ANNEX 3: Commentary on the Armed Conflict Nexus in Crimes Against Humanity

NO.	NAME OF SOURCE	SUPPORTING TEXT
	PERTAINING TO YEARS: PRE-1945	
1.	M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW (1999)	"The conclusion is clear that 'crimes against humanity' are analogous to war crimes and are an extension thereof, and that they are based on the same moral and legal principles that have long existed and that are the underpinning of principles, norms and rules of the humanization and regulation of armed conflicts." (p. 77).
	PERTAINING TO YEARS: 1945 - 1954	
2.	Egon Schwelb, *Crimes Against Humanity,* 23 B. Y. B. INT'L L. 178 (1946)	"[The IMT], in interpreting the notion of crimes against humanity, lays particular stress on that provision of its Charter according to which an act, in order to come within the notion of a crime against humanity, must have been committed in execution of or in connexion with any crime within the jurisdiction of the Tribunal, which means that it must be closely connected either with a crime against peace or a war crime in the narrower sense." (p. 205). "[A crime against humanity] is … a kind of by-product of war, applicable only in time of war or in connexion with war and destined primarily, if not exclusively, to protect the inhabitants of foreign countries against crimes committed, in connexion with an aggressive war, by the authorities and organs of the aggressor state." (p. 206).

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		"As defined in the Nuremberg Judgment, the crime against humanity is an 'accompanying' or an 'accessory' crime to either crimes against peace or violations of the laws and customs of war." (p. 206). "Even with regard to revolting and horrible crimes the connexion with aggression or with war crimes in the narrower sense must be proved, and where the proof is not satisfactory they are not considered by the [IMT] as crimes against humanity within the meaning of the Charter." (p. 206). "The Allied and German courts, applying Law No. 10, are local courts, administering primarily local (municipal) law, which, of course, includes provisions emanating from the occupation authorities." (p. 218).
3.	UN War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948)	"The Allied and German courts, applying Law No. 10, are local courts, administering primarily local (municipal) law, which, of course, includes provisions emanating from the occupation authorities." (p. 214, not citing Schwelb).
4.	Roger S. Clark, *Crimes Against Humanity, in* THE NUREMBERG TRIAL AND INTERNATIONAL LAW, (Ginsburgs and Kudriavtsev, eds. 1990)	"I do not believe, however, that the Tribunal was trying to make a pronouncement about the concept of crimes against humanity in general. What it was concerned with was both a much narrower question as to its own jurisdiction and a question as to what had been proved in respect of the relationship between pre-1939 offenses and aggressive war." (p. 195).
5.	Diane F. Orentlicher, *Settling Accounts: The Duty*	"… crimes against humanity were punished at Nuremberg

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	to Prosecute Human Rights Violations of a Prior Regime, 100 YALE L. J. 2537 (1991)	only if they had a nexus to war." (p. 2589). "The Genocide Convention['s] … definition of the crimes [of genocide] is not coextensive with crimes against humanity punished at Nuremberg …" (p. 2586, n. 216).
6.	Theodor Meron, Editorial Comment, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78 (1994)	"Although largely because of an amending Protocol to the Charter the Nuremberg Tribunal did not consider crimes committed before the war to be crimes against humanity, it may have been guided by jurisdictional considerations and not necessarily by a conceptually narrow definition of crimes against humanity." (p. 85).
7.	M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW (1999)	"At the time the [IMT] Charter was enacted, the war connecting element was indispensable to link 'crimes against humanity' to pre-existing conventional and customary international law prohibiting such conduct in time of war. Without such a connecting element, the Charter would have clearly violated the 'principles of legality.'" (p. 265).
8.	Stuart Ford, *Crimes Against Humanity at the Extraordinary Chambers in the Courts of Cambodia: Is a Connection with Armed Conflict Required?,* 24 UCLA PAC. BASIN L. J. 125 (2007)	"Regardless of how Control Council Order No. 10 should be viewed, in the immediate aftermath of WWII the IMT's definition of crimes against humanity was viewed as the most accepted statement of international law, including the requirement of a nexus with armed conflict." (p. 148).
	PERTAINING TO YEARS: 1955 - 1967	
	There was no significant commentary pertaining to the development of the armed conflict nexus in the	

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	definition of crimes against humanity under customary international law during this time to the best of the Defence's knowledge.	
	PERTAINING TO YEARS: 1968 - 1984	
9.	Natan Lerner, *The Convention on the Non-Applicability of Statutory Limitations to War Crimes*, 4 ISR. L. REV. 512 (1969)	"[In the Convention on the Non-Applicability of Statutory Limitations to War Crimes], [t]he fact that article I [defining war crimes and crimes against humanity] was adopted in the Third Committee by a vote of 59 to 12, with 27 abstentions, and by the joint working group by a vote of 8 to 2 with 5 abstentions, shows to what extent its text involves controversial issues with strong political implications." (p. 525).
10.	Robert H. Miller, *The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 65 AM. J. INT'L L. 476 (1971)	"Many states were of the opinion that it was not the purpose of the [Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity] to attempt to redefine war crimes or crimes against humanity." (p. 485). "In contrast, other states were of the view that the convention provided an opportunity to bring up to date the definition of war crimes and crimes against humanity." (p. 485). "The principal criticisms of the convention were directed at Article I. By providing in that article that certain crimes, 'irrespective of the date of their commission,' were subject to prescription, the convention relates to crimes to which statutory limitation already applied. Failure to make

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		allowance for those states which respect the principle of non-retroactivity in criminal law meant that those states could not become parties … Despite the gravity of the international crimes defined in the convention, those definitions have been described by delegates as ambiguous, confusing, obscure and lacking in legal precision. The wording of the definition of crimes against humanity is a cause of particular concern." (p. 500).
11.	Yoram Dinstein, *International Criminal Law,* 20 ISR. L. REV. 206 (1985)	"The Convention [on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity] is admittedly very controversial, because [Article I] needlessly defines crimes against humanity and does it in an arbitrary and tendentious way, its targets being less the criminal of the Second World War and more South Africa and Israel." (para. 232).
12.	Stuart Ford, *Crimes Against Humanity at the Extraordinary Chambers in the Courts of Cambodia: Is a Connection with Armed Conflict Required?*, 24 UCLA PAC. BASIN L.J. 125 (2007)	"Less than half of the member states of the United Nations voted in favour of the Convention [on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity], and no Western state did so." (p. 161-62). "A close reading of the negotiating history of the 1968 Convention on Statutes of Limitation reveals that there were two significant factions within the General Assembly. One group, composed primarily of developing countries in Africa, with the support of Soviet Bloc countries, would have accepted the removal of the nexus with armed conflict from the definition of crimes against humanity, although it seemed to be more concerned with the inclusion of apartheid in the

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		definition. Another group, composed largely of Western European, North American and South American countries, opposed efforts to broaden the scope of crimes against humanity and wished to retain the IMT's definition, including the nexus with armed conflict. Perhaps more importantly, neither faction represented a clear majority, although it appears there was slightly more support for the group that wanted to broaden the definition of crimes against humanity." (p. 167). "[The Apartheid Convention] had not been signed by any Western countries by the time it entered into force on July 18, 1976. In fact, major Western powers, like the United States, the United Kingdom, France, Germany, Canada, Australia, Italy and Spain, have never become parties to the Apartheid Convention." (p. 169).
13.	Stuart Ford, *Crimes Against Humanity at the Extraordinary Chambers in the Courts of Cambodia: Is a Connection with Armed Conflict Required?*, 24 UCLA PAC. BASIN L.J. 125 (2007)	"In December 1978, the General Assembly … invited member states to submit comments on the [ILC's 1954 Draft Code of Offences Against the Peace and Security of Mankind] … The responses of U.N. member states to the General Assembly's call for comments … are more important than the deliberations of the ILC itself because the ILC cannot create new international law, while the views of member states could be evidence of the opinio juris necessary to create new customary international law. One of the most striking things about the comments is how the influence of the Cold War permeates them. The comments received in 1982, 1983, 1985, and 1987 largely represent the viewpoints of Soviet allies. A number of developing states also responded, but it is

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		clear that the Eastern Bloc states were acting in a coordinated manner. None of the major Western states commented. None of the states' comments directly addressed whether they believe a nexus with armed conflict is necessary." (p. 169-73). "…it seems likely that the tipping point [of when general state practice changed from defining armed conflict with an armed conflict to defining armed conflict without] occurred at some point between 1968 and 1984. However, there is very little state practice during this period, which makes it difficult to know whether the tipping point occurred at the beginning, middle or end of that period. In short, the customary definition of crimes against humanity may well have lost the requirement of a nexus with armed conflict before 1975, but due to the paucity of state practice between those two dates, it is not certain." (p. 183-84).
	PERTAINING TO YEARS: 1985 - 1998	
14.	Stuart Ford, *Crimes Against Humanity at the Extraordinary Chambers in the Courts of Cambodia: Is a Connection with Armed Conflict Required?*, 24 UCLA PAC. BASIN L.J. 125 (2007)	"In 1991, the ILC provisionally adopted a definition of crimes against humanity that did not include a nexus with armed conflict, and while the text underwent further drafting changes prior to the completion of the ILC's work in 1996, it remained without a nexus with armed conflict." (p. 170-71). "In effect, the ICTY [statute]'s definition of crimes against humanity requires a nexus with armed conflict … The second problem [in creating the ICTY Statute] was the principle of legality … the ICTY would use only that part of international criminal law that had become 'beyond doubt' part of

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		customary international law ... The drafters apparently doubted that those definitions of crimes against humanity that eliminated the nexus with armed conflict had become customary international law." (p. 173-75).
15.	WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE (2006)	"Without much doubt, it can be stated that the drafters of the ICTY Statute believed that such a limitation was imposed by customary international law, and that to prosecute crimes against humanity in the absence or armed conflict would violate the maxim *nullum crimen sine lege.*" (p. 187). "The ICTY Appeals Chamber has explained that in 'drafting Article 5 of the Tribunal's Statute and imposing the additional jurisdiction requirement that crimes against humanity be committed in armed conflict, the Security Council intended to limit the jurisdiction of the Tribunal to those crimes which had some connection to armed conflict in the former Yugoslavia.' This is reading a lot into the alleged intent of the Security Council, based on a rather sparse record. An equally plausible explanation is that the lawyers in the Secretariat who drafted the Statute believed that the nexus with armed conflict was still, in 1993, an element of the customary law concept of crimes against humanity." (p. 188).
16.	Susan Lamb, Nullum Crimen, Nulla Poena Sine Lege *in International Criminal Law*, *in* 1 The Rome Statute of the International Criminal Court: A Commentary 743 (Cassese, Gaeta, Jones, eds., 2002).	"As was the case with the Nuremberg trials, however, the *nullum crimen* principle has not, in practice, served to limit the *ad hoc* Tribunals' exercise of its jurisdiction in any meaningful way." (p. 742). "Indeed, the jurisprudence of the ICTY and the ICTR has

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		amply confirmed the tendency of judges to adopt an expansive approach towards the interpretation of international humanitarian law." (p. 743). "The dearth of State practice to guide the *ad hoc* Tribunals has ensured that the definition of international crimes by the *ad hoc* Tribunals has had a somewhat emotive, *de lege ferenda* quality." (p. 746).
17.	Stuart Ford, *Crimes Against Humanity at the Extraordinary Chambers in the Courts of Cambodia: Is a Connection with Armed Conflict Required?*, 24 UCLA PAC. BASIN L.J. 125 (2007)	"The Commission of Experts recommended that the ICTR have jurisdiction over crimes against humanity, but noted that the formulation of crimes against humanity in the Charter of the IMT had led to a 'certain level of ambiguity in the content and legal status' of crimes against humanity. The Commission had already concluded that the conflict in Rwanda was a non-international armed conflict, so it could not directly apply the Nuremberg definition, which required a nexus with an armed conflict. So, the Commission argued that crimes against humanity did not require a nexus with armed conflict … Unfortunately, it is difficult to determine precisely how the Security Council arrived at the definition it included in the Statute of the ICTR because there appear to be no records of the drafting process." (p. 178-89).
18.	WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE (2010)	"…when [the Security Council] adopted the Statute of the International Criminal Tribunal for Rwanda, [it] did not include an armed conflict *nexus*. But this was explained as a departure from customary international law." (p. 145).
19.	Stuart Ford, *Crimes Against Humanity at the*	"In 1994, the General Assembly had created an Ad Hoc

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	Extraordinary Chambers in the Courts of Cambodia: Is a Connection with Armed Conflict Required?, 24 UCLA PAC. BASIN L.J. 125 (2007)	Committee on the Establishment of an International Criminal Court to take over the work of the ILC. The ILC, recognizing the difficulties of defining a crime that was primarily the product of customary international law, had not offered a definition of crimes against humanity in its draft statute, noting instead that there were 'unresolved issues about the definition of the crime.' In the commentaries that accompanied the draft, the ILC reprinted Article 5 of the ICTY (which does require a nexus with armed conflict) and the analogous text from its own draft Code of Offences (which does not require a nexus) but did not take a position on which one was authoritative." (p. 177). "The Ad Hoc Committee was similarly unable to make up its mind. It noted that there were 'different views' amongst its members about whether crimes against humanity required a nexus with armed conflict, and decided to give the question 'further consideration.' This debate continued during the Rome Conference with 'a significant number of delegations' taking the position that a nexus with conflict was required, although ultimately the Rome Statute did not require a nexus with armed conflict." (p. 177).
20.	Herman von Hebel and Darryl Robinson, *Crimes Within the Jurisdiction of the Court, in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS (Roy S. Lee ed., 1999)	"While the preparatory negotiations [for the ICC] had by no means settled the issue [of the armed conflict nexus], many participants were surprised when a significant number of delegations argued vigorously that crimes against humanity could only be committee during armed conflict. Some even went so far as to require a nexus to *international* armed conflict. Delegations supporting a nexus to armed conflict

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		noted that such a nexus was required in the Nürnberg and Tokyo Charters and also in the ICTY Statute. However, the clear majority of delegations were of the view that current customary international law did not require a nexus to armed conflict. These delegations argued that the nexus requirement in the Nürnberg and Tokyo Charters was a limitation on the jurisdiction of those Tribunals, rather than an element of the definition of crimes against humanity." (p. 92-93). "Several delegations of the Arab Group advanced this view, [that crimes against humanity required an armed conflict nexus] as did some other African and Asian delegations." (p. 92, n. 43).
21.	Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. OF TRANSNAT'L L. 787 (1999)	"[T]he above options [for the definition of crimes against humanity, including an armed conflict link alternative] appeared in the final consolidated text that served as a foundation for deliberations in July 1998 in Rome. In contrast to the crime of genocide, a consensus definition of crimes against humanity eluded drafters until the final days of the Diplomatic Conference. China, India, the Russian Federation and a number of states from the Middle East continued to support the retention of the war nexus requirement …" (p. 844).
22.	WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE (2010)	In the Preparatory Committee for the ICC, "[t]hose arguing against the link with armed conflict proposed alternative contextual elements, employing terms like 'widespread' and 'systematic', so as to distinguish crimes against humanity from ordinary crimes. China and Russia argued for retaining

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		the nexus with armed conflict. Some delegations took the view that 'existing law required some type of connection to an armed conflict in a broad sense, with references being made to the Nürnberg Charter, the Yugoslavia Tribunal Statute, the memorandum of its President and the Nikolic case pending before it; and that customary law had not changed owing to the adoption of human rights instruments which provided specific procedures for addressing violations or the Rwanda Tribunal Statute.' Others said that the 'nexus was no longer required under existing law…'" (p. 146). "At the Rome Conference, many of the early comments [on the armed conflict nexus] by delegations lacked clarity. Thus, in the initial debate on the subject in the Committee of the Whole, in the minds of a significant number of participants the issue appeared to be framed as whether crimes against humanity should only apply during international armed conflict or whether they should be extended to non-international armed conflict. Many delegations insisted that crimes against humanity could be committed in peacetime, while a handful took the contrary view." (p. 147).
	PERTAINING TO SEVERAL OR MORE DECADES	
23.	Theodor Meron, *The Geneva Conventions as Customary Law,* 81 AM. J. INT'L L. 348 (1987)	In a discussion regarding the interpretation of international humanitarian law by tribunals (ICJ and IMT), Meron states, "These [international judicial] decisions nevertheless point to certain trends in this area, including a tendency to ignore, for the most part, the availability of evidence of state practice (scant as it may have been) and to assume that noble

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		humanitarian principles that deserve recognition as the positive law of the international community have in fact been recognized as such by states. The "ought" merges with the "is," the lex ferenda with the lex lata. The teleological desire to solidify the humanizing content of the humanitarian norms clearly affects the judicial attitudes underlying the "legislative" character of the judicial process. Given the scarcity of actual practice, it may well be that, in reality, tribunals have been guided, and are likely to continue to be guided, by the degree of offensiveness of certain acts to human dignity; the more heinous the act, the more the tribunal will assume that it violates not only a moral principle of humanity but also a positive norm of customary law." (p. 361).
24.	Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,* 100 YALE L. J. 2537 (1991)	"The legal status of the nexus requirement – then and now – is ambiguous, however." (p. 2589).
25.	Theodor Meron, Editorial Comment, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78 (1994)	"…neither in the literature nor in the work of the ILC can one find consistent positions on the nexus requirement." (p. 85, citing sources dated 1950-1992).
26.	Stuart Ford, *Crimes Against Humanity at the Extraordinary Chambers in the Courts of Cambodia: Is a Connection with Armed Conflict Required?*, 24 UCLA PAC. BASIN L.J. 125 (2007)	"…crimes against humanity has a history which predates World War II. However, it did not exist as a specifically articulated crime with concrete elements before World War II, and it was not until 1951 that the definition of crimes against humanity in the Nuremberg Principles, including a nexus with armed conflict, was widely accepted as customary international law. Objections to the removal of the nexus with

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		armed conflict continued until the 1998 negotiations of the Rome Statute. Therefore, 1951 to 1998 is the continuum on which the transition to a definition that does not require a nexus occurred. However, unlike customs that form around international conventions, there is no clear date that represents the point when the practice became general." (p. 182).