). The cautious language in such instance is yet further overdetermined, of course, by the structural factors underpinning UN caution generally.

⁴ I.e. excluding the weightier, but definitionally more specific, not to mention even more contested, category of genocide.

of terminology, it is important that existing terminology be employed.⁵ In the second place, the crimes against humanity label carries with it an already clearly recognized hefty weight of normative condemnation. Finally, despite the lack of clarity regarding situations of crimes against humanity in the international criminal law realm, the term is still better defined than any comparable term to have developed purely within human rights law.⁶

The ambiguity of the concept of crimes against humanity means that a necessary first step in the process of producing a clear definition of the term, as Geras has recognized, must be to conduct a reconstruction of the term. Performing such a reconstruction is not a task that can be accomplished in a vacuum or on the basis of formalist principles—rather, like all interpretation, such a reconstruction can only be accomplished with reference to guiding principles, with greater unity and clarity in such principles leading to greater unity and clarity of interpretation. This paper proposes a “victim-centered approach,” described in further detail below, as the central guiding principle in the light of which reconstruction should be performed.

Part two of this paper provides a historical account of the development of the concept of crimes against humanity. While well-trodden ground for the initiated, this brief history provides important context for those less familiar with the idea of crimes against humanity. The history, moreover, helps to show certain ways in which the term has evolved over the course of its life that may be taken as signs of the influence of a victim-centered approach on the term’s evolution. Part three of the paper introduces and discusses the victim-centered approach, attempting to lay to rest some of the major critiques and concerns such an approach might raise. Parts four, five, and six then perform the necessary reconstruction—emphasizing the importance of thinking about situations of crimes against humanity in terms of responsible entities, situational parameters, and levels of aggregate harm. Finally, part seven addresses the importance of naming in general, maps out the parameters of the terrain surrounding situations of crimes against humanity, and suggests of clearer categories in such areas.

I. HISTORICAL DEVELOPMENT OF THE IDEA OF CRIMES AGAINST HUMANITY

A key early articulation of the idea of crimes against humanity came through the Martens Clause of the Fourth Hague Convention, which referred to the “laws of humanity and the dictates of public conscience.”⁷ Another key historical moment came with the 1915 declaration by Russia,

⁵ On the importance of unifying terms, see David Scheffer, *Genocide and Atrocity Crimes*, 1 GENOCIDE STUD. & PREVENTION: AN INT’L JOURNAL 229, 237 (2006); David Scheffer, *The Merits of Unifying Terms: ‘Atrocity Crimes’ and ‘Atrocity Law,’* 2 GENOCIDE STUD. & PREVENTION: AN INT’L JOURNAL 91, 92 (2007).

⁶ The Rules of Procedure of the Inter-American Commission include in the list of situations which merit inclusion in Chapter IV.B of the Annual Report – the Chapter reserved for the situations of greatest concern – situations of ‘massive, serious and widespread violations of human rights’. Exactly which situations fall under that label is not further defined however. Inter-American Commission on Human Rights, 2013 Rules of Procedure. The African Charter refers to ‘serious or massive violations,’ but no definition is provided. African Charter on Human and Peoples Rights, CAB/LEG/67/3 rev. 5 (1982; entry into force: Oct. 21, 1986), Art. 58(1).

⁷ Convention Respecting the Laws and Customs of War on Land, Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, (Oct 18, 1907). The Clause appeared 8 years earlier in the preamble to the Hague II Convention of 1899; and in the 1868 St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. See Lindsay Moir, *Crimes Against Humanity in Historical Perspective*, 3 N.Z. Y.B. INT’L L. 101, 126-27 (2006). On the importance of the Martens Clause see Antonio Cassese, *The Martens Clause: Half a Loaf or Simply Pie in the Sky?*, 11 EUR. J. INT’L L. 187 (2000). It has also been argued that slavery could be understood as a crime against humanity from as early as 1841. See Leila S. Wexler, *The Interpretation of the Nuremberg*

Britain and France that Turkey had committed crimes “against humanity and civilization” through its actions against its Armenian population.⁸ While the Treaty of Versailles did not include a definition of crimes against humanity, but rather only of war crimes,⁹ a Commission formed to look into responsibilities for acts during the war found that Germany and her allies had violated the ‘dictates of humanity’ and the ‘laws of humanity’, making them liable to criminal prosecution.¹⁰ The 1920 Treaty of Sevres, signed with Turkey, explicitly envisioned prosecution of those responsible for crimes against humanity, understood to encompass massacres of Armenians in particular, but the treaty was never ratified and no tribunals were formed.¹¹ Even though prosecution of crimes against humanity was not being pursued in practice, the concept was beginning to take shape.¹²

The need for an additional category to complement war crimes was recognized by the United Nations War Crimes Commission during World War II.¹³ When Italy surrendered, the treaty of surrender referred to prosecution of both war crimes and “analogous offenses.”¹⁴ The key aim was to prosecute not only war crimes, which were “only a part of the whole ghastly Hitlerite enterprise”, but rather for “the *entire* enterprise to be included in the trial.”¹⁵ The point was that “but for the fact that the victims were technically enemy [i.e. German, in the most part] nationals, such persecutions were otherwise in every respect similar to war crimes”¹⁶—with motivation to create such a category being provided by the fact that “the suggestion that Nazi persecutors and

Principles by the French Court of Cassation: From Touvier to Barbie and Back Again, 32 COLUM. J. TRANSNAT'L L. 289, 296-97 (1994). Schabas agrees, and in fact traces the term back to Voltaire. See William Schabas, *Why is There a Need for a Crimes Against Humanity Convention?*, 44 STUD. IN TRANSNAT'L LEGAL POL'Y 251, 261 (2012).

⁸ PARIS, EDITIONS INTERNATIONALES, LA DOCUMENTATION INTERNATIONALE: LA PAIX DE VERSAILLES, VOL. 3, RESPONSIBILITIES DES AUTEURS DE LA GUERRE ET SANCTIONS, Annex I (1930). See also Leslie C. Green, *Group rights, war crimes and crimes against humanity*, 1 INT'L J. ON GROUP RTS. 107, 115 (1993) (stating “[a]lthough the 1915 tripartite declaration was the first occasion in which the term ‘crimes against humanity’ appeared in an international instrument, there were numerous references to humanitarian intervention prior to this in the doctrine of international law. None of these, however, suggested that there was a right to try as criminals those responsible for the acts which led to the intervention”).

⁹ Largely due to US skepticism as to the notion of crimes against humanity; see *Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities*, Annex II, Apr. 4, 1919, reprinted in 14 AM. J. INT'L L. 127 (1920).

¹⁰ See Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT'L L. 178, 180-81 (1946) (providing an overview of International commission findings that Germany and her allies had violated the “laws of humanity.”); see also Lindsay Moir, *Crimes Against Humanity in Historical Perspective*, 3 N.Z. Y.B. INT'L L. 101, 109 (2006) (“The distinction made by the Commission between (a) the law and customs of war, and (b) the laws of humanity is fundamentally important, and can be seen as reflecting the distinction between war crimes and crimes against humanity at Nuremberg and beyond.”).

¹¹ E.g., *Treaty of Peace Between the Allied Powers and Turkey*, Aug 10, 1920, reprinted in 15 AM. J. INT'L L. 179, 235 (1921); Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT'L L. 178, 182 (1946); David Matas, *Prosecuting Crimes Against Humanity: The Lessons of World War I*, 13 FORDHAM INT'L L. J. 86, 91 (1989).

¹² Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT'L L. 178, 181-83 (1946).

¹³ *Id.* at 184-85.

¹⁴ *Id.* at 185.

¹⁵ Lindsay Moir, *Crimes Against Humanity in Historical Perspective*, 3 N.Z. Y.B. INT'L L. 101, 113 (2006) (citing U.S. DEP'T OF ST., PUB. NO. 3080, REP. OF Robert H. Jackson, *United States Representative to the International Conference on Military Tribunals* (1945, released 1949) [hereinafter *Jackson Report*]).

¹⁶ *Id.* (citing UN War Crimes Commission, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 174 (1948)).

exterminators had not violated the traditional rules of warfare was, however, ‘simply impossible for the battered peoples of Europe to accept in 1945.’¹⁷

The first definition of crimes against humanity was provided by the International Military Tribunal in Nuremberg in 1945, which defined the term in article 6(c) as referring to

[m]urder, 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.¹⁸

As noted, the category of crimes against humanity had been perceived as necessary in order to ensure that prosecutions might not only reach crimes against foreign populations, but also crimes against a country’s own citizens. The creation of the category was hence linked from the beginning to the idea of human rights as a category of international law, that is, to the idea that states have obligations not only to each other, but also to their own citizens.¹⁹ As one author has put it,

[t]he crimes against humanity charge confirmed that citizens are under the protection of international law even when they are victimized by their compatriots. Furthermore, the criminality of such acts “whether or not in violation of the domestic law of the country where perpetrated” established the supremacy of international law over municipal law. In this way, the prohibition of crimes against humanity at Nuremberg had the potential to irretrievably pierce the trope of sovereignty—“a rule of international law which provides that no state shall intervene in the territorial and personal sphere of validity of another national legal order.”²⁰

It was hence perhaps in order to soften this dramatic expansion of international responsibility that crimes against humanity in the Nuremberg context were ultimately defined as fundamentally linked to war crimes and crimes against peace, or in connection with “any crime

¹⁷ *Id.* at 109 (citing BRADLEY SMITH, REACHING JUDGMENT AT NUREMBERG 14 (1977)).

¹⁸ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Art. 6(c), Aug. 8, 1945, 82 U.N.T.S. 279, 287-88. The definition at the International Military Tribunal for the Far East was similar, though it did not refer to the religious grounds of discrimination and was explicit as to liability extending up and down chains of command. On the nature of the underlying grounds in the Nuremberg definition, see Phyllis Hwang, *Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court*, 22 FORDHAM INT’L L. J. 457, 462-3 (1998).

¹⁹ On the relation between the concepts see HERSH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 36 (1950); LOUIS HENKIN, RICHARD PUGH, OSCAR SCHACHTER & HANS SMIT, INTERNATIONAL LAW 986 (2nd ed. 1987); M. Cherif Bassiouni, *The Proscribing Function of International Criminal Law in the Process of Protection of Human Rights*, 9 YALE J. WORLD PUB. ORDER 193 (1982).

²⁰ Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT’L L. 787, 791 (1999) (citing Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Art. 6(c), Aug. 8, 1945, 82 U.N.T.S. 279-287-88 and Franz Schick, *The Nuremberg Trial and the International Law of the Future*, 41 AM. J. INT’L L. 770, 784-85 (1947)).

within the jurisdiction of the Tribunal,” as article 6(c) puts it.²¹ In fact, Jackson argued for such a definition in part due to his awareness that domestic patterns of racial discrimination in the United States could otherwise come to be addressed as crimes against humanity.²²

One of the central legal debates around the idea of crimes against humanity at Nuremberg concerned whether or not prosecutions under that notion would run afoul of the notion of *nullum crimen sine lege*.²³ Some, like Jackson, argued that the prohibition was not violated since the acts in question were “criminal by standards generally accepted in all civilized countries.”²⁴ At the same time it was hard to deny, as one commentator writing shortly thereafter put it, that international prosecution under the notion of crimes against humanity “must be considered a legal innovation of the first magnitude.”²⁵ Ultimately, the tribunal claimed that the prohibition of *ex post facto* laws was not yet a matter of customary international law and hence the charges might stand, though a major motivation was clearly that the importance of prosecuting crimes against humanity was seen as greater than the importance of respecting such a principle.²⁶

Likely due to uncertainty as to the legitimacy of prosecutions for crimes against humanity, the category was relied on in a generally supportive way at Nuremberg, with the tribunal cautious in probing the boundaries—while it was willing to consider crimes against humanity committed before the first of September 1939 in the course of considering broader patterns, no defendants were convicted solely for crimes against humanity committed prior to September 1, 1939, and the tribunal was in general reluctant to find that the nexus requirement had been met in such instances.²⁷ At the

²¹ M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 25 (2nd ed. 1999); Margaret deGuzman, *Crimes Against Humanity*, in *ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW* 121, 121-22 (Nadia Bernaz & William Schabas eds., 2011); Lindsay Moir, *Crimes Against Humanity in Historical Perspective*, 3 N.Z. Y.B. INT’L L. 101, 120-22 (2006); Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT’L L. 787, 791-2 (1999); Egon Schwelb, *Crimes Against Humanity*, 23 BRITISH Y.B. INT’L L. 178, 205 (1946).

²² See William Schabas, *Why Is There a Need for a Crimes Against Humanity Convention?*, 44 *STUD. IN TRANSNAT’L LEGAL POL’Y* 251, 262-63 (2012). Jackson’s support for the nexus formed part of a larger concern to preserve the traditional notion of sovereignty. While Jackson was opposed by Groos from the French delegation, Jackson won out. Even with the nexus requirement, however, the result was still a dramatic challenge to the traditional notion of sovereignty. Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT’L L. 787, 799-800 (1999) (citing *Jackson Report*, *supra* note 15, at 329, 331, 361).

²³ See, e.g., BRADLEY F. SMITH, *REACHING JUDGMENT AT NUREMBERG* 14 (1977); BASSIOUNI, *supra* note 21, at 18, 31.

²⁴ *Jackson Report*, *supra* note 15, at 48. See also BASSIOUNI, *supra* note 21, at 41-42; BRADLEY F. SMITH, *REACHING JUDGMENT AT NUREMBERG* 15 (1977).

²⁵ F.B. Schick, *The Nuremberg Trial and the International Law of the Future*, 41 *AM. J. INT’L L.* 770, 785 (1947).

²⁶ See ANTONIO CASSESE ET AL, *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 354-55 (2002). See also Hans Kelsen, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?*, 1 *INT’L L. Q.* 153, 164-65 (1947); BRADLEY SMITH, *THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD, 1944-1945* 86 (1982).

²⁷ See Judgment of October 1, 1946, *International Military Tribunal Judgment and Sentences*, reprinted in 41 *AM. J. INT’L L.* 172, 249 (1947); Egon Schwelb, *Crimes Against Humanity*, 23 *BRIT. Y.B. INT’L L.* 178, 205 (1946); Leila S. Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT’L L. 289, 308 (1994); Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT’L L. 787, 804 (1999); Lindsay Moir, *Crimes Against Humanity in Historical Perspective*, 3 N.Z. Y.B. INT’L L. 101, 121-22 (2006).

same time, the Tribunal was relatively lax in finding the requirement satisfied in other instances.²⁸

After the war, the allies incorporated an expanded definition into the law governing Germany, provoking challenges that prosecutions under the new standard conflicted with the principle of legality.²⁹ Article 2(1)(c) of the Allied Control Council Law defined crimes against humanity as:

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.³⁰

However, in the actual conduct of trials under the Control Council Law, tribunal judgments split on whether or not the war nexus requirement was a necessary part of the definition of crimes against humanity.³¹ At the same time, the tribunal started to formulate a new limiting test—focusing on acts forming part of “systematic government organized or approved procedures amounting to atrocities.”³²

Following the post-war tribunals, the international community at large recognized the idea of crimes against humanity, and the newly created International Law Commission (ILC) was charged with developing the concept.³³ In 1950, at its second session, the ILC set forth its first definition of crimes against humanity in principle 6(c) of its “Nuremberg Principles,” defining crimes against humanity as:

[M]urder, extermination, enslavement, deportation, or other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, where such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.³⁴

²⁸ See Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT'L L. 787, 805-6 (1999); cf. HANNAH ARENDT, EICHMANN IN JERUSALEM 257 (1963) (contending that the ambiguity of the new crime category left tribunal judges with little guidance on when to charge the crime and how to properly sentence those convicted.).

²⁹ See Charles Jalloh, *What Makes a Crime Against Humanity a Crime Against Humanity*, 28 Am. J. Int'l L. 381, 395-96 (2013); *Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against the Peace and Against Humanity*, Art. 2 (1)(c), (1945), reprinted in, 1 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL OF COUNCIL LAW NO. 10 (1951).

³⁰ *Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against the Peace and Against Humanity*, Art. 2 (1)(c), (1945), reprinted in, 1 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL OF COUNCIL LAW NO. 10 (1951).

³¹ See Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT'L L. 787, 809-17 (1999).

³² *United States v. Altstoetter*, Judgment, 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO 10 954 (1951), at 982.

³³ See Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95(I), at 188 (Dec. 11, 1946); G.A. Res. 177 (II), 111 (Nov. 21, 1947).

³⁴ Jean Spiropoulos (Special Rapporteur on the Formulation of *Nürnberg Principles*), *Formulation of Nürnberg Principles*, 187. U.N. Doc. A/CN.4/22 (Apr. 12, 1950).

Therefore, in its first definition the ILC went with the Nuremberg as opposed to the Allied Control Council Law approach, maintaining the war nexus requirement as part of the definition, despite the fact that this requirement might have been purely jurisdictional even from the beginning.³⁵

By 1954 the ILC had yet another definition, this time presented as article 11 of its Draft Code of Offenses Against the Peace and Security of Mankind. This time around the ILC removed the war nexus requirement, defining crimes against humanity as:

Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.³⁶

The new attempt proved controversial, however, due to the suggestions that discrimination should now be shown relative to all of the potential offenses, and that state instigation or toleration would be required.³⁷

Little concrete work was done on the issue in the following decade, though the war nexus requirement was chipped away at by the 1968 Convention on the Non-Applicability of the Statutory Limitations to War Crimes and Crimes Against Humanity and the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid.³⁸ Thus, by the time work on a new draft code and definition commenced in the mid 1980s, there was agreement that the war nexus requirement was no longer necessary.³⁹

The next ILC definition was produced in 1991, following the end of the Cold War. By the time it had arrived at this new Draft Code, now renamed the Draft Code of Crimes Against the Peace and Security of Mankind, the ILC had hit upon the comparatively more objective formula of distinguishing crimes against humanity on the basis that they were committed on a “systematic manner or on a mass scale.”⁴⁰ The draft states, under an article headed “Systematic or Mass Violations of Human Rights,” that

[a]n individual who commits or orders the commission of any of the following violations of human rights: murder; torture; establishing or maintaining over persons a status of slavery, servitude or forced labour; persecution on social, political, racial, religious or cultural grounds, in a systematic manner or on a mass

³⁵ See, e.g., ROGER CLARK, *Crimes Against Humanity at Nuremberg*, in THE NUREMBERG TRIAL AND INTERNATIONAL LAW 195 (George Ginsburgs & V.N. Kudriavtsev eds., 1990); THEODOR MERON, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT’L L. 78, 85 (1994).

³⁶ Int’l L. Comm’n, Rep. on the Work of Its Sixth Session, Draft Code of Offenses Against the Peace and Security of Mankind, U.N. Doc. A/2691, at 150 (1954).

³⁷ See Daniel Johnson, *The Draft Code of Offences Against the Peace and Security of Mankind*, 4 INT’L & COMP. L. Q. 445, 465 (1955).

³⁸ See Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT’L L. 787, 823 (1999).

³⁹ *Id.*

⁴⁰ Int’l Law Comm’n, Rep. on the Work of Its Forty-Third Session, U.N. Doc. A/46/10, at 103 (1991). On the 1991 draft, see Christian Tomuschat, *Crimes Against the Peace and Security of Mankind and the Recalcitrant Third State*, in WAR CRIMES IN INTERNATIONAL LAW 41, 49-50 (Yoram Dinstein & Mala Tabory eds., 1996).

scale; or deportation or forcible transfer of population shall, on conviction thereof, be sentenced. . .⁴¹

The renaming of the 1991 definition is noteworthy, testifying to the clear recognition that crimes against humanity are a subcategory of systematic and mass human rights violations and, through that recognition, potentially opening up the door to expansion of the compass of criminality.⁴² While the renaming would not stick, it may yet come to be re-recognized in the future.

Once again the next definition would go backwards in suppressing the direct human rights relation, in failing to recognize the widespread/systematic requirement, and in reintroducing the war nexus requirement. Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute) stated that

[t]he International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.⁴³

While the ICTY Statute therefore linked crimes against humanity to conflict, as had been done at Nuremberg, this could even more easily be read as simply a jurisdictional limitation, rather than a substantive definitional component.⁴⁴ This limitation flows from the logic used at Nuremberg—since once again an international tribunal was being created, a bold act in and of itself, limitations would help to bolster potentially challengeable legitimacy. The *Tadic* decision of the Appeals Chamber affirmed that the ICTY Statute war nexus requirement was to be understood as limited because the Court made clear that it understood this component did not form a part of the

⁴¹ *Id.*; LYAL SUNGA, THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW: DEVELOPMENTS IN CODIFICATION AND IMPLEMENTATION 124-62 (1997); BASSIOUNI, *supra* note 21, at 189-191.

⁴² It is also noteworthy and important to observe that what exactly would qualify as systematic or mass was unclear, with the observation, for instance, that “even a crime perpetrated against a single victim could constitute a crime against humanity on the basis of its perpetrator’s motives and its cruelty.” Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT’L L. 787, 824 n.181 (1999) (citing *Summary Records of the 2379th Meeting*, [1995] 1 Y.B. Int’l L. Comm’n 3, U.N. Doc. A/CN.4/SER.A/1995). The ILC itself observed it had introduced the new heading because

[t]he common factor in all the acts constituting crimes under this draft article was a serious violation of certain fundamental human rights. In the light of this idea and bearing in mind the considerable development in the protection of human rights since the 1954 draft Code, both in the elaboration of international instruments and in the bodies that implement them and in the universal awareness of the pressing need to protect such rights, the Commission thought it useful to bring out this common factor in the draft article itself and in the title.

Int’l Law Comm’n, Rep. on the Work of Its Forty-Third Session, U.N. Doc. A/46/10, at 103 (1991).

⁴³ Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. S/RES/827, at 6 (2009).

⁴⁴ See Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT’L L. 787, 827 n.191 (1999).

definition of crimes against humanity under customary international law.⁴⁵ The ICTY also read in the requirement that the harm in question be widespread or systematic, despite the absence of such language from the Statute,⁴⁶ which supplies a post-hoc judicial remedy to address the problematic initial drafting.⁴⁷

Article 3 of the Statute of the International Criminal Tribunal for Rwanda (ICTR Statute) removed any such reference to an armed conflict, stating that

[t]he International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: 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.⁴⁸

The ILC adopted a third definition of crimes against humanity in 1996, as

[a]ny of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group: a) Murder; b) Extermination; c) Torture; d) Enslavement; e) Persecutions on political, racial, religious or ethnic grounds; f) Institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population; (g) Arbitrary deportation or forcible transfer of population; (h) Arbitrary imprisonment; (i) Forced disappearance of persons; (j) Rape, enforced prostitution and other forms of sexual abuse; (k) Other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.⁴⁹

In its comments on the 1996 definition, the ILC clarified that by systematic it meant an act committed pursuant to a preconceived plan or policy, while by massive it meant acts involving a multiplicity of victims.⁵⁰

Of course, the definition incorporated in the 1998 Rome Statute contains a particular claim to authority. There, article 7(1) defines crimes against humanity as

any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a)

⁴⁵ See *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 141 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

⁴⁶ See, e.g., *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 644 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

⁴⁷ However, the ICTY also read in other unfortunate and unnecessary elements. See Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT'L L. 787, 828, 832-40 (1999).

⁴⁸ International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955, at 4 (Nov. 8, 1994).

⁴⁹ Int'l Law Comm'n, Rep. on the Work of Its Forty-Eighth Session, art. 18, U.N. Doc. A/CN.4/L.532 (1996).

⁵⁰ See Int'l Law Comm'n, Rep. on the Work of Its Forty-Eighth Session, art. 18 ¶¶ 3-4, U.N. Doc. A/51/10 (1996).

Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.⁵¹

Article 7(2)(a) adds an additional twist to this definition, which creates a number of complications. The Rome Statute definition does manage to minimize, however, the potential link to armed conflict,⁵² and to dispose with the potential necessity of showing discriminatory grounds. The progressive features of Article 7 are quite an achievement since Article 7 was developed in negotiations with 160 countries, and one might have expected the definition to be more restrictive than its precursors as a result.⁵³

The history of changing definitions of situations of crimes against humanity demonstrates the manner in which the category has evolved dramatically and constantly over the course of its relatively brief life—suggesting, especially given the ongoing contestations and uncertainties in several areas considered below, that further changes are in store in the future as well.

The history demonstrates the roots of the idea of crimes against humanity in the context of war, but also the manner in which the concept has gradually and consistently transcended and broken with that framework.⁵⁴ The history also demonstrates a gradual expansion in the sorts of

⁵¹ Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90.

⁵² Though several states, including China, India, the Russian Federation and a number of Middle Eastern states argued for its inclusion. See Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT'L L. 787, 844 (1999). As scholars have noted, it is unsurprising that the war nexus should continue to find support, given that it provided a principle means of maintaining the idea of crimes against humanity within the war crimes sphere and hence the sphere of traditional international law and state sovereignty, as opposed to the more challenging sphere of human rights. See, e.g., Guyora Binder, *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie*, 98 YALE L.J. 1321, 1333, 1989; Elisabeth Zoller, *La définition des crimes contre l'humanité*, 120 J. DU DROIT INTERNATIONAL 549, 558 (1993); Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT'L L. 787, 846-47 (1999).

⁵³ See Darryl Robinson, *Defining 'Crimes Against Humanity' at the Rome Conference*, 93 AM. J. INT'L L. 43, 43 (1999).

⁵⁴ However, accretions from the war context persist in the Rome Statute—demonstrated in the references to “civilian population,” “attack,” and so on. While some attempt to preserve aspects of the limitation these terms apply, the weight of transitioning interpretation runs against them. Thus, one scholar has noted that the language of attack, for instance, is unfortunate, and that it would have been better if the term “acts” was simply used. David Donat-Cattin, *Crimes Against Humanity*, in THE INTERNATIONAL CRIMINAL COURT: COMMENTS ON THE DRAFT STATUTE 49, 54-55 (Flavia Lattanzi, ed., 1998). International tribunals have found similarly, observing that “the concept of ‘attack’ may be defined as a [*sic*] unlawful act of the kind enumerated [by the statute in question]. An attack may also be non-violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid Convention of 1973, or exerting

underlying violations that might be taken to add up to a situation of crimes against humanity, and the gradual development of a definition focused on the categorization of the harms in question as widespread or systematic, a test, that is, primarily concerning aggregate level of harm. Taken together, these developments suggest something even more fundamental—a gradual evolution of the notion of crimes against humanity in the direction of what might be termed a “victim-centered perspective,” as detailed below.

II. A VICTIM-CENTERED APPROACH

In the first place, a word of caution is needed—the intent in referring to a “victim-centered approach” here is not to make reference to the movement within international criminal law to ensure greater participation of and attention to victims, though those are aims with which this author sympathizes. Instead, the intent in this context is to emphasize a “victim-centered approach” in defining situations of crimes against humanity—meaning that the experiences of victims will be key to determining whether a situation of crimes against humanity may be found to exist or not. In short, such an approach will tend to clear away convolutions in the definition of the term that are not responsive to the harm being experienced by victims, leading to an approach to the term focused on aggregate level of harm.⁵⁵ To adopt such an approach will not dissolve all complications, of course; it will, however, help to clear out much unnecessary definitional confusion, and hence to refocus discussions on crimes against humanity around core underlying issues present but underexplored in current debates.

The victim-centered focus is made possible by, and builds on, the strong emphasis on the importance of individuals already deeply embedded in the notion of crimes against humanity itself. As observed in the introduction, in and of itself such a principle is surely unassailable—who could criticize an approach which foregrounds the situation of victims? The rub, however, comes with what such an approach inevitably minimizes.

A version of this approach is recognized by Kress, who, drawing on Robinson, refers to it as “victim-focused teleological reasoning.”⁵⁶ Kress launches several arguments that may be taken as contrary to such an approach. In the first place, Kress critiques the approach on the basis that it

pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.” Mohamed Elewa Badar, *From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity*, 5 SAN DIEGO INT’L L.J. 73, 108 (2004) (citing *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 581 (Sept. 2, 1998). Ironically, the term “attack” was apparently chosen out of the belief that it might be understood as less restrictive in certain instances; see Darryl Robinson, *Defining ‘Crimes Against Humanity’ at the Rome Conference*, 93 AM. J. INT’L L. 43, 50-51 (1999).

⁵⁵ As such, the definition of crimes against humanity proposed here is generally in alignment with that proposed by Geras. NORMAN GERAS, *CRIMES AGAINST HUMANITY: BIRTH OF A CONCEPT* (Manchester University Press eds., 1st ed. (2011)).

⁵⁶ See Claus Kress, *On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision*, 23 LEIDEN J. INT’L L. 855, 861 (2010); Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT’L L. 925, 933-46 (2008). While supporters of a limited standard employ the label “teleological” to those arguing for a broader concept of crimes against humanity, that term itself, including its understood pejorative connotation, is in need of radical re-thinking. Without going into detail, it is worth noting that “teleological” thinking can be understood to encompass the gradual detailing of general standards, the working through of convoluted and contradictory norms and laws in favor of universal applicability and the principle of legality, and the evolution of standards to meet contemporary needs, rather than simply the loose notion of empty-headed idealism the term seems intended to conjure up.

conflicts with the approach provided by customary international law.⁵⁷ Given the complexity and confusion in both the definition of the terms in question as well as the historical fluidity of the category of crimes against humanity, however, such an approach is less than convincing. Second, Kress suggests that advances in international criminal law “should. . . not be initiated by the international judiciary but should rather be supported by a solid amount of state practice.”⁵⁸ This argument is weak once again to the extent the state of the law is far less clear than Kress contends—rendering judicial acts in such area the typical and necessary resolution of confusion, rather than a form of judicial activism.

Other opponents of a broad and flexible understanding of situations of crimes against humanity, such as Kaul and Schabas, devote a major portion of their attention to Nuremberg and the roots of the term, arguing in essence that the category should continue to be applied in the ways it traditionally has been.⁵⁹ There are several reasons to disfavor such an approach, however. In the first place, such an approach fails to account for the development of the notion of crimes against humanity over the course of its history, as explored above. Second, such an approach seems to convert the particularity of original cases into the boundaries of the generality of the law that is understood to have been applicable. Third, such an approach fails to account for the potential of new forms of mass violation, which a flexible, harm-based approach is better able to take into account.⁶⁰ Fourth, such an approach seems overly Western-centric (as is, one might argue, so much of international law), privileging the World War II model of state-orchestrated harm over hazier situations in which state and non-state actor violence may overlap and intermingle, which have been prominent in so many parts of the world in the post-World War II era. Fifth, such a conservative mode of interpretation seems out of place in the context of an area of law that was born out of the need to address violations as they in fact occur, rather than out of fealty to previously clearly established legal categories.

At heart, interpreters like Kaul and Kress simply seem to favor a more conservative approach. The core question, then, is what policy rationales might counsel in favor of such an approach? Perhaps the closest Kress comes to addressing this question is his suggestion that since international criminal law goes further than human rights law in limiting state sovereignty, it is particularly important that it not be subject to progressive interpretation. In particular, Kress argues that international criminal law

⁵⁷ See Kress, *supra* note 56, at 867-71 (arguing that customary international law supports a narrow reading of ‘organization’, and more broadly a high contextual requirement for crimes against humanity).

⁵⁸ *Id.* at 873.

⁵⁹ See William Schabas, *Is Terrorism a Crime Against Humanity*, 8 INT’L PEACEKEEPING 255 (2004); William Schabas, *State Policy as an Element of International Crimes*, 98 J. CRIM. L. & CRIMINOLOGY 953 (2008); Situation in the Republic of Kenya, ICC-01/09, Pre-Trial Chamber II, Decision Pursuant to Article 15, Dissent of Judge Kaul (Mar 31, 2010)

⁶⁰ In this context, it is worth pointing out that the expansion of the notion of crimes against humanity has not been occurring in a vacuum, nor has it been driven by abstract academic concerns—rather, it has evolved as part and parcel of an effort to address the worst harms that are actually occurring in the world today. As such, it is important not only that a standard that can encompass a variety of forms of responsible entities be developed, but also that the notion remain loose and open and able to evolve to address new forms of mass harm creation. Also emphasizing the later point on the importance of flexibility, see Alain Pellet, *Applicable Law*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1056-8 (Antonio Cassese et al eds., 2002); see also David Hunt, *High Hopes, ‘Creative Ambiguity’ and an Unfortunate Mistrust in International Judges*, 2 J. INT’L CRIM. JUST. 56, 59 (2004) (arguing that flexibility in international criminal law is necessary for it to grow).

carries with it the competence of properly instituted international. . . courts to decide on the genuineness of national. . . proceedings, a presumption against immunities *ratione materiae*, a presumption in favour of universal jurisdiction, and a presumption against the power to grant amnesties.⁶¹

The suggestion that such characteristics are unique to international criminal law is quickly belied by an examination of the work of the regional human rights courts, however, of which all the same statements could be made.⁶²

Once again, Kress does not quite manage to state what might be taken as the argument at the heart of his position—that is, why a conservative approach should be favored over a progressive one. Extrapolating, therefore, and assuming that the exponent of such an argument is in favor of the application of the category of crimes against humanity in general (for if not resistance is far easier to understand), the core argument behind such a position would appear to be the backlash argument. In other words, if the law is pushed too far in a progressive direction, a backlash may occur, leaving the ultimate state of the law in a worse position than when the progressive push started.

Even where it is most studied, relative to domestic court decisions, the backlash hypothesis is deeply contested. There is perhaps even more reason to be skeptical relative to the international realm, where—at least where progressive interpretation is conducted gradually—states are likely to adjust to new developments, rather than to challenge them. That rapid progressive change may not be possible should not deter one from advocating such change—rather it should merely make one realistic as to the pace at which the change in question may occur. Finally, and perhaps most essentially of all, it should be recognized that the progressive changes in question are not strictly opposed to state interests in the manner that Kress seems to presume: first, because progression in the understanding of situations of crimes against humanity of the sort advocated here consists, in significant part, in reorientation rather than simply expansion; second, because expansions in the framework may be taken as in the interests of states, insofar as states are concerned—as in fact so many are—with addressing the worst situations of mass rights violation around the world; and third, because jurisdiction in international criminal law remains governed by the sovereignty-respecting principle of complementarity.

Another significant concern for Kress and Kaul appears to be the limited capacity of the ICC. Such limited capacity is a fact; the response, however, should be a principled prioritization or triage, in which the court focuses on the most severe instances of violation, rather than an approach which refuses to consider some such instances on the basis of formalistic criteria.

The piece upon which Kress dwells, Robinson's article on the tensions within international criminal law, draws a different binary, emphasizing tensions internal to international criminal law

⁶¹ Kress, *supra* note 56, at 861.

⁶² One might also observe, further to the point made above, that it is strange that Kress recognizes the sovereignty-limiting principle inherent to crimes against humanity, while seeking to limit its use to interpret that body of law at the same time.

Kress is right, however, to observe that international criminal law has served to highlight an understanding that has been deeply contested in the human rights context – that human rights obligations should be understood as horizontal as well as vertical. Instead of rejecting this recognition, as Kress would have it, however, it seems far preferable to follow Clapham's approach, accepting and recognizing the horizontal component of rights violations. See Kress, *supra* note 56, at 860 (citing Andrew Clapham, *Human Rights Obligations of Organized Armed Groups*, in *NON-STATE ACTORS AND INTERNATIONAL HUMANITARIAN LAW: ORGANIZED ARMED GROUPS: A CHALLENGE FOR THE 21ST CENTURY* 103 (Marco Odello & Gian Luca Beruto eds., 2010)).

due to its dual basis in both the liberal criminal law context and the human rights/humanitarian law context.⁶³ While Robinson is careful to emphasize that he is seeking to highlight an internal tension and not necessarily taking sides, it is hard to read the piece without coming to the conclusion that international criminal law must do more to recognize liberal criminal defense principles.

Those who follow such a reading might well be among those who criticize the approach at hand—they might contend that such a strongly assertive, progressive approach will do even more to undermine the already weakened system of rights for the accused. The position advanced here however is that in fact the opposite may be the case. In order to assert that an individual has committed crimes against humanity, two separate things must be shown—the situation must be found to amount to one of crimes against humanity; and the individual in question must be found culpable relative to a constituent harm.⁶⁴ A reconstructed and, in some ways, more liberal approach to the first question concerning the definition of situations may bring with it both increased normative pressure and expanded potential for other forms of sanction. It may then be possible to tip the scales in the other direction on the other side of the equation—strengthening the rights of individual defendants at the individual liability stage of international criminal trials, now that criminal sanction alone is not forced to carry the full weight of remedial responsibility.

III. RESPONSIBLE ENTITIES

The first question that must be addressed relative to situations of crimes against humanity is what sorts of entities may be responsible for creating such situations. A victim-centered approach favors liberality in terms of the recognition of the types of entity that may be responsible. In this context, any form of entity to which responsibility for harms rising to the necessary level of gravity can in fact be attributed—be it state, organization or individual—should be recognized as potentially responsible for, or as partaking in, the creation of a situation of crimes against humanity.

Arguments have, of course, been raised against such a position. Besides the more general arguments of Kress, discussed above, Bassiouni has aligned himself against expansion of liability beyond states, arguing, for instance, that when

[C]rimes are committed as part of a state's policy, it is likely to produce large-scale victimization. . . . [I]t is not the quantum of the resulting harm that controls, but the potentiality of large-scale harm that could derive from a state's abuse of power. In other words, when state actors abuse the power of a state, there is little that can stop them before they carry out their course of conduct against a civilian population. . . .⁶⁵

The weakness of such a position is already apparent in the text itself. Bassiouni insightfully identifies a key component of assessing the gravity of a situation, dealt with further below—the importance of considering potential future harm, and not merely harm committed to date. The core

⁶³ See Robinson, *supra* note 56.

⁶⁴ In the crimes against humanity context, the situational gravity threshold question is of course contained in the requirement that the act be committed 'as part of a widespread or systematic attack directed against any civilian population.'

⁶⁵ M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION 10 (2011). See also deGuzman, *supra* note 2, at 368-9 (2000), *commenting on* BASSIOUNI, *supra* note 21, at 248-9.

emphasis remains on aggregate of harm and potential harm—an emphasis in full agreement with the position adopted here. The natural result of such an emphasis, however, is that should an individual cause or have the potential to cause a greater amount of harm than a state might, there would be a stronger claim that his or her acts be understood to create a situation of crimes against humanity.⁶⁶

One might also argue that limiting the potential for situations of crimes against humanity to be created only by the actions of states is a progressive choice—since states are, in general, amply able to punish those they consider major criminals, it is important to retain the crimes against humanity category for state harms.⁶⁷ A strong argument can be made in favor of such a position—that expanding the framework would allow states to divert attention from themselves. However, strong arguments can be made on the other side as well. Overall, such an approach would help to establish a common framework under which individuals, organizations and states could all be held liable. The potential value of such an approach can, for instance, be seen if one considers the terrorism context—as consideration of state and terrorist crimes under the same framework might help to ensure state commission of similar acts is recognized as such, to create a more realistic, comparative weighing of the harm arising from such sources in comparison to other harms, and to ensure such harms are no longer dealt with by an isolated legal regime that breeds abusive standards.

The Kenya case before the ICC is helpful for highlighting some of the complexities of identification of responsible entities in practice, and the value of a loose standard relative to responsible entities. In his dissent at the Article 15 stage in that case, Judge Kaul argued that it was not clear a policy could be identified to commit the violence in question, or that it could be traced to a single entity.⁶⁸ Judge Kaul’s decision could be critiqued on many levels—one could disagree

⁶⁶ Similarly, Schabas argues that the policy element should be maintained, due to the need to encompass more serious violations. See William Schabas, *Prosecuting Dr. Strangelove, Goldfinger, and the Joker at the International Criminal Court: Closing the Loopholes*, 23 LEIDEN J. INT’ L. 847-9 (2010). Once again, though, the key emphasis is on extent of harm, for which a policy or states-only requirement presents only a broad and vague cypher.

The example of individuals often seems misleading in this context, since it is hard to imagine that an individual without links to what could be characterized as one sort of organization or another would have the resources necessary to commit harm of the requisite level of gravity. Should they be able to do so, however, it is not clear why they should be excluded from capacity to commit crimes against humanity. As others have recognized:

Are there not forces and organizations whose powers might be greater and whose actions might be more extensive than those of certain countries represented institutionally at the United Nations? Care is required because other methods of total abuse of the human condition could equal in horror, albeit from other aspects, those of which we have just spoken.

Leila Sadat, *Crimes Against Humanity in the Modern Age*, 107 AM. J. INT’L L. 334, 354 (2013) (citing Cass. Crim., Jan. 26, 1984, JCP 1984 1120, 197 (submission of French Advocate Dontenville)). The statement here still refers to organizations, but its logic is equally applicable to powerful individuals. See also Situation in the Republic of Kenya, ICC-01/09, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶¶ 89-90 (Mar 31, 2010).

⁶⁷ See, e.g., William Schabas, *Is Terrorism a Crime Against Humanity*, 8 INT’L PEACEKEEPING 255, 259-60 (2004) (arguing that crimes against humanity were originally developed for atrocities that were not punishable by judicial authorities and not for terrorist groups); William Schabas, *State Policy as an Element of International Crimes*, 98 J. CRIM. L. & CRIMINOLOGY 953, 974 (2008) (arguing that it is not necessary to define terrorism as an international crime because States where terrorism occurs can prosecute those responsible).

⁶⁸ See Situation in the Republic of Kenya, ICC-01/09, Pre-Trial Chamber II, Decision Pursuant to Article 15,

with his reading of the facts, for instance, and one could bolster such a position by arguing for a loose standard at such an early stage in a judicial determination. The majority decision in the case may be taken to go even further, however, gesturing towards how entities may be defined—as it might be taken that a finding of a situation of crimes against humanity would be found in such a case without responsibility being unitarily attributed to one particular entity, but rather to a web of interconnected actors and entities, unity among which consists of and is demonstrated by their commission of a unified set of violations.⁶⁹ The case also demonstrates the close relationship between a loose standard and evidential questions—with Judge Kaul’s standard tending to shield the state, allowing for situations of crimes against humanity not to be found, despite compelling evidence of concerted violations, on the basis that the necessary internal working of the mechanisms of violence in question are inaccessible.

Another hypothetical scenario may help to demonstrate the superiority of a flexible test in this area as well. Imagine a situation of cross-border human trafficking involving work conditions amounting to slavery. The activity would be driven both by corrupt members of the authorities on both sides of the flow of people, as well as shadowy organizations and individuals involved in the human trafficking business, and perhaps supported by a variety of corporations involved in obtaining and supplying the labor force in question. In such a situation, not only do evidential questions once again arise, but even if they were settled a problem remains insofar as the situation is created by a combination of actors at different levels. While states are involved in multiple ways, including both through the criminal acts of their corrupt agents as well as through a failure to protect, the situation on a whole is created by a combination of state and non-state actors. The hypothetical also helps to highlight the absurdity of requiring a state element in the creation of the situation as a core component of the definition—as, should such component be found sufficient even on the state-centric approach in a situation like the one in question, presumably all the actors involved could then in fact be prosecuted, which is indeed the very point of the category of crimes against humanity. Moreover, like the Kenya example, the hypothetical highlights the fact that states are not unitary actors but instead consist of multiple conflicting groups and individuals, often primarily motivated by private interests—once again counseling in favor of a more flexible approach.

Finally, it is worth noting that in the war crimes context, the distinction has long since broken down—with non-state participants in conflicts being recognized as potential committers of war crimes just as state parties’ agents are, and with the situational test of whether or not a conflict exists being based on a factual inquiry.

The position of the majority is the position a victim-centered approach supports – a position that takes seriously the perspective and understanding of those involved in and suffering from the situation in question. To recognize that a common responsible entity may be found in such a case is also to observe the close inter-relationship between determining responsible entities and determining the boundaries of the situation in question. In this context, it is in fact the second part of the equation, the problem of recognizing how the boundaries of a particular situation should be defined, that is particularly complex and vexing; it is to this problem that we now turn.

Dissent of Judge Kaul, ¶¶ 147-52 (Mar 31, 2010).

⁶⁹ See Situation in the Republic of Kenya, ICC-01/09, Pre-Trial Chamber II, Decision on the Prosecutor’s Application for Summons, ¶ 22-5 (Mar 8, 2011).

IV. DEFINING SITUATIONS

One of the most perplexing elements of defining situations of crimes against humanity concerns the definition of situations. This section will first turn to current legal standards in this area, exploring how reference to the policy requirement has muddied the waters. The section will then attempt to go beyond current standards to explore the hard questions at the heart of the problem of defining situations. Given the lack of attention to these issues, the primary contribution of this piece can only be to clear the field and to focus attention on such questions, in the hope that further definitional clarity may be achieved in time. At the same time, however, this piece attempts to go as far as possible towards developing a framework of thought through which to approach such issues, in the hope that this may provide a useful starting point for further explorations.

A. *The Policy Requirement*

Article 7(1) of the Rome Statute states

[f]or 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[.]⁷⁰

Article 7(2)(a) of the Rome Statute requires that such attack be “pursuant to or in furtherance of a State or organizational policy to commit such attack.”⁷¹

What exactly the policy requirement entails has never been entirely clear.⁷² It has, hence, been a matter of great debate within the literature, with scholars arguing both about the meaning of the term and the rationales in support of different interpretations. Primarily, scholars have argued in favor of a loose reading of the term, despite the more precise meaning the word “policy” seems to connote.⁷³ Among other arguments, scholars have emphasized that a loose reading of the policy

⁷⁰ Rome Statute of the International Criminal Court, art. 7(1), July 17, 1998, 2187 U.N.T.S. 90.

⁷¹ *Id.* at art. 7(2)(a).

⁷² As Mettraux points out, from the beginning Maxwell Fyfe expressed reservations about the policy requirement due to its lack of clarity. See Guénaël Mettraux, *The Definition of Crimes Against Humanity and the Question of a “Policy” Element*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 142-43 (Leila Nadya Sadat ed. 2011) (citing International Conference on Military Trials, London 1945, *Minutes of Conference Session of 19 July 1945, concerning the definitions of crimes within the jurisdiction of the IMT*, reprinted in REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS, LONDON 1945, at 301 (1949)).

⁷³ See deGuzman, *supra* note 2, at 374; Phyllis Hwang, *Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court*, 22 FORDHAM INT’L L. J. 457, 502-3 (1998); Guénaël Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT’L L.J. 237, 270-82 (2002); Darryl Robinson, *Defining ‘Crimes Against Humanity’ at the Rome Conference*, 93 AM. J. INT’L L. 43, 50-51 (1999) (citing Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 653 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997) for the proposition that the policy in question need not be formalized and might be deduced from the circumstances); Leila Nadya Sadat, *Crimes Against Humanity in the Modern Age*, 107 AM. J. INT’L L. 334, 371 (2013) (emphasizing that the policy requirement was added to the Rome Statute at the last minute). See generally ROBERT CRYER, HÅKAN FRIMAN, DARRYL ROBINSON & ELIZABETH WILMHURST, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE (Cambridge University Press, 2007); Matt Halling, *Push the Envelope—Watch it Bend: Removing the Policy Requirement and Extending Crimes Against Humanity*, 23 LEIDEN J. INT’L L. 827 (2010), <https://perma.cc/697S-X22J> (advocating for removing the state or organizational policy requirement from the definition of

requirement seems essential simply given the structure of the Rome Statute definition. Since it is difficult to distinguish the policy requirement from the “systematic” requirement, a strong reading inevitably converts the disjunctive “or” in “widespread or systematic” into the conjunctive “and.”⁷⁴ On the other hand, a few scholars have also come down in favor of a stringent policy requirement, basing their arguments primarily on either a historical approach or on an understood merging of the policy requirement and the requirement that crimes against humanity can only be committed by states or state-like entities.⁷⁵

Much of the debate and confusion around the policy requirement likely derives from the fact that there is in a sense a missing, implicit requirement in the Rome Statute—a requirement that can perhaps best be referred to as the “common situation requirement.” In order to demonstrate a situation of widespread or systematic violation, in other words, one cannot simply pick violations at random; rather, one must show that a common situation exists linking the violations and evidence one presents. Hence, some commentators have assigned the policy requirement this role, making it the criterion upon which unassociated crimes in the context of a crime wave are not considered to constitute a situation of crimes against humanity, for instance.⁷⁶ The question, then, is whether the policy requirement provides an appropriate criterion under which to resolve such a definitional problem. The answer provided by this paper, needless to say, is no; rather than providing clarity, reference to the policy requirement has in fact obscured the difficult question at the heart of defining situations.

B. *Defining Common Situations*

The question of how common situations are to be defined has two parts: first, what sorts of evidence justify understanding violations as interlinked; second, how are the temporal limits of a situation to be defined.

Determining whether violations are interlinked involves overlapping inquiries into several different questions. In the first place, unifying characteristics of the victim group may help to show how the violations in question form part of a common situation—one might think of the situation of African Americans, for instance, or indigenous peoples, or of other identity-defined groups. In the second place, the violation itself may provide evidence of a connection—where similar violations are being committed against multiple different victims by the same responsible entity, evidence exists of a common situation. Such commonality may in fact span considerable geographic and victim-class differences—one might think for instance of problematic instances of the use of

crimes against humanity); Guénaël Mettraux, *The Definition of Crimes Against Humanity and the Question of a “Policy” Element*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 142 (Leila Nadya Sadat ed., 2011). A loose reading has of course also been adopted by the ICC; see Situation in the Republic of Kenya, ICC-01/09, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶¶ 84-88 (Mar. 31, 2010).

⁷⁴ See, e.g., deGuzman, *The Road From Rome*, supra note 2, at 372 (citing *The South Asia Human Rights Documentation Center, The North Americans Re-Write Customary International Law: An “And” by Any Other Name is Still an “And”* (July 2, 1998)).

⁷⁵ See generally Claus Kress, *On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision*, 23 LEIDEN J. INT’L L. 855 (2010); William A. Schabas, *State Policy as an Element of International Crimes*, 98 J. CRIM. L. & CRIMINOLOGY 953 (2008).

⁷⁶ See, e.g., Darryl Robinson, *Essence of Crimes against Humanity Raised by Challenges at ICC*, EUR. J. INT’L L. BLOG (Sept. 27, 2011), <http://www.ejiltalk.org/essence-of-crimes-against-humanity-raised-by-challenges-at-icc/> [<https://perma.cc/E4NL-29EV>].

force or surveillance abroad that are then brought home; or of policing practices applied on the one hand against dissidents and on the other against migrants and refugees. Third, where there is evidence that violations committed in different manners against different groups share a common motivation, for instance of ensuring authoritarian control, those violations too may be understood as linked. While the “policy” requirement suggests a relatively conservative and limited approach to recognizing such interconnections, a victim-centered approach suggests a far more liberal methodology to these questions.

To lay out such factors does not, of course, provide much more than a starting point for considering how to define the limits of situations, from which the infinitely demanding task of applying legal categories to concrete facts may begin. The greater the clarity around and attention to such issues, however, the greater will be the usefulness of future jurisprudence in helping to explore the best way of thinking about such parameters.

The second question, as laid out above, is how to define the temporal boundaries of a particular situation.⁷⁷ This question is even more vexed than the question of inter-linkages. On the one hand, as long as violations are interlinked, one might understand them as all adding up to a single situation, over the course of time. On the other hand, in assessing gravity, what is important is clearly the aggregate of harm committed within a concentrated period of time. As such, the question becomes, how are the parameters of such a concentrated period to be assessed? An arbitrary numerical delimitation (e.g. five years) would not do justice to the complexity of such situations in reality. Given the close connection to the question of aggregate harm—and the consequent complexities of temporal position relative to the assessment of situations—this question is delayed for the moment, to be picked up at the conclusion of the examination of aggregate harm, to which we now turn.

V. AGGREGATE HARM

Wherever one might land on the liberality of the victim-based approach, it has the clear additional merit of simplifying the notion of crimes against humanity and centering the factual inquiry as to whether or not such a situation in fact exists around the question of aggregate level of harm.

A. *The “Widespread or Systematic” Requirement*

The primary test of whether a level of aggregate harm sufficient to constitute a situation of crimes against humanity may be found, that has developed as a core component of the definition of crimes against humanity over the course of the history of the term, is whether the violations in question are “widespread” or “systematic,” with the understanding that only one such category must be shown to apply.⁷⁸

An underlying violation will be considered “widespread” where

⁷⁷ The importance of this question has been recognized by the ICC. *See, e.g.*, Situation in the Republic of Kenya, Pre-Trial Chamber II, Decision Pursuant to Article 15, ICC-01/09, ¶¶ 205-7 (Mar. 31, 2010) (utilizing a liberal approach to temporal scope).

⁷⁸ *See, e.g.*, Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1-A, Judgement, ¶ 93 (Int’l Crim. Trib. for the Former Yugoslavia, June 12, 2002), <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf> [<https://perma.cc/EJ2W-7S4C>].

the inhumane acts [are] *committed on a large scale* meaning that the acts are directed against a multiplicity of victims. . . The term “large scale” is sufficiently broad to cover various situations involving multiplicity of victims, for example, as a result of the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.⁷⁹

The definition of systematic has been subject to more controversy. In some cases it has been defined as including a policy element—thus *Tadic* states that a violation will be considered systematic where it is committed “pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhuman acts.”⁸⁰ *Akayesu* endorses this in stating that

[t]he concept of systematic may be defined as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy.⁸¹

The *Kunarac* Appeals Chamber judgment, on the other hand, states that

[t]he phrase “systematic” refers to “the organized nature of the acts of violence and the improbability of their random occurrence”. The Trial Chamber correctly noted that “patterns of crimes—that is the non-accidental repetition of similar criminal conduct on a regular basis—are a common expression of such systematic occurrence”. . . neither the attack nor the acts of the accused need to be supported by any form of “policy” or “plan”. . . It may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic (especially the latter) to show that there was in fact a policy or plan, but it may be possible to prove these things by reference to other matters.⁸²

⁷⁹ Int’l Law Comm’n, Rep. on the Work of its Forty-Eighth Session, U.N. Doc. A/51/10, at 47 (1996), http://legal.un.org/docs/?path=../ilc/documentation/english/reports/a_51_10.pdf&lang=EFSXP [https://perma.cc/5ZRW-YAL2]; *see also* Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 648 (Int’l Crim. Trib. for the Former Yugoslavia, Trial Chamber May 7, 1997), <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf> [https://perma.cc/CC3A-MLH9].

⁸⁰ Int’l Law Comm’n, Rep. on the Work of its Forty-Eighth Session, UN Doc A/51/10, at 47 (1996), http://legal.un.org/docs/?path=../ilc/documentation/english/reports/a_51_10.pdf&lang=EFSXP [https://perma.cc/5ZRW-YAL2]; *see also* Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 648 (Int’l Crim. Trib. for the Former Yugoslavia, Trial Chamber May 7, 1997), <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf> [https://perma.cc/CC3A-MLH9].

⁸¹ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 580 (Int’l Crim. Trib. for Rwanda, Sept. 2, 1998), <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf> [https://perma.cc/QG9F-B33Q].

⁸² Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1-A, Judgement, ¶¶ 94, 98 (Int’l Crim. Trib. for the Former Yugoslavia, June 12, 2002), <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf> [https://perma.cc/CC3A-MLH9]. As the tribunal starts to recognize in the judgment, the difference between the two standards is perhaps best understood as a matter of evidence. *See*, BASSIOUNI, *supra* note 21, at 196-99. The result of the Kunarac decision, therefore, is that systematicity can be shown either by showing intent, or by showing pattern or practice.

That widespread harms may ground a finding of sufficient gravity of aggregate harm is unsurprising. Where harms are widespread, moreover, the systematic nature of the harms in question may be presumed. Why should systematic harm, that one cannot also show to be widespread, also be taken as evidence of a situation of sufficient gravity however? Two rationales present themselves. In the first place, evidentiary issues are frequently very challenging in the context of demonstrating major rights violations. As such, pointing to the systematic nature of harms may be taken as a way of suggesting that the harms in question extend beyond what can otherwise be shown. In the second place—and uniquely to the assessment of *ongoing* situations of violation—demonstrating the systematic nature of the harm in question may be taken, together with assessment of the capacity of the responsible entity,⁸³ as strong grounds to fear for extensive further violations of the sort in question. This prompts an assessment of the situation from a contemporaneous perspective as one amounting to one of crimes against humanity on the basis in part of the potential of future harm.

B. Underlying Harms

Only certain sorts of violations have been taken as significant in terms of determining whether a situation of crimes against humanity exists. Primarily, these are what might be classified as integrity rights violations—harms to life and limb and forms of physical violence and coercion—killings, torture, rape, slavery, and so on.

While a certain magnitude of such integrity harms would seem to constitute an essential component of situations of crimes against humanity, the definition of the term to date may be taken to go beyond such purely integrity harms as well. The Rome Statute list, provided above, is the most comprehensive to date. Several terms within that list—specifically “[i]mprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law[.]” apartheid, “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health[.]” and persecution—all appear to push the boundaries beyond the integrity rights realm.⁸⁴

First, the Rome Statute refers to “[i]mprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law[.]”⁸⁵ While on the one hand, imprisonment constitutes a form of physical coercion and an integrity harm, it also quickly presents a much more complicated issue, as determining whether or not the deprivation of liberty in question violates the fundamental rules of international law will quickly come to involve an extensive assessment of both a country’s penal code and the manner in which its justice system functions in the criminal realm in general. Inclusion of such a form of violation alone converts potential application of the Rome Statute from coverage only of situations involving massive physical violence to situations of mass and unjust criminal and prison systems as well.

On a more general level, such a focus helps to shift one’s imagination of the sorts of situations which might come to be classified as situations of crimes against humanity—with the category now encompassing more clearly repressive, authoritarian regimes—or states that apply such regimes to particular components of their population—as well as situations involving excessive levels of physical violence. The category of apartheid—too internally complex to go into in detail here—clearly helps to shift the overall potential focus of situations of crimes against

⁸³ This emphasis picks up Bassiouni’s point about potential for future harm discussed above.

⁸⁴ Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90.

⁸⁵ *Id.*

humanity in this direction as well, focused, as it is, on a situation of overall political discrimination and inequality.

The catch-all clause of the Rome Statute, referring to “[o]ther inhumane acts[,]” provides another basis for a potentially broad understanding of those crimes that constitute crimes against humanity.⁸⁶ The definition provided by the ICTY and ICTR to such a term was broad, understanding serious attacks on human dignity, as well as acts causing serious suffering or injury, to amount to crimes against humanity;⁸⁷ the 1996 ILC definition, as noted above, was similar.⁸⁸ Scholars too have argued for a broader interpretation of this clause.⁸⁹ The ICC on the other hand has suggested, unsurprisingly, that it will read this clause cautiously.⁹⁰ Nonetheless, the presence of the term provides a clear avenue by which the category of underlying harms may be expanded in time.

The category of persecution has been saved for last because it presents yet another way of thinking about such issues. In the first place, the inclusion of the term as one category of potential underlying harm helps to expand and reorient the notion of crimes against humanity along the same grounds as does reference to apartheid, discussed above.⁹¹ The Rome Statute does not assert persecution as one more category among equals however—rather, persecution is defined as a crime that may underlie a finding of crimes against humanity only where it is connected to another act.⁹²

This is, at first encounter, an odd way in which to define the harms that may underlay a situation of crimes against humanity. On further reflection, however, such a rule begins to make some sense. In the first place, a certain level of harms of the sort defined by the other articles of Article 7 of the Rome Statute is required in order for a situation to potentially qualify as one of crimes against humanity. Once sufficient gravity of such harms is present—the level of which will be less than what would otherwise be necessary to constitute a situation of crimes against humanity—additional, “persecution” harms may be considered, adding weight to the gravity calculation as a whole, and allowing a more comprehensive assessment of the ultimate situation to be produced.

Persecution may hence be a bridge through which categories of rights violation otherwise excluded from the Rome Statute list may be examined when the weight of violations encompassed

⁸⁶ *Id.*

⁸⁷ *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Judgement, ¶ 151 (Int’l Crim. Trib. for Rwanda May 21, 1999), <http://unictr.unmict.org/sites/unictr.org/files/case-documents/ict-95-1/trial-judgements/en/990521.pdf> [https://perma.cc/9HLR-YAE7]; *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Judgement, ¶ 91 (Int’l Crim. Trib. for Rwanda, I June 7, 2001); *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgement, ¶ 240 (Int’l Crim. Trib. for the Former Yugoslavia, Mar. 3, 2000), <http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf> [https://perma.cc/A87M-WG3J].

⁸⁸ *See* Int’l Law Comm’n, Rep. on the Work of its Forty-Eighth Session, U.N. Doc. A/51/10, at 47 (1996).

⁸⁹ *See, e.g.,* Bernhard Kuschik, *Humaneness, Humankind and Crimes Against Humanity*, 2 GOETTINGEN J. INT’L L. 501, 502-10 (2010).

⁹⁰ *Prosecutor v. Katanga*, ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶¶ 450-53, 455 (Sept. 30, 2008). In paragraph 450 however the ICC also leaves open significant grounds for expansion of the term, observing that international human rights law should be looked to in determining the meaning of other inhumane acts.

⁹¹ The category of persecution is potentially extremely broad; for listings of acts falling under this category, *see* STEVEN RATNER & JASON ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* 74 (1st ed. 1997); *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Judgement and Sentence, ¶¶ 22, 1072-76 (Int’l Crim. Trib. for Rwanda, I Dec. 3, 2003); David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L L. 85, 99-101 (2004).

⁹² *See Nahimana v. Prosecutor*, Case No. ICTR-99-52-A, Judgment, ¶ 986 (Nov. 28, 2007) (explaining that hate speech alone cannot be “a violation of the rights to life, freedom and physical integrity of the human being” in the absence of additional acts causing physical injury).

by that list is sufficient. In this manner, socioeconomic as well as civil and political rights violations might all come to form part of the picture.⁹³

C. Aggregate Harm and Temporality

The final question, of course, and the most significant, is how aggregate harm is to be determined. There is no magic formula to answer the question of sufficient level of harm, which will inevitably require a hard, contextual determination.

A few helpful general points as to how the inquiry should be made may be laid out, however. In the first place, as the above has demonstrated, the inquiry must take into account both different types of harms that may be understood as part of the same situation, each of which may carry different weight, as well as the overall extent of the harm. Where the weight of “core” harms is substantial, but not enough in itself to ground a finding of a situation of crimes against humanity, other sorts of “persecution” harms may also be considered in conducting the weighing. In any event, the final analysis should include an assessment of all the harms that may be found part of the situation in question.

One of the hardest questions in fact, however, delayed from two previous sections for further consideration here, concerns the temporal delimitation of situations. The first point to note in this context is that the temporal relationship between the assessor and the situation in question matters.

Assessment of past situations will allow for a fuller and more dispassionate assessment. Precipitating events will be context specific, but are likely to include significant political moments or the first instances of violation of a type that will come to be regularly repeated. Concluding events are likely to have a similar character. In such context, as noted above, the quantity of time in which the harms in question occur will be a key part of the analysis. Attempting to define in advance the parameters of such temporality would be like attempting to quantify in some absolute way the level of harm that must be found; rather, such questions must be left to context-specific assessment.

Assessment of ongoing situations will be the same when it comes to precipitating events—though the absence of the greater perspective afforded by history may mean that certain early manifestations of the situation in question may be hard to identify. The ongoing nature of the situation in question, however, will mean that there is no attempt to identify an endpoint; the final assessment of whether the situation rises to the necessary level of gravity will, instead, involve an assessment of expected future harm.

In this context, of course, something like a paradoxical situation may arise—an ongoing situation may be assessed as one of crimes against humanity, due to the effects of such assessment, to then be subject to the sorts of pressure that may, in the course of time, succeed in preventing the

⁹³ Of course, where socioeconomic rights violations amount to the harms listed in the Rome Statute, for instance loss of life, they may be directly considered. The reason for the exclusion of civil and political rights violations from the scope of the definition of situations of crimes against humanity is likely the fact that these violations are not considered crimes committed by individuals, but rather, on the classic liberal approach, harms committed by states. As Luban has convincingly argued, however, there is strong reason to apply the label crimes against humanity to instances of severe political persecution, as characterized in major part by civil and political rights violations. *See generally* David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L L. 85, 99 (2004). The concept of persecution should hence be thoroughly utilized to ensure all the violations involved in such situations may be considered.

situation from arising to the level of gravity typically associated with such situations. This is of course a benign paradox, however, in that it presents the sort of outcome most devoutly to be desired.

VI. OTHER WIDESPREAD OR SYSTEMATIC HUMAN RIGHTS VIOLATIONS

The paper so far has attempted to reconstruct the notion of situations of crimes against humanity. This reconstruction has had multiple aims. In the first place, a victim-centered approach has been advocated in order to attempt to ensure that the concept is of maximum use relative to actually existing situations of mass harm. Second, by attempting to cut through much existing complication, the hope has been to simplify and clarify the potential use of the term, in order to encourage its more frequent and assertive invocation.

The paper has a third purpose as well, however. The term crimes against humanity, even on the liberal approach advocated, is still limited in its applicability to situations involving harms of the type enumerated in the Rome Statute.⁹⁴ An approach identical to that applied to the determination of situations of crimes against humanity may be applied more broadly to other sorts of determinations of widespread or systematic human rights violations, with the latter label being applied in instances involving primarily other forms of violations, as well as to instances in which the aggregate level of harm necessary to constitute a situation of crimes against humanity has not been reached.⁹⁵ Situations of widespread or systematic human rights violation hence form an umbrella category, encompassing but going beyond situations of crimes against humanity, with situations potentially crossing over from one category to the other as they worsen or improve. In addition, there is perhaps the need for another category that may lie in the concentric circle between

⁹⁴ This limitation is motivated in part by the need to ensure that the category retains its rhetorical power through application only to the worst situations of harm. In fact, this means that the aggregate level of harm necessary to constitute a situation of crimes against humanity, as well as being indefinite, will also vary depending on context—as the level should constantly be calibrated in order to capture only the worst instances of violation. Geras, *supra* note 2, at 94-95 (stating that the key is to achieve the right equilibrium between how the term is used for triggering purposes and an understood potential liberality of scope).

⁹⁵ There has in fact been a certain though loose recognition of such a concept in the human rights context, which has taken place not only in the reports of commissions of inquiry, of NGOs, and of supranational rights-monitoring bodies, but also in the jurisprudence of supranational rights tribunals; for instance, such tribunals have recognized the existence of “massive and serious violations,” administrative and legislative practices of violation, and “prevailing condition, pattern or practice of violations” on numerous occasions while considering exceptions to the rule of exhaustion. *See, e.g.*, *Akdivar v. Turkey*, App. No. 21893/93, Eur. Ct. H.R., ¶ 67 (Aug. 30, 1996); *Aksoy v. Turkey*, App. No. 21987/93, Eur. Ct. H.R., ¶ 52 (Dec. 18, 1996); *Amnesty Int’l v. Sudan*, Communications 48/90, 50/91, 52/91, 89/93, Afr. Comm’n. H.P.R., ¶ 33 (Nov. 15, 1999); *Article 19 v. Eritrea*, Communication 275/03, Afr. Comm’n. H.P.R., ¶ 77 (May 30, 2007); *Austria v. Italy*, App. No. 788/60, 4 Y.B. Eur. Conv. on H.R. 29 (Eur. Comm’n on H.R., 1961); *Cyprus v. Turkey*, App. No. 8007/77, 21 Y.B. Eur. Conv. on H.R. 85, 101 (Eur. Comm’n. on H.R., 1978); *Denmark v. Greece*, App. Nos. 3321-3/67, 3344/67, 11 & 12 Y.B. Eur. Conv. on H.R. 710 & 194 (Eur. Comm’n. on H.R., 1967); *Denmark v. Greece*, App. No. 4448/70, 13 Y.B. Eur. Conv. on H.R. 108 (Eur. Comm’n. on H.R., 1970); *Denmark v. Turkey*, App. No. 34382/97, Eur. Ct. H.R. (June 8, 1999); *Donnelly v. United Kingdom*, App. Nos. 5577-5583/72, 1976 Y.B. Eur. Conv. on H.R. 84 (Eur. Comm’n on H.R.); *Free Legal Assistance Grp. v. Zaire*, Communications 25/89, 47/90, 56/91, 100/93, Afr. Comm’n. H.P.R., ¶ 36 (Apr. 4, 1996); *Greece v. United Kingdom*, App. No. 176/56, 2 Y.B. Eur. Conv. on H.R. 12 (Eur. Comm’n on H.R., 1958-9); *Mentes v. Turkey*, App. No. 23186/94, Eur. Ct. H.R. (Nov. 28, 1997); *Organisation Mondiale Contre la Torture v. Rwanda*, Communications 27/89, 46/91, 49/91, 99/93, Afr. Comm’n. H.P.R., ¶¶ 17-18 (Oct. 31, 1996); *see also* Miguel Vivanco & Lisa Bhansali, *Procedural Shortcomings in the Defense of Human Rights*, in *THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS* 431 (Harris & Livingstone eds., 1998).

the two—potentially termed “gross violations”—encompassing situations that seem to approach situations of crimes against humanity, but may still fall short, due to uncertainty over the extent of the level of the harm in question.⁹⁶

Substantial literature has sought to expand the definition of crimes against humanity into new realms.⁹⁷ While some such efforts may in fact capture situations that fit the types of harms enumerated by the Rome Statute, in other cases such attempts appear to have been motivated more by the fact that the category of crimes against humanity has offered the only legal concept through which normative condemnation and the possibility of concrete sanction against individuals might be imagined. Creating new categories of mass harm however will enable further normative pressure and, in time, may lead to new forms of accountability and jurisdictional avenues for redress, without overburdening the category of crimes against humanity and at the same time moving away from some of the more problematic aspects of the criminal context.

VII. CONCLUSION

This paper set out with the purpose of establishing a clearer framework through which situations of mass or severe rights violation could be conceptualized. In order to engage in that project, the paper began with the concept of situations of crimes against humanity, and performed a reconstruction of that concept around the notion of a victim- or harm-centered approach. This reconstruction was in part normatively motivated, in part intended to produce a simpler notion of crimes against humanity. While complexities remain, these are the complexities involved in mapping legal concepts onto complex factual situations, irreducible on any account. The hope is that a clearer schema will lead to more consistent and assertive invocation of the category of crimes against humanity, as much in the wider normative context as in the narrower realm of judicial activity.

The aim, as the last section spelled out, has also been to produce different headings under

⁹⁶ Such uncertainty may take either factual form (i.e. how extensive are the violations in question in reality?) or theoretical form (i.e. do the aggregate violations in the situation in question rise to the necessary level of gravity?). In fact, of course, all investigations will involve uncertainty on both accounts.

⁹⁷ See, e.g., Ilias Bantekas, *Corruption as International Crime and Crime Against Humanity: An Outline of Supplementary Criminal Justice Policies*, 4 J. INT'L CRIM. JUST. 466 (2006); Emily Camastra, *Hazardous Child Labor as a Crime against Humanity: An Investigation into the Potential Role of the International Criminal Court in Prosecuting Hazardous Child Labor as Slavery*, 15 GEO. J. ON POVERTY L. & POL'Y 335 (2008); Elias Davidson, *Economic Oppression as an International Wrong or as Crime Against Humanity*, 23 NETH. Q. HUM. RTS. 173 (2005); Stuart Ford, *Is the Failure to Respond Appropriately to a Natural Disaster a Crime Against Humanity? The Responsibility to Protect and Individual Criminal Responsibility in the Aftermath of Cyclone Nargis*, 38 DENVER J. INT'L L. & POL'Y 227 (2010); Neil Francey, *The Death Toll from Tobacco: A Crime Against Humanity?*, 8 TOBACCO CONTROL 221 (1999); Jennifer Gong-Gershowitz, *Forced Marriage: A 'New' Crime Against Humanity?*, 8 NW. J. INT'L HUM. RTS. 53 (2009); Hyman Greenstein & Paul DiBianco, *Marijuana Laws—A Crime Against Humanity*, 48 NOTRE DAME LAW. 314 (1972); Sonja Grover, *The Systematic Persecution of Street Children as a Crime Against Humanity: Implications for their Right to Asylum*, 1 J. MIGRATION & REFUGEE ISSUES 118 (2006); Neha Jain, *Forced Marriage as a Crime Against Humanity: Problems of Definition and Prosecution*, 6 J. INT'L CRIM. JUST. 1013 (2008); Diana Kearney, *Food Deprivations as Crimes Against Humanity*, 46 N.Y.U. J. INT'L L. AND POL. 253 (2013); Ashley McLachlan-Bent & John Langmore, *A Crime Against Humanity? Implications and Prospects of the Responsibility to Protect in the Wake of Cyclone Nargis*, 3 GLOBAL RESP. TO PROTECT 37 (2011); William Tucker, *The Big Lie: Is Climate Change Denial a Crime Against Humanity?*, 7 INTERDISC. J. HUM. RTS. L. 91 (2012); Mohammed Wattad, *The Rome Statute and Captain Planet: What Lies Between 'Crimes Against Humanity' and the 'Natural Environment'?*, 19 FORDHAM ENVTL. L. REV. 265 (2009); Judy Yuk & Jessie Yee, *Sexual Intercourse as Rape under the State Policy of Forced Marriage: A Crime Against Humanity*, 2 CITY U. HONG KONG L. REV. 161 (2010).

which mass violations may be classified. The purpose of producing such a schema is twofold. In the first place, as relative to the reconstruction of the definition of situations of crimes against humanity, the aim is to utilize the normative power of naming itself, and to utilize the categories laid out in order to project greater levels of condemnation relative to ongoing situations of violation in particular. Naming has another function as well however—as readers of Felstiner, Abel, and Sarat’s piece will know—naming forms the first stage in a potential process of dispute resolution. When naming has been accomplished, that is, it is possible to move on to the stage of blaming, involving the attribution of responsibility to particular actors and the determination of appropriate sanctions and remedies. By distinguishing the identification of situations of crimes against humanity from the later criminal liability inquiry, and by distinguishing such situations from other situations of widespread or systematic human rights violation, it becomes possible to consider other remedies and penalties that might be appropriate in such instances, in a manner that will complement the work of criminal proceedings in combatting the worst forms of global rights abuse globally.