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The Nuremberg Military Tribunals and the origins of International Criminal Law

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Citation

Heller, K. J. (2011, June 16). *The Nuremberg Military Tribunals and the origins of International Criminal Law*. Retrieved from <https://hdl.handle.net/1887/17757>

Version: Not Applicable (or Unknown)

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Note: To cite this publication please use the final published version (if applicable).

CHAPTER 10: Crimes Against Humanity

INTRODUCTION

The OCC charged defendants with crimes against humanity in all twelve trials.¹ Those crimes were enumerated in Article II(1)(c) of Law No. 10:

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.

Although Article II(1)(c) overlapped considerably with Article II(1)(b), the war-crimes provision, there were two important differences. First, Article II(1)(c) criminalized “persecutions” as well as atrocities and offenses. Second, whereas Article II(1)(b) applied to war crimes committed against “civilian population from occupied territory,” Article II(1)(c) applied to “any civilian population,” indicating that crimes against humanity could be committed outside of occupied territory.

As noted in Chapter 5, there was also a critical difference between Article II(1)(c) and its equivalent in the London Charter, Article 6(c). Article 6(c) required crimes against humanity to be committed “in execution of or in connection with any crime within the jurisdiction of the Tribunal” – the “nexus” requirement. That requirement was conspicuously absent from Article II(1)(c), leaving open the possibility that the NMTs would reject the IMT’s position that none of the acts committed against German Jews prior to 1 September 1939 – the date Germany invaded Poland – qualified as crimes against humanity.

This chapter discusses the tribunals’ interpretation of Article II(1)(c). Sections 1-3 examine the three categories of crimes against humanity that were discussed by the tribunals: (1) atrocities and persecutions committed in occupied territory that also qualified as war crimes; (2) wartime atrocities and persecutions committed outside of occupied territory; and (3) atrocities and persecutions committed before the war. Section 4 then discusses the contextual elements that the tribunals applied to all three categories of crimes against humanity – their widespread and systematic commission pursuant to a government policy. Finally, Section 5 focuses on the specific crimes against humanity enumerated in Article II(1)(c), with an emphasis on genocide.

I. ACTS IN OCCUPIED TERRITORY

The IMT held that war crimes “committed on a vast scale” in occupied territory also constituted crimes against humanity.² The NMTs took a similar approach to the relationship between the two crimes, although they insisted that large-scale war

¹ TAYLOR, FINAL REPORT, 69.

² IMT JUDGMENT, 65.

crimes qualified as crimes against humanity only if they were also systematic and committed pursuant to a government policy – an issue discussed below.

The tribunals condemned a wide variety of atrocities and persecutions committed in occupied territory as both war crimes and crimes against humanity: the crimes committed pursuant to the Night and Fog program in the *Justice* case³; the Germanization program and the systematic plunder of the “incorporated and occupied territories” in *RuSHA*⁴; slave labor and the plunder of Jewish property in *Pohl*⁵; Sonderkommando executions in *Einsatzgruppen*⁶; the persecution of the Catholic Church⁷ and forced conscription of civilians in *Ministries*.⁸ In fact, the *Pohl* tribunal held that slave labor and plunder in the “Eastern occupied territories” were crimes against humanity even though the indictment limited such crimes to acts committed *outside* of occupied territory.⁹

Read literally, Article II(1)(c) limited “murder-type” crimes against humanity to acts committed against civilians. That limitation reflected the position of the UNWCC’s Legal Committee, which had concluded that “[o]ffences committed against members of the armed forces were outside the scope of this type” – and were likely outside the scope of persecution-type crimes against humanity as well.¹⁰ The *High Command* tribunal nevertheless convicted Warlimont of a murder-type crime against humanity for participating in the “illegal plan of the leaders of the Third Reich fostering the lynching of Allied flyers.”¹¹

II. WARTIME ACTS OUTSIDE OF OCCUPIED TERRITORY

The NMTs held that atrocities and persecutions committed against two different kinds of civilian populations outside of occupied territory during the war qualified as crimes against humanity: (1) civilians in countries that were not belligerently occupied by Germany; and (2) German civilians.

A. Non-German Civilians

The tribunals agreed that atrocities and offenses committed against civilians in countries that were not belligerently occupied qualified as crimes against humanity. In *Milch*, for example, the defendant was charged not only with the war crime of enslaving civilians in occupied territory, but also with the crime against humanity of enslaving “German nationals and nationals of other countries.” Tribunal II rejected the prosecution’s proof regarding German nationals, but concluded that “[a]s to such crimes against nationals of other countries, the evidence shows that a large number of Hungarian Jews and other nationals of Hungary and Romania, which countries were occupied by Germany but were not belligerents, were subjected to the same tortures

³ *Justice*, III TWC 1134.

⁴ *RuSHA*, V TWC 152.

⁵ *Pohl*, V TWC 997.

⁶ *Einsatzgruppen*, IV TWC 548, 554-55.

⁷ *Ministries*, XIV TWC 522.

⁸ *Id.* at 549.

⁹ See *Pohl*, Indictment, para. 24, V TWC 207.

¹⁰ UNWCC HISTORY, 179.

¹¹ *High Command*, XI TWC 679.

and deportations as were the nationals of Poland and Russia.” It thus concluded that “the same unlawful acts of violence which constituted war crimes under count one of the indictment also constitute crimes against humanity as alleged in count three of the indictment.”¹²

The *Ministries* tribunal reached a similar conclusion regarding the deportation of Jews from Hungary. Veesenmayer contended that “he could not commit war crimes against Hungarians inasmuch as Hungary was a military ally of Germany.”¹³ The Tribunal agreed that war crimes could only be committed in occupied territory, but pointed out that Count 5 was not concerned with war crimes, but dealt with crimes against humanity “irrespective of the nationality of the victims.”¹⁴

B. German Civilians

Although Article II(1)(c) provided that murder-type crimes against humanity could be committed “against any civilian population” and that persecution-type crimes against humanity were criminal “whether or not in violation of the domestic laws of the country where perpetrated,” the tribunals split concerning the criminality of wartime atrocities and persecutions committed against German civilians. Most of the tribunals held that, in fact, they did qualify as crimes against humanity. The *Justice* tribunal specifically relied on the text of Article II(1)(c) to conclude that “acts by Germans against German nationals may constitute crimes against humanity within the jurisdiction of this Tribunal to punish.”¹⁵ It thus held that crimes committed pursuant to the “nationwide government-organized system of cruelty and injustice” were crimes against humanity “when enforced in the Alt Reich against German nationals.”¹⁶ The *Einsatzgruppen* tribunal did likewise, condemning Einsatzgruppe A’s executions of more than 20,000 German Jews as crimes against humanity on the ground that Article II(1)(c) was “not restricted as to nationality of the accused or of the victim, or to the place where committed.”¹⁷ The *Ministries* tribunal took a similar position.¹⁸

The *Medical* tribunal, by contrast, rejected the idea that medical experiments conducted during the war on German nationals qualified as crimes against humanity, even though it had no trouble accepting that such crimes could be committed against non-German civilians in countries that were not belligerently occupied.¹⁹ The crimes against humanity count in the indictment, for example, alleged that the Nazis’ euthanasia program involved the murder of “hundreds of thousands of human beings, including German civilians, as well as civilians of other nations.”²⁰ The Tribunal did not question the idea that the program had involved German civilians, but it

¹² Milch, II TWC 791.

¹³ Ministries, XIV TWC 653.

¹⁴ Id. at 654.

¹⁵ Justice, III TWC 973.

¹⁶ Id. at 1081.

¹⁷ Einsatzgruppen, IV TWC 499.

¹⁸ Ministries, XIV TWC 654.

¹⁹ See, e.g., Medical, II TWC 227.

²⁰ Medical, Indictment, para. 14, I TWC 16-17.

nevertheless held that only “the deaths of non-German nationals” outside of occupied territory were criminal.²¹

Michael Marrus has attributed the *Medical* tribunal’s erroneous approach to crimes against humanity to the OCC’s decision to focus the trial on medical experiments involving non-Germans – a decision, in his opinion, that meant “the trial suffered grievously as a chronicle of the medical crimes.”²² If so, the OCC did not learn its lesson, because the *RuSHA* tribunal reached the same conclusion regarding the euthanasia program the following year. The crimes against humanity count in the indictment charged Hildebrandt for participating in “the extermination of thousands of German nationals pursuant to the so-called ‘Euthanasia Program’ of the Third Reich, from September 1939 to February 1940”²³ – namely, *after* the invasion of Poland. The Tribunal nevertheless acquitted him on the ground that the prosecution had not contended “that this program, insofar as Hildebrandt might have been connected with it, was extended to foreign nationals.” In its view, “euthanasia, when carried out under state legislation against citizens of the state only, does not constitute a crime against humanity.”²⁴

III. ACTS COMMITTED BEFORE THE WAR

A. Background

Article 6(c) of the London Charter limited crimes against humanity that took place before the war to atrocities and persecutions committed “in execution of or in connection with any crime within the jurisdiction of the Tribunal.”²⁵ Early American proposals for the London Charter did not contain a nexus requirement; the final American proposal before the London Conference, dated 14 June 1945, simply criminalized “[a]trocities and offenses, including atrocities and persecutions on racial or religious grounds, committed since 1 January 1933 in violation of any applicable provision of the domestic law of the country in which committed.”²⁶ Those proposals, however, treated crimes against humanity as domestic crimes; as soon as the Allies decided at the London Conference to limit the IMT’s jurisdiction to violations of international law, nearly every draft of what would become Article 6(c) required the nexus.²⁷ That restriction was evidently acceptable to Justice Jackson, who took the position that “the way Germany treats its inhabitants... is not our affair any more than it is the affair of some other government to interpose itself in our programs. The reason that this program of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was a part of a plan for making an illegal war.”²⁸

²¹ *Medical*, II TWC 289.

²² Marrus, *Nuremberg Doctors’ Trial*, 114-15.

²³ *RuSHA*, Indictment, para. 26, IV TWC 617.

²⁴ *RuSHA*, V TWC 161-62.

²⁵ IMT Judgment, 65.

²⁶ Roger S. Clark, *Crimes Against Humanity*, in *THE NUREMBERG TRIAL AND INTERNATIONAL LAW* 177, 182 (G. Ginsburgs & V. N. Kudriavtsev eds., 1990).

²⁷ *Id.* at 183.

²⁸ Quoted in *id.* at 186.

The nexus requirement doomed the pre-war crimes against humanity charges in the IMT indictment. The Tribunal had “no doubt whatever” that “[t]he policy of persecution, repression and murder of civilians in Germany before the war of 1939... was most ruthlessly carried out” against Jews, communists, and other undesirables. It nevertheless refused to criminalize those actions, concluding that “revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime.”²⁹

Unlike Article 6(c), of course, Article II(1)(c) did not contain a nexus requirement. That absence complicated Taylor’s planning for the NMT trials. He was convinced that the drafters of Law No. 10 had intentionally eliminated the requirement. Yet, like Jackson, he was skeptical that acts committed by Germans against German nationals – particularly non-violent persecutions – violated international law in the absence of the nexus. As he wrote to Howard Petersen, the Assistant Secretary of War, in February 1947, “[m]y own view is that departures from democratic systems as may exist in some countries and discrimination, even quite aggravated such as may exist against negroes in certain countries, should not even, in these enlightened time, constitute crimes at international law.”³⁰ Taylor was not alone in that belief: the following month, the State Department told Taylor that although it believed Law No. 10 criminalized pre-war acts that did not satisfy the nexus requirement, “as a matter of policy the United States should not prosecute a crime against humanity alone but only in conjunction with a crime against peace or war crimes.”³¹

Despite his concerns, Taylor ultimately alleged peacetime crimes against humanity in two cases. The *Flick* indictment charged Flick, Steinbrick, and Kaletsch with responsibility for acts of Aryanization committed “[b]etween January 1936 and April 1945”³² and charged Flick and Steinbrick with responsibility for a variety of SS crimes committed “[b]etween 30 January 1933 and April 1945.”³³ Similarly, the *Ministries* indictment accused 13 defendants of having participated in atrocities and persecutions committed “during the period from January 1933 to September 1939.”³⁴

B. The Tribunal’s Response

Although pre-war crimes against humanity were charged only in *Flick* and *Ministries*, five tribunals addressed the nexus requirement. The *Justice* and *Einsatzgruppen* tribunals rejected the requirement, albeit in dicta, while the *Pohl*, *Flick*, and *Ministries* tribunals accepted it.

1. No Nexus Required

The first tribunal that addressed the nexus requirement – Tribunal III in the *Justice* case – rejected it. The Tribunal began with the text of Law No. 10, pointing out that because Article 6(c)’s nexus requirement had been “deliberately omitted” from

²⁹ IMT JUDGMENT, 65.

³⁰ Memo from Taylor to Petersen, 19 Feb. 1947, NA-153-1018-1-84-1.

³¹ Memo from Petersen to Taylor, 4 Mar. 1947, NA-15301018-1-84-1.

³² *Flick*, Indictment, para. 13, VI TWC 21.

³³ *Id.* at 23, para. 17.

³⁴ *Ministries*, Indictment, para. 30, XII TWC 38.

Article II(1)(c), there was no question that Law No. 10 did not require pre-war atrocities and persecutions to be committed “in execution of, or in connection with” war crimes or crimes against peace.³⁵ It then rejected the defendants’ argument that peacetime crimes against humanity violated the principle of non-retroactivity, insisting that as long as the acts in question satisfied the contextual elements of crimes against humanity – discussed below – they violated international law as it existed prior to the war:

[T]he statute is limited by construction to the type of criminal activity which prior to 1939 was and still is a matter of international concern. Whether or not such atrocities constitute technical violations of laws and customs of war, they were acts of such scope and malevolence, and they so clearly imperiled the peace of the world that they must be deemed to have become violations of international law.³⁶

The Tribunal concluded by noting, in a nice rhetorical move, that Hitler himself accepted the criminality of peacetime crimes against humanity, having “expressly justified his early acts of aggression against Czechoslovakia on the ground that the alleged persecution of racial Germans by the government of that country was a matter of international concern warranting intervention by Germany.”³⁷

The *Einsatzgruppen* tribunal rejected the nexus requirement on similar grounds. It also emphasized that the absence of the requirement in Article II(1)(c) meant that “the present Tribunal has jurisdiction to try all crimes against humanity as long known and understood under the general principles of criminal law,” regardless of when, where, or against whom they were committed.³⁸ And it also justified the criminalization of peacetime crimes against humanity on the ground that “the law of humanity” was “not restricted to events of war,” but envisaged “the protection of humanity at all times” against “acts committed in the course of wholesale and systematic violation of life and liberty.”³⁹

2. Nexus Required

Three tribunals, by contrast, limited pre-war crimes against humanity to those that satisfied the nexus requirement. The *Pohl* tribunal emphasized the sovereignty of the German state, insisting – with regard to the infamous 1933 decree suspending key provisions of the Weimar Constitution – that international law had nothing to say about how a government treated its own people:

It is to be assumed that if this is the kind of national government the people of Germany preferred, they were entitled to it. If they consented to surrender their human liberties to a police force, that was their privilege, and any outsider who intruded could well be told

³⁵ Justice, III TWC 974.

³⁶ Id. at 982.

³⁷ Id.

³⁸ *Einsatzgruppen*, IV TWC 499.

³⁹ Id. at 497-98.

to mind his own affairs. But when the attempt is made to make the provisions of such a decree extra-territorial in their effect and to apply their totalitarian and autocratic police measures to non-Germans and in non-German territory, they thereby invaded the domain of international law.⁴⁰

The *Flick* tribunal reached the same conclusion, but by different means. It relied solely on the language of Law No. 10, finding “no support” for the prosecution’s argument that the absence of the nexus was intentional. First, the Tribunal held that any ambiguity in Article II(1)(c) had to be resolved in favor of the defendants, because “[j]urisdiction is not to be presumed. A court should not reach out for power beyond the clearly defined bounds of its chartering legislation.”⁴¹ Second, the Tribunal insisted that, in fact, the meaning of Article II(c) was not ambiguous at all, because Article 1 of Law No. 10 made the Moscow Declaration and the London Charter an “integral part” of the document, and “[i]mplicit in all of this chartering legislation is the purpose to provide for punishment of crimes committed during the war or in connection with the war.”⁴²

3. *Ministries*

Two months after the *Flick* tribunal issued its decision, the defendants in *Ministries* filed a motion with Tribunal IV – a panel that included *Flick*’s Judge Christianson, now the Presiding Judge – to dismiss Count 4 of the indictment, which alleged the commission of crimes against humanity between January 1933 and September 1939. Oral argument was held on the motion on 2 March 1949, in the middle of the prosecution’s case-in-chief. The defense was represented by Egon Kuboschok, Rasche’s main counsel. The prosecution was represented by Taylor.

a. **The Defense Argument**

The defense motion essentially repeated Tribunal IV’s reasoning in *Flick*. It began by arguing that Article II(1)(c) did not have to mention the nexus requirement, because the Preamble of Law No. 10 stated that the document’s purpose was to “give effect” to the London Charter, which specifically limited pre-war crimes against humanity to those committed in connection with war crimes or crimes against peace. It then claimed that, in light of the “close connection” between the Charter and Law No. 10, the drafters of the latter could only have extended Article II(1)(c) to include peacetime crimes against humanity by expressly stating their desire to do so. Deleting the “in connection with” language was not enough, according to the motion, because Article II(1)(c) had also eliminated Article 6(c)’s “before or during the war” language, yet the OCC had repeatedly claimed that Article II(1)(c) applied to crimes against humanity committed prior to 1 September 1939. “If one thing was omitted intentionally, surely the other thing was omitted, too.”⁴³

⁴⁰ Pohl, V TWC 991-92.

⁴¹ *Flick*, VI TWC 1212-13.

⁴² *Id.* at 1213.

⁴³ *Ministries*, Defense Motion to Dismiss Count Four of the Indictment, 26 Feb. 1948, XIII TWC 77-78.

In his oral presentation, Kuboschok focused on an additional argument for reading the nexus requirement into Article II(1)(c): the principle of non-retroactivity. In his view, it was precisely the nexus requirement that prevented Article 6(c) from violating that principle: “crimes against humanity perpetrated between 1933 and 1939” that did not have “any connection whatsoever with war crimes as such” would not have violated any law that existed prior to the war, “be it either codified law or customary law, the Kellogg-Briand Pact and the provisions of international law, codified as well as customary law.” Kuboschok also pointed out – very cleverly – that the prosecution had defended Article 6(c) at the IMT on precisely that ground.⁴⁴

b. The Prosecution Argument

Taylor entered his oral argument with three objectives. First, in response to the argument made in the defense motion, he had to demonstrate that Article II(1)(c) applied to pre-war crimes against humanity even though it did not contain Article 6(c)’s “before or during the war” language. Second, he had to establish that the drafters of Law No. 10 had, in fact, intentionally removed the nexus requirement. Third, he had to show that nexus-less crimes against humanity would not violate the principle of non-retroactivity.

The first objective was the easiest to satisfy. Article II(5) of Law No. 10 provided that “[i]n any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect of the period from 30 January 1933 to 1 July 1945.” As Taylor pointed out, that provision made no sense if the drafters of Law No. 10 wanted to limit the prosecution of crimes against humanity to those committed after the invasion of Poland on 1 September 1939.⁴⁵

Taylor devoted most of his argument to the second objective, which was obviously much more complicated. He began by claiming that the IMT had wrongly interpreted Article 6(c) of the London Charter. In his view, the “in connection with” language was not intended to limit the prosecution of pre-war crimes against humanity to those that were actually connected to war crimes or crimes against peace, but was designed “to make it clear that the definition was not meant to embrace private or occasional crimes or local petty persecutions but only such wholesale campaigns of eradication.”⁴⁶ That was a bold argument – and one that directly contradicted the drafting history of Article 6(c), which indicates that the drafters included the nexus because they believed that the connection to crimes against peace was necessary to distinguish a domestic crime from an international crime against humanity.⁴⁷

Perhaps recognizing the weakness of his interpretation, Taylor also argued that the IMT’s interpretation of the nexus requirement was irrelevant to the defendant’s motion, because “[j]ust as the IMT was bound by the definitions in the London Charter, so... this Tribunal is bound by the definition of Law No. 10.” Law No. 10 had been enacted by the Control Council and was “the fountain of jurisdiction” of the

⁴⁴ Id. at 80-81, Defense Argument.

⁴⁵ Id. at 93-94, Prosecution Argument.

⁴⁶ Id. at 92.

⁴⁷ Clark, in GINSBURGS & KUDRIAVTSEV, 187-88.

NMTs. No individual tribunal, therefore, had the power to “set aside and disregard any provisions of Law No. 10” – including the nexus requirement.⁴⁸

That argument depended, of course, on the idea that the drafters of Law No. 10 had deliberately rejected Article 6(c)’s nexus requirement. Taylor thus argued exactly that:

[T]he very fact that this clause appeared in the definition of the London Charter, but not in the definition of Law No. 10, we think serves only to emphasize the clear and unambiguous meaning of Law No. 10.... [T]he London Charter was in the hand of those who promulgated Law No. 10, as the preamble and Article I of Law No. 10 make abundantly clear, and it is a well recognized principle of construction that changes in language are presumed to be meaningful rather than meaningless.⁴⁹

Taylor supported his argument by citing the *Justice* tribunal’s conclusion that the nexus requirement had been “deliberately omitted” from Article II(1)(c). He then addressed Tribunal IV’s decision in *Flick*, which had reached the opposite conclusion. With regard to the *Flick* tribunal’s nexus argument, he insisted that “it is one thing to resolve ambiguities in favor of the accused, and quite another to create ambiguities where none in fact exist, and with all respect we believe that is what had been done in that case.”⁵⁰ With regard to the Tribunal’s Article I argument, he claimed that the drafters made the Moscow Declaration and London Charter an “integral part” of Law No. 10 not to prevent Law No. 10 from deviating from the Charter, but to give effect to provisions in the Charter that were “essential to the implementation of Law No. 10,” most notably the three Articles – Articles 9, 10, and 11 – governing the prosecution of members of organizations that the IMT had deemed criminal. Indeed, he pointed out that “to give the London Charter such over-riding effect would be in direct contravention of the London Agreement itself,” which provided in Article 6 that “[n]othing in this agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any Allied territory or in Germany for the trial of war criminals.”⁵¹

Taylor’s statutory interpretation argument was by far his strongest. As he pointed out, the drafters of Law No. 10 – primarily Charles Fahy’s legal team in the American Legal Division of the Control Council – modeled Article II(1)(c) on Article 6(c). It thus seems highly unlikely either that the deletion of the nexus requirement was accidental or, if deliberate, was not intended to expand the category of crimes against humanity to include those that were not connected to war crimes or crimes against peace. Indeed, the NMT defendants and the *Flick* tribunal were alone in their insistence that Article II(1)(c) still required the nexus – that interpretation was rejected not only by Taylor and the State Department, but also by the UNWCC, which

⁴⁸ Ministries, Prosecution Argument, XIII TWC 85.

⁴⁹ Id. at 93.

⁵⁰ Id. at 92.

⁵¹ Id. at 95-96.

stated that the only possible interpretation of the “striking difference” between Article 6(c) and Article II(1)(c) was that the latter did not require the nexus.⁵²

Although Taylor did not cite it in his argument, an exchange between Alvin Rockwell, the director of OMGUS’s Legal Division, and Col. C.B. Mickelwait, the Theater Judge Advocate, indicates that the deletion of the nexus requirement was intentional. On 12 November 1946, Rockwell sent a memo to Mickelwait proposing that the U.S. propose certain amendments to Law No. 10. One of those amendments proposed amending Article II(1)(c) to read, in relevant part, as follows:

(c) Crimes against Humanity. Atrocities and offenses committed on or after 30 January 1933, *whether or not connected with the crimes set out in (a) or (b) above* or in violation of the domestic laws of the country where perpetrated.⁵³

Mickelwait responded on November 20 that the Theater Judge Advocate’s office concurred with OMGUS’s proposal.⁵⁴ The amendment was never adopted by the Control Council, but that does not undermine its importance. As Rockwell made clear in his memo, the amendment was not designed to expand the substantive reach of Article II(1)(c). On the contrary, OMGUS wanted to offer it “merely for clarification of subsection (c)” – “to remove any doubt that crimes against humanity may be charged which occurred after the Nazi seizure of power and which were not directly related to crimes against peace or war crimes.”⁵⁵

Having argued that the drafters intentionally eliminated the nexus requirement, Taylor turned to his third and final objective: demonstrating that a nexus-less Article II(1)(c) would not violate the principle of non-retroactivity. He accepted that the principle applied – and referenced a working draft of the Universal Declaration of Human Rights, then being debated by U.N. Commission on Human Rights, to that effect.⁵⁶ But he insisted that atrocities and persecutions that were not connected to war crimes or crimes against peace had been criminal even prior to World War II. He began by discussing the trial of Peter von Hagenbach in 1474, claiming that “[t]he acts of which he was accused were not committed during actual hostilities or in time of war and, therefore, under our modern terminology would be akin more to crimes against humanity than to war crimes.”⁵⁷ He then cited the *Justice* tribunal’s belief that peacetime crimes against humanity “constituted violations not alone of statute but also of common international law”⁵⁸ and recalled the examples of peacetime humanitarian interventions that the Tribunal had provided in its decision, such as the American intervention in Cuba in 1898.⁵⁹

c. The Tribunal’s Decision

⁵² HISTORY OF THE UNWCC, 213.

⁵³ Memo from Rockwell to Mickelwait, 12 Nov. 1946, NA-549-2236-1, at 2 (emphasis added).

⁵⁴ Memo from Mickelwait to Rockwell, 20 Nov. 1946, NA-549-2236-1, at 1.

⁵⁵ *Id.*

⁵⁶ Ministries, Prosecution Argument, XIII TWC 88.

⁵⁷ *Id.* at 97.

⁵⁸ See *Justice*, III TWC 979.

⁵⁹ Ministries, Prosecution Argument, XIII TWC 97-98.

Although Taylor had argued his position well, the *Ministries* tribunal held that Article II(1)(c) only criminalized pre-war atrocities and persecutions that were connected to war crimes or crimes against peace. Its disappointing order, which ran less than five pages and contained very little analysis, simply parroted Kuboschok's main arguments. The Tribunal agreed that Law No. 10's "give effect" and "integral part" language indicated that the drafters of Law No. 10 did not intend to expand the NMTs' jurisdiction beyond the limits of the London Charter. It defended that conclusion by pointing out that, if the Tribunal did not read the nexus requirement into Article II(1)(c), it "would be according to this and similar tribunals jurisdiction over crimes of the character described, whenever and wherever committed"⁶⁰ – an absurd argument, given that Law No. 10's Preamble specifically limited the tribunals' personal jurisdiction to German war criminals and that Article II(5) made clear that their temporal jurisdiction began on 30 January 1933, when Hitler was appointed Chancellor of Germany.

The Tribunal also agreed with Kuboschok that peacetime crimes against humanity "were not, when committed, crimes against international law."⁶¹ That may well have been the correct decision; a number of scholars, both past and present, have reached the same conclusion.⁶² But it is still unfortunate that the *Ministries* tribunal did not bother to address, much less distinguish, the numerous examples of unilateral humanitarian interventions cited by the *Justice* tribunal and by Taylor during his presentation. Instead, the Tribunal simply noted that "[s]uch arguments and observations rather serve to emphasize the urgent need of comprehensive legislation by the family of nations, with respect to individual human rights."⁶³

Although the order dismissing Count 4 was issued by Tribunal IV as a whole, it is clear that Judge Maguire disagreed with his colleagues' interpretation of Article II(1)(c). Indeed, he expressed his disagreement to his friend Judge Brand, the presiding judge in the *Justice* case, who encouraged him "not to go along" with a "narrow construction of crimes against humanity committed by a government against its own nationals"⁶⁴ – the same construction, of course, that the *Justice* tribunal had already rejected, if only in dicta. In the end, though, Judge Maguire chose not to dissent from the majority's holding, for reasons that he never publicly or privately explained.

Finally, it is important to note that the *Ministries* tribunal was willing to criminalize peacetime atrocities and persecutions that *did* satisfy the nexus requirement. It convicted Darre for his role in the theft of Jewish agricultural property, for example, even though the thefts were completed a few months prior to the invasion of Poland. That conviction was justified, according to the Tribunal, because it was "unquestionable" that "the proceeds of the Aryanization of farms and other Jewish

⁶⁰ Id. at 115, Order Dismissing Count Four.

⁶¹ Id. at 116, Order Dismissing Count Four.

⁶² See, e.g., BASSIOUNI, 80.

⁶³ *Ministries*, Order Dismissing Count Four, XIII TWC 117.

⁶⁴ Quoted in MAGUIRE, 176.

property were in aid of and utilized in the program of rearmament and subsequent aggression.”⁶⁵

IV. THE CONTEXTUAL ELEMENTS

The IMT was generally silent concerning the contextual elements of crimes against humanity, emphasizing only that the difference between a war crime and a crime against humanity was that the latter involved acts “committed on a vast scale.” The NMTs, by contrast, not only systematically developed the contextual elements, they adopted a very strict approach to those elements. Specifically, they limited all three categories of crimes against humanity to atrocities and persecutions that were committed pursuant to government policy and were both large-scale and systematic.

A. Government Policy

The policy requirement was articulated most forcefully by the *Justice* tribunal with reference to peacetime crimes against humanity:

As we construe it, [Article II(1)(c)] provides for punishment of crimes committed against German nationals only where there is proof of conscious participation in systematic government organized or approved procedures amounting to atrocities and offenses of the kind specified in the act and committed against populations or amounting to persecutions on political, racial, or religious grounds.⁶⁶

That requirement followed naturally from the Tribunal’s insistence that the Nazis’ pre-war atrocities and persecutions violated international law even though they were not connected to war crimes or crimes against peace. Such acts violated international law *precisely because* they were the product of government policy. In the words of the Tribunal, “governmental participation is a material element of the crime against humanity” because “[o]nly when official organs of sovereignty participated in atrocities and persecutions did those crimes assume international proportions.”⁶⁷

The *Einsatzgruppen* tribunal also viewed the policy requirement as a substitute for the nexus requirement. Although it concluded that Article II(1)(c) was not “limited to offenses committed during war,” it insisted that such peacetime offenses violated international law only if the Nazi regime had been in some sense responsible for their commission:

Crimes against humanity are acts committed in the course of wholesale and systematic violation of life and liberty. It is to be observed that insofar as international jurisdiction is concerned, the concept of crimes against humanity does not apply to offenses for which the criminal code of any well-ordered state makes adequate provision. They can only come within the purview of this basic code of humanity because the state involved, owing to indifference,

⁶⁵ Ministries, XIV TWC 557.

⁶⁶ Justice, III TWC 982.

⁶⁷ Id. at 984.

impotency or complicity, has been unable or has refused to halt the crimes and punish the criminals.⁶⁸

As the quotes indicate, the *Einsatzgruppen* tribunal took a slightly broader approach to the policy requirement than the *Justice* tribunal. The latter held that the requirement was satisfied as long as the crimes in question were “government organized or approved.” The former, by contrast, held that the requirement was satisfied by government “indifference, impotence, or complicity.” The *Einsatzgruppen* tribunal thus suggested that the perpetrators of crimes against humanity did not have to be formally or informally connected to the government as long as their ability to commit the crimes depended on the government being too weak to stop them.

The *Einsatzgruppen* and *Justice* tribunals each discussed the policy requirement primarily in the context of peacetime crimes against humanity. The *Justice* tribunal, however, made clear that the requirement applied to the other categories of crimes against humanity, as well. First, it specifically held that “the adoption and application of systematic government-organized and approved procedures amounting to atrocities and offenses of the kind made punishable by C. C. Law 10 qualified as crimes against humanity “when carried out in occupied territory.”⁶⁹ Second, when the defendants claimed that they could not be convicted of committing crimes against humanity against civilians in occupied territory or against German civilians during the war because they were simply applying then-existing German law, the Tribunal rejected that argument on the ground that “[i]t can scarcely be said that governmental participation, the proof of which is necessary for conviction, can also be a defense to the charge.”⁷⁰ In practice, therefore, the *Justice* tribunal applied the policy requirement to all three categories of crimes against humanity.

The *Ministries* tribunal also strongly implied that the policy requirement applied to acts committed during the war. The Tribunal condemned the Nazis’ “campaign of persecution of the Catholic Church” as a crime against humanity on the ground that it “did not consist of isolated acts of individual citizens,” but had been “adopted as a matter of policy by the Third Reich.”⁷¹ That campaign had involved acts that substantively qualified as all three categories of crimes against humanity: persecutions of priests who resided in occupied territory; persecutions of priests from countries allied with Germany, such as Hungary; and persecutions of German priests prior to the war.⁷² The Tribunal nevertheless limited the criminality of campaign to wartime acts in the first and second categories; it dismissed the pre-war acts in the third category when it dismissed Count 4. It could not, therefore, have believed that the policy requirement applied only to pre-war acts.

B. Large-Scale and Systematic Acts

⁶⁸ *Einsatzgruppen*, IV TWC 498.

⁶⁹ *Justice*, III TWC 1081.

⁷⁰ *Id.* at 984.

⁷¹ *Ministries*, XIV TWC 522.

⁷² *Id.* at 520-21.

The NMTs also insisted that atrocities and persecutions qualified as crimes against humanity only if they were both large-scale and systematic. As Tribunal III said in the *Justice* case:

It is not the isolated crime by a private German individual which is condemned, nor is it the isolated crime perpetrated by the German Reich through its officers against a private individual. It is significant that the enactment employs the words “against any civilian population” instead of “against any civilian individual.” The provision is directed against offenses and inhumane acts and persecutions on political, racial, or religious grounds systematically organized and conducted by or with the approval of government.⁷³

The other tribunals took similar positions. The *Einsatzgruppen* tribunal simply defined crimes against humanity as governmental acts involving the “wholesale and systematic violation of life and liberty.”⁷⁴ The *Ministries* tribunal condemned the persecution of the Catholic Church as a crime against humanity because persecutory acts “were committed on a large scale... were planned and were a part of the program adopted as a matter of policy by the Third Reich.”⁷⁵ And the *Medical* tribunal considered the Nazis’ medical experiments to be crimes against humanity because they were “not the isolated and casual acts of individual doctors and scientists working solely on their own responsibility,” but were “carried out on a large scale” as “the product of coordinated policy-making and planning at high governmental, military, and Nazi Party levels.”⁷⁶

Unfortunately, except for insisting that isolated acts could not qualify as crimes against humanity, the tribunals provided little interpretive guidance concerning the scale and systematicity requirements. The absence of discussion is not surprising, though, given the nature of the crimes committed by the Nazis. Those crimes were almost invariably large-scale and systematic; the OCC thus had no incentive to allege crimes against humanity that had any chance of running afoul of the contextual elements.

C. Connection Between the Act and the Attack

Finally, it is worth noting that the tribunals required the prosecution to prove that a defendant’s specific acts were, in fact, committed as part of a larger attack on a civilian population. In *Ministries*, for example, the OCC alleged that during the war Meissner had illegally acquired a property interest in the Berlin Hippodrome by causing the owner, a German industrialist, “to be arrested by the Gestapo and threatened with imprisonment in a concentration camp unless he should consent to the transaction.” The Tribunal did not question the idea that the Nazis had engaged in large-scale, systematic plunder of private property during the war. It nevertheless acquitted Meissner of a crime against humanity because it concluded that “[t]he

⁷³ *Justice*, III TWC 973.

⁷⁴ *Einsatzgruppen*, IV TWC 498.

⁷⁵ *Ministries*, XIV TWC 522.

⁷⁶ *Medical*, II TWC 181.

transaction, whatever it may have been, was purely personal” and had no connection to the larger Nazi policy of plunder.⁷⁷

V. SUBSTANTIVE LAW

Although the tribunals devoted most of their attention to the jurisdictional and contextual elements of crimes against humanity, they also discussed the substantive aspects of those crimes, particularly persecution-type crimes against humanity and genocide.

A. Murder-Type

The tribunals rarely addressed the substantive aspects of the murder-type crimes against humanity listed in Article II(1)(c), because nearly all of them qualified as war crimes under Article II(1)(b) when committed in occupied territory⁷⁸ and were thus discussed in that context. The primary exception was rape, which was unique to the crimes against humanity provision, but – as many feminist scholars have noted – never charged in the NMT trials.⁷⁹

B. Persecution-Type

The tribunals focused on three basic issues concerning persecution-type crimes against humanity: (1) whether political, racial, and religious persecution was a war crime when committed in occupied territory; (2) whether even “minor” acts of persecution qualified as crimes against humanity; and (3) whether the deprivation of private property was not only a war crime, but a crime against humanity as well.

1. Persecution as a War Crime

The most striking difference between Article II(1)(c) and Article II(1)(b) was, of course, that only the crimes against humanity provision criminalized “persecutions on political, racial, or religious grounds.” The tribunals nevertheless held that racial and religious persecutions qualified as war crimes when committed in occupied territory. The *Ministries* tribunal relied on Article 46 of the Hague Regulations – which protected “religious convictions and practice” – to hold that the persecution of Catholic priests from occupied countries was a war crime.⁸⁰ And the *Justice* tribunal held in no uncertain terms that atrocities and offenses “amounting to persecution on racial grounds” – a category in which the Tribunal included all acts of persecution against Jews⁸¹ – qualified as war crimes “when carried out in occupied territory.”⁸² No tribunal ever addressed the status of political persecutions in occupied territory, largely because Taylor made a conscious decision to avoid charging defendants with

⁷⁷ *Ministries*, XIV TWC 606.

⁷⁸ See UNWCC HISTORY, 194; Schwelb, in METTRAUX, 131.

⁷⁹ See, e.g., Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288, 301-02 (2003).

⁸⁰ *Ministries*, XIV TWC 522.

⁸¹ *Justice*, III TWC 1063.

⁸² *Id.* at 1081.

political persecution whenever possible⁸³; the only defendant ever convicted of such persecution – Oeschey in the *Justice* case, discussed below – committed the crime in Germany during the war.⁸⁴ There is no reason to assume, though, that the *Justice* tribunal would have treated political persecution any differently than racial persecution; after all, unlike religious freedom, the Hague Regulations did not guarantee either racial integrity or political opinion.⁸⁵

2. Minor Forms of Persecution

The *Justice* tribunal made clear that laws did not qualify as crimes against humanity simply because they “could be and were applied in a discriminatory manner.”⁸⁶ In particular, the Tribunal refused to criminalize German laws that imposed the death penalty on habitual criminals, on looters, on hoarders, and on individuals whose statements undermined “military efficiency.” Such laws, the judges insisted, may be “revolting to our sense of justice.” But that did not mean that they were crimes against humanity, particularly given that they were adopted in response to the exigencies of war. The Tribunal upheld the anti-looting laws, for example, by claiming that “[a]nyone who has seen the utter devastation of the great cities of Germany must realize that the safety of the civilian population demanded that the werewolves who roamed the streets of the burning cities, robbing the dead, and plundering the ruined homes should be severely punished.”⁸⁷ Similarly, with regard to the military efficiency laws, the Tribunal noted that “even under the protection of the Constitution of the United States a citizen is not wholly free to attack the Government or to interfere with its military aims in time of war.”⁸⁸

Although the peacetime/wartime distinction was obviously critical to the *Justice* tribunal, the fact that none of those “Draconic laws” directly involved political, racial, or religious persecution also seems to have been important. The Tribunal was more than willing to condemn acts that involved such persecution even when the acts themselves were relatively minor. Two examples are particularly illustrative. First, the Tribunal held that Oeschey had committed a crime against humanity when, in the final weeks of the war, he sentenced a German count to death for insulting Hitler and expressing approval of the attempt on his life. It acknowledged that “the mere fact alone that Montgelas was prosecuted for remarks hostile to the Nazi regime may not constitute a violation of C. C. Law 10,” but insisted that “Montgelas was not convicted for undermining the already collapsed defensive strength of the defeated nation, but... as a last vengeful act of political persecution.”⁸⁹ Second, the Tribunal held that even “lesser forms of racial persecution” such as denying Jews the right to engage in civil litigation without advancement of costs qualified as crimes against humanity. The Tribunal recognized that such laws might appear “as a small matter compared to the extermination of Jews by the millions,” but pointed out that they

⁸³ Memo from WDSCA for Taylor, 28 Mar. 1947, NA-153-1018-1-84-1, at 1.

⁸⁴ *Justice*, III TWC 1164.

⁸⁵ Many scholars at the time believed that all three forms of persecution were war crimes. See, e.g., Schwelb, in METTRAUX, 132.

⁸⁶ *Justice*, III TWC 1027.

⁸⁷ *Id.* at 1026.

⁸⁸ *Id.*

⁸⁹ *Id.* at 1164.

were nevertheless “part of the government-organized plan for the persecution of the Jews.”⁹⁰

3. Deprivation of Property

The most contentious issue was whether depriving civilians of property on political, racial, or religious grounds qualified as a crime against humanity. The tribunals agreed that the theft of personal property could qualify, but disagreed concerning the theft of industrial property.

a. Industrial Property

The *Flick* and *Farben* tribunals both held that depriving civilians of industrial property on the basis of race qualified as a war crime but not as a crime against humanity.⁹¹ The *Flick* tribunal offered two rationales for that limitation. To begin with, it argued that “it nowhere appears in the judgment that IMT considered, much less decided, that a person becomes guilty of a crime against humanity merely by exerting anti-Semitic pressure to procure by purchase or through state expropriation industrial property owned by Jews.”⁹² That was an unpersuasive interpretation: the IMT had declined to hold the seizure of Jewish businesses – discussed in the section of the judgment entitled “Persecution of the Jews” – not because of the nature of the plundered property, but because it could not conclude that the seizures were connected to Nazis’ aggressive wars.⁹³ Indeed, the IMT made clear that it would have considered the pre-war persecution of the Jews to be a crime against humanity had the nexus been satisfied.⁹⁴

The *Flick* tribunal also argued that Article II(1)(c) excluded offenses committed against industrial property. It pointed out that all of the “atrocities and offenses” that qualified as murder-type crimes against humanity involved “offenses against the person.” It then insisted that, “[u]nder the doctrine of *ejusdem generis* the catch-all words ‘other persecutions’ must be deemed to include only such as affect the life and liberty of the oppressed peoples.”⁹⁵ That was an equally unpersuasive argument, one that depended on a significant misstatement of Article II(1)(c). The crimes against humanity provision did not mention “other persecutions” after listing the murder-type atrocities and offenses; it simply mentioned “persecutions.” The difference was critical: although the expression “other persecutions” might have implied that Article II(1)(c) intended to criminalize persecutions “of the same kind” as the atrocities and offenses, the more generic term “persecutions” gives rise to no such implication. Indeed, given that the provision mentioned atrocities or offenses “or” persecutions, the far more natural reading of the provision is that *any* persecution on one of the prohibited grounds constituted a crime against humanity.

⁹⁰ Id. at 1114.

⁹¹ *Flick*, VI TWC 1216; *Farben*, VIII TWC 1129.

⁹² *Flick*, VI TWC 1215.

⁹³ IMT Judgment, 65.

⁹⁴ Id.

⁹⁵ *Flick*, VI TWC 1215.

For reasons that are unclear – and may have been strategic – Taylor took the same position as the *Flick* and *Farben* tribunals in his oral argument in *Ministries*.⁹⁶ Fortunately, the *Ministries* tribunal itself did not. As noted above, it not only condemned the Nazis’ systematic theft of Jewish agricultural property – farms, livestock, etc. – as a crime against humanity, it convicted Darre, the Minister of Food and Agriculture, for participating in those thefts.⁹⁷ Similarly, the *Pohl* tribunal convicted Frank of a crime against humanity for participating in Action Reinhardt, “an ambitious and profitable undertaking for Germany” in which Jews “were herded into concentration camps as slaves and their entire worldly possessions confiscated.” The Tribunal noted that an integral part of Action Reinhardt was the WVHA’s systematic theft of Jewish real property.⁹⁸

b. Personal Property

Undermining its own argument, the *Flick* tribunal suggested that, in terms of Article II(1)(c), “[a] distinction could be made between industrial property and the dwellings, household furnishings, and food supplies of a persecuted people.”⁹⁹ A number other tribunals specifically held that the theft of personal property on political, racial, or religious grounds was a crime against humanity. The *Pohl* tribunal’s condemnation of Action Reinhardt is one example: the program involved the looting of Jewish personal property as well as Jewish real property – everything from blankets to baby carriages to jewelry.¹⁰⁰ Other examples include the *RuSHA* tribunal’s criminalization of the Germanization program, which involved the “confiscation of all property of Poles and Jews for resettlement purposes,”¹⁰¹ and the *Ministries* tribunal’s conviction of Schwerin von Krosigk for permitting his subordinates in the Ministry of Finance to confiscate “money, securities, jewelry, furniture, clothing, [and] works of art” owned by German Jews and by Jews who lived in Belgium, the Netherlands, and occupied France.¹⁰²

C. Genocide

The concept of genocide was first mentioned in Telford Taylor’s opening argument in the *Medical* case. At this point in the trials, genocide had no legal function; Taylor simply used the term to describe the Nazis’ systematic persecution of various groups:

Mankind has not heretofore felt the need of a word to denominate the science of how to kill prisoners most rapidly and subjugated people in large numbers. This case and these defendants have created this gruesome question for the lexicographer. For the moment we will christen this macabre science "thanatology," the

⁹⁶ *Ministries*, Prosecution Argument, XIII TWC 100.

⁹⁷ *Ministries*, XIV TWC 556-57. Judge Powers dissented from the majority’s legal conclusion, agreeing with the *Flick* and *Farben* tribunals that “[a] persecution... must involve some act of violence against the person of the persecuted.” *Id.* at 917, Powers Dissent.

⁹⁸ *Pohl*, V TWC 977-78.

⁹⁹ *Flick*, VI TWC 1214.

¹⁰⁰ *Pohl*, V TWC 977.

¹⁰¹ *RuSHA*, V TWC 96.

¹⁰² *Ministries*, XIV TWC 677-78.

science of producing death. The thanatological knowledge, derived in part from these experiments, supplied the techniques for genocide, a policy of the Third Reich, exemplified in the "euthanasia" program and in the widespread slaughter of Jews, gypsies, Poles, and Russians.¹⁰³

The OCC did not rely on genocide as a legal concept until Case No. 8 – *RuSHA*. Count 1 of the *RuSHA* indictment, concerning crimes against humanity, alleged that “[t]he acts, conduct, plans and enterprises charged in paragraph 1 of this count were carried out as part of a systematic program of genocide, aimed at the destruction of foreign nations and ethnic groups, in part by murderous extermination, and in part by elimination and suppression of national characteristics.”¹⁰⁴ Very similar language then appeared in the *Einsatzgruppen* and *Ministries* indictments.¹⁰⁵

American war-crimes officials made a conscious decision during the *Medical* case to try to establish genocide as a crime against humanity in the later trials. As the prosecution was nearing the end of its case-in-chief, Raphael Lemkin, the Polish Jew who coined the term “genocide,” wrote to David Marcus, the head of the War Department’s War Crimes Branch, to stress “the necessity of developing the genocide concept” in the case.¹⁰⁶ Lemkin’s memo came too late, but it led John H.E. Fried, then a legal consultant to the Secretary of War, to submit his own memo to the OCC not long thereafter promoting the idea of developing genocide in subsequent cases.¹⁰⁷ That memo, in turn, was reinforced by the Departments of State and War, which informed Taylor during the defense’s case-in-chief that insofar as he intended “to formulate accusations in [later] indictments charging crimes against humanity in terms of persecutions on religious and racial grounds,” they wanted him to describe those persecutions as acts of genocide.¹⁰⁸

Despite the OCC’s best efforts, the tribunals barely addressed genocide in their judgments. The *RuSHA* and *Ministries* tribunals mentioned genocide only when they quoted the indictments, although Judge Powers was obviously skeptical of the idea, arguing in his *Ministries* dissent that it was incorrect “to assume that every reference to the ‘Final Solution’ of the Jewish Question means extermination.”¹⁰⁹ The *Einsatzgruppen* tribunal mentioned genocide twice – to note that the *Einsatzgruppen* had set up a school to teach “the fine art of genocide”¹¹⁰ and that “the genocide program was in no way connected with the protection of the *Vaterland*”¹¹¹ – but did not consider genocide as a legal concept.

¹⁰³ *Medical*, Prosecution Opening Argument, I TWC 38.

¹⁰⁴ *RuSHA*, Indictment, para. 2, IV TWC 609-10.

¹⁰⁵ *Einsatzgruppen*, Indictment, para. 2, IV TWC 15; *Ministries*, Indictment, para. 39, XII TWC 44.

¹⁰⁶ Memo from Lemkin to Marcus, 19 Jan. 1947, 1, NA-153-1018-10-86-3-1, at 1.

¹⁰⁷ John H.E. Fried, Memorandum on the Necessity to Develop the Concept of Genocide in the Proceedings, Undated, TTP-5-1-1-2, at 1.

¹⁰⁸ Memo from WDSKA for Taylor, 28 Mar. 1947, at 1.

¹⁰⁹ *Ministries*, Powers Dissent, XIV TWC 909.

¹¹⁰ *Einsatzgruppen*, IV 450.

¹¹¹ *Id.* at 469-70.

By contrast, the Tribunal III specifically held that genocide was a crime against humanity in the *Justice* case – an ironic result, given that the OCC did not mention genocide either in the indictment or in its opening argument. Three aspects of the Tribunal’s decision are particularly notable. First, it singled out genocide as the “prime illustration” of a crime that, “by reason of its magnitude and international repercussions,” qualified as a crime against humanity even in the absence of a nexus to war crimes or crimes against peace.¹¹² Second, it cited the recently-adopted General Assembly Resolution 96(I) in defense of that conclusion, stating that the Assembly, though not “an international legislature,” was “the most authoritative organ in existence for the interpretation of world opinion.”¹¹³ Third, it specifically convicted two defendants – Lautz and Rothaug – of genocide for participating in “the established governmental plan” for the extermination of Poles and Jews.¹¹⁴

CONCLUSION

The NMTs made an invaluable contribution to the development of crimes against humanity. First, unlike the IMT, the tribunals systematically distinguished between the three different geographic and temporal categories of crimes against humanity: acts that took place in occupied territory; acts that took place outside of occupied territory during the war; and acts that took place prior to the war. Second, they laid the groundwork for the eventual elimination of the nexus requirement, even though the *Flick* and *Ministries* tribunals wrongly held that Law No. 10 required the nexus. Third, they developed the contextual elements that are at the heart of modern doctrine and that definitively distinguish crimes against humanity from war crimes. Fourth, and finally, they provided the first comprehensive analysis of persecution as a crime against humanity and were the first tribunals – international or domestic – to convict defendants of genocide. All of those contributions are discussed in more detail in Chapter 16.

¹¹² *Justice*, III TWC 983.

¹¹³ *Id.*

¹¹⁴ *Id.* at 1128 (Lautz), 1156 (Rothaug).